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The September 11th Victim Compensation Fund: An Effective Administrative Response to National Tragedy

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The September 11th Victim Compensation Fund: An Effective Administrative Response to National Tragedy

Robert M. Ackerman[†]

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I. INTRODUCTION

In the wake of the terrorist attacks of September 11, 2001, Congress established the September 11th Victim Compensation Fund (the Fund) to assist the direct victims of these attacks and their families. The Fund allowed for substantial payments from the United States Treasury on a no-fault basis to persons who had sustained physical injury and to family members of those who had died if they would forego traditional tort remedies against the airlines and other potential defendants. Conceived as part of a legislative scheme to rescue the beleaguered airline industry, the Fund nevertheless evidenced compassion toward people who had suffered disproportionate, horrible losses in an unprecedented national tragedy. Notwithstanding its attractive features, both the substantive rules for compensation and the procedures employed by the Fund engendered substantial criticism. At least for a time, it appeared that a substantial number of potential claimants would forego claims against the Fund and pursue traditional tort remedies. However, by the time the Fund closed its doors, ninety-seven percent of those eligible to file death claims with the Fund had done so.

In this article, I examine the September 11th Victim Compensation Fund from both a procedural and substantive standpoint. The procedural analysis will look at both the “upstream” process, i.e., the law-making process under which the legislation was enacted and the rules for the Fund were established, and the “downstream” process under which claims were resolved and compensation has been paid out. Intertwined with the procedure are the substantive rules of recovery, including the largely formulaic means through which compensation was determined with a minimum of fact-finding and advocacy. I will examine how the administrative process dealt with a legislative mandate that failed to clearly set forth whether the Fund was to serve primarily as a means of providing emergency relief to needy victims, or as an alternative means of tort recovery. Closely linked to this discussion is the public perception of the fairness of the Fund’s compensation scheme, and what that might tell us about the normative value of traditional rules of tort recovery. Both the procedural and substantive elements of the Fund should generate reflection regarding the capability of the administrative process to respond to disaster and, for that matter, the fairness and efficiency of the administrative process in general.

I have previously written about the Fund in communitarian terms, suggesting that the Fund represents some of the noblest communitarian impulses of the American people, although its compensation scheme (based largely on victims' income expectations) falls somewhat short of the communitarian ideal.¹ Others have written about a variety of implications of the Fund, including tort reform,² procedural design,³ victim relief,⁴ and the psychology of compensation for harm.⁵ This article, while touching upon these perspectives, will focus upon the Fund as a creature of the administrative process, making both the rules necessary for its operation and the determinations regarding compensation. I will suggest that, notwithstanding objections regarding its "undemocratic" nature and flawed compensation scheme and procedures, the Fund represents some of the best features of the administrative state, employing a dispute resolution professional to refine the rules and deal with difficult questions in a principled, if imperfect, manner. I will further suggest that the Fund, like other schemes for compensation and dispute resolution, should be judged on the basis of its limited objectives, and that when so judged, the Fund has performed remarkably well.

The Fund's two major shortcomings were legislatively derived: (1) a failure on the part of Congress to clearly articulate whether the Fund was to serve primarily as a distributive justice mechanism to provide emergency relief to disaster victims or as a corrective justice measure providing victim compensation on the tort model; (2) a failure to provide a mechanism for review of the determinations made by

1. See ROBERT F. COCHRAN, JR. & ROBERT M. ACKERMAN, *LAW AND COMMUNITY: THE CASE OF TORTS* 189-94, 198-214, 216-18 (2004).

2. See, e.g., Marshall Shapo, *Compensation for Terrorism: What We Are Learning*, 53 DEPAUL L. REV. 805, 813-817 (2003); Robert L. Rabin, *The Quest for Fairness in Compensating Victims of September 11*, 49 CLEV. ST. L. REV. 573, 587-89 (2001); Alan B. Morrison, *Lessons To Be Learned: The Victim Compensation Fund*, 53 DEPAUL L. REV. 821, 826-829 (2003); Larry S. Stewart et al., *The September 11th Victim Compensation Fund: Past or Prologue?*, 9 CONN. INS. L.J. 153, 171-179 (2002); Matthew Diller, *Tort and Social Welfare Principles in the Victim Compensation Fund*, 53 DEPAUL L. REV. 719, 731-753 (2003).

3. See Janet Cooper Alexander, *Procedural Design and Terror Victim Compensation*, 53 DEPAUL L. REV. 627, 661-90 (2003).

4. See, e.g., Joe Ward, *The September 11th Victim Compensation Fund: The Answer to Victim Relief*, 4 PEPP. DISP. RESOL. L. J. 161, 167-76 (2003); Julie Goldscheid, *Crime Victim Compensation in a Post-9/11 World*, 79 TULANE L. REV. 167, 195-220 (2004).

5. See, e.g., Tom R. Tyler & Hulda Thorisdottir, *A Psychological Perspective on Compensation for Harm: Examining the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 355, 386-391 (2003); Deborah R. Hensler, *Money Talks: Searching for Justice Through Compensation for Personal Injury and Death*, 53 DEPAUL L. REV. 417, 451-56 (2003).

the Fund's administrators. These deficiencies were corrected, for the most part, by (1) administrative regulations that provided a humane compromise between a rigid, tort-based formula and a softer, more needs-based formula for compensation and (2) an efficient claims process that provided claimants a respectful, user-friendly forum in which to present their claims and obtain timely awards. The Fund fell short only when measured against unrealistic expectations that a process established to provide timely economic compensation for enormous harm would either fully replicate remedies provided by the slower, more cumbersome tort system or bring about a complete healing to those who have experienced heartbreaking loss.

Part II of this article describes the "upstream" process that created the Fund, analyzing both the legislation that provided its framework and the administrative rules that fleshed out the detail. Part III examines the criticisms launched against the Fund, and how those criticisms were addressed through principles of statutory and administrative interpretation. Part IV examines the Fund's claims experience and considers the choices available to the Fund's beneficiaries. Finally, Part V evaluates the Fund in terms of principles of democratic governance and reasonable expectations regarding modern-day legislative and administrative processes.

Along the way, we will encounter the following themes:

- **Dynamic interpretation of statutes in the administrative process.** The legislation establishing the Fund appeared to call for compensation through a tort-like, corrective justice model, which tends to reward high income earners more than those of modest means. However, the legislation also had elements of a social welfare program, distributing benefits in accordance with need. The Fund's Special Master developed regulations that largely hewed to the tort compensation model but which at the extremes tapered the greatest economic disparities among claimants. While controversial, the regulatory gloss on the Congressional mandate was by-and-large fair, sensible, and politically expedient. It represents a dynamic interpretation of the statute, largely to good effect.
- **Democratic governance and the administrative process.** The processes employed by the Fund, while imperfect, fulfilled the objective of providing quick, no-fault recovery in a user-friendly manner. Notwithstanding departures from textbook procedure, both the upstream processes under which the Fund's rules were established and the downstream processes

employed by the Fund to determine claims reflected values essential to democratic governance, such as participation, individual autonomy, and due process.

- **The normative value of tort law and procedure.** Arising out of a unique combination of events, the September 11th Victim Compensation Fund should be regarded as *sui generis*. It is unlikely that any American government will provide no-fault awards of the magnitude allowed by the Fund in response to any future event. The Fund is therefore unlikely to serve as a model for future tort reform. The experience of the Fund nevertheless indicates that the norms of traditional tort law and procedure (aided by statutory language) may have an endowment effect, creating high expectations regarding the sums to be awarded.
- **The need to evaluate the Fund in accordance with realistic expectations.** The Fund, like any dispute resolution mechanism, must be evaluated in terms of its limited objectives and realistic expectations. The Fund has fulfilled its limited objectives: it has provided prompt and fair compensation to those injured on September 11th and the families of those who died that day; it has prevented an onslaught of suits against the airlines and New York City; and it has provided “a compassionate and collective response to an act of shocking barbarity.”⁶ No single remedy will fully address the consequences of the events of September 11th and it is unrealistic to evaluate the Fund as if it should.

A. *Writing about September 11th*

There is no doubt that the legal response to the horrific losses incurred on September 11, 2001 was significant enough to merit exploration and discussion. Nevertheless, writing about September 11th is a humbling experience. More than three years after the tragic events, it remains difficult to place them in proper historical perspective. As of this writing, Osama bin Laden remains at large, and his Al Qaeda network remains a potent threat. While other, smaller (but significant) terrorist attacks have occurred since September 11th, we still do not know whether the events of that day were but the first in a series of large-scale terrorist assaults on American targets, or if they will continue to stand out as the most prominent and horrible manifestation of a menace that the world will ultimately bring under

6. Editorial, *9/11 Fund Closes Its Doors*, N.Y. TIMES, June 18, 2004, at A30.

control. The roots of evil are difficult to comprehend, and the significance of events such as these is known only to God.⁷ From this perspective, our efforts to construct meaning out of even the concrete legal responses to the events of September 11th seem petty and futile, and to use such an exercise to demonstrate clever intellectual footwork both crass and vulgar.

But it is the very nature of mankind to try to find meaning in events, especially tragic events. Out of such meaning, we can attempt to construct a better, albeit sadder world. The scholarship to date on the September 11th tragedy evidences genuine concern for the victims, for their families, and for others omitted from the compensation scheme but for whom we might nevertheless have compassion, as well as for a shocked nation that continues to grieve even as it responds to the tragedy on several fronts.⁸ It is only natural that scholars approach matters of consequence from the disciplinary perspectives with which they are familiar. I have taught and written about torts and dispute resolution for twenty-four years. During the past several years my scholarly interests have focused on communitarianism; more recently, I struggled to teach a course in legislative and administrative process. For me, then, it was only natural to think about how these fields coalesced in the legal response to the September 11th tragedy.

As far as I am aware, I personally know nobody who was killed on September 11th. Like many Americans, I am familiar with a few people closely connected to some of those murdered that day, including the brother of a college acquaintance and the best friend of a student's sister. Another student's brother escaped a building in the World Trade Center complex just prior to its collapse, losing his baseball memorabilia collection but not his life. After the second plane struck the World Trade Center, I telephoned my brother, who at the time lived and worked in Northern Virginia, and suggested that he stay clear from the Pentagon that day; moments later, that huge office building was also struck. I grew up in the New York area, and have lived and worked most of my adult life within the geographic triangle formed by New York City, Arlington, Virginia, and Shanksville, Pennsylvania. I never admired the World Trade Center as a

7. For a contemporary discussion of the nature of evil, see LANCE MORROW, *EVIL: AN INVESTIGATION* (2003).

8. See, e.g., Shapo, *supra* note 2. See also Robert L. Rabin, *The September 11th Victim Compensation Fund: A Circumscribed Response or an Auspicious Model?*, 53 *DEPAUL L. REV.* 769, 799-803 (2003).

monument to architecture or good urban planning,⁹ but came to value it as a symbol of a great city and global commerce, and more importantly, as a place in which thousands of people worked and spent a major portion of their days. I cannot think of September 11, 2001 without reliving the images of buildings in flames, people jumping to their deaths, and the collapse of those great towers. In the course of writing this article, I have had to pause many times, as those images recurred. I can only guess at how those more closely related to the victims feel.

The traditions and expectations of the academy are to write in detached manner, and to narrowly compartmentalize one's analysis.¹⁰ Scholars are trained and coached to analyze matters from the professional perspective of a narrowly defined discipline, e.g., a communitarian perspective of tort law, or a dynamic theory of statutory interpretation.¹¹ The events of September 11th and their aftermath do not lend themselves to such compartmentalization. The search for meaning in such events involves many perspectives; law may be the least of them. However, the legal response to tragedy can reflect our compassion; it can also help us develop a sense of shared history and construct community. I have argued elsewhere that community is difficult, if not impossible, to construct out of process alone.¹² More typically, it is a product of shared experience; sadly, this experience is often one of shared pain. So it is altogether fitting to consider how the legal responses to September 11th may evidence a communitarian strain that is often submerged, but never quite extinguished, in the law.

This is an article about administrative process, dispute resolution, and torts. It is an article written from a communitarian perspective. Most of all, however, it is an article about human loss, our response to it, and the search for meaning and compassion in the human experience.

9. For a critique of the sort of monumental development of which the World Trade Center was a prominent example, see JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961).

10. New York Times columnist David Brooks recently wrote, "The academy encourages squirrel-like specialization." David Brooks, *Learning to Think, and Live*, N.Y. TIMES, July 20, 2004, at A19.

11. This may be particularly true of legal scholars. Thomas Reed Powell, who taught law at Harvard for twenty-five years, is credited with saying, "A legal mind is a mind that can think of one of two inseparably connected things without thinking of the other." LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 500 (2000).

12. See Robert M. Ackerman, *Disputing Together: Conflict Resolution and the Search for Community*, 18 OHIO ST. J. ON DISP. RESOL. 28, 88-91 (2002).

II. THE UPSTREAM PROCESS: ESTABLISHING THE SEPTEMBER 11TH VICTIM COMPENSATION FUND

A. *The Legislation*

Any history of the Victim Compensation Fund legislation is necessarily brief. On September 22, 2001, less than two weeks after the attacks, Congress established the September 11th Victim Compensation Fund. The Fund was really an afterthought. In the wake of the September 11th attacks, Congress and the Bush Administration saw an acute need for legislation to protect the airline industry. That industry, already in precarious financial condition, was rocked by the September 11th attacks, which brought down four large passenger airplanes, forced a three-day interruption in commercial air traffic, and provoked public concern regarding the safety of air travel. One aspect of federal relief would be a limitation on recovery against the airlines for the deaths and injuries that occurred on September 11th; that provision would cap the victims' total recovery at the limits of the airlines' liability insurance (a total of approximately \$6 billion).¹³ It was here that the plaintiffs' trial lawyers¹⁴ and Congressional Democrats stepped in, arguing that Congress could not limit the rights of the victims without providing an alternative remedy. Congressional staffers¹⁵ therefore conceived of the Victim Compensation Fund, which would provide compensation to September 11th victims from the United States Treasury on a no-fault basis.

The measure establishing the Fund was enacted without conventional hearings and with little floor debate. It was passed, together with the other provisions of the Air Transportation Safety and System Stabilization Act (the "ATSSSA"),¹⁶ on September 22, 2001, a mere eleven days after the events it was supposed to redress. Noted one writer, "According to key participants in the process, almost no time was spent discussing the moral or philosophical why's of the

13. Lisa Belkin, *Just Money*, N.Y. TIMES MAG., Dec. 8, 2002, at 92, 94.

14. Most notably the Association of Trial Lawyers of America (ATLA), which had called for a moratorium on lawsuits stemming from September 11th, but did want to see the victims compensated. See *Call for Moratorium on Filing Over Terrorism*, 24 PA. L. WKLY. 1097, 1097 (2001).

15. Steven Brill credits David Crane, a member of Senator Trent Lott's staff, as the originator of the scheme for the Victim Compensation Fund. STEVEN BRILL, AFTER: HOW AMERICA CONFRONTED THE SEPTEMBER 12 ERA 84 (2003).

16. Section 101(a) of the Air Transportation Safety and System Stabilization Act, IV, Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified at 49 U.S.C.A. § 40101 (West 2003)) (hereinafter ATSSSA), provided \$5 billion in direct aid and \$10 billion in loan guarantees to the airline industry.

plan.”¹⁷ Indeed, at the time of passage, few people were inclined to question the philosophy or mechanics of the Fund. The Fund reflected the national outpouring of grief and sympathy in the wake of the unprecedented attacks of September 11th. The terrorist missions were attacks on the nation, and Congress and the public regarded it as altogether fitting that the nation as a whole should provide relief to the most directly affected victims. The nuances of compensation (and even their underlying rationale) could be ironed out through regulations to be promulgated by the Attorney General, on advice of a Special Master. In the meantime, the Victim Compensation Fund stood as an example of the largess of the American people, wounded by the most devastating attacks ever to strike American soil, but determined to comfort the victims and pursue the enemy.

The legislative parameters of the Fund were simple. Those who had suffered physical injury and families of those who had died in the attacks on the World Trade Center, the Pentagon, and in the crash of United Airlines Flight 93 near Shanksville, Pennsylvania would be entitled to compensation on a no-fault basis.¹⁸ A Special Master would be appointed by the Attorney General to assist in promulgating regulations and to administer the Fund.¹⁹ The Special Master was to determine, as to each eligible claimant, “(i) the extent of harm to the claimant, including any economic and noneconomic losses; and (ii) the amount of compensation to which the claimant is entitled based on the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant.”²⁰ This determination was to be made within 120 days after the claim was filed;²¹ all claims had to be filed no later than two years after regulations were promulgated (resulting in a final filing deadline of December 22, 2003).²² Economic and noneconomic losses were defined in the ATSSSA:²³ no punitive damages were to be awarded,²⁴ nor was negligence to be considered.²⁵ In a departure from the usual rules for tort recovery, collateral source compensation was to be deducted from the total award.²⁶ Claimants were to have the right to be represented by an

17. Belkin, *supra* note 13, at 94.

18. ATSSSA § 405(b)(2).

19. *Id.* at § 404(a).

20. *Id.* at § 405(b)(1).

21. *Id.* at § 405(b)(3).

22. ATSSSA § 405(a)(3).

23. *Id.* at § 402(7), (9).

24. *Id.* at § 405(b)(5).

25. *Id.* at § 405(b)(2).

26. ATSSSA § 405(b)(6).

attorney²⁷ and to present evidence;²⁸ however, the determinations of the Special Master were to be “final and not subject to judicial review.”²⁹

Those who filed claims with the Fund would be statutorily precluded from bringing a traditional tort action for injuries sustained in the September 11th tragedy.³⁰ (Later amendments made it clear that actions against the terrorists themselves were not precluded.³¹) Those who chose to bring such an action, rather than file with the Fund, would be subject to several constraints: liability of any “air carrier, aircraft manufacturer, airport sponsor, or person with a property interest in the World Trade Center” would be limited to the insurance coverage maintained by such entity;³² liability of New York City could not exceed the greater of the City’s insurance coverage or \$350,000,000 (provided by later amendment);³³ exclusive jurisdiction for any such claims would be in the United States District Court for the Southern District of New York,³⁴ with the substantive law of the state in which the crash occurred applying³⁵ in what was described as a federal cause of action.³⁶

Thus, the September 11th victims would be provided the means of obtaining a quick, certain recovery of substantial damages through an administrative process in which they had limited due process rights. Previous no-fault compensation systems (usually enacted on the state level) had assured recovery regardless of fault, but had sharply limited the *amount* recovered to a fraction of what would be obtained in a traditional tort action. Worker’s compensation, for example, typically provides for medical expenses, a portion of wage loss, and virtually nothing for pain and suffering or other noneconomic losses. The formula adopted for the September 11th Victim Compensation Fund, in contrast, seemed designed to yield recoveries more closely resembling the larger amounts recoverable in fault-based tort actions. This seemingly generous awards scheme, together with the constraints on traditional tort actions imposed by the ATSSSA, were to serve as incentives to bring claims against the Fund in lieu of

27. *Id.* at § 405(b)(4)(A).

28. *Id.* at § 405(b)(4)(B).

29. *Id.* at § 405(b)(3).

30. ATSSSA § 405(c)(3)(B).

31. *Id.* at § 405(c)(3)(B).

32. *Id.* at § 408(a)(1).

33. *Id.* at § 408(a)(3).

34. ATSSSA § 408(b)(3).

35. *Id.* at § 408(b)(2).

36. *Id.* at § 408(b).

traditional tort actions against the airlines and other potential defendants.

As emergency legislation, the Air Transportation System Safety and Stabilization Act sailed through Congress, without protracted hearings or committee markups. The most intensive discussion of the legislation occurred during a late night meeting of Congressional leadership in House Speaker Dennis Hastert's office on September 20.³⁷ The following day's floor debate revealed that some members of Congress had reservations about the legislation, but most of these dealt with the fact that the ATSSSA provided substantial relief to the airlines without direct relief to laid-off employees or provision for federalization of airport security.³⁸ (Subsequent legislation would address these concerns.³⁹) Regarding the Victim Compensation Fund, somewhat inconsistent interpretations were provided on the floor of the House and Senate. In the House of Representatives, Congressman Jon Spratt (D-S.Car.) remarked:

I wanted to propose that we set a fair but generous cap on the victims' benefits paid by the government, and use some of the money saved to help the thousands of airline workers who are being terminated or laid off, and are in a real sense, victims of the September 11 tragedy also. H. Resolution 244, the rule allowing this bill to come to the House floor, would not permit me to offer such an amendment, and for that reason, I voted against the rule. I will vote for the bill, but it would be a much better bill if such an amendment had been made.⁴⁰

Ironically, Congressman Spratt's remarks would later be cited by potential Fund claimants to support an unsuccessful claim that the Special Master's regulations provided higher income victims with less than the full recovery to which they were entitled under the legislation.⁴¹

Earlier in the debate, Rep. John Sensenbrenner (R-Wisc.), the Judiciary Committee Chairman, raised the concern (also voiced in the session in Hastert's office by Rep. Nickles (R.-Okla.)) that the victim compensation provisions might set a precedent for similar compensation provisions in the event of a future disaster.⁴² Three

37. See BRILL, *supra* note 15, at 95-97.

38. See 147 CONG. REC. H5894 (2001); 147 CONG. REC. H5922 (2001).

39. Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001) (codified in scattered sections of 5 U.S.C.; 26 U.S.C.; 31 U.S.C.; 49 U.S.C.).

40. 147 CONG. REC. H5892 (2001).

41. See *Colaio v. Feinberg*, 262 F. Supp. 2d 273, 290 (S.D.N.Y. 2003). For an extensive discussion of this litigation, see *infra* notes 128-153 and accompanying text.

42. 147 CONG. REC. H5879-80 (2001).

Congressmen inserted into the record a letter from ATLA President Leo Boyle in support of the Victim Compensation Fund provisions.⁴³ Boyle would remain a staunch supporter of the Fund, while continuing to assert that it should not serve as a template for general tort reform.⁴⁴

In the Senate, however, the debate took on a somewhat different tone. Senator John McCain (R-Ariz.) strongly suggested that the Fund was intended to provide relief to victims, but not necessarily to replicate traditional tort compensation.⁴⁵ But otherwise, there was little mention of the victim compensation provisions during the brief debate prior to passage of the measure.

The ATSSSA was passed by a vote of 356 to 54 in the House and 96 to 1 in the Senate. It was immediately signed by President George W. Bush. Congress revisited the legislation establishing the Fund in November 2001, in the course of enacting the Aviation and Transportation Security Act (which dealt with matters of airport security and established the Transportation Security Administration).⁴⁶ The limitations on liability were broadened to include potential defendants other than airlines (including aircraft manufacturers and New York City),⁴⁷ language clarifying Fund claimants' ability to sue the terrorists (notwithstanding a claim against the Fund) was added,⁴⁸ and some other language was cleaned up to reduce (but not eliminate) ambiguity.⁴⁹ And on January 23, 2002 Congress passed the Victims of Terrorism Tax Relief Act, which amended the Internal Revenue Code to exempt from income tax the awards obtained from the Fund.⁵⁰

43. *E.g. id.* at H5914. Each Congressman did this in live debate within a few minutes of the others.

44. *See No Victim Left Behind*, TRIAL MAG., Jul. 1, 2004, at 66 (while ATLA traditionally disfavors federal involvement in civil tort remedies, the executive committee believed the Fund was an appropriate exception under extreme circumstances).

45. *See infra* note 145 and accompanying text.

46. Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001).

47. *Id.* at § 201(b).

48. *Id.* at § 201(a).

49. *See id.* at § 201(b)(2)(d) (clarifying definitions of "air carrier," "aircraft manufacturer," and "airport sponsor").

50. Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, 115 Stat. 2427 (2002) (codified as amended at 26 U.S.C.A. 692 (West 2003)).

B. *The Regulations*

1. *Rulemaking Upstream*

The legislative product that left the President's hands was short on detail and even lacking in a coherent rationale. As a consequence, months of debate and discussion as to whether the Fund was a tort-type compensation scheme or a welfare-type relief measure followed. The resolution of this debate would lie mostly within the administrative process, with a brief (and, it would seem, obligatory) detour through the courts.

In contrast with the hurried manner in which the underlying statute was drafted and enacted, the "upstream" process of rulemaking pursuant to the statute was about as thorough and inclusive as the statutory time constraints would allow.⁵¹ The Act required that "the Attorney General, acting through a Special Master appointed by the attorney general, . . . promulgate all procedural and substantive rules for administration of this title,"⁵² including regulations with respect to (1) forms to be used in submitting claims, (2) information to be included in such forms, (3) procedures for hearing and presentation of evidence, (4) procedures to assist an individual in filing and pursuing claims, and (5) "other matters determined appropriate by the Attorney General."⁵³ To this end, on November 5, 2001, the Justice Department published notice of inquiry and advance notice of rulemaking and requested public input on a number of issues.⁵⁴ Shortly thereafter (on November 26), the Attorney General appointed Kenneth Feinberg as the Fund's Special Master. Feinberg seemed particularly well-suited for the job; having served as Special Master in the Agent Orange, DES, and Dalkon Shield cases, Feinberg was adept at fashioning remedies in mass-tort cases. Despite his prior association with Senator Edward Kennedy, a leading Democrat, Feinberg was able to convince Republican Attorney General John Ashcroft that he was the perfect person to take on this sensitive and complex task.⁵⁵ Political connections may have gotten Feinberg's foot

51. I use the terms "upstream" and "downstream" to distinguish between the "upstream" process of lawmaking (including rulemaking) and the "downstream" process of applying the law (largely through individual determinations), both of which are functions of a typical administrative agency and, in this instance, of the Special Master.

52. ATSSSA at § 404.

53. *Id.*, at § 407.

54. September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 55,901 (Nov. 5, 2001) (to be codified at 28 C.F.R. pt. 104).

55. BRILL, *supra* note 15, at 133-34, 242.

in the door, but professional expertise would make him an effective administrator for the Fund.

In response to its notice of inquiry, the Justice Department received more than 800 comments, from a variety of sources.⁵⁶ Many of these comments were reflected in an Interim Final Rule published on December 21, 2001.⁵⁷ The Justice Department subsequently received thousands of comments on the Interim Final Rule, many of them through public and private meetings conducted by the Special Master at various sites convenient to victims, victims' advocates, public officials, and others.⁵⁸ The revisions to the Interim Final Rule found in the Final Rule (published March 13, 2002) reflect the serious consideration given to these comments. Most of the revisions provided for an expansion in benefits to victims and their families.⁵⁹ The process through which the regulations were promulgated reflected several of the values of democratic governance elaborated upon in Section V.A of this article.⁶⁰

While the statute seemed to anticipate regulations dealing primarily with procedure, both the Interim Final Rule and the Final Rule necessarily provided much as to substance, including formulae for calculation of both economic and noneconomic components of the awards and, subsequently, a series of tables indicating presumed awards based on factors such as age, income, and marital status.⁶¹ Critical to the ultimate awards would be the manner in which economic and noneconomic losses were treated under the Special Master's regulations and tables. The statute defined "economic loss" as "any pecuniary loss resulting from harm (including the loss of earnings or other benefits relating to employment, medical expense loss, replacement services loss, loss due to death, burial cost, and loss of business or employment opportunities) to the extent that recovery

56. September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,275 (Dec. 21, 2001) (to be codified at 28 C.F.R. pt. 104).

57. *See id.* at 66,274.

58. September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,235 (Mar. 13, 2002) (to be codified at 28 C.F.R. pt. 104).

59. *See id.* at 11,234 (increased non-economic damages for spouse and each dependent from \$50,000 to \$100,000; expanded from twenty-four hour to seventy-two hour time period for injured to have obtained medical treatment); *see id.* at 11,238 (used tables for adult males to calculate economic damages for all claimants).

60. *See infra* notes 297-318 and accompanying text.

61. Most of the financial calculations underlying these tables were performed by Price Waterhouse, which had a "multimillion dollar contract" for services connected with the Fund. Interview with Kenneth Feinberg, Special Master, September 11th Victim Compensation Fund, in Washington, D.C. (Aug. 11, 2003).

for such loss is allowed under applicable State law.”⁶² The statute defined “noneconomic losses” as “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.”⁶³ Two items are of particular note here: (1) the reference to “applicable State law” in connection with economic (but not noneconomic) loss, and (2) the expansive definition of noneconomic loss, which took in items such as hedonic damages and other losses not universally recognized in wrongful death actions.⁶⁴ Both of these items would be seized upon by those who claimed that the Special Master’s formulae failed to provide victims with the full damages to which they were entitled under the Act.⁶⁵

The regulations enlarging upon these definitions seemed to give with one hand but take with the other. For example, the Special Master indicated a willingness to deviate from the tables and adjust compensation upwards in recognition of special needs. § 104.41 of the regulations acknowledged that § 405(b)(1)(B)(ii) of the Act required the Special Master to take into consideration “the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant,” and stated that “the individual circumstances of the claimant may include the financial needs or financial resources of the claimant or the victim’s dependents and beneficiaries.”⁶⁶ Other elements seem to indicate likely generous payouts. The same regulation established a minimum payout (before deduction of collateral sources) of \$500,000 for deceased victims with a spouse or dependent, or \$300,000 for deceased victims who were single with no dependents.⁶⁷ (The Special Master’s ultimate practice of setting the minimum death award at \$250,000, regardless of collateral sources, can find no direct support in either the statute or the regulations.) And collateral sources (which would be deducted from the final award)

62. ATSSSA § 402(7).

63. *Id.* at § 403(9).

64. See Lori A. Nicholson, *Hedonic Damages in Wrongful Death and Survival Actions: The Impact of Alzheimer’s Disease*, 2 ELDER L.J. 249, 259 n.88 (1994) (only Connecticut expressly allows post-death hedonic damages); *Mather v. Griffin Hosp.*, 540 A.2d 666, 678 (Conn. 1988) (the Connecticut Supreme Court has “long held that loss of life’s enjoyments is compensable” in wrongful death cases).

65. See *infra* notes 126-154 and accompanying text.

66. 28 C.F.R. § 104.41 (2004).

67. *Id.*

would be defined as narrowly as the statute would allow.⁶⁸ But, under § 104.42 the Special Master chose to interpret the phrase “to the extent recovery for such loss is allowed under applicable state law” (as used in the statute’s definition of economic loss⁶⁹) as preventing recovery “for those categories or types of economic losses that would not be compensable under the law of the state that would be applicable to any tort claims brought by or on behalf of the victim.” The statutory language would be interpreted as a limit, not as a mandate; apparently the Special Master did not feel compelled to provide full compensation for economic damages as provided under the relevant state’s tort law.

This interpretation was not an uninformed one. Reactions to the Interim Final Rule included several comments critical of income-based determinations that would create disparities between wealthy and poor victims.⁷⁰ And Feinberg had, apparently, received advice from both Senator Edward Kennedy (D-Mass.) (for whom he had previously worked) and Senator Chuck Hagel (R-Neb.) (with whom he had become friendly while working on the Agent Orange case), which he summarized as “Don’t let twenty percent of the people get eighty percent of the money.”⁷¹ Somehow Feinberg would try to find a way to navigate between the income-based determinations seemingly mandated (but nowhere expressly required) by the statute and a desire to moderate federal largess as to claimants who might otherwise receive awards in excess of \$10 million.

Under § 104.43 of the regulations, the Special Master would publish tables “that will permit prospective claimants to estimate determinations of loss of earnings or other benefits related to employment based upon the individual circumstances of the deceased victim, including: the age of the decedent as of September 11, 2001; the number of dependents who survive the decedent; whether the decedent is

68. 28 C.F.R. § 104.47 excluded charitable gifts and tax benefits from collateral sources subject to the statutory offset and allowed the Special Master to reduce the offset attributable to insurance proceeds by the amount of premiums paid by the decedent. Had charitable gifts been included in the definition of collateral sources, then millions of dollars that Americans had donated to the many charities established to help the September 11 victims would have become, in effect, contributions to the U.S. Treasury. Both Ashcroft and Feinberg recognized that such a result was politically and morally untenable, notwithstanding apparent congressional intent to include charitable gifts in collateral sources subject to the offset. See BRILL, *supra* note 15, at 265-66.

69. Now codified as § 402(7).

70. September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,237 (Mar. 13, 2002) (to be codified at 28 C.F.R. pt. 104).

71. Elizabeth Kolbert, *The Calculator*, THE NEW YORKER, Nov. 25, 2002, at 47.

survived by a spouse; and the amount and nature of the decedent's income for recent years."⁷² When those tables were published, in August 2002, they topped out at \$231,000 annual income, a figure substantially below that of some of the victims employed in the financial industry that occupied much of the World Trade Center. Comments published together with the Final Rule stated:

Although we still anticipate that awards in excess of \$3 or \$4 million will be rare, we emphasize again that there are no "caps" under this program. To the contrary, each claimant has the option to ask for a hearing at which he or she may assert additional, individualized circumstances and argue that the presumed award methodology is inadequate to resolve his or her particular claim in a fair manner. We will consider all such individual circumstances, including, but not limited to, the financial needs of victims and victims' families.⁷³

The Special Master thereby gave himself flexibility to depart from his formulaic methodology where he felt circumstances warranted.

All of this left survivors of the highest-income victims wondering whether the awards would meet their expectations. Cantor Fitzgerald, a bond-trading firm that had lost several hundred employees who had worked in the upper floors of the World Trade Center, published a book detailing the economic losses to which the employees' families were arguably entitled under New York law.⁷⁴ This book served as a basis for a subsequent legal challenge to the regulations and tables.⁷⁵

The disparity in treatment of high and low income victims under the Fund's economic damages formula would be further tempered by (1) the statutory requirement that awards be reduced by amounts provided to victims from collateral sources, such as their own life insurance contracts, and (2) the Special Master's formula for presumed awards of noneconomic damages. Treatment of collateral sources under the Act was at variance with traditional tort rules. Congress's insistence that collateral sources reduce payments from the Fund may have reflected either (a) the recent tendency of legislatures to

72. 28 C.F.R. § 104.43 (2004).

73. September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. at 11,234.

74. See Cantor Fitzgerald submission to the Department of Justice, available at <http://news.findlaw.com/hdocs/docs/cantor/cantor902smdojsub.pdf>.

75. See *infra* notes 128-176 and accompanying text.

look with disfavor on the collateral source rule⁷⁶ and/or (b) recognition that the Fund was less a traditional means of tort recovery and more a public benefit. If the Fund was more an expression of public largess than an effort to mimic tort recovery, a reduction for collateral sources could be seen as more or less benign, penalizing only those who had other resources and leaving more funds available for those less able to take care of themselves.

Rejecting the collateral source rule also could be seen as a way of offsetting the advantage to the wealthy provided by the traditional calculation of economic damages. High-wage earners were more likely to have substantial life insurance policies and employee death benefits to tide their families over. So the family of a high-wage earner might see an initial economic damage calculation from the Fund of several million dollars, only to find it reduced substantially by life insurance proceeds also in the millions. That family's net award from the Fund might be no greater than that of the family of a more modest-wage earner; indeed, this was one of the complaints about the Fund voiced by high-income families and their advocates.⁷⁷ But of course, in the end, the higher income family would end up with a higher total recovery, some paid by the Fund, some through proceeds of an insurance policy it had purchased. In addition, the Special Master's narrow definition of collateral sources (excluding, for example, gifts from charities)⁷⁸ would have a salutary effect on families of some moderate-income victims such as firefighters and police officers.⁷⁹ There was probably some rough justice in this, enough to

76. See generally, Stephen L. Olson & Pat Wasson, *Is the Collateral Source Rule Applicable to Medicare and Medicaid Write-offs?*, 71 DEF. COUNS. J. 172, 173-74 (2004) (discussing how more than thirty states have passed legislation to modify or abrogate the collateral source rule). For states abrogating collateral source rule in all civil actions, see, e.g., ALASKA STAT. § 9.17.070 (Michie 2000); MINN. STAT. § 548.36 (2000); N.D. CENT. CODE § 32-03.2-06 (2001). For states abrogating collateral source rule in all personal injury actions, see, e.g., COLO. REV. STAT. § 13-21-111.6 (1997); CONN. GEN. STAT. § 52-225a (1991); FLA. STAT. ANN. § 768.76 (West 1994); IDAHO CODE § 6-1606 (Michie 1998); IND. CODE § 34-44-1-2 (1998); IOWA CODE § 668.14 (1998); MICH. COMP. LAWS § 600.6303 (2000); MONT. CODE ANN. § 27-1-308 (2000); N.J. STAT. ANN. § 2A:15-97 (West 2000); N.Y. C.P.L.R. 4545(c) (McKinney 2001).

77. Margaret Cronin Fisk, *Many 9/11 Families Wait on Filing Suits*, NAT'L L.J., Sept. 16, 2002, at A1.

78. 28 C.F.R. § 104.47.

79. See BRILL, *supra* note 15, at 650-51 (describing how one fireman's widow became eligible to receive money from the federal public safety officer's benefit (\$250,000), New York City one-year salary benefit (\$52,000), New York State World Trade Center Relief Fund (\$20,000), Social Security (\$370,000), Fire Department contractual death benefit (\$25,000), Victim Compensation Fund (est. \$1,530,000), Union life insurance (est. \$175,000), accidental death coverage (\$50,000), Fire Department group insurance (\$8,500), pension (\$2,400,000 over 40 years), Firefighters' 9/11 Fund

displease people at both ends of the economic spectrum in equal amounts.

The regulations regarding noneconomic losses would attempt to transform an amorphous, elusive concept into a coherent formula.⁸⁰ Presumed noneconomic losses for those killed in the attacks would be in the amount of \$250,000. This amount, said Feinberg, was “roughly equivalent to the amounts received under existing federal programs by safety officers who are killed on duty, or members of the military who are killed in the line of duty while serving our nation.”⁸¹ Under the Interim Final Rule, there would be an additional \$50,000 for the spouse and each dependent of the victim; under the Final Rule that amount was increased to \$100,000.⁸² With respect to noneconomic awards, the Special Master was disinclined to differentiate between those on board the four aircraft that were seized by the terrorists and those inside the buildings struck by three of those aircraft; between those trapped above the fires and those below them; between those who had engaged in desperate cell phone conversations with their families and those who did not have the opportunity to exchange final words with their loved ones. Feinberg wished to spare claimants the agony of producing evidence of the suffering they and their loved ones had endured on September 11th. Again, however, claimants would be allowed to present evidence of special circumstances entitling them to a larger award.⁸³

The regulations regarding noneconomic loss, while formulaic, had the communitarian benefit of treating everyone more-or-less equally. Office workers and flight attendants, firefighters and bond traders all would be presumed to have suffered equally, or perhaps

(\$418,000), Twin Towers Fund (\$355,000), Red Cross (average payout of \$121,000), New York Police and Fire Widow's and Children's Benefit Fund (\$118,000), Robin Hood Fund (\$5,000), September 11th Fund (average payout of \$20,000), Leary Firefighters Foundation (\$3,500), Union Widows and Children's Fund (\$128,000), New York Stock Exchange Fallen Heroes Fund (\$20,000), and New York Fire Safety Foundation Fund (\$7,000) for a total of \$6,076,000). A Rand Institute for Civil Justice study found that “[t]he large charitable gifts combined with other government benefits not available to civilians meant that [the survivors of] an emergency responder killed in the attack likely received \$1.1 million more than [the survivors of] a civilian with a similar economic loss.” LLOYD DIXON & RACHEL KAGANOFF STERN, COMPENSATION FOR LOSSES FROM THE 9/11 ATTACKS xxv (2004).

80. See COCHRAN & ACKERMAN, *supra* note 1, at 206. See also Roselle L. Wissler et al., *Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 MICH. L. REV. 751, 754-55 (1999).

81. September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,279 (Nov. 5, 2001) (to be codified at 28 C.F.R. pt. 104).

82. 28 C.F.R. § 104.44.

83. See *id.* at § 104.33(b).

more accurately, all of their survivors would be presumed to be equally deserving of recovery for this element of loss. To some, however, this was the problem. Some families thought that they or their loved ones had suffered more than others. Others thought that the reduction of this suffering to a formula (and a “mere” \$250,000 per decedent plus \$100,000 per dependent) was an insult to the memory of their murdered relatives.⁸⁴ Some victims’ families seemed to fault the Special Master for failing to arrive at a figure that could actually represent the monumental loss they had suffered,⁸⁵ despite his acknowledgment that “[n]o amount of money can right the horrific wrongs done on September 11, 2001.”⁸⁶ Realistically, the best he could do was offer a sum that would ease the families’ economic hardship and serve as a token of the nation’s heartfelt sympathy.

2. *The Downstream Claims Process*

Procedurally, the regulations allowed claimants to choose one of two tracks for consideration of their claims. If a claimant chose Track A, a Claims Evaluator would determine eligibility and the claimant’s presumed award in accordance with the regulations within 45 days of filing; thereafter the claimant could either accept the award or request a hearing before the Special Master or his designee.⁸⁷ Under Track B, the Claims Evaluator would determine eligibility (again within 45 days); thereafter, eligible claimants would proceed directly to hearing.⁸⁸

28 C.F.R. § 104.33 spelled out the procedures to be used at the hearing. Consistent with the statute, claimants could be represented by counsel, present evidence (orally or in writing), and present witnesses (including experts); the Special Master or his designee would be permitted to question witnesses.⁸⁹ In short, “[t]he objective of hearings shall be to permit the claimant to present information or evidence that the claimant believes is necessary to a full understanding of the claim.”⁹⁰ Hearings would, “to the extent practicable, be scheduled at times and in locations convenient to the claimant or his

84. See Belkin, *supra* note 13; BRILL, *supra* note 15, at 314; Hensler, *supra* note 5, at 249-52.

85. See Hensler, *supra* note 5, at 249-52.

86. September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. at 11,233.

87. 28 C.F.R. § 104.31.

88. *Id.*

89. *Id.* at § 104.33(b),(d).

90. *Id.* at § 104.33(b).

or her representative” and “limited in length to a time period determined by the Special Master or his designee.”⁹¹ The Special Master was required to notify the claimant in writing of the amount of the award, but was not obliged to “create or provide any written record of the deliberations that resulted in that determination.”⁹² Again, consistent with the statute, there would be “no further review or appeal of the Special Master’s determination.”⁹³ The process was designed to take no more than 120 days, consistent with § 405(b)(3) of the Act.

The process would thereby resemble that which is used in final, binding arbitration, except that there would be no party opposing the claim. It featured flexibility, ease-of-use (although some would be daunted by the thirty-three-page claims form), and quick turnaround. A procedure was established under the regulations to provide advance benefits to survivors and injured claimants to alleviate financial hardship.⁹⁴ The Special Master established a website⁹⁵ and several Claim Assistance sites to help guide claimants through the process; ATLA established Trial Lawyers Care, through which experienced trial lawyers would provide free legal assistance to people making claims on the Fund. (Many claimants nevertheless availed themselves of lawyers charging fees, which were sometimes below the normal billing rate.)

Media commentators described the scheme for the Fund as “about as fair as it could possibly be,”⁹⁶ “a good start on the road to recovery,”⁹⁷ “eminently fair,”⁹⁸ and “offer[ing] speedy and rational compensation.”⁹⁹ But storm clouds were forming.

III. A TORRENT OF CRITICISM, OR, NO GOOD DEED GOES UNPUNISHED

Even as many observers applauded the establishment of the Fund and the principles under which it was to operate, opposition was forming. Some of the criticism involved objections to the Fund’s basic statutory structure: the failure to include victims of other terrorist attacks (such as the 1995 bombing of the Alfred B. Murrah

91. 28 C.F.R. § 104.33 (c).

92. *Id.* at § 104.33(g).

93. *Id.*

94. *Id.* at § 104.22.

95. <http://www.usdoj.gov/victimcompensation/>

96. Steven Brill, *A Tragic Calculus*, NEWSWEEK, Dec. 31, 2001, at 28.

97. *A Fair Shake for Victims*, N.Y. TIMES, Dec. 23, 2001, § 4, at 8.

98. *A Fair Amount*, N.Y. DAILY NEWS, Dec. 28, 2001, at 46, available at 2001 WL 32181395.

99. *Take the Money*, WASH. POST, Jan. 18, 2002, at A24.

Federal Building in Oklahoma City) or even a broader range of disasters; the failure to include a broader range of victims of the September 11th attacks (such as those who suffered from the inhalation of toxic substances in the weeks following the attacks¹⁰⁰); and the income-based differentiation among awards to be granted to the victims and their families. Other criticism involved the regulatory scheme: the delegation of broad discretion to the Special Master; the Special Master's alleged failure to follow the statutory mandate in his regulations and tables setting forth presumed awards; and the absence of any appeals apparatus or the requirement of a written opinion that could provide the reasoning behind the award or form the basis for an appeal. Most of the objections to the Fund stemmed from procedural and substantive aspects of the scheme that deviated from normal expectations regarding tort recovery. We will consider some of these criticisms here, not so much to provide a catalog of objections regarding the Fund as to consider the Fund's implications for administrative regulation, tort reform, and dispute resolution.

A. *Statutory "Flaws"*

One set of critiques of the Fund can be categorized as objections to the basis for compensation set forth in the statute. There were two major subsets to this category: (1) that the Fund did not embrace a broad enough class of victims; and (2) that the Fund allocated a disproportionate amount of awards to the families of high-income victims.

1. *No Awards to Persons Not Physically Injured in the September 11th Attacks or Their Immediate Aftermath*

This criticism of the Fund's structure in turn has two subcategories. One of these involves the Fund's failure to provide any remedy for victims of other terrorist attacks, or, for that matter, tragedies unrelated to terrorism. The Special Master has described them in this manner:

I'll show you e-mails from people that'll break your heart. . . .
 Dear Mr. Feinberg, my son died in Oklahoma City. Why not me? Dear Mr. Feinberg, my son died in the first World Trade Center bombing, in '93, why not me? Anthrax – why not me? African Embassy bombing – why not me? U.S.S. Cole – why not

100. See Robert L. Rabin, *Indeterminate Future Harm in the Context of September 11*, 88 VA. L. REV. 1831, 1849 (2002).

me? And then you get even beyond terrorism. "My husband died last year saving three little girls in a Mississippi flood — why not him?" . . . Where do you stop?¹⁰¹

These questions, coming from ordinary citizens who have experienced extraordinary tragedies, carry a special poignancy and bear a significant truth.¹⁰² It is difficult to distinguish, in principle, those who have suffered from the September 11th tragedy and those who have borne the scars of other terrorist attacks on the United States. It is but a small (and some would say irrelevant) step to others who have died in a tragic, premature manner. For the Special Master, the answer can be couched in straightforward legal terms: Congress did not give him the power to make awards to those who were not directly involved in the September 11th tragedy. However, that does not answer why Congress chose to limit recovery in this manner.

Why did other terrorist attacks generate horror and sympathy, but not federal government largess in the form or scale allotted to the September 11th victims? I suggest several reasons, grounded in genuine compassion, patriotic fervor, and practical politics.

First (as I have observed elsewhere), "the September 11 attacks resulted in deaths and injuries on what was for Americans an unprecedented scale—a *monumental* scale, accentuated by the indelible televised image of the collapse of two 110-story skyscrapers. . . . It would take extraordinary measures (of which the Fund was but one) to redress this unprecedented scar on the national psyche."¹⁰³ Second, the *visibility* of the events of September 11th distinguished it from most tortious conduct, and even most acts of terrorism. The September 11th victims were not the cloying, overreaching demons portrayed in the tort reform crusades, people who, with the assistance of tasseled-loafed trial lawyers, had played the system to pluck the purses of hard-working Americans and productive corporations.¹⁰⁴ Unlike those imagined hordes of whiners and malingerers,

101. Kolbert, *supra* note 71, at 42, 49

102. A number of comments received from the public at large suggested not that victims of other misfortunes should have access to the Fund, but rather that the September 11th victims should be denied compensation. Hensler, *supra* note 5, at 444.

103. COCHRAN & ACKERMAN, *supra* note 1, at 192.

104. The contrast between the Bush Administration's support for the Fund and its ongoing efforts to limit tort recoveries in other circumstances (such as medical malpractice) demonstrates the difference between the treatment of abstract concepts and visible tragedies. The \$250,000 *cap* on noneconomic damages proposed by the Bush Administration for medical malpractice cases equals the \$250,000 in *presumed* noneconomic damages provided by the Fund to families of September 11 decedents. To this \$250,000 the Special Master would add \$100,000 per dependent. See Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act, H.R. 5, 108th

the September 11th victims were visible; they were *real* people with *real* injuries. We had seen it on television and shared their pain, and Congress, in the episodic, issue-of-the-moment manner of most legislatures, responded. Third,

the shared national trauma came in the form of a foreign attack on the *community* of the United States of America. Those who perished in the World Trade Center, in the Pentagon, and on Flight 93 were believed to have died on behalf of all Americans, creating a justifiable, communitarian sense that the loss should not fall disproportionately on those who were unfortunate enough to occupy the targets at the fatal moment. There was little Americans could do as a nation to ameliorate the personal suffering; the nation could, however, make a large financial gesture to convey its sympathy and ease the financial trauma.¹⁰⁵

But the most significant distinction between this event and its predecessors was the legislative context in which the Victim Compensation Fund was established. The legislation creating the Fund was but a part of a larger measure, the Air Transportation Safety and System Stabilization Act. As explained earlier, Washington recognized the need for federal legislation protecting the airline industry *before* it recognized the need for a comprehensive compensation scheme for the families of those killed and injured in the September 11th attacks. The Victim Compensation Fund pivoted around two statutory provisions: (1) the preclusion of a conventional tort action (against airlines and others) for those who sought compensation from the Fund;¹⁰⁶ and (2) the limiting of the airlines' liability to those who chose to sue (rather than seek compensation from the Fund) to the airlines' liability insurance coverage.¹⁰⁷ While it was clear that Al Qaeda terrorists were chiefly responsible for the attacks, the danger that allegations of security lapses would prompt lawsuits against airlines and others was cogent enough and the concern that the airlines would be deemed uninsurable (and would thereby fail economically) was potent enough to cause Congress to provide for victim compensation in the airline bailout package. The Victim Compensation Fund must therefore be seen as a component of a larger measure to protect a vital industry from failure. "Unfortunately for the victims of the Oklahoma City bombing or other disasters, no major industry was in

Cong. § 4(b) (2003). See also Ceci Connolly, *Cheney Urges Cap on Medical Malpractice Awards, Proposal Aims to Improve Health Care*, WASH. POST, July 20, 2004, at A6.

105. COCHRAN & ACKERMAN, *supra* note 1, at 192.

106. ATSSSA § 405(3)(B)(i).

107. *Id.* at § 408(a)(1).

danger of failure as a consequence of lawsuits the victims or their families might bring.”¹⁰⁸

And so the federal government responded to private harm, but harm on a scale so massive that only the federal government could address it; harm that, if left uncompensated, would have done further damage to the general public. Even those espousing limited government (such as the President and many members of Congress) deemed the circumstances appropriate for federal intervention.¹⁰⁹

The second criticism regarding the breadth of the Fund’s coverage involves its failure to compensate victims of the September 11th attacks who were not killed or injured within hours of the four airplane crashes. Some people (including several who were involved in rescue and cleanup operations) complained of illnesses contracted due to inhalation of toxic particles in the vicinity of the World Trade Center (which came to be known as “Ground Zero”) during the weeks following September 11th. Others (particularly businesses near Ground Zero) had suffered substantial economic losses. Statutorily, relief from the Fund was limited to those who were “present at the World Trade Center, the Pentagon, or the site of the airline crash at Shanksville, Pennsylvania at the time, or in the immediate aftermath, of the terrorist-related aircraft crashes of September 11, 2001,” and “had suffered physical harm or death as a result of such an air crash,” crew members and passengers (excluding the terrorists) on any of the four airplanes involved in that day’s crashes, and the personal representatives of any deceased victims meeting the foregoing description.¹¹⁰ The regulations defined “immediate aftermath” (for all claimants other than rescue workers) as “the period of time from the crashes until twelve hours after the crashes;” for rescue workers, that period was extended to ninety-six hours.¹¹¹ “Physical harm” (apart from harm resulting in death) was limited, for the most part, to a physical injury treated by a medical professional within twenty-four hours after injury or rescue.¹¹²

Thus, for example, most persons who had sustained respiratory damage due to exposure to toxic dust in the weeks following the collapse of the World Trade Center were precluded from recovering

108. COCHRAN & ACKERMAN, *supra* note 1, at 194.

109. During floor debates of recent appropriations measures Congress has given further indication that a philosophy of limited government often gives way to political expedience. See, e.g., 150 CONG. REC. H4898 (daily ed., Jun. 24, 2004) (statement by Rep. Hensarling).

110. ATSSSA § 405(c)(2).

111. 28 C.F.R. § 104.2(b).

112. *Id.* at § 104.2(c).

through the Fund.¹¹³ Again, it would be difficult, as a matter of principle, to distinguish these victims from those who had suffered more immediate non-fatal injuries. Perhaps they were considered too far removed in time from the cataclysmic event to register on the nation's (or Congress') conscience, or too far removed from the events on the hijacked airplanes to be viewed as a significant threat to the airlines' assets through suit.¹¹⁴ Ironically, these victims, while precluded from recovery through the Fund, were still subject to the limitations on tort recovery set forth in § 408 of the Act. (Section 408(a)(3), limiting the liability of New York City, was enacted as an amendment to the Act with these toxic inhalation claims in mind.¹¹⁵) These victims, lacking the recourse of Fund claimants, would seemingly be in the best position, legally and strategically, to mount a constitutional challenge to those limitations.¹¹⁶

2. *Larger Awards to Rich People*

As for those who were eligible for the Fund's assistance, concern was expressed regarding the disparities in likely awards to decedents' families based on the victims' prospective income streams. The income-based disparity in awards for economic loss would come as no surprise to those who used the traditional tort system as their template; for them, the chief problem was the possibility that the Fund

113. For a much fuller exposition of this issue, see Robert Rabin, *supra* note 100, at 1843-53.

114. For purposes of proximate cause, passengers on the four hijacked airliners would be seen as having had the most direct connection to the airlines, occupants of the World Trade Center and Pentagon as having had a less direct connection, and those exposed to toxic dust in the vicinity of the World Trade Center as having had an even less direct connection to any culpable acts on the part of the airlines or airport security companies. The proximity of the harm to the wrongdoing (assuming, for the moment, that there was any wrongdoing on the part of the airlines) bears a resemblance (albeit on a much larger scale) to the helpful, though timeworn, hypothetical provided in Judge William Andrews' famous dissent in *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 353 (1928), the seminal and most well-known of the line of New York proximate cause cases. (In the hypothetical, a driver collides with another car loaded with dynamite in the trunk. In the ensuing explosion "A, walking on the sidewalk nearby, is killed. B, sitting in a window of a building opposite, is cut by flying glass. C, likewise sitting in a window a block away, is similarly injured." Meanwhile, the explosion startles a woman ten blocks away and she involuntarily drops her baby.) But the toxic dust victim might have a broader choice of defendants as distinguished from an occupant of the World Trade Center, she could sue both United and American Airlines, the security subcontractors for both airlines, the City of New York (for failure to protect or warn against toxic dust), and perhaps others. The prospects for such suits would be uncertain; all would be subject to limitations as to liability and venue found in § 408 of the ATSSSA.

115. See Rabin, *supra* note 2, at 579-80.

116. See *infra* text accompanying notes 202-211.

might fail to provide compensation identical to that which the tort system would provide for a successful claimant.¹¹⁷ But those who “viewed the program not as a replication of the tort system, but instead as a government program designed to assist the victims and their families,”¹¹⁸ considered it unfair that families of the wealthiest victims would receive more money than those of the brave police officers and firefighters who had rushed into the doomed buildings to rescue them. “Rich people do not deserve more because they are rich,” observed one commenter on the regulations.¹¹⁹ The notion that economic distinctions would survive the deaths of those involved in a common disaster seemed perverse to some, especially those unfamiliar with the manner in which the tort system allocates damages.

The problem was based, at least in part, on the competing theories of corrective and distributive justice. Traditional tort remedies are based on a corrective justice paradigm: defendants are held liable on the basis of fault, classified as either intentional or negligent wrongdoing, and damages are designed to place the plaintiff in the same position she would have been in absent the defendant's tortious conduct. So a high-income victim, deprived of that income through death or disabling injury, generates a larger damage award than a lower-income victim suffering from the identical injuries. Even strict liability, which departs from the corrective justice model of *liability* and embraces distributive justice principles,¹²⁰ allows *damages* based on traditional corrective justice principles.¹²¹

117. See September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,237 (Mar. 13, 2002) (to be codified at 28 C.F.R. pt. 104); see also *infra* notes 124-51 and accompanying text.

118. See September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. at 11,237; see also Kolbert, *supra* note 71, and accompanying text.

119. September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. at 11,237. See *supra* notes 70-71 and accompanying text.

120. By distributive justice, I refer to the fairness of the outcomes or rewards that an individual or group receives. See C. Wesley Younts & Charles W. Mueller, *Justice Processes: Specifying the Mediating Role of Perceptions of Distributive Justice*, 66 AM. SOC. REV. 125, 125 (2001). Social psychologists often use the term “distributive justice” in a broader sense “to refer to psychological reactions to the outcome of a dispute or an allocation.” E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 62 (1988).

121. Initially, at least, the courts adopting strict products liability embraced distributive justice concepts, i.e., the idea that defendant manufacturers should be held liable not due to any fault on their part, but due to their ability to distribute the costs of product-related injuries through the pricing mechanism. See, e.g., *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1962); *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 441 (Cal. 1944). This concept has been eroded of late, as fault-based principles have resurfaced in products liability cases. See Sheila L. Birnbaum,

But corrective justice was not the rationale behind a program in which the United States Treasury would be the source for payment of billions of dollars to the September 11th victims and their families. Recovery from the Fund was to be based not on any wrongdoing by the United States government,¹²² but on humanitarian instincts grounded in distributive justice, i.e., a desire to avoid financial dislocation on the part of victims and their families, and to express a sense of shared national loss. True, the Fund was intended as an attractive alternative to a tort remedy based on corrective justice, but that in itself did not require that taxpayer-funded payments be based on a corrective justice concept. Having abandoned fault as a basis for recovery, there was no theoretical basis for maintaining a corrective justice model for damages.

Corrective justice in the traditional tort sense remains an appropriate remedy against the Al Qaeda terrorists or, for that matter, against far less culpable but arguably negligent parties such as the airlines and airport security firms. Amendments to the ATSSSA permit the families of victims to bring tort claims “against any person who is a knowing participant in any conspiracy to hijack any aircraft or commit any terrorist act,”¹²³ without forfeiting their claims against the Victim Compensation Fund. Those who were willing to forego a claim on the Fund could test their chances in an action against an allegedly negligent airline or security firm under § 408 of the Act. However, the federal government, which played no *direct* role in bringing about the September 11th tragedy, had no legal obligation to provide compensation to families in accordance with the tort law’s notions of *corrective* justice.¹²⁴

Unmasking the Test for Design Defect: From Negligence to Strict Liability to Negligence, 33 VAND. L. REV. 593 (1980); see also RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2(b) (1997). Perhaps a more complete example of a distributive justice-based deviation from the tort system is worker’s compensation, a no-fault remedy in which the injured worker receives limited compensation, based on a published schedule rather than on an individualized determination of actual loss. See, e.g., N.Y. WORKER’S COMP. LAW § 29 (McKinney 2004).

122. At least a few commentators have suggested that the Fund’s establishment implied that the government “was responsible in some way for failing to prevent the tragedy.” Tyler & Thorisdottir, *supra* note 5, at 359. The legislative history is devoid of any such characterization.

123. ATSSSA § 408(c).

124. *But see* THE 9/11 COMMISSION REPORT, NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 263-66 (2004) (indicating missed opportunities by the federal government to prevent the September 11th tragedy). The federal government’s negligence, if any, would likely fall under the discretionary function exception of the Federal Torts Claims Act. See Marshall Shapo, *Compensation for Victims of Terror: A Specialized Jurisprudence of Injury*, 30 HOFSTRA L. REV. 1245, 1245 (2001).

The Cantor Fitzgerald bond-trading firm (which employed many of the World Trade Center victims) would complain that the Special Master's tables inadequately provided for awards to families of many of its high-income employees.¹²⁵ This was understandable advocacy by Cantor Fitzgerald on behalf of its extended "family." But Cantor Fitzgerald's cause need not be taken up by the federal government. In its haste to rescue the airlines and provide compensation to the families of September 11th victims, Congress reflexively drew on remedies language from the familiar tort system. It was under no obligation to do so.¹²⁶ Congress squandered an opportunity to replace a corrective justice system designed to punish wrongdoers and compensate victims for lost economic expectations (however uneven) with a distributive justice model designed to more equitably provide for the victims' families and demonstrate the compassion of the American people.¹²⁷ To be sure, there are reasonable explanations for this. The time was short, and there was a practical need to devise a system that would be regarded as a palatable substitute for suing the airlines. But it is unlikely that a dollar-for-dollar replication of traditional tort damages would have been necessary to deter speculative claims against airlines and security firms teetering on the edge of bankruptcy.

What occurred in the frenzy of legislative drafting and the maelstrom of post-September 11th events was a default to familiar language. To the extent it was given any thought at all, a tort-based damages formula was a capitulation to the routine, rather than an embrace of something new and imaginative to address an unprecedented challenge. In providing no-fault recourse to the U.S. Treasury, Congress broke half the mold; in defaulting to traditional tort definitions of loss, it preserved the other half. Might a Congress and administration that was a little more imaginative and a little less pressed for time have developed a still generous but more egalitarian means of distributing funds representing the nation's largess? Might it have found statutory language to explicitly provide compensation on a needs basis? Under the circumstances, one can hardly fault the Special Master for finding the statutory wiggle-room to flatten out

125. See *infra* note 128 and accompanying text.

126. COCHRAN & ACKERMAN, *supra* note 1, at 202.

127. In his Final Report, the Special Master observed, "The statutory mandate of tailored awards fueled divisiveness among claimants and undercut the very cohesion and united national response reflected in the Act." Final Report of the Special Master for the September 11th Victim Compensation Fund of 2001 82 at http://www.usdoj.gov/final_report.pdf.

economic awards at the top, to take individual needs into account, and to award noneconomic damages on an egalitarian basis.

B. *Administrative Law Issues*

But these adjustments on the part of the Special Master in turn spawned more vocal criticism, in the form of complaints that the resulting scheme would fail to fully compensate some victims in accordance with the statutory mandate. Particularly harsh criticism came from the Cantor Fitzgerald bond-trading firm. The data compiled by that firm supported the contention that, based on his formulae and tables, the Special Master planned to provide compensation to the families of high-income victims far short of that of which was mandated under the enabling legislation. On January 24, 2003, the families of six victims (most of whom had been Cantor Fitzgerald employees) filed suit against the Special Master, the Attorney General and the United States Department of Justice, seeking class certification and declaratory and injunctive relief to the effect that the awards contemplated by the Special Master were in violation of the underlying legislation. The complaint in that action, *Colaio v. Feinberg*,¹²⁸ together with two other actions with which it was consolidated, provided a litany of arguments in support of the proposition that the compensation scheme was inadequate and at odds with the statute. It is worth pausing to examine these arguments, as well as the judicial response.

1. *Conformity of Regulations to Statutory Mandate*

The plaintiffs in *Colaio* contended that the Special Master's compensation scheme (1) imposed an arbitrary and unreasonable "cap" on awards; (2) improperly imposed a "needs" test in determining the "individual circumstances of the claimant;" (3) imposed a restrictive interpretation of "economic loss" contrary to New York law; (4) improperly failed to publish methodology for determining presumed economic loss beyond the 98th percentile of income and focused on 1998-2000 salary levels; (5) required that claimants present "extraordinary circumstances" for claims not adequately addressed by the presumptive award methodology; (6) improperly used post-tax income as the basis for calculating economic loss; (7) arbitrarily and unreasonably used a higher consumption rate for single decedents than for those who were married or had children in determining economic loss; and

128. 262 F. Supp. 2d 273 (S.D.N.Y. 2003); see also Class Action Complaint, *Colaio v. Feinberg*, 03 Civ. 0558 (S.D.N.Y. 2003).

(8) violated equal protection and due process rights in making award determinations.¹²⁹

On consideration of cross-motions for summary judgment, Judge Alvin K. Hellerstein employed the standards of *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*¹³⁰ and *Skidmore v. Swift & Co.*¹³¹ to determine whether the Special Master's regulations and policies were in accord with the statutory mandate. Under *Chevron*, the courts apply a two-step analysis of agency regulations: (1) if Congress "has directly spoken to the precise question at issue" in the text of the statute, the text governs; and (2) if the statute is "silent or ambiguous with respect to the specific issue," then the court reviews "whether the agency's answer is based on a permissible construction of the statute."¹³² Under *Skidmore*, agency policies not promulgated in accordance with the APA's notice and comment procedures (here, that would include the Special Master's tables) are still accorded a measure of deference.¹³³ Judge Hellerstein decided that "[t]he Special Master's policies qualify for *Chevron* deference or, at minimum, *Skidmore* respect."¹³⁴ The challenge to the regulations and methodologies governing the Fund thereby brought the personal injury claims of September 11th victims and their families into the arcane world of administrative law.

Employing the *Chevron* and *Skidmore* standards, Judge Hellerstein examined each of the plaintiffs' contentions. He found "no reliable evidence that the Special Master ha[d] imposed a cap."¹³⁵ While

129. *Colaio*, 262 F. Supp 2d at 282-83 (S.D.N.Y. 2003); see also Class Action Complaint 18-28, *Colaio v. Feinberg*, 03 Civ. 0558, (S.D.N.Y. 2003).

130. 467 U.S. 837 (1984).

131. 323 U.S. 134 (1944).

132. *Colaio*, 262 F. Supp. 2d at 29 (paraphrasing *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984)). The *Colaio* court did not distinguish between the two standards employed under the second step of the *Chevron* analysis, i.e., whether Congress had expressly delegated rule-making authority with respect to the issue in question. Because the distinction between "arbitrary and capricious" and "unreasonable" is a fine line indeed, it is questionable as to whether such a distinction is useful or necessary.

133. "The weight of [the agency's] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Colaio*, 262 F. Supp. 2d at 288 (quoting *Skidmore v. Swift*, 323 U.S. 135, 140 (1944)). This deference is justified by the "specialized experience and broader investigations and information available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires." *Colaio*, 262 F. Supp. 2d at 288, quoting *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001).

134. *Colaio*, 262 F. Supp. 2d at 289.

135. *Id.* at 290.

acknowledging Feinberg's statement that "awards in excess of \$3 or \$4 million will be rare," the Judge recognized that each claimant had a right to a hearing "at which he or she may assert additional individualized circumstances and argue that the presumed award methodology is inadequate."¹³⁶ Judge Hellerstein also noted that the Fund's website already had indicated awards in excess of \$3 million.¹³⁷ (Awards for deceased victims ultimately topped out at \$7.1 million.¹³⁸) Later in the opinion, the court recognized the Special Master's observation that "calculation of awards for many victims with extraordinary incomes beyond the 98th percentile could be a highly speculative exercise;"¹³⁹ even the plaintiffs had conceded that one may more readily forecast future income streams for low- and middle-income employees than for decedents with high incomes.¹⁴⁰ The regulations were therefore reasonable in declining to calculate presumed economic loss beyond the 98th percentile, leaving the issue to hearings and fact-finding.¹⁴¹ Likewise, it was not unreasonable to use a three-year earnings average to determine presumed economic loss.¹⁴²

As to the use of a "needs" test, the judge determined that "[t]he agency's definition of 'individual circumstances' to 'include the financial needs or financial resources of the claimant or the victim's dependents and beneficiaries,' 28 C.F.R. § 104.41, is a plausible and reasonable construction of the phrase and does not conflict with any expressed congressional intent."¹⁴³ While the *Colaio* complaint cited Representative Spratt's concern that the statute called for disparate treatment of high and low wage-earners,¹⁴⁴ the court looked to the Senate for its legislative history, quoting (among others) remarks by Senator John McCain (R-Ariz.):

No amount of money can begin to compensate the victims for their suffering. Nothing will make them and their families "whole." It is not the intent of the federal Fund to do this. Nor

136. *Id.* at 289-90, citing September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,233, 11,234 (Mar. 13, 2002) (to be codified at 28 C.F.R. pt. 104).

137. *Id.* at 290.

138. http://www.usdoj.gov/victimcompensation/payments_deceased.html (last visited Nov. 19, 2004).

139. *Colaio*, 262 F. Supp. 2d at 295, quoting September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. at 11,233, 11,237.

140. *Id.*

141. *Id.* at 296.

142. *Id.* at 291-92.

143. *Colaio*, 262 F. Supp. 2d at 296.

144. *See id.* at 290; *See also supra* text accompanying note 40.

is it the intent of the Fund to duplicate the arbitrary, wildly divergent awards that sometimes come from our deeply flawed tort system—awards from which up to one third or more of the victims' award is often taken by attorneys.

The intent of the Fund is to ensure that the victims of this unprecedented, unforeseeable, and horrific event, and their families do not suffer financial hardship in addition to the terrible hardships they already have been forced to endure.¹⁴⁵

The court further quoted Senator McCain's observations regarding the possibility that a conventional tort action might not yield favorable results for the victims and their families, concluding that "[t]he Fund was not intended to replicate tort damage awards in wrongful death cases."¹⁴⁶ Despite the absence of any reference to the 98th percentile level in the statute, the court stated that the "discretion beyond the 98th percentile level to determine awards according to the claimant's needs, resources, and other individual circumstances" was "discretion that Congress wanted the Special Master to have."¹⁴⁷ Furthermore, the failure to furnish presumptive award guidelines for those with annual incomes above the 98th percentile did not, in the court's eyes, create an equal protection claim. Classifications based upon wealth alone are not suspect, and the Special Master's methodology was rationally related to a legitimate governmental interest, i.e., providing a speedy and just system of making awards.¹⁴⁸ Finally, the plaintiffs' due process contention was seen as recasting an invalid statutory claim as a constitutional argument.¹⁴⁹

Of particular significance is the court's treatment of the Special Master's interpretation of the phrase "to the extent recovery for such loss is allowed under applicable State law" (in the statute's definition of "economic loss"¹⁵⁰) as imposing a limitation, rather than a mandate, as to recovery for economic loss.¹⁵¹ The court noted that the text of § 402(7) refers to the categories of loss, and does not deal with the calculation of damages. It further noted that § 402(7) was a definitions section; statutory guidance for the calculation of awards was to be found elsewhere, in § 405(b). But § 405(b) employed the term

145. *Colaio*, 262 F. Supp. 2d at 291 (quoting 147 CONG. REC. S9594 (daily ed. Sept. 21, 2001) (statement of Sen. McCain)).

146. *Id.*

147. *Id.* at 293.

148. *Id.* at 300.

149. *Colaio*, 262 F. Supp. 2d at 300-01.

150. ATSSSA §402(7).

151. See *supra* text accompanying notes 46-49.

“economic loss”—*defined* in § 402(7) – in describing how the harm to the claimant was to be determined. Nevertheless, said the court, “Congress did not instruct the Special Master to engage in the intricate calculations mandated by state tort law in crafting awards.”¹⁵² The text of § 402(7) was ambiguous, the government’s reading was “based on a permissible reading of the statute,” and the court therefore accorded deference to the agency interpretation under *Chevron*.¹⁵³ In like manner, given that the Special Master was not bound to follow state law in determining the amount of loss, his use of after-tax earnings to determine economic loss was entitled to deference, and was neither arbitrary, capricious, nor unreasonable.¹⁵⁴ And the use of higher consumption rates for single victims was also seen as “rationally based and reasonably and properly implement[ing] the Act and regulations.”¹⁵⁵

2. *The Nondelegation Issue*

Prior to the above analysis, the court addressed two additional administrative law issues that the plaintiffs had raised: (1) that Congress did not delegate to the Special Master the power to prescribe the standards by which the awards are determined, and left it to the Special Master only to calculate awards according to criteria defined by Congress; and (2) that if Congress did delegate discretion to the Special Master, such delegation was not guided by any “intelligible principle.”

The court made short shrift of the first issue, citing language in the statute expressly authorizing the Special Master to “promulgate all procedural and substantive rules for the administration of this title.”¹⁵⁶ The second issue involved a “nondelegation” argument, the assertion that a Congressional delegation of lawmaking power to an administrative agency presents a separation of powers issue, and

152. *Colaio*, 262 F. Supp. 2d at 294.

153. *Id.*

154. *Id.* at 298. Note that by finding that the Special Master’s methodology was “not arbitrary and capricious, and is reasonable,” *id.*, Judge Hellerstein obviated the need to determine whether Congress had expressly instructed the Special Master to resolve the issue at hand. In fact, Congress’ instructions to the Attorney General (and through him, the Special Master) were fairly general, but could be viewed as embracing regulations of this type.

155. *Id.* at 299.

156. *Colaio*, 262 F. Supp. 2d at 289, quoting ATSSSA § 404(a)(2).

that Congress must provide the agency with an “intelligible principle” to which the agency is directed to conform.¹⁵⁷ The issue may be seen as a sleeping giant. It is sleeping because it has been employed only twice to invalidate a statutory delegation of lawmaking power, the last instance being the notorious *Schechter Poultry* case.¹⁵⁸ The issue is a giant one because it challenges the lawmaking power of administrative agencies, exercised since the creation of the Interstate Commerce Commission in 1887, and greatly expanded since the advent of the New Deal in the 1930s. At least one member of the current Supreme Court, Justice Clarence Thomas, sees no reason to condition application of the nondelegation doctrine on the existence of an “intelligible principle” to guide administrative agencies, as no such language appears in the Constitution.¹⁵⁹ In *Whitman v. American Trucking Associations, Inc.*, Justice Thomas invited the Court “[o]n a future day” to “address the question whether our delegation jurisprudence has strayed too far from our Founders’ understanding of separation of powers.”¹⁶⁰ Were this more restrictive view of administrative lawmaking to prevail, the entire system of administrative governance might be shaken at its foundation.

Judge Hellerstein was not so bold as to shake this system at the district court level. Instead, he found an intelligible principle in § 403’s statement that the Act’s purpose is to “provide compensation” and in § 405(b)’s provision of basic criteria for determining the amount of the award – the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant. The court also noted that it was not necessary “that Congress supply administrative officials with a specific formula for guidance in a field where flexibility and the adaption of congressional policy to infinitely variable conditions constitute the essence of the program.”¹⁶¹ The court concluded: “Although plaintiffs may disagree with how the Special

157. *Hampton & Co. v. United States*, 276 U.S. 394 (1928); *Mistretta v. United States*, 488 U.S. 361 (1989); *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457 (2001).

158. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating § 3 of National Industrial Recovery Act). The other instance was *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (invalidating § 9(c) of National Industrial Recovery Act). These cases were critically viewed as judicial efforts to thwart the New Deal, giving rise to President Franklin D. Roosevelt’s Court-packing plan. See generally ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* (1941); MARIAN C. MCKENNA, *FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR* (2002).

159. *Whitman*, 531 U.S. at 486-87, (Thomas, J., concurring).

160. *Id.* at 487.

161. *Colaio*, 262 F. Supp. 2d at 287, quoting *Lichter v. United States*, 334 U.S. 742 (1948).

Master proposes to exercise his discretion, and perhaps even with Congress' decision to grant him discretion, it cannot be said that the Act fails to provide an 'intelligible principle' by which the Special Master shall determine the compensation to be awarded."¹⁶²

3. *Between the Rock of Nondelegation and the Hard Place of Chevron*

While inconsistent pleading is not unknown under the Federal Rules of Civil Procedure,¹⁶³ the *Colaio* plaintiffs' two delegation arguments seem to defeat one another. If the statute set forth sufficient criteria for the Special Master to calculate awards without additional rules (as the *Colaio* plaintiffs contended), then certainly whatever discretion Congress gave the Special Master was guided by an intelligible principle; and if an intelligible principle was lacking, then Congress gave the Special Master insufficient guidance to calculate awards unaided by regulations. But juxtaposition of the nondelegation and *Chevron/Skidmore* issues presented a similar paradox for the Fund's defenders. In order for the statute to survive the nondelegation argument, Congress had to provide the Special Master with an "intelligible principle" that would have narrowed his discretion; he could not simply do anything he wanted to do. But for the Special Master's regulations and methodologies to survive judicial scrutiny, the statute had to be read as giving him a great deal of discretion. In most cases subject to such scrutiny, Congress is found to have provided an intelligible principle, while still giving the administrative agency sufficient wiggle room to write regulations embellishing upon that principle. That, according to Judge Hellerstein, was the case here: the statute was specific enough to survive a nondelegation challenge, but not so specific as to hamstring the Special Master's efforts at regulatory creativity. Feinberg had threaded the needle to the court's satisfaction.

Some unfortunate pronouncements attributed to the Special Master, however, gave greater credence to a nondelegation argument than the statutory text alone would provide. In the months following his appointment, Feinberg is reported to have said, on more than one occasion: "The law gives me unbelievable discretion. It gives me discretion to do whatever I want. So I will."¹⁶⁴ If such a statement were to be taken literally, then it would appear that (at least in the Special

162. *Id.*

163. FED. R. CIV. P. 8(e)(2).

164. Kolbert, *supra* note 71, at 42, 48.

Master's mind) the statute allowed just the type of uncanalized discretion found wanting in *Schechter Poultry*.¹⁶⁵ Fortunately for the Fund, its constitutionality was judged (by Judge Hellerstein and, as we shall see, the Second Circuit) on the basis of the statutory language, rather than the Special Master's gratuitous remarks. So long as the regulations and methodologies comported with the statute, there was little available in the form of a judicial remedy, particularly in light of the non-reviewability of the Special Master's award determinations.

4. *The Regulations Survive – Barely*

That reality did not go unnoticed by the United States Court of Appeals for the Second Circuit when it affirmed the District Court's decision (*sub nom Schneider v. Feinberg*) on September 26, 2003.¹⁶⁶ On appeal, a shorter, *per curiam* opinion focused on the *Chevron* issues.¹⁶⁷ Like the District Court, the Second Circuit declined to place the Special Master in an interpretive cage. While stating that "any cap on compensation would be a direct violation of the statute,"¹⁶⁸ the appellate court found no evidence of a *de facto* cap, stating, "the record does not show that the cut-off on the presumed-loss tables and the "extraordinary circumstances" requirement for awards exceeding \$4 million constitute a sham or pretext."¹⁶⁹ The court acknowledged that Feinberg's comments "fuel an impression that the Special Master has closed his mind to awards that exceed his idea of what is appropriate in the most general sense of the word."¹⁷⁰ These comments, lacking the force of law, were not to be accorded *Chevron* deference. But the court, in a bow to legal realism, recognized that Congress

"has confided each award to the sealed box of a Special Master's mind, has refrained from meaningful prescriptions, and has placed the result beyond the reach of review. . . . So while we agree with plaintiffs that the Special Master's comments are

165. A.L.A. *Schechter Poultry Corp.*, 295 U.S. at 495, 551 (Cardozo, J., concurring).

166. *Schneider v. Feinberg*, 345 F.3d 135 (2d Cir. 2003).

167. The nondelegation argument had been dropped on appeal. E-mail from John Cambria, Counsel, Salans Law Firm, to author (Jun. 22, 2004, 07:34:43 EST) (on file with author).

168. *Schneider*, 345 F.3d at 143.

169. *Id.* at 144.

170. *Id.* at 145.

hard to square with the text of the Act, we decline to declare what we cannot enforce.”¹⁷¹

This statement acknowledges (but does not cure) the Fund’s most significant procedural flaw: the absence of judicial review of the Special Master’s award determinations. That, together with the absence of any requirement for written explanation of awards, placed the *Colaio/Schneider* plaintiffs, and others like them, in a *Catch 22*: while the Special Master’s off-the-cuff *statements* might portend a scheme at variance with apparent legislative intent, only his *regulations* (and accompanying tables) were subject to judicial review. With his *determinations* exempt from judicial review, he could, in fact, *do whatever he wanted* – and he had more than hinted that he would. The fact that many of us have the utmost respect for Feinberg, and believed that in the end he would be eminently fair, could not mask the apparent arbitrariness of the scheme. Indeed, even if the regulations promised compensation precisely in the manner the plaintiffs desired, the statute deprived them of any mechanism to insure that the Special Master would follow his own regulations.¹⁷² Even arbitration provides more bases for judicial review.¹⁷³

The appeals court considered challenges to two specific regulations: 28 C.F.R. § 104.41, defining the phrase “individual circumstances” to “include the financial needs or financial resources of . . . the victim’s dependents and beneficiaries,” and 28 C.F.R. § 104.42, construing the phrase “to the extent recovery for such loss is allowed under applicable State law” (in the statute’s definition of “economic loss”) as imposing a limitation, rather than a mandate, as to recovery

171. *Id.*

172. Courts are willing to interpret the language of judicial preclusion in a less restrictive manner in order to allow judicial review of agency determinations (*see Johnson v. Robison*, 415 U.S. 361, 370 (1973)) unless there is “clear and convincing evidence” of a contrary legislative intent (*see Abbott Labs v. Gardner*, 387 U.S. 136, 141 (1967)). Since the ATSSSA expressly states that decisions “shall be final and not subject to judicial review,” (*see ATSSSA, supra* note 16, at § 405(b)(3)) the “clear and convincing” standard seems to have been met.

173. *E.g.*, The Federal Arbitration Act (FAA), 9 U.S.C § 10 (1996), expressly provides for review on the basis of corruption, fraud, or undue means; evident partiality of the arbitrator; misconduct of the arbitrator; and excess of arbitral authority. Cases arising under the FAA also provide for review on the basis of public policy (*see, e.g., Exxon Shipping Co. v. Exxon Seamen’s Union*, 11 F. 3d 1189, 1194-96 (3d Cir. 1993)), arbitrary and capricious awards (*see, e.g., Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 782 (11th Cir. 1993)), and manifest disregard of the law (*see, e.g., Rodriguez v. Prudential-Bache Securities, Inc.*, 882 F. Supp. 1202, 1209 (D.P.R. 1995)). For a full exposition of the statutory and nonstatutory grounds for judicial review of arbitration awards, *see* THOMAS E. CARBONNEAU, *CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION* 585-646 (2003).

for economic loss. With respect to the latter regulation, the court held that “[t]he use of the word “compensation” does not reflect unambiguous Congressional intent to afford the same level of compensation available under the tort law,” noting that in other contexts, Congress had “evinced clear intent to provide tort victims with compensation to make them whole.”¹⁷⁴ The court also upheld the first of these regulations, stating that “[t]he legislative decision to omit a cap on awards does not impliedly foreclose needs-based considerations.”¹⁷⁵ But it also made the following, head-scratching statement:

[T]he Special Master has said that very large awards justified by economic loss would be unseemly. Thus, to the extent the Special Master is employing a need-based analysis to compute awards, he has introduced some limit on what would otherwise be proper compensation under the Act. *Such notion, in our view, would seem to be contrary to what Congress aimed to accomplish in the statute.* The overriding purpose of the statute is, of course, fair compensation for economic and non-economic loss. Therefore, even though the Special Master has authority to conduct a thorough analysis, he *should* take into full account a claimant’s economic loss, as specifically required by the statute, before evaluating need-based circumstances. This slight shift in approach has the virtue of more closely reflecting Congress’ aim as well as appearing to be more fair to claimants.¹⁷⁶

This is interesting advice to be sure, and perhaps a source of vindication to the plaintiffs. Yet the absence of declaratory or injunctive relief, combined with the absence of any mechanism for appealing the Special Master’s final determinations, resulted in no enforceable obligations on the Special Master. So the Second Circuit allowed the regulations to survive, but just barely, and without great enthusiasm. Moreover, with the December 22, 2003 deadline for filing of claims with the Fund fast approaching, no effort was made to test the regulations at the Supreme Court.

5. *A Dynamic Interpretation*

On its face, the statute seems to allow the regulations and methodologies to pass muster (barely), consistent with the reviewing courts’ analysis. The Act defines economic and noneconomic losses in a manner recognizable to tort lawyers, and employs these terms in connection with the determinations to be made by the Special

174. *Schneider*, 345 F.3d at 146.

175. *Id.* at 148.

176. *Id.* at 147 (emphasis added).

Master. It also expressly excludes punitive damages and requires that any awards be reduced by amounts received from collateral sources. But nowhere does the statute explicitly require that awards otherwise replicate the awards the claimants would receive in a successful tort claim. In that sense, the courts were correct: the statute is ambiguous, perhaps in part because it was hastily drafted to meet an emergency, perhaps in part because Congress did not really decide (or wish to decide) whether it was crafting a substitute tort remedy or an emergency assistance program. In its haste, Congress may not have realized that it had left significant gaps to be filled in by a Special Master who did not require congressional confirmation. Or perhaps at least some members of Congress recognized these gaps, but were happy to punt the difficult issues to an unelected administrator.¹⁷⁷

The sparse legislative history is not particularly helpful. Some members of Congress, such as Representatives Gephardt and Spratt, left the impression that the Act would provide full tort recovery for the victims and their families (although Spratt regretted that this was the case).¹⁷⁸ Others, either contemporaneously with passage (such as Senator McCain) or sometime thereafter (such as Senators Hagel and Kennedy) suggested that the Special Master need not provide the equivalent of full tort recovery, particularly where it would exaggerate financial disparities among claimants.¹⁷⁹ Efforts to reconstruct the legislative history so as to divine congressional intent bring to mind Judge Harold Leventhal's admonition (later cited by Justice Antonin Scalia) that such an undertaking is akin to entering a crowded cocktail party and looking over the heads of the guests for one's friends.¹⁸⁰ The metaphor is particularly apt where the main conversation at this particular cocktail party (reported in the Congressional Record) focused on the airline bailout provisions of the Act, with only occasional references to the Victim Compensation Fund.

177. In other contexts, then-Associate Justice William H. Rehnquist criticized Congress of "abdicat[ing] its responsibility for the making of a fundamental and most difficult policy choice," (*Am. Textile Mfrs. Inst. Inc. v. Donovan*, 452 U.S. 490, 547 (1981)) and emphasized that Congress is "the governmental body best suited and most obligated to make the choice." (*Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 672 (1980)).

178. See 147 CONG. REC. H5892 (2001), *supra* notes 39-40 and accompanying text.

179. See *Colaio v. Feinberg*, 262 F. Supp. 2d 273, 289 (S.D.N.Y. 2003), *supra* note 133 and accompanying text.

180. *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring).

Notwithstanding these problems, the structure imposed by the Special Master reflected some of the more salutary aspects of the administrative process. The regulations recognized the congressional ambivalence, and amounted to a creative straddle that took into account (in roughly equal amounts) statutory language, likely congressional intent, practical politics, administrative efficiency, and fairness. They provided for awards resembling but not quite duplicating traditional tort remedies, acknowledging disparities based on income while tapering these disparities at the extremes. (The bottom extreme was protected by the provision for minimum awards in 28 C.F.R. § 104.41.¹⁸¹ While the regulations provided for a minimum *before* collateral sources, Feinberg in fact made no award under \$250,000, thereby further bolstering the awards at the lower end, and making the Fund a viable option for many people who might otherwise have brought suit.) Proceeds of life insurance policies (more likely to be received by wealthy claimants), fell within the definition of collateral sources; charitable gifts (a form of relief at least as likely to be received by claimants of modest means), were excluded from this definition, and therefore did not offset awards from the Fund. Pain and suffering were presumed to have been experienced equally among victims and beneficiaries. Taken as a whole, the regulations and the methodologies they spawned represented an honest and intelligent effort to breathe meaning into a hurriedly-drafted statute containing just the barest description of the basis for compensation. The result was a humane compromise between a rigid, tort-based formula and a softer, more needs-based formula for compensation.

Perhaps the best example of this phenomenon was the reviewing courts' acceptance of the regulatory treatment of the Act's definition of "economic loss." The interpretation provided by the regulations (that the statutory language regarding applicable state law should be treated not as a mandate, but as a limitation) was, in Judge Hellerstein's view, a reasonable interpretation of that provision. It is reasonable, I would say, but not the *most likely* interpretation of congressional intent. No matter: given the *reasonableness* of the Special Master's interpretation, and *Chevron's* command to the judiciary to defer to reasonable administrative interpretations of statutes, it did not matter that another interpretation was more likely to reflect congressional intent. Many conservatives (e.g., Justice Scalia)

181. This provision states: "In no event shall an award (before collateral source compensation has been deducted) be less than \$500,000 in any case brought on behalf of a deceased victim with a spouse or dependent, or \$300,000 in any case brought on behalf of a deceased victim who was single with no dependents."

and liberals (e.g., Professor William Eskridge) regard legislative intent as an amorphous concept;¹⁸² rather than struggle with congressional intent, better to give the administrative agency charged with applying the statute free rein to adapt the statute to reality, so long as its interpretation is not entirely at odds with the statutory language.

Scholars of legislation and administrative law might view the regulations, along with Judge Hellerstein's *Chevron* analysis, as an example of "dynamic statutory interpretation." Professor Eskridge, a leading proponent of dynamic interpretation, has argued:

Interpretation is not static, but dynamic. Interpretation is not an archeological discovery, but a dialectic creation. Interpretation is not mere exegesis to pinpoint historical meaning, but hermeneutics to apply that meaning to current problems and circumstances.

The dialectic of statutory interpretation is the process of understanding a text created in the past and applying it to a present problem. This process cannot be described simply as the recreation of past events and past expectations, for the "best" interpretation of a statute is typically the one that is most consonant with our current "web of beliefs" and policies surrounding the statute.¹⁸³

A leading example of dynamic interpretation is *United Steelworkers of America, AFL-CIO-CLC v. Weber*, which upheld an affirmative action plan in a collective bargaining agreement despite complaints that Title VII of the 1964 Civil Rights Act prohibited such arrangements.¹⁸⁴ Of particular note is the concurring opinion of Justice Harry Blackmun, explaining that Congress, while enacting Title VII, was unlikely to have anticipated the circumstances giving rise to the affirmative action plan upheld in that case.¹⁸⁵ Eskridge explains, "Justice Blackmun argued that the evolution of Title VII created a practical dilemma for unions and employers that justified affirmative action in many cases."¹⁸⁶ The *Chevron* case itself may be seen as an example of dynamic interpretation in an administrative context. In *Chevron*, the Court acknowledged the legitimacy of an administrative

182. Eskridge has called legislative intent "a psychological construct . . . in which very few scholars still believe." William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1538-39 (1987).

183. *Id.* at 1482-83.

184. *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 208 (1979).

185. *Id.* at 211 (Blackmun, J., concurring).

186. Eskridge, *supra* note 182, at 1492.

modification of regulations in light of changing policies and administrations (in this instance, the Reagan Administration's inclination to reduce the federal government's role in environmental protection), and recognized that both the original regulation *and* its modified version could be consistent with the legislative command.

As in *Chevron*, the regulations pertaining to the Fund are an administrative gloss on a Congressional enactment. But unlike the regulation considered in *Chevron* (or the judicial interpretation in *Weber*), the Victim Compensation Fund regulations were promulgated more-or-less contemporaneously with the enactment of the statute. Dynamic interpretation of the legislation establishing the Fund reflected not changing circumstances over several years, but rather, circumstances and problems that came to light only after opportunity for public comment and further consideration. Some problems regarding the statutory scheme – like the deduction for collateral sources which, if interpreted broadly, could have rendered millions of dollars of charitable contributions meaningless – presented practical dilemmas resolved not through judicial interpretation but through thoughtful, “interpretive” regulations promulgated by the Special Master. To the extent they may appear to deviate from the statutory language or (more likely) legislative intent, this deviation was based not on changing times and conditions, but because the statute was an emergency measure that failed – either deliberately or due to the exigencies of the moment – to take into consideration all of the variables with which the Fund's administrators would have to contend. It was only natural that the responsible agency would fill in the gaps, and altogether appropriate that it do so not by trying to divine intent from ambiguity, but by wedding the purpose of the statute to the demands of the situation, while remaining faithful to the statute's explicit commands.¹⁸⁷ Much as Eskridge envisions judges as “diplomats, whose ordering authority is severely limited but who must often update their orders to meet changing circumstances,”¹⁸⁸ the Special Master crafted the regulations within the statute's limitations but to meet circumstances that came to light only when the realities of the situation became fully apparent. It was

187. The one deviation from the statute's express commands may have been the awarding of a minimum of \$250,000 to all death claimants, notwithstanding the statutory provision requiring that amounts received from collateral sources be deducted from all awards. This practice finds specific authority in neither the statute nor the regulations.

188. Eskridge, *supra* note 182, at 1482.

better for this to be done within the executive branch than the judicial branch: the *Chevron* doctrine recognizes that it is preferable for a more accountable "political branch" to engage in such an exercise.¹⁸⁹

In this sense, the Special Master's regime was a typical manifestation of the modern administrative state (albeit with a temporally limited function): filling in gaps where Congress did not tread; making rules that would have a major impact on peoples' lives, based on vaguely-defined statutory criteria; and (on the downstream end) providing an expedited process with limited access to judicial review. The administrative methodology emphasizes flexibility, expedience, and, at its best, ingenuity, at a cost of strict adherence to statutory language, congressional intent, and traditional procedural norms. For better or worse, this is the way a modern administrative state deals with complex issues, arising under exigent circumstances, in an expeditious and politic manner.

Some critics would contend that expedience is not our most important value and that strict adherence to the will of Congress as the only constitutionally endowed lawmaking body is of far greater importance. Administrative expedience has been the basis of several national and international horrors (consolidation of Hitler's power following the Reichstag fire is a prime example; the Iran/Contra affair is another, slightly more benign one). The NIRA was a response to the Great Depression, an emergency of comparable scope to that which spawned the Victim Compensation Fund, yet the Supreme Court determined (in *Panama Refining* and *Schechter Poultry*) that the emergency was no excuse for excessive delegation of congressional lawmaking power.¹⁹⁰ But even under the best of circumstances, Congress could not anticipate all of the permutations of loss and all of the variables that those charged with carrying out its statutory commands would encounter, and late September, 2001 hardly presented the best of circumstances. Some delegation of lawmaking power would be necessary. Such a delegation would best be made to a dispute resolution professional capable of understanding both the full implications of the statutory text and the circumstances faced by

189. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 865-66 (1984).

190. *Panama Refining Co.*, 293 U.S. at 391, 433; *Schechter Poultry*, 295 U.S. at 528. These and related cases provoked a popular attack on judicial activism which may have caused the Court to recalibrate the nondelegation doctrine; as a consequence, no federal statute has been struck down on this basis since 1935. Of course, one aspect of that attack (President Roosevelt's Court-packing plan) was itself seen as a step too far.

victims of mass torts. As Professor Eskridge has suggested, “[i]nterpretation is a contemporary interpreter’s dialogue with the text and with the tradition that surrounds it.”¹⁹¹ And the dialogue undertaken by the Special Master included the broader dialogue of the notice and comment process characteristic of administrative rule-making.

IV. THE ACTION DOWNSTREAM: FILE WITH THE FUND, LITIGATE, OR SIT IT OUT?

A. *The Fund’s Claim Statistics*

With the parameters for the Fund set by Congress, the rules for its operation established by the Special Master, and both surviving tests in the courts, the path was clear for the Fund to operate. The Fund’s intended beneficiaries faced a choice unfamiliar to personal injury victims: to file a claim with an administrative apparatus set up to deal with this unique situation, or to pursue litigation against the airlines, security companies, and perhaps others in the courts, subject to the limitations of ATSSSA § 408. For a long while, many of the Fund’s beneficiaries did neither. Despite its apparent attributes and wide publicity, the Fund did not immediately attract a large volume of claims. As of August 11, 2003, over 2100 claims had been filed with the Fund, of which 1200 were deemed eligible claims on behalf of deceased victims.¹⁹² Given that there were potentially almost 3000 death claims, that the Fund had been open for approximately a year and a half, and that only four months remained until the December 22 filing deadline, the claims rate at that time appeared to be disturbingly low.¹⁹³

But four months later, as the filing deadline was reached, the claims profile looked much different. Filings accelerated in the wake of the *Schneider* decision, and more so as the filing period was about to expire. In the month of December, 2003 alone, the Fund received 986 death claims and 1550 personal injury claims. Altogether, the Fund received 2880 death claims deemed eligible for compensation, representing claims from relatives of 97% of the 2976 September 11th dead. These numbers exceeded expectations. Feinberg had stated,

191. Eskridge, *supra* note 182, at 1509.

192. While there was little outright fraud, some death claims were filed by several relatives of the same victim, or by persons ineligible to file for a particular victim. These had to be weeded out by the Special Master and his staff.

193. See Fisk, *supra* note 77, at A1, A10.

just a few months earlier, that his goal was for 90% of the beneficiaries to file either with the Fund or with the court; his greatest concern was that some families might do nothing.¹⁹⁴ In the end, there may have been as few as eight families eligible for death awards that filed with neither the Fund nor the court.¹⁹⁵

The average award for death claims was \$2,082,035, higher than the median award, which was \$1,677,633. Awards for families of deceased victims ranged from \$250,000 to \$7.1 million.¹⁹⁶ A total of 2680 legitimate personal injury claims were processed, with awards ranging from \$500 (for simple bruises) to \$8.6 million (for serious burn injuries).¹⁹⁷ It should come as no surprise that the highest injury award exceeded the highest death award; the most serious injuries would be accompanied not only by income deprivation, but by substantial medical treatment, rehabilitation, and a lifetime of pain and suffering. Because many people are likely to have never reported minor injuries, it is impossible to obtain a denominator representing the total of potential injury claims.¹⁹⁸

194. Public meeting with Kenneth Feinberg, Special Master, in Philadelphia, PA (Sept. 18, 2003).

195. The precise number of deaths for which nobody filed claims is difficult to ascertain. Subtracting the 2880 eligible death claims filed with the Fund (figure obtained from the Fund) and the eighty-five lawsuits filed with the U.S. District Court for the Southern District of New York (figure obtained from defendants' counsel) from 2976 (the most widely reported figure for total deaths) yields a remainder of eleven. However, the Fund, using New York City's figures, claims a revised death total of 2973. In addition, as Table 1 indicates, the total number of claims (filed with the Fund and the court) from the World Trade Center appears to exceed the number of reported deaths from that site.

196. Table 12: General Award Statistics for Deceased Victims, *in* Final Report of the Special Master for the September 11th Victim Compensation Fund of 2001, 110, Table 12: General Award Statistics for Deceased Victims, *available at* http://www.usdoj.gov/final_report.pdf (last visited Feb. 11, 2005). The report includes a series of tables with detailed award statistics.

197. *Id.* at Table 12: General Award Statistics for Physical Injury Victims.

198. A Rand Institute for Civil Justice study reports 215 civilians seriously injured in the September 11th attacks; the study defines "serious injuries" as "physical injuries that resulted in hospitalization for one day or more in the immediate aftermath of the attack." DIXON & STERN, *supra* note 79, at xxiii.

TABLE 1

	Column 1 VCF Awards	Column 2 Active Lawsuits	Column 3 Total Deceased Victims	Column 4 Non-claimers [col. 3-(col. 1 + col. 2)]
AA Flight 11 (1 WTC)	65	21	87	1
UAL Flight 175 (2 WTC)	46	14	60	0
WTC ground victims	2,597	9	2,605	(1 extra claim?)
AA Flight 77 (Pentagon)	33	23	59	3
Pentagon ground victims	114	4	125	7
UAL Flight 93 (PA)	25	14	40	1
Totals	2,880	85	2,976	11 net

Sources:

For airplane totals, see Lucien J. Dhooge, *A Previously Unimaginable Risk Potential: September 11 and the Insurance Industry*, 40 AM. BUS. L.J. 687, 695 (2003), and subtract the hijackers from each plane. For numbers on hijackers, see Press Release, U.S. Dept. of Justice (Sept. 14, 2001), at <http://www.fbi.gov/pressrel/pressrel01/091401hj.htm>.

For total victims, see Jennifer Lin, *A Third Have Not Filed for 9/11 Fund; Less Than Three Weeks Remain to Apply for Federal Compensation*, PHILADELPHIA INQUIRER, Dec. 14, 2003, at A1; LLOYD DIXON & RACHEL KAGANOFF STERN, *COMPENSATION FOR LOSSES FROM THE 9/11 ATTACKS* 15 (2004). The VCF reports that the total number of victims has been reduced to 2,973. Telephone Interview with Camille Biros, Feinberg Associates (Feb. 10, 2005).

For Pentagon victims, see Steve Vogel, *Pentagon Victims Honored; 400 Attend Wreath Ceremony at Arlington National Ceremony*, CHARLOTTE OBSERVER, Sept. 12, 2003, at A1.

Totals for VCF claims obtained from Feinberg Associates. E-mail from Camille Biros, Feinberg Associates, to author (Jul. 1, 2004, 01:05 EST) (on file with author).

Totals for active lawsuits obtained from Desmond T. Barry, Jr. E-mail from Desmond T. Barry, Jr., Condon & Forsyth, to author (Jul. 8, 2004, 12:16 EST) (on file with author), updated through Memorandum from Tim Carter, Condon & Forsyth, to Desmond T. Barry, Jr., Condon & Forsyth (Feb. 7, 2005) (on file with author).

Table 1 shows the distribution of death claims filed with the Fund, as well as the distribution of § 408 death claims filed with the United States District Court for the Southern District of New York. Insofar as possible, the table differentiates these figures among the four hijacked aircraft and the three buildings they struck. The data comes from a variety of sources, and is difficult to reconcile. (As of this writing, the total number of death claimants at the World Trade Center site would appear to exceed the number of reported deaths by one; the disparity may be greater if the downward revision of total deaths to 2973 is attributed to that location.) Nevertheless, a few observations are particularly striking:

1. The overwhelming majority (99%) of potential death claimants filed somewhere; 97% filed with the Fund, while only 2% chose to file with the court.

2. A disproportionately high number of survivors of Flight 93 victims (representing 14 out of 40 (35%) of the innocent passengers who crashed in Shanksville) opted for a tort claim. Somewhat more surprisingly, of the 59 innocent passengers on Flight 77 (which crashed into the Pentagon), 23 (39%) of their families bypassed the Fund and filed claims with the court.
3. A slightly smaller proportion (94.4%) of Pentagon-based victims are represented in claims filed either with the Fund or with the court. Seven of the 125 Pentagon dead had no claim filed on their behalf at all.

These data provide only numerical summaries – useful summaries, to be sure – of the Fund’s claims experience. Behind each of the claims, and each decision to file suit or not to claim at all, is a story involving a number of objective and subjective factors, which we shall now explore. First among these factors is the viability of the litigation option, i.e., the pursuit of a tort claim under § 408 of the ATSSSA.

B. *The Litigation Option*

The objections to the Fund discussed in Section IV of this article would have carried less weight if the legislation establishing the Fund provided potential claimants with the choice of “opting out” of the conventional tort system. But recall that § 408 of the ATSSSA transformed any civil actions against those arguably responsible for the events of September 11th into a federal action, placed exclusive jurisdiction in the Southern District of New York, and limited the liability of airlines and others to their insurance coverage.¹⁹⁹ Had the Fund simply been an option that the victims and their families could pursue, it would have been hard to complain about its legal consequences. Instead, the Act forced victims and their families to choose between the Fund and what appeared to be a whittled down tort remedy, thereby adding strength to arguments that the Fund was inadequate in substance or deficient in procedural protections.

1. *Has Anything of Value Been “Taken”?*

The Act also raised a constitutional issue. By enacting § 408 of the ATSSSA (imposing a number of conditions on civil actions brought on behalf of September 11th victims against the airlines and others), Congress had limited the recourse of plaintiffs in already

199. See *supra* notes 32-36 and accompanying text.

vested causes of action. Of course, the regulation of actions stemming from aircraft accidents should clearly fall under Congress' commerce power, and therefore no constitutional issues derive from the fact that this cause of action would normally arise under state law.²⁰⁰ This regulation might, however, raise policy questions, particularly for those whose political rhetoric included a commitment to the devolution of power from the federal government to the states.²⁰¹

However, the retroactive restrictions on the right to sue the airlines and others could be seen as a due process violation – an unconstitutional taking of property without just compensation.²⁰² In addition, if the Victim Compensation Fund established as an alternative to tort litigation failed to provide a full tort remedy, the “takings” argument would be sharpened.²⁰³

Others have discussed the “takings” issue more fully,²⁰⁴ so I will discuss it only briefly here. It would appear that none of the cases cited in the literature is fully dispositive. *Penn Central Transportation Co. v. New York City*²⁰⁵ and before it, *Pennsylvania Coal Co. v. Mahon*²⁰⁶ set forth some of the major constitutional principles of “takings” jurisprudence, but both of these cases involved real property, and are therefore not on all fours with our issue. *Duke Power*

200. See *United States v. Lopez*, 514 U.S. 549 (1995). But see Erin G. Holt, *Note: The September 11 Victim Compensation Fund: Legislative Justice Sui Generis*, 59 N.Y.U. ANN. SURV. AM. L. 513, 539-40 (2004) (arguing that there is a “states’ rights” issue).

201. See Robert M. Ackerman, *Tort Law and Federalism: Whatever Happened to Devolution?*, 14 YALE L. & POL’Y REV. 429 (1996).

202. Lee S. Kreindler, *The Terrorist Attacks of 11 September 2001: Legal Liability Issues Confronting Claimants – The Congressional Response – Salvation or Frustration?*, 27 AIR & SPACE L. 377, 383 (2002).

203. Note that the *Colaio/Schneider* plaintiffs did not assert a “takings” argument; they did not wish to alter the consequences of § 408 so much as to improve their recovery from the Fund. A takings argument might best be made by those who chose to pursue a civil action, claiming that § 408 of the Act reduced their common law remedy without providing an adequate substitute.

204. Robert S. Peck, *The Victim Compensation Fund: Born from Unique Confluence of Events not Likely to be Duplicated*, 53 DEPAUL L. REV. 209, 218-20 (2003) (Peck seems to think that the entire issue was resolved in *Duke Power v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978)); Holt, *supra* note 200, at 541 (Holt seems to consider “takings” jurisprudence inapposite here, but goes on to discuss the issue in due process terms).

205. 438 U.S. 104 (1978).

206. 260 U.S. 393 (1922).

*Co. v. Carolina Environmental Study Group, Inc.*²⁰⁷ upheld the constitutionality of the Price-Anderson Act,²⁰⁸ which provided a substitute remedy to those injured by nuclear accidents. But the Price-Anderson Act has prospective effect only; it does not eliminate or otherwise affect remedies available in an already accrued cause of action, unlike § 408 of the ATSSSA. A better analogy may be found in the circumstances surrounding the Iran-United States Claims Tribunal. There, a series of executive orders took Americans' pending claims against Iran out of American courts and placed them in the hands of a special international tribunal with a cap on total liability. The Supreme Court upheld the constitutionality of the executive orders in *Dames & Moore v. Regan*,²⁰⁹ but declined to address the "takings" issue.²¹⁰

In *Duke Power*, the Court considered whether a legislatively enacted compensation scheme was a satisfactory quid pro quo for the common law rights of recovery the Price-Anderson Act abrogates. Without deciding whether the Due Process Clause "in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy,"²¹¹ the Court determined that the Price-Anderson Act did provide "a reasonably just substitute for the common-law or state tort law remedies it replaces."²¹² For reasons suggested below, it would appear that the Fund provides "a reasonably just substitute" for the remedies its beneficiaries would have under common law. Such a finding might not only provide a constitutional defense; it would help establish the fairness of the scheme as a matter of public policy.

2. *Why the Fund Was, in Most Cases, a Better Remedy, Objectively Speaking*

Several obstacles confront those September 11th victims who would pursue a conventional tort action, even without the limitations of § 408. First and foremost, a finding of negligence on the part of the airlines, security firms, airports, or aircraft manufacturers (to name

207. 438 U.S. 59 (1978).

208. 42 U.S.C. § 2210 (2000).

209. 453 U.S. 654 (1981).

210. *Id.* at 688.

211. *Duke Power v. Carolina Environmental Study Group, Inc.*, 438 U.S. at 88. The Court cited a number of cases supporting the proposition that "a person has no property, no vested interest, in any rule of the common law." *Id.* at 88 n.32. However, § 408 of the ATSSSA poses a somewhat different question because it affects already accrued causes of action.

212. *Id.* at 88.

the most obvious defendants) is anything but certain. Others have catalogued the substantive problems facing such claims,²¹³ so I will list only a few here: the difficulty of establishing a pre-September 11th standard of care that any of the defendants breached; the difficulty of establishing foreseeability (i.e., prior to September 11th, whether a reasonable person could foresee that hijackers would fly jumbo jets into skyscrapers); the related problem of proximate cause (particularly for victims who were not passengers in the doomed aircraft); and the diffusion of responsibility for safety among the potential defendants. These and other problems make the establishment of liability anything but a slam-dunk proposition.

a. *Judge Hellerstein's Decision in the § 408 Litigation*

At least some of these obstacles have been rendered a little less formidable by a September 9, 2003 decision rendered by Judge Alvin K. Hellerstein, before whom the September 11th claims brought under § 408 had been consolidated. In *In re September 11 Litigation*,²¹⁴ approximately seventy September 11th survivors and injury victims and ten entities which sustained property damage waived their right to file with the Fund and brought suit against the airlines, airport security companies, airport operators, the airplane manufacturer (Boeing), and the operators and owners of the World Trade Center (the "WTC Defendants"). The defendants moved to dismiss the claims, arguing that they had no duty to protect the plaintiffs against terrorist attacks, and that the crashing of jumbo passenger jets into large office buildings by terrorists was unforeseeable as a matter of law.

Judge Hellerstein denied the motions, except for one related to a strict products liability claim brought against Boeing for the Pentagon crash.²¹⁵ His opinion, rendered in the state that gave birth to the *Palsgraf* case,²¹⁶ was a mini-treatise on the law of proximate cause, foreseeability, and duty. Drawing "all reasonable inferences in favor

213. See, e.g., Elizabeth M. Schneider, *Grief, Procedure, and Justice: The September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 457, 494-97 (2003); Alexander, *supra* note 3, at 640-55; Rabin, *supra* note 2, at 586-87.

214. 280 F. Supp. 2d 279 (S.D.N.Y. 2003).

215. Judge Hellerstein dismissed this claim because Virginia, the state in which the Pentagon is located, does not recognize strict products liability. *Id.* at 306, citing *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 236 Va. 419, 374 S.E.2d 55, 57 n.4 (1988). Section 408(b)(2) of the ATSSSA requires that the court apply the law "of the State in which the crash occurred unless such law is inconsistent with or preempted by federal law."

216. *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99, 100-01 (1928), the seminal case on duty, proximate cause and foreseeability, is cited only once in

of the plaintiff[s],²¹⁷ the court stated, *inter alia*, that (1) “plaintiffs and society generally could have reasonably expected that the screening performed at airports by the Aviation Defendants would be for the protection of people on the ground as well as for those in airplanes;”²¹⁸ (2) “the crash of the airplanes was within the class of foreseeable hazards resulting from negligently performed security screening;”²¹⁹ (3) “[l]arge-scale fire was precisely the risk against which the WTC Defendants had a duty to guard and which they should have reasonably foreseen;”²²⁰ and (4) the terrorists acts did not qualify, as a matter of law, as an ‘extraordinary’ intervening cause;”²²¹ noting that “there ha[d] been many efforts by terrorists to hijack airplanes,” and “[t]he practice of terrorists to blow themselves up in order to kill as many people as possible ha[d] also been prevalent.” Therefore, “[a]lthough there ha[d] been no incidents before the ones of September 11, 2001 where terrorists combined both an airplane hijacking and a suicidal explosion,” Judge Hellerstein could not “say that the risk of crashes was not reasonably foreseeable to an airplane manufacturer.”²²²

The court invoked the maxim that “[i]n order to be considered foreseeable, the precise manner in which the harm was inflicted need not be perfectly predicted.”²²³ Thus, if the airlines had a duty to protect people on the ground from airplane crashes, or if the World Trade Center owners had a duty to protect its occupants from fire, the fact that these events would not have occurred but for the intervention of terrorists did not cut off liability, particularly if some sort

Judge Hellerstein’s forty-one-page opinion. *In re September 11 Litigation*, 280 F. Supp. 2d at 295.

217. *In re September 11 Litigation*, 280 F. Supp. 2d at 289, citing *Jackson Nat’l Life Ins. Co. v. Merrill Lynch & Co.*, 32 F.3d 697, 699-700 (2d Cir. 1994).

218. *Id.* at 292.

219. *Id.* at 296. “While it may be true that terrorists had not before deliberately flown airplanes into buildings, the airlines reasonably could foresee that crashes causing death and destruction on the ground was a hazard that would arise should hijackers take control of a plane. The intrusion by terrorists into the cockpit, coupled with the volatility of a hijacking situation, creates a foreseeable risk that hijacked airplanes might crash, jeopardizing innocent lives on the ground as well as in the airplane. While the crashes into the particular locations of the World Trade Center, Pentagon, and Shanksville field may not have been foreseen, the duty to screen passengers and items brought on board existed to prevent harms not only to passengers and crew, but also to the ground victims resulting from the crashes of hijacked planes, including the four planes hijacked on September 11.” *Id.*

220. *In re September 11 Litigation*, 280 F. Supp. 2d. at 302.

221. *Id.*

222. *Id.* at 307.

223. *Id.* at 295. For a case frequently cited for this proposition, see *Derdarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 434 N.Y.S.2d 166, 414 N.E.2d 666, 670 (1980).

of terrorist activity on airplanes or in regard to the World Trade Center was foreseeable.

Throughout the opinion, the court took pains to point out that its decision fell far short of a final ruling on the merits, that the litigation was at an early stage, and that discovery, proof, and a jury decision would have to follow in order for the plaintiffs to ultimately prevail.²²⁴ Still, by surviving the motions to dismiss, the plaintiffs had surmounted a significant hurdle in the § 408 litigation.

b. *The Realities of Tort Litigation*

But even if the legal problems could be surmounted and plaintiffs' verdicts obtained, some of those verdicts may not be quite as generous as suggested by the lawyers and actuaries retained by the likes of Cantor Fitzgerald.²²⁵ Empirical research suggests that in both trial and settlement, a substantial discount is made in tort cases where economic loss is large. A Rand study of airline accident cases has revealed that as independently-assessed economic losses to survivors of crash victims increase, the percentage of those losses received by survivors as compensation – through tort judgments and settlements – declines.²²⁶ According to the study, once survivors incurred economic loss in excess of \$250,000, their total recovery (including noneconomic loss) was significantly less than their economic loss alone; once economic loss exceeded \$2,000,000, the compensation declined to under forty percent of that loss.²²⁷ Amounts received in settlement and as a consequence of jury verdicts were similar in this

224. *In re September 11 Litigation*, 280 F. Supp. 2d at 302.

225. For discussion regarding *Colaio* claims, see *supra* text accompanying notes 128-176.

226. Rand researchers performed the assessment using the "human capital" approach to determine economic loss. Airline crashes provided a good sample, because liability in these cases is rarely disputed and contributory negligence is almost never at issue. In addition, because most victims die quickly, other elements of damages, such as pain and suffering and medical expenses, are rarely factors that will cause significant variations in awards or settlements. See Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System – and Why Not?*, 140 U. PA. L. REV. 1147, 1216 (1992) citing JAMES S. KAKALIK ET AL., COSTS AND COMPENSATION PAID IN AVIATION ACCIDENT LITIGATION 86-95 (1988). While in a tort action regarding September 11th losses, liability could be very much at issue, the economic consequences of these losses are quite similar to those sustained in commercial airline accidents.

227. *Id.* at 1217, Table V. Limited data from more recent cases suggests higher awards in aviation accident cases. DIXON & STERN, *supra* note 79, at 34-35. Using the Rand Institute for Civil Justice's database, Dixon and Stern found twelve plaintiff's verdicts in aviation wrongful death cases between 1994 and 1999, with mean and median awards of \$7.4 and 5.6 million, respectively (adjusted to 1999 dollars). *Id.* at 35.

regard,²²⁸ although it is likely that jury verdicts were, by and large, higher than settlements.²²⁹ Unfortunately, an explanation for this phenomenon is not readily available.²³⁰ Perhaps jurors and negotiators consciously or subconsciously cap off such losses even in a fault-based system. If so, the Special Master's inclination to taper off recovery for economic losses may reflect a reality not incorporated into the figures projected by Cantor Fitzgerald and other advocates of more generous awards for high-end claimants.

The value of any judgment obtained in a conventional tort action would be further eroded once the plaintiffs' attorneys' fees (ranging from twenty-five to forty percent of total recovery) were taken into account. This factor looms particularly large when a tort action under ATSSSA § 408 is compared to a claim on the Fund, which a substantial number of lawyers were willing to pursue *pro bono*. It would be a fair question to ask some of the more aggressive plaintiffs' attorneys how much of their clients' money they were willing to invest in transaction costs (in the form of their own fees) in order to prove the point that a tort action, rather than a Fund claim, was worth pursuing. In addition, the substantial time required for discovery, pre-trial motions, trial, appeal, and collection of any judgment would have to be compared to the 140 days within which any claim to the Fund would have to be determined and paid.²³¹

At one time (before the overwhelming majority of potential claimants opted for the Fund), the greatest risk of a potential tort action may have been the collectibility of a judgment against the airlines. In the absence of § 408(a)'s limitations on liability, the likely effect on the airlines of judgments in excess of insurance coverage would have been bankruptcy, with "successful" plaintiffs receiving just pennies on the dollar. One of the involved airlines, United, did in fact file for Chapter 11 protection shortly after September 11th, notwithstanding the assistance of the ATSSSA, and it is doubtful that it

228. Saks, *supra* note 226, at 1216.

229. DIXON & STERN, *supra* note 79, at 35.

230. In *Schneider v. Feinberg*, the Second Circuit, in sustaining the Special Master's regulations, took note of its earlier observation that "the projection of future income at [high] levels' of earnings is 'itself extremely conjectural.'" 345 F.2d 135, 144, quoting *McWeeney v. New York, New Haven & Hartford R.R. Co.*, 282 F.2d 34, 39 (2d Cir. 1960) (en banc).

231. ATSSSA, §§ 405(b)(3) (providing for no more than 120 days from filing of claim to determination by Special Master) and 406(a) (requiring authorization of payment within twenty days of determination).

would have been able to emerge intact with billions of dollars of underinsured contingent liabilities hovering over a bankruptcy proceeding.²³² Absent § 408, American Airlines, the nation's largest carrier, might have found itself in similar straits. Section 408's limitation of damages to the airlines' insurance coverage might therefore be seen as a legislatively-constructed anticipatory bankruptcy workout. Rather than sitting back and waiting for an avalanche of competing, speculative claims against a limited fund (i.e., the airlines' assets), Congress limited the airlines' liability to their existing insurance and created as an alternative a special Fund with unlimited resources, to which claimants could queue up and obtain guaranteed payment.

Ironically, because the great majority of the potential claimants in fact availed themselves of the Fund, substantial funds remain in the insurance pool for the eighty-five survivors of deceased victims who ultimately chose to pursue a tort action. The survivors of twenty-one victims on American Airlines flight 11, which crashed into One World Trade Center, might have to share the \$1.5 billion in insurance on that flight (assuming a judgment against American Airlines) with the survivors of a handful of victims in the skyscraper who also brought suit.²³³ These victims (assuming that they can recover in tort) will have to share that coverage with other claimants, including personal injury victims not eligible for relief from the Fund²³⁴ and those claiming ground damage (which could number in the thousands). Not so for the fourteen survivors of victims of United Airlines flight 93, which crashed in Shanksville. With no ground damage resulting from that crash, these survivors (again, assuming a plaintiffs' verdict) would have the \$1.5 billion that insured that airplane to themselves, far more than would be necessary to satisfy any tort judgments. In either case, the very success of the Fund in attracting ninety-seven percent of the potential claimants resulted in a substantial insurance pool for those who chose to take their chances in court.

c. *A Rational Choice*

Even so, when measured against the *likely* (rather than theoretical) outcome of a conventional tort action, even absent the constraints

232. United Airlines has thrice been denied loan guarantees under the ATSSSA, and as of this writing, its long-term viability remains in doubt. Scott McCartney, *The Middle Seat: What's Ahead for United and Its Fliers as the Government Bows Out of Bailouts*, WALL ST. J., June 30, 2004, at D1.

233. See Table 1, *supra* p. 848.

234. See *supra* note 32 and accompanying text.

of § 408, the Fund looks like an excellent option for the overwhelming majority of eligible claimants.²³⁵ Indeed, those who experienced September 11th-related injuries but are ineligible to make claims on the Fund (e.g., those who sustained inhalation injuries or property loss) may have more reason to complain about § 408's limitations on liability; they are subject to those limitations, even though they were precluded from making claims on the Fund.²³⁶ The real prospects for recovery in a conventional tort action against the airlines and others lend practical support to both the limitations on recovery imposed by § 408 and the Special Master's inclination to taper off awards to the Fund's high-income claimants. Moreover, given the risks of conventional litigation, the Fund would appear to have been a "reasonably just substitute"²³⁷ for the traditional common law remedy, thereby fending off a constitutional challenge.²³⁸ Therefore, under rational choice theory,²³⁹ under which decisions are based entirely on the likely economic outcome, most potential claimants will have chosen to cast their lot with the Fund.

C. *Subjective Economic Factors*

Pursuit of a tort action under § 408 might nevertheless be a rational choice for certain limited categories of potential claimants. One such category consists of beneficiaries of particularly well-insured decedents. James Debeuneure, 58, a Washington, D.C. school-teacher, died aboard American Flight 77 when it hit the Pentagon. His son, Jacques Debeuneure, 34, a Matthews, N.C. postal worker, has brought suit against American Airlines.²⁴⁰ Debeuneure has said

235. The attributes of the Fund over more conventional alternatives may have frightened some personal injury lawyers who may have seen the Fund as a harbinger of broader tort reform to come. See Roger Parloff, *Tortageddon - Why the September 11 Victims' Fund Could Become a Template for Mass Tort Reform*, THE AM. LAW., Mar. 2002, at 106.

236. For elaboration on this point, see Rabin, *supra* note 2, at 579.

237. The quoted phrase is found in *Duke Power* 438 U.S. at 88; see *supra* notes 211-12 and accompanying text.

238. As of this writing, none of the § 408 plaintiffs has mounted a constitutional challenge to the damages limitation of that section of the Act.

239. Rational choice theory "presumes parties will act so as to maximize their expected utility, which involves comparing end states that might result from alternative behaviors discounted by their likelihood of occurring. In economic analysis of law [it is assumed that parties] will act to maximize their expected wealth." Olivia A. Radin, *Rights as Property*, 104 COLUM. L. REV. 1315, 1322-23 n.41 (2004), quoting George S. Swan, *The Law and Economics of the Blaine Amendments: Zelman v. Simmons-Harris and Romer v. Evans*, 80 U. DET. MERCY L. REV. 301, 320 n.148 (2003).

240. *Debeuneure v. American Airlines, Inc.*, 02 Civ 00452 (S.D.N.Y. 2003).

that his father was so well-insured that the offset for collateral benefits would leave him with no recovery from the Fund.²⁴¹ While the Special Master's practice of awarding a minimum of \$250,000 to each claimant might modify this analysis, for claimants who were already beneficiaries of substantial insurance proceeds (or proceeds from other collateral sources), litigation under § 408 is probably a rational choice.

A second category involves those for whom adequate insurance coverage was apparent even before the overwhelming majority of potential claimants opted for the Fund. Most prominent among the members of this category are survivors of those who died aboard United Airlines Flight 93. That flight crashed in a rural area outside Shanksville, Pennsylvania with forty innocent passengers on board. There have been no claims for collateral damage on the ground, leaving all of the airplane's estimated \$1.5 billion in liability insurance for the passengers' survivors. Given the natural sympathy a jury would have for the Flight 93 passengers (who are believed to have attempted to wrest control of the airplane from the terrorist hijackers), their survivors might take the calculated risk of bringing a civil action.²⁴² Claims statistics seem to have borne this out: whereas overall, only 85 out of 2,976 September 11th deaths (3%) have resulted in § 408 claims, 14 out of 40 Flight 93 deaths (35%) have resulted in such claims.

The above reasoning applies, to a lesser extent, to the survivors of the 59 victims aboard American Airlines Flight 77, which crashed into the Pentagon. The Pentagon crash resulted in the deaths of 114 people on the ground (the survivors of four of whom who have sued); any significant property damage on the ground was sustained by the United States government, an unlikely plaintiff. Twenty-three of the fifty-nine Flight 77 deaths (i.e., 39%) have resulted in § 408 claims, an even greater percentage than those connected with Flight 93. If limited recourse to the airlines' assets (i.e., through the limitation on

241. Martin Kasindorf, *Some 9/11 Families Reject Federal Fund and Sue*, USA TODAY, Jul. 14, 2003, at A1.

242. Note, however, that damages in this action would not be determined simply by dividing \$1.5 billion by fourteen. The plaintiffs (except for any carrying international tickets) would have to show fault on the part of the airline; they then would have to prove damages, which would be substantial in most death claims, but far short of the \$107 million dividend produced by dividing the insurance equally among the plaintiffs. Note, however, that the damages would not be subject to the collateral source offset which diminishes awards from the Fund.

recovery to their liability insurance) was regarded as the biggest obstacle to recovery under § 408, then rational choice theory can explain why a disproportionately large number of Flight 93 and Flight 77 deaths (involving less competition for such assets) resulted in tort claims.

D. *Noneconomic Factors*

An assessment of the estimated economic return from litigation would not, in most cases, be the sole determinant of whether a potential claimant would elect to sue, file with the Fund, or sit it out. As adherents of socioeconomics would assert, other, noneconomic factors would also play a legitimate role, notwithstanding rational choice theory.²⁴³ Among these factors are the following:

1. *Risk Preference*

While the economic model of litigation suggests that litigants will accept only those settlement offers that are at least equal to their expected return from litigation, many potential litigants are risk-averse, and will therefore accept something less in order to avoid the risks of litigation.²⁴⁴ Tort plaintiffs frequently fall into this category; as one-time players, they can ill-afford the lottery aspects of tort litigation, and are therefore somewhat disposed to accept settlements below the expected value of litigation.²⁴⁵ And people who have experienced serious tragedy may consider themselves star-crossed or unlucky, and therefore that much more reluctant to take their chances in court.²⁴⁶

243. See Robert Ashford, *Socio-Economics: What Is Its Place in Law Practice?*, 1997 WIS. L. REV. 611, 612-15 (1997) (detailing the basic premises of socio-economics).

244. See Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 118 (1996); see also Chris Guthrie, *Prospect Theory, Risk Preference, and the Law*, 97 NW. U. L. REV. 1115, 1116 (2003) (arguing that "people are often willing to take risks to avoid losses but are unwilling to take risks to accumulate gains").

245. "To calculate expected value of litigation . . . litigants will multiply their estimate of the plaintiff's chances of prevailing on the liability issue by the plaintiff's likely damages." Russell Korobkin, *Aspirations and Settlement*, 88 CORNELL L. REV. 1, 6 (2002).

246. Liability insurers, on the other hand, can exploit this vulnerability. Aware of the risk-aversion of many tort plaintiffs, they can make low-ball settlement offers, knowing that some will be accepted. While some of the rejected offers may result in trials with adverse results, the cumulative results will average out to no more than their expected value over time, making this a profitable (if cynical) strategy for these repeat players. This may explain Samuel Gross and Kent Syverud's observation that "insurance companies systematically offer only a fraction of the expected value of personal injury judgments in cases with substantial damages. . . ." Samuel Gross & Kent

As they faced the decision to sue or claim with the Fund, potential beneficiaries were in a situation not unlike that of the typical tort plaintiff who has received a settlement offer. These individuals could view estimates of the expected award from the Fund (available through the Special Master's office) as tantamount to settlement offers to be compared with the expected value of a § 408 claim against the airlines and others. Many of these potential claimants, having already experienced serious tragedy, would be understandably reluctant to take their chances in litigation. For them, the certain recovery provided by the Fund might eclipse even the rosier projections of success in litigation.

Of course, a few potential claimants may have had a *preference* for risk. While a gambler mentality is rare among one-time players (and in particular, tort plaintiffs), some of these claimants may have received enough support from insurance, charities, and other non-Fund sources to serve as a cushion against risk. For others, a totally subjective preference for risk may have won out. Moreover, in a society that values individual autonomy with respect to litigation choices, these claimants were perfectly within their rights to give effect to their preferences in the form of a civil action under § 408 of the ATSSSA.

2. *Self-serving Bias*

Some attorneys (as well as their clients) may be prone to self-serving bias, a tendency to view one's prospects (in this case, in litigation) as better than they really are.²⁴⁷ Surveys of lawyers show that a great majority of them are likely to consider themselves "better than average" lawyers who are capable of achieving better than average results (the "Lake Woebegone effect").²⁴⁸ In fact, empirical evidence suggests a tendency to overestimate the value of one's claim,

Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 353 (1991).

247. See Ward Farnsworth, *The Legal Regulation of Self-Serving Bias*, 37 U.C. DAVIS L. REV. 567, 567 (2003) (defining self-serving bias as "the tendency to make various judgments in a manner skewed to favor one's own self-interest"); George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135 (1993); Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1, 13-19 (1999).

248. See Birke & Fox, *supra* note 245, at 17-19; Rees W. Morrison, *In-House Counsel are Paid to Make Decision. Tips for Avoiding Traps*, LEGAL TIMES, Nov. 2001, at 39 (describing overconfident lawyers who are overly certain of the correctness of the applicable law).

one's poker hand, or even outcomes over which one has no direct control.²⁴⁹

In the context of the choices presented with respect to the Victim Compensation Fund, potential claimants, and especially their lawyers, would have to resist a tendency to overvalue their prospects at trial. Beneficiaries would be best served by lawyers who leavened their appraisals of trial outcomes with a dose of realism, and even a conscious effort to counteract self-serving bias. The relatively low number of § 408 claims that were ultimately brought suggests that they may have done so.

3. *Endowment Effect*

A more likely factor with respect to § 408 claims was the endowment effect²⁵⁰ of traditional norms of tort litigation. Attorneys (and to a lesser extent, clients) accustomed to conventional measures of tort damages and the traditional process of tort litigation may have become inured to both substantive and procedural norms, and therefore unwilling to accept a different damages formula and a different process.²⁵¹ Furthermore, having seen in the statute definitions of economic and noneconomic loss that resembled the tort definitions, lawyers and their clients may have developed an expectation against which the estimates furnished by the Special Master appeared paltry.²⁵² Rather than seeing a multimillion-dollar Fund award as a net

249. See Bruce L. Hay, *The Theory of Fee Regulation in Class Action Settlements*, 46 AM. U. L. REV. 1429, 1462 n.120 (1997). See also Joseph Rand, *Understanding Why Good Lawyers Go Bad: Using Case Studies in Teaching Cognitive Bias in Legal Decision-making*, 9 CLINICAL L. REV. 731, 743 (2003) (describing gambler's false belief that numbers on a roulette wheel can become "due"); Birke & Fox, *supra* note 247, at 16-17.

250. See RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* 77 (2002), citing Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 325 (1990) (describing the endowment effect as a manifestation of "loss aversion," the generalization that losses are weighted more than gains in the evaluation of prospects and trades). See also Jennifer Arlen, *The Future of Behavioral Economic Analysis of Law*, 51 VAND. L. REV. 1765, 1771 (1998) (The endowment effect occurs when people "demand significantly more to give up an object than they would be willing to pay to acquire it.").

251. One prominent aviation litigator called the Fund "the new legal disasterland." Kreindler, *supra* note 202, at 377.

252. Roger Parloff, responding to the carping of plaintiffs' lawyers, summarized the issue: "If the victims may have no viable claim in the tort system after all, because no one was really at fault for their deaths other than the terrorists, then why must a compassion-driven, taxpayer-financed fund pay what the tort system might theoretically have extracted from a totally hypothetical, deep-pocketed, unambiguously guilty defendant?" The answer lies, says Parloff, in "the otherworldly sense of entitlement that the tort system now fosters." Parloff, *supra* note 235, at 106.

gain, potential Fund beneficiaries may have viewed it as a loss as compared to the traditional measures of tort damages or the expectations derived from the statutory language.

One manifestation of this endowment effect was the *Colaio/Schneider* litigation. That litigation amounted to an effort to bind the Special Master to norms of traditional tort damages which the plaintiffs by then had come to regard as an "entitlement."²⁵³ But most of the plaintiffs who failed to overturn the regulations in that litigation nevertheless saw the Fund as superior to litigation under § 408, and eventually filed with the Fund. Others did not, possibly because they used a 100% recovery under a traditional tort damages formula as their lodestar (notwithstanding any of the discounting factors previously discussed). For them, full tort recovery was an entitlement, anything less was viewed as a loss, and the Fund was an inadequate substitute for litigation.

4. *Reactive Devaluation and Displaced Aggression*

Reactive devaluation is a phenomenon that occurs when a party to negotiations, suspicious of the motivations of her negotiating partner, places a lower value on an offer from that partner than an objective appraisal might warrant.²⁵⁴ Reactive devaluation is most prevalent where the negotiators regard each other as adversaries. While the Special Master was neither technically nor actually in a position adversarial to that of the Fund's beneficiaries, some prospective Fund claimants may have come to regard him (or the structure underlying the Fund) with suspicion. The Fund's beneficiaries had been subjected to terrible personal tragedy on September 11th, and the hypervigilance that often accompanies such tragedy may have created suspicions regarding the motives underlying the Fund.²⁵⁵ With Osama bin Laden unavailable, and the airline executives and other government officials inaccessible, the very visible Kenneth Feinberg became a convenient target of their wrath. "I was the point

253. Peck, *supra* note 204, at 224.

254. Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. DISP. RESOL. 235, 246-47 (1993); Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in BARRIERS TO CONFLICT RESOLUTION 26, 41-42 (Kenneth Arrow et al. eds., 1995).

255. "After catastrophe, some survivors experience extreme and persistent arousal in the form of anxiety, panic, hypervigilance, irritability, and insomnia." Deborah Serani, *Expanding the Frame: Psychoanalysis after September 11*, BULL. OF THE MENINGER CLINIC, Winter 2004, at 4.

man, so I became the target for every conceivable type of emotional response to 9/11," said Feinberg.²⁵⁶

Kenneth Feinberg accepted no compensation for his work on the Fund.²⁵⁷ He toiled tirelessly for hundreds of hours, traveling to scores of locations to address Fund beneficiaries and others and respond to their questions and complaints. To some, he has been patient, understanding, and gracious. To others he has appeared blunt, arrogant, and condescending.²⁵⁸ Steven Brill, who chronicled the events following the September 11th attacks, describes him as lacking in bedside manner.²⁵⁹ To a great extent, Feinberg's character was in the eye of the beholder: what some saw as honesty, candor, and intelligence, others saw as aloofness, chilliness, or arrogance. In large part due to his public availability, Feinberg came to personify the Fund, and some of the responses to the Fund reflected people's reactions to him.²⁶⁰

Thus, despite, or perhaps *because* of his good intentions, Feinberg and the Fund he administered became a target of displaced aggression on the part of those who had been grievously harmed by the events of September 11th, and especially those who viewed the Fund as inadequate.²⁶¹ The data would suggest, however, that the displaced aggression was more likely to manifest itself in comments about the Fund or delays in filing, rather than outright refusals to file with the Fund. In time, despite whatever hostility they may have felt toward the Fund, its legislative creators, or its administrators, most potential claimants came to realize that the Fund was their best option.

256. Lisa Meyer, *9/11 Fund Chief Looks Back on Incredible Times*, ASSOCIATED PRESS NEWSWIRES, July 5, 2004.

257. "To accept payment would have been like taking blood money," said Feinberg. Interview with Kenneth Feinberg, Special Master, in Washington, D.C. (Aug. 11, 2003).

258. See Kolbert, *supra* note 71; BRILL, *supra* note 15, at 335-37.

259. BRILL, *supra* note 15, at 313, 322.

260. Feinberg endured the brickbats with exceptional equanimity. "Of course they're angry," said Feinberg of the Fund's intended beneficiaries. "Why shouldn't they be, after what they've been through?" Interview with Kenneth Feinberg, Special Master, in Washington, D.C. (Aug. 11, 2003).

261. Displaced aggression is a psychological phenomenon "by which a person redirects his or her aggressive impulse onto a target that may substitute for the target that originally aroused the person's aggression." SURVEY OF SOCIAL SCIENCE: PSYCHOLOGY SERIES 163 (Frank N. Magill ed., 1993) (attributing this to Sigmund Freud).

5. *The Need for an Explanation and to Assess Blame*

When terrible things have happened to a loved one, there is a natural need for an explanation, a refusal to believe that horrible tragedy was merely a product of chance. Tyler and Thorisdottir have observed:

People find it troubling to believe that accidents with widespread and devastating consequences can occur without the negligence of someone. If people believe that some party is responsible, they can then believe that the event could have been controlled. . . . As human beings, we feel uncomfortable believing that mass harms can occur by chance, and that we are, therefore, powerless to defend against them. So, we seek a way to view their occurrence, or at least the damage they cause, as due to the failure of some person (or persons) to exercise due care.²⁶²

This tendency is particularly pronounced in the United States, where (as Bob Cochran and I have noted elsewhere) many of us entertain the notion that we are entitled to lead lives free from tragedy; that it is our birthright to proceed through life without mishap, at home in a land where "seldom is heard a discouraging word and the skies are not cloudy all day," and that, should something go wrong, the courts will be available for redress.²⁶³ In some sense, this is a healthy attitude in that it reflects the American sense of optimism, of perfectability,²⁶⁴ of control over one's environment and one's future.²⁶⁵ The belief that resort to the courts will make things right reflects a peculiarly American confidence in legal institutions. It may be preferable to the fatalism that pervades some other cultures or to the extralegal "self-help" measures employed in societies where judicial institutions have proven unreliable. But this attitude can also deteriorate into a process of "naming, blaming, and claiming"²⁶⁶ that

262. Tyler & Thorisdottir, *supra* note 5, at 365.

263. COCHRAN & ACKERMAN, *supra* note 1, at 172.

264. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 426-28 (Harvey C. Mansfield & Delba Winthrop trans., 2000) (describing how equality suggests to the Americans the idea of the indefinite perfectibility of man).

265. COCHRAN & ACKERMAN, *supra* note 1, at 172.

266. The phrase comes from the title of a widely-cited article on the emergence and transformation of disputes. See William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming* . . . , 15 *LAW & SOC'Y REV.* 631 (1980).

brings out the worst aspects of American litigiousness.²⁶⁷ If something goes wrong in America, there must be an explanation, probably grounded in somebody's culpability.²⁶⁸ And no event was more disturbing to the American sense of perfection than the tragedy of September 11, 2001.

Among the September 11th families there were those who felt that only by bringing a lawsuit could they discover who truly was to blame, and that accepting payment from the Fund would be a betrayal of their loved ones. Thomas Ashton, age 21, died at the World Trade Center on September 11th. His mother, Kathleen Ashton, explained:

Some day, please God, I will see my son again. I need to be able to look at him and say, "Tommy, I did the right thing." The right thing is not to take the money. The right thing is to try to get answers, to see what sort of lapses allowed the murderers to do what they were able to do.²⁶⁹

A lawsuit not only allows for discovery and, in some instances, accountability; it can also provide the emotional catharsis sought by victims of harm.²⁷⁰ For some claimants, that catharsis was missing from the Fund's claims process. Lacking a rationale based on fault (indeed, lacking a clear explanation for the basis for compensation), the Fund looked to some like a payment without substance – a hidden, under-the-table process in place of a public expiation.

This reaction may have been perplexing to would-be tort reformers such as Marc Franklin, who urged (almost four decades ago) that the conventional negligence system be replaced with a comprehensive no-fault system, funded at least in part by tax revenues.²⁷¹ Franklin was among the first to describe the problem of a "negligence lottery" of which there were two major aspects: a "plaintiff's lottery" under which the ability to recover for injury was dependent upon finding a solvent person or entity on whom to cast blame,²⁷² and a "defendant's lottery" in which the amount the defendant was obligated to pay was

267. *But see* Marc S. Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 6-7, 38 (1986) (finding that empirical data does not support the notion that Americans have been especially litigious of late).

268. *See, e.g.*, Tyler & Thorisdottir, *supra* note 5, at 368.

269. Kasindorf, *supra* note 241.

270. Tyler and Thorisdottir fault the Fund and its creators for failing to consider or explain the rationale underlying the Fund's rules. Tyler & Thorisdottir, *supra* note 5, at 358. This failure may have deprived some claimants of the closure they might have otherwise obtained from legal process.

271. *See* Marc Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967).

272. *Id.* at 781.

largely dependent on the characteristics of the plaintiff – most notably the plaintiff's likely future income stream.²⁷³ Viewed in any light other than the perspective of a tort lawyer, the basis for liability and the amount of compensation looked rather odd. In Franklin's words, "there is no logical reason why treatment of the transgressor should be tied inexorably to treatment of the victim."²⁷⁴ And it is equally odd for "[t]wo defendants who commit identical careless acts [to] find themselves liable for vastly different amounts depending solely on the fortuitous nature of the harm that results."²⁷⁵ The solution would be a broad system of no-fault recovery from a fund financed with tax dollars and motorists' fees, with "selective reimbursement" from certain business enterprises.²⁷⁶ Specific deterrence in the form of criminal prosecution and administrative regulation would substitute for whatever deterrent effect the tort law was thought to provide.²⁷⁷

In a modified manner and for a single event, this is what the September 11th Victim Compensation Fund attempted to do. Separating the treatment of the transgressor from compensation for the victim, it provided no-fault recovery (far more generous than that contemplated by Franklin, Jeffrey O'Connell, and other Great Society-era visionaries²⁷⁸) from a Fund financed by the American taxpayer. Selective reimbursement could be found in the government's maintaining a right of subrogation (subject to the limitations on liability of § 408),²⁷⁹ which allows the government to pursue Al Qaeda – the most culpable wrongdoer. Specific deterrence is provided in the form of greater federal regulation of and more direct government involvement in airline security.²⁸⁰ Yet some critics of the Fund, instead of applauding its separation of compensation from culpability, have suggested that "the government itself implied that it was responsible

273. *Id.* at 790.

274. *Id.* at 781.

275. Franklin, *supra* note 271, at 790.

276. *See id.* at 812.

277. *See id.* at 781. The term "specific deterrence" was used by Professor (now Judge) Guido Calabresi to describe safety regulations enacted collectively, as distinguished from the "general deterrence," or market-based approach. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 95-134 (1970).

278. Franklin, for example, would have provided full medical payments and eighty-five percent of lost income (subject to a then-economically feasible cap of \$125 per week), with no recovery for noneconomic loss. Franklin, *supra* note 271.

279. ATSSSA § 409.

280. *See* Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001).

in some way for failing to prevent the tragedy from occurring by compensating the victims because compensation typically flows from feelings of responsibility for harm.”²⁸¹ This is an interesting piece of reverse engineering. Because it stepped up to the plate and offered to make generous payments to injured citizens at a time of national tragedy, the government was now implying that it was at fault. This insistence on associating compensation with fault once again demonstrates the gravitational effect of the traditional norms of the tort system.

6. *Avoidance*

Of course, many Fund claimants welcomed a process that would allow them to recover substantial compensation without undergoing the trials, tribulations and delays of tort litigation. For some intended beneficiaries, even filing with the Fund may have been too great an emotional burden. Despite the availability of a no-fault remedy, and the formulaic manner in which the Special Master was prepared to treat the claims, the form for those claiming on behalf of a decedent was a long one – nine pages of instructions, plus twenty-four pages to fill out, to be exact. Even with free legal help (along with free assistance provided by other professionals), the task appeared daunting to some.

Many Fund claimants kept their involvement to a minimum. Until very late in the claims process some potential claimants were too overwhelmed by grief to bring themselves to assemble the required documentation and file a claim. Among those who did, most availed themselves of Track A of the claims process,²⁸² which did not require a hearing before a written determination; of these people, many accepted the Special Master’s written determinations of their claims. Declining to avail themselves of the hearing allowed under both Tracks A and B, these people avoided what Bernard Mayer has called the “tyranny of participation.”²⁸³

281. Tyler & Thorisdottir, *supra* note 5, at 359.

282. 1349 of the 2880 death claimants and 2387 of the 2673 injury claimants availed themselves of Track A. E-mail attachment from Camille Biros, Feinberg Associates, to Robert M. Ackerman, Professor of Law, The Penn State Dickinson School of Law (July 1, 2004) (on file with author).

283. BERNARD S. MAYER, *BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION* 54 (2004). For the most part, Mayer favors engagement in conflict resolution, but he recognizes that people sometimes need protection from “the ‘tyranny of participation’ that conflict resolution processes can seem to impose.” *Id.*

Indeed, the Fund seemed particularly well-suited for those who wished to spare themselves the agony of reliving the horrors of September 11th, limiting their participation to the submission of a paper claim. In the final analysis, only a handful (no more than a dozen families of deceased victims) avoided engagement altogether, declining to seek out a remedy from either the courthouse or the Fund.²⁸⁴

7. *Resentment of the Commodification of Life*

Some potential claimants considered it unseemly to reduce the value of their loved ones' lives to dollars and cents, and therefore hesitated to file claims with the Fund. While this sentiment could have applied to tort claims as well, awards from the Fund appeared more formulaic, less tailored to the individual circumstances of the victim, and therefore seemed to depersonalize (and even commodify) the deceased more than damages in tort. Deborah Hensler has commented on the difficulty of placing any value on a loved one's life, and how for some victims the "money [from the Fund] came to mean, not just the wherewithal to cover their needs, nor a means of assuring accountability, nor even an expression of society's compassion for their plight, but rather, what the lives of their children were worth in the eyes of the community."²⁸⁵ Likewise, George Priest has noted the sense in which "the awards granted under the September 11 Fund serve as a surrogate for a measure of the value of the lives of the victims who perished on September 11th."²⁸⁶ If so, then many such awards seemed wanting.

8. *Patriotism*

Kenneth Feinberg has surmised that at least a few of the Fund's intended beneficiaries may have considered it unpatriotic to impose on the United States Treasury for compensation as the country commenced a war against terrorism.²⁸⁷ This may have been particularly

284. Determining the precise number of deceased remains difficult, as does determining the number of families of deceased victims who have declined to file with the Fund or the court. Press estimates place the latter number at thirty, but my best estimate, based on numbers obtained from the Fund, the U.S. District Court for the Southern District of New York, and plaintiffs' and defendants' counsel in the September 11th litigation, places the number between nine and sixteen. See Table 1 *supra* p. 848.

285. Hensler, *supra* note 5, at 438.

286. George L. Priest, *The Problematic Structure of the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 527, 544 (2003).

287. Interview with Kenneth Feinberg, Special Master, September 11th Victim Compensation Fund, in Washington, D.C. (Aug. 11, 2003).

true for those who were serving the armed forces (in military or civilian capacity) at the time of the attacks. This may help explain why families of those who died in the Pentagon filed with the Fund at a lower rate than Fund beneficiaries in general.

9. *Intra-family Squabbles*

Feinberg reports several instances in which two or more family members squabbled over who would file for compensation and who would get the money. Such disagreements occurred only in a minority of the families, but they often were bitter. Observed Feinberg:

Biological parents fighting with fiancés, sisters fighting with brothers, spouse one fighting with spouse two. . . The statute didn't give us much guidance at all about how to deal with those family squabbles.²⁸⁸

In some of these instances, Feinberg and his staff turned into mediators to resolve family conflicts. In one such instance, blood relatives of a September 11th victim agreed to share Fund proceeds with the victim's gay partner to the extent the partner's live-in status altered the victim's consumption rate, and thereby increased the award.²⁸⁹ It is reasonable to assume that some intra-family disputes were a cause of delayed filings with the Fund.²⁹⁰

10. *Holding Out for More Information*

Some late filers hesitated to submit their claims until they had a better idea of what kind of payments were likely to be made to claimants in their circumstances (although Feinberg had, from the beginning, provided data to the public about awards in representative claims).²⁹¹ Some waited to file until the conclusion of the *Colaio/*

288. Meyer, *supra* note 256.

289. Interview with Kenneth Feinberg, Special Master, September 11th Victim Compensation Fund, in Washington, D.C. (Aug. 11, 2003).

290. For additional reports of intra-family disputes, see Neil Swidey, *Judge, Jury, Exchequer as Special Master of the September 11th Victim Compensation Fund, Kenneth R. Feinberg Alone Puts a Price Tag on the Lives Lost and Injuries Suffered in the Terrorist Attacks*, BOSTON GLOBE, Jan. 1, 2004, at 10 (detailing conflicts including "[t]he parents who don't recognize a victim's same-sex partner; the parents who filed fraud charges against a woman claiming to be a fiancée but who they claim is just a gold digger; the widows who learned their husbands had secret families; the fathers who walked out on their kids only to come forward to make a claim after one was killed on 9/11"); Stephanie Saul, *Sad State of Estates, 9/11 Families Take Funds Fight to Court*, NEWSDAY, Sept. 21, 2003, at A8 (describing disputes that "pit ex-wives against mistresses, parents against widows, and children against children").

291. The Fund's website, http://www.usdoj.gov/victimcompensation/award_summaries.pdf, provides a number of examples of awards (with anonymity preserved) for comparison's sake. 28 C.F.R. § 104.34 provides the Special Master with the right to

Schneider litigation.²⁹² Holding out seemed to be a strategy more often utilized by those who expected larger awards, as the size of the median and average awards continued to creep up throughout the life of the Fund.

11. *Fear of Reprisal*

A few potential claimants had privacy interests; some were undocumented aliens who (despite assurances to the contrary from the Special Master) were afraid that their information would be shared with the immigration authorities. Others may have had similar misgivings regarding the Internal Revenue Service. Furthermore, despite efforts to disseminate information regarding the Fund through U.S. embassies and other outlets abroad, some relatives of the deceased may have been foreign nationals who were late to get word about the Fund.

In short, there any number of reasons for filing late in the claims period, filing a tort claim with the court, or not filing at all. But for the overwhelming majority of Fund beneficiaries, the Fund was the most logical choice, not because it was “the only game in town,” as Feinberg claimed,²⁹³ but because it was the best way to obtain *economic* relief from the horror of September 11th. Most claimants ultimately valued certainty, timeliness, and administrative convenience over the factors that might drive them to bring suit. Other processes might provide more information about the events of September 11th, or the emotional support necessary to deal with loss, but this was not the Fund’s mission. For most claimants, weary, disdainful of process, and seeking closure, the Fund was the most logical choice.

V. EVALUATING THE FUND

The circumstances surrounding the Victim Compensation Fund’s creation were unique, and we hope and pray they will remain so. As

publish some or all of the awards. In addition, the Special Master and his staff were willing to meet with claimants and their representatives and provide estimates of awards before claims are filed.

292. The number of filings accelerated after the District Court’s dismissal of *Colaio v. Feinberg*, 03 Civ. 0558 (S.D.N.Y. 2003), and again after the Second Circuit affirmance in *Schneider v. Feinberg*, 345 F.3d 135 (2d Cir. 2003). Of course, by the time *Schneider* was decided, time was running short to file with the Fund in any event.

293. BRILL, *supra* note 15, at 314, 321. Some beneficiaries resented Feinberg’s choice of metaphor; for them, the consequences of September 11th were anything but a game. *Id.* at 336-37.

one commentator has suggested, the Fund was “born of a unique confluence of events not likely to be duplicated.”²⁹⁴ Even if future acts of terrorism on American soil cause thousands of deaths and injuries, Congress is unlikely to respond with a program quite this generous again. Robert Rabin suggests that “the establishment of the Fund reflected a mix of genuine outpouring of sympathy for the victims of September 11th and great concern that the airline industry faced instant meltdown. Under these compelling circumstances, from a political economy perspective, the federal government’s decision to assume responsibility for victim compensation played out in a singular fashion.”²⁹⁵

Because the Fund is *sui generis*,²⁹⁶ it is unlikely to have a profound impact on developments in the law of torts. The Fund experience does shed light on the normative value of conventional tort rules and processes, and the manner in which people respond to tragic loss, as discussed in Section IV. Beyond that, the lasting lessons we are most likely to draw from the Fund experience involve the role of the administrative process in lawmaking and conflict resolution. We have discussed the legal implications of the administrative process in Part III, and the factors involved in claimant choices in Part IV. We shall now examine the Fund’s administrative process in terms of democratic governance.

A. *The Fund’s Administrative Process and Democratic Governance*

The Fund embodied several of the frequently-cited attributes of the administrative process. The upstream process was distinguished by its capacity to fill gaps in legislation, taking advantage of the subject-matter expertise of the administrative agency. Here, where the underlying statute was emergency legislation, the advantages of administrative gap-fillers constructed by a person of Feinberg’s expertise proved particularly useful, even though controversial. The downstream process was less cumbersome and more efficient than the traditional judicial process. To the extent the Fund’s objective was to provide quick, no-fault compensation to victims who did not

294. Peck, *supra* note 204.

295. Robert L. Rabin, *Indeterminate Future Harm in the Context of September 11*, 88 VA. L. REV. 1830, 1867 (2002).

296. Several people have used this term in connection with the Fund, including Kenneth Feinberg himself. See, e.g., Holt, *supra* note 200; Schneider, *supra* note 213, at 460; Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 155 (2003). See also Interview with Kenneth Feinberg, Special Master, in Washington, D.C. (Aug. 11, 2003).

wish to be burdened with litigation or to relive the horror of September 11th, the claims process again seems to have served its purpose.

There remain, however, legitimate objections to both the upstream processes through which the rules for the Fund were promulgated and the downstream processes used by the Fund. In a recent article in a symposium on mandatory arbitration, Richard Reuben identifies "certain core substantive values of democratic governance that may be used to assess the democratic character of arbitration, namely: a dispute-resolution method, process or system."²⁹⁷ Reuben employs the term "democratic" broadly; he states (and I agree) that "a purely majoritarian understanding [of democracy] fails to meaningfully account for the place of governmental dispute resolution within a system of democratic governance."²⁹⁸ At the conclusion of his article, Reuben invites us to consider "how might democracy theory inform other aspects of dispute resolution. . . and how might what we have learned about dispute resolution inform our understandings of democracy?"²⁹⁹ He suggests that such inquiries "can and should also be directed at the public adjudication context."³⁰⁰ Indeed, even more so than in arbitration (an essentially private process), democratic principles should weigh heavily in an evaluation of an administrative process established by Congress to provide compensation from the public treasury to victims of a national tragedy. So we shall endeavor to do so here.

As the "core substantive values of democratic governance," Reuben lists participation, accountability, transparency, rationality, personal autonomy, equality, and due process, along with the "social capital values" necessary to promote civil society.³⁰¹ Because (unlike

297. Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 DUKE J. OF LAW & CONTEMP. PROBS. 279, 282 (2004).

298. *Id.* at 284.

299. *Id.* at 320.

300. *Id.*

301. Reuben, *supra* note 297, at 285-86, 291. For other descriptions of procedural justice criteria, see E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 93-117 (1988); JOHN RAWLS, *A THEORY OF JUSTICE* 85-90 (1971). In a recent article regarding the significance of the landmark administrative due process case, *Goldberg v. Kelly*, 397 U.S. 254 (1970), Judith Resnik notes that the case "details the key features of procedural systems – notice, exchange of information between disputants in writing or orally [in] hearings, and decision-making by a third party who is constrained in some respects." Judith Resnik, *The Story of Goldberg: Why This Case is Our Shorthand*, in *CIVIL PROCEDURES STORIES: AN IN-DEPTH LOOK AT THE LEADING CIVIL PROCEDURES CASES* (Kevin Clermont ed., 2004).

arbitration) the processes surrounding the Fund involved law-making, I shall add majoritarianism to the list; while not the sole attribute of democracy, it remains an important value in the context of democratic law-making. In addition, because efficiency was obviously one of Congress's goals in establishing the Fund, I shall add that to the list as well.³⁰² While in Part IV, we focused on the interaction between the Fund and individual claimants, here our focus is broader and more systemic.

1. *Majoritarianism*

I have restricted analysis of majoritarianism to the law-making process, as it would appear unsuitable for the adjudicative process in a society that does not endorse mob rule.³⁰³ In the context of the law-making process, majoritarianism is a fundamental value of democracy. Reuben has noted:

Democracy's essential theory is the consent of the governed, a concept that is implemented through the democratic value of participation. Under this social contract theory, the exercise of coercive government power is seen as legitimate because laws are enacted with the consent of those who will be bound by them. In most democracies, this consent is achieved through representation rather than direct participation.³⁰⁴

302. Arguably, efficiency is not a value of democratic governance; in fact, democracy can be notoriously inefficient. However, while democracy may require both upstream and downstream processes to gear down, it does not require that sand be tossed into the gears. Professor Reuben has suggested that "responsiveness" might be a better term, but that term arguably incorporates majoritarianism and accountability as well as efficiency. See E-mail from Richard Reuben, Associate Professor of Law, University of Missouri-Columbia School of Law, to author (Aug. 30, 2004) (on file with author).

303. Granted, some majoritarian institutions occasionally play an adjudicative role, such as Congress in impeachment proceedings. However, here, the role of the "majority" is carefully circumscribed, and representative, republican aspects apply. To the extent impeachment decisions resemble referenda rather than the application of legal standards, they have been criticized. See L. Darnell Weedon, *The Clinton Impeachment Indicates a Presidential Impeachable Offense is Only Limited by Constitutional Process and Congress' Political Compass Directive*, 27 WM. MITCHELL L. REV. 2499 (2001). The jury system, in which the decision-makers are drawn from the citizenry at large, usually requires unanimity, rather than a mere majority.

304. Reuben, *supra* note 297, at 287, citing Geraint Parry, *Types of Democracy*, in POLITICAL PHILOSOPHY: THEORIES, THINKERS, AND CONCEPTS 364, 365-367 (Seymour Martin Lipset ed., 2001); ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION (1971). While Reuben has made this observation with respect to the participation value, it would appear to apply with equal weight to the majoritarian value of democratic governance.

George Priest has suggested that “[t]he September 11 Fund will remain controversial because the source of the definition of its awards – however able and committed – is not in any sense democratic.”³⁰⁵ Indeed, regulations drafted by a Special Master – not subject to Senate confirmation, but appointed by a Senate-confirmed Cabinet officer who was in turn appointed by a President who reached office while failing to obtain a majority of the popular vote – appear less “democratic” than legislation enacted by Congress. But the objection here is not really any different than the classic objection to the adoption of administrative regulations that have the authority of law; i.e., that only the duly elected legislative branch, and not unelected bureaucrats, has the power to make law.³⁰⁶

As a practical matter, the review and comment process used to fashion regulations for the Fund provided far greater opportunity for citizen input than the process that precedes the adoption of most legislation, and the Special Master’s report accompanying the Interim Final Rule evidenced serious consideration and incorporation of many of the comments thereby obtained. But to those unfamiliar with administrative rule-making (and the Fund provided many people with their first such encounter), refinement of legislative rules by an unelected, interim, ad hoc government official smacked of authoritarianism and disregard for conventional democratic processes.³⁰⁷

Perhaps the most legitimate majoritarian objection to the Fund lies in the ambiguity of its Congressional mandate, i.e., that Congress gave the Special Master factors to consider in making awards, but

305. Priest, *supra* note 286, at 545. Priest cites Guido Calabresi’s earlier observations regarding “the necessity of selecting particular types of bodies to make difficult – in his word, tragic – decisions, such as the value of life.” *Id.* at 544-45, citing GUIDO CALABRESI & PHILLIP BOBBITT, *TRAGIC CHOICES* (1978).

306. See, e.g., J.B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 *GEO. L.J.* 757, 761 (2003) (noting, *inter alia*, that “institutions creating regulations, critics charge, are not sufficiently accountable to voters and are too vulnerable to rent-seeking by special interests”); *Daughter of Miriam Center for the Ages v. Matthews*, 590 F.2d 1250, 1257 (3d Cir. 1978) (noting that “Near the center of the growing concern over legitimacy [of administrative rulemaking] lies the apprehension that the critical choices of our society will more and more be made by administrative personnel who are not, as a practical matter, accountable to anyone.”).

307. For a manifestation of this view in the popular press, see Joel Brinkley, *Out of Spotlight, Bush Overhauls U.S. Regulations*, *N.Y. TIMES*, Aug. 14, 2004, at A1 (describing changes in rules by Bush Administration “done through regulation, not law – lowering the profile of the actions”). To lawyers, administrative regulations are very much a part of the law, but Brinkley’s language reflects the popular equation of law with legislation.

never came out squarely in favor of either a tort-based, corrective justice framework or a welfare-based, distributive justice scheme.³⁰⁸ For that matter, Congress, exercising its budgetary authority, probably should have placed some kind of limit on the total amount to be disbursed by the Fund. Arguably, Congress shirked its duty in failing to make what some would regard as essential policy determinations.³⁰⁹ But at the time, Congress had many things on its plate, and its default regarding these decisions allowed for considered administrative choices after notice and comment.

2. *Participation*

Participation is an important democratic value for both lawmaking and adjudicative processes. The ability to participate effectively in lawmaking – whether or not one’s view is ultimately adopted – is a fundamental principle of democratic governance, enshrined in such documents as the Declaration of Independence and the Constitution, and in particular, the “right to petition” clause of the First Amendment.³¹⁰ Likewise as to the adjudicatory process, the right to counsel and the right to confront witnesses are but two examples of constitutionally-guaranteed aspects of the value of participation in decisions directly affecting oneself.³¹¹ Effective participation requires access, the right to be heard, and some degree of responsiveness. In the context of civil disputes, perceptions of procedural justice “are enhanced to the extent that disputants perceive that they had the opportunity to present their views, concerns, and evidence to a third party and had control over the presentation (“opportunity for voice”).”³¹² These perceptions of procedural justice, and in particular, the opportunity

308. See Hensler, *supra* note 5, at 421-55; see also Tyler & Thorisdottir, *supra* note 5, at 369-75.

309. See *supra* note 173 and accompanying text.

310. Congress shall make no law abridging the right of the people to “petition the government for a redress of grievances.” U.S. CONST. amend. I.

311. For contemporary cases providing for fundamental participation in adjudication, see, e.g., *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (ruling that detainees must be allowed access to lawyer and a trial); see also *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

312. Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do with It*, 79 WASH. U. L.Q. 787, 820 (2001); see also E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 101-04 (1988). Professor Welsh goes on to explain that “disputants [also] are more likely to perceive procedural justice if they perceive that the third party considered their views, concerns, and evidence,” and that “disputants’ judgments about procedural justice are affected by the perception that the third party treated them in a dignified, respectful manner and that the procedure itself was dignified.” *Id.*

for “voice,” seem to strongly influence participants’ satisfaction with the overall proceeding, regardless of the substantive outcome.³¹³

On the upstream end, time constraints resulted in little opportunity for direct participation by potential beneficiaries in the making of the legislation that established the Fund.³¹⁴ But thereafter, it would be difficult to conceive of an instance in which a government agency made greater efforts to inform a core constituency of its plans and to seek its input as to its rules and operating procedures. The notice and comment process elicited thousands of comments that were read and taken into account as the regulations were drafted and revised.³¹⁵ The Special Master held numerous meetings with potential Fund beneficiaries, before, during, and after the promulgation of the rules.³¹⁶

Downstream, the Special Master continued to hold group meetings in a number of cities as beneficiaries sought assistance in preparing their claims.³¹⁷ A number of regional assistance centers were opened. Furthermore, Feinberg and members of his staff were available to potential claimants who desired an estimate of their awards before deciding whether to file suit or claim with the Fund.³¹⁸ The

313. *Id.* at 821. “Through a long series of experiments involving many different settings and situations, disputants’ opportunity for voice has been found to “reliably affect” perceptions of procedural justice. “[W]hen disputants [feel] that they [have] been allowed a full opportunity to voice their views, concerns, and evidence, the disputing process [is] seen as fairer and the outcome [is] more likely to be accepted.” *Id.*, quoting E. Allan Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, in *EVERYDAY PRACTICES AND TROUBLE CASES* 180 (Austin Sarat et al. eds., 1988).

314. Even here, the voices of potential claimants were heard, albeit indirectly, through the participation of the Association of Trial Lawyers of America in the drafting process. Peck, *supra* note 204, at 217-25. In addition, all constituencies were at least theoretically represented through their elected representatives in Congress.

315. Reuben notes, “[P]articipation values are . . . promoted in . . . the notice-and-comment processes in administrative rulemakings.” Reuben, *supra* note 297, at 288, citing the APA at 5 U.S.C. §§ 553(c), 554(d) (2000).

316. It is therefore puzzling that two of the Fund’s critics have stated that “there were no hearings or other forums in which people could articulate their views about what type and level of compensation was appropriate,” and that “[b]eneficiaries of the Fund were never asked for input and did not get the opportunity to express their feelings, or argue for what they thought was appropriate compensation for their loved ones.” Tyler & Thorisdottir, *supra* note 5, at 384.

317. By September 18, 2003, when I attended one of Feinberg’s meetings with Fund beneficiaries in Philadelphia, the only people in attendance were Feinberg, a member of his staff, a lawyer from Trial Lawyers Care, a newspaper reporter, a news photographer, and me. (Fairness requires me to report that a hurricane had been forecasted for the area, there had been at least one prior meeting in the Philadelphia area, and Philadelphia is not an area in which a large number of Fund beneficiaries are located.)

318. See BRILL, *supra* note 15, at 322, 478-79.

actual claims process allowed claimants to choose between submitting a paper application only, going to hearing after learning the results of the paper application, and going directly to hearing. Claimants could bring counsel or other advisors into the hearing, could present evidence in a wide variety of ways, and receive a respectful hearing from the Special Master or one of the forty-one professionals he employed to assist him. Claimants requesting that Feinberg hear their cases personally were accommodated, and ultimately he heard 867 of the 3526 cases that went to hearing.³¹⁹ And due to the efforts of Trial Lawyers Care and other volunteers, the opportunity for voice was real, not just theoretical. Sometimes participants in a legal process find their best voice through a professional advocate, and the volunteer effort provided many Fund beneficiaries with such voice.

3. *Accountability*

Professor Reuben notes: “Accountability refers to the degree to which the government can be held responsible to the citizenry for its policies, words, and actions.”³²⁰ While legislators may be held to account through the electoral process,³²¹ other government officials, particularly in the executive branch, may be held accountable in other ways, such as judicial review. It is in this particular area where the Fund’s most serious procedural shortcoming is apparent.

Were we to grade the Fund’s accountability on the upstream end, we would give it a “C,” and the C is for *Chevron*. The basic structure for the Fund was established by Congress, which remains accountable through the electoral process. But with major gaps to fill, some of the most significant rule-making was left to an appointed Special Master with no direct accountability to the electorate. The rule-making was, however, subject to judicial scrutiny, thanks to Judge Hellerstein’s ruling in *Colaio* that § 405(b)(3), while precluding review of the Special Master’s *determinations*, did not preclude judicial review of his regulations, methodologies, and policies prior to such determinations.³²² The judicial scrutiny was, in turn, subject to *Chevron* deference. As we have seen (and as the Second Circuit noted with less

319. E-mail from Camille Biros, The Feinberg Group, to author (Aug. 12, 2004) (on file with author).

320. Reuben, *supra* note 297, at 288.

321. *Id.*

322. *Colaio v. Feinberg*, 262 F. Supp. 2d 273, 285 (S.D.N.Y. 2003).

enthusiasm than Judge Hellerstein), this deference allowed the Special Master quite a bit of wiggle room. His regulations had to be “reasonable” under the statute, but the court was not free to substitute its own “reasonable” interpretation for that of the Special Master. We have come to accept this as an appropriate distribution of executive and judicial power in an administrative state – an eclectic acknowledgment of the needs of a modern democracy.

It is on the downstream end, however, where accountability all but disappeared. Under § 405(b)(3) of the act, the Special Master’s determinations as to claims were “final and not subject to judicial review.” Likewise, the regulations provided that “[t]here shall be no further review or appeal of the Special Master’s determination.”³²³ The absence of recourse to a reviewing court naturally gives rise to the concern that awards will be arbitrary. Legal realists³²⁴ might say that in the absence of judicial review, there was really nothing to prevent the Special Master from ignoring his own regulations in the fashioning of awards, even if the regulations themselves were subject to judicial review (as they were in *Colaio/Schneider*). Such concerns were not dampened by the Special Master’s ill-considered statement: “The law gives me unbelievable discretion. It gives me discretion to do whatever I want. So I will.”³²⁵

It appears, however, that he did not. While it is uncertain in the absence of written explanations for the awards, the data provided by the Special Master strongly suggests that he did, in fact, follow his own regulatory guidelines in fashioning awards. There is every reason to believe that the Special Master administered the Fund with the utmost integrity. But in a government of laws, not men, the proper functioning of the administrative process cannot depend entirely on the probity of a single individual.³²⁶ Here, Tyler and Thorisdottir’s criticism of the Fund finds its mark: “Placing most of the

323. 28 C.F.R. § 104.33(g) (2002).

324. Legal realism embraces the concept that legal decision-makers “decide cases according to their own political or moral tastes, and then choose an appropriate legal rule as a rationalization.” Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 267 (1997), quoting RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 3 (1977). An appellate tribunal might serve as a constraint on arbitrary decision-making, but no such constraint exists in the absence of review.

325. Kolbert, *supra* note 71, at 42, 48.

326. “Rare is the person who can weigh the faults of others without putting his thumb on the scales.” Byron J. Langenfield, at <http://www.worldofquotes.com/author/Byron-J-Langenfield/1>.

authority for implementation in the judgments of one person, no matter how competent or well motivated, does not reflect procedural justice.”³²⁷

It is one thing for a party to a dispute to voluntarily agree to an arbitral proceeding in which the right to appeal is waived in favor of an expedited determination.³²⁸ It is quite another thing to be denied the right to appeal by statute. We can appreciate the need for an expedited process under these circumstances, but limited judicial review of arbitrary administrative conduct would not have compromised the efficiency of the scheme. As a practical matter, it would hardly have been resorted to at all. The *availability* of review, however, would not only have served as a check on a less trustworthy official, but perhaps more importantly, would have engendered greater confidence on the part of the Fund’s constituents.³²⁹

Two constraints on the downstream process provide a saving grace: First, the availability of a more-or-less conventional tort action not only provided potential Fund claimants an element of choice (as in voluntary arbitration), but it also served as a competitive constraint on the Fund administrators. Feinberg and his staff could not be too parsimonious (or too arbitrary) without risking a mass defection to the tort remedy the Fund was constructed to avoid. The second constraint was a market constraint. Feinberg did not take on the administration of the Fund out of the blue; he was, and remains, a dispute resolution professional, with an interest not only in future work, but in retaining his good name. Integrity, fairness, and professionalism in the administration of the Fund would and should work to Feinberg’s professional benefit, and thereby serve as a safeguard against arbitrary determinations. In this sense, Feinberg was like a professional arbitrator, whose future work depended on the quality of his past work. Moreover, Feinberg’s probity was not compromised by

327. Tyler & Thorisdottir, *supra* note 5, at 376.

328. Along with Professor Reuben, I would distinguish cases in which parties’ agreement to arbitrate is truly voluntary from the “arbitration by ambush” that appears with growing frequency in consumer and employment contracts. See Ackerman, *supra* note 12, at 69; See Jean R. Sternlight, *Is Binding Arbitration a Form of ADR?: An Argument That the Term “ADR” Has Begun to Outlive Its Usefulness*, 2000 J. DISP. RESOL. 97 (2000).

329. Feinberg himself acknowledged this point: “To vest such authority in one group, however credible and qualified, without opportunity for appeal, raised perceptions of unfairness and guaranteed second-guessing by claimants determined to compare their awards with others.” Final Report of the Special Master for the September 11th Victim Compensation Fund of 2001, 81, at http://www.usdoj.gov/final_report.pdf (last visited Feb. 11, 2005).

a “repeat player” syndrome that is said to affect the work of arbitrators who are called upon to rule between unevenly matched adversaries in a series of disputes.³³⁰

4. Transparency

Transparency relates to the openness of government decision-making.³³¹ It is closely related to accountability in the sense that without transparency, there is little opportunity for accountability. This can be seen in the context of the awards made by the Fund. Because the Special Master was required to “notify the claimant in writing of the final amount of the award, but need not create or provide any written record of the deliberations that resulted in that determination,”³³² there was little basis on which to challenge the Special Master’s determinations.³³³ Indeed, the absence of a written explanation of awards, together with Congress’ failure to articulate a rationale for compensation, lend credence to Tyler and Thorisdottir’s contention that “it is going to be very difficult for beneficiaries of the Fund to look at the compensation offer and determine whether justice has been done.”³³⁴

The Special Master did provide a degree of transparency on a cumulative basis. Throughout the Fund’s life, he provided almost daily updates regarding median awards and average awards. He indicated the range of awards for each income level and provided examples of awards, describing the circumstances while maintaining the anonymity of the claimants.³³⁵ This was yet another effort to provide information to potential claimants so that they could proceed with the claims process in an informed manner. It also provided the transparency needed for public accountability, at least as to the general

330. “Repeat player syndrome” allegedly occurs when parties “repeatedly select favorite arbitrators, who then return the favor with biased decisions in favor of the repeat players.” Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 786 (2003), citing Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RTS. & EMP. POL’Y J. 189, 214 (1997).

331. Reuben, *supra* note 297, at 289.

332. 28 C.F.R. § 104.33(g) (2002).

333. This is not unlike the rule applied in many arbitrations, that an opinion need not accompany an award. Even (or perhaps especially) where the scope of review is narrow, it is surmised that providing the neutral’s reasoning only invites scrutiny. Of course, this is precisely what we like to encourage when government action is involved.

334. Tyler & Thorisdottir, *supra* note 5, at 382.

335. Much of this information remains available on the Fund’s website at <http://www.usdoj.gov/victimcompensation/>.

operation of the Fund, as distinguished from the particulars of each award. Few public agencies have subjected themselves to this level of scrutiny on a daily basis. Upstream, once the law-making process advanced past the early-morning huddle in Speaker Hastert's office, the notice and comment process provided precisely the type of transparency anticipated under the Administrative Procedure Act.³³⁶

5. *Rationality*

"Rationality, in the democratic sense, refers to the consistency of governmental decisions with the law, social norms, or public expectations," explains Reuben. "It correlates with notions of equal protection and due process, and in the United States is secured by the Bill of Rights and the Fourteenth Amendment, as well as statutory protections against arbitrary and capricious decision-making by government agencies."³³⁷

A number of commentators have suggested that the Fund's chief weakness stemmed from Congress' failure to articulate a consistent rationale for compensation.³³⁸ Whether the Fund was a corrective justice mechanism, based on the tort model, or a distributive justice mechanism, based on the social welfare model, was an issue that would trouble Feinberg as well as others. Those who had previous exposure to the tort system clung to a corrective justice norm; the *Colaio/Schneider* litigation was clear evidence of this expectation. But other social norms, including at least some people's notions of fairness, suggested a more equal distribution of benefits. Feinberg ended up crafting a compromise that had elements of distributive justice (and perhaps practical politics) at the high and low ends, but which for the great majority of claims employed a corrective justice model. To Feinberg and many of us who examined the system, it was about as rational as one could reasonably hope for. But to those with different expectations, the scheme seemed arbitrary and subjective.

336. "The purpose of the [Administrative Procedure Act] is to bolster clarity, consistency, and public participation in federal agencies." James Hunnicutt, *Another Reason to Reform the Federal Regulatory System: Agencies' Treating Nonlegislative Rules as Binding Law*, 41 B.C. L. REV. 153, 189 (1999).

337. Reuben, *supra* note 297, at 289-90, citing *inter alia*, 5 U.S.C.A. §§ 706 (2003) (a portion of the Administrative Procedure Act); *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) ("requiring a 'rational connection between the facts found and the choice made' in order for administrative action to survive arbitrary-and-capricious review," quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

338. See, e.g., Tyler & Thorisdottir, *supra* note 5 at 384-85; Hensler, *supra* note 5 at 432.

One might disagree with a rationale for a legal scheme (e.g., the progressive income tax), and still grudgingly accept it. It is when that rationale does not seem to be consistently employed (e.g., when special interests appear to receive extraordinary tax breaks) that the system appears unfair and the grumbling becomes especially intense. The absence of a consistent rationale articulated by Congress, combined with the problems regarding downstream transparency and accountability (described above), cultivated perceptions of unfairness regarding the Fund.

Notwithstanding this, the Special Master attempted to articulate how the Fund would operate through the regulations and his comments appended thereto. He also seems to have applied the regulations in a consistent and reasonable manner. A series of juries applying the same law to a series of cases presenting similar facts would not have achieved results nearly as consistent as did the Fund administrators. While some commentators have suggested that justice is *better* served through a series of inconsistent, unarticulated jury awards,³³⁹ the consistency provided by the employment of a Special Master and his professional staff contributed to the rationality of the scheme.

6. Equality

The first stage of the upstream process provided as much equality as the American legislative process will allow. This entails, among other things, a Senate in which representation is based on statehood, not population, a Congress in which leadership has disproportionate influence,³⁴⁰ a president who is elected by the Electoral College and not a popular plurality, and a system in which industry lobbyists have substantial influence.³⁴¹ The notice and comment period that preceded the adoption of the final regulations involved

339. See Priest, *supra* note 286, at 545 n.33, citing GUIDO CALABRESI & PHILLIP BOBBITT, *TRAGIC CHOICES* (1978). Calabresi and Bobbitt defend the use of juries of randomly chosen laypersons sitting discontinuously and deciding responsibly – without explanation – as appropriate for tragic decisions. However, it is the potential for consistency in the decisions of the Fund's Special Master that provides for greater fairness.

340. *E.g.*, the constituents of House Speaker Dennis Hastert (R-Ill.) and House Majority Whip Tom DeLay (R-Tex.) had (through the prominent roles played by their congressmen) more influence on the legislation establishing the Fund than, for example, those of Congressmen Jerrold Nadler (D-N.Y.) and James P. Moran (D-Va.), in whose districts the World Trade Center and Pentagon, respectively, were located.

341. Steven Brill describes a "tawdry scene of . . . liquor-plying [airline industry] lobbyists having their way with the House Majority Whip" on the eve of the ATSSSA's enactment. BRILL, *supra* note 15, at 93. My colleague Nancy Welsh has asked me

broader access,³⁴² but even here, some input (e.g., those of Senators Hagel and Kennedy and others who were in close contact with Feinberg) may have carried greater influence than others.³⁴³

Substantively, the equality criterion has a close connection to the rationality criterion. One would like to think that the regulations provided a basis for like cases being treated in like manner. But Tyler and Thorisdottir have suggested that “the existence of at least three possible standards of distributive fairness³⁴⁴. . . invite[d] people to interpret their situation in ways that bring principles more favorable to themselves to bear on the issue of what is fair.”³⁴⁵ Deborah Hensler observed that families invoking the *equality* principle would argue “that all victims, or all victims within a certain group, should get paid the same amount,” but other families invoking the *equity* or *need* principle would argue just as forcefully for other bases for compensation.³⁴⁶ Fairness, and even equality, became a relative matter in the eye of the beholder. But even as claimants may have felt themselves subject to the Fund administrators’ whims, the claims process had less of a lottery aspect to it than the tort system, as Senator McCain and others had hoped.³⁴⁷ In particular, awards from the Fund were untainted by the racial and gender bias that too often distorts conventional tort judgments and settlements.³⁴⁸

why the executives at United and American Airlines did not take pains to meet with the September 11th victims to express regret regarding the role of their corporations in the tragedy. See Jonathan Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1016 (1999) (arguing that apology and forgiveness can be beneficial to both parties). My short answer was that they had indeed met with the people whom *they* considered most important: the congressional leaders and Bush Administration officials who could arrange a bailout of the airline industry and protect them from a crippling spate of lawsuits. My long answer was that the airlines considered *themselves* the victims, succumbing to the “everyone’s a victim” mentality that has taken hold over much of American society. See Robert M. Ackerman, *Tort Law and Communitarianism: Where Rights Meet Responsibilities*, 30 WAKE FOREST L. REV. 649 (1995); ROBERT HUGHES, *CULTURE OF COMPLAINT: THE FRAYING OF AMERICA* (1994).

342. See *supra* text accompanying notes 51-58.

343. Brill describes how Special Master Feinberg was influenced by the informed comments of victims’ family members who wielded no political clout, but who had simply done their homework. BRILL, *supra* note 15, at 324-25, 382-83.

344. For descriptions of these standards, based on equity, equality, and need, see Hensler, *supra* note 5, at 434-35.

345. Tyler & Thorisdottir, *supra* note 5, at 371.

346. Hensler, *supra* note 5, at 434-35.

347. See *supra* note 145 and accompanying text.

348. See Lucinda M. Finley, *Female Trouble: The Implications of Tort Reform for Women*, 64 TENN. L. REV. 847 (1997); Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463 (1998); Frank M. McClellan, *The Dark Side of Tort Reform: Searching for Racial Justice*, 48 RUTGERS L. REV. 761 (1996). To the extent the incomes of claimants or their deceased relatives had been

7. *Due Process*

Our discussions of rationality and equality touched upon substantive due process issues, so here we will briefly examine *procedural* due process in connection with both upstream lawmaking and downstream adjudication. Upstream, the ATSSSA was a product of a legislative end-run around the usual process of committee hearings, mark-ups, and debates, but for good reason. The emergency that gave rise to the ATSSSA was tantamount to that surrounding a declaration of war. Despite, or perhaps because of, the visible presence of the airline industry and trial lawyers' lobbyists as the measure was drafted, the short-circuited legislative process included genuine debate (some public, most of it private) about the substantive issues at stake.³⁴⁹ The regulations were a product of the notice and comment procedure required by the Administrative Procedure Act,³⁵⁰ and the requirements were observed in more than just a formalistic sense.

Individual claims to due process carry more weight with respect to the *law-applying* that proceeds downstream than in the *law-making* that occurs upstream. Every citizen does not have a right to notice and hearing before Congress as it considers each measure that may apply to him or her (although the APA does provide for some rights with respect to administrative rule-making), but such rights will attach when a court or agency applies those rules in a specific case.³⁵¹ Downstream, the Fund would expose many of those accustomed to formal courtroom procedure to a less formal administrative process. The Fund's individual determinations lacked several of the formal trappings that many Americans equate with due process. A variety of legal and cultural norms, evidenced by formal documents and popular culture, have impressed upon the American psyche the notion that due process means a "day in court," and furthermore, that that "day in court" means literally a day in *court*. Scores of popular movies, from *A Few Good Men* to *My Cousin Vinny*, climax in a trial,

previously distorted by racial or sex discrimination, however, the Fund's compensation scheme kept this distortion largely intact.

349. See BRILL, *supra* note 15, at 81-85, 92-98 (describing the various proposals and compromises made between House and Senate leaders, White House officials, airline lobbyists, and victims' representatives).

350. See 5 U.S.C. § 553(b) (1996).

351. Compare, e.g., *Londoner v. City and Co. of Denver*, 210 U.S. 373, 385 (1908) (holding that the city council's decision involving a small group violated due process because they were not afforded an opportunity to be heard), with *Bi-Metallic Investment Co. v. State Board of Equalization of Colorado*, 239 U.S. 441, 445 (1915) (holding that when a rule applies to a large group it is impractical for everyone to be heard).

but very few portray an administrative hearing. The Fund replaced formal evidentiary hearings before a black-robed judge with written submissions and, if requested, informal conferences.³⁵²

A moment's reflection would reveal to most Americans that they in fact interact with the government's administrative apparatus (including its decision-making component) on a routine basis; obtaining a driver's license, filing a tax return, and mailing a letter all place the citizen in contact with administrative agencies. Despite the cynicism that attends much discourse about motor vehicle bureaus, the IRS, and the Postal Service, these routine encounters usually conclude satisfactorily and without rancor.³⁵³ But the events giving rise to the Victim Compensation Fund were anything but routine, and to some, the processing of claims through a mechanism less awe-inspiring than a court seemed to suggest that important matters were not being taken seriously, that the tragic death of a loved one was being dealt with in an arbitrary manner, and that the victims were being relegated to second-class justice. As noted earlier, some critics regarded the Fund as a mere "shut up fund,"³⁵⁴ a device to get the September 11th victims and families out of the way, so that the airlines and government could go about their business. To them, it was set up to provide "small justice for small people," a complaint originated by early critics of the alternative dispute resolution (hereinafter "ADR") movement.³⁵⁵

352. Richard Delgado and others have expressed the view that "the formalities of a court trial – the flag, the black robes, the ritual – remind those present that the occasion calls for the higher, 'public' values, rather than the lesser values embraced during moments of informality and intimacy." Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WISC. L. REV. 1359, 1388 (1985). These and other norms "create a 'public conscience and a standard for expected behavior that check overt signs of prejudice.'" *Id.*, quoting G. ALLPORT, *THE NATURE OF PREJUDICE* 470 (25th Anniv. Ed. 1979).

353. The success of the Postal Service's REDRESS dispute resolution program, together with the more publicized triumphs of Lance Armstrong and his cycling team, have helped restore the Postal Service's image recently. See Tina Nabatchi & Lisa B. Bingham, *Transformative Mediation in the USPS REDRESS & TM Program: Observations of ADR Specialists*, 18 HOFSTRA LAB. & EMP. L.J. 399, 400 (2001). See also Sal Ruibal, *Armstrong's Joyride; Texan Takes Sixth Tour de France in Row*, USA TODAY, Jul. 26, 2004, at 1.

354. See David W. Chen, *Many Relatives, Wary and Anguished*, *Shun Sept. 11 Fund*, N.Y. TIMES, June 1, 2002, at B1; see also Tyler & Thorisdottir, *supra* note 5, at 356.

355. See Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076 (1984); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Delgado, *supra* note 352, at 1360 (expressing the concern that deformalization of dispute resolution processes may increase the risk of class-based prejudice).

These criticisms are misdirected. Studies of procedural justice strongly suggest "that disputants are less concerned about receiving formal due process . . . than they are about being treated in a manner that is consistent with their everyday expectations regarding social relations and norms."³⁵⁶ Perceptions of procedural justice are enhanced to the extent that disputants perceive (1) that they have had opportunity for voice, (2) that a third party considered their views, concerns, and evidence, (3) that they were treated in a dignified, respectful manner in a dignified procedure, and (4) that the decision-maker was even-handed and attempted to be fair.³⁵⁷ These elements were very much evident in the Fund's procedures,³⁵⁸ although as noted previously, issues of respect and fairness were matters very much in the eye of the beholder.³⁵⁹ And apart from the absence of appeal, the Fund retained the traditional elements of due process, notably: notice and opportunity to be heard, the right to counsel, and the right to a determination by an impartial decision-maker. Deviations from more formal processes were tailored to the purpose of the Fund: to provide quick determination and payment of a substantial award under a simplified no-fault system. The Fund allowed claimants to avail themselves of the type of "quick and dirty solution" advocated by tort reformers such as Jeffrey O'Connell, who wished to spare victims the travails of a cumbersome court-based process, substituting a less intimidating, more efficient, and more user-friendly system.³⁶⁰

8. *Efficiency*

Efficiency was a major reason for the Fund, and because of both the manner in which it was tailored and the laudable, professional efforts of the Special Master and his staff, the efficiency goal was met. Claims were processed expeditiously; the 120-day timeline was strictly adhered to. An aid to efficiency, both upstream and downstream, was the absence of any real opposition to the concept of the Fund or to the claims made by its beneficiaries. Congress passed the ATSSSA quickly due to the sense of emergency (including the fate of

356. Welsh, *Making Deals*, *supra* note 312, at 826, citing Lind, *supra* note 313, at 187.

357. *Id.* at 820-21.

358. *See supra* text accompanying notes 314-18.

359. *See supra* notes 258-60 and 345-46 and accompanying text.

360. *See* Jeffrey O'Connell et al., *The Costs of Consumer Choice for Auto Insurance in States Without No-Fault Insurance*, 54 MD. L. REV. 281, 282 (1995) (advocating an automobile insurance no-fault system).

the airline industry), the patriotic fervor of the moment, and the genuine desire to help the September 11th victims. While different stakeholders emphasized different aspects of compensation during the rule-making process, the notice and comment period lacked the clash of interests that attends more politically controversial rule-making as, for example, in the field of environmental regulation. Aspects of the regulations were attacked in court, not in an effort to thwart the Fund, but rather as a means of perfecting rights under the legislative scheme adopted for the Fund. Even as these attacks proceeded, the Fund was not impeded in its efforts to process claims.

The claims process itself, like many administrative proceedings, was non-adversarial. It involved only the claimant and the administrative agency, and in this case, an agency whose interests were not at all adverse to those of the persons appearing before it. Neither Feinberg nor his deputies considered it their obligation to protect the U.S. Treasury against genuine claims. The chief obstacle to efficiency was time; the processing of the onslaught of claims that arrived between the *Schneider* decision (in September 2003) and the filing deadline (on December 22) posed a formidable task, but one that was accomplished by the Fund's shutdown date of June 15, 2004. Indeed, the very fact that the Fund had a limited life helped create conditions conducive to the expeditious processing of claims. One cannot set aside work for tomorrow if there is no tomorrow.

9. *Promotion of Strong Civic Society*

In a recently published book, Bob Cochran and I observed that American law, like American culture, although dominated by individualist language, nevertheless evidences a quieter, communitarian strain.³⁶¹ The ATSSSA evidences this communitarian strain in that its victim compensation and airline bailout provisions are efforts by the American people to support the most direct and visible victims of a terrorist attack on the nation. I have suggested earlier that a strong civic society may have been further advanced by a more needs-based formula for recovery, which would have minimized discord regarding economic inequality.³⁶² By tapering recovery of economic damages at the highest and lowest income levels and using an egalitarian formula for noneconomic damages, however, the Special

361. "In the law, the language of individual rights comes easily while the language of community is more foreign." COCHRAN & ACKERMAN, *supra* note 1, at 1.

362. See *supra* notes 122-24 and accompanying text.

Master avoided the most extreme disparities, thereby softening the differentiation between the "haves" and "have-nots."

Public choice theorists might claim that the September 11th victims (represented by the trial lawyers) and the airline industry simply prevailed in the ongoing clamor for "rents," and that ensuing complaints about the Fund's compensation scheme once again demonstrated the dominance of individualism in American legal culture.³⁶³ But only the most jaded cynic would not see in the Fund the heartfelt desire to aid one's neighbor in time of need.³⁶⁴ The "town meeting" format that Feinberg adopted first to obtain feedback regarding the proposed regulations and later to inform potential claimants about the Fund's nuances served as a procedural device conducive to promotion of a strong civic society. Feinberg was not always greeted warmly at these meetings, which sometimes became confrontational. Still, when confronted with complaints about "greedy" victims' families, Kenneth Feinberg replied:

This Fund, and the comments of distressed family members, are not about "greed" but, rather, reflect both the horror of September 11 and the determination of family members to value the life of loved ones suddenly lost on that tragic day. . . . I believe that America is unique in creating such a Fund that expresses the compassion, concern, and determination of its people in coming to the aid of the victims of September 11.³⁶⁵

Robert Rabin has noted that "[a] long and bitter contest over liability, stretching out over a period of years, in which families of September 11 victims had nothing beyond recriminations, bitterness, and frustrations with 'the system,' almost certainly would have been regarded as intolerable to the national community."³⁶⁶ Imperfect as the Fund was, it spared both the families of victims and the larger

363. "Public choice [is] the economic study of nonmarket decision-making, or simply the application of economics to political science." Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 878 (1973), quoting DENNIS C. MUELLER, PUBLIC CHOICE 1 (1979). See also Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707 (1991).

364. To those who would claim that the airline relief provisions of the ATSSSA were yet another example of welfare capitalism, I would respond that the legislation acknowledged the significance of the airline industry to the nation's economy and security and provided recognition of our mutual interdependence. Moreover, the subsequent administration of the loan guarantees and other aid demonstrated that the government was not going to provide corporate handouts without sound basis (at least through this program). See McCartney, *supra* note 232.

365. September 11th Victim Compensation Fund, 67 Fed. Reg. 11,235 (Mar. 13, 2002) (to be codified at 28 C.F.R. pt. 104).

366. Rabin, *supra* note 8, at 771.

American community the trauma of such a protracted process, allowing the community to confront together the threat of terrorism and related challenges. The fact that political partisanship and a divisive war in Iraq would, in a few short years, splinter the national cohesion that developed after September 11th cannot and should not be blamed on the Fund. In addition, the fact that a few potential claimants chose to opt out of the Fund and pursue a tort remedy displays not the Fund's shortcomings, but the value our society places on individual autonomy, even as it pursues the collective good.

10. *Personal Autonomy*

The United States court system has long honored the principles of individual choice in pursuit of legitimate ends. More recently, proponents of alternative means of dispute resolution have espoused the use of processes that place a premium on individual autonomy.³⁶⁷ Procedural justice research supports the view that "high process control for disputants tends to enhance procedural fairness."³⁶⁸ In the course of describing the core values of democratic governance, Reuben goes so far as to say that "personal autonomy should be seen as a unifying and synthesizing value that can have a dominating or trumping effect when other supporting democratic values are in tension."³⁶⁹

As a communitarian, I am cautious about embracing this concept as wholeheartedly as Reuben and others might. Certainly, Western political and legal thought since the Enlightenment has placed a high value on individual autonomy.³⁷⁰ Some of us, however, would hesitate to describe self-actualization as an all-trumping value of our legal or political system.³⁷¹ A process established by Congress, employing the United States Treasury to compensate individuals and families who have sustained direct losses in a national tragedy may have legitimate objectives in addition to the promotion of personal autonomy. Still, the chief reason for establishing the Fund (apart

367. Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001).

368. LIND & TYLER, *supra* note 120, at 94.

369. *See* Reuben, *supra* note 297, at 287.

370. *See id.* at 286, citing Lester G. Crocker, *Introduction to THE AGE OF ENLIGHTENMENT 3* (Lester G. Crocker ed., 1969). *See also* Reuben, *supra* note 297, at n.40-42 (*see generally* the works of Hobbes, Locke, Rousseau, Kant, and Wood).

371. *See* Ackerman, *supra* note 12, at 84 (noting how the discussion of client values is often steered towards selfish ends rather than communitarian principles). *See also* AMITAI ETZIONI, *SPIRIT OF COMMUNITY* 26 (1993).

from the airline bailout) was to assist the September 11th victims and their families, and it is altogether appropriate to consider how the Fund has served the value of personal autonomy or, more colloquially, personal choice.³⁷²

I would assert that the Fund accomplished this quite well. Personal autonomy has little meaning in the context of the upstream law-making process, apart from the participatory features we have discussed earlier. But downstream, the availability of real choice, particularly in the manner of participation, loomed large. First, potential claimants could choose between assured recovery from the Fund and the riskier possibility of litigation which, as discussed earlier, may have served certain needs better than the Fund. The Fund itself presented some procedural choices: to make a paper submission, followed (if the claimant so chose) by an oral hearing (through Track A), or to proceed directly to the oral hearing (through Track B).³⁷³ And these choices were apt to be informed ones. The various assistance sites and other sources of information established by Feinberg's office, together with volunteer assistance through organizations such as Trial Lawyers Care, allowed Fund beneficiaries to make real choices, rather than just making blind stabs in the dark. Furthermore, support from charities, life insurance, and other programs in the months immediately following September 11th provided sufficient interim relief for most claimants to carefully consider whether or not to file a claim with the Fund.³⁷⁴

B. *Limited Objectives and Reasonable Expectations*

As suggested above, retention of the litigation alternative (albeit in modified form) is consistent with our interest in personal autonomy. Therefore, despite the attributes of the Fund, it is not for us to find fault in those who, for reasons of their own, chose to pursue litigation under § 408 of the ATSSSA, or, for that matter, those who chose to do nothing at all. We have already catalogued some very legitimate reasons some people might choose these courses of action.³⁷⁵ For the great majority of claimants, the certainty of recovery, the need for closure, and the desire for administrative convenience worked in favor of a claim against the Fund. For at least a few, however, other concerns – the need for accountability, the desire for a

372. See Reuben, *supra* note 297, at 303-04.

373. 28 C.F.R. § 104.31(b).

374. DIXON & STERN, *supra* note 79, at 31.

375. See *supra* text accompanying notes 197-209.

more ornate process, a reluctance to accept a check from the government – made litigation the more desirable route. Moreover, a very small number of people apparently chose to avoid altogether the “tyranny of participation,”³⁷⁶ making no claim whatsoever. That the Fund proved to be the better choice for most need not have made it the best choice for all.

The Fund itself should be evaluated in light of *reasonable* expectations. No single remedy – not the Fund, not the tort system, not any process devised by man – can fully compensate victims of a tragedy on the scale of September 11th, nor can any such process fully restore a sense of moral balance in the face of such evil. Bernard Mayer has written about the different dimensions of conflict and its resolution, distinguishing between cognitive, emotional, and behavioral dimensions.³⁷⁷ Mayer observes that no single device can fully satisfy the need for resolution in each dimension:

Full resolution of conflict occurs only when there is resolution along all three dimensions: cognitive, emotional, and behavioral. But such closure does not often happen in a neat, orderly, synchronized manner. . . . Although resolution along one dimension encourages resolution along the other dimensions, the reverse is also true. People in conflict may experience a significant setback in their progress toward resolution in one dimension when they do not experience progress along another. Furthermore, different disputants in a conflict often experience differing degrees of resolution along the various dimensions.³⁷⁸

The Fund was not designed to do complete justice. At best, it could compensate for out-of-pocket expenses, prevent financial hardship, and serve as a tangible expression of the sympathy and compassion of the American people. Its purpose was not to replace a spouse, parent, or child, but to replace the *income* that person would have provided; not to fully compensate for the pain and suffering experienced by a fallen victim and his or her family, but to recognize it in a tangible way.

Other processes have been put in place to achieve different ends relating to the events of September 11th. The National Commission on Terrorist Attacks Upon the United States (popularly known as the “September 11 Commission”) was established, largely due to pressure from victims’ families, to seek information about just how the events of September 11th transpired, including an effort to determine what

376. See MAYER, *supra* note 283, at 54.

377. BERNARD MAYER, *THE DYNAMICS OF CONFLICT RESOLUTION*, 98-108 (2000).

378. *Id.* at 108.

lapses – particularly by government entities – may have allowed the tragic events to occur.³⁷⁹ The political process (with respect to government actors) and the market (with respect to private actors, such as the airlines) remain available to impose responsibility on those whom the community-at-large deems to have acted negligently. A few claimants have pursued litigation with this objective, and their efforts might uncover useful information. To the extent liability is imposed as a consequence of such litigation, it might have a deterrent effect as to future conduct, thereby having an effect on the market as well.³⁸⁰ The hunt for Osama bin Laden continues so that we might someday exact vengeance and restore some sense of moral balance.³⁸¹ That hunt, together with other aspects of the War on Terrorism,³⁸² is also a means of promoting another goal: adequate national security in a world we now recognize as more dangerous as a consequence of the events of September 11th. Finally, we can hope that the September 11th victims and their families will find some succor, if not complete healing, through the compassion and support of their families, friends, religious congregations and communities.³⁸³ To expect the Fund to serve all or even most of these functions is to rely too much on any single mechanism.

379. See Titles I and VI, Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, 116 Stat. 2383, 2408-13 (2002) (creating the National Commission on Terrorist Attacks Upon the United States). An acceleration of filings with the Fund occurred as the September 11th Commission was stepping up its work in a visible way, but that acceleration is almost certainly more attributable to the approach of the filing deadline than to any activity by the Commission.

380. Because most September 11th victims and families filed with the Fund and did not pursue § 408 claims, any tort judgments will not reflect the full damage incurred on September 11th. These judgments, because they will not have imposed the full costs on the defendants, may be viewed as having an inadequate deterrent effect. However, to make the *available* defendants (e.g., airlines, security firms, World Trade Center owners, an aircraft manufacturer) liable for the full costs of the September 11th tragedy would impose upon them liability far in excess of their culpability.

381. While unlikely to be realized as a remedy, the Act maintains the possibility of a civil action against bin Laden and other terrorists. See ATSSSA § 408(c).

382. I will leave for another forum the question of whether conduct such as the invasion of Iraq serves to advance the War on Terrorism.

383. Andrew McThenia and Tom Shaffer have recognized that people are most likely to get justice from sources other than the government:

Justice is not usually something people get from the government. And courts . . . are not the only or even the most important places that dispense justice. . . . Justice is not the will of the stronger; it is not efficiency in government; it is not the reduction of violence; justice is what we discover – you and I, Socrates said – when we walk together, listen together, and even love one another, in our curiosity about what justice is and where justice comes from.

Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1664-65 (1985).

The failure of the Fund or its chief administrator to meet all the needs of the victims and their families cannot be attributed to the shortcomings of the administrative process, or to the rules established for the Fund's operation. The Fund falls short only when measured against the unrealistic expectation that a legal process established to provide economic compensation for harm will bring about a complete healing to those who have experienced heartbreaking loss. Such expectations exceed the capacity of the most carefully crafted procedures and the fairest and most compassionate of compensation schemes. In the final analysis, the Fund and its administrators performed admirably. Said the *New York Times* as the Fund concluded its work:

Congress had two purposes in mind when it established the Victim Compensation Fund after 9/11. One was economic: to provide the families of the World Trade Center victims with prompt and fair compensation in exchange for their agreement not to sue the airlines and send them into bankruptcy. The other was to provide a compassionate and collective response to an act of shocking barbarity. . . . [T]he Fund did the task it was given. The airlines got the protection they needed. The American people made a national gesture of sympathy to the bereaved families. The families themselves were able to get compensation through a quicker and simpler route than litigation. In a story with no happy endings, it's good to see this satisfactory one.³⁸⁴

VI. CONCLUSION

For the most part, the September 11th Victim Compensation Fund was a success. The Fund awarded \$7,049,415,537 in compensation to 5560 victims and their families in the course of two years.³⁸⁵ It did so expeditiously, with a minimum of expense and inconvenience to its beneficiaries. The Fund succeeded in providing compensation to the immediate victims of the horrors of September 11th. At the very least, it provided these victims the material wherewithal to get on with their lives, and in most cases, it provided substantially more than that. The Fund also served to insulate the airline industry from devastating tort liability. The Fund succeeded only somewhat in conveying a sense of the compassion of the American people. To

384. Editorial, *supra* note 6.

385. Final Report of the Special Master for the September 11th Victim Compensation Fund of 2001, 110, Table 12: General Award Statistics for Deceased Victims and General Award Statistics for Physical Injury Victims, at http://www.usdoj.gov/final_report.pdf (last visited Feb. 11, 2005).

the extent it failed in this regard, it was (1) because some beneficiaries, having sustained such severe tragedy, did not want to believe that anything good could come of the events of September 11th, and (2) because the norms of American tort law had conditioned them and their lawyers to look askance at a process and compensation formula that did not fully replicate the familiar tort system. But for most beneficiaries, the Fund offered a tangible means of reconstructing their lives and provided an element of closure.

Fretting about the details is something American lawyers, and especially legal academicians, do particularly well. The Fund was deficient in two major respects: (1) the statute's failure to articulate a clear formula for recovery and (2) the absence of any appeal of the Special Master's determinations. Both of these deficiencies were consequences of hastily drafted statutory language. Both were cured to a great extent in the administrative process, by (1) the articulation of a formula for recovery for most victims in the regulations and (2) the fair and careful manner in which the Special Master and his staff considered and determined the awards.

A few lasting lessons may be gleaned from the experience. The unusual events of September 11, 2001 gave rise, through the ATSSSA, to a unique combination of welfare capitalism and genuine humanitarianism that is not likely to be duplicated in the foreseeable future. The Fund's event-specific compensation scheme was too costly to serve as a model for a more widespread plan of relief for victims of terrorism or for large-scale tort reform. In the Fund we saw evidence of the endowment effect of traditional substantive and procedural norms for recovery for personal injury, and how quickly a generous expression of the American people's compassion can be transformed into an entitlement. We also saw how the administrative process can be used to reshape a vague Congressional mandate into a workable program, and how a skillful, professional effort can avoid some of the costs and uncertainties of traditional compensation systems. Finally we saw, from the bittersweet experience of Kenneth Feinberg and his staff, that no good deed goes unpunished.

On June 15, 2004, Special Master Kenneth Feinberg closed the Fund for business and paid a quiet visit to the President.³⁸⁶ No bands played, no champagne corks popped for the Victim Compensation Fund. That is as it should be. The Fund, born out of tragedy, will never be cause for celebration. It will not bring happiness. It will not mend broken hearts or establish full justice. Those of us who

386. See Editorial, *supra* note 6.

try to derive meaning from tragedy may have to be content with the fact that an agency established by Congress to provide tangible relief to the direct victims of a national trauma did so fairly and efficiently, and then quietly closed its doors.