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PROCEDURAL DESIGN AND TERROR VICTIM COMPENSATION

*Janet Cooper Alexander**

INTRODUCTION

Within eleven days of September 11, 2001, Congress passed, and the President signed into law, legislation to provide compensation for the losses caused by the terrorist attacks.¹ The Air Transportation Safety and System Stabilization Act (ATSA) included approximately \$15 billion in loans and guarantees for the airline industry and a victim compensation program, which was then expected to cost between \$3 and \$4 billion, for those who were injured or killed in the attacks and their families. The victim compensation program was an afterthought. The first recorded mention of adding victim compensation to the airline bailout occurred only three days before the bill was signed into law. Scant consideration was given to the details, particularly the procedural details, of the program. Yet the program was not placed within an existing procedural or administrative framework, such as the federal or state courts, or a federal agency, such as the Federal Emergency Management Agency (FEMA) or the Department of Health and Human Services. Rather, it was created as a freestanding program to be administered by a special master who would be appointed by the Attorney General and whose awards would be paid directly from the national treasury. Nearly every detail of the program, from the factors to be considered in setting individual awards to the procedure for filing claims, was left to be filled in by the Special Master.

* Frederick I. Richman Professor of Law, Stanford Law School. Grateful thanks to my invaluable and indefatigable research assistant, Ron Fein, whose help included primary responsibility for the summary of the legislative history and structure of the September 11th Victim Compensation Fund that appears as the Appendix to this Article. Special thanks to Bob Peck of the Center for Constitutional Litigation, who provided information about the origin of the victim compensation proposal and provided me a copy of the initial draft proposal, to Deborah Hensler and participants in a workshop on designing victim compensation programs, sponsored by the Sanford Center on Conflict and Negotiation in April 2002, to participants at the 9th Annual Clifford Symposium on Tort Law and Social Policy, and to Steve Landsman and Bob Clifford for making the Symposium possible.

1. Pub. L. 107-42, 115 Stat. 230 (2001) (codified at 49 U.S.C.A. § 40101 note (West Supp. 2003)) [hereinafter ATSA]. The victim compensation program is contained in Title IV of the Act. September 11th Victim Compensation Fund of 2001, §§ 401-409, 115 Stat. at 237-41.

As the September 11th Victim Compensation Fund of 2001 took shape through Special Master Kenneth Feinberg's promulgation of regulations and processing of claims, claimants and others criticized the fairness and legitimacy of the procedural rules as well as the administration of the Fund.² Many of these complaints concerned matters such as the use of grids and caps, whether the regulations should have been written to allow larger awards,³ the methodology and evidentiary basis for estimating lost future income, whether the collateral source rule should apply and to what kinds of payments, whether same-sex partners should be able to file claims, and whether the program should be expanded to include victims of other past terrorist acts.⁴ Questions about the more fundamental issue whether a government-funded program to provide for victims of terrorist attacks should be modeled on mass tort litigation at all were muted, at least at the beginning.

President George W. Bush has predicted that the "war on terrorism" will last for a long time, perhaps a decade, and that more attacks will certainly occur on U.S. soil.⁵ The metaphorical war has expanded to include a real war and occupation, first in Afghanistan and then in

2. See generally U.S. DEP'T OF JUSTICE, COMMENTS, at <http://www.usdoj.gov/victimcompensation/comments.html> (last visited Oct. 13, 2003) (updated periodically); David W. Chen, *7 Families Sue Administrator of 9/11 Fund*, N.Y. TIMES, Jan. 27, 2003, at B1; David W. Chen, *Worst-Hit Firm Faults Fairness of Sept. 11 Aid*, N.Y. TIMES, Sept. 17, 2002, at A1.

3. The mean award for death claims is currently around \$1.8 million, with a high of \$6.9 million and a low of \$250,000, after offsets. U.S. DEP'T OF JUSTICE, COMPENSATION FOR DECEASED VICTIMS: AWARD PAYMENT STATISTICS, available at http://www.usdoj.gov/victimcompensation/payments_deceased/html (last visited Jan. 26, 2004) [hereinafter U.S. DEP'T OF JUSTICE, DECEASED VICTIMS]. The highest award to an injured claimant to date is \$7.9 million. U.S. DEP'T OF JUSTICE, COMPENSATION FOR PERSONAL INJURY VICTIMS: AWARD PAYMENT STATISTICS, available at http://www.usdoj.gov/victimcompensation/payments_injury (last visited Jan. 26, 2004) [hereinafter U.S. DEPT. OF JUSTICE, PERSONAL INJURY VICTIMS].

4. Congress later passed legislation directing the President to prepare "a legislative proposal to ensure fair, equitable, and prompt compensation for all United States victims of international terrorism," both in the future and retroactively to November 1, 1979. Departments of Commerce, Justice, and State, and the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 107-77, § 626(a)-(b), 115 Stat. 748, 803 (2002). The origins of this provision are unclear; it was in neither the original House nor Senate versions of the bill, and appeared for the first time in the conference report, with no further explanation. See H.R. REP. NO. 107-278, at 57 (2001); 147 CONG. REC. H8001 (daily ed. Nov. 9, 2001). November 1, 1979 was probably selected because the Iran embassy hostage crisis began on November 4, 1979. Additionally, the House passed a bill to include victims of the embassy bombings in the 9/11 program; it stalled in the Senate. See Embassy Employee Compensation Act, H.R. 3375, 107th Cong. (2001).

5. See, e.g., President George W. Bush's Address to a Joint Session of Congress and the American People (Sept. 20, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> (last visited Oct. 13, 2003) ("Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated."); *More Terror Attacks Likely, Rumsfeld Says*, MILWAUKEE JOURNAL-SENTINEL, May 18, 2002, at 10A (quoting Secretary of Defense Donald Rumsfeld as saying, "The likelihood

Iraq. Initially, at least, the Bush Administration argued for war in Iraq on the ground that Saddam Hussein's regime sponsored international terrorism and might provide weapons of mass destruction—chemical, biological, and nuclear—to terrorists who would use them against the United States. Even if that threat was oversold or has been eliminated, there are many potential sources of weapons for such terrorist attacks. It is timely, then, to consider how the government should go about compensating future civilian losses in the war against terrorism.

Although this Article views the problem of designing a compensation program for future victims of terrorism “through the spectacles of . . . procedure,”⁶ procedural design is not just a matter of tinkering with the details or mechanisms of what has already been done or of importing familiar procedures into new contexts. Rather, good procedural design flows from foundational questions about the purpose and function of the institution we are designing. In this case such questions include:

- What is the purpose of the compensation program?
- What values should the program embody?
- Why should eligible claimants be treated differently from apparently similarly-situated persons?
- Why are existing procedural institutions inadequate to compensate these persons?

The answers to these questions—whether consciously chosen or unwittingly assumed—will play a large part in determining the remedy, a crucial issue for procedural design. As an example, if the relevant purposes and values lead to a conclusion that every person who was present at Ground Zero, or their estates, should receive a payment of \$5,000 (or \$5 million), no very elaborate procedures will be needed. It will only be necessary to verify, to a desired degree of accuracy, that the claimant was indeed present and the address to which to send the check. If, at the other end of the spectrum, an individualized determination of harm including all the components of tort damages is needed, the procedure will be much more complicated and will probably look a lot like tort litigation. Moreover, these functional consider-

is—because it's not possible to defend at every place at every moment—that there will be another terrorist attack. We should just face that reality.”).

6. “Everything that you know of procedure you must carry into *every* substantive course. You must read each substantive course, so to speak, through the spectacles of that procedure. For what substantive law says should be means nothing except in terms of what procedure says you can make real.” KARL N. LEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 9 (1960).

ations will suggest procedural analogues that can serve as models for crafting procedural rules.

In this Article, I discuss possible models for a victim compensation fund, such as mass tort litigation, disaster relief, and insurance; the implications of these models for procedural design; and some suggestions for designing future victim compensation programs.⁷

II. THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001

When Congress passed legislation authorizing compensation for the victims of September 11, 2001, the compensation program itself was an afterthought, and the procedures by which the program would be administered were given almost no thought at all.⁸ The primary purpose of the legislation was to protect a vital part of the national infrastructure from collapse.⁹ Not only did United Airlines and American Airlines face massive potential tort liability arising from the September 11th attacks, which made September 11, 2001 “the second-bloodiest day in United States history, after the battle of Antietam in the Civil War,”¹⁰ but even more importantly, the consequences of the at-

7. I regret that this Article, like much of the public discussion of the events of September 11th, may seem to focus on those injured or killed at the World Trade Center to the exclusion of the victims of the attacks on American Airlines Flight 77, which crashed into the Pentagon, and United Flight 93, which was brought down near Shanksville, Pennsylvania.

With respect to the analysis of this Article, the reason is primarily that the death and injury toll of the Pentagon and Shanksville crashes was within the “normal” range for aviation disasters. The casualties from the Flight 93 crash were limited to the 40 passengers and crew and the four hijackers, while at the Pentagon site 59 people aboard the plane and 125 on the ground died, with many more injured. Property damage at the Pennsylvania site was negligible, and though the Pentagon was seriously damaged, it was not destroyed. The losses associated with these crashes could easily have been compensated through the tort system within the policy limits of the insurance on the airplanes. The World Trade Center attack was unique because the vast majority of the 2,800 dead were on the ground, and the property damage resulting from the crashes was spectacularly large (as well as arguably unforeseeable). See Eric Lipton, *Struggle to Tally All 9/11 Dead by Anniversary*, N.Y. TIMES, Sept. 1, 2002, at A1 (As of that date, the official death tally was 2,807, and the final total was expected to be no fewer than 2,750.). The insurance carried by United Airlines and American Airlines was far too little to cover such damages and the excess was far beyond the power of the airlines to pay.

With respect to public perceptions, the destruction of the World Trade Center not only resulted in the loss of many more lives than in previous terrorist attacks on U.S. soil, it was also captured in many vivid images, involved the destruction of a major landmark and symbol of the nation’s largest city and its financial markets, and was highly salient to the media centered in New York City.

8. For a fuller discussion of the history of the legislation creating the September 11th Victim Compensation Fund and a summary of the provisions of the statute and the implementing regulations, see the Appendix.

9. H.R. 2891, 107th Cong. (2001) (stating that the bill’s statutory purpose was “[t]o preserve the continued viability of the United States air transportation system”).

10. Lipton, *supra* note 7.

tacks threatened the “continued viability” of the entire air transportation industry.¹¹ All passenger flights were grounded immediately after the attacks, causing industry losses of approximately \$330 million per day. Fear of further attacks caused a huge drop in passenger demand.¹² The airline industry estimated losses during the coming year at \$24 billion,¹³ raising the specter of multiple bankruptcies. Additionally, the risks and uncertainties of future attacks caused insurers to threaten to refuse to provide coverage, without which the airlines could not fly.¹⁴

The original version of the legislation, introduced on September 14, 2001, was a simple \$15 billion airline relief bill.¹⁵ While this version capped the airlines’ liability at the amount of the insurance on the four airplanes, a total of \$7 billion, it contained no provision for victim compensation at all.¹⁶ The losses caused by the crashes were estimated at \$40 billion.¹⁷

Language creating a victim compensation fund was added a week later to win the votes of House Democrats, who had insisted that the bill include compensation from the federal government to the dead and injured and their families as a quid pro quo for restrictions on

11. *Id.*

12. *Hearing on H.R. 2891 To Preserve the Continued Viability of the U.S. Air Transp. Sys., and on the Fin. Condition of the Airline Indus. in the Aftermath of the Events Which Occurred on Tuesday, September 11, 2001, Before the House Comm. on Transp. and Infrastructure*, 107th Cong. 1 (2001), available at <http://www.house.gov/transportation/fullhearings/09-19-01/09-19-01memo.html> (last visited Oct. 13, 2003) [hereinafter *Hearing on H.R. 2891*]. See also H.R. COMM. ON TRANSPORTATION AND INFRASTRUCTURE, H.R. REP. NO. 107-45; *Hearing on H.R. 2891 To Preserve the Continued Viability of the U. S. Air Transp. Sys., Before the House Comm. on Transp. and Infrastructure*, 107th Cong 44-45 (2001) (testimony of Leo F. Mullin, Chairman and CEO, Delta Air Lines) (explaining calculations), available at http://commdocs.house.gov/committees/Trans/hpw107-45.000/hpw107-45_of.htm (last visited Oct. 13, 2003).

13. Industry operating losses in 2001 (including less than four months following the attacks) exceeded \$10 billion, with net losses of almost \$8 billion, compared to operating profits of almost \$7 billion and net profits of \$3 billion in 2000. U.S. DEP’T OF TRANSP., BUREAU OF TRANSPORTATION STATISTICS (July 11, 2002), available at http://www.bts.gov/PressReleases/2002/bts15_02 (last visited Oct. 13, 2003). Within a week of the attacks, the five largest airlines (Continental, Northwest, American, United, and Delta) all announced significant flight reductions and layoffs of a total of perhaps 100,000 employees. *Hearing on H.R. 2891, supra* note 12, at 2.

14. Congress later passed legislation creating a federally administered terrorism risk insurance program to assure the availability of property and casualty insurance for acts of terrorism and to protect the insurance industry from the risks and uncertainties of losses arising from terrorist acts. See *Terrorism Risk Insurance Act of 2002*, Pub. L. No. 107-297, 116 Stat. 2322 (2002) (codified at 15 U.S.C.A. § 6701 note (West Supp. 2003)) [hereinafter *TRIA*].

15. See H.R. 2891, 107th Cong. (2001).

16. The bill authorized the President to compensate air carriers from losses sustained as a result of the September 11th attacks through a combination of direct payments, loans or loan guarantees, and suspension or modification of the airlines’ federal financial obligations. *Id.* § 1(1)-(3).

17. Lisa Belkin, *Just Money*, N.Y. TIMES, Dec. 8, 2002, § 6 (Magazine), at 92.

their ability to sue the airlines.¹⁸ The Democrats' proposal, which would have created a specific fund through federal appropriations that could also receive funds from insurance, potential defendants, and private contributions and that would have been administered by a newly-created Article I court, was significantly different from the bill that soon became law. The Republican leadership was unwilling to agree to the creation of a "September 11th Compensation Court" affiliated with the Southern District of New York and headed by an Article I judge appointed by the President, with the advice and consent of the Senate, to a five-year term.¹⁹ Instead, they drafted a bill creating a more ad hoc structure that strongly resembles the procedure for administering mass tort settlements. This bill was quickly enacted and signed by President Bush.

The new statute²⁰ created a program (not really a fund, as the payments were to be made from the Treasury as awarded by the Special Master and were not limited to any particular individual or aggregate dollar amount) under which claimants²¹ would receive compensation from the federal government in exchange for giving up their right to sue anyone but the hijackers and their accomplices.²² Just twenty-two hours elapsed between the first recorded mention of a victim compensation program and September 22, when the President signed the bill into law.²³ The compensation program was not examined through the committee process, and the entire bill (of which the provisions creating the Fund were only a small part) was debated for just over an hour in both the House and Senate.²⁴ Very little discussion of the victim compensation provisions took place during this abbreviated debate.²⁵

18. The idea apparently was originally discussed in a meeting between representatives of the Association of Trial Lawyers of America (ATLA) and the Democratic leadership on September 19. *See id.*

19. For a more detailed discussion of the initial proposal, see *infra* text accompanying notes 130-135.

20. ATSA, *supra* note 1.

21. Claimants were persons injured on September 11, 2001 as a result of the attacks, or their estates or personal representatives. ATSA, *supra* note 1, § 405(c)(2)(A)-(C); *see also* Appendix, text accompanying notes 70-84.

22. ATSA, *supra* note 1, § 405(c)(3)(B)(i)-(ii).

23. *See* Library of Congress, Bill Summary and Status for the 107th Congress, H.R. 2926, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR02926:@@L&summ2=M&#status> (last visited Oct. 13, 2003). The first mention came on September 19, in the committee hearing on H.R. 2891, when Rep. Max Sandlin asked the CEO of World Airways, "Do you think some of the money that we set aside, and certainly we want to help the airlines, should some of that be set aside for a claim fund for the victims?" H.R. COMM. ON TRANSP. & INFRASTRUCTURE, H.R. REP. NO. 107-45, at 152 (2001). The legislative history is discussed in more detail in the Appendix *infra* text accompanying notes 5-53.

24. *See* Library of Congress, *supra* note 23.

25. *See* Appendix notes 22-53 and accompanying text.

Perhaps partly because a primary purpose of the September 11th Victim Compensation Fund was to insulate United Airlines and American Airlines from tort liability for the loss of life and property resulting from the use of their airplanes as weapons of mass destruction, partly because those drafting the act were familiar with procedures used in distributing settlement funds in mass tort cases, partly because members of the American Trial Lawyers Association (ATLA) were active in the drafting of the bill, and partly because legislators wanted to express the generosity of the American people toward the victims, the process created by the statute and its implementing regulations looks very much like the procedures commonly used in administering mass tort settlements. The bill set forth a bare bones definition of eligible claimants, adopted a measure of compensation that looked a lot like tort damages, directed that regulations be promulgated to implement the program, and authorized the appointment of a special master to oversee the administration of claims.²⁶ Potential disputes over the purpose and operation of the program were avoided by keeping both the statute and the legislative debate short. The details were very much left to be filled in by regulation, and it turned out that it was the Special Master who, by promulgating regulations, in large part determined the procedural form of the program—and, indeed, much of its substantive content.²⁷

The goal of persuading potential plaintiffs to opt out of the tort system dictated the nature of the compensation provided under the program.²⁸ In order to be attractive to potential tort plaintiffs, the compensation would have to be comparable to what they could expect to receive from the tort system.²⁹ The statutory language was clearly modeled on tort damages. The Special Master was directed to determine “the extent of the harm to the claimant, including any economic and non-economic losses” and then to determine the amount of compensation “based on the harm to the claimant, the facts of the claim,

26. See ATSA, *supra* note 1, §§ 401-407. See also Appendix text accompanying notes 130-149.

27. See ATSA, *supra* note 1, §§ 404, 407. See also Appendix text accompanying notes 130-149.

28. For plaintiffs who elected to remain in the tort system, the statute created a federal cause of action for the September 11th hijackings and crashes, made it the exclusive remedy for damage claims against any defendant other than the hijackers and their co-conspirators, limited the airlines' liability for all claims (including property damage and punitive damages) to the amount of the insurance coverage, and consolidated all claims for property damage, personal injury, and death in the Southern District of New York. ATSA, *supra* note 1.

29. Of course, there was one important difference that was largely ignored by critics who argued that compensation from the Fund was too low: unlike tort plaintiffs, claimants did not have to prove that a particular defendant was legally liable for their losses, or run the risk that the defendant would become insolvent or otherwise fail to satisfy the judgment. See *infra* notes 76-86 and accompanying text.

and the individual circumstances of the claimant.”³⁰ Because the awards were determined according to tort principles, they were based largely on the victim’s earnings at the time of the crashes. (The regulations limited non-economic damages to a flat sum that varied only according to the number of the victim’s survivors.)³¹ The statute covered only claims for “physical harm” or death; no provision was made for compensation for property damage or any other economic loss.³²

Three important assumptions were embedded in the statutory compensation scheme: (1) Mass tort litigation is the paradigm for how to compensate victims of blameworthy acts including (international) terrorism. (2) Global settlement of all claims through a centralized process in which determinations of individual compensation are made outside the courts is the preferable resolution of mass tort litigation. (3) Claims administration under a special master or other bureaucratic form is a cheaper, faster, and more equitable method of compensation than litigation. These assumptions underlie the decision to reject the Democrats’ proposal to create an Article I court to administer a fund created by Congress and containing not only federal appropriations but also insurance proceeds, corporate payments, and private charitable contributions, and instead to turn the process over to a “special master” to administer a government entitlement program in an essentially ad hoc manner.³³

There are two reasons why the procedural structure of the September 11th Fund has been unsatisfactory. First, no real thought was given to procedural design. The drafters, in a tearing hurry and with many other large and urgent matters to think about, took the simplest procedural form that was ready to hand—give the victims compensation comparable to what they would have recovered in a successful tort suit, appoint a special master who is experienced at administering tort settlement funds and give him a blank check on the Treasury, and

30. ATSA, *supra* note 1, § 405(b)(1)(B)(i)-(ii). Punitive damages were excluded. *Id.* § 405(b)(5). Awards were to be reduced by collateral source payments, although the regulations interpreted this provision not to apply to payments from charities. *See id.* §§ 402(4), 405(b)(6); 28 C.F.R. § 104.47(b)(1)-(2) (2002).

31. 28 C.F.R. § 104.44 (2002).

32. *See* ATSA, *supra* note 1, §§ 403, 405(c)(2)(A)-(C). Congress began to address the issue of property damage through TRIA, which required insurers to make terrorism insurance available to the same extent as other types of coverage, made the federal government responsible for paying up to almost 90% of such claims, and set up a mechanism for recouping amounts paid for such claims through increases in premiums. *See* TRIA, *supra* note 14.

33. Of course the Special Master promulgated comprehensive regulations following exhaustive hearings and extensive public comments. But the decision of how to go about the process of promulgating regulations, as well as the scope and content of the regulations, was left largely to the Special Master’s discretion.

let him work out the details. This ad hoc (in fact, *ad hominem*) approach may well have been necessary in the chaotic days after September 11th, but the resulting institutional design contains gaps and internal inconsistencies.

Significantly, differences over the program's procedural form did emerge even during the lightning-fast drafting process. The Democrats originally proposed a true fund, not an open-ended call on the federal treasury, that would be administered by a new Article I court.³⁴ The Republican leadership, however, balked at creating a legislative court to administer the program and instead created something that looked like a mass tort settlement facility with a Special Master (unattached to any court) who reported to the Attorney General. These were important differences, but they were resolved out of public view and were never subjected to the normal legislative hearing process.

The second and more fundamental reason for the unsatisfactory structure of the program is that the central purpose of the Act was not to compensate victims but to keep the airlines running by, among other things, protecting them from going broke paying tort judgments. To a great extent, the concern that the risk of enormous liability might bankrupt airlines or cause the insurance industry to refuse to provide coverage framed the issue as one about tort-type compensation. Some members of Congress appeared to envision payments that would be roughly equivalent to the tort recoveries that were being discouraged.³⁵ Others stated that the purpose of the Fund was not to "duplicate" the tort system but to help victims and their families to get back on their feet.³⁶

34. See *infra* text accompanying notes 131-135.

35. See 147 CONG. REC. H5906 (daily ed. Sept. 21, 2001) (statement of Rep. Robert Turner) (bill would provide "full recovery for their economic and noneconomic damages"); *id.* at S959 (statement of Sen. Charles Schumer) (purpose of the victim compensation fund was that without it, victims in the airplanes would recover but victims on the ground would probably receive nothing); *id.* at S9586 (statement of Sen. Mitch McConnell) ("My only concern with this bill is that . . . there is no limit in this legislation on the amount of lawyer fees that personal injury lawyers can receive for filing lawsuits . . . [T]here is no guarantee that . . . the personal injury lawyers do not end up taking the lion's share of the award."); *id.* at S9594 (statement of Sen. Orin Hatch) ("This will help ensure that injured people receive money and receive it faster than they otherwise would if left to pursue claims through litigation.").

36. See 147 CONG. REC. S9594 (daily ed. Sept. 21, 2001). Sen. John McCain stated:

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 is it the intent of the fund to duplicate the arbitrary, wildly divergent awards that sometimes come from our deeply flawed tort system . . . 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.

The pressure to enact the legislation immediately was intense, and this fundamental issue about the purpose of the compensation program was not resolved by Congress. The adoption of a tort measure of damages in what was essentially a federal government entitlement program guaranteed that the program would have many built-in contradictions. The tension about the purpose of the program continued throughout the promulgation of the Interim and Final rules, and continues to this day. For example, families of high-income victims who died at the World Trade Center filed a class action lawsuit against the Special Master, the Attorney General, and the Department of Justice seeking a judicial determination that the regulations shortchange the families of high-income victims by hundreds of millions of dollars in violation of the statutory purpose, that lost income should be compensated in full, even for victims who were making millions of dollars a year, and that damages for pain and suffering should not be capped.³⁷ The government argued in response that the statute is not “a replacement of the tort system”; rather, its purpose is to provide a “sustainable, realistic and reasonable foundation” for families to rebuild their lives.³⁸

III. PURPOSES AND VALUES OF VICTIM COMPENSATION

Of course, at one level the purpose of a statutory victim compensation program is to provide money to the victims or their families. But why? What was it about these events that made Congress decide that the federal government should pay money to these persons, and why was a special program needed?

A. *The Tort Model*

As we have seen, the primary purpose of the ATSA was to bail out the airline industry. Victim compensation was added to win the votes necessary to pass the bill, to provide a quid pro quo—perhaps constitutionally necessary—for retroactively capping the airlines’ tort liability, and for cosmetic purposes to make a \$15 billion airline bailout more acceptable to the public. This purpose, and the fact that the legislation was passed after the injuries had occurred, dictated that it was important to get potential tort plaintiffs to choose to file claims

Id. See also *id.* at S9599 (“This program is targeted to help the neediest victims and their families.”) (statement of Sen. Patrick Leahy).

37. See *Colaio v. Feinberg*, 262 F. Supp. 2d 273 (S.D.N.Y. 2003); David W. Chen, *Relatives’ Lawyers Ask Court To Rule Sept. 11 Fund Unfair*, N.Y. TIMES, Apr. 15, 2003, at D3.

38. Chen, *supra* note 37. On May 8, 2003, the district court granted the government’s motion for judgment on the pleadings. See *Colaio*, 262 F. Supp. 2d at 301.

rather than sue the airlines. This, in turn, meant that the expected value of filing a claim would have to be similar to tort damages.

The choice of (mass) tort damages as the conceptual model is not surprising. The attacks were unquestionably a gigantic tort that killed or injured thousands of people and caused massive economic damage. Additionally, tort litigation is the norm whenever an airplane crashes or a building falls down. But in this most public of cases, tort litigation was not suited to the task of compensating victims. Although the victims of September 11th appeared as “deserving” of large recoveries as anyone could possibly be, they could not recover damages from the real culprits, the hijackers and their accomplices, who were either dead or out of reach.³⁹

It is common in tort cases with serious injuries in which the primary tortfeasor is judgment-proof, such as car crashes or nightclub fires, to seek recovery from secondary defendants such as manufacturers, operators, or premises owners. With respect to the September 11th injuries, however, it seemed neither fair nor in the public interest to require the possibly negligent airlines or premises owners to pay the full amount of the damages, especially as they also had suffered large losses. Both the size of potential judgments and the uncertainty about whether they would be awarded threatened the financial security of the airline industry and the continued availability of insurance coverage, without which they could not fly. Accordingly, rather than allowing the principles of joint and several liability on the one hand and foreseeability on the other to define the extent of tort damages against the solvent potential defendants, Congress gave the airlines a “get-out-of-liability-free card,” limiting their aggregate tort liability to the amount of insurance coverage for the four airplanes involved. This decision essentially eliminated potential solvent tort defendants, at least for victims on the ground.

When there are no solvent defendants, tort victims usually have to bear the costs of their injuries themselves, with the help of personal assets and insurance. This outcome was also unacceptable, at least as to the dead and injured.⁴⁰ As the massive outpouring of private char-

39. The possibility of proceeding against the United States or foreign assets of individual (e.g., Osama bin Laden) or state sponsors of the September 11th attacks is discussed *infra* at notes 108-110 and accompanying text.

40. No provision was made for government compensation for property damage. Rather, the owners would have to rely on their own assets or insurance, or (if they did not make a claim against the Fund for personal injury or death) find someone to sue in court. The limitation on airline liability, however, applied to all liability arising out of the events of September 11th, including claims for property damage. A few months later, Congress passed legislation designed to ensure the availability and affordability of anti-terrorism coverage in property and casualty

ity demonstrated, the public wanted to take care of the victims, not only out of shock and pity but also as a show of collective unity and defiance.⁴¹ Moreover, the federal government may have been partly at fault (even though it probably could not be held legally liable) for security failures that made the hijackings possible, as well as, in a more general sense, for the foreign policy that the terrorists opposed. Therefore it could seem logical to craft a solution in which the victims received something approximating tort damages, but the federal government, on behalf of the nation, would step in and pay.

A further possible reason for setting compensation to approximate tort damages is the possibility that if Congress absolved the airlines and other secondary defendants of liability after the fact and left the victims to fend for themselves, the bailout might be vulnerable to an attack based on the takings clause. The argument would be that when Congress capped the airlines' liability at their existing insurance coverage, substituted an exclusive federal cause of action for state law causes of action, and required claimants to waive all of their claims arising from the events of September 11th in order to receive compensation from the Fund, it took private property (the right to sue the airlines under state tort law for injuries that had already occurred) for public use (to protect vital national infrastructure). Due process therefore would require the government to provide "just compensation."⁴² Just compensation would be the fair market value of the confiscated chose in action—the expected value of litigating to a judgment.⁴³ Therefore, under the takings view, compensation from the Fund should be based on the same principles as tort damages.⁴⁴ Proponents of the victim compensation program deployed takings ar-

insurance, and to stabilize the market for such insurance through government guarantees and regulation. TRIA, *supra* note 14.

41. The problem of how to draw the line between the September 11th victims and other tort victims who go without recovery is discussed below. See *infra* notes 92-102 and accompanying text.

42. See Joan Bernott Maginnis, *The 9/11 Victim Compensation Fund: Overview and Comment*, Federalist Society for Law and Public Policy Studies, at 4, available at <http://www.fed-soc.org/Publications/Terrorism/VictimFund.pdf> (last visited Oct. 13, 2002) (arguing that ATSA's limitation on the ability to sue may constitute an uncompensated taking); See also *Colaio*, 262 F. Supp. 2d at 300 (rejecting plaintiffs' claim that the Special Master's regulations were a violation of their rights to full compensation under ATSA; plaintiffs did not argue that the retroactive limitation on liability violated due process).

43. See, e.g., Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067 (1989).

44. Those who suffered property damage also suffered a taking—their suits too were limited to the amount of insurance—but the Fund was limited to claims based on personal injuries or death. If the takings argument is viable, then there is an important gap in the compensation program.

guments in the nonpublic discussions that led to the creation of the program.⁴⁵

B. Alternatives to the Tort Model

There are other possible ways of perceiving the events than the tort model, however.

The fiery collapse of the World Trade Center might be seen as a kind of natural disaster that no one could foresee or protect against. In this conception, the purpose of a victim's compensation program would be the same as other federal disaster relief—to help the victims or their survivors get through the calamity and back on their feet.

One might also view the attacks as an act of war waged against civilians and the U.S. economic system by “enemy combatants,” as the President repeatedly suggested both before and after the war on Iraq. Military casualties of war receive only modest payments, however, and civilian casualties normally receive no government compensation (other than ordinary employee benefits, if applicable).

Alternatively, such events might be seen as an unavoidable risk of life in early twenty-first century America, a risk that, because it is related to the national government's foreign policy, the federal government should insure against.

Or the attacks might be viewed as acts directed symbolically against the entire country and its government, making the victims emblematic surrogates for all Americans. On this view, the expressive content of the act might call for an expressive act of national generosity toward the victims, who should be treated differently from other victims of torts, crimes, or disasters as a way of showing defiance to the perpetrators—in the words of one commentator, “to serve as a national expression of unity in the face of a tragedy unique in American history, as well as to help survivors.”⁴⁶

C. Procedural Implications of Differing Conceptions of the Purposes of Compensation

In this section I discuss the procedural implications of these different views of the nature of the victims' losses and the purpose of compensating them.

45. Conversation with Robert Peck, Senior Director for Legal Affairs and Policy Research, Association of Trial Lawyers of America (Apr. 24, 2003). Whatever the merits of the takings argument as applied to the September 11th program, however, it would not apply to legislation prospectively creating an exclusive federal cause of action governed by federal law and with federal remedies to apply to harms caused by terrorist acts committed in the future.

46. Michael I. Meyerson, *Losses of Equal Value*, N.Y. TIMES, Mar. 24, 2002, at D4.

1. Tort Litigation and Settlement

The model that is implicit in the statute is tort litigation, which is the usual means of obtaining compensation for personal injuries caused by intentional or negligent acts. Tort litigation follows as a matter of course when airplanes fall out of the sky or crash into things and when buildings fall down. This is true even when the events occur as a result of terrorist acts. For example, private litigation over the Lockerbie crash resulted in payments by the airline of over \$500 million,⁴⁷ the 1993 World Trade Center bombing resulted in 500 lawsuits,⁴⁸ and there was litigation against the federal government over the Oklahoma City bombing.⁴⁹ In this case it was almost certain that lawsuits would be filed against the airlines, the architects of the World Trade Center, the Port Authority, and others whose negligence, it would be argued, made the attacks possible and the damage more catastrophic.⁵⁰

Such lawsuits would not be especially difficult for courts to handle. Personal injury claims would have involved no more than about 3000 individuals. Joinder, joint representation, and consolidation and transfer would have aggregated the claims into a relatively small number of litigations that would resemble other mass accident cases. Property damage cases, particularly as the factual and legal theories became more attenuated, would be more difficult to manage, but many procedural mechanisms, including new statutory tools, exist to make such litigation feasible. For example, the Multiparty, Multiforum Trial Jurisdiction Act of 2002 grants the federal courts original jurisdiction over single-event accidents in which more than seventy-five natural persons have died and in which there is minimal diver-

47. See Amanda Ripley, CNN, *What Is a Life Worth?* (Feb. 4, 2002), available at www.cnn.com/ALLPOLITICS/time/2002/02/11/life.html; see also Ronald Sullivan, *Court Upholds Pan Am 103 Awards*, N.Y. TIMES, Feb. 1, 1994, at D2.

48. Jensen Brenner Floor Statement on Litigation Management Provisions in Terrorism Insurance Bill, U.S. House of Rep. Comm. on Judiciary (Nov. 29, 2001), available at http://www.house.gov/judiciary/news_112901.htm (last visited Oct. 13, 2003).

49. *Victims Fight Over Lawsuit*, DENVER POST, Mar. 20, 1997, available at <http://63.147.65.175/bomb/bomb63.htm>; CNN, *Oklahoma Bombing Victims To Sue Government Agencies* (Mar. 19, 1997), available at <http://www.cnn.com/US/9703/19/okc.bomb/index.htm> (last visited Oct. 13, 2003).

50. See generally *Mulligan v. Port Auth. of N.Y. & N.J.*, No. 02 Civ. 6885, 2002 WL 31008974 (S.D.N.Y. Sept. 6, 2002) (order permitting plaintiffs to sue Port Authority but leave litigation "dormant" and thus not waive ability to claim against the Victim Compensation Fund); James Glanz & Eric Lipton, *Expert Report Disputes U.S. on Collapse*, N.Y. TIMES, Oct. 22, 2002, at B1; Greg Barrett, *Fireproofing Deficient on World Trade Center, Says Architect*, LAFAYETTE J. & COURIER, Sept. 12, 2002; Nadine Post, *No Reasonable Precautions Could Have Prevented Collapses*, ENG'G NEWS-REC., Apr. 8, 2002.

sity.⁵¹ This statute also permits consolidation of all cases into one court through removal of actions filed in state court⁵² and multidistrict litigation treatment.⁵³ The Act was designed to streamline litigation of mass accident cases generally, but it would apply equally to single-event acts of terrorism such as the September 11th attacks. More sweeping procedural innovations are also possible. For example, the Terrorism Risk Insurance Act of 2002 (TRIA)⁵⁴ provides for an exclusive federal cause of action for property damage, personal injury, or death resulting from an act of terrorism,⁵⁵ consolidates all cases into a single federal court⁵⁶ with nationwide jurisdiction,⁵⁷ and provides for the application of a single substantive law.⁵⁸ These litigation management provisions could permit consolidated, streamlined litigation for losses from terrorist acts.

The factors limiting the use of the tort system in terrorism cases thus are not procedural, but rather include substantive law, defendants' financial ability to respond, the broader economic impact of potential or actual liability on corporations, industries, and markets, and public policy.

In any event, a fundamental premise of the Fund was that the airlines should be relieved of liability in excess of their insurance coverage. Because tort litigation could be anticipated and was within the capability of the court system, the need to persuade potential plaintiffs to opt out of the tort system provided another reason to make compensation under the Fund comparable to what claimants would expect to receive through litigation. The analogy to tort litigation and settlement affects procedural as well as remedial characteristics of the Fund.

51. 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11,020, 116 Stat. 1758 (codified at 28 U.S.C.A. § 1369 (West Supp. 2003)).

52. Because there is original federal court jurisdiction under § 1369, the actions can be removed under 28 U.S.C. § 1441(a) (2000).

53. 28 U.S.C.A. § 1407 (West Supp. 2003).

54. TRIA, *supra* note 14.

55. *Id.* § 107(a)(1). All state causes of action except those against the terrorists or their accomplices are preempted. *Id.* § 107(a)(2), (b).

56. *Id.* § 107(a)(4).

57. *See id.*

58. *Id.* § 107(a)(3). This seems to leave a gap: an act that occurs abroad against an American air carrier, vessel, or mission is expressly included in the definition of an act of terrorism, but since it did not occur in any state, section 107(a)(3) does not provide substantive law. Perhaps federal courts would develop a federal common law under their admiralty jurisdiction to handle these scenarios.

a. Procedural Consequences of the Tort Model

The adoption of the tort model—even though the government was substituted as the payor and fault was eliminated from the calculation—encouraged the claimants and the public to think of the process as a version of tort settlement and to expect that the victims were entitled to large awards.⁵⁹ Statutory language directed the Special Master to determine “the extent of the harm to the claimant, including any economic and noneconomic losses” and then to determine the amount of compensation “based on the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant,”⁶⁰ and the implementing regulations based recovery primarily on lost income. These regulations added to the expectation of large awards. Many victims were extremely high earners, and their families’ arguments for multi-million dollar awards based on tort principles received sympathetic media attention. Additionally, the media, particularly the *New York Times* through its “Portraits of Grief” feature, focused attention on each of the individual victims and their families, adding to the sense that victims should be treated individually.

Thus far, the average award for deceased claimants has been \$1.8 million, with awards as high as \$6.9 million.⁶¹ Victim advocates, led by the financial services firm Cantor Fitzgerald, which lost 658 employees in the World Trade Center collapse, have argued that awards should be even higher—as much as \$20 million or more for very high-income decedents.

The provision for an individualized measure of damages based on traditional tort criteria that included elements like pain and suffering and lost income was the source of the most significant issues for procedural design with respect to the September 11th Fund. Individualized awards must be based on individualized evidence, and on the exercise of judgment through some form of individualized adjudication. The Special Master could devise rules of evidence to limit and define the types of evidence that could be offered and the weight it would be given, but his freedom in this regard was constrained by the tort-like measure of damages. Because the statute commanded him to

59. Thus far the Fund has made awards totaling some \$3 billion. The total cost of the compensation program is variously estimated at between \$4-6 billion. See Chen, *supra* note 37 (\$4-5 billion); Belkin, *supra* note 17 (\$6 billion). Public perception of the size of tort awards is skewed, as media coverage tends to overrepresent plaintiff’s verdicts, large verdicts, and punitive damage awards, and tends to underrepresent later reductions of awards by trial judges and reversals by appellate courts. See U.S. DEP’T OF JUSTICE, DECEASED VICTIMS, *supra* note 3.

60. ATSA, *supra* note 1, § 405(b)(1). Punitive damages were excluded. *Id.* § 405(b)(5).

61. See *supra* note 3.

determine “economic and noneconomic losses” and to base the award on that determination, lost future income had to be part of the proceedings.⁶²

Even if Congress did not have the time to give much consideration to whether it wanted to replicate tort damages or to set up a system that could successfully compete with the tort system on economic grounds, by the time the Special Master was promulgating regulations he knew that it was important to convince claimants that they should choose the Fund rather than tort remedies. If lost income was a component (and in most cases, the largest component) of the award, that meant expert testimony and the potential for contested issues regarding methodology and assumptions. In turn, inclusion of such issues meant that lay people would feel they required legal representation, that the proceedings would be complex and technical, and that the Special Master would have to take steps to maintain consistency among claimants.

Individualized determination of noneconomic damages such as pain and suffering would have made the proceedings even more complex, as well as more traumatic, for claimants and the public. The Special Master eliminated this factor by setting noneconomic damages at a standard amount based on the number of dependents.⁶³ This departure from individualized adjudications was defensible, as it was consistent with state statutes setting caps on noneconomic damages, and with the statutory language referring to the “individual circumstances” of the claimants. The decision also allowed the Special Master to sidestep controversy over determinations that would inevitably involve a significant measure of speculation, and to avoid the awkwardness of the government valuing the suffering of one victim differently from that of another. As might have been expected, the decision to cap noneconomic damages was strongly criticized,⁶⁴ but most of the controversy over the awards has focused on the methodology for determining lost income.

Complex proceedings are more costly both for claimants and for the adjudicator, as well as more time-consuming. The cost to claimants was held down for September 11th claimants by the plaintiff’s bar’s generous response in providing pro bono representation, though many claimants retained their own attorneys on a contingent-fee basis. We

62. In *Colaio v. Feinberg*, the district court held that it was within the Special Master’s discretion not to base the awards solely on economic and noneconomic losses and not to award compensation equal to tort damages. *Colaio v. Feinberg*, 262 F. Supp. 2d 273, 287 (S.D.N.Y. 2003).

63. See 28 C.F.R. §104.44 (2002); Appendix, subpart II(C)(2)(a).

64. The regulation was upheld in *Colaio*, 262 F. Supp. 2d at 287.

cannot assume, however, that tort lawyers would agree to provide representation gratis for all future victims of terrorism. If individualized determinations based on complex expert evidence are part of the system, claimants will need representation to develop and present the evidence necessary to prove their claims. If lawyers do not continue to donate their services, these costs will become part of the system and will result either in higher costs to the government or lower net recoveries by claimants.

The time required to process awards has also been significant. In April 2003, some nineteen months after the Fund was established, only 236 awards had been completed.⁶⁵ By November 2003, only 1,890 death claims had been filed, representing less than sixty-five percent of the 2,976 who were killed, and only about half of the expected 3,000 injury claims had been filed.⁶⁶ Meanwhile, 1,700 lawsuits had been filed.⁶⁷ Indeed, there was such concern that hundreds or even thousands of people might miss the deadlines for filing both September 11th Fund claims and lawsuits and be left completely without compensation that the New York congressional delegation sought to have the statutory deadline for filing claims with the Fund extended for another year, to December 31, 2004.⁶⁸ In the last days and hours before the filing period expired, however, claims came flooding in. Eventually ninety-seven percent of eligible families filed claims.⁶⁹ One-third of the 2884 death claims and more than half of the 4185 injury claims were filed in December 2003.⁷⁰ In the end, only thirty-nine families elected to file lawsuits, and only about fifty families did not seek either form of compensation.⁷¹ Special Master Feinberg estimated that the claims administration process would conclude in June 2004.⁷²

In short, the necessity to make individualized determinations of “harm” or “losses” was at odds with Congress’s intention that the

65. As of April 17, 2003, nineteen months after the Fund’s creation, 593 claims had been submitted, 370 award letters issued, 236 awards accepted, and 53 hearings requested. See http://www.usdoj.gov/victimcompensation/payments_deceased.html (visited Apr. 17, 2003); http://www.usdoj.gov/victimcompensation/payments_injury.html (visited Apr. 17, 2003) (data updated periodically). In some cases, multiple claims were submitted in respect of one victim.

66. Daniel Wise, *9/11 Fund Gains Trust Among Injured, Families*, N.Y. L.J., Dec. 2, 2003.

67. *Id.*

68. David W. Chen, *As Deadline for 9/11 Aid Nears, Many Relatives Haven’t Filed*, N.Y. TIMES, Nov. 22, 2003, at A1.

69. David W. Chen, *Man Behind Sept. 11 Fund Describes Effort as a Success, with Reservations*, N.Y. TIMES, Jan. 1, 2004, at B1.

70. *Id.*

71. *Id.*

72. *Id.*

Fund would provide immediate compensation to claimants, and with its desire to eliminate the costs and delays of litigation.

b. Procedural Advantages of the Tort Settlement Model

Though it was understandable that the drafters of ATSA employed the tort model when they constructed a program to provide compensation to the victims of September 11th, there are important conceptual differences between the purposes and values of victim compensation and tort settlement. These differences lead to both procedural advantages and procedural drawbacks in using tort settlement claims administration as a model for future victim compensation programs.

The most obvious difference is that by substituting the government as payor and declaring that claims could be filed on behalf of all those who were injured or killed as a result of the September 11th terrorist-related plane crashes, ATSA completely eliminated the issues that constitute the liability phase of tort litigation. Payments are not based on the government's own liability in tort. The government's conduct is not an issue—and neither, in most cases, is anyone else's, including the terrorists, the airlines, and the premises owners and operators. To establish the claimant's eligibility—the equivalent to the liability phase in a tort suit—all that is necessary is to show that the claimant's loss was caused by or sufficiently related to an act that is within the definition of a "terrorist attack."⁷³ Whether the event qualifies as a "terrorist attack" may be determined, as in other legislation passed after September 11th,⁷⁴ legislatively or by the executive branch, and often there will be no significant causation issues. For example, causation was clear in the deaths from the airplane crashes and building collapses. If later-manifesting injuries were at issue, such as respiratory injuries to rescue workers at the World Trade Center, or a chemical, biological, or "dirty bomb" attack, causation could become a factor.

Similarly, in the circumstances of September 11th, there was no real need for testimony of percipient witnesses, except to the extent necessary to establish the claimant's presence at the scene. The contested

73. Eligible losses are limited to personal injury or death suffered at the crash sites or aboard the airplanes, at the time of, or in the immediate aftermath of, the crashes.

74. See, e.g., TRIA, *supra* note 14. TRIA defines an act of terrorism as an act certified by the Secretary of the Treasury, Secretary of State, and Attorney General as meeting certain specified criteria. TRIA, *supra* note 14, § 102(1)(A)(i)-(iv). Interestingly, the Oklahoma City bombing would not have qualified under TRIA, because it was not committed on behalf of a "foreign person or foreign interest." *Id.* § 102(1)(A)(iv).

parts of the case only involve the computation of the award. For this, medical, actuarial, and other expert testimony is likely to be determinative.

The mass tort settlement model offers several procedural advantages. Appointing a special master to administer the program each time there is a triggering event avoids the need to create, staff, and fund an ongoing administrative body which, because terrorist attacks may occur infrequently, may not be needed for long periods of time or to fold the victim compensation program into an existing administrative structure designed to solve different problems.

Unlike adjudication in court, mass tort settlement claims administration does not create precedent and does not have to follow rules of general application. The claims procedures, as well as the substantive rules of decision, can be tailored to the needs of the particular case. Similarly, the procedural needs and substantive rules of a fund for those who were killed or injured in the planes or on the ground on September 11th could be very different from those for a fund set up to compensate people injured by a biological attack on a water supply or a "dirty bomb" detonated in a population center.

It is often argued that the ad hoc nature of a settlement model might promote speedier dispositions and lower costs. The slow pace of the September 11th claims administration may seem to run counter to this assumption. However, the Special Master had to create procedures and promulgate regulations from scratch, as well as overcome claimants' uncertainties about whether to opt into the Fund. In this effort, he met with over 1,000 families. These obstacles presumably would not be present in a system that is put in place before terrorist attacks occur. The tort claims administration model could permit degrees or gradations of adjudication through such mechanisms as presumptive levels of compensation, grids, and caps, all of which are common in mass tort settlements.

The September 11th Fund utilized all of these simplifying or standardizing devices. Such procedures could make outcomes more consistent and reduce administrative and claimant costs by limiting the number of issues that could be contested and standardizing awards. Moreover, placing all determinations under the authority of a single appointed master may bring a degree of consistency that is hard to achieve in atomistic individual litigation. All of these procedures undercut the individualized calculation of actual harm that is the premise of tort damages, but these inroads have become commonplace in mass tort settlements, and they may therefore seem less objectionable when the procedures are transplanted to the victim compensation context.

One might also argue that the special master model would allow the program to obtain the advantages of flexibility, efficiency, and adjudicative discretion while retaining the aura of legitimacy and authority that attaches to judgments of courts—or so it might seem if one does not think too hard about the kind of authority a special master can possibly have when the appointment is not made and supervised by a court. In that context the “special master” looks more like an administrative law judge.

Some of these advantages may not be as benign as they first seem. In creating procedures for administering settlements of private litigation, precedent is not needed because the settlement is (at least notionally) based on consensual resolution of a particular case.⁷⁵ There is no need for rules of general application, and consistency can be achieved within the claimant group by other methods, such as grids. Nor is an ongoing bureaucracy or a full-service set of procedural rules necessary because the procedures can be tailored to the needs of the particular case and are adopted by consent. Judicial review is not required, because the administrator’s discretion is limited by the consent of the parties and the documents creating the claims facility have been approved by a court. When the program is run by the government and may be used in a variety of different factual contexts, however, discarding precedent, rules of general applicability, and judicial review may be less benign.

c. Drawbacks of the Mass Tort Settlement Model

The option of filing a claim with the September 11th Fund offered claimants at least one important advantage over tort litigation that is not often discussed. Eligibility for compensation depends solely on whether the victim was injured or killed on September 11th as a result of the attacks. Claimants do not need to prove liability or causation.⁷⁶ If claimants meet the straightforward criteria for eligibility, they are entitled to recover their economic and noneconomic losses.⁷⁷ More-

75. In the case of class action litigation, the notion that settlements derive legitimacy from the knowing consent of the parties is somewhat fictional because consent is given by class counsel, there are serious practical limitations on the ability to withhold consent by opting out, and there may be conflicts of interest between class counsel and absent members of the class.

76. “[T]he Special Master shall not consider negligence or any other theory of liability.” ATSA, *supra* note 1, § 405(b)(2).

77. The statute does not literally require that the award be equal to the economic and noneconomic losses suffered by the claimant. The Special Master is required to determine the amount of those losses, and then to determine the amount of compensation “based on the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant.” *Id.* § 405(b)(1). The statute arguably allows the Special Master to deviate from the full amount of the harm by such measures as valuing pain and suffering at a set amount, setting awards at a

over, the awards are not reduced by attorneys fees or taxes. Because skilled attorneys are providing legal representation pro bono, claimants net the full amount of the award (less expenses),⁷⁸ and because the federal government pays the award, there is no risk that the award will not be enforceable. The entire award is paid immediately in a lump sum and is tax-free. Congress has also exempted September 11th victims and their families from both income and estate taxes.⁷⁹

By contrast, tort plaintiffs must prove liability, bear the risk that the jury may find against them in the liability phase, pay attorneys fees from any recovery (unless unusual circumstances permit fee-shifting), and enforce the judgment. In standard economic theory, the expected value to a plaintiff of a tort claim is the amount of the judgment if a plaintiff prevails, discounted by the risk of a defendant's verdict, and reduced by the costs of litigating to judgment. Passengers aboard the airplanes would probably be able to establish liability⁸⁰ and might expect to receive large judgments,⁸¹ but plaintiffs on the ground could

designated percentage of actual harm, or making sliding-scale adjustments based on factors such as income level or family size. See Statement of the Special Master Regarding the Progress of the September 11th Victim Compensation Fund, available at http://www.usdoj.gov/victimcompensation/sp_statement.pdf (last visited Oct. 14, 2003). For the sake of clarity, I will refer to awards as based on or equal to the actual economic and noneconomic losses; the simplification does not affect the analysis.

78. In the preamble to the Interim Final Rule, the Special Master emphasized the fact that "the Fund is a no-fault, administrative scheme that should not involve the kind of risks and expense that would justify any significant attorneys fee," and warned that "contingency arrangements in excess of 5% of a claimant's recovery from the Fund would not be in the best interests of the claimants." 66 Fed. Reg. 66,280 (Dec. 21, 2001).

79. Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, 115 Stat. 2427 (2002) (codified at 26 U.S.C.A. §692(c), (d) (West Supp. 2003)).

80. Airline liability for crashes is virtually absolute. Even the victims in the crash of Pan Am Flight 103 over Lockerbie, Scotland, which was caused by a bomb carried aboard by Libyan terrorists, were able to recover \$500 million from the airline and its insurers. See *infra* note 81.

81. Recoveries for families of passengers killed in airplane crashes are usually substantial. See <http://www.cnn.com/ALLPOLITICS/time/2002/02/11/life.html> (last visited Oct. 14, 2003)

In 25 major aviation accidents between 1970 and 1984, the average compensation for victims who went to trial was \$1 million in current dollars, according to a RAND Corp. analysis. Average compensation for cases settled without a lawsuit was \$415,000. The biggest aviation payout in history followed the crash of Pan Am Flight 103 over Lockerbie, Scotland, in 1988. Settlements ranged all over the spectrum, with a couple dozen exceeding \$10 million, according to Manhattan attorney Lee Kreindler, who acted as lead counsel. Dividing the total \$500 million payout over the 270 victims yields an average award of \$1.85 million. However, the families had to hand about a third of their awards to their lawyers, and they waited seven to eight years to see any money.

Id. According to this source, average recoveries of passengers *after trial* were less in current dollars than the average awards to date from the Fund, and even the recoveries in "the biggest aviation payout in history" averaged about the same as the awards from the Fund—before deducting the one-third contingency fees the tort plaintiffs had to pay. *Id.* But see Roger Parloff, *Tortageddon—Why the September 11 Victims' Fund Could Become a Template for Mass Tort Reform*, AM. LAW., Mar. 2002, at 14 (quoting Kreindler as noting that "it is not even clear that

face substantial obstacles to proving liability and causation,⁸² and the expected value of their tort claims would have to be discounted for the risk of nonrecovery. Attorney fees would amount to a substantial percentage of any tort recovery. As Congress recognized, successful tort claims could bankrupt the defendants, which would make many judgments uncollectable—particularly in light of ATSA's limitation of aggregate tort liability to the amount of the insurance coverage on the four airplanes. And the portion of the recovery that represented lost income would be taxable. Finally, litigation to judgment can take years; the Lockerbie plaintiffs waited over seven years after the crash to be paid.

Thus, the elimination of liability issues, the substitution of the federal government as payor, the availability of top-notch pro bono attorneys, and exemption from federal taxes make the expected value of claims against the Fund attractive as compared to tort litigation, even with the limits on pain and suffering and the ban on punitive damages. The Victim Compensation Fund appears to be a better deal for claimants than some have supposed.

Perceptions of the comparison between awards from the Fund and potential recoveries through tort litigation, however, on the part of both claimants and the public, have been framed by comparing actual, tax-free, guaranteed awards from the Fund with hypothetical judgments for successful tort claimants, before deducting attorneys fees, costs of litigation, or taxes. The fact that claimants did not have to prove liability, pay for lawyers, wait years for their payments, or run the risk that the defendants would run out of money should, in theory, have meant that awards could be set at the present expected value of tort claims, which would be substantially less than the full amount of economic and noneconomic losses. These subtleties have been largely lost in the public discussion. Some have strongly criticized the Special Master, and the formulas for awarding compensation, for providing too little to claimants compared to the potential recoveries for successful tort plaintiffs in litigation.⁸³ For example, a prominent aviation

the plastic and ceramic knives and box-cutters used by the terrorists violated Federal Aviation Administration regulations in effect at the time").

82. For example, such extensive destruction on the ground may have been unforeseeable to the airlines; the architects may not have been negligent in failing to design the buildings to withstand the impact and explosion of a big plane loaded with jet fuel; the Port Authority may not have been negligent; telling people in the South Tower it was safe to return to work did not affect the injuries of people in the North Tower, or of those who had not already escaped from the South Tower.

83. The firm of Cantor Fitzgerald, which lost 658 employees in the World Trade Center collapse, issued a report in September 2002 criticizing the awards for being too low. Several months later, several Cantor Fitzgerald families sued the Special Master, the Attorney General, and the

lawyer who represented 350 families called the presumed awards “grossly unfair” and “so harsh as to be confiscatory.”⁸⁴ But even measured against tort judgments after trial, average awards under the Fund seem to be comparable to average gross awards for successful tort plaintiffs, even before deducting attorney fees.⁸⁵ By the same token, setting awards at the gross value of a potential tort judgment, rather than the expected value of litigating to judgment, makes the program more costly to the taxpayers than it would need to be if the only consideration were to provide a comparable alternative to tort litigation.⁸⁶

From the claimants’ perspective, both mass tort settlements and the September 11th Fund tended to flatten out differences in outcomes, eliminating the very high awards that some tort plaintiffs would receive after trial and giving more to the less seriously injured. The families of high-earning decedents have strongly criticized the Fund’s regulations for cutting off the lost-income tables at a yearly income of \$231,000 and cautioning that awards are not likely to exceed approximately \$6 million. A significant number of those killed at the World Trade Center earned more than \$1 million a year and would have received much higher awards if lost income calculations were based on their actual income.⁸⁷

Department of Justice, challenging the rules of the Fund and the formulas for determining awards, and seeking certification of a class comprised of the 2800 people who died at the World Trade Center. See *Colaio v. Feinberg*, 262 F. Supp. 2d 273 (S.D.N.Y. 2003) (granting motion for judgment on the pleadings).

84. See Jennifer Barrett, *Arbitrary and Inappropriate*, NEWSWEEK, Sept. 18, 2002, Newsweek Web Exclusive, LEXIS, Nexis Library, Newsweek File (quoting Lee Kreindler); Parloff, *supra* note 81, at 14.

85. See *supra* note 81.

86. On the other hand, juries might choose to disregard weaknesses in the liability case in order to compensate sympathetic plaintiffs—and who could be more sympathetic than the victims of a terrorist attack? In theory, the government would not have to offer very much in order to get plaintiffs with difficult liability cases to opt out of the tort system. In practice, the likelihood of a plaintiffs’ verdict would be higher than the strength of the legal claim might suggest, and plaintiffs might have many noneconomic incentives to sue rather than to accept a small payment.

87. Awards are also reduced below potential tort judgments by the statute’s command that collateral source payments such as life insurance proceeds should be offset against the presumptive amount of awards. Very high income victims are more likely to carry large amounts of life insurance; indeed, many high income claimants’ awards would have been completely offset by life insurance, had not the Special Master used his discretion to award a minimum payment of \$250,000 even to these claimants. Because the collateral source offset is contained in the statutory language rather than the regulations, it has not received as much criticism during the claims administration process.

d. Fairness and the Tort Litigation Model

From a procedural perspective, there is a more basic flaw in using a tort litigation model to design victim compensation programs. The most fundamental procedural value is fairness. In their natural habitat, the fairness of tort damages is supported by a host of principles—economic (risk-creators should internalize the costs of their risky activities, risk-creating enterprises are more efficient cost-bearers), moral (harms should be borne by blameworthy actors rather than by innocent bystanders), and pragmatic (the specter of jury awards for compensatory and punitive damages deters unreasonably risky conduct)—that point to individualized damages based on actual harm.⁸⁸ When the government pays, however, individualized compensation based on tort measures may no longer appear fair.

The underlying principle of individualized determinations of tort damages is that the wrongdoer is responsible for putting victims back in the position they would have occupied but for the wrongful act. In the case of injury or death, this principle means compensation for lost future income as well as special damages and pain and suffering. The tort system's legitimacy is based on the fact that damages determinations are individualized. Victims of the same tort (e.g., negligent maintenance of the sidewalk leading to a slip and fall) may receive different amounts based on factors such as their income. This process is considered legitimate because it forces the defendant to internalize the costs of risk creation and compensates each plaintiff for the market value of his or her loss.

But when the federal government is not a tortfeasor but pays out money anyway, then the competing principle is equality—all persons are created equal, one person one vote, equal justice under law. This principle points to a remedy that values all persons equally, without regard to their wealth, status, class, race, ethnicity, or gender. Such a principle could be expressed in payments that are equal for all victims, payments based on need (taking into account such factors as wealth, age, number of dependants, and collateral source payments), or a hybrid of the two. For example, claimants could receive medical care and reimbursement of medical expenses, perhaps administratively through an agency or by including them in military or government employee health plans or Medicare, plus a set amount based on the severity of the injury.

88. Punitive damages are an exception, but even punitives are supposed to be individualized based on the blameworthiness of the defendant's conduct and the amount necessary to deter the defendant and others.

What is not acceptable under the equality principle is a system that makes it appear that the national government places a higher value on the lives of wealthy people than those of poor people. As time went by, criticisms of the Fund based on perceived violations of the equality principle became more insistent. In the words of one journalist:

How did the government get into the business of saying that one victim's life is worth three times as much as another's? Or that the grief of these families is worth millions, while the grief of other crime victims, or accident victims, or even other terror victims, is not? . . . Should an emissary with unlimited taxpayer funds—current projections put the cost as high as \$6 billion—have such power over people's lives at all?⁸⁹

If the government, rather than the tortfeasor, is paying, then the rationales of cost internalization and deterrence are no longer present. The federal government did not create the risk or cause the harm, so there is nothing to internalize and nothing to deter. Indeed, to the extent that the Fund replaces tort litigation over the airlines', architects', or Port Authority's negligence, it could even undermine the tort goals of deterrence and internalization of costs. When the government is a volunteer, there is no particular rationale for adopting tort damages as the measure of the award.

Thus, making individualized tort damages, calculated primarily on the basis of income and wealth, the measure of compensation paid by the national government to victims who died together in the same terrorist attack is inconsistent with the fundamental principle in a democracy that, to the government, at least, all persons have equal value. It has even been called "un-American."⁹⁰ Special Master Feinberg himself has called attention to this seeming unfairness:

If I were writing the program today—and I don't fault Congress; they were acting under the gun—I would have clarified the public-policy foundation. . . . Is it tort or is it social welfare? And I'd think long and hard about this: Is a flat sum better than variations? I think perhaps it might be.⁹¹

89. Belkin, *supra* note 17, at 92.

90. See Julie Kosterlitz, *Who Counts?*, NAT'L J., May 4, 2002, at 1296 (The terrorists didn't choose their victims based on income. "For the federal government to say that the person whose dishes were washed at the World Trade Center will get a higher taxpayer-funded contribution than the person who did the washing of the dishes—I think that is un-American.") (quoting Oklahoma Governor Frank Keating).

91. Belkin, *supra* note 17; see also Statement of the Special Master Regarding the Progress of the September 11th Victim Compensation Fund, *supra* note 77 ("While I appreciate such arguments, disparities among awards are unavoidable here because the statute creating the Fund expressly requires that I consider the claimant's 'economic loss.' . . . I had no choice but to make income one of the many individual circumstances that I consider in making awards.").

Another aspect of the fairness problem appears when we return to one of the foundational questions of procedural design discussed above: What distinguishes the beneficiaries of this program from other similarly situated persons and requires us to treat them differently? The September 11th program, precisely because it was an ad hoc response to the events of a single terrible day, has been criticized for failing this basic test of fairness.

Were these claimants singled out because they were victims of heinous acts who cannot recover through the tort system? Then what about victims of violent crimes, who usually do not recover damages from the perpetrator?⁹²

Is it because they were victims of terrorism? Then what about the victims of the Oklahoma City bombing,⁹³ the Beltway snipers, or the Unabomber—or Orlando Letelier and Randi Moffatt, who were killed by a car bomb in Washington, D.C. in 1976 by agents of the Chilean secret police?⁹⁴ The federal government's only compensation to victims of the Oklahoma City bombing, aside from paying ordinary employee benefits for the victims who were federal employees, was to give \$75,000 to the state crime victims restitution program.⁹⁵

Is it because they were victims of foreign terrorists? What about the first World Trade Center bombing, the Lockerbie crash, the embassy bombings in Kenya and Tanzania,⁹⁶ the bombing of the military barracks in Lebanon? None of these victims received government compensation, though the Lockerbie plaintiffs did eventually recover

92. Typically the perpetrators, if they are caught, have no assets. State funds for compensating crime victims are not well funded and cannot provide payments on the scale of tort damages.

93. Senator Don Nickles argued as early as September 20, 2001, during the last-minute negotiations that resulted in the bill that became ATSA, that the federal government should not provide compensation for the September 11th victims without also compensating those killed or injured in the Oklahoma City bombing. Kosterlitz, *supra* note 90.

94. See JOHN DINGES & SAUL LANDAU, ASSASSINATION ON EMBASSY ROW (1980). Family members of Letelier and Moffatt filed a civil suit against the government of Chile, the Chilean secret police, and nine individuals, obtaining a settlement from the government of Chile after its transition to democracy. See <http://www.tni.org/letelier/> (last visited Oct. 13, 2003).

95. See *Oklahomans Questioning Sept. 11 Aid*, N.Y. TIMES, Dec. 23, 2001, at B8. In addition, about \$35 million in private charitable contributions were made, mostly to the American Red Cross, although not all of those funds were paid to the bombing victims. Associated Press, *A Nation Challenged: The Victims; Oklahomans Questioning Sept. 11 Aid*, N.Y. TIMES, Dec. 23, 2001, at B8.

96. In May 2002, the House voted to include the victims of the embassy bombings in the September 11th Fund. See Embassy Employee Compensation Act, H.R. 3375, 107th Cong. (2002). It languished in committee in the Senate. See <http://thomas.loc.gov/cgi-bin/bdquery/D?d107:9:./temp/~bd3lH0:@@L&summ2=M&—/bss/d107query.html> (last visited Oct. 13, 2003).

from Pan Am. Indeed, what about the anthrax attacks through the postal system?⁹⁷

Is it because these were "acts of war," as the President has said? Then what about civilian losses in the attack on Pearl Harbor and reporters in Iraq, Afghanistan, Vietnam, and other war zones?

Even if it is because they were victims of the terrorist attacks on September 11, 2001, what about those who suffered property damage or the rescue workers who were seriously injured by working for months under tons of burning rubble and breathing dust, smoke, ash, and noxious fumes?⁹⁸

When the government decides to break with the usual social practice that tort victims who cannot find solvent defendants to sue and people injured by terrorists or acts of war must bear their own losses, it will naturally face challenges based on line-drawing arguments. Indeed, there have already been efforts to extend the coverage of ATSA to victims of the Oklahoma City bombing, the first World Trade Center attack, and other similar events.⁹⁹ Congress itself passed legislation less than two months after ATSA was enacted, directing the President to submit, by the time of the submission of the fiscal year 2003 budget, a legislative proposal "to establish a comprehensive program to ensure fair, equitable, and prompt compensation for all United States victims of international terrorism" from November 1, 1979 forward.¹⁰⁰

The larger the payments from victim compensation programs, the more troubling and even indefensible such disparate treatment will seem, particularly if the rationale appears to be compensation to the claimants as tort victims. Awards from the Fund have averaged \$1.8

97. Families of those killed in the anthrax attacks and the Oklahoma City bombing were included in a bill, passed in January 2002, exempting September 11th victims from 2001 income taxes. Kosterlitz, *supra* note 90.

98. Because of the statutory language, rescue workers who arrived on the scene more than ninety-six hours after the attacks were not eligible for compensation. See ATSA, *supra* note 1, § 405(c); 67 Fed. Reg. 11,245, § 104.2(c)(1) (Mar. 13, 2002); Appendix, subpart II(C) *infra*.

99. See Belkin, *supra* note 17, at 92 (discussing Oklahoma City, embassy bombings, USS Cole, first World Trade Center bombing, anthrax letters). In May 2002, the House passed legislation to extend the benefits of the September 11th Fund to the embassy bombing victims, but that bill has not been acted on by the Senate. *Id.*

100. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, § 626(a)-(b), Pub. L. No. 107-77, 115 Stat. 748, 803 (2002). November 4, 1979 was the date that followers of the Ayatollah Khomeini overran the U.S. embassy in Tehran and held fifty-two Americans hostage for 444 days. The statute was passed on November 15, 2001 and signed by the President on November 28, 2001. See <http://thomas.loc.gov/cgi-bin/bdquery/D?d107:1:/temp/~bds1Nb:@@L&summ2=M&-/bss/d107query.html> (last visited Oct. 13, 2003). Although the fiscal year 2003 budget proposal has been submitted, no proposal for a comprehensive, retroactive victim compensation program has been made.

million and have ranged as high as \$7.9 million.¹⁰¹ The least defensible explanation for the difference in treatment is one that seems to capture part of the truth of the September 11th Fund: "If your death involves an industry that the government feels compelled to protect, you're in luck. But if it is an industry that the government would let go under, you are on your own."¹⁰²

2. *Act of War*

President Bush began referring to the September 11th attacks as an "act of war" just one day after they occurred.¹⁰³ His administration has defended the many extraordinary measures suspending or ignoring civil liberties that were adopted following the attacks as within the President's war powers in response to such acts,¹⁰⁴ and this position has been accepted by some courts.¹⁰⁵

The rhetorical trope of acts of war, however, does not get us very far in designing a victim compensation program. Acts of war are commonly excluded from insurance policies covering both personal injury and property damages, but the government does not normally provide compensation for such injuries. Family members of military personnel who are killed in combat receive a special payment of six thousand dollars, three thousand of which is considered a "death gratuity" that is tax-free, as well as other modest benefits.¹⁰⁶

101. See http://www.usdoj.gov/victimcompensation/payments_deceased.html (last visited Jan. 26, 2004) (data updated periodically); http://www.usdoj.gov/victimcompensation/payments_injury.html (last visited Jan. 26, 2004) (data updated periodically).

102. See Belkin, *supra* note 17, at 92.

103. See Katharine Q. Seelye & Elisabeth Bumiller, *Bush Labels Aerial Terrorist Attacks "Acts of War,"* N.Y. TIMES, Sept. 13, 2001, at A16.

104. See Anne E. Kornblut & Susan Milligan, *An Emotional Bush Promises Victory,* BOSTON GLOBE, Sept. 14, 2001, at A1 (quoting a close Bush associate as describing the President's speech as declaring a "state of war").

105. See, e.g., *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003) (holding that detention, without access to counsel, of American citizen captured as alleged enemy combatant in Afghanistan was within President's war powers).

106. See Jacqueline L. Salmon, *Military Families Bemoan Loss of Bill on Death Benefits,* WASH. POST, Mar. 16, 2003, at C7. The additional benefits include burial costs, monthly compensation to the spouse and each child under eighteen health coverage, for the family, six months of free housing or help with housing costs, a portion of the servicemember's retirement pay, and an income tax break for at least one year. The value of these benefits does not remotely approach the amounts awarded under the September 11th Victim Compensation Fund. Servicemembers can also purchase life insurance coverage of up to \$250,000. *Id.* For a side-by-side comparison of federal military and civilian employee death benefits, see *infra* note 107. Servicemembers who were killed at the Pentagon on September 11th were also eligible for compensation from the Fund and from the money donated to private charities for the September 11th victims.

Civilian casualties and property damages from acts of war are ordinarily not compensated by the government.¹⁰⁷ Victims may be able to sue the foreign government or individuals involved in U.S. courts,¹⁰⁸ but significant recoveries are not usually obtained. Even if a judgment is obtained, there may be no assets in the United States to satisfy it, or the federal government may prohibit execution against frozen assets.¹⁰⁹ Sometimes when hostilities are concluded the foreign state will be released from such claims.¹¹⁰

In short, if terrorist attacks are really acts of war, then the usual practice would be to let the losses lie where they fall. Recently, we have seen daily television coverage of injuries and deaths of civilians and military personnel through acts of war in Iraq. It is unlikely that special federal benefits will be provided to them. The contrast between the television images of the military and civilian casualties of the war in Iraq, who will not receive special compensation from the U.S. government aside from these modest benefits, and the victims of the September 11th attacks, who will receive tort-like damages in addition to funds from private charities, may make it less likely that Congress will legislate so generously for future terrorist attacks.

Other countries, notably Israel and Britain, have had to deal on an ongoing basis with civilian deaths from terrorist actions. These programs are functionally similar to government-paid terrorism insurance for personal injury or death. They are discussed below in subpart III(c)(4).

107. For a comparison of federal military and civilian death benefit programs, see <http://www.cpms.osd.mil/icuc/attacks/Death%20Benefits%20Chart.htm> (last visited Oct. 14, 2003); see also <http://www.cpms.osd.mil/icuc/attacks/Death%20Benefits.htm> (last visited Oct. 14, 2003).

108. See Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(7) (2000). The U.S. government has itself paid compensation to foreign casualties of U.S. actions, such as the families of those who were killed in the unintentional U.S. bombing of the Chinese embassy in Serbia, who each received \$1.5 million. See Belkin, *supra* note 17, at 17.

109. For example, President Bush signed an order on the first day of the second Gulf War releasing \$150 million in Iraqi assets in the United States that had been frozen since the first Gulf War, so that they could be seized to satisfy judgments obtained by Americans who were held captive and used as human shields in the first Gulf War. See Tom Schoenberg, *Fights Loom for Iraqi Riches*, LEGAL TIMES, Apr. 2, 2003, at 1. Cuban assets in the United States that have been frozen for decades, and judgments may not be enforced against them. In an interesting attempt to get around this ban, one judgment creditor attempted to attach an aircraft owned by the Cuban government that was hijacked to Key West. Peter Page, *Cuban Plane Sale a Symbolic Victory*, NAT'L L.J., Jan. 20, 2003, at A4.

110. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

3. *Disaster Relief*

Although the Bush administration has been referring to the events of September 11, 2001 as “acts of war” since September 12, 2001,¹¹¹ the public appears to regard terrorist acts on U.S. soil as natural disasters rather than acts of war. For example, focus groups rejected a proposed Homeland Security public relations slogan, “Be a soldier in your own home,” because “[t]hey did not like to think about a terrorist attack in terms of war . . . but more as a disaster like a tornado or earthquake that they could weather.”¹¹²

The philosophy of disaster relief is to relieve immediate suffering, get people back on their feet, and rebuild what was lost. The extraordinary outpouring of \$2 billion in donations to the American Red Cross and to charities set up specifically to benefit those who suffered losses was an expression of this impulse.¹¹³ Those who were considered especially deserving—the firefighters, police, and other rescue workers who were seen as heroes because they voluntarily put themselves in harm’s way to rescue others—were special objects of this generosity. Funds earmarked solely for these public employees constituted at least eighteen percent of the total contributions.

The disaster relief model has much to recommend it, particularly because it is based on need and therefore is less subject to the criticism that the government should not value the lives of the wealthy more highly than other lives. Indeed, Special Master Feinberg and the government have recently spoken of the purpose of the Fund in terms that evoke the disaster-relief concept of getting people back on their feet, as opposed to providing a replacement of the tort system.¹¹⁴ However, this focus on subsistence may result in a level of benefits that is much lower than the public would have wanted for victims of September 11th or other terrorist acts, at least in the immediate aftermath when the regulation was passed. Compensation under the disaster model often depends heavily on property losses which could cause a bias in favor of wealth and could probably be addressed more efficiently through regulation and support of the property and casualty insurance market. Finally, delivery of services under the disaster relief model has often been chaotic and plagued by delay.

111. See Seelye & Bumiller, *supra* note 103.

112. See Maureen Dowd, *Ready or Not . . .*, N.Y. TIMES, Feb. 23, 2003, § 4 (Week in Review), at 11.

113. See Laura Hruby & Marni D. Larose, *September 11 Donations: How Much Charities Have Raised and Distributed*, CHRON. OF PHILANTHROPY, Mar. 1, 2002, available at <http://philanthropy.com/free/update/2002/03/2002030101.htm> (last visited Oct. 14, 2003).

114. See *supra* note 36.

4. Insurance

Another way to look at terrorist attacks is that at this historical moment they are a risk that people are subject to just because they live in the United States. Just as there is a risk of earthquake in San Francisco or of pickpockets in crowded downtown areas, there is a statistically small risk of being a victim of a terrorist attack simply by being in the United States, especially in or near large cities, landmarks, financial centers, and other symbolic locations. From this perspective, a government program to compensate victims of terrorist acts should be essentially a form of government-provided, government-funded insurance against the risk of terrorism.

Other countries have adopted this approach to victim compensation. Israel has a high incidence of injuries from terrorist attacks, and it provides various government benefits to victims of terrorism. Under the Israeli program, a citizen or resident of Israel who was injured in Israel or abroad, or a non-Israeli who was injured in Israel by hostile action (as certified by an authority appointed by the Ministry of Defense), is eligible for benefits. These include financial benefits during medical treatment if the person is unable to work, a monthly disability benefit based on a designated civil service grade and scaled according to the percentage of disability, and dependents' benefits for widows and parents of persons who have died as the result of hostile action equal to those paid to families of soldiers killed in action. They also include noncash benefits such as medical treatment, vocational rehabilitation, loans and grants for housing, assistance in purchasing and maintaining a car, and personal services. Widows, orphans, and bereaved parents are also entitled to receive vocational rehabilitation and other noncash benefits.¹¹⁵ Benefits do not take the form of a lump sum cash payment.¹¹⁶

The Israeli program provides ongoing support and services to survivors, but the benefits are modest and do not purport to be payments in compensation for economic or noneconomic losses. Except for providing disability benefits equivalent to those for government workers and survivors' benefits equal to those for soldiers killed in action, the Israeli program does not attempt to replace lost future income. The program reflects an attitude that considers injuries due to terrorist acts as a relatively normal hazard of Israeli life, for which the government should provide support and social services, but not compensa-

115. See Nat'l Ins. Inst. of Isr., at http://www.btl.gov.il/English/btl_indx.asp?name=newbenefits/hostilities.htm (last visited Oct. 11, 2003).

116. Claimants who have suffered 10-19% disabilities do receive a lump-sum payment in lieu of the other benefits described. See *id.*

tion. It is consistent with a society that has universal military service, a socialized view of the relations among citizens and the government, and that has considered itself to be essentially on a wartime footing since its founding.

The British government also provides terrorism compensation.¹¹⁷ One program operates by supporting the market for terrorism insurance. This program was created in the early 1990s in response to IRA terrorism, primarily in London, and the unavailability of insurance through insurance carriers' adoption of terrorism exclusions. This program created a national mutual reinsurance company (the Pool Reinsurance Company, or "Pool Re") in which the government is the reinsurer of last resort for losses due to terrorist acts on the British mainland.¹¹⁸ In Northern Ireland, however, the British government compensates property owners directly for losses due to terrorist attacks.¹¹⁹ While the incidence of terrorist acts in Northern Ireland was high when the program was created, property values were low, keeping the cost of compensating property damage in Northern Ireland relatively low.

The United States has taken an insurance approach to some mass injuries that were thought to require government intervention. The Vaccine Injury Compensation Program (VICP) was set up in 1988 to protect vaccine producers from tort suits, while also providing compensation to those injured by vaccines.¹²⁰ Public health policy favors widespread participation in vaccination programs, but it is inevitable that some persons who are vaccinated will be injured. Moreover, the threat of large judgments for an unknown number of vaccine recipients could easily cause producers to exit the market, as the profit margins on vaccines are not large. The VICP is overseen by the Department of Health and Human Services and special masters within the U.S. Court of Federal Claims. There is a cap of \$250,000 for each claim, and a statute of limitations of three years from the administration of the vaccine. Decisions of the special master can be appealed to a judge of the Court of Federal Claims and then to the Federal Cir-

117. See William B. Bice, *British Government Reinsurance and Acts of Terrorism: The Problems of Pool Re*, 15 U. PA. J. INT'L ECON. L. 441 (1994) (describing the British terrorism reinsurance program and related public policy problems).

118. *Id.*

119. *Id.* at 463 n.126.

120. See MOLLY TREADWAY JOHNSON ET AL., *USE OF EXPERT TESTIMONY, SPECIALIZED DECISION MAKERS, AND CASE MANAGEMENT INNOVATIONS IN THE NATIONAL VACCINE INJURY COMPENSATION PROGRAM* 14 (1998).

cuit.¹²¹ The VICP replaces tort litigation, but it does not attempt to provide compensation equal to tort damages. Of course, most people injured by vaccines are infants or children, who do not usually receive extremely high tort awards.

Congress has turned to the insurance market as a way to provide protection for the public from property damage caused by terrorist acts. On November 26, 2002, Congress passed the Terrorism Risk Insurance Act of 2002 (TRIA),¹²² which is designed to assure that terrorism coverage is widely available and affordable in property and casualty insurance policies, and committed the federal government to pay ninety percent of the cost of claims over the policy deductible, up to a total amount of \$100 billion per year, during a three-year transition period. The statute also establishes a system of regulation to assure that after the transition period premiums will appropriately reflect the costs of terrorism coverage and makes the federal government the reinsurer of last resort in case property losses are too large for the insurance industry to cover. Under the statute, the federal government does not directly provide compensation for property damage caused by terrorism, but it does undertake to assure that terrorism insurance is available and affordable, thus making compensation available through a market solution.¹²³

Taking the view that terrorist acts are a risk that may appropriately be compensated by a form of government-provided insurance, a victim compensation program could provide benefits that look like insurance benefits: a standard payment for death and payments for personal injury based on the type and severity of the injury, coupled perhaps with noncash benefits such as medical insurance, perhaps under programs serving federal employees or veterans, and housing assistance. Indeed, during the hurried negotiations that led to the passage of ATSA, White House Budget Director Mitchell E. Daniels, Jr. proposed a flat payment for survivors' families of \$100,000 (later raised by Congress to \$250,000).¹²⁴

Adopting the insurance model would eliminate the procedural and philosophical difficulties associated with the tort compensation model. The program would be more easily administered and would better reflect the equality principle.

121. See generally Jonathan Groner, *Vaccine Bill Becomes Big Headache*, LEGAL TIMES, Mar. 13, 2003, at 1.

122. See TRIA, *supra* note 14.

123. For a discussion of the case management provisions of TRIA, see *supra* text accompanying notes 54-58.

124. See Kosterlitz, *supra* note 90.

IV. DESIGNING A COMPENSATION PROGRAM FOR FUTURE VICTIMS OF TERRORISM

The preceding discussion concludes that a program structured as a form of government-provided insurance against personal injury or death caused by acts of terrorism, together with federal guarantees that terrorism insurance for property damage will be available and reasonably priced, would be preferable as a matter of public policy to the ATSA tort settlement model as a means for providing compensation to future victims of terrorism. The insurance model might be simpler to administer as well.

Assuming, however, that an ongoing program to compensate victims of future terrorist acts follows the tort settlement model, what are the important issues of procedural design? What questions would have to be answered in structuring the program, and what have we learned from the experience of the September 11th Fund?

A. Structure

Because of the haste in which the September 11th legislation was drafted, even basic structural elements were only sketched, or were left to be filled in later. For example, the allocation of rulemaking and reviewing power between the Attorney General and the Special Master, which was left ambiguous in the statute, was resolved by the Special Master issuing legislative rules covering such matters as the right to and nature of evidentiary hearings and administrative review.

The legislation creating a future compensation program would likely specify many of the structural and procedural provisions that, in the case of the September 11th Fund, were worked out by the Special Master through regulation. Congress knows how to identify the nature of such provisions. Indeed, it provided a good list in legislation, passed in 2002, directing the President to submit a proposal for a victim compensation program for acts of international terrorism from November 1979 forward:

The legislative proposal shall include, among other things, which types of events should be covered; which categories of individuals should be covered by a compensation program; the means by which United States victims of prior or future acts of international terrorism, including those with hostage claims against foreign states, will be covered; the establishment of a Special Master to administer the program; the categories of injuries for which there should be compensation; the process by which any collateral source of compensation to a victim (or a relative of a deceased victim) for an act of international terrorism shall be offset from any compensation that may be paid to that victim (or that relative) under the program es-

established by this section; and identifiable sources of funds including assets of any state sponsor of terrorism to make payments under the program.¹²⁵

Let us consider some of these structural questions that are essential to sound procedural design.

1. *Where Is the Program's Institutional Home?*

Generally speaking, contract and tort (or tort-type) claims against the government are assigned to the courts, whether Article III courts, Article I courts such as the United States Court of Federal Claims, or state courts. Locating such claims in the courts is consistent with the fact that the claimant's right to payment usually depends on a determination of the government's fault or responsibility. Courts are the traditional forum for determinations of fault and compensation for resulting injuries. They are regarded as having special institutional competence in valuing past injuries.

When the government creates a benefits or entitlement program, however, the determination of eligibility and the amount of the award is usually given to a specialized administrative agency, subject to judicial review by Article III trial or appellate courts under a more or less deferential standard. This option permits a degree of specialization and procedural flexibility that is difficult to achieve within a court. Additionally, an agency is freer to consider policy and budgetary concerns in setting the level of payments. Under this model, a victim compensation program could be lodged in an existing agency, such as the Department of Homeland Security, FEMA, the Social Security Administration, or even the newly-created Terrorism Risk Insurance Program within the Department of the Treasury,¹²⁶ or in a newly-created agency.

Occasionally Congress has created a hybrid structure combining the efficiency and entitlement aspects of an agency with the compensatory, accuracy, and legitimacy aspects of a court. The VICP is analogous to terror victim compensation in some respects: it provides government compensation for unavoidable, possibly mass, injuries, in order to protect the vaccine industry from tort litigation, promote public health policy, and provide compensation to injured persons. The VICP is administered by the Department of Health and Human Services and by special masters within the United States Court of Fed-

125. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 107-77, § 626(b), 115 Stat. 748, 803 (2002).

126. TRIA, *supra* note 14, § 103(a)(1)-(2).

eral Claims, an Article I court, with a limited right of review in the Court of Federal Claims.¹²⁷

The September 11th Fund, however, has a unique and puzzling institutional structure. It is a free-standing entity within the Department of Justice (DOJ). The only statutory officer of the Fund is the Special Master, who reports directly to the Attorney General. The remainder of the institutional structure was invented by the Special Master through regulations. This structure is unique because it locates a no-fault compensation program within the DOJ as a free-standing entity. The DOJ, of course, is primarily concerned with law enforcement, not with benefits administration, and the Fund is not only separated from other benefits administrations but from all other functions within the DOJ itself. The Special Master has both legislative and adjudicative functions but operates within no specified procedural or institutional structure.

A further anomaly is that the person who is entrusted with all of the functions of the program is called a special master—a term that in all other contexts denotes a para-judicial officer, located within a court, appointed by and subordinate to an Article I or Article III judge. A special master is appointed to assist a court with a particular matter.¹²⁸ Special masters are often appointed in complex litigation to oversee administrative or preliminary adjudicative proceedings in a lawsuit, including administration of a settlement agreement. There is no point to calling an administrator within the Justice Department a special master, other than to invoke the authority of special masters within the federal courts in order to lend legitimacy to the adjudicative determinations made by the administrator. If a special master does not derive his or her authority from a court—and in fact the decisions of a special master are not even subject to judicial review—then the title takes on a completely different meaning from its normal usage. It would be more accurate to give the head of the program an administrative title such as commissioner or administrator.¹²⁹

127. The Court of Federal Claims is an Article I court that has jurisdiction over claims against the government that are “founded . . . upon . . . any Act of Congress or any regulation of an executive department.” 28 U.S.C. § 1491(a)(1) (2000). Its judges are appointed by the President with the advice and consent of the Senate for a term of fifteen years and receive the same pay as federal district court judges. 28 U.S.C. §§ 171(a); 172 (a), (b)(2000).

128. See BLACK’S LAW DICTIONARY 989 (7th ed. 1999) (“master: . . . 2. A parajudicial officer . . . specially appointed to help a court with its proceedings”); FED. R. CIV. P. 53 (“special master: A master appointed to assist the court with a particular matter or case”).

129. The title “Special Master” does, on the other hand, reflect the ad hoc nature of the September 11th Fund.

It is helpful to compare the peculiar structure established by ATSA with the original proposal by congressional Democrats, which would have prescribed a much more traditional institutional organization.¹³⁰ The original proposal called for Congress to appropriate funds into a “September 11th Compensation Fund.”¹³¹ (The persistence of the original name explains the mystery of why the program is called the September 11th Victim Compensation “Fund” when it is not a “fund” at all, but an open-ended call on the Treasury.) The Fund would also accept contributions from insurance companies, airlines, and other potential tort defendants, “or any other entity that seeks to contribute,” and would have a right of subrogation “against any airline, insurance company or other entity found to be responsible for payment of compensation to the victims and their families.”¹³² In the original conception the Fund was to provide a mechanism for coordinating all sources of payments to the victims—programmatic (from the federal government), fault-based (from private entities such as the airlines and premises owners), insurance, and private charity. Rather than being a no-limit ATM card on the federal treasury, it would be a finite, defined fund to be allocated among claimants. Under the proposal, compensation payments would be made first from the nongovernment sources, thus minimizing the public cost by using public funds only to the extent that private funds were insufficient.

The Fund was to be administered by an Article I court, the “September 11th Compensation Court,” which would be located in the Southern District of New York and affiliated with the U.S. District Court for the Southern District of New York. Its presiding judge was to be appointed by the President, with the advice and consent of the Senate, for a term of five years and would have been removable only for good cause. The presiding judge would have the authority “to promulgate all procedural and substantive rules necessary to administer the Fund,”¹³³ as well as to hire hearing officers and administrative staff. An initial determination of eligibility and compensation would be made by court staff,¹³⁴ and the claimant would have the right to

130. Robert S. Peck, *The Victim Compensation Fund: Born from a Unique Confluence of Events Not Likely to Be Duplicated*, 53 DEPAUL L. REV. 209 (2003). I am grateful to Robert Peck, President of the Center for Constitutional Litigation, who was intimately involved in the effort to include a victim compensation program in the bill, for providing me with this initial draft, and granting permission to use it in this Article.

131. *Id.*

132. *Id.*

133. *Id.*

134. Claimants would be entitled to “compensation for” “injuries as a result of” the September 11th crashes, and to reasonable attorneys fees as approved by the Compensation Court. *Id.*

seek a hearing before a hearing officer, encompassing the right to counsel, the right to present documentary and testimonial evidence, “and any other due process rights determined appropriate by the Presiding Judge.”¹³⁵ The claimant would have the right to appeal the Compensation Court’s final disposition to the district court, with no further appellate review.

Thus, the initial Democratic proposal was for a more familiar and more formal, institutional structure. Not only were the Fund’s procedures more fully specified in this skeleton proposal than in the final legislation, they were not *sui generis*, but were within a procedural tradition that could have been used to further define the institution and its processes. Rather than having to solicit thousands of public comments over a period of months before promulgating regulations, an Article I court with a statutory mandate to provide certain types of procedural protections could have instituted *procedural* rules (such as evidentiary rules) quickly, with oversight from the district court.

Adjudication in a court might seem more consonant with applying a tort measure of damages, as well as better suited to administering a system in which government liability is open-ended rather than limited to a pre-determined dollar amount as in most settlement agreements. Placing victim compensation within the structure of the federal courts could lend the program valuable institutional legitimacy and authority, rather than making those attributes dependent on the personal qualities and reputation of the special master or the results of particular determinations. This would help to insulate the administration of the program from charges of bias (which were frequent if seemingly unsupported). It would also provide a visibly nonpartisan mechanism for oversight and review of individual compensation determinations.

On the other hand, an Article I court under the supervision of a federal district court would probably have tended to have more formal rules, more process and procedural rights, more opportunity for appellate review and consequent delays, and a greater tendency toward both procedural and substantive rules that mimicked traditional tort litigation. There is a general perception, whether it is accurate or not, that a lack of formality in alternatives to adjudication, such as settlement claims facilities under special masters, leads to fewer delays, lower costs of administration, and greater user-friendliness than traditional courts. The less formal structure that was adopted for the

135. *Id.*

Fund was undoubtedly intended to provide swifter resolution and payment than the norm for litigation in courts.¹³⁶

These considerations did not receive significant attention in the brief time between the first mention of victim compensation and the introduction and rapid passage of the bill. The Republican leadership did not want to create a new court or formalize the selection of the head of the program through the advise and consent process, a five-year term, and the tenure provisions of the Democrats' draft. (Recall that until much later, Republicans opposed creation of a Department of Homeland Security and the federalization of airport screeners.)

From an institutional and constitutional perspective, it would make more sense to follow either of the traditional models—administrative agency or Article I court—rather than the curious hybrid of the September 11th Fund. The Article I court model would emphasize process protections and the adjudicative nature of the program, while the agency model would embody an entitlement perspective and would probably tend to make the program look more like other government benefit programs. While the “special master” terminology recalls the Article I court model, the legislative history suggests that Congress had predominantly in mind creating a speedy and streamlined process (commanding that determinations be made within 120 days and taking issues of causation and fault off the table) rather than a formalized, due process adjudicative model. If a future program might cover exposure-only claimants or later-manifesting injuries, however, so that eligibility might not be so easily determined and causation might be a significant issue, the mass tort experience suggests that more attention to due process and adjudicative procedures may be warranted.

2. *Who Should Run the Program?*

In the initial negotiations over the September 11th Fund, Democrats argued that the program should be run by a senior judge, subject to Senate confirmation.¹³⁷ Appointing a senior judge would have emphasized the adjudicative and rights-based nature of the program, and would have lent authority and impartiality to the new program.¹³⁸

136. Though the pace of final resolution and payments has been slower than the drafters probably foresaw, the Special Master promulgated regulations early on to allow interim payments to claimants pending final resolution. Additionally, private charities and other sources (such as employee benefits and insurance) provided funds to many victims and their families.

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

138. Although sitting Article III judges generally cannot exercise non-Article III powers and must sit in an Article III court, this restriction would not apply to a retired judge. A retired judge can continue to retain her title and full salary if she “has performed substantial duties for a Federal or State governmental entity” that “is equal to the full-time work of an employee of the

The final version of the bill adopted the Republican position, favoring a special master appointed by the Attorney General, whose decisions could not be appealed. Subsequent legislation directing the President to propose a compensation program for all victims of international terrorism from 1979 forward also seemed to contemplate that the program would be administered by a special master.¹³⁹

This extraordinary institutional structure has actually worked rather well. It was imperative that the program be put in place immediately and begin operating at once, that extensive rulemaking be completed very quickly, and that extensive outreach be done among families that had suffered horrific losses and had to make decisions of great consequence in the midst of many kinds of uncertainties. Special Master Feinberg's long experience in mediating, facilitating, and administering mass tort settlements, as well as his reputation among lawyers and judges and his single-minded dedication to doing an impossible job, enabled him to create an agency that does about as good a job as could reasonably be expected given the constraints of the statute he was responsible to implement. It is possible that no one but a czar could have created a functioning organization so quickly while retaining the respect, if not the agreement, of the various stakeholders. If the procedural rules had been written by the Attorney General's staff, as is suggested by the statutory language,¹⁴⁰ there would likely have been considerable wrangling over the Interim and Final Rules that might have prevented the Fund from getting itself together in time to win over the potential claimants. Moreover, rulemaking by the Attorney General would have increased the perception, and likely the reality, of the role of political maneuvering in the rulemaking process. While Special Master Feinberg was criticized for being autocratic, even his critics did not suggest that his decisions were affected by political pressure.

Nevertheless, this structure should not be adopted for future compensation programs. Combining legislative and adjudicative powers

judicial branch." 28 U.S.C. § 371(b)(1), (e)(1)(D) (2000). The use of retired judges would avoid the issues that have arisen when sitting federal judges have undertaken non-Article III duties (e.g., Chief Justice Warren's chairmanship of the Warren Commission, Justice Robert Jackson's service as chief prosecutor for the Nuremberg War Crimes Tribunal).

139. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 107-77, § 626(b), 115 Stat. 748, 803 (2002). ("The legislative program shall include . . . the establishment of a Special Master to administer the program.")

140. See Appendix text accompanying notes 61-69. *But see* Colaio v. Feinberg, 262 F. Supp. 2d 273, 286 (2003) (rejecting plaintiffs' claim that "Congress did not delegate to the Special Master the power to prescribe the standards by which awards are determined . . . [and] that the Special Master was to serve as a quasi-judicial official responsible for assessing evidence and calculating awards according to criteria defined by Congress").

in a single person, and making that person exempt from any administrative or judicial review, can lead to conflicts of interest, blind spots, poor organization, and the appearance of arbitrariness or bias. Institutional design should not depend on finding a single individual with a unique set of talents and experience; rather, it should assist whoever is assigned to the institution to make good decisions.

The appointment of a distinguished senior judge or a preeminent mediator and special master such as Mr. Feinberg signaled the importance Congress assigned to the program and was surely intended to reassure claimants about the impartiality and integrity of the process. Would future programs require an administrator of such stature, especially if the events were less spectacular and less nationally traumatic? If future events were more like the Oklahoma City bombing, the embassy bombings, the Beltway snipers, or the anthrax letters, it might seem appropriate to dial down the prestige of the appointed administrator. Once regulations and procedures for the program are established, the administrator's rulemaking powers would be of less consequence. The appointment of a senior judge could lend prestige to the program, and there is a fairly large pool of senior judges from which to choose, but—as has been the case with Mr. Feinberg—administrative abilities might be more important than adjudicative expertise.

3. *Who Should Appoint the Head of the Program?*

Obviously, the higher the rank of the person appointing the head of the program, the greater the prestige of the position. The highest prestige would come from appointment by the President and confirmation by the Senate, as originally proposed by the Democrats. This process may not have been feasible for the September 11th Fund because of the press of time, and the experience of the September 11th Fund suggests that it is not necessary. Other possibilities are appointment by the Attorney General, as ATSA provides, by the Director of Homeland Security, or by whatever administrative agency the program might be made part of.¹⁴¹

4. *How Should Subordinate Hearing Officers Be Chosen?*

If there are a sufficient number of claimants, there will have to be more than one person to determine the amount of the awards. The more individualized the decision has to be, the more evidence and

141. Special masters attached to a court are appointed by the judge to whom the particular case or matter is assigned.

technical expertise will be required and the more necessary it will be to have additional adjudicative staff, and the more highly skilled those persons will have to be.

In the case of the September 11th Fund, the legislation authorized the Special Master to employ and supervise subordinate hearing officers but did not specify how they were to be chosen. Special Master Feinberg handled the initial phase of Fund administration himself, with subordinates who did not take a prominent public role. In September 2002, he appointed forty-one hearing officers to conduct both preliminary hearings and appeals of preliminary awards.¹⁴² In the future, claimants might be more geographically dispersed, leading to an even greater need for subordinate decisionmakers.

There were no published criteria for the selection of Special Master Feinberg's subordinate adjudicators. Though the individuals selected had impressive resumes, the list was criticized for including "too many corporate defense lawyers and too many people plucked from Mr. Feinberg's Rolodex of friends, former colleagues and fellow mediators."¹⁴³

While it may be appropriate for heads of departments to have a high degree of freedom to appoint high-ranking policy-making subordinates, when the job is adjudicative in nature this may diminish the perception of impartiality and independence that, in turn, contributes to the perception that the process is fair. Therefore, there should be regularized procedures for appointing such subordinates. Administrative agencies have regular procedures for selecting administrative law judges, as do district courts for the selection of magistrate judges. In any event, there should be more transparency in the qualifications to be considered in appointing the hearing officers and a more open application process.

5. *How Should the Program Be Activated?*

At this point, it probably would not be desirable to create a permanent specialized body that deals only in terrorism claims. Terrorist acts are sporadic and, thus far, infrequent, so the members would be sitting around most of the time with nothing to do. If victim compensation is administered through an existing administrative structure, such as FEMA or the Court of Federal Claims, the terrorism cases could be incorporated into its ongoing docket. If victim compensation

142. David W. Chen, *Legal Heavyweights To Help Decide Sept. 11 Fund Appeals*, N.Y. TIMES, Sept. 24, 2002, at B1.

143. *Id.*

continues to be as generous as the September 11th Fund has been, however, it may make a poor fit into a program that administers programs such as veterans' or social security benefits. Therefore, a separate administrative body is likely to be utilized to implement the legislation.

That body will have to be organized so that it can spring into action on short notice. The triggering event would be a certification that a particular event qualified as a terrorist act under the statute creating the program. In the case of the September 11th program, Congress made this determination legislatively. The legislative history of ATSA demonstrates why this is a bad idea. The pressure to act quickly in order to protect the air transport infrastructure and to reassure the public led to legislation that was adopted with almost no deliberation or debate.¹⁴⁴ In fact, it appeared that most members of Congress had not even read the legislation when they voted. Congress simply cannot move quickly enough.

A more practical idea is to designate a high official, or a small group of officials, in the executive branch to make the certification. Under the Terrorism Risk Insurance Act (TRIA), the determination is to be made by the Secretary of the Treasury (because certification authorizes payments to be made directly from the national treasury to insurers) with the concurrence of the Secretary of State and the Attorney General.¹⁴⁵ This determination cannot be delegated and is not subject to judicial review. It seems sensible to centralize, or at least to coordinate, the authority to certify a terrorist act for purposes of the various federal responsibilities that turn on such certification. The high degree of discretion in the TRIA certification procedure affords flexibility to respond to a variety of novel future terrorist incidents, and the immunity from judicial or administrative review limits the chance that a quick response will be frustrated by second-guessing or litigation over the determination. On the other hand, giving an executive official unlimited and unreviewable discretion could allow arbitrary or politically-motivated action.

These concerns could be addressed by specifying criteria for certifying a terrorist attack, such as the number of deaths, the dollar value of insurance claims or property loss, and so on. The more fixed and detailed such criteria are, of course, the more likely that an event that should be certified will not meet the criteria, or vice versa. And it is sometimes hard to distinguish "terrorism" from "crime," especially if

144. See Appendix text accompanying notes 22-53.

145. TRIA, *supra* note 14, § 102(1).

domestic terror is involved (one needs only to think of Timothy McVeigh, Ted Kaczynski, or the Beltway snipers.)

In general, the more the program is embedded in an agency or other organization that does similar work on an ongoing basis, the more clearly the procedural and substantive rules governing its operations are specified in advance, and the less individualized (and therefore time- and labor-intensive) its decisions, the more quickly it can get to full speed once a triggering event occurs.

6. *How Should the Program Be Coordinated with Litigation?*

The primary purpose of ATSA was to limit the tort liability of the airlines to ensure that they would remain solvent and would be able to continue to obtain insurance. In providing an alternative to tort litigation against the airlines and other secondary defendants, Congress did not intend to discourage litigation against the terrorists themselves or their co-conspirators or sponsors. In fact, Congress has passed legislation making it easier to bring such suits in federal court.¹⁴⁶ The first coordination objective, then, is to ensure that the compensation program is a substitute for tort litigation against the protected entities, but not others.

Determining which potential defendants should be protected is a complex public policy question. For example, should government compensation substitute for tort litigation only when the potential defendants are part of essential infrastructure or otherwise able to lobby Congress successfully for protective legislation?¹⁴⁷ Should a defendant's alleged negligence be taken into account in determining whether or how much to substitute the government as payor, to preserve incentives for taking care? Or would allowing plaintiffs to sue nonconspirator defendants even for gross negligence simply open the can of worms that the victim compensation legislation was designed to keep closed? I will not discuss such policy issues here, but will touch only on procedural issues of coordinating victim compensation programs with tort litigation.

ATSA attempted to force claimants to choose between government compensation and tort litigation against the airlines and others by conditioning participation in the Fund upon waiver of the right to sue

146. Multiparty, Multiforum Trial Jurisdiction Act of 2002, 28 U.S.C. § 1369; TRIA, *supra* note 14, § 107(a)(1).

147. "If your death involves an industry that the government feels compelled to protect, you're in luck. But if it's an industry that the government would let go under, you are on your own." Belkin, *supra* note 17, at 95.

anyone who did not participate directly in the terrorist act.¹⁴⁸ Waiver of tort claims was an essential part of the statutory purpose of protecting the airlines from massive tort liability. Even if the airlines were negligent in allowing the hijackers to get on board, to take over the planes, and to crash three of them into their targets without being overwhelmed or intercepted, the necessity of shielding the airlines from tort liability in excess of their insurance coverage was deemed more important than preserving victims' right to sue.

The waiver mechanism was successful. Many potential claimants delayed filing claims so as to obtain more information about the size of the awards from the Fund and the possibilities for tort recovery. In the end, ninety-seven percent of eligible families chose the Fund over litigation.¹⁴⁹ It is estimated that total payments will exceed \$5 billion.¹⁵⁰

The original version of the bill would have capped the airlines' liability but would not have provided any compensation from the government. Such a plan, enacted after the events occurred and the losses were sustained, might have been found to violate due process.¹⁵¹

In designing a plan for future terrorist attacks, however, other options would be available. Acting under its Article I powers, Congress could create a federal cause of action for injuries sustained as a result of a terrorist attack as defined by a designated government official, provide for exclusive federal jurisdiction and limited venue for such claims, and declare that the statute preempts state law as to all claims arising out of, or related to, such attacks. The statute could specify the criteria for seeking damages under the statute and could provide that in lieu of recourse against any other persons, victims and their survivors would be entitled to certain benefits under the statute.

Because no such injuries have yet occurred, preemption of state law would not constitute a taking.¹⁵² Once the state law tort remedy is

148. Though the Fund compensates only for personal injury and death, claimants must waive their right to sue for *all* damages, including property damage. ATSA, *supra* note 1, § 405(c)(2)(A)(ii), (3)(B)(ii).

149. See Chen, *supra* note 69.

150. *Id.*

151. Whether plaintiffs would have had legally viable claims against such defendants, and whether juries could have been trusted to decide such cases based on the law, are separate and controversial issues.

152. See *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978). *Duke Power Co.* upheld the Price-Anderson Act's limitation on liability of private parties (primarily utilities and component manufacturers) in the case of a future catastrophic accident at a nuclear power plant. The Court held that the limitation on liability was a valid economic regulation designed to stimulate private development of electric energy through atomic power and to pro-

eliminated prospectively, it would not be necessary to make compensation from the Fund comparable to tort damages in order to persuade claimants to give up their right to sue.¹⁵³ Freed from the practical need to lure claimants away from the tort system and the constitutional concern over how much “compensation” is “just,” the statutory compensation could be different from tort damages.¹⁵⁴ It could, in fact, be structured along one of the other models discussed in Part III—act of war, disaster relief, or government-provided insurance.

Congress has, in fact, already adopted aspects of this approach in legislation passed since ATSA. TRIA contains litigation management provisions that create an exclusive federal cause of action for personal injury, property damage, or death resulting from an act of terrorism as certified by the Secretary of the Treasury.¹⁵⁵ All state causes of action, except those against actual terrorists or their co-conspirators, are preempted.¹⁵⁶ The substantive law is drawn from the state where the act occurred.¹⁵⁷ The Judicial Panel on Multi-District Litigation designates a district court (or courts) that will have exclusive subject matter jurisdiction over all causes of action (including state causes of

vide compensation in the event of a catastrophic accident. *Id.* at 83. The Court emphasized that “a person has no property, no vested interest, in any rule of the common law” and that the “Constitution does not forbid . . . the abolition of old [rights] recognized by the common law . . . to attain a permissible legislative object . . . despite the fact that otherwise settled expectations may be upset thereby.” *Id.* at 88 n.32 (citations, internal quotation marks omitted). Indeed, “[t]hat the accommodation struck [between burdens and benefits of economic legislation] may have profound and far-reaching consequences . . . provides all the more reason for this Court to defer to the congressional judgment unless it is demonstrably arbitrary or irrational.” *Id.* at 83-84 (footnote omitted).

153. Compare workers’ compensation statutes, which replace tort claims against employers and provide considerably lower recoveries than tort damages.

154. The Court in *Duke Power Co.* held that the fact that the specific limitation on liability might not be enough to provide full compensation to victims of the hypothetical future accident did not make it irrational or arbitrary. *Duke Power Co.*, 438 U.S. at 84-85. “Initially, it is not at all clear that 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. . . . [T]he Price-Anderson Act does, in our view, provide a reasonably just substitute for the common-law or state tort law remedies it replaces.” *Id.* at 88 (footnote omitted). However, the Court also emphasized that the statute also commits Congress to review the situation if an accident should occur and to take whatever steps are deemed necessary to protect the public. *See id.* at 90.

155. TRIA, *supra* note 14, § 107(a)(1).

156. *Id.* § 107(a)(2), (b).

157. *Id.* § 107(a)(3). There is an apparent gap in coverage. An act that occurs abroad against a U.S. air carrier, vessel, or mission is expressly included in the definition of an act of terrorism, but because it did not occur in any state, section 107(a)(3) does not specify the substantive law to be applied. Perhaps federal courts will develop a federal common law, perhaps under their admiralty jurisdiction, to cover such occurrences.

action) arising from that terrorist act.¹⁵⁸ The designated district court has nationwide personal jurisdiction.¹⁵⁹ Although TRIA applies only to property and casualty insurance, with the possibility that group life insurance might be included if a study shows that its availability is being restricted because of terrorism risk,¹⁶⁰ the litigation management provisions, including the preemption of state causes of action, expressly apply to all claims for personal injury and death, as well as property damage.¹⁶¹

This approach appears workable with respect to incidents such as the events of September 11th. It might not work as smoothly for acts such as the anthrax letters, in which victims might not be concentrated in one location and familiar choice of law questions might occur.¹⁶² TRIA uses the creation of an exclusive federal cause of action as a device to coordinate tort suits in a single federal court, in order to further the statutory purpose of “[ensuring] the continued widespread availability and affordability of property and casualty insurance for terrorism risk.”¹⁶³ The same approach could be extended to permit claims against terrorists and their conspirators to proceed in the designated federal court under federal law borrowed from the state where the event occurred, and to provide a government compensation program as the exclusive remedy for all other relief.

Similarly, the Multiparty, Multiforum Trial Jurisdiction Act provides for original federal subject matter jurisdiction of claims arising from a single accident when there are more than seventy-five claims and minimal diversity exists. This provision permits removal of actions filed in state court to federal court and consolidation of all cases into a single district court (or courts). It is already available for suits against terrorists that meet minimal diversity requirements. The Foreign Sovereign Immunities Act, as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996, waives the sovereign immunity of foreign states that are designated as state sponsors of terrorism and makes them subject to suit in United States courts for claims of personal injury or death caused by “an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material

158. *Id.* § 107(a)(4).

159. *Id.*

160. *Id.* § 103(h), (i).

161. TRIA, *supra* note 14, § 107(a). TRIA has a sunset provision that would cause it to expire in December 2005.

162. These problems would be no more severe, however, than they would in the absence of the statute.

163. TRIA, *supra* note 14, § 101(b)(1)-(2).

support . . . for such an act.”¹⁶⁴ This provision makes it easier to sue governments that sponsor terrorism.¹⁶⁵

There is a second coordination issue: What if claimants are successful in obtaining a large tort recovery against the terrorists? Osama bin Laden, for example, is wealthy. Should the victim compensation program include a right of subrogation or a set-off against the award from the Fund? This is an issue of substantive tort policy rather than a procedural issue. The collateral source rules applicable to September 11th Fund awards would offset any such recoveries obtained before the determination of the claim against the Fund¹⁶⁶ but would not apply to judgments obtained after the award. Even though this disparate treatment appears illogical, it would encourage timing stratagems to allow claimants to keep both awards and might reduce some victims’ incentives to sue solvent terrorists, the likelihood of finding a solvent defendant and enforcing a judgment against it is remote enough and the desirability of encouraging private litigation against terrorists’ assets great enough that it probably would not be necessary to try to recover any “excess” payments.

7. *How Should the Program Be Coordinated with Other Payments to Victims, Including Private Charity?*

One of the most controversial issues with respect to the September 11th Fund has been a question of substantive tort policy: to what extent should the collateral source rule apply? The statute directs the Special Master to “reduce the amount of compensation . . . by the amount of the collateral source compensation the claimant has re-

164. 28 U.S.C.A. §1605(a)(7)(A) (West Supp. 2002). This section was added to the Foreign Sovereign Immunities Act by the Anti-Terrorism and Effective Death Penalty Act of 1996 and the Flatow Amendment. See *Roeder v. Islamic Republic of Iran*, 195 F. Supp. 2d 140, 144, 149 (D.D.C. 2002).

165. Suing state sponsors of terrorism may still not be successful. On November 28 and December 20, 2002, Congress further amended section 1605(a)(7)(A) to specifically authorize the then-pending suit *Roeder*. That suit, brought by the hostages held in the American Embassy in 1979 and their families, sought to recover damages of \$33 billion from the government of Iran. *Roeder*, 195 F. Supp. 2d at 144, 149. Although expressing annoyance at “Congress’ intent to interfere with ongoing litigation” and its failure to draft legislation that would accomplish its clear purpose, and suggesting that the attempt to legislate a result in pending litigation violated the separation of powers ((*INS v. St. Cyr*, 533 U.S. 289 (2001); *Plaut v. Spendthrift Farms*, 514 U.S. 211 (1995); *United States v. Klein*, 80 U.S. (13 Wall.) 128)), the district court concluded that regardless of whether the government of Iran was immune from suit, substantive liability had been abrogated by the Algiers Accords, the 1981 bilateral agreement between the United States and Iran that secured the hostages’ release, established the Iran-United States Claims Tribunal, and prohibited U.S. lawsuits against Iran arising out of the hostage-taking. *Id.* at 144-48, 161-66, 184.

166. ATSA, *supra* note 1, § 405(b)(6).

ceived or is entitled to receive . . .”¹⁶⁷ The statute defines “collateral source” as “all collateral sources, including life insurance, pension funds, death benefit programs, and payments by Federal, State, or local governments related to the terrorist-related aircraft crashes of September 11, 2001.”¹⁶⁸

Deducting collateral source payments from awards would tend to reduce the cost of the program to the U.S. Treasury and to reduce payments from the Fund to the survivors of higher income decedents, who presumably would have been more likely to purchase significant amounts of life insurance. On the other hand, tort law in most states does not take account of collateral source payments in determining the amount of the judgment; this rule follows from the principle that tortfeasors should internalize the costs of their activities, and should not be able to avoid such costs by taking advantage of the tort victim’s prudence. By expressly rejecting the collateral source rule in the statute itself, Congress seemed to be opting for a sort of hybrid, safety-net program that would assure that all victims received total payments that were equivalent to, but not in excess of, tort-type damages.

Though the statutory language appears quite clear, its application has been substantially narrowed in practice. First, private charitable contributions were excluded by regulation from the definition of collateral sources.¹⁶⁹ Deducting such contributions from awards would have reduced the cost of the program and could have provided an incentive for charities to direct their funds to those whose losses were not covered by the Fund (e.g., persons whose injuries manifested more than twenty-four hours after September 11th or who had property damage rather than personal injuries).¹⁷⁰ Concerns were raised, especially by charitable organizations, however, that deducting charitable donations from awards might cause private charity to dry up, or might lead charities to defer making donations until after the awards

167. ATSA, *supra* note 1, § 405(b)(6).

168. *Id.* § 402(4).

169. See 28 C.F.R. § 104.47(b)(2) (2001). The value of services or in-kind charitable gifts such as emergency housing, food, and clothing, and tax benefits received from the federal government are also excluded. *Id.* § 104.47(b)(1), (3).

170. As an example of directing charitable funds to persons who were not covered under the Fund, in August 2002, the American Red Cross and the September 11th Fund (a nonprofit charitable organization, not the federal September 11th Victim Compensation Fund) announced a program to pay for extended mental health treatment for people directly affected by the terrorist attacks. An estimated 150,000 families would meet the eligibility requirements, and the program would pay for treatment even if the person did not realize the need for it “for months or even for years.” Erica Goode, *Program To Cover Psychiatric Help for 9/11 Families*, N.Y. TIMES, Aug. 21, 2002, at A1. The September 11th Fund, which has raised over \$500 million, has already provided cash assistance to more than 100,000 people. *Id.*

had been paid out. Additionally, many donations had been earmarked by the donors for those directly injured on September 11th. And reducing awards by the amount of charitable donations was inevitably framed as taking money away from deserving victims and diverting generous private donations to the federal treasury. This position was not a tenable one for the Fund to take. As a result, the approximately \$2 billion raised by private charities for distribution to the victims of September 11th was not deducted from the compensation paid by the government.

Excluding payments from charities from the statutory collateral source reduction not only increased aggregate payments to the victims but also skewed the distribution of payments. At least eighteen percent of the approximately \$2 billion in private charitable contributions was earmarked solely for uniformed public workers.¹⁷¹ The police and firefighters who died in the World Trade Center were also eligible for important benefits from their employers, including tax-free salary continuation and survivors' benefits. They may also have (appropriately) received payments from funds that were not specifically designated in their favor.

The exclusion of charitable donations thus led to a system that benefited high-income victims and uniformed public safety employees who received a large amount of designated charitable donations. The relative position of lower-income victims was reduced even more than it already had been by the decision to base compensation primarily on income.

The treatment and coordination of payments from private charities should be considered in drafting any future victim compensation program. Such donations have been substantial in many instances besides September 11th. For example, the Lockerbie Air Disaster Trust received over £2 million, plus £370,000 in interest,¹⁷² in addition to the \$500 million settlement from Pan Am. Contributions for the families of the 168 people killed in the Oklahoma City bombing totaled about \$35 million.¹⁷³ One possibility was embodied in the Democrats' initial proposal: create a fund that could receive not only federal appropriations but also insurance proceeds, payments from entities that may have been partly responsible for the success of the attack, and private

171. See The Foundation of the Better Business Bureau Serving Metropolitan New York, *New York BBB Announces Results on Survey of September 11th Charity Activity* (Aug. 23, 2002), available at <http://www.newyork.bbb.org/AlertDetl.asp?ID=1> (last visited Oct. 14, 2003).

172. Stuart Millar, *Relatives May Sue Lockerbie Charity: Trust Rejects Requests for Financial Help from Families of Pan Am Bomb Victims*, OBSERVER (Scotland), May 21, 2000, at 1.

173. Associated Press, *A Nation Challenged: The Victims; Oklahomans Questioning Sept. 11 Aid*, N.Y. TIMES, DEC. 23, 2001, at B8.

contributions. This proposal would allow compensation efforts to be coordinated and funds to be more equally allocated. The legislation could also minimize the public cost of the program by specifying that funds from private sources should be paid out first. The September 11th experience suggests that it is difficult to achieve this kind of coordination after the events have occurred. Indeed, the Special Master had to disregard the statutory directive that all collateral source payments should be offset because private charities, which received over \$3 billion in connection with September 11th, threatened to withhold distributing funds until after awards had been determined in order to avoid "subsidizing" the government.

Second, the drafters undoubtedly did not realize that the statutory language created a loophole through which some families could avoid the deduction of life insurance benefits from their awards. The statute states that collateral source payments to the claimant must be excluded from the award,¹⁷⁴ but under the regulations collateral source payments to other family members may be excluded.¹⁷⁵ A claim may be filed by the "personal representative" of a decedent who died aboard one of the flights or at one of the crash sites.¹⁷⁶

The regulations rely on state law to determine who could file a claim as a "personal representative."¹⁷⁷ The personal representative is either a person appointed by a court as the decedent's personal representative or as the executor or administrator of the decedent's will or estate, or, if no such person has been appointed, then "the first person in the line of succession established by the laws of the decedent's domicile governing intestacy."¹⁷⁸ Accordingly, it may be possible for a family with, for example, a surviving spouse and several children to decide to have the person with the least collateral source compensation file the claim in order to minimize the collateral source reduction. (That person would have to be either first in line under the intestacy laws or capable of being appointed by the court as a personal representative.)

Obviously, the legislation creating any future victim compensation program should carefully specify the way in which collateral source payments should be treated, and this treatment should reflect the goals of the program.

174. ATSA, *supra* note 1, § 405(b)(6).

175. 28 C.F.R. § 104.47(a) (2001).

176. ATSA, *supra* note 1, § 405(c)(2)(A)-(C).

177. *See* 66 Fed. Reg. 66,283, § 104.4 (Dec. 21, 2001).

178. *Id.* § 104.4(a)(1)-(2).

If the goal is to function like a government-provided insurance policy against injury or death caused by terrorism, then the specified benefits should be paid in full without regard to whether any collateral source payments have been received.

If the goal is to ensure that the victims or their survivors receive compensation at a designated level by committing the government to “top up” any deficiency, then payments from all sources should be deducted from awards.

If the goal is to provide for a certain level of compensation above and beyond what the victim or survivors would have received if the injury or death had been from other causes, then payments such as life or disability insurance or employer-provided benefits should be disregarded, but charitable payments should be deducted from the award.¹⁷⁹

If the goal is to replicate the results of the tort system, then the program should follow the rules of the state of the victims’ domicile.

If the goal is to encourage charitable donations from the public, then such payments should not be counted (although then the public will, in a sense, be paying twice, once as taxpayers and once as donors, and there may be inequities in the allocation of total benefits).

Furthermore, if the compensation from the government program is to be adjusted based on payments from other sources, the legislation should specify how those payments are to be coordinated, to discourage gaming the system to delay collateral-source payments or deflect them to a payee who does not “count” to maximize the payment from the government program. The statute might even require that all charitable donations intended for individual recipients be channeled through a trust set up as part of the government compensation program.

People do not like the idea of “taking money away” from police and firefighters. Like members of the military, however, risk of injury or death in the performance of their duties is part of the known conditions of the job. Public safety employee contracts reflect the risky, perhaps life-threatening, nature of the job by providing special benefits if employees are killed or injured in the line of duty. There is no *a priori* reason why such benefits should not be treated like other similar collateral source payments such as insurance—though Congress

179. This approach would be complicated by the likelihood that people, especially high-income people, who work in locations or jobs that have a high risk of terrorist attack would logically purchase more insurance or would purchase terrorism insurance.

might decide to give uniformed public workers and military personnel the additional benefit of excluding them.

B. Procedures for Determining Awards

The type of hearing should depend both on the nature of the determination and the values and objectives of the program. If victim compensation is intended to be similar to insurance, the procedures for filing a claim can be simple, and a mid-level bureaucrat can make the determination on the basis of the written materials submitted, with some right of internal administrative appeal to ensure that the standards have been applied properly. A significant portion of the compensation might be handled by enrolling survivors in various ongoing benefit programs—disability, medical, housing assistance, fixed stipends, and so on. There would be no need for more complex procedures such as evidentiary hearings or expert witness testimony.

The more the award looks like tort damages, with individualized determinations and a heightened desire for accuracy, the more procedural complexity will be required and the more time-consuming and costly the proceedings will inevitably become. Because the September 11th Fund was required by statute to base awards on a determination of actual economic and noneconomic losses, including lost future income, it had to have formalized procedures. Whenever a determination of lost income is required, parties will have to have the right to be represented by a lawyer, to submit factual evidence and expert testimony, to discover and challenge the methodology to be used in the calculation of the award, and to present their case and arguments to the decision maker. Individualized determinations based on evidentiary presentations, in turn, require evidentiary rules and standards of proof—What evidence and assumptions may be used to calculate lost income? Should lost income be calculated on an after-tax or before-tax basis? What are the actuarial assumptions of the methodology? How are facts demonstrated to be true? What factors can be considered in calculating pain and suffering or mental anguish? Does the claimant or the administrator have the right to cross-examine witnesses?

These additional procedures will be necessary because when the decision is based on complex and technical factors, decision makers need more, and more reliable, information and procedural guidance on how to arrive at their decisions, and lay people need professional assistance to understand and navigate the system. When something important is at stake in an individualized determination, everyone in the process

wants the decision to be made carefully and with all the relevant factual information.

It would be possible to make these determinations solely on the basis of a written record, including the claimants' arguments as well as their evidence. But other values and considerations counsel having individual, or at least group, hearings with the opportunity to present at least some live testimony. Individual hearings promote transparency and legitimacy by giving claimants the opportunity to present their own case, allowing them to see the presentation of the case, and showing them that the decision maker is attending to the presentation. Live testimony by certain expert witnesses can even make the process more efficient by allowing the decision maker to raise questions, clarify points, and seek the claimant's response to counter-arguments. If the award depends on individualized determination of noneconomic losses, such as pain and suffering, mental anguish, and diminution in quality of life, there is really no substitute for live testimony.

Live hearings can serve other values as well. In many types of cases, there is value for claimants in the very fact of being able to tell their story in a formal setting, to a person vested with authority, and having that story heard. The Dalkon Shield Claimants Trust is a classic example of a claims process that was structured to give the claimants an opportunity to express, in a formal setting, what the injury meant to them in individualized, human terms.¹⁸⁰ Providing victims of terrorist acts, or their survivors, the opportunity to testify about the consequences of the events and to express their rage, frustration, and sorrow could be a constructive and desirable function of claims administration. If this is a goal of the process, it would be important to ensure that hearing examiners reflect the pool of potential claimants by race, sex, and other relevant factors, and to provide native speaker examiners at the claimant's option.¹⁸¹

If awards are to be calculated based on individualized determinations of lost income and other similar factors, it could also be worthwhile to consider providing multiple procedural options, ranging from extremely simple and speedy resolution (but with relatively small awards) to more complex but nonadversarial proceedings in which claimants could present additional evidence to justify higher awards, to adversarial processes such as arbitration, with the highest possible awards. The Dalkon Shield Claimants Trust is an example of such a

180. See generally Carrie Menkel-Meadow, *Taking the Mass Out of Mass Torts: Reflections of a Dalkon Shield Arbitrator on Alternative Dispute Resolution, Judging, Neutrality, Gender, and Process*, 31 LOY. L.A. L. REV. 513 (1998).

181. See *id.*

multi-track process.¹⁸² The regulations for the September 11th Fund adopted a form of multi-tracking. Claimants could elect in advance to accept the presumed award, in which case they could receive their award within sixty-five days of filing the claim (Track A). Or they could choose the alternate track (Track B), in which they would receive an evidentiary hearing at which they could argue for an upward departure from the presumed award. Track A would provide a speedy and certain remedy, and Track B would provide additional procedural rights, an individualized determination based on an evidentiary hearing, and the chance of receiving a higher award, but not as soon.

Another procedural option is to provide appellate review, or layers of review, within the claims process in which claimants can present arguments against the hearing examiner's award. In the claims process that was created to resolve the Prudential Life Insurance Sales Practices Litigation, for example, claimants could pursue multiple levels of review alternating between bodies chosen by plaintiffs' counsel and the company. In the victim compensation context, this sort of review process could include persons chosen by a claimants' representatives group, or by a claimant-oriented group such as Trial Lawyers Care, ATLA, or the American Bar Association.

Individualized proceedings lead inevitably to disparate awards for seemingly similar claimants. If the proceedings are relatively complex or the claims numerous there will have to be numerous hearing officers. It will then be necessary to have procedures for reviewing awards for consistency. This should include administrative review of proposed awards before awards become final. The process for appealing awards should also include controls to ensure that awards after appeal are not systematically higher than unappealed awards.

Grids and caps can reduce the amount of evidence, time, and individual attention needed to make each award, as well as even out differentials in outcomes, but they make the determinations less reflective of individual facts and circumstances, and reduce the sense that a claimant's submissions and telling their story will make a differ-

182. See Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found?)*, 61 *FORDHAM L. REV.* 617, 630 (1992). Claimants could choose option 1 (short form and instant offer), in which claimants need only file a form affidavit claiming use of the device and consequent injury and received a fixed payment in exchange for a full release; option 2 (claim form and tailored offer), in which the claimant provided medical records substantiating use and injury, but need not prove causation, and received scheduled compensation depending on the nature of the injury; or option 3, in which the claimant provided more evidence, including evidence of causation and damages, and, where proof was shown, received a settlement offer based on historical litigation settlements; and, for claimants who completed option 3 and were not satisfied with the offer, a settlement conference, then binding arbitration or trial.

ence in the outcome. Individualized determinations can seem unfair because people are treated differently based on what may seem to be irrelevant facts, and standardized determinations can seem unfair because they do not consider the individual.

C. Appeals and Judicial Review

In any compensation program there should be a provision for review of the initial decision. In the simplest model, in which the only real questions are whether the eligibility determination is correct and whether the prescribed criteria have been correctly applied, elaborate appeals procedures should be unnecessary, and internal administrative review within the fund, under the direction of the administrator, should be sufficient. The more complex the determination, the more extensive and technical the evidence admitted, and the greater the value placed on accuracy in the determination, the greater the possibilities for appellate review.

ATSA expressly provides that the Special Master's decisions on claims to the September 11th Fund are not subject to judicial review. This provision is clearly designed to speed the process along so that claimants do not need to wait their turn for a court hearing. It may also be intended to reduce the need for legal representation and to avoid having determinations turn on technical or legalistic issues.

Claimants to the Fund have clear notice that the Special Master's decisions are not subject to judicial review, and they have the option to file suit in federal court where their right of appeal is preserved rather than to file a claim for compensation from the Fund. Provisions waiving any right of judicial review are routine in private settlement agreements. Particularly in light of the favorability of the criteria for determining awards and the size of the awards the Special Master has made, one cannot get too worried over the lack of judicial review of the September 11th awards. In other circumstances, however, it is possible that a program that preempts state law and eliminates all possibility of recovery except through the fund, private insurance, and suits against the terrorists and their accomplices, may not be constitutionally able to be exempted from all judicial review.

Whether determinations of individual claims can be completely insulated from judicial review has not yet been presented to the courts. Judge Alvin Hellerstein of the Southern District of New York did, however, sustain the availability of judicial review of the regulations and procedures for determining claims. In *Colaio v. Feinberg*, he held that the provision barring judicial review of the Special Master's determination of claims does not preclude judicial review of "the legality

of the regulations and of the interpretive methodologies, and policies adopted by the Special Master."¹⁸³ He also held that those regulations, methodologies, and policies were within the Special Master's discretion.¹⁸⁴

D. Defining Eligible Claimants

There was considerable controversy over the regulations that adopted state law as the rule of decision on who was eligible to become a personal representative.¹⁸⁵ The most serious issue in ATSA's definition of eligible claimants, however, was its limitation of eligible claimants to those who had suffered physical harm or death at the scene of the crashes, or aboard the planes, at the time or in the "immediate aftermath" of the crashes.¹⁸⁶ This provision was reasonably effective in improving certainty about who was eligible, making eligibility determinations simple, limiting the opportunities for fraud (though there were still cases of fraudulent claims), keeping the total costs of the fund down by limiting the number of claimants, and avoiding the problems associated with future claimants.

In hindsight it became clear that this definition was much too restrictive. It excluded people who did not report their injuries within twenty-four hours,¹⁸⁷ as well as many rescue and reconstruction workers who worked for days, weeks, and months under the burning rubble, breathing smoke, ash, and toxic fumes, and who were either injured on the site or later developed respiratory ailments as a result of their efforts.¹⁸⁸ It is still possible that some of these people may

183. ATSA, *supra* note 1, § 405(b)(3).

184. *Colaio v. Feinberg*, 262 F. Supp. 2d 273, 285 (2003).

185. The primary objection was that same-sex partners could not serve as personal representatives under the applicable state law. The Special Master concluded that the Fund had to align its rules with state law to avoid conflicts in the administration of the decedent's estate.

186. ATSA, *supra* note 1, §405(c)(2)(A)-(C); 66 Fed. Reg. 66,282, § 104.2(c)(1),(2) (Dec. 21, 2001). "Immediate aftermath" was defined as twelve hours for non-rescue workers and ninety-six hours for rescue workers. 66 Fed. Reg. at 66,282, § 104.2(b). "Physical harm" required "a physical injury that was treated by a medical professional within 24 hours of the injury having been sustained or within 24 hours of rescue" (with some minor exceptions) and, in non-fatal cases, required "contemporaneous medical records." *Id.* § 104.2(c)(1), (2).

187. *See* 67 Fed. Reg. 11,242 (Mar. 13, 2002) ("Commenter indicated that—despite being seriously injured—he spent more than 24 hours trying to locate his family members.").

188. The regulations addressed this issue by defining "immediate aftermath" to mean twelve hours after the crashes for "all claimants other than rescue workers," and ninety-six hours after the crashes for "rescue workers who assisted in efforts to search for and recover victims." 28 C.F.R. § 104.2(b) (2002) There is no requirement that the injury be sustained within this period, only that it be "sustained as a result of" the crashes. Even if all of the workers at the site were construed to have been searching for victims in addition to clearing and restoring the site, many of them arrived more than ninety-six hours after the crashes and, therefore, are not covered at all.

later develop cancer, emphysema, or other serious diseases as a result of their work in the aftermath of the collapse. If they were not present at the site in the first ninety-six hours after the crashes, however, they would not be eligible to file claims.¹⁸⁹ In the case of latent injuries, the ability to recover may also be limited by the definition of “physical harm” to include only “a physical injury to the body that was treated by a medical professional within twenty-four hours of the injury having been sustained.”¹⁹⁰

There may be other types of injuries that should be compensated as well—people who were held hostage but not physically injured, or persons who were not physically injured but suffered emotional trauma.¹⁹¹ A decision would have to be made whether to limit the compensation program to acts taking place on U.S. territory, or acts by international terrorists, as ATSA and TRIA do.¹⁹²

The line between providing clear rules that control the number of potential claimants, facilitate administering the process, and discourage fraud on the one hand, and providing enough flexibility to allow the program to respond to unforeseen circumstances on the other, is a fine one. We know now that a compensation program should be flexible enough to include people who are injured after the terrorist act itself, but as a result of that act, such as rescue workers and workers clearing the rubble, even if they are not present when the act occurs.¹⁹³ We also know that such injuries, as well as injuries from other possible kinds of terrorist attacks, such as biological weapons and “dirty” bombs, can take a long time to manifest themselves after exposure. We know that the problem of future claimants, persons who have already been exposed but who may or may not suffer serious consequences in the future, has been one of the most difficult problems in mass tort litigation. And we can infer that terrorist attacks are likely to occur in unforeseen ways and to present novel problems. A program to compensate future terror victims should reflect very careful thought about how to achieve flexibility in responding to novel circumstances while providing adequate guidance and certainty.

189. *Id.*

190. *Id.* § 104.2(c)(1), (2).

191. See *supra* note 170 (Private charities created a program to provide extended mental health care to as many as 150,000 families.).

192. Technically, a U.S. embassy is not on foreign soil. TRIA expressly includes damage that took place within the United States, to an American air carrier or vessel, or on the premises of an American mission abroad. TRIA, *supra* note 14, § 102(1)(A).

193. See generally WILLIAM LANGEWIESCHE, AMERICAN GROUND: UNBUILDING THE WORLD TRADE CENTER (2002).

E. Defining Eligible Losses

Unlike most airplane crashes, the September 11th attacks caused many, many times more deaths and property damage on the ground than on the planes. Even terrorist bombings until that time had caused comparatively little damage; the most serious, the bombing of the Murrah Federal Building in Oklahoma City, killed 168 people (just six percent of the total at the World Trade Center) and caused property damage, mostly to federal property, that was far less than the billions of dollars of damage caused by the September 11th attacks.

ATSA provided victim compensation only for personal injury and death. In order to file a claim, however, claimants had to waive all claims against anyone other than the terrorists, even property damage claims that were not covered by the Fund. Those who suffered only property damage received nothing from the Fund, though they could still bring private suits, and many have. But ATSA limited the liability of air carriers to the insurance coverage on the planes, some \$7 billion.¹⁹⁴

The decision not to compensate property losses was justifiable in light of the cost of such a program, the difficulty and delays that would be inevitable in administering so many claims (many of which could have involved more complicated determinations than the decedents' lost income), the fact that many property owners could rely on insurance coverage, and the historical fact that the federal government has not provided compensation for property damage in similar circumstances. Nevertheless, the possibility of enormous destruction of property in a terrorist attack should be taken into account in considering a victim compensation program.

Congress has chosen to address the problem of property damage caused by terrorist acts by strengthening and supporting the market for insurance against such losses. TRIA was designed to guarantee that insurance coverage for terrorism-related losses would be widely available in property and casualty insurance policies, to support the insurance industry in providing such coverage by paying for most of such losses during a three-year transition period, by thereafter administering a program by which the costs would be absorbed by policyholders through premium costs, and to serve as the reinsurer of last resort should losses exceed the capacity of the insurance market.¹⁹⁵

194. ATSA, *supra* note 1, § 408(a). The liability of other possible defendants, such as the Port Authority, was not limited, but in order to file a claim with the Fund, claimants had to waive all rights to file a civil action against anyone other than knowing participants or conspirators in the act, except to recover collateral source obligations. *Id.* §§ 405(c)(3)(B)(i), 408(c).

195. TRIA, *supra* note 14. See discussion *supra* notes 54-58, 122-123 and accompanying text.

The goal was to calm insurance markets and the public by reducing uncertainty regarding future terrorist acts, to assure that property owners would be able to purchase anti-terrorism insurance, and to build a functioning market for such coverage.¹⁹⁶

This approach seems to be the correct one for property damage. Most property owners carry property and casualty insurance, and the cost of anti-terrorism coverage should be relatively low if spread among all policyholders. There will still be difficult issues, such as what happens if the property owner does not carry enough insurance to cover losses from a terrorist attack, and whether those who own property in low-risk or low-cost areas should subsidize those who own property in, say, Manhattan. If the answer to the second question is yes, there will be some incentive for financial and other industries to concentrate in a few high-cost, high-risk geographical areas; if the answer is no, there will be an incentive to decentralize those industries. Nevertheless, the private insurance market appears to be a good tool for addressing the property damage problem.¹⁹⁷

With respect to personal injuries, it might be possible to fashion a compensation program by requiring life and medical insurance policies to contain anti-terrorism coverage.¹⁹⁸ Because the risk of death or injury as a result of terrorist activity is very low compared to all the other risks of daily life, terrorism insurance should not add significantly to the overall cost of insurance (though this depends in part on how pooling is done, that is, how broadly the risk is spread). However, many people do not have life or medical insurance at all, and those who do have life insurance have widely varying amounts of coverage. In general, higher income individuals will benefit more from terrorism compensation that is included as a standard term in insurance policies. Thus, if public policy favors adopting an insurance model of compensation (that is, fixed payments and noncash benefits that are essentially equal for all claimants with similar losses), that objective can probably best be achieved through a compensation fund

196. *Id.*

197. This problem has arisen in connection with the British Pool Re program. See *supra* note 118 (describing the British terrorism reinsurance program and related public policy problems). The issues are cogently analyzed in a fifty-year-old article; see generally Jack Hirshleifer, *War Damage Insurance*, 35 REV. ECON. & STAT. 144 (1953), reprinted in 9 CONN. INS. L.J. 1 (2002); see also Peter Siegelman, *A New Old Look at Terrorism Insurance: Jack Hirshleifer's War Damage Insurance After Fifty Years*, 9 CONN. INS. L.J. 19 (2002) (retrieving Hirschleifer's article from obscurity and applying it today).

198. TRIA requires the Secretary of the Treasury to determine whether the availability of group life insurance is being affected by terrorism exclusions and if so, to include it within the program. TRIA, *supra* note 14.

with appropriate rules and regulations rather than through the insurance market.

F. *Reducing Costs and Delay*

One rationale for creating a government compensation system was to get money to victims faster and at a lower cost than would be possible through the court system. The statute provided, for example, that the Special Master must finalize the amount of the award within 120 days of the filing of the claim.¹⁹⁹ Simply using a special master and alternative dispute resolution model does not necessarily guarantee that costs and delays will be lower, however.

There are several procedural ways to reduce costs and delays. One is to standardize the remedy and the evidentiary basis on which it is awarded. As discussed above, this would reduce or eliminate the need for evidentiary hearings, expert testimony, and other costly, time-consuming procedures. This decision, however, reflects fundamental policy choices about the rationale and goals of the program, and should not be based simply on a desire to reduce costs.

Another way of reducing costs and delay is to have procedural and substantive rules and regulations in place before the event occurs. This would provide more certainty for potential claimants and would allow the program to get up and running quickly.

A third way is to strip elements of proof or potential defenses away from the case. For example, ATSA forbids the Special Master to take negligence or other theories of liability into account in determining awards.²⁰⁰ As it turned out, causation was not an issue in light of the definition of eligible claimants and the nature of the attack, so the only issues for decision were the amount of compensation to award based on the victim's economic and noneconomic losses.

It would be unwise to assume that this will be the case in future events, however. For example, a chemical, biological, or nuclear attack could cause latent harms that do not manifest themselves immediately. For that matter, even for the events of September 11th it seems clear in retrospect that injuries such as respiratory ailments suffered by rescue and reconstruction workers should have been included in the program. Such injuries may manifest themselves much later, and causation may be a serious issue in those claims.

199. ATSA, *supra* note 1.

200. *Id.*

G. What If the Future Doesn't Look Like the Past?

The September 11th attacks were unexpected, and shockingly so. In retrospect, they appeared to be foreseeable. When Congress passed victim compensation legislation only eleven days after the attacks, it seemed obvious that it was reasonable to limit compensation to injuries sustained within a day or so of the crashes. Now it seems even more obvious that rescue efforts and clearing the rubble would be dangerous, would continue for many months, and could expose workers to toxic substances that could cause injuries that would take months or years to manifest.

We have already been warned that terrorist attacks in the future might involve biological weapons, such as anthrax or smallpox, chemical weapons, or "dirty bombs" that would not require much technological sophistication and could be brought into the country in a suitcase. We have been told that attacks might come on apartment buildings, bridges, or water supplies, or might take the form of cyberterrorism.

All this is simply to repeat that compensation programs and the institutions that implement them, like generals, should beware of planning to fight the last war. To a point, we can try to foresee possible types of attacks; to a point, we can try to build flexibility into the procedural design so that the program can respond nimbly to a variety of types of events; and there is always the safety valve that Congress can respond legislatively if the future is too different from the past to be accommodated by existing institutions and procedures.

V. CONCLUSION

It is still too early to judge the success of the September 11th Fund. It is not too early, however, to draw lessons for the design of compensation programs for the future.

The central idea of this Article is that criticisms that have been thought to be about procedure or implementation really flow from much more fundamental problems of institutional design. Procedure is not like a bandage that you slap on a wound or a vessel into which you pour a dispute. Good procedural design flows from understanding and making real the purposes and values of the substantive law or program that the procedures will implement.

Many of the aspects of the September 11th Fund that have troubled claimants and observers flow from the contradiction of adopting a tort litigation and settlement claims administration model for a government entitlement program. The policy rationale that supports basing

tort damages on lost future income is not present when the government volunteers to provide payment, and individualized damages based largely on income or wealth are inconsistent with the principle that—in the government's eyes—all persons are created equal. The equality principle is a central pillar of our constitutional faith, and it is especially important in times of national crisis when the people must pull together. Tort-type compensation takes people who were killed together in a terrible national trauma and says some are more valuable than others—and that wealthy people deserve more government assistance. Moreover, a tort measure of compensation makes the system harder to administer, more costly for the taxpayer, and more out of sync with how other similarly-situated persons are treated.

A better solution, in my view, would be to view government compensation to terror victims as a form of government-provided insurance against a remote but catastrophic risk that we all run just because we live in this country. Government-provided insurance should be in the same amount for everyone. The base amount should not be broken down into components such as pain and suffering or lost income, but it might be adjusted for need-based factors such as number of dependents and disability. Such adjustments should be standardized as much as possible, or handled by the provision of noncash benefits such as medical care, education, and housing assistance, perhaps by including the recipients in an existing program such as one for federal employees or veterans. Because it is not intended to make the recipient whole, this type of program does not require making judgments about people's worth, or complex calculations, or deductions for payments from collateral sources. It could include noncash benefits such as medical care. It could even take the form of a life annuity.

All of these benefits would be easy to administer, would promote the equality principle (perhaps assisted by the need or relief principle), and could be calibrated with respect to the cost to the government. Personal injuries and other injuries that are difficult to monetize, such as captivity or torture, could be compensated through this sort of government entitlement program. Property damage and business loss could be addressed through government support and stabilization of the private insurance market through legislation such as TRIA.

A program such as this, put in place far enough in advance to allow procedural and substantive rules to be developed before the program is called on to pay claims, would eliminate many of the complexities and uncertainties that have proven so difficult in the September 11th context. Its procedural rules could be designed to be clear and intelli-

gible, even to laypersons, and to express the values and implement the purposes of the program.

In any event, the procedures by which victim compensation is provided must be consciously designed to fulfill the purposes and goals of the program. Identifying, agreeing on, and understanding those purposes and goals may be the most difficult part of designing terror victim compensation programs.

**APPENDIX:
THE HISTORY AND STRUCTURE
OF THE SEPTEMBER 11TH VICTIM
COMPENSATION FUND**

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This Appendix provides a summary of the history of the legislation and regulations that created the September 11th Victim Compensation Fund, and a guide to the structure and major provisions of the legislation and the implementing regulations.

I. HISTORY OF THE LEGISLATION

A. *H.R. 2891—Bailout Without Victims' Compensation*

Shortly after the terrorist attacks of September 11, 2001, it became evident that the nation's airlines were in a precarious financial position as a result of the attacks. According to the airlines, the industry lost approximately \$330 million each day that the airlines were grounded and was expected to lose \$24 billion during the coming year.¹ Within a week of the attacks, the five largest airlines (Continental, Northwest, American, United, and Delta) all announced significant flight reductions and layoffs amounting to perhaps 100,000 employees.²

In response to the airlines' financial difficulties, late in the afternoon on Friday, September 14, Representative Don Young (Chairman of the Committee on Transportation and Infrastructure) introduced H.R. 2891, "[t]o preserve the continued viability of the United States air transportation system."³ H.R. 2891 was a simple airline relief bill. It authorized the President to compensate air carriers from "losses

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1. *Hearing on H.R. 2891, To Preserve the Continued Viability of the United States Air Transportation System, Before the House Comm. on Transp. and Infrastructure*, 107th Cong. (2001), available at <http://www.house.gov/transportation/fullhearings/09-19-01/09-19-01memo.html> (last visited Oct. 13, 2003) [hereinafter *Hearing on H.R. 2891*]; see also H.R. REP. NO. 107-45 (2001), *To Preserve the Continued Viability of the United States Air Transportation System: Hearing on H.R. 2891 Before the House Comm. on Transp. and Infrastructure* 107th Cong. 44-45, 59-60 (2001), available at http://commdocs.house.gov/committees/Trans/hpw107-45.000/hpw107-45_of.htm (last visited Oct. 13, 2003) (explaining calculations).

2. See *Hearing on H.R. 2891, supra* note 1.

3. H.R. 2891, 107th Cong. (2001).

sustained . . . as a result of the events of the attack on the United States on September 11, 2001” through a combination of direct payments, loans or loan guarantees, and suspension or modification of the airlines’ federal financial obligations.⁴ The bill was referred to the Committee on Transportation and Infrastructure on September 14.⁵ As the clock turned past midnight, Representative Young sought unanimous consent to discharge the measure from committee and consider it immediately, but several Representatives objected because the bill was being rushed.⁶

On Wednesday, September 19, the Committee held a hearing “to receive testimony on H.R. 2891 and other possible legislation to preserve the continued viability of the United States air transportation system, and to receive testimony on the financial condition of the airline industry in light of the tragic events of September 11, 2001.”⁷ The Committee received over eight hours of testimony, mainly from airline executives and labor union officials.⁸

During this hearing, several witnesses suggested that Congress somehow minimize the airlines’ liability to victims on the ground.⁹ However, the case was put most forcefully by Leo Mullin, Chairman and CEO of Delta, who testified on behalf of the Air Transport Association (ATA).¹⁰ He explained that liability on the ground would prevent the airlines from being able to access capital markets and thus would undermine the entire bailout scheme.¹¹ ATA proposed complete immunity for damage to persons and property on the ground, while preserving the rights of the passengers’ survivors.¹²

Later in the day, Representative Max Sandlin asked Hollis Harris, President and CEO of World Airways, “Is there any advice you could give to us on how we could work together as an industry and as a Congress to provide relief to the families and the victims without further victimizing the victims?”¹³ When Harris did not appear to under-

4. *Id.* § 1(1)-(3).

5. 147 CONG. REC. H5703 (daily ed. Sept. 14, 2001).

6. *See id.* at H5684-91.

7. *Hearing on H.R. 2891, supra* note 1.

8. *See generally* H.R. REP. NO. 107-45 (2001).

9. *See, e.g., id.* at 38-39 (testimony of James P. Hoffa, General President, International Brotherhood of Teamsters), 64 (testimony of Tom Horton, Chief Financial Officer, American Airlines) (“Liability protection is probably the single most important thing that the government can do to help us get back in the capital markets and help ourselves Until that cloud is lifted, I don’t think we are going to have any access to the capital markets.”).

10. *See id.* at 41-49.

11. *See id.* at 46-47.

12. *Id.* at 47.

13. *Id.* at 151.

stand, Representative Sandlin asked flatly, "Do you think some of the money that we set aside, and certainly we want to help the airlines, should some of that be set aside for a claim fund for the victims? Would that be something to consider or not?"¹⁴ This was the first mention in the legislative record of a victim compensation fund.

B. H.R. 2926—*Bailout Plus Victim Compensation*

Two days later, on Friday, September 21, Representative Young introduced a new bill, H.R. 2926, the Air Transportation Safety and System Stabilization Act (ATSA).¹⁵ That same day, Senator Tom Daschle (for himself and Senator Trent Lott) introduced S. 1450, which was identical to H.R. 2926.¹⁶ This bill provided considerably more detail than its predecessor, and included a victim compensation fund in Title IV.¹⁷

According to the *New York Times*, the fund was designed in less than twenty-four hours.¹⁸ Like its predecessor (H.R. 2891), H.R. 2926 began as an airline bailout bill without a compensation fund. The Democrats refused to agree to such a bill. The White House then proposed a relatively simple plan: All victim lawsuits would be consolidated in the U.S. District Court for the Southern District of New York, and the government would pay any amount by which judgments exceeded the airlines' insurance coverage.¹⁹ The bill "came close to unraveling" because Democrats wanted to extend unemployment benefits and health insurance to laid-off airline workers, whereas Republicans were wary of the government covering airline liability.²⁰

On the night of Thursday, September 20, House and Senate leaders met to hammer out a compromise. The Democrats proposed an open-ended fund, presided over by a senior judge subject to Senate confir-

14. *Hearing on H.R. 2891, supra* note 1, at 152.

15. Air Transportation Safety and System Stabilization Act, H.R. 2926, 107th Cong. (2001) [hereinafter ATSA]. ATSA was enacted as Pub. L. 107-42, 115 Stat. 230, (codified at 49 U.S.C.A. § 40101 note (West Supp. 2003)).

16. *See* Air Transportation Safety and System Stabilization Act, S. 1450, 107th Cong. (2001) (2001); 147 CONG. REC. S9627 (daily ed. Sept. 21, 2001).

17. *See* ATSA §§ 401-09, 115 Stat. at 237-41.

18. *See* Diana B. Henriques & David Barstow, *Fund for Victims' Families Already Proves Sore Point*, N.Y. TIMES, Oct. 1, 2001, at A1.

19. *See id.* The discussion that follows is based on the same article. The draft of the Democrats' proposal provided by Robert S. Peck, *The Victim Compensation Fund: Born from a Unique Confluence of Events Not Likely To Be Duplicated*, 53 DEPAUL L. REV. 209 (2003), and discussed at notes 140-146 of the main Article, indicates a proposal for a fund consisting of specific congressional appropriations, with claims to be adjudicated by an Article I court.

20. *See* Lizette Alvarez, *Washington Talk; With Bipartisan Zeal, Rival House Leaders Bond*, N.Y. TIMES, Sept. 25, 2001, at A16.

mation, with power to award any amount of money for both economic and noneconomic losses. The Republicans extracted two key concessions: collateral source payments would offset any awards, and the Attorney General would have sole power to choose the fund's administrator. This compromise became Title IV of H.R. 2926.²¹

C. Debate and Passage

Remarkably, the victim compensation fund element of ATSA received very little attention during the debates. Few legislators mentioned it in their remarks, and those who did rarely broached the deep underlying questions.

H.R. 2926 and its Senate companion S. 1450 were pushed through even more quickly than the original bill.²² On the morning of Friday, September 21, Senator Daschle requested unanimous consent to consider S. 1450 for a one-hour debate without possibility of amendments or motions.²³ Several Senators took the procedural request for unanimous consent as an opportunity to comment on the merits. Senator Daschle eventually renewed his motion for unanimous consent, and the actual debate began.²⁴ The Senate passed the bill by a vote of 96 to 1 at 6:20 p.m.²⁵

At 6:08 p.m., the House considered a resolution to allow one hour of debate on H.R. 2926 and to close the bill to amendments or intervening motions, other than a motion to recommit it to committee.²⁶ The resolution passed at 8:49 and debate began at 8:54 p.m.²⁷ The bill passed the House at 11:06 p.m., by a vote of 356 to 54.²⁸

21. See Henriques & Barstow, *supra* note 18.

22. Apparently, the airlines' insurers had threatened to cease providing liability coverage effective the following Wednesday, September 26, 2001. See 147 CONG. REC. H5900 (daily ed. Sept. 21, 2001) (statement of Representative William Lipinski).

23. 147 CONG. REC. S9584 (daily ed. Sept. 21, 2001). Sen. Daschle also asked unanimous consent that if the House passed a bill identical to the Senate bill, that it be immediately considered and passed.

24. See *id.* at S9588.

25. See U.S. Senate Roll Call Votes 107th Congress - 1st Session, available at http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=1&vote=00284 (last visited Apr. 1, 2003); 147 CONG. REC. S9604-05 (daily ed. Sept. 21, 2001); Bill Summary and Status for H.R. 2926, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR02926:@@L&summ2=M&#status> (last visited Apr. 1, 2003) [hereinafter Bill Summary for H.R. 2926]. The Senate does not record times in its journal as often as the House does, which is why less detail is available about the precise chronology in the Senate.

26. See H.R. Res. 244, 107th Cong. (2001).

27. See Bill Summary and Status for H.R. 2926, *supra* note 25.

28. See *id.*

1. *The Debate in the House of Representatives*

The House apparently saw H.R. 2926 as an airline bailout bill and debated it as such. The first two mentions of airline liability caps were brief and glancing.²⁹ The first substantive point about liability, made more than twenty minutes into the hour allotted to the debate, was that not just airlines, but also aircraft and component and parts manufacturers, were covered under the bill.³⁰ By 9:45 p.m.—fifty minutes into a one-hour debate—only one more Representative had mentioned victims' compensation at all, again only fleetingly.³¹

Not until almost 10:00 p.m. did a Representative indicate that he might have actually read Title IV, or even a summary of it. Representative Robert Turner of Texas mentioned, for the first time on the House floor, that the bill would provide victims "full recovery for their economic and non-economic damages by the establishment of a special master."³² This was the first discussion of types of damages, the special master, or any other aspect of victim compensation. By 10:15, with the clock still ticking, the only addition to the debate on victims' compensation was Representative Sheila Jackson-Lee's statement that "[t]his legislation also speaks to the tragedy and travesty of 6,000 dead; and I think we should compensate them as well."³³ Debate was closed at 10:20 p.m., a motion to recommit failed at 10:57 p.m., and the bill passed 356 to 54 at 11:06 p.m.³⁴

This was the full extent of the actual debate on the House floor before the bill was passed. Days or weeks later, a number of representatives inserted "revised and extended remarks" into the record. These after-the-fact revisions to the record only emphasize the sketchiness of the contemporaneous debate by illustrating what no one actually said. For instance, Representative Walter Jones of Ohio spoke for thirty seconds soon after 9:45 p.m., during which she made one brief remark about the victim compensation fund.³⁵ Later, she "revised and extended" her remarks (to a length that could not possibly have

29. See 147 CONG. REC. H5899 (daily ed. Sept. 21, 2001) (statement of Rep. Gephardt); *id.* (statement of Rep. Oxley).

30. See *id.* at H5901 (statement of Rep. Tiahrt).

31. See *id.* at H5903 (statement of Rep. Clement) ("[T]his bill helps to stabilize the industry and assist families who have lost loved ones . . ."). Shortly thereafter, one more Representative referred to victim compensation, even more laconically. See *id.* at H5905 (statement of Rep. Jones) ("I support victims compensation.").

32. *Id.* at H5906 (statement of Rep. Turner).

33. *Id.* at H5907 (statement of Rep. Jackson-Lee).

34. See Bill Summary and Status for H.R. 2926, *supra* note 25. The motion to recommit concerned matters not relevant here.

35. See 147 CONG. REC. H5905 (daily ed. Sept. 21, 2001) (statement of Rep. Jones) ("I support victims compensation").

fit within thirty seconds) to critique the liability and compensation schemes in some detail, including the government's assumption of liability, elimination of punitive damages, collateral source reduction, and capping airline liability at the limit of insurance coverage.³⁶ Similarly, Representative John LaFalce—who apparently did not speak at all during the debate—later inserted remarks discussing the bill's “gross inequities [of] compensating for economic losses based solely on the deceased worker's earnings.”³⁷ Because this aspect of the bill was not mentioned at all on September 21, these remarks would have materially contributed to the bill had they been uttered before its passage. Indeed, the one set of remarks that actually explained Title IV's provisions—by Representative John Conyers, who claims to have been “intimately involved in [its] crafting”—was later inserted by revision and extension.³⁸

There are several reasons why Title IV received so little discussion in the House on September 21. First, most Representatives appeared to view the bill as an airline bailout, and saw Title IV as an add-on. Even those who spoke in opposition (mostly Democrats) primarily objected to its lack of compensation for laid-off airline employees.³⁹ Second, and perhaps more importantly, the bill was rushed, and apparently most Representatives did not read it. Representative Don Young himself admitted, “I know most of my colleagues have not read the bill.”⁴⁰ Yet he refused to extend the debate while thirty Democrats waited to speak.⁴¹ Meanwhile, at least one Representative intimated that the rush was not connected to any outside events, but rather to a desire to push a bill through late on a Friday night.⁴² As Representative Conyers, who *supported* the bill, complained:

[T]here has been almost no semblance of fair or deliberate procedure on the legislation. We had no committee markup. We had no committee hearings on the bill. The bill itself was drafted in the dead of night, and has not been available to most members until a few hours before the vote. This is not the way we should legislate on a minor piece of legislation, let alone a major bill that impacts

36. *See id.*

37. *Id.* at H5911 (statement of Rep. LaFalce).

38. *See id.* at H5914 (statement of Rep. Conyers).

39. *See, e.g., id.* at H5916 (statement of Rep. Inslee).

40. *Id.* at H5908-09.

41. *See id.* at H5904 (statement of Rep. Young) (objecting to Rep. DeFazio's request to extend debate).

42. *See also id.* at H5900 (statement of Rep. Lipinski) (“[W]e do not have to pass this legislation tonight. The real deadline is this coming Wednesday, because Wednesday is the day when the airlines lose their insurance. So we could work on this bill Saturday, Sunday, Monday, Tuesday, and even Wednesday . . .”).

our entire airline industry. If this issue is so important, why are we voting so late this Friday evening, without time to review or consider these serious measures? Why not take the time to read this legislation carefully? In our desperation to help our fellow citizens, I fear we are pushing to judgment without recognizing the complexity or importance of these issues.⁴³

2. *The Debate in the Senate*

The Senate discussed the victims' compensation provisions much more than the House did but did not broach the fundamental normative questions behind the details. The first discussion came during the procedural unanimous consent question, before the bill was technically open for debate on the merits. The second speaker, Senator Ben Nelson of Florida, praised the victim compensation element as a solution to the pending insurance crisis:

The second component that came out of our hearing was that the airlines, in order to be able to operate, have to have insurance that is available and affordable. That is what is creating the crisis right now, that several of the insurance carriers are about to yank the coverage from the airlines. Of course, the airlines will be grounded if that is going to occur. That is what is so important in this package that is coming out that the majority leader and the Republican leader are about to describe, a component of victims' compensation which would eliminate a lot of the uncertainty about all that collateral damage that had been done as a result of the World Trade Center being rammed by those two jet liners and where would be the source of that funding.⁴⁴

Senator Mitch McConnell, on the other hand, was more concerned about the plaintiffs' bar:

My only concern with this bill is that . . . there is no limit in this legislation on the amount of lawyer fees that personal injury lawyers can receive for filing lawsuits, either in absolute terms or as a percentage of the victim's recovery. In other words, there is no guarantee that the victims or their families will receive an amount of the damages awarded to ensure that the personal injury lawyers do not end up taking the lion's share of the award. . . I wish the legislation had included at least a 25-percent cap on fees, such as is already the case in the Federal Tort Claims Act today.⁴⁵

Once the hour of actual debate began, there was some substantive discussion of victims' compensation.⁴⁶ New York's Senator Charles

43. *Id.* at H5914 (statement of Rep. Conyers).

44. 147 CONG. REC. S9585 (daily ed. Sept. 21, 2001) (statement of Sen. Nelson).

45. *Id.* at S9586 (statement of Sen. McConnell).

46. As in the House, the principal source of complaint about the bill appeared to be the lack of relief for laid-off airline workers. *See, e.g., id.* at S9593 (statement of Sen. Boxer).

Schumer identified the underlying equity issue that, he hinted, was the purpose of the victim compensation fund: without it, victims in the airplanes would recover, but victims on the ground would probably get nothing.⁴⁷

Soon afterward, Senator John McCain emphasized the goal of ensuring that victims got *something*. He pointed out that the tort system would lead to one of “two unsatisfactory outcomes: 1. that the airlines, whose liability insurance coverage is insufficient to cover all damage, would be dissolved as their assets were sold to pay off their liability and/or; 2. some or all of the victims who were injured or killed in this tragedy would receive no compensation.”⁴⁸ The purpose of the fund, he explained, was to avoid either outcome. The purpose was *not* to produce awards comparable to those of the tort system:

It is not the intent of the federal fund to [try to make the victims or their families “whole.”] *Nor is it the intent of the fund to duplicate the arbitrary, wildly divergent awards that sometimes come from our deeply flawed tort system* The intent of the fund is to ensure that the victims . . . and their families *do not suffer financial hardship* in addition to the terrible hardships they already have been forced to endure.⁴⁹

Other Senators, while not explicitly addressing normative questions, seemed to agree with this model of averting imminent financial hardship.⁵⁰ Few, if any, appeared to have Cantor Fitzgerald stockbrokers in mind. Senator Patrick Leahy, who was the first speaker to give some details about Title IV’s mechanics, explained that “[t]his program is targeted to help the neediest victims and their families We literally had children who kissed their parents good-bye in the morning and came home at night and found that they were orphans, and the mortgage is due in 2 weeks.”⁵¹

As in the House, several Senators expressed concern about the bill’s rush to passage.⁵² Only one Senator appeared to understand the unprecedented nature of the Special Master’s authority under the bill.⁵³

47. *Id.* at S9593 (statement of Sen. Schumer).

48. *Id.* at S9594 (statement of Sen. McCain).

49. *Id.* (emphasis added).

50. *See, e.g., id.* at S9594 (statement of Sen. Hatch) (“This will help ensure that injured people receive money and receive it faster than they otherwise would if left to pursue claims through litigation.”).

51. *Id.* at S9599 (statement of Sen. Leahy).

52. *See, e.g., id.* at S9601 (statement of Sen. Sessions) (“I know this bill is probably moving on to passage tonight. I am troubled by it. We are going to need to do some work on it in the future, and I expect we will be coming back and revisiting this. I think that should be made clear.”).

53. *See id.* at S9602 (statement of Sen. Nickles)

Although I think the committees and the other people who worked on it did a pretty good job, the special master has enormous responsibility under this legislation, to be

Despite considerably more discussion in the Senate than in the House, the race to draft, debate, and pass the bill left little time for reflection on how well the Senate's asserted purpose for the Fund—helping the “neediest victims”—matched with the text of the bill that it passed.

D. *The Regulations*

On November 5, 2001, the Department of Justice (DOJ) requested public input on a small number of issues.⁵⁴ The DOJ noted that the Special Master had not yet been appointed but that it wanted as much public comment as feasible before issuing the regulations by December 21, 2001. The DOJ received over 800 comments in response, many on topics not within the scope of the DOJ's initial notice of inquiry.⁵⁵

On November 26, 2001, the Attorney General appointed Kenneth Feinberg as Special Master. On December 21, 2001—the statutory deadline—the DOJ promulgated an “Interim Final Rule.”⁵⁶ Because of the tight time frame, and because of the desire to start receiving and processing claims immediately, the DOJ used various exceptions in the Administrative Procedure Act to avoid the requirements of notice-and-comment rulemaking, and to make the Interim Final Rule effective immediately while receiving further comments.⁵⁷ The DOJ received thousands of comments, and the Special Master “met personally with more than 1,000 victims, victims' advocates, public officials, and others” before promulgating the Final Rule.⁵⁸ The Final Rule clarified and modified various points and took effect immediately.⁵⁹

II. STRUCTURE OF THE FUND

Title IV has nine provisions, which can be divided into four categories:

Introductory: Section 401 is the short title “September 11th Victim Compensation Fund of 2001,” and section 403 is a statement of purpose.

making determinations on what family survivors will receive, what injured members and individual will receive . . . I am not against having a victims' compensation section, but when we put this together in a short period of time, I am not sure we did it the best way.

54. See September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 55,901 (Nov. 5, 2001).

55. See *id.* at 66,275-76.

56. See September 11th Victim Compensation Fund of 2001, Interim Final Rule, 66 Fed. Reg. 66,274 (Dec. 21, 2001) (codified at 28 C.F.R. § 104 (2003)).

57. See *id.* at 66,280.

58. September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,233 (Mar. 13, 2002).

59. See *id.* at 11,244.

Special Master: Sections 404 and 407 describe the Special Master and his duties.

Eligibility and payment: Section 405 and 406 define the substantive criteria for eligibility and basic procedural requirements, and section 402 defines certain key terms used by section 405.

Lawsuits: Section 408 creates an exclusive federal cause of action for September 11th claims against air carriers, limiting air carrier liability to the extent of insurance coverage; section 409 gives the United States a right of subrogation.

A. Purpose

Title IV states that its purpose is “to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001.”⁶⁰ By its terms this excludes anyone who only suffered property or business loss. This exclusion is repeated in the section on eligibility.

B. Special Master

The Special Master is “appointed by the Attorney General,” (i.e., without confirmation by the Senate).⁶¹ “[A]cting through [the] Special Master,” the Attorney General was authorized to administer the Fund, “promulgate all procedural and substantive rules,” and “employ and supervise hearing officers and other administrative personnel.”⁶² The Special Master was also required to develop a claim form, preferably one that may be filed electronically, that requests information concerning the victim’s injury or death, economic and noneconomic losses, and collateral compensation.⁶³

A short deadline was imposed for promulgating regulations. The Attorney General, this time “in consultation with” the Special Master, was required to promulgate implementing regulations not later than ninety days after enactment of ATSA, that is, December 21, 2001.⁶⁴ Because Title IV itself contained very few details, the regulations had to be comprehensive. They needed to include claim forms, the information to be included with them, procedures for hearing and presenting evidence, procedures for filing and pursuing a claim, and anything else that the Attorney General deemed appropriate.⁶⁵

60. ATSA, *supra* note 15, § 403.

61. *See id.* § 404(a).

62. *Id.* § 404(a)(1)-(3).

63. *Id.* § 405(2)(A)-(B)(iii).

64. *Id.* § 407.

65. *Id.* § 407(1)-(5).

There is a subtle but distinct contrast between the language of sections 404 (Special Master) and 407 (regulations) on one hand and 405 (eligibility) and 406 (payment) on the other. In section 404, the “Attorney General, *acting through* a Special Master,” administers the program, and in section 407, the “Attorney General, *in consultation with* the Special Master” promulgates regulations on various topics, including “matters determined appropriate *by the Attorney General.*”⁶⁶ In each case, procedural and supervisory responsibility appears to lie with the Attorney General. By contrast, section 405—by far Title IV’s lengthiest provision—authorizes claimants to file compensation claims “with the Special Master” and describes the criteria the Special Master should employ in evaluating claims, without once mentioning the Attorney General.⁶⁷ Similarly, section 406 discusses the Special Master’s determinations of compensation and authorization of payment, and the Attorney General appears only briefly to accept donations from private parties.⁶⁸

Read together, these provisions suggest a framework in which the Attorney General designs the framework of the Fund and defines its regulations, while the Special Master determines eligibility and compensation. Put differently, arguably the Attorney General was to be responsible for questions of law, and the Special Master for questions of fact—a role similar to that of the typical court-appointed special master. As history actually developed, however, Feinberg appeared to take responsibility *both* for determinations of fact *and* the design of the Fund’s procedures.⁶⁹

C. Eligibility and Payment

1. Who Can File a Claim?

a. Statutory Definitions

A “claimant” is any individual who files a claim with the Fund.⁷⁰ A claimant must then qualify as an “eligible individual” under section 405(c).⁷¹ An “eligible individual” must be either: (1) an individual

66. ATSA, *supra* note 15, §§ 404, 407, 407(5) (emphasis added).

67. *See id.* § 405.

68. *See id.* § 406.

69. This interpretation of Congress’s delegation has been upheld by the Southern District of New York. *See Colaio v. Feinberg*, 262 F. Supp. 2d 273, 286 (S.D.N.Y. 2003) (rejecting plaintiffs’ claim that “Congress did not delegate to the Special Master the power to prescribe the standards by which awards are determined . . . [and] that the Special Master was to serve as a quasi-judicial official responsible for assessing evidence and calculating awards according to criteria defined by Congress.”).

70. *See ATSA, supra* note 15, § 402(3).

71. *See id.* §§ 402(5), 405(c).

who was present at one of the crash sites “at the time, or in the immediate aftermath” of the crash, and suffered physical harm or death as a result; (2) a passenger on one of the flights, minus the hijackers themselves; or (3) the “personal representative” of a decedent who died aboard one of the flights or at one of the crash sites.⁷² Only one claim may be submitted by an eligible individual or on behalf of a dead one.⁷³

b. Physical Harm

The Interim Final Rule placed strict time limits on the “immediate aftermath” and “physical harm.” The “immediate aftermath” was defined as within twelve hours after the crashes for non-rescue workers, and within ninety-six hours after the crashes for “rescue workers who assisted in efforts to search for and recover victims.”⁷⁴ Similarly, “physical harm” required “a physical injury that was treated by a medical professional within 24 hours of the injury having been sustained or within 24 hours of rescue,” and, in non-fatal cases, required “contemporaneous medical records.”⁷⁵

These terms were somewhat controversial and received negative public comments. One commenter “indicated that—despite being seriously injured—he spent more than 24 hours trying to locate his family members.”⁷⁶ Others were “persuaded not to seek treatment in the 24 hours following the attacks in order to allow physicians to care for those suffering potentially life-threatening injuries.”⁷⁷ Hence, the revised final rule expanded “physical harm” to include injuries:

treated by a medical professional within 24 hours of the injury having been sustained, or within 24 hours of rescue, or within 72 hours of injury or rescue for those victims who were unable to realize immediately the extent of their injuries or for whom treatment by a medical professional was not available on September 11, or within such time period as the Special Master may determine for rescue personnel who did not or could not obtain treatment by a medical professional within 72 hours.”⁷⁸

Intriguingly, the regulations do not contain a proximate cause limitation. This omission was necessary in order to cover rescue workers who were injured after the actual crash. Arguably the omission might

72. *See id.* § 405(c)(2)(A)-(C).

73. *See id.* § 405(c)(3)(A).

74. 66 Fed. Reg. at 66,282, § 104.2(b).

75. *Id.* § 104.2(c)(1), (2).

76. 67 Fed. Reg. at 11,242.

77. *Id.*

78. September 11th Victim Compensation Fund of 2001, § 104.2(c)(1), 67 Fed. Reg. 11,233, 11,245 (Mar. 13, 2002).

have led to problems of overinclusion, but there is nothing to suggest that any such problems arose.

c. Personal Representative

The statute does not define “personal representative” (the claimant who may file on behalf of a deceased victim), and early on a controversy arose as to who could qualify. The most controversial potential personal representatives were ex-spouses and domestic partners (including same-sex domestic partners). Many wanted these people to qualify, and many did not.

The Interim Final Rule relied on state law to provide the criteria for determining this question.⁷⁹ The personal representative is either “[a]n individual appointed by a court of competent jurisdiction as the Personal Representative of the decedent or as the executor or administrator of the decedent’s will or estate” or, if no such person has been appointed by a court, then “the first person in the line of succession established by the laws of the decedent’s domicile governing intestacy.”⁸⁰ The Special Master explained that this reference to state law was necessary because of the quid pro quo nature of the Fund: “[I]f the identity of Personal Representatives for purposes of this Fund were determined by federal regulation, there could be many situations in which the representative as defined by state law would choose litigation while the Personal Representative as defined by federal regulation would seek to recover from the Fund.”⁸¹

After the Interim Final Rule was issued, this decision was “[o]ne of the topics receiving the most comments.”⁸² However, the Special Master suggested in response that “criticisms of some of the potentially applicable state laws . . . are more properly directed toward state officials,” and offered the limited consolation that “intestacy laws are relevant only in the absence of a valid will.”⁸³ He also added that if the state-law next of kin supports distribution to a same-sex partner, then “[c]ut[ting] a check for the same sex partner . . . will be no problem . . . [I]t’s a ministerial function.”⁸⁴ There was no change in the revised rule.

79. *See id.* § 104.4, 66 Fed. Reg. at 66,283.

80. *Id.* § 104.4(a)(1)-(2).

81. 66 Fed. Reg. at 66,277.

82. 67 Fed. Reg. at 11,242.

83. *Id.* at 11,243.

84. Jane Gross, *U.S. Fund for Tower Victims Will Aid Some Gay Partners*, N.Y. TIMES, May 30, 2002, at A1.

2. *Determining an Eligible Individual's Award*

a. Award Computation

Once a claimant is determined to be an eligible individual, the Special Master is required to consider two criteria and forbidden from considering others. First, he must consider "the extent of the harm to the claimant, including any economic and noneconomic losses," where "noneconomic losses" means "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."⁸⁵ Second, he must consider "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."⁸⁶ On the other hand, he is forbidden from considering "negligence or any other theory of liability" and "may not include amounts for punitive damages."⁸⁷

The statute left the Special Master broad leeway to devise a method for award calculation, so long as he confined his criteria to those in the statute. For instance, it would have been entirely consistent with the statute to ask each claimant to prove individual economic losses based on individual circumstances, or, at the other extreme, to impose a grid. He chose a middle path: a grid with departures allowing for unusual circumstances. The system works as follows:

85. ATSA, *supra* note 15, §§ 402(7), 405(b)(1)(B)(i).

86. *Id.* § 405(b)(1)(B)(ii).

87. *Id.* § 405(b)(2), (5).

Type of Loss	Victim died (claimant = personal representative)	Victim injured but lived (claimant = victim)
Minimum award before collateral source offset	<ul style="list-style-type: none"> • \$500k for decedent with spouse/dependent. • \$300k for single decedent with no dependents. 	—
Loss of earnings/business opportunities	<ul style="list-style-type: none"> • Calculated from “presumptive, non-binding estimated award”⁸⁸ grid based on decedent’s age; number of surviving dependents; whether survived by a spouse; amount and nature of decedent’s income for 1998-2000. • May be adjusted based on individual circumstances. 	<ul style="list-style-type: none"> • Case-by-case, based on actual amount of work missed without compensation. • Or can use grid methodology and adjust based on extent of physical harm.
Noneconomic loss	<ul style="list-style-type: none"> • \$250k plus an additional \$100k for spouse and each dependent. • Includes noneconomic component of replacement services loss. • (No adjustment for manner/circumstances of death.) 	<ul style="list-style-type: none"> • Start with figures for noneconomic loss for deceased victims, then adjust based on extent of physical harm. • Includes noneconomic component of replacement services loss. • (No adjustment for manner/circumstances of injury.)
Medical expenses	<ul style="list-style-type: none"> • Actual out-of-pocket expenses not reimbursed by health insurance. 	<ul style="list-style-type: none"> • Actual out-of-pocket expenses not reimbursed by health insurance, plus estimated future medical expenses.
Replacement services	<ul style="list-style-type: none"> • Used to value loss of earnings for victims who did not work full-time outside the home. 	<ul style="list-style-type: none"> • Used to value loss of earnings for victims who did not work full-time outside the home.
Death/burial costs	<ul style="list-style-type: none"> • Actual out-of-pocket expenses. 	—
Disability - Total permanent	—	<ul style="list-style-type: none"> • May accept determination of Social Security Administration, other government agencies, or private insurers, or may require evaluation by medical experts.
Disability - Partial	—	<ul style="list-style-type: none"> • Consider both ability to perform usual occupation and ability to perform usual daily activities.

Sources: 28 C.F.R. §§ 104.41-.46.

Aspects of this system reflect interesting value choices. First, the “presumed, non-binding estimated award” for earnings loss of dece-

88. 67 Fed. Reg. at 11,236.

dents has many procedural and fairness advantages.⁸⁹ In a system with multiple claims evaluators, it encourages uniformity and cabins discretion without removing the ability to make exceptions for unusual cases. However, the principal benefit stems from the voluntary nature of the Fund. Publishing presumed awards “enable[s] claimants to make informed decisions regarding whether to submit a claim.”⁹⁰ This purpose is further emphasized by the fact that *surviving* claimants generally receive a case-by-case determination, with no advance presumed award.⁹¹ The Special Master explained this provision by saying that “these schedules, tables, or charts cannot cover every possible claimant (e.g., injured claimants).”⁹² As an explanation, this is inadequate. Workers’ compensation and other no-fault programs have almost a century’s experience in quantifying the economic loss of a finger, an ear, an arm, etc. A more likely explanation is that claims on behalf of decedents are worth more in tort, and thus the Fund needs to take extra steps, for example, publishing expected awards, to woo them. In contrast, surviving victims are less likely to sue in tort, are more likely to choose the Fund, and hence require less convincing in advance.

Unlike the income-based grid for economic losses, noneconomic losses for decedents are based on a flat sum. The Special Master acknowledged that:

each person experienced the unspeakable events of that day in a unique way. Some victims experienced terror for many minutes, as they were held hostage by terrorists on an airplane or trapped in a burning building. Some victims had no warning of what was coming and died within seconds of a plane hitting the building in which they worked. While these circumstances may be knowable in a few extraordinary circumstances, for the vast majority of victims these circumstances are unknowable.⁹³

Besides simplifying calculation, flat-sum noneconomic losses also partially respond to critiques of the inequity of compensating stockbrokers more than janitors.⁹⁴ As one commentator complained:

[T]he compensation fund has been seen as a replacement for litigation Once the compensation fund was viewed as a surrogate for litigation, the calculations for disbursement fell into the same trap that has long plagued the legal system. . . . The formula reflects the

89. *Id.*

90. 66 Fed. Reg. at 66,278.

91. See 28 C.F.R. § 104.45(a) (2001).

92. See *id.*

93. 66 Fed. Reg. at 66,279.

94. See, e.g., *id.* at 66,290 (comments suggesting flat compensation based on number of survivors).

values of the tort system, which pragmatically reduces loss to a monetary calculation. But the purpose of the compensation fund is greater: to serve as a national expression of unity in the face of a tragedy unique in American history, as well as to help survivors. While juries are instructed routinely not to permit their sympathy for victims to enter into their consideration of damage awards, this fund represents an attempt to embody our collective sympathy. . . . The families of the firefighter and the financier, the broker and the busboy, with their shared emotional losses, should be compensated equally. What ultimately unites the victims and their survivors with each other and with the nation is far greater than the differences in their last paychecks.⁹⁵

Given the voluntary quid pro quo nature of the Fund, the only way truly equal compensation could have been provided would be to compensate everyone at the stockbroker level, which would have been unaffordable (and arguably incompatible with the statute); anything less would have pushed stockbrokers' families to the tort system. Therefore, the Special Master had to offer stockbrokers' survivors much more than janitors' survivors. Given that, perhaps using a flat fee for noneconomic loss compensation partially mollifies janitors' survivors.

The particular number for noneconomic loss (\$250,000) was selected because it is "roughly equivalent to the amounts received under existing federal programs by public safety officers who are killed while on duty, or members of our military who are killed in the line of duty while serving our nation."⁹⁶ This statement can be interpreted in several ways. It might mean that \$250,000 is a standard government reference point for the value of a life (unlikely, since regulatory agencies typically value a life at a million dollars or more); or that \$250,000 is a standard government reference point for how much to compensate a decedent's victims above and beyond earnings-based death benefits (perhaps, but then one would expect to see references to death insurance benefits provided to civilian government employees); or, most intriguingly, that the government considers everyone killed on September 11th to be, at least symbolically, "killed in the line of duty while serving our nation."

The \$250,000 figure was not without critics. Victims' groups and Northeastern politicians urged the Special Master to increase it, noting that jury awards for noneconomic loss in airline crash cases often run into the millions.⁹⁷ Trial Lawyers Care criticized the flat figure for

95. Michael I. Meyerson, *Losses of Equal Value*, N.Y. TIMES, Mar. 24, 2002, at 4-15.

96. *Id.*

97. David Barstow, *Final Rules for Federal Victims' Fund Increase Aid to Families of Sept. 11 Dead*, N.Y. TIMES, Mar. 7, 2002, at B4.

noneconomic loss as “[t]he only area in which the regulations still depart from the statute” for using the presumptive methodology, and characterized the \$100,000 per spouse or dependent supplement as “arbitrary and unrealistically low.”⁹⁸

b. Collateral Source Offset

The statute requires the Special Master to deduct from the initial award “the amount of the collateral source compensation . . . the claimant has received or is entitled to receive” because of the attacks.⁹⁹ This provision has two ambiguities: the first has not yet attracted much attention, but the second was the source of a serious open controversy. First, the award is reduced by the amount of the *claimant’s* collateral source compensation. If there are multiple beneficiaries—for instance, a spouse and several children—they may be entitled to differing amounts of collateral source compensation. This ambiguity—resulting from the same narrow definition of a claimant as the *individual* filing the claim—creates an incentive for the family member with the least outside compensation to file the claim. Indeed, the Final Rule gives the Special Master discretion to exclude collateral sources “where the recipients of collateral source compensation are not beneficiaries of the awards from the Fund.”¹⁰⁰ The family member with the most collateral source compensation (e.g., the beneficiary of the life insurance policy) may simply waive participation in the Fund and keep his or her right to sue.¹⁰¹

Second, and much better known, is the controversy over whether charitable contributions should qualify as collateral source compensation. The statute defines “collateral source” as “*all collateral sources, including* life insurance, pension funds, death benefit programs, and payments by Federal, State, or local governments” related to the attacks.¹⁰²

An early controversy erupted over the Fund’s treatment of charitable contributions. The three advantages of counting charitable contributions as a collateral source are that it would: (1) “help even out the

98. Leo V. Boyle, President, ATLA, & Larry S. Stewart, President, Trial Lawyers Care, Inc., *Improvements Make September 11th Victim Compensation Fund Regulations Fairer* (Mar. 7, 2002), available at <http://www.911lawhelp.org/info/news/mar7.htm> (last visited Oct. 28, 2003).

99. ATSA, *supra* note 15, § 405(b)(6).

100. 28 C.F.R. § 104.47(a) (2001). Thus, for example, if a victim’s spouse is the Fund claimant, but the victim’s life insurance is paid only to her child, the Special Master has the discretion to not deduct the life insurance from the award. A spouse and child in collaboration could use this provision strategically by having the spouse, not the child, file.

101. See also *infra* notes 123-124 and accompanying text.

102. *Id.* § 402(4) (emphasis added).

flow of aid to those who have not benefited from specialized fundraising efforts";¹⁰³ (2) reduce taxpayer costs; and (3) avoid penalizing early charitable donors by making them pay twice, once as a donor and once as a taxpayer. To many, however, these advantages seemed outweighed by the disadvantages. The logical response of private philanthropy to collateral source reduction would be "to steer more of its aid to the thousands of affected families excluded from the federal fund," for example, those who were not injured but lost their jobs.¹⁰⁴ But many donors expressly "specified that their gifts [were] to be used only for direct victims—the same people who [would] benefit from the new fund."¹⁰⁵ Thus, charitable collateral source reduction would result in a loss of total awards for "core" victims (those who lost relatives at the crash sites) without any corresponding gain (either from the Fund or private charity) for "non-core" victims. Robert Clifford, the chairman of the American Bar Association Task Force on Terrorism and the Law, flatly declared that the Fund's effect on private charity was "clearly something [Congress] never thought about,"¹⁰⁶ and several of the bill's drafters acknowledged that "this was a question that was overlooked in their haste to create a fund."¹⁰⁷

During the weeks after ATSA's passage, this ambiguity festered and affected both donation and distribution of private charity.¹⁰⁸ Clifford worried that charitable donation would "come to a halt" until the Attorney General clarified the question.¹⁰⁹ And if the Fund did reduce awards by the amount of charitable donations, "major charities might . . . simply withhold their aid until after the fund had made its awards—an outcome that would have slowed the flow of charitable support to needy families."¹¹⁰

To the relief of many, the Interim Final Rule specifically excluded charitable donations. It noted that "charitable contributions are different in kind from the collateral sources listed in the Act" and that "deducting charitable awards from the amount of compensation would have the perverse effect of encouraging potential donors to

103. See Henriques & Barstow, *supra* note 18.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. See David Barstow & Diana B. Henriques, *A Nation Challenged: The Charities; Debate Over Rules for Victims Fund*, N.Y. TIMES, Nov. 6, 2001, at A1.

109. See Henriques & Barstow, *supra* note 18.

110. Diana B. Henriques, *Victims' Families Get Break on Earlier Charity*, N.Y. TIMES, Dec. 20, 2001, at B7.

withhold their giving until after claimants have received their awards from the Fund.”¹¹¹ This decision was retained in the revised rule.¹¹²

D. Lawsuits

ATSA has four major effects on civil litigation:

1. Claimants must waive their right to sue because of damages sustained because of the crashes, and withdraw any already-pending suits by March 21, 2002. (This does not apply to suits to recover collateral source obligations or against the terrorists.)¹¹³
2. It creates an exclusive federal cause of action, with original and exclusive jurisdiction in the Southern District of New York, for *all* actions for damages arising out of the crashes.¹¹⁴ In any such suit, the substantive law and choice of law are borrowed from the state where the crash occurred.¹¹⁵
3. Liability against any air carrier is limited to the extent of its liability insurance coverage.¹¹⁶
4. The United States has the right of subrogation against any judgment in favor of a successful Fund claimant.¹¹⁷

The *quid pro quo* of the statutory design requires Fund claimants to waive the right to sue in tort. However, due perhaps to a drafting oversight, there are several mismatches in the *quid* and the *quo*.

First, the waiver applies to “damages sustained as a result of the terrorist-related aircraft crashes,” which is broader than the damages that the Fund purports to compensate.¹¹⁸ For instance, the Fund does not compensate for property damage, but a claimant must waive the right to sue for such damage. Thus, a claimant who suffered property damage *and* was injured must waive *both* the right to sue for physical and emotional harm (for which he or she will be compensated from the Fund) *and* property loss (for which he or she will not be compensated from the Fund). The *quid* does not match the *quo*. Moreover, there is no proximate cause limitation on the scope of the waiver. Thus, a claimant who broke an arm in the collapse and then was hit by

111. 66 Fed. Reg. at 66,279.

112. See 67 Fed. Reg. at 11,241.

113. See ATSA, *supra* note 15, § 405(c)(3)(B)(i)-(ii). The provision does not specifically mention air carrier defendants, so a claimant waives the right to sue *anybody* except collateral source obligors.

114. See *id.* § 408(b)(3). The exclusive federal cause of action also sweeps more broadly than the Fund: it covers any suit for “damages arising out of the hijacking and subsequent crashes.” See *id.* § 408(b)(1).

115. *Id.* § 408(b)(2).

116. *Id.* § 408(a).

117. *Id.* § 409.

118. See ATSA, *supra* note 15, § 405(c)(3)(B)(i).

a speeding ambulance, breaking a leg, probably must waive his or her suit against the ambulance in order to claim for the broken arm. Unless the Special Master intends to impose no proximate cause limitation on the Fund's awards,¹¹⁹ the *quid* again does not match the *quo*.

Second, unintended consequences arise where a claimant is the personal representative of a decedent. Under ATSA section 405, the waiver attaches to the *claimant*, not the *claim*. As one commentator described the problem: "While Congress logically could intend that every Fund beneficiary waive his right to file ATSA's exclusive civil damages action, Congress's statute does not say that. On the contrary, it says something quite different and odd."¹²⁰ The problem is that only "the claimant" must waive the right to file, and "claimant" is defined as "an individual filing a claim."¹²¹ This introduces two potential problems: under-waiver and over-waiver. Under-waiver occurs when the rights of the claim are held by more than just the claimant, and over-waiver occurs when the claimant has rights beyond those of the claim.¹²² Both problems are created by the statute's incorrect focus on the identity of the claimant, rather than the nature of the claim.

1. Under-Waiver

When the underlying eligible individual is deceased and left several dependents, there might be multiple Fund *beneficiaries* even though there is only one *claimant*. If a dead crash-site victim left four children, one could apparently file as personal representative, waive the right to sue, collect an award based on the size of the decedent's family, distribute the award among his or her siblings, and leave the other three (who were not claimants, and therefore did not waive anything) free to sue the airlines.¹²³ The Special Master has attempted to solve this problem in the regulations, by requiring the claimant to certify that "there is no pending lawsuit brought by a dependent, spouse, or beneficiary of the victim."¹²⁴

119. See *supra*, notes 113-118 and accompanying text.

120. Joan Bernott Maginnis, *The 9/11 Victim Compensation Fund: Overview and Comment* 15, available at <http://www.fed-soc.org/Publications/Terrorism/VictimFund.PDF> (last visited Oct. 30, 2003).

121. See ATSA, *supra* note 15, §§ 402(3), 405(c)(3)(B)(i).

122. See also *supra* note 118 and accompanying text (over-waiver where claimant has both injury and property claims).

123. See Maginnis, *supra* note 120, at 15. However, the federal government has "the right of subrogation with respect to any claim paid by the United States" under Title IV. ATSA, *supra* note 15, § 409 (emphasis added). Arguably, therefore, the federal government would have the right of subrogation against the nonclaimant beneficiaries if they succeeded in their suits.

124. 28 C.F.R. § 104.21(b)(1) (2001).

2. *Over-Waiver*

This problem created by the statute may not arise on the September 11th facts, but it is certainly plausible in principle. Assume X died at the site, leaving only one heir, Y (a child or spouse), who was also present at the site and was injured but survived. If Y is the claimant for X, then, in order to receive the Fund's payments on behalf of X, Y must waive *her own, independent* claims. The same applies if Y was not injured, but suffered property damage. In this case, the Special Master did not attempt to correct Congress's error.¹²⁵

3. *Withdrawal of Pending Suits*

The statute requires that any person already party to a suit for which waiver would be required must withdraw from that suit by March 11, 2002 in order to submit a claim.¹²⁶ The first test of this requirement came in September 2002. Under New York law, any suit against the Port Authority of New York and New Jersey (which operated the World Trade Center) must be filed within a year of the incident, and a notice of claim to the agency is required sixty days before filing.¹²⁷ Over one thousand notices were filed.¹²⁸ With the deadline for filing suit on September 10, 2002 looming, a judge in the Southern District of New York ruled that suits timely filed against the Port Authority would be "suspended and shall remain dormant" while the plaintiffs decided whether to file a claim with the Fund.¹²⁹

III. PROCEDURES

ATSA provides very little detail about the procedures to be used in administering the Fund. Most of its procedural provisions are simply grants of authority to the Special Master. The bulk of the procedural framework is found in the regulations. The following is a summary of the claims, determination, hearing, and award process combining both statutory and regulatory elements.

The claimant begins the process by filing an "Eligibility Form" and *either* a "Personal Injury Compensation Form" *or* a "Death Compen-

125. See 67 Fed. Reg. at 11,246. (codified at 28 C.F.R. § 104.61(a) (2001)).

126. ATSA, *supra* note 15, § 405(c)(3)(B)(ii); 28 C.F.R. § 104.61(b).

127. See David W. Chen, *Hundreds of 9/11 Families File for Right To Sue Port Authority*, N.Y. TIMES, July 10, 2002, at B4.

128. See Benjamin Weiser, *Judge Says Sept. 11 Families Can Change Minds on Suing*, N.Y. TIMES, Sept. 4, 2002, at B3.

129. *Mulligan v. Port Auth'y of N.Y. & N.J.*, No. 02 Civ. 6885, 2002 WL 31008974, at *5 (S.D.N.Y. Sept. 6, 2002).

sation Form,” as appropriate.¹³⁰ The form is deemed “filed” when it is “substantially complete”; this is relevant for the claimant’s right to a determination within 120 days of filing.¹³¹ Put cynically, the Special Master can delay processing a claim—and avoid the statutory deadlines—by refusing to certify it as “substantially complete.”¹³²

The claimant may also apply for advance benefits, a concept introduced by the regulations. In the case of a dead victim, a spouse, or other claimant who has the consent of the spouse (or, if there is no spouse, all the dependents) may be eligible for advance benefits if there is immediate financial hardship and if the claimant has not received substantial collateral source compensation.¹³³ Advance benefits for a deceased victim’s personal representative are \$50,000. A surviving victim is eligible for advance benefits of \$25,000 if he or she was hospitalized for a week or more. Payment of advance benefits occurs within fifteen days after a claims evaluator confirms the claimant’s eligibility, assuming there are no conflicting claims. Advance benefits are credited against any future award, and accepting them requires the claimant to waive certain other deadlines.¹³⁴

The claimant selects one of two procedural tracks on the compensation form: Track A or Track B. On Track A, the claims evaluator determines the claimant’s eligibility and presumed award from the presumed award grid. The claimant receives notice of the presumed award within forty-five days of filing. The claimant may then accept the presumed award immediately, or request a hearing before the Special Master or his designated “hearing officer” of either the award amount, or a finding of ineligibility.¹³⁵ If the claimant accepts the award, payment must be made within twenty days.¹³⁶ Because Track A creates the possibility of receiving an award within sixty-five days of filing if the claimant is willing to accept the presumed award, it is most appealing to claimants who either need the money very quickly, or do

130. See generally 28 C.F.R. § 104.21 (2001). The requirements for how the procedures themselves were developed are discussed *supra*.

131. See 28 C.F.R. § 104.21(a); see also ATSA, *supra* note 15, § 405(b)(3) (providing that the Special Master shall issue a determination not later than 120 days after the date on which a claim is filed).

132. See *infra* note 157 and accompanying text.

133. See 28 C.F.R. § 104.21(b)(5).

134. See *id.* § 104.22.

135. See *id.* § 104.31(b)(1).

136. ATSA, *supra* note 15, § 406(a). Technically, payment must be made within twenty days after a final determination is made. Since the Special Master cannot know for certain whether a Track A claimant intends to accept the presumed award until after the deadline for filing supplemental submissions has passed on day sixty-six, payment probably does not come until day eighty-six.

not have reason to believe they will receive more than the presumed award.

On Track B, the claims evaluator simply determines the claimant's eligibility, but not a presumed award. The claimant receives notice of eligibility within forty-five days of filing. After that, the claimant proceeds to a hearing to determine the award.¹³⁷ Because Track B requires a hearing, it is more attractive to claimants who believe they can convince the hearing officer to depart upwards from the presumed award, and can afford to wait.

A claimant seeking review of his or her presumed award under Track A, or a Track B claimant, has twenty-one days after receiving notice to file supplemental submissions.¹³⁸ The hearing is scheduled, where practicable, "at times and in locations convenient to the claimant or his or her representative."¹³⁹

At the hearing, the claimant may present "any evidence relevant to the determination of the award."¹⁴⁰ The claimant has the right to (but need not) be represented by an attorney, or present witnesses, including expert witnesses or both.¹⁴¹ The hearing is inquisitorial, not adversarial; the hearing officer may question witnesses and examine experts' credentials.¹⁴²

In a Track A hearing, the issues for the hearing officer are whether (1) there was an error in determining the presumed award or (2) the claimant presents "extraordinary circumstances not adequately addressed by the presumptive award."¹⁴³ In a Track B hearing, the hearing officer begins with the presumed award but may vary it if "the claimant presents extraordinary circumstances not adequately addressed by the presumptive award methodology."¹⁴⁴

After the hearing officer makes his or her decision, the Special Master notifies the claimant of the final award in writing.¹⁴⁵ This must occur within 120 days of the claimant's original filing,¹⁴⁶ unless the claimant applied for advance benefits, in which case, waived this 120-day period.¹⁴⁷ The Special Master's determination is final and "not

137. See 28 C.F.R. § 104.31(b)(2).

138. *Id.* § 104.33(a).

139. *Id.* § 104.33(c).

140. *Id.* § 104.33(b).

141. ATSA, *supra* note 15, § 405(b)(4)(A)-(B); 28 C.F.R. § 104.33(d).

142. See 28 C.F.R. § 104.33(d).

143. *Id.* § 104.33(f)(1)-(2).

144. *Id.* § 104.31(b)(2).

145. *Id.* § 104.33(g).

146. See ATSA, *supra* note 15, § 405(b)(3).

147. See 28 C.F.R. § 104.22(f).

subject to judicial review."¹⁴⁸ Actual payment must come within twenty days of the determination of the award.¹⁴⁹

The various deadlines for the two tracks, measured in days after filing, are summarized below:¹⁵⁰

Days after filing	Track A – accepting presumed award	Track A – not accepting presumed award	Track B
45	Receive notice of: • Eligibility	Receive notice of: • Eligibility	Receive notice of: • Eligibility
	• Presumed award	• Presumed award	
66		Supplemental submissions due	Supplemental submissions due
86	Payment due? ¹⁵¹		
120		Final determination	Final determination
140		Payment due	Payment due

IV. THE ROLE OF LAWYERS

In theory, the Fund is supposed to be simple enough to navigate without a lawyer. The preamble to the Interim Final Rule declared that "it is important that this Fund be accessible to potential claimants who have limited resources and who are not trained in the law."¹⁵² Even at a hearing, "[t]he claimant shall be entitled to be represented by an attorney in good standing, but it is not necessary that the claimant be represented by an attorney."¹⁵³ The regulations also indicate some skepticism about high legal fees:

Although the Department's regulations do not set specific limits on attorneys fees separate from those existing in state law or attorney ethical standards, the Department believes that contingency arrangements exceeding 5% of a claimant's recovery from the Fund would not be in the best interest of the claimants . . . [T]he Special Master will have discretion to inform potential claimants of the nature of the Fund so that they may make informed decisions regarding the types or amount of fees that they pay for legal or other assistance. For example, the Special Master may notify claimants and potential claimants of the availability of free legal services . . . [or] that the Fund is a no-fault, administrative scheme that should not involve the kind of risks and expense that would justify any significant contingency fees.¹⁵⁴

148. ATSA, *supra* note 15, § 405(b)(3).

149. *Id.* § 406(a).

150. A claimant seeking advance benefits waives these deadlines. *See* 28 C.F.R. § 104.22.

151. *See supra* note 136.

152. 66 Fed. Reg. at 66,280.

153. *Id.*

154. *Id.*

The most substantial source of free legal services for Fund claimants is Trial Lawyers Care (TLC), a project of the Association of Trial Lawyers of America (ATLA). TLC was launched on October 15, 2001, before Feinberg was even appointed; as the ATLA President put it, "When 500 firefighters rush into a burning building that is about to collapse, and hundreds sacrifice their lives to rescue strangers, my fellow trial lawyers and I can answer the legal needs of those who suffered most without charging a fee."¹⁵⁵ TLC has been described as "the largest pro bono effort [the legal] profession has ever undertaken."¹⁵⁶

In practice, the Fund's supposedly simple procedures have not worked as smoothly. First, the claim is not considered "filed," and hence the statutory and regulatory clocks do not start ticking, until a claims evaluator determines the claim to be "substantially complete." As of November 12, 2002, 783 claims had been filed, but fewer than 200 had been deemed "substantially complete."¹⁵⁷ Because over three-quarters of claims filed have been deemed to be wanting in some way, the Fund does not appear to live up to its promise of simplified procedures that can be undertaken without an attorney. Indeed, certain claims had still not received a determination four months after filing, and one claimant who filed for advance benefits had still not received a penny five months later.¹⁵⁸

TLC's estimates of the value of free legal services provide some clue to the problem. Before the regulations had even been promulgated, a TLC official estimated that the typical case could require 200 hours of legal time.¹⁵⁹ This estimate has not been revised downward based on either the regulations or actual experience. Perhaps sensing an opportunity, some private law firms have stepped in and are charging clients for representation. One firm that specializes in aviation disasters is charging ten percent for Fund claims, clearly in excess of what the regulations recommend as a maximum fee.¹⁶⁰

155. Remarks of Leo Boyle, President of the Association of Trial Lawyers of America and Vice President of Trial Lawyers Care (Oct. 15, 2001), available at <http://www.911lawhelp.org/info/news/leotalk.htm> (last visited Oct. 30, 2003).

156. Diana B. Henriques, *Lawyers Offer Free Advice in Tapping Federal Fund*, N.Y. TIMES, Oct. 15, 2001, at B11.

157. David W. Chen, *Victims' Kin Find Fault with Overseer of 9/11 Fund*, N.Y. TIMES, Nov. 13, 2002, at B1.

158. See *id.*

159. See Henriques, *supra* note 156.

160. Diana B. Henriques, *Legal Representation and a 10 Percent Fee*, N.Y. TIMES, Mar. 29, 2002, at B8.

V. CONCLUSION

Much of the structure, regulation, and implementation of the Fund derives from two historical facts about the Fund's birth. First, it was born as a last-minute addition to an airline bailout bill. Second, it was designed to woo victims and their families away from the tort system. The first point explains why the statute has some strange gaps, and why it delegates so much authority to the Special Master—there simply was not time to work out the details. The second point led to a wide range of perhaps unanticipated but arguably inevitable consequences. Awards would depend to a large extent on income. "Previews" of expected awards would be published in advance, at least for those with the largest potential claims, so they could evaluate how much to expect if they filed. Same-sex domestic partners would not be recognized any more than they would under state law.

Other aspects of the Fund derive from the fact that the government is the ultimate payer. The Fund's procedures, limitations, and grid methodology could have been adopted without making the government the payer; such a system would resemble workers' compensation. Had this been the approach, the collateral source offset rule might not have been adopted, for the purpose of the rule was to protect taxpayers.

These points illustrate some of the choices and results implicit in the Fund's design—choices that could, but need not, be replicated in an compensation scheme designed in advance and without undue time pressures.