

Restoration and Relief: Procedural Justice and the September 11th Victim Compensation Fund

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TABLE OF CONTENTS

I. INTRODUCTION.....	96
II. AN OVERVIEW OF THE VICTIM COMPENSATION FUND	98
A. <i>The ATSSA</i>	98
B. <i>Origins of the Victim Compensation Fund</i>	99
C. <i>The Special Master</i>	100
D. <i>Eligibility</i>	101
E. <i>Limitation on Civil Actions</i>	101
F. <i>Noneconomic Damages</i>	102
G. <i>Economic Damages</i>	103
H. <i>Collateral Offsets</i>	103
I. <i>The Claims Evaluation Process</i>	104
J. <i>Lack of Review or Appeal</i>	105
K. <i>A Note on Legality</i>	105
III. PROCEDURAL VALUES	105
A. <i>The Efficiency Principle</i>	106
1. Expediency	107
2. Accessibility.....	107
B. <i>The Fairness Principle</i>	108
1. Transparency.....	108
2. Consistency.....	109
3. Equity	110
4. Accuracy	110
5. Accountability	111
C. <i>A Note on Overlaps, Conflicts and Tradeoffs</i>	112
IV. THE EFFICIENCY OF THE VICTIM COMPENSATION FUND	113
A. <i>Expediency</i>	113
B. <i>Accessibility</i>	114
C. <i>Overall Assessment of Efficiency</i>	117
V. THE FAIRNESS OF THE VICTIM COMPENSATION FUND	118
A. <i>Transparency</i>	118

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B.	<i>Consistency</i>	120
C.	<i>Equity</i>	122
D.	<i>Accuracy</i>	124
E.	<i>Accountability</i>	125
F.	<i>Overall Assessment of Fairness</i>	127
VI.	CONCLUSIONS AND RECOMMENDATIONS	128
A.	<i>Efficiency and Fairness</i>	128
B.	<i>Recommendations</i>	128
1.	More Congressional Guidance	128
2.	Use of “Purer” Theories of Awards	129
3.	A Less Public (or Publicity-Minded) Special Master	129
4.	Creation of Written Records and Mechanisms for Appeal	130
5.	A Note on the Importance of “Voice”	131
C.	<i>Concluding Thoughts</i>	131

I. INTRODUCTION

Less than ten days after the tragic events of September 11th, Congress passed the Air Transportation Safety and System Stabilization Act (“ATSSA”).¹ The law served the dual purposes of saving the airline industry from financial ruin and providing financial compensation to those who had lost loved ones or suffered personal injuries during the attacks.² The latter provision was unprecedented in American legal history: never before had Congress issued a “blank check” for governmental compensation of “those injured by what might be described as tortious or criminal third party conduct. . . .”³ Indeed, though the government had provided assistance and even compensation to disaster victims in the past, such financial assistance was rare and had always been subject to strictly enforced caps.⁴ The victims of September 11th, therefore, were on the verge of receiving an unprecedented amount of financial relief from the federal government.

Less than two weeks after the creation of the Victim Compensation Fund (“Fund”), however, September 11th victims began raising serious concerns about its various provisions.⁵ Initially, these complaints were somewhat vague. Individuals

1. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (codified at 49 U.S.C. § 40101 (2001)).

2. *Id.* at §§101-201, 401-408.

3. Stephan Landsman, *A Chance to be Heard: Thoughts About Schedules, Caps, and Collateral Source Deductions in the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 393, 395 (2003); see also, KENNETH FEINBERG, STATEMENT OF THE SPECIAL MASTER REGARDING THE PROGRESS OF THE SEPTEMBER 11TH VICTIM COMPENSATION 1 (2002) http://wsdoj.gov/victimcompensation/sp_statement.pdf.

4. See, e.g., Lawrence M. Friedman & Joseph Thompson, *Total Disaster and Total Justice: Responses to Man-Made Tragedy*, 53 DEPAUL L. REV. 251, 283-84 (2003).

5. Diana B. Henriques & David Barstow, *Fund for Victims' Families Already Proves Sore*

noted, for instance, that the Fund was not “coordinated with the other relief work very well”⁶ and that the government should not be in the business of “making millionaires out of people.”⁷ The difficulty that individuals had in expressing their concerns was understandable. The Fund had very few points of comparison either institutionally or historically, so it was difficult to identify precisely why it was problematic, if at all.⁸

In the absence of concrete comparisons, individuals began to employ more abstract ethical rhetoric in their critique of the Fund. A *New York Times* article published ten days after the Fund’s creation, for instance, noted that the Fund “ha[d] begun to generate both resentment and confusion about its ultimate *fairness* and *effectiveness*.”⁹ Both scholars and victims of previous terrorist attacks cited “accountability,” “even-handedness,” “fairness,” and “equity,” among other values, as the bases of their discontent.¹⁰ Such concerns also appeared in the public comments solicited by the Department of Justice shortly after the passage of the Fund. Over three quarters of those comments were framed in terms of “justice” or “fairness,” presenting a very telling picture about what American society ultimately values in its institutions.¹¹ There are strong legal and societal expectations that institutional procedures—legal, governmental, and administrative—will embody certain ethical values or principles.¹² The very first rule of Federal Civil Procedure, for instance, acknowledges these values, noting that civil procedure “shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.”¹³ A wide body of sociological research, moreover, suggests that public satisfaction with institutions is strongly correlated with the extent to which individuals feel that these institutions employ fair and efficient procedures.¹⁴ Some studies have even concluded that individuals are more satisfied by procedures that

Point, N.Y. TIMES, Oct. 1, 2001, at A1.

6. *Id.* at B8.

7. *Id.*

8. See Landsman, *supra* note 3, at 395, Feinberg, *supra* note 3, at 1.

9. Henriques & Barstow, *supra* note 5 at A1 (emphasis added).

10. *Id.* at A1, B8.

11. Deborah R. Hensler, *Money Talks: Searching for Justice Through Compensation for Personal Injury and Death*, 53 DEPAUL L. REV. 417, 438 (2003).

12. See, e.g., FED. R. CIV. P. 1; Landsman, *supra* note 3, at 408-12.

13. FED. R. CIV. P. 1.

14. See, E. Allan Lind, et al., *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224, 224 (1993); Jonathan D. Casper, et. al., *Procedural Justice in Felony Cases*, 22 LAW & SOC’Y REV. 483, 503-04 (1988); JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 115-16 (1975). Jonathan D. Casper and his colleagues, for instance, found that convicted felons were “acutely sensitive” to the fairness of the procedures used in their sentencing and that this sensitivity had a strong influence on their satisfaction with the outcome of this process. Landsman, *supra* note 3, at 408 (discussing Casper et al., *supra*, at 503-04).

they perceive to be fair than by procedures that they perceive to be in their self-interest.¹⁵

Additionally, the mere fact that the United States government codifies extensive procedural rules in the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, and even the United States Constitution demonstrates a strong American commitment to procedural values like fairness and efficiency.¹⁶ These rules are designed to ensure both that parties in conflict have opportunities to present their respective sides and that the outcomes of such conflicts are as fair as possible.¹⁷ If such values were not important to American civil society, such procedural mechanisms would not be as extensively developed, commented on, reviewed, and revised.

This article, therefore, rests on the assumption that if the American legal community can identify which ethical principles or norms are valued in American procedural systems, it can use those principles to establish a framework against which new and unique procedural systems like the September 11th Victim Compensation Fund can be measured.

As such, this article strives to identify the procedural values considered most important in American society and to assess the Victim Compensation Fund based on its embodiment of such values. In Part II, the Victim Compensation Fund and its procedural mechanisms are introduced and explained. Part III of the article examines procedural values and identifies which values should be used when assessing the Fund. Fairness and efficiency are identified as the two most important overarching procedural values, with several other sub-values embodied by each. In Part IV, the Fund is judged against efficiency values. In Part V, the Fund is judged against fairness values. Conclusions are drawn and recommendations are made in Part VI.

Ultimately, this article posits that though the Fund fulfilled efficiency values, it failed to fulfill fairness values due to its frequent arbitrariness and lack of accountability.

II. AN OVERVIEW OF THE VICTIM COMPENSATION FUND

A. *The ATSSA*

The attacks on September 11th, 2001 were unprecedented in America in terms of their human devastation. While the death toll was staggering—with 2,742 deaths in New York, 189 deaths at the Pentagon, and 44 more deaths in Shanksville, Pennsylvania¹⁸—Congress's first impetus to provide relief came from early reports of

15. See THIBAUT & WALKER, *supra* note 14, at 115-16.

16. See *generally* Fed. R. Civ. P. 1; U.S. Const. amdt. VI.

17. See FED. R. CIV. P. 1; U.S. CONST. amdt. VI.

18. Robert S. Peck, *The Victim Compensation Fund: Born From a Unique Confluence of Events Not Likely to be Duplicated*, 53 DEPAUL L. REV 209, 212 (2003).

the imminent collapse of the airline industry.¹⁹ Indeed, the stability of the airline industry was being threatened not only by the loss of the three planes and the resulting rise in insurance premiums, but also by the loss of business in the two and a half days following the tragedy and the projected losses due to a greater hesitancy to fly on the part of the American public.²⁰ In fact, the industry lost over one billion dollars by October 2001.²¹

To respond, members of Congress quickly drafted an Act that would aid the ailing industry.²² As drafted and passed, the ATSSA provided that the airline industry would receive a range of benefits, including federal loan guarantees of roughly ten billion dollars, compensation of up to five billion dollars for losses incurred between September 11th and 14th, and compensation for any further losses between that time and the end of the year.²³

B. *Origins of the Victim Compensation Fund*

The idea of providing victim compensation was not raised by legislators until shortly before the ATSSA was passed.²⁴ In fact, 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.”²⁵ Although the precise motivations for the last-minute inclusion of the program are unclear, evidence suggests that it was partly attributable to the demands of airline executives who wanted protection from lawsuits,²⁶ and partly due to pressure from Democratic legislators who threatened to vote against the bill unless it provided for some form of victim compensation.²⁷

Due to its last-minute insertion, the language that established the Fund was extremely broad.²⁸ A basic skeleton of a Fund was created and left to be fleshed out by administrative regulations or, more specifically, by a “Special Master who, by promulgating regulations, [was to determine] the procedural form of the program . . .

19. Janet Cooper Alexander, *Procedural Design and Terror Victim Compensation*, 53 DEPAUL L. REV. 627, 630 (2003).

20. Peck, *supra* note 18, at 216 (“Although the skies were closed for just two and one-half days, businesses began to explore video conferencing and other alternatives to travel. Families were canceling trips.”) (footnote omitted).

21. *Id.*

22. See ATSSA § 40101 et. seq.

23. Landsman, *supra* note 3 at 395.

24. See, Alexander, *supra* note 19, at 627; see also Henriques & Barstow, *supra* note 5, at B8.

25. Alexander, *supra* note 19, at 632.

26. Henriques & Barstow, *supra* note 5, at B8.

27. Landsman, *supra* note 3, at 394.

28. See generally ATSSA, *supra* note 1, §§ 401-08, Alexander, *supra* note 19, at 633.

and . . . much of its substantive content.”²⁹ Moreover, due to its quick drafting and approval, there was virtually no legislative history for the Special Master to draw upon to gain insight into what Congress had envisioned for the Fund.³⁰

C. *The Special Master*

On November 26, 2001, Attorney General John Ashcroft appointed Kenneth R. Feinberg to the position of Special Master.³¹ Feinberg was a natural choice for the position, having extensive experience in bringing about and administering settlements in mass tort suits of all kinds.³² Indeed, given that the Fund was loosely modeled on the tort system³³ and that Congress’s objective was to get as many people as possible to “settle” with the Fund rather than to file suit, Feinberg’s skills seemed particularly well suited for the Special Master position.³⁴

It was Feinberg, therefore, in his role as Special Master, that “filled in the blanks” of the Fund during the months after its creation.³⁵ He did so through the passage of two sets of administrative regulations—the Interim Final Rule and the Final Rule—both of which laid out the key provisions of the Fund.³⁶ Those key provisions are as follows.

29. Alexander, *supra* note 19, at 633. Use of the word “Fund” to describe the victim compensation program was a misnomer as a pool of money was not created for the purposes of compensation. In fact, no financial constraints were placed on the program and the Special Master was given seemingly unlimited access to the government coffers for the purposes of victim compensation. Landsman, *supra* note 3, at 395. However, the word “Fund” will be used in this article in deference to the popular title of the program.

30. Robert L. Rabin, *The September 11th Victim Compensation Fund: A Circumscribed Response or an Auspicious Model?*, 53 DEPAUL L. REV. 769, 786 n.51 (2003).

31. Press Release, U.S. Dep’t of Justice, Attorney General Ashcroft Names Special Master to Head September 11th Compensation Program (Nov. 26, 2001), available at <http://www.usdoj.gov/opa/pr/2001/November/01-ag-608.htm>.

32. Jonathan D. Melber, *An Act of Discretion: Rebutting Cantor Fitzgerald’s Critique of the Victim Compensation Fund*, 78 N.Y.U. L. REV. 749, 753-54 (2003). Feinberg was closely involved as a court-appointed Special Settlement Master in the Agent Orange cases, the DES class action, and a number of asbestos cases. *Id.*

33. A description of the similarities and differences between the tort system and the Fund are beyond the scope of this paper. There is a general consensus among legal scholars, however, that the Fund is more similar to the tort system than it is different. See, Matthew Diller, *Tort and Social Welfare Principles in the Victim Compensation Fund*, 53 DEPAUL L. REV. 719, 721 (2003); Rabin, *supra* note 30, at 783; Elizabeth M. Schneider, *Grief, Procedure, and Justice: The September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 457, 472-73 (2003).

34. See Diller, *supra* note 33, at 757; see also Alexander, *supra* note 19, at 633.

35. Schneider, *supra* note 33, at 464 (citing Elizabeth Kolbert, *The Calculator: How Kenneth Feinberg determines the value of three thousand lives*, THE NEW YORKER, Nov. 25, 2002, at 42, available at http://www.newyorker.com/fact/content/?021125fa_fact).

36. September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,274 (Dec. 21,

D. Eligibility

Section 405(b) of the ATSSA gave the Special Master the power to determine whether a claimant was eligible to receive relief from the Fund.³⁷ Feinberg, in turn, decided that “eligible claimants” were those who were (1) present at the World Trade Center, the Pentagon, or in Shanksville, Pennsylvania³⁸ at the time of the crashes or in their “immediate aftermath,”³⁹ and who (2) suffered from death or “physical harm.”⁴⁰

“Physical harm” was defined as a “physical injury to the body that was 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. . . .”⁴¹ The Special Master, however, did not extend eligibility to those individuals who, while not suffering from immediate injuries, were, instead, likely to develop conditions in the future due to hazardous environmental conditions at the sites during recovery efforts.⁴²

E. Limitation on Civil Actions

Both the ATSSA and the administrative rules provided that individuals waived their rights to file a civil action in any United States court for “damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001” when they filed claims with the Fund.⁴³ Individuals who filed civil actions before their application to the Fund were required to withdraw such actions in order to be eligible for Fund awards.⁴⁴ Exempted from this provision were actions filed against any knowing participant in the September 11th conspiracy to hijack aircraft and engage in other terrorist activity.⁴⁵

2001) [hereinafter Interim Final Rule]; September 11th Victim Compensation Fund of 2001, 28 C.F.R. § 104 (2002) [hereinafter Final Rule].

37. ATSSA § 405(b)(1)(A).

38. Interim Final Rule, 66 Fed. Reg. at 66, 274 (Dec. 21, 2001).

39. *Id.* The term “immediate aftermath” was construed to mean “the period of time from the crashes until 12 hours after the crashes” for civilians, and the time between the crashes and 96 hours after their occurrence for rescue workers. *Id.*

40. *Id.*

41. Final Rule, 28 C.F.R. § 104.2(c)(1) (2006).

42. See Kenneth P. Nolan & Jeanne M. O’Grady, *The Victim Compensation Fund—Looking a Gift Horse in the Mouth*, 53 DEPAUL L. REV. 231, 239 (2003); see generally Final Rule, 28 C.F.R. § 104.2(c)(1).

43. Interim Final Rule, 66 Fed. Reg. at 66,287. However, both documents permit actions to recover collateral source obligations. ATSSA § 405(b)(6); Final Rule, 28 C.F.R. § 104.47(a) (2006).

44. ATSSA § 405(c)(3)(B)(ii); Interim Final Rule, 66 Fed. Reg. at 66,287.

45. Victim Compensation Fund Frequently Asked Questions, U.S. Dep’t of Justice, Section 9. Waiver/Certification, <http://www.usdoj.gov/archive/victimcompensation/faq9.html> (last visited

F. Noneconomic Damages

Both the ATSSA and the Interim and Final Rule provided for two kinds of damages: economic and noneconomic.⁴⁶ Noneconomic damages, as defined by the Interim Final Rule, were those related to the “pain, emotional suffering, loss of enjoyment of life, and mental anguish” suffered by the victims of September 11th.⁴⁷

Since noneconomic damages are highly intangible—intricately related to the mental and emotional health of claimants—and likely to be vastly different between cases, Feinberg recognized that they would be difficult to quantify among living victims, and entirely immeasurable among deceased victims.⁴⁸ As a result, Feinberg decided that the “most rational and just way” to determine noneconomic damages for deceased victims was to set a single presumed award.⁴⁹ The original presumed award was \$250,000, plus an additional \$50,000 for each spouse and dependent.⁵⁰ This presumed award was raised in the Final Rule to \$250,000, plus an additional \$100,000 for each spouse and dependent.⁵¹ Feinberg based these award amounts on the federal uniformed services death benefit.⁵²

Despite the existence of a presumed award for the noneconomic damages of deceased claimants, noneconomic damages for injured claimants were ultimately based upon the discretion of the Special Master.⁵³ The Interim Final Rule provided that the Special Master could base his calculations upon the presumed award but also could adjust his calculations “based upon the extent of the victim’s physical harm.”⁵⁴

Sept. 2, 2006).

46. ATSSA § 405(b)(1)(B)(i); Final Rule, 28 C.F.R. §§ 104.43–44 (2006).

47. Interim Final Rule, 66 Fed. Reg. at 66,279.

48. Victim Compensation Fund Frequently Asked Questions, U.S. Dep’t of Justice, Section

5. Compensation for Deceased Victims, <http://www.usdoj.gov/archive/victimcompensation/faq5.html> (last visited Sept. 2, 2006) [hereinafter DOJ FAQ, Sect. 5]. The Department of Justice stated:

Each person who was killed or injured in the September 11 attacks suffered grievous harm, and 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.

Id.

49. Interim Final Rule, 66 Fed. Reg. at 66,279.

50. *Id.* at 66,286.

51. Final Rule, 28 C.F.R. §104.44 (2006).

52. Nolan & O’Grady, *supra* note 42, at 244–45.

53. Interim Final Rule, 66 Fed. Reg. at 66,287.

54. *Id.*

G. *Economic Damages*

Unlike the assignment of a single presumed award for noneconomic damages, Feinberg developed an elaborate method of calculating the economic loss of each deceased claimant.⁵⁵ With the assistance of the accounting firm PriceWaterhouse Coopers, Feinberg established a complex system of tables, charts and schedules that calculated presumed economic losses based on a vast number of factors.⁵⁶ Such factors included, but were not limited to, age, marital status, occupation, salary level, life expectancy, industry and market predictions, health benefits, and burial costs.⁵⁷

The calculation of economic losses for injured claimants was similarly complex, and took into account a number of factors including: loss of earnings and other benefits, partial disability, total permanent disability, medical expenses, and loss of business or employment opportunities.⁵⁸ For both deceased and injured claimants, the ATSSA also gave Feinberg the discretion to consider the “individual circumstances” of each claimant in his calculations.⁵⁹

Feinberg’s schedules, tables, and charts were published and accessible to all potential claimants, but did not detail what those claimants whose income fell above the 98th percentile could expect to receive.⁶⁰ Though Feinberg explained this omission by asserting that the calculation of awards for such claimants was “highly speculative,” he also noted that the “financial need” of such claimants would factor into his analysis.⁶¹ This was one of the most controversial aspects of the Fund and one that will be discussed more extensively below.⁶²

H. *Collateral Offsets*

Section § 405(b)(6) of the ATSSA required the Special Master to reduce the compensation of victims by the amount of collateral source compensation they “received or were entitled to receive as a result of the terrorist-related aircraft crashes of September 11, 2001.”⁶³ The Final Rule gave specific examples of such sources—

55. *See id.* at 66,278-79.
56. Diller, *supra* note 33, at 761; *see also* Interim Final Rule, 66 Fed. Reg. at 66,278-79.
57. Interim Final Rule, 66 Fed. Reg. at 66,278-79; *see also* DOJ FAQ, Sect. 5 *supra* note 48, at §§ 5.2, 5.3.
58. Interim Final Report, 66 Fed. Reg. at 66,287-87.
59. ATSSA § 405(b)(1)(B)(ii).
60. DOJ FAQ Sect. 5, *supra* note 48, at § 5.7.
61. *Id.*
62. *See* Colaio v. Feinberg, 262 F. Supp. 2d 273, 286 (S.D.N.Y. 2003); *see generally* submission of Cantor Fitzgerald, L.P., Espeed, Inc. and TradeSpark L.P. 7, 37-38, 49-50 (2002), <http://fil.findlaw.com/hdocs/docs/cantor/cantor902smdojsub.pdf> [hereinafter Submission of Cantor Fitzgerald].
63. ATSSA § 405(b)(6).

life insurance payments, pension funds, death benefits programs and payments given by the Federal, State, or local governments in response to the events of September 11th—and gave the Special Master discretion to create a methodology for calculating the amount of collateral offsets received by each claimant.⁶⁴ Charitable donations, however, were exempted from the calculation of collateral sources,⁶⁵ as the Special Master recognized that including them in his calculations “would have the perverse effect of encouraging potential donors to withhold their giving until after claimants [had] received their awards from the Fund.”⁶⁶

I. *The Claims Evaluation Process*

The Interim Final Rule established two procedural options for individuals filing claims with the Fund: Track A and Track B.⁶⁷ If a claimant selected Track A and submitted her documents, a Claims Evaluator would make a preliminary judgment on her eligibility and on her presumed award.⁶⁸ The claimant would then be notified of her presumed award and would have the option of either accepting it or requesting a “hearing before the Special Master,”⁶⁹ where she could present evidence as to why the presumed award was incorrect or inadequate.⁷⁰

If the claimant selected Track B, however, she would proceed immediately to a hearing before the Special Master after a preliminary assessment of her eligibility by a Claims Evaluator.⁷¹ At the hearing, the Special Master, or his designee, would utilize the “presumed award methodology” that is applied to every claim, but he would also have the discretion to “modify or vary the award calculation if the claimant present[ed] extraordinary circumstances not adequately addressed by the . . . methodology.”⁷²

Feinberg noted in the introduction to the Interim Final Rule that such hearings would be conducted in a “nonadversarial” manner,⁷³ but also noted that claimants had the right to be represented by an attorney, to present witnesses (including expert witnesses), and to present documents and any other evidence that the Special Master might deem relevant.⁷⁴ Interestingly, however, the Interim Final Rule limited such

64. Final Rule, 28 C.F.R. § 104.47(a) (2006).

65. *Id.* at § 104.47(b)(2).

66. Interim Final Rule, 66 Fed. Reg., at 66,279. A number of scholars have addressed the charitable giving exemption, but an extensive analysis of the topic is beyond the scope of this paper.

67. *Id.* at 66,285.

68. *Id.*

69. *Id.* at 66,279.

70. *Id.* at 66,285.

71. *Id.*

72. *Id.* at 66,279.

73. *Id.* at 66,280.

74. *Id.* at 66,285.

hearings to approximately two hours, a time restriction subsequently abandoned in the Final Rule in favor of a time limit “determined by the Special Master or his designee.”⁷⁵

J. Lack of Review or Appeal

Neither the Interim Final Rule nor the Final Rule provided any mechanism for appealing the Special Master’s award calculations.⁷⁶ In fact, the Interim Final Rule explicitly rejected any right to appeal for claimants, asserting that “[t]here shall be no further review or appeal of the Special Master’s determination.”⁷⁷ Additionally, the regulations did not obligate the Special Master to “create or provide any written record of the deliberations that resulted in [his] determination[s].”⁷⁸

K. A Note on Legality

The legality of the administrative procedures set out by the Interim Final and Final Rules was unsuccessfully challenged in *Colaio v. Feinberg*.⁷⁹ There, the court ruled that “the procedures required by the regulations and by the Special Master fairly implement the Act, are entitled to judicial respect, and do not infringe on plaintiffs’ constitutional and statutory rights.”⁸⁰ This article will not conduct an in-depth examination of the court’s reasoning, but will instead operate under the assumption that the administrative procedures of the Fund were legal.⁸¹

III. PROCEDURAL VALUES

Any examination of procedural values in America rightly begins at Federal Rule of Civil Procedure 1, which lays out the scope and purpose of the procedural rules.⁸² The Rule states that the procedural rules in all federal civil courts in the United States must be “construed and administered to secure the just, speedy and inexpensive determination of every action.”⁸³ Similarly, Rule 102 of the Federal Rules of Evidence states that the rules must “be construed to secure fairness in administration,

75. Compare *id.* (where the Interim Final Rule limited duration to two hours), with Final Rule, 28 C.F.R. § 104.33(c) (2006) (where the Final Rule expands the limitation to a duration established by the Special Master or his designee).

76. See, e.g., Landsman, *supra* note 3, at 407.

77. Interim Final Rule, 66 Fed. Reg., at 66,285.

78. *Id.*

79. 262 F. Supp. 2d 273 (S.D.N.Y. 2003).

80. *Id.* at 290.

81. For a comprehensive discussion of the legality of the Fund, see Melber, *supra* note 32.

82. FED. R. CIV. P. 1.

83. *Id.*

[and] elimination of unjustifiable expense and delay.”⁸⁴ Rule 2 of the Federal Rules of Criminal Procedure asserts that the rules “are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.”⁸⁵ Significantly, the principles of fairness and efficiency are embodied by all three. Indeed, these two values are arguably the most important and overarching values in American legal and institutional procedures.

Feinberg recognized the importance of both values in one of his earliest publications on the Victim Compensation Fund: the preamble to the Interim Final Rules.⁸⁶ There he stated that two principles had guided the development of the Fund’s procedures. First, he noted that “the process should be efficient, straightforward, and understandable to the claimants”—a nod to efficiency.⁸⁷ Second, he asserted that “claimants should, to the greatest extent possible, be treated fairly based on the claimant’s own individual circumstances and relative to other claimants”—a clear recognition of the importance of fairness.⁸⁸ Feinberg acknowledged the importance of fairness and efficiency again at the close of the Fund.⁸⁹ Thus, it seems clear that fairness and efficiency, two governing procedural values in America, are also valid principles to employ in assessing the Fund.

Both principles, however, encapsulate other important sub-values. Indeed, it is difficult to measure the total “efficiency” or “fairness” of a procedural system without assessing the extent to which the system fulfills the component parts of these principles. Though there is not a set list of what sub-values fairness and efficiency encompass, a closer reading of various Federal Rules provides at least some indication.⁹⁰

A. *The Efficiency Principle*

Under the value of efficiency there are considerations such as the “speedy . . . and inexpensive determination of every action”⁹¹ and the elimination of “unjustifiable expense and delay.”⁹² Feinberg, moreover, described the importance of efficiency by noting that procedures should be “straightforward . . . and understandable to . . .

84. FED. R. EVID. 102.

85. FED. R. CRIM. P. 2.

86. Interim Final Rule, 66 Fed. Reg., at 66,274.

87. *Id.* at 66,278.

88. *Id.*

89. KENNETH R. FEINBERG, U.S. DEP’T OF JUSTICE, POLICY STATEMENT ON PROGRAM SHUTDOWN SCHEDULE, (2006) http://www.usdoj.gov/victimcompensation/Shutdown_Statement.pdf.

90. *See, e.g.*, FED. R. CIV. P. 1; FED. R. CRIM. P. 2; FED. R. EVID. 102; Interim Final Rule, 66 Fed. Reg., at 66,274.

91. FED. R. CIV. P. 1.

92. FED. R. CRIM. P. 2; FED. R. EVID. 102.

claimants.”⁹³ Two sub-values thus manifest themselves as essential to the attainment of efficiency: expediency and accessibility.

1. Expediency

The value of expediency embodies the notion that a process should not be unduly time-consuming but should instead be “speedy”⁹⁴ and lacking in “unnecessary bureaucracy.”⁹⁵ Fulfillment of this value seems particularly important in cases, like this one, where procedures are designed to provide rapid relief to individuals. Congress embodied this value in the Act that created the Fund. It required the Special Master to make a determination on each victim’s claim “[n]ot later than 120 days after that date on which [the] claim [was] filed. . . .”⁹⁶

2. Accessibility

Accessibility requires that individuals eligible to utilize a set of procedures not be subjected to undue obstacles in their attempts to do so.⁹⁷ This, in turn, necessitates several things. First, accessing the procedure should be “inexpensive,” so that eligible individuals are not precluded from utilizing them due to economic disadvantage.⁹⁸ Second, procedures should be “straightforward” so that individuals can understand how to utilize them in order to accomplish their goals.⁹⁹ Third, procedures should not discriminate between eligible individuals but should strive to accommodate all of them.¹⁰⁰

Accessibility is crucial to the achievement of efficiency because a high level of accessibility increases the chances that procedures will be able to be employed quickly and successfully by claimants.¹⁰¹

93. Interim Final Rule, 66 Fed. Reg. at 66,278.

94. FED. R. CIV. P. 1.

95. FEINBERG, *supra* note 89.

96. ATSSA, § 405(b)(3).

97. Alan M. Koral & Pearl Zuchlewski, *Sexual Harassment: Principles and Investigations*, 676 PRAC. L. INST. LITIG. & ADMIN. PRAC. COURSE HANDBOOK SERIES 349, 368 (2002).

98. *See, e.g.*, FED. RULE CIV. P. 1.

99. Interim Final Rule, 66 Fed. Reg. at 66,278.

100. Congress embraced this component of accessibility in drafting the legislation for the Fund by asserting that “any individual who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11th” should be provided with compensation under the terms of the Act. ATSSA § 403 (emphasis added).

101. Admittedly, accessibility could also appropriately fall under the fairness principle of procedure because it embraces the notion that all individuals should be treated equally in terms of their ability to utilize procedures. However, where this value is placed has little impact on its analysis in this paper. As a result, it will be placed under the efficiency principle only for the sake of brevity and the avoidance of redundancy.

B. *The Fairness Principle*

Discussions of the meaning of fairness in procedural contexts are, generally speaking, “rather thinly developed.”¹⁰² This is in spite of the fact that fairness is frequently touted as a guiding principle in the creation and implementation of procedure.¹⁰³ Law Professor Robert G. Bone, however, adequately describes fairness as a concern “with how persons are treated either individually or in relation to one another—whether their rights are respected, for example, or whether they are treated as equals in the distribution of social goods.”¹⁰⁴ He also notes that fairness embodies an “ideal of respect” for the “human dignity and autonomy” of all persons.¹⁰⁵ Achievement of a high degree of fairness in the development and use of procedure, therefore, seems to require attention to several important sub-values: transparency, consistency, equity, accuracy, and accountability.

1. Transparency

To be fair, procedures must be transparent, meaning that they must be both comprehensible and predictable.¹⁰⁶ Indeed, as discussed, if the achievement of fairness requires a respect for the autonomy of individuals, procedures should be designed so that individuals can both understand them and make informed choices about utilizing them.¹⁰⁷ Individuals choosing to utilize procedural systems should have a strong and relatively accurate sense about what will happen to them (or at least a strong sense of the range of possibilities and their attendant probabilities) as a result of doing so.¹⁰⁸

102. Robert G. Bone, *Agreeing to Fair Process: The Problem With Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 489 (2003).

103. See, e.g., FED. R. CRIM. P. 2; FED. R. EVID. 102; Interim Final Rule, 66 Fed. Reg. at 66,274; FEINBERG, *supra* note 89.

104. Bone, *supra* note 102, at 495.

105. *Id.* at 509.

106. See, e.g., T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT'L L. 91, 106 (2004) (transparency “comport[s] with norms of fair and due process”); Milagros Rivera Sanchez & Ang Peng Hwa, *Effective Regulators: A Response to the International Telecommunication Union's Case Study on Singapore*, 4 ASIAN-PAC L. & POL'Y J. 1, 16 (2003) (“[T]ransparency is an important component of effective regulation and is essential for fairness, independence and overall accountability.”).

107. See, Bone, *supra* note 102, at 509.

108. See, e.g., Press Release, U.S. Dep't of Justice, Final Regulations of September 11th Compensation Announced (Dec. 20, 2001), <http://www.usdoj.gov/victimscompensation/pressdec20.htm> [hereinafter Press Release, Dec. 2001].

Feinberg recognized the importance of transparency in many of his public statements and press releases.¹⁰⁹ For instance, in the preamble to the Interim Final Rule, he asserted that “claimants [should] be able to enter the program—or choose not to enter the program—with an understanding of how their claims will be treated.”¹¹⁰ Moreover, in a Department of Justice Press Release several months later he is quoted as saying that “[i]t is important to ensure that people have a sense of what they might receive from the program before they decide to apply.”¹¹¹

2. Consistency

Consistency means treating like individuals or cases alike.¹¹² Consistency is at the very heart of the fairness because it demands that authorities apply the same set of decision-making rules or criteria to people similarly situated. In doing so, consistency prevents abuse of discretion and arbitrariness.¹¹³ Thus, while the creators of procedural rules may define the meaning of “similarly situated” differently, consistency merely demands that once such lines of similarity and difference have been drawn, they are closely adhered to.

Feinberg also publicly promoted the value of consistency, noting in the Interim Final Rule that “in principle, similarly situated claimants should not receive dramatically differing treatment.”¹¹⁴ Interestingly, however, his public acceptance of this sub-value was not as all-embracing as, for instance, his acceptance of the sub-values of accessibility and transparency.¹¹⁵ While his acceptance of the latter two values appeared from his comments to be unconditional, he seemed to leave himself a good deal of “wobble room” in his comments about consistency. In the Interim Final Rule, for instance, he did not assert that like cases should be treated alike, but merely that they should not be treated “*dramatically differen[tly]*.”¹¹⁶ Feinberg’s relaxed notion of consistency and how it played out in his administration of the Fund will be discussed below.

109. See, e.g., *id.*; Feinberg, *supra* note 89.

110. Interim Final Rule, 66 Fed. Reg., at 66,278.

111. Press Release, Dec. 2001, *supra* note 108.

112. See, e.g., Jerry L. Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication in Matthews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 44 (1976) (“The nearest approximation to an index of accuracy is consistency in adjudication: if like cases are being treated alike by state agencies, then claimants are at least receiving formal justice through the existing procedures.”).

113. See, e.g., Jessica Allen, *Just Words? The Effects of No-Citation Rules in Federal Courts of Appeals*, 29 VT. L. REV. 555, 578 (2005).

114. Interim Final Rule, 66 Fed. Reg. at 66,278.

115. Compare *id.* with Press Release, Dec. 2001, *supra* note 108.

116. Interim Final Rule, 66 Fed. Reg. at 66,278 (emphasis added).

3. Equity

Equity is another requisite component of fairness.¹¹⁷ While this term is defined in a number of ways in the legal realm,¹¹⁸ for the purposes of this paper “equity” will be defined as having an ethical justification for treating cases differently. Thus, whereas consistency demands that like cases be treated alike, equity demands that when cases are treated differently, there is a principled reason for doing so.¹¹⁹ In this sense, equity is a check on the lines of similarity and difference drawn for consistency’s sake. Like consistency, equity is important to fairness because it reduces the arbitrary treatment of individuals. It ensures that no party receives arbitrarily favorable or unfavorable treatment.¹²⁰ Thus, applying this value to the Fund, equity would be fulfilled if the Special Master had ethically acceptable reasons for awarding differing amounts of money to different claimants.

4. Accuracy

Accuracy can be defined as “the proper substantive outcome . . . based upon correctly found facts appropriately applied. . . .”¹²¹ Accuracy is a central value of procedure in civil, criminal, and administrative law.¹²² Accuracy is a crucial component of fairness because, as the Third Circuit Court of Appeals noted, in *In re Japanese Elec. Prod. Antitrust Litigation*, “if . . . decisions are not based on factual determinations bearing some reliable degree of accuracy . . . remedies will not be applied consistently with the purposes of the laws.”¹²³ An emphasis on accuracy in procedural systems, moreover, tends to make such systems “more difficult to manipulate” because there will be greater checks on truth and falsity, thus presumably leading to fairer results.¹²⁴

117. Eric A. Lustig, *Taxation of Prepaid Tuition Plans and the 1997 Tax Provisions—Middle Class Panacea or Placebo? Continuing Problems and Variations on a Theme*, 31 AKRON L. REV. 229, 266 (1997) (“The goal of equity relates to fairness.”).

118. See, e.g., Jeffrey Metzler, *Inequitable Equilibrium: School Finance in the United States*, 36 IND. L. REV. 561, 564 (2003); Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, 28 FORDHAM URB. L.J. 1611, 1648 (2001).

119. See, e.g., Christine N. Cimini, *Principles of Non-Arbitrariness: Lawlessness in the Administration of Welfare*, 57 RUTGERS L. REV. 451, 494 (2005).

120. *Id.* at 510.

121. John J. Capowski, *Accuracy and Consistency in Categorical Decision-Making: A Study of Social Security’s Medical-Vocational Guidelines—Two Birds With One Stone or Pigeon-Holing Claimants?*, 42 MD. L. REV. 329, 331-32 (1983).

122. Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 307-08 (1994).

123. *In re Japanese Elec. Prod. Antitrust Litig.*, 631 F.2d 1069, 1084 (3d Cir. 1980).

124. Kaplow, *supra* note 122, at 397.

In the context of the Fund, accuracy meant calculating awards based upon correct or truthful information about the claimants. This, in turn, depended on some degree of assessment of the information provided by the claimants in their applications. If, for instance, an individual claimed that a deceased victim had an income of \$65k before his or her death, an “accurate” result would be one where (1) the victim *actually* did have an income of \$65k and (2) the Special Master used \$65k to represent his or her income in his calculations.

It is highly difficult, however, to establish precise standards for accuracy (i.e. one mistake made per 100 claims processed) or to achieve perfect accuracy within any system.¹²⁵ Professor Jerry L. Mashaw has acknowledged this problem in his scholarship and has developed a useful approach to “measuring” accuracy.¹²⁶ He notes that “[t]he nearest approximation to an index of accuracy is consistency in adjudication: if like cases are being treated alike by state agencies, then claimants are at least receiving formal justice through the existing procedures.”¹²⁷ While consistency may be a helpful benchmark in some respects, it cannot determine whether claimants were deceitful in their application forms. To assess accuracy in that regard, therefore, the Fund’s checks on claimant-supplied information will have to be assessed.

5. Accountability

Accountability is “the duty of a . . . decision maker to explain, legitimate and justify [her] decision[s] and to make amends where a decision [has caused] injustice [or] harm.”¹²⁸ Inherent in this definition are two requirements. First, to be accountable, authorities within procedural systems must provide some form of explanation for their decisions. As the Supreme Court recognized in *Goldberg v. Kelly*, this ensures that decision makers *have* some form of explanation for their decisions.¹²⁹ This, in turn promotes fairness because “[i]f decision makers have to explain their decisions to the community or to some reviewing body, then it is more likely that their decisions can be justified.”¹³⁰

125. Jerry L. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 796 (1974).

126. Mashaw, *supra* note 112, at 44.

127. *Id.*

128. John D. Jackson, *Making Juries Accountable*, 50 AM. J. COMP. L. 477, 483 (2002).

129. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (“To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on. . .”).

130. Jackson, *supra* note 128, at 486.

Second, in being accountable, procedural systems must have some mechanism for amends to be made when a harm or injustice does occur.¹³¹ In legal systems, for instance, this form of accountability is provided for by the availability of appeal. If either the plaintiff or defendant in a case feel that a court has erred in its decision making, the party can appeal to a higher court. Thus, accountability operates as an insurance mechanism of fairness because it provides individuals a means of protecting themselves if an injustice does occur.

C. *A Note on Overlaps, Conflicts and Tradeoffs*

To a very a large extent, the values identified in this section may overlap or conflict in a variety of situations. Indeed, promotion of efficiency values, if taken to an extreme, could undermine the fulfillment of fairness, as speed tends to reduce accuracy and thoughtfulness. Similarly, the pursuit of fairness can become an unduly burdensome and tedious task if undertaken to a radical extent. As a result, value judgments or tradeoffs may need to be made in some procedural systems based on what those systems are designed to accomplish and what is at stake. For example, fairness and accuracy of judgments in death penalty cases is clearly more important than how *quickly* such judgments are made because the resulting punishment is so severe and final.¹³²

Consequently, one must be cognizant of the interactions between these values when using them to assess procedural systems. When such a system “fails” to embody a particular value, one must determine whether “failure” or “sacrifice” is the appropriate description. Failure would be the outright disregard of a value with little or no justification, whereas sacrifice would be the conscious neglect of a value for the purposes of better achieving another. This is an important distinction because sacrifice, in certain contexts (such as death penalty cases), might be well-justified, whereas outright failure might not. Thus, in the analysis that follows, where the Fund does not sufficiently embody a particular value, but where there might be an ethical justification for such a shortfall, a “balancing test” will be conducted between the importance of the value and what might have been gained gained by its sacrifice under the circumstances. This balancing test will determine whether the Fund has truly failed to embody particular values.

131. *Id.* at 483.

132. *See* U.S. v. Booker, 543 U.S. 220, 244 (2005) (“[T]he interest in fairness and reliability protected by the right to a jury trial—a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment—has always outweighed the interest in concluding trials swiftly.”); *see also* Tom Stacy, *Changing Paradigms in the Law of Homicide*, 62 OHIO ST. L.J. 1007, 1058-59 (2001).

IV. THE EFFICIENCY OF THE VICTIM COMPENSATION FUND

At first glance and upon more extensive examination, the Fund embodied the principles of efficiency extremely well. Its shockingly quick implementation, its quick response time to claimants, and its liberal eligibility requirements all make it a commendable embodiment of this procedural value. A closer analysis reveals why.

A. *Expediency*

As discussed above, Congress wanted the Fund to provide immediate financial relief to the victims of September 11th.¹³³ As a result, the Fund's design and implementation occurred very quickly.¹³⁴ Indeed, as discussed, Congress designed the "basic architecture" of the Fund in mere hours.¹³⁵ Moreover, less than three months after that, Special Master Feinberg finished and released the Fund's administrative regulations and procedures in the form of the Interim Final Rule.¹³⁶ The first award to a claimant was issued in August 2002, less than one year after the tragedy.¹³⁷ Considering that the Fund started off as a mere shell of a relief program, the fact that it was fully functioning in less than a year is highly impressive.

Furthermore, the response time to individual claims was extremely expedient. As discussed above, the Act passed by Congress required that the Special Master make a determination on each victim's claim "not later than 120 days after that date on which [the] claim [was] filed," a requirement that the Special Master seemingly met in each case.¹³⁸ Moreover, once an award was authorized for a claimant by the Special Master, the procedures set up by the Fund allowed it to be "processed and received within 6-8 weeks."¹³⁹

There is, therefore, no evidence that the Fund was not expedient. In the end, there seemed to be little criticism on the part of either victims or members of the general public that the Fund was responding too slowly to the events of September 11th, or that victims were waiting too long for an assessment of their claims.¹⁴⁰

133. See ATSSA § 403; Alexander, *supra* note 19, at 644-45.

134. See ATSSA (voted into law Sept. 22, 2001; just 11 days after the attacks).

135. Henriques & Barstow, *supra* note 5, at B8.

136. Interim Final Rule, 66 Fed. Reg. at 66,274.

137. Paul Howard, *A 9/11 Tort-Fest*, N.Y. POST, Aug. 10, 2002, http://www.manhattan-institute.org/html/_nypost-a_911_tort_fest.htm.

138. ATSSA § 405(b)(3).

139. Press Release, U.S. Dep't of Justice, Closing Statement from the Special Master, Mr. Kenneth R. Feinberg, on the Shutdown of the September 11th Victim Compensation Fund (date unavailable), <http://www.justice.gov/archive/victimcompensation/closingstatement.pdf> [hereinafter Press Release, Closing Statement].

140. Alexander, *supra* note 19, at 644 (explaining that almost all eligible families chose to file a claim with the Fund even though another option was to file a lawsuit external to the Fund and that almost all claims administration concluded by June 2004).

Those that did complain about a lack of Fund expediency did so on the basis that a large number of victims waited more than two years to file their claims.¹⁴¹ This observation was true: of the 2,884 claims ultimately filed with the Fund, more than one-third were filed in December 2003, less than a month before the Fund stopped receiving submissions altogether.¹⁴² The evidence suggests, however, that these late submissions were not attributable to the complexity or sluggishness of the Fund but to the “continuing grief” of the claimants.¹⁴³ Filing with the Fund required many victims to confront the “reality of their loss” and thus often made it difficult and painful for them to complete the necessary paperwork.¹⁴⁴ Their difficulty, however, does not implicate the expediency of the Fund but rather reflects the magnitude of the pain affecting its claimants. In short, therefore, it is fair to deem the Fund “expedient” on all fronts.

B. Accessibility

Accessibility, as discussed above, has three component parts: lack of undue expense, straightforwardness, and lack of discrimination between eligible individuals.¹⁴⁵ The Fund properly fulfills all three components.

First, all claimants were able to apply for Fund relief for free.¹⁴⁶ Moreover, any claimants needing assistance in filing their claims could obtain such help without cost.¹⁴⁷ The Special Master set up toll-free phone numbers and free walk-in claim assistance centers in cities throughout the country for these purposes.¹⁴⁸ Additionally, a number of outside legal organizations—most notably, Trial Lawyers Who Care—provided free advice and extensive cost-free assistance to claimants.¹⁴⁹ Thus, there is seemingly no justification for attacking the Fund on the grounds of expense.¹⁵⁰

141. *See, e.g., id.* at 644-45.

142. *Id.* at 644.

143. Schneider, *supra* note 33, at 465.

144. *Id.* at 481.

145. *See* FED. R. CIV. P. 1; Interim Final Rule, 66 Fed. Reg. at 66,278; ATSSA § 403.

146. Victim Compensation Fund Frequently Asked Questions, U.S. Dep’t of Justice, Section 1. General Information, <http://www.justice.gov/archive/victimcompensation/faq1.pdf> (last visited Sept. 2, 2006).

147. *See, e.g.,* Press Release, Dec. 2001, *supra* note 108.

148. Instructions—Compensation Form for Deceased Victims, U.S. Dep’t of Justice, available at <http://www.usdoj.gov/archive/victimcompensation/deceasedvictims.pdf> (last visited Sept. 2, 2006) [hereinafter Instructions]. Claim Assistance Centers were located in Manhattan, New York; Arlington, Virginia; Boston, Massachusetts; Jersey City, New Jersey; Long Island, New York; Metro Park, New Jersey; and Stamford, Connecticut. Press Release, U.S. Dep’t of Justice, Final Regulations of September 11th Compensation Announced (Mar. 7, 2002), http://www.usdoj.gov/opa/pr/2002/March/02_ag_130.htm.

149. Tanina Rostain, *What Does It Mean to Practice Law “In the Interests of Justice” in the Twenty-First Century?: Professional Commitments in a Changed World*, 70 FORDHAM L. REV. 1811,

Second, while the straightforwardness of the Fund's administrative procedures is a more debatable issue than its cost, strong evidence supports the assertion that the Fund ultimately embodied this procedural value.¹⁵¹ Some scholars have argued that claimants filing with the Fund were subjected to a "complicated and lengthy" process requiring "complex documentation . . . time and effort" and, thus, that the Fund failed the test of straightforwardness.¹⁵² This is a valid assertion in light of the fact that the application form was over twenty pages long and required extensive documentation of information that claimants were not likely to know offhand (e.g., details about pension plans, social security information, salary information from prior years, etc.).¹⁵³ Moreover, before filing with the Fund, many claimants had to work with the probate or surrogate courts of their States or counties to execute a victim's will or to be deemed a "Personal Representative" (a necessity for those filing on behalf of deceased victims).¹⁵⁴ In light of the complexity of the filing process, the Special Master made a determined effort to make the Fund as procedurally accessible and user-friendly as possible.¹⁵⁵ Indeed, "[t]he Fund's administrators . . . used technology to communicate through an extensive website that detail[ed] the regulations and provide[d] forms, statistics, frequently asked questions, reminders about deadlines and information about drop-in centers."¹⁵⁶ Moreover, as discussed above, a great deal of free assistance was readily available to claimants by telephone and in person.¹⁵⁷

The question, therefore, is whether the free assistance made available to claimants counterbalanced the procedural complexity of the Fund. On balance, it did.

1818 (2002).

150. An interesting issue is whether the provision of free legal services by outside organizations was crucial to the Fund's achievement of accessibility, at least as to the cost criterion. There have been no studies on whether claimants felt that legal advice was crucial to successfully filing with the Fund nor could this author find any data on the percentage of claimants who utilized such services. Upon reflection, but admittedly with no data to support this argument, it does not seem that the provision of free legal services by outside organizations was crucial to the Fund's achievement of accessibility. Indeed, if such services had not been provided, analysis of the accessibility of the Fund would have rested on an examination of its filing costs and on the characteristics of its filing process alone. Both examinations occur above, and both have favorable results. Provision of free legal services, therefore, seems to have been more of a positive side effect of the Fund rather than an integral part of its accessibility.

151. Press Release, Dec. 2001, *supra* note 108; Instructions, *supra* note 148; Press Release, Closing Statement, *supra* note 139.

152. Schneider, *supra* note 33, at 478.

153. Instructions, *supra* note 148.

154. Victim Compensation Fund Frequently Asked Questions, U.S. Dep't of Justice, Section 3. Personal Representative <http://www.justice.gov/archive/victimcompensation/faq3.pdf> (last visited Sept. 2, 2006).

155. Schneider, *supra* note 33, at 478.

156. *Id.*

157. *See, e.g.*, Instructions, *supra* note 148.

By the time the administration of the Fund ended in December of 2003, over 98% of eligible families who had lost loved ones in the attacks of September 11th had submitted claims to the Fund.¹⁵⁸ This number would likely have been substantially lower if the procedural components of the Fund had been unduly complex, as more claimants would have been deterred from filing by the process. However, as it stands, virtually all eligible claimants *did* file successfully with the Fund, and thus, were clearly able to navigate through its various procedures.¹⁵⁹ Additionally, the Fund's pool of eligible claimants was largely an "educated" one, further mitigating the likelihood that its procedures were unduly burdensome or confusing.¹⁶⁰

Third, the Fund had extremely liberal eligibility requirements, as discussed above. In fact, "eligibility for compensation depend[ed] solely on whether the victim was injured or killed on September 11th as a result of the attacks."¹⁶¹ Thereby, victims did not have to prove "liability or causation" but merely had to "meet the straightforward criteria for eligibility."¹⁶² Consequently, at face value, the Fund did not seem to discriminate between claimants.

However, there are several possible areas of contention over perceived discrimination within the Fund's eligibility requirements. For example, some criticism has been leveled at the Fund for not extending eligibility to gay and lesbian partners of victims.¹⁶³ The Special Master of the Fund had little ability to address this issue, however, because the Fund relied on state law to determine who had legal standing to file claims.¹⁶⁴ Under virtually all state laws, gay and lesbian partners, fiancées, and live-in significant others did not have standing to be personal representatives of decedents.¹⁶⁵ While the Fund could have created its own mechanism for determining who had standing to be a Personal Representative of each deceased victim, this would have been an incredibly laborious and legally complex task and one that arguably would have drastically undermined the efficiency of the Fund. Revising state trust and estate law (or establishing a new body of it altogether) in order to take non-traditional (or at least non-state-sanctioned) relationships into account would likely have taken an excessive amount of time and would have only benefited a small group of people at the expense of a much larger group. Accordingly, the Special Master was not unreasonable in choosing to rely on state law to the detriment of these groups of people.¹⁶⁶

158. Press Release, Closing Statement, *supra* note 139.

159. *Id.*

160. Nolan & O'Grady, *supra* note 42, at 236.

161. Alexander, *supra* note 19, at 647.

162. *Id.*

163. Hensler, *supra* note 11, at 436, 441, 449 n.117.

164. Interim Final Rule, 66 Fed. Reg. at 66,283.

165. *Id.* at 66,277.

166. Additionally, it is worth noting that these groups of people were eligible to receive compensation from a number of charitable organizations. Interim Final Rule, 66 Fed. Reg. at 66,274.

Eligibility was also only extended to those individuals who were “treated by a medical professional within 24 hours of [an] 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. . . .”¹⁶⁷ Consequently, individuals who might have “suffer[ed] long-term effects of exposure to the environmental conditions at . . . the sites” but whose conditions did not immediately manifest themselves were not eligible for awards from the Fund.¹⁶⁸ Thus, one could argue that the Fund unfairly discriminated between “immediate” and “future” victims of September 11th. This is an especially compelling argument in light of the fact that the ATSSA imposed no time limits on its provision for relief.¹⁶⁹

The Special Master did not voice any reasons for excluding these “future” victims from the Fund. One can theorize that accommodating such victims would have negatively impacted the overall cost and administrative requirements of the Fund by requiring it to stay open indefinitely and by making determinations of injury causation significantly more complex. However, in the absence of such evidence or statements by the Special Master on the topic, one can only fairly draw the conclusion that this group of victims was simply ignored without a compelling justification.

Overall, therefore, the Special Master did not adequately fulfill the non-discrimination requirement of accessibility. While his refusal to develop unique standing rules for homosexual and live-in partners may have been justifiable in light of the need for efficiency, his lack of consideration for the rights of potential future claimants was neither justified nor even addressed. Although an early valuation of the claims of such individuals was probably not possible, the Special Master’s closure of the Fund in December 2003 demonstrated a total lack of regard for the late-developing injuries of September 11th victims.

C. Overall Assessment of Efficiency

In sum, the Fund largely embodied the procedural value of efficiency. It was expedient and met two of the three criteria of accessibility: lack of expense and straightforwardness. Though the Fund failed to meet the third criterion of accessibility—non-discrimination—this failure impacted a comparatively small group of potential claimants: rescue workers present at the three sites in the days following the tragedy and individuals in non-traditional relationships. It did not, therefore, completely undermine the Fund’s achievement of efficiency. This is particularly true in light of the Special Master’s fervent efforts to meet the

167. Final Rule, 67 Fed. Reg. at 11,245.

168. Nolan & O’Grady, *supra* note 42, at 239. Primarily, these individuals were rescue workers. *Id.*

169. See ATSSA §§ 404, 405.

requirements of the principle in every other regard. The Fund, therefore, was strongly, though not entirely, efficient.¹⁷⁰

V. THE FAIRNESS OF THE VICTIM COMPENSATION FUND

While the Fund may have fulfilled the efficiency principle of procedure, an examination of its provisions and administration reveal that it did not fulfill the fairness principle of procedure. Indeed, the wide discretion granted to the Special Master by the original Act, and Feinberg's embodiment of that role, undermined the fairness of the Fund by permitting a high degree of arbitrariness to enter into its administration.¹⁷¹ A discussion of the Fund's relationship to the five sub-values of fairness—transparency, consistency, equity, accuracy, and accountability—demonstrates how this arbitrariness developed.

A. Transparency

To be transparent, a procedural system must promote informed choice and have a high predictability of results.¹⁷² In regards to the first requirement—informed choice—Feinberg frequently asserted that claimants should “be able to enter the program . . . with an understanding of how their claims will be treated.”¹⁷³ He also took a number of steps to promote such informed choice including, but not limited to, publishing the “schedules, tables, [and] charts of presumed determinations for economic and noneconomic losses,”¹⁷⁴ holding “informational town hall meetings” around the country,¹⁷⁵ and setting up the claim assistance centers and hotlines discussed above.¹⁷⁶ All of these measures were presumably designed to provide potential claimants with the information they needed to make informed choices when choosing between the Fund and private litigation.¹⁷⁷

170. It is worth noting, however, that Feinberg had a strong incentive to make the Fund as expedient and accessible as possible. Indeed, the goal of the original Act was to get as many people as possible to “opt out of the tort system” and file with the Fund. Alexander, *supra* note 19, at 633, 641. Had the Fund not been as efficient, it is likely that more people would have taken their chances with private litigation, and thus Feinberg would have largely failed to achieve his primary objective as Special Master.

171. See, e.g., Landsman, *supra* note 3, at 403.

172. See Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 894 (2006).

173. Interim Final Rule, 66 Fed. Reg. at 66,278.

174. *Id.*

175. Victim Compensation Fund Frequently Asked Questions, U.S. Dep't of Justice, Section 1. General information, <http://www.justice.gov/archive/victimcompensation/faq1.pdf> (last visited Sept. 2, 2006).

176. See, e.g., Instructions, *supra* note 148.

177. Diller, *supra* note 33, at 754-55. One could make an argument that a more relevant issue in regard to choice and the Fund is not whether such choice is “informed,” but rather whether it

What Feinberg did not readily reveal or explain to potential claimants, however, was the discretion he had to increase or decrease the awards published in his charts, tables, and schedules.¹⁷⁸ As the court recognized in *Colaio*, the Act creating the Fund invested the Special Master “with considerable discretion.”¹⁷⁹ More specifically, the Act and the Final Rule gave the Special Master the right to take “individual circumstances” into account when making final awards¹⁸⁰ and to consider any “extraordinary circumstances” in each claimant’s case.¹⁸¹ Despite the strong impact that these “circumstances” could have on final awards, Feinberg “provided virtually no guidance about what such circumstances might be and how they might be established.”¹⁸²

As a result, Feinberg’s efforts to “inform” potential claimants about the Fund seem relatively disingenuous in light of the fact that he was not giving them the “whole truth.” Seen in this light, his personal outreach to claimants and the information he provided to them begins to look like a misinformation campaign rather than an informational one. By providing such a wealth of information, in essence, Feinberg gave claimants the illusion that they were well-informed about their options though, in reality, they were not.¹⁸³ Worse, by making the Fund seem more predictable than it actually was, Feinberg was perhaps unfairly inducing them into signing onto it.

The Fund encounters similar problems when measured against the predictability element of transparency. While the “charts and schedules that specified *to the dollar* how much individuals of a specified age, with a specified income, and a specified number of dependents could expect to receive” gave the illusion that the Fund had a very high degree of predictability, Feinberg’s refusal to explain how his discretionary power affected those calculations undermined the predictability of the Fund to a very high degree.¹⁸⁴

Moreover, the Fund was entirely unpredictable for one group of claimants. For victims whose income fell above the 98th percentile of national incomes, no

exists at all. Indeed, when faced with the options of a relatively certain award of a substantial amount of money or a costly, time-consuming, and risky investment in private litigation, it is questionable whether any rational actor would opt for the latter. This issue, however, is beyond the scope of this paper.

178. See, e.g., DOJ FAQ, Sect. 5, *supra* note 48; Melber, *supra* note 32, at 763 (“In light of the Special Master’s wide discretion, the unique nature of this alternative to litigation, and the explicit mandate to consider factors other than pure economic and noneconomic losses, it is quite reasonable to conclude that the phrase ‘based on . . . individual circumstances’ permits Feinberg to increase or decrease compensation.”).

179. *Colaio v. Feinberg*, 262 F. Supp. 2d. at 273, 286 (2003).

180. ATSSA, § 405(b)(1)(B)(ii).

181. Interim Final Rule, 66 Fed. Reg., at 66,285.

182. Landsman, *supra* note 3, at 402.

183. See *id.*

184. *Id.* at 401.

presumed awards were published at all.¹⁸⁵ While some have attempted to explain away this omission by asserting that the statistical model Feinberg used to calculate generalized awards broke down after the 98th percentile—possible because the assumptions behind various components of economic loss “could very well produce inappropriate results”¹⁸⁶—Feinberg still did not substitute anything in their place. In fact, this author could find nothing on record where Feinberg made any attempt to explain to this group of claimants how much they could expect to receive from the Fund if they submitted a claim or precisely how their claims were going to be assessed. Instead, Feinberg conveyed vague and mixed messages to this group, noting at one point that there would be no “caps” on awards,¹⁸⁷ but asserting later that awards of more than three or four million dollars “would be rare.”¹⁸⁸ This was a source of incredible frustration for this group of claimants, as demonstrated by the Cantor Fitzgerald families who filed a cause of action against Feinberg over the omission of their loved ones from his charts and tables.¹⁸⁹

In short, therefore, the Fund failed to embody transparency due to the Special Master’s high degree of discretion in influencing final award calculations and his utter failure to explain or curb his use of such discretion, or to alert potential claimants to it. Ironically, had Feinberg engaged in fewer public information campaigns and touted the predictability of the Fund less, he probably would have done more towards promoting the transparency of the Fund, as claimants and potential claimants would have had a more accurate sense of how much they really knew about the inner workings of the Fund. Instead, they were led to believe that the Fund was highly predictable when, in fact, it often was not.¹⁹⁰

B. *Consistency*

Likewise, the Fund failed to embody the value of consistency, which demands that like cases be treated alike. While one would assume from looking at Feinberg’s charts and schedules that like cases would be treated alike, the reality was actually quite different. A reporter for the *New Yorker* who spent several days shadowing Feinberg reported, for instance, that:

Feinberg was by turns gentle and hostile, confiding and withholding, depending on what seemed most efficacious. With awards below the average—currently about \$1.5 million—he was almost always willing to add a few hundred thousand; on one occasion, I heard him promise to give a widow an additional

185. DOJ FAQ Sect. 5, *supra* note 48.

186. *Id.*

187. Final Rule, 67 Fed. Reg. at 11,234.

188. *Id.*

189. See Submission of Cantor Fitzgerald, *supra* note 62, at 4-6.

190. See Diller, *supra* note 33, at 754-55.

half million dollars for no other reason than that she had come in with her two small children and asked for it. As far as I could make it out, Feinberg's reasoning in these cases amounted to: Let's do what seems to work, and worry about how to justify it afterward.¹⁹¹

Such arbitrary decision-making in dealing with individual claimants clearly does not abide by the demands of consistency.

Similarly, several big decisions that Feinberg made during the administration of the Fund served to undermine consistency. For instance, while pensions and death benefits were originally considered collateral offsets for all claimants, several months into the administration of the Fund, Feinberg decided to make an exception in the cases of firefighters and police who were killed in the attacks.¹⁹² "While no one begrudges the families of the firefighters and police victims any benefit," consistency demanded that "what the Special Master does for one he must do for all."¹⁹³

Even more threatening to consistency was Feinberg's treatment of families whose loved ones had incomes over the 98th percentile. Not only were such victims left off his charts and tables, but their claims were also subjected to an additional consideration: "whether the financial needs of those victims' families [were] being met."¹⁹⁴ Consideration of such a factor was a "radical departure from what Congress had originally envisioned," as the Act that created the Fund neither imposed limits on the amount of compensation that claimants could receive nor even mentioned "need" as a relevant calculus.¹⁹⁵ Moreover, yet again, Feinberg failed to explain to the relevant claimants how such a consideration would factor into his calculations.¹⁹⁶

One can make the argument that Feinberg's discretion might have *enhanced* the fairness of the Fund by taking into account relevant individual factors and circumstances that his charts, schedules and graphs simply could not encapsulate. However, even if this were true—and no evidence suggests that it is—Feinberg's use of discretion still runs contrary to the way that he was touting the Fund, thereby undermining its transparency and predictability. As one scholar noted:

In the name of an allegedly efficient, user friendly, and equitable approach, virtually all grounds for proof, contest, and argument were read out of the Fund process. In their place, the Master substituted charts and schedules that specified *to the dollar* how much individuals of a specified age, with a specified income,

191. Elizabeth Kolbert, *The Calculator: How Kenneth Feinberg determines the value of three thousand lives*, THE NEW YORKER, Nov. 25, 2002, at 48, available at http://www.newyorker.com/fact/content/?021125fa_fact.

192. Michele Landis Dauber, *The War of 1812, September 11th, and the Politics of Compensation*, 53 DEPAUL L. REV. 289, 341 (2003).

193. Nolan & O'Grady, *supra* note 42, at 248.

194. Final Rule, 67 Fed. Reg. at 11,244.

195. Landsman, *supra* note 3, at 400 (citing Interim Final Rule, 66 Red. Reg. at 66,274).

196. *Id.* at 402.

and a specified number of dependents could expect to receive. Gone was any need for a claimant to say anything . . . a few simple facts jotted on a form would yield a precise and unvarying award.¹⁹⁷

Feinberg thus left little room for discretion in the award equations that he was publishing.

Additionally, the use of discretion to calculate claimants' awards was inconsistent in light of Feinberg's use of the Track A and Track B models. Under this system, claimants who chose the faster, simpler Track A had their claims evaluated *only* in light of Feinberg's charts and schedules.¹⁹⁸ However, Track B claimants received special hearings with the Special Master where factors like "need" and "individuals circumstances" *were* taken into account.¹⁹⁹ Granted, while Track A claimants did have the option of requesting a hearing with the Special Master after their awards were calculated, they did not have a strong incentive to do so since they were not aware that their Track B counterparts were receiving higher awards at the discretion of Feinberg.²⁰⁰

Feinberg, in short, should have chosen one approach and firmly adhered to it. Either he should have created a series of charts, schedules, and tables for *all* victims (those victims whose income fell above the 98th percentile included) and strictly utilized them, or calculated awards on an individual basis, publicized the criteria that would have contributed to his decisions and noted that discretion would enter into his calculations. Instead, by mixing his approaches seemingly at will, he unjustifiably allowed arbitrariness to enter into the Fund and undermine its consistency.

C. Equity

Equity, as discussed above, requires that when eligible claimants are treated differently, they are treated differently for ethically justifiable reasons.²⁰¹ Due to the arbitrary and discrepant treatment of certain groups of claimants, the Fund did not embody the equity component of fairness. Indeed, while Feinberg and other scholars have voiced reasons why certain claimants—namely those with incomes above the 98th percentile—*should* have been treated differently, they have ultimately failed to demonstrate how such differing treatment was justifiable in the administration of the Fund.²⁰²

197. *Id.* at 401.

198. Interim Final Rule, 66 Fed. Reg. at 66,285.

199. *See id.* at 66,285-86.

200. *See id.* at 66,285.

201. Cimini, *supra* note 119, at 494.

202. *See, e.g.,* Melber, *supra* note 32, at 764 (citing Final Rule, 67 Fed. Reg. at 11,243-44); Lisa Belkin, *Just Money*, N.Y. TIMES MAGAZINE, Dec. 8, 2002, § 6 at 92 (Where Feinberg rationalizes why those above the 98th percentile *should* have been treated differently by pointing to

Before examining the reasons why the Fund fails to be equitable, it is worth noting that Feinberg does deserve recognition and commendation for his decisions *not* to treat certain groups of claimants differently. For instance, the methodology he used to calculate economic damages was “gender and race neutral,” despite strong evidence that women and minorities tend to earn less in the workplace over the course of their careers.²⁰³ In fact, Feinberg’s methodology employed general demographic information about “All Active [White] Males” in making calculations for all claimants.²⁰⁴

However, Feinberg undermined any gains he made towards an equitable Fund administration by his arbitrary treatment of wealthier claimants, or more specifically, those whose income fell above the 98th percentile.²⁰⁵ While, as discussed, Congress made no provisions for such treatment, Feinberg took it upon himself to consider the “financial needs” of these families and not others.²⁰⁶ Feinberg, in attempting to justify this disparate treatment under social welfare principles, remarked to one reporter that “[i]t’s a philosophic problem, and it’s a financial problem. What to do with some of these people . . . with incomes of a million or two million. Are there no limitations? . . . should the taxpayer and this program subsidize a \$10 million lifestyle? . . . That isn’t what Congress intended.”²⁰⁷

Feinberg may have had a valid philosophical point. Was it equitable to reinforce what is arguably an inequitable distribution of wealth in American society? If awards were based on income levels, those most in need were getting the least compensation. One scholar noted that “those children already at the margins of society [had] that legacy imprinted on their future, as the compensation they [were] entitled to in this settlement . . . reflect[ed] the earning ability of their deceased parent.”²⁰⁸ Such arguments might justify reducing the awards of wealthier claimants.

However, these arguments ultimately fail to excuse the disparate treatment of wealthier claimants in the Victim Compensation Fund for one primary reason: financial need was not taken into account for *all* wealthy claimants, but merely for those whose income fell above the 98th percentile.²⁰⁹ Had Feinberg truly been committed to social welfare principles, or to addressing the financial need component

the potential of providing exorbitant awards to the wealthier victims (since there was virtually no cap on these awards), the ultimate burden falling on the taxpayer, and the lack of congressional intent to support these awards.)

203. DOJ FAQ Sect. 5, *supra* note 48, at 6, 9.

204. *Id.* at 5-6 (citing James Ciecka, et al., *A Markov Process Model of Work-Life Expectations Based on Labor Market Activity in 1997-98*, 9 J. LEGAL ECON. 33, 40-44 (1999-2000)).

205. *Id.* at 3.

206. Landsman, *supra* note 3, at 400.

207. Belkin, *supra* note 202, § 6 at 98.

208. Hensler, *supra* note 11, at 436 (citing Sondra Leftoff, *Letter to the Editor*, N.Y. TIMES, Dec. 21, 2001, at A28).

209. DOJ FAQ, Sect. 5, *supra* note 48, at 3.

of claimants' submissions, he should have applied this principle across the board. Indeed, the same arguments that apply to claimants above the 98th percentile surely apply to those in the 95th or 96th percentiles. Moreover, by Feinberg's logic, financial need would have necessitated *increasing* the awards of those claimants whose incomes were in the lower percentiles. Instead of across the board treatment, however, Feinberg drew an arbitrary line between a small group of claimants and everyone else. As a result, despite what seemed to be good intentions on his part, the administration of the Fund failed to embody the principle of equity.

D. Accuracy

As discussed above, the accuracy of the Fund was dependent on two component parts: truthful information being supplied by claimants and truthful information being processed by the Special Master.²¹⁰ In regard to the first component, the Special Master required claimants to submit substantial amounts of supporting documentation with their applications to the Fund.²¹¹ Such documentation included original certified copies of death certificates, copies of tax returns, proofs of income (by means of year-end pay statements, pay stubs, salary letters, overtime stubs, or bonus letters), certified copies of the victims' wills, official documentation on health benefits and insurance policy statements, among others.²¹² Indeed, each piece of information submitted by claimants had to have supporting documentation.²¹³ Moreover, claimants had to sign their applications in the presence of a notary public and certify that all information contained therein was truthful.²¹⁴

Despite this apparent attempt at accuracy, the Special Master seemingly took no extra care to discover skilled fakes in this process.²¹⁵ Therefore, it might have been possible for a highly skilled individual to have produced an impressive forgery of any of these documents and consequently use them to deceive the Special Master. However, expending effort to take extra care to identify such skilled fakes would not have been a particularly valuable use of the Fund's time or resources. Indeed, had the Special Master gone to such lengths, it is likely that the expediency of the Fund would have been unduly compromised, since it would have necessitated the evaluation of each application by an expert trained in counterfeit detection. Additionally, while there have been no official studies conducted on this, at face value it seems highly improbable that a significant number of claimants both had forgery

210. See discussion *supra* Section II.B.4.

211. See Instructions, *supra* note 148, at 1.

212. *Id.*

213. *Id.* at 9.

214. *Id.* at 2.

215. *Id.* at 17.

skills and employed them. Thus, the Fund seems to have fulfilled the first component of accuracy.

In regard to the second component—the processing of accurate information—Professor Mashaw suggests that consistency might be a helpful tool in assessing accuracy.²¹⁶ This is especially true in light of the fact that there is no evidence available as to whether the Special Master included accurate numbers in his calculation of awards.²¹⁷ There is, however, strong evidence of inconsistency within the Fund.²¹⁸ Indeed, as discussed above, Feinberg often manipulated calculated awards on a discretionary basis.²¹⁹ Paradoxically, however, such post-calculation manipulation may actually be indicative of fulfillment of this second component of accuracy. If Feinberg knew that he had the discretion to change awards once they were calculated, he seemingly had no incentive to “play” with the numbers being supplied to him by claimants. If he did not like the results of given calculations, he could simply step in and change them.

The Fund, therefore, seems to have met the requirements of accuracy by requiring claimants to submit substantial documentation of their losses and to attest to the veracity of their documents. Accordingly, while it is possible that errors did occur, the extra effort that would have been required to eliminate them would have been unduly burdensome on the Fund and unjustifiably reduced its efficiency.

E. Accountability

Accountability requires that decisions be both explainable and subject to appeal or review.²²⁰ The Fund failed to fulfill either requirement. First, Feinberg was not required under the original act or administrative rules to “create or provide any written record of [his] deliberations.”²²¹ Indeed, though Feinberg relied on “economic analyses of each case performed by the accounting firm of PriceWaterhouse Coopers,” those reports were not accessible to claimants and the claimants were “thereby denied access to critical information concerning the disposition of their claims.”²²² This often made the process seem “arbitrary and hostile to victims and their families.”²²³

Second, all decisions made by Feinberg and his agents were final and unappealable.²²⁴ Thus, “[i]f a claimant became dissatisfied, there was nowhere he or

216. Mashaw, *supra* note 112, at 44.

217. *See* discussion *supra* Section II.B.4.

218. *See, e.g.,* Kolbert, *supra* note 191 at 48.

219. *See id.*

220. Jackson, *supra* note 128, at 483.

221. Interim Final Rule, 66 Fed. Reg. at 66,285.

222. Diller, *supra* note 33, at 761.

223. Landsman, *supra* note 3, at 403.

224. Interim Final Rule, 66 Fed. Reg. at 66,285.

she could turn. . . . Everything was removed from the claimant's hands."²²⁵ While some have dismissed the significance of the Fund's lack of an appeal mechanism "in light of the favorability of the criteria for determining awards and the size of the awards,"²²⁶ this argument undervalues the ethical importance of appeal. Arbitrary or unethical decision making is not justified by "large payouts" or "good outcomes" for claimants. Indeed, fairness is a relational principle, concerned with how outcomes are apportioned between like claimants rather than with the overall size of awards.²²⁷ Thus, though the Fund's awards were almost invariably large, many claimants may rightfully have wondered why their awards were not *as large* as those of similarly-situated claimants. In such situations, mechanisms of appeal should have been available.

One may correctly observe that the availability of appeal or the retention of written records may have reduced the efficiency of the Fund.²²⁸ Both would have required investment of time and resources and, as such, possibly detracted from the Fund's expediency and accessibility. On balance, however, this loss of efficiency would not have overshadowed the benefits that would have accrued from having a written record or providing mechanisms for appeal. The reasons are two-fold.

First, given that Feinberg had seemingly reduced virtually all decision-making in the Fund to mere mathematical calculations,²²⁹ creating a record of such decisions would not have been unduly burdensome. In fact, it would have entailed only noting what calculations had been made. The only cases in which more extensive written records would have been necessary were those where Feinberg used his discretion to add or subtract money from the calculated awards. While this might have imposed an extra burden on Feinberg, such a burden might also have served as an incentive for him to minimize his use of discretion, arguably enhancing the transparency, predictability, and consistency of his decisions. Thus, creation of a written record would only have burdened the procedural aspect of the Fund that was most problematic—the discretion of the Special Master—and would have led to a greater embodiment of fairness.

Second, if conscientiously implemented, a mechanism for appeal would not have unduly burdened the Fund. If Feinberg had been concerned about the expediency of the Fund, he could have waited for all claims to be filed and processed before hearing appeals. That way, all applicants would have had initial decisions rendered in their

225. Landsman, *supra* note 3, at 407.

226. Alexander, *supra* note 19, at 683.

227. See generally Phillip Harvey, *Human Rights and Economic Policy Discourse: Taking Economic and Social Rights Seriously*, 33 COLUM. HUM. RTS. L. REV. 363, 417-18 (2002) (discussing the problems inherent in balancing the interests of different individuals for public policy purposes).

228. Cf. Grace E. D'Alo, *Accountability In Special Education Mediation: Many a Slip 'Twixt Vision and Practice?*, 8 HARV. NEGOT. L. REV. 201, 207 (2003) (observing that a federally-mandated appeals process tends to be "time consuming, demanding, costly, and stress producing").

229. See discussion *supra* Section I.F.

cases as quickly as possible, and the Fund could have avoided a slowdown due to a backlog of appeals. Granted, while those appealing the Special Master's decisions would have had to wait longer to "cash a check," an appeal would have been a choice and not a requirement. Although providing an appeals process would have undoubtedly raised the costs associated with the Fund, the Fund essentially held a blank check to the United States Treasury,²³⁰ and consequently, such an expense likely would not have detracted from other administrative activities. Moreover, the benefits of having an appeals process would have been manifold, as discussed above.²³¹ Indeed, having an appeals process would have arguably mitigated instances of arbitrary treatment within the Fund and ensured that a fundamental standard of fairness had been met in each case.²³² As one scholar notes, an appeals process would have enhanced the integrity and accountability of the Fund and ensured that victims had "an opportunity to be heard."²³³

F. Overall Assessment of Fairness

In sum, the September 11th Victim Compensation Fund largely failed to be fair. Of the five requisite components of fairness—transparency, consistency, equity, accuracy, and accountability—the Fund fulfilled only one: accuracy. Feinberg's inconsistent and unpredictable application of certain criteria to the calculation of certain awards and his discretionary manipulation of calculated awards fatally undermined the Fund's achievement of fairness.

230. See generally Landsman, *supra* note 3, at 395 (explaining that the Fund's "blank check for government compensation . . . is unique in American legal experience."). This lack of an operating budget makes it difficult to assess the desirability of adding other administrative mechanisms to the Fund that may have promoted fairness. Presumably, at some point the costs associated with the Fund would become absurd and excessive. However, without an adequate point of comparison or some sort of Congressionally-proposed limit on cost, it is difficult to identify precisely where that point is. Indeed, as discussed above, previous disaster relief models are too dissimilar to provide helpful comparisons and Congress provided virtually no legislative history as guidance on this matter. See Landsman, *supra* note 3, at 395; Friedman & Thompson, *supra* note 4, at 286-87; Rabin, *supra* note 30, at 786 n.51.

231. Landsman, *supra* note 3, at 407.

232. Cf. Goldberg v. Kelly, 397 U.S. 254, 266-71 (1970) (discussing due process benefits in an administrative proceeding).

233. See Landsman, *supra* note 3, at 407.

VI. CONCLUSIONS AND RECOMMENDATIONS

A. *Efficiency and Fairness*

Overall, the Fund was commendably efficient. At the close of the Fund in December 2003, over 98% of eligible individuals had filed claims with the Fund.²³⁴ Ultimately, “only thirty-nine families elected to file lawsuits, and only about fifty families” did not take any action at all.²³⁵ From a pure efficiency standpoint, therefore, the Fund achieved what it set out to do: provide quick financial relief and reparations to the victims of September 11th while simultaneously stopping a barrage of lawsuits from being filed.²³⁶

From a fairness standpoint, however, the Fund was highly unsatisfactory.²³⁷ Its lack of adequate consistency, equity, and accountability hindered the embodiment of this value. Sadly, this shortcoming was obvious not only from a scholarly perspective, but from a layperson’s as well.²³⁸

B. *Recommendations*

In light of the Fund’s numerous failures and successes, several recommendations can be made to promote procedural efficiency and fairness in future victim compensation funds.

1. More Congressional Guidance

First, most of the Fund’s shortcomings can be traced back to Congress’s quick and skeletal construction of the Fund. Indeed, as discussed above, the language establishing the Fund was drafted and passed in mere hours and provided little guidance to the Special Master beyond: “Here’s a blank check to the Treasury, go set up a Fund.” As a result, Feinberg was left guessing as to Congress’s intent. As he told one reporter, “If I were writing the program today . . . I would have clarified the public policy foundation. . . . Is it tort or is it social welfare?”²³⁹

Had Congress provided clearer guidelines, many of the problems in the administration of the Fund probably could have been avoided. For instance, if Congress had explicitly said that all awards were to be based upon victim incomes,

234. Press Release, Closing Statement, *supra* note 139.

235. Alexander, *supra* note 19, at 644. Still, some estimates are even higher. See e.g., In re September 11 Litigation, 280 F. Supp. 2d 279, 287 (S.D.N.Y. 2003) (claiming that approximately seventy of those who were injured or killed and ten other affected entities have brought lawsuits).

236. See Landsman, *supra* note 3 at 406; *supra* note 23 and accompanying text.

237. See, e.g., Diller, *supra* note 33, at 759; Alexander, *supra* note 19, at 653.

238. See Landsman, *supra* note 3, at 403.

239. Belkin, *supra* note 202, at 97.

Feinberg probably would not have treated the victims above the 98th income percentile differently. Better yet, had Congress laid out the criteria for calculating awards, the problems created by Feinberg's use of discretion would have been mitigated or avoided altogether.

Thus, Congress would be wise to invest more time and energy when drafting the overarching details of victim compensation funds such as grounds of eligibility, award calculation criteria, and financial limitations on the administration of the fund. While quick passage of such funds in cases of disaster is a worthy objective, there must be a clear middle ground between lightning-quick, yet slipshod, development and careful, yet impractically slow, development. Congress should find that middle ground.

2. Use of "Purer" Theories of Awards

Second, the largest procedural problems in the Fund were created when Feinberg attempted to "mix" the theories upon which he calculated victims' awards by applying tort principles to some claimants' applications and social welfare principles to others.²⁴⁰ As discussed above, for families whose income fell below the 98th percentile, Feinberg touted a simple income-based calculation of awards.²⁴¹ However, for those above the 98th percentile, Feinberg applied social welfare principles and reduced the awards on a discretionary basis based on a presumed lack of need.²⁴² Both theories, when implemented with clear-cut criteria, have benefits and drawbacks. Either theory could be used successfully as the guiding principle of a victim compensation fund. However, when used within the same compensation scheme and without regard for each other, an unacceptable level of arbitrariness can enter the administration of the scheme, as demonstrated by the September 11th Victim Compensation Fund.

Administrators of victim compensation funds, therefore, need to develop a single basis for calculation and apply it equally to all eligible claimants. If administrators wish to reduce awards based on need, they should do so for everyone. If they want to calculate awards based on extent of injuries, they need to do so equally for everyone. Such equal application of clear principles ensures consistent and equitable treatment of eligible claimants in victim compensation funds.

3. A Less Public (or Publicity-Minded) Special Master

Third, many of the problems in the September 11th Victim Compensation Fund seemed to arise from Feinberg's embodiment of the Special Master position. He took a very high-profile approach to his role, publicly selling the Fund and

240. *See id.*

241. *See supra* Section I.G

242. *See* DOJ FAQ, Sect. 5, *supra* note 48, at 3.

emphasizing his own personal role in making decisions within it.²⁴³ His public statements revealed him to be an individual of “strong opinions and value judgments” about the very issues he was in charge of adjudicating.²⁴⁴ However, in being “both the salesman and the product itself,” Feinberg often created “the appearance of prejudice.”²⁴⁵ This, in turn, arguably exacerbated claimants’ perceptions that the Fund was arbitrary and unfair.²⁴⁶

In the future, Special Masters would be wise to be more detached from the public and to maintain a greater veneer of impartiality and neutrality. Such a stance is more likely to enhance the public’s perception of fairness in victim compensation funds and perhaps even enhance the fairness of the funds themselves. Indeed, reading over Feinberg’s public statements and transcripts of his town-hall meetings, one wonders at the extent to which he found himself “trapped” by his off-the-cuff remarks to the public.²⁴⁷ Given his extensive comments to the public, he might have felt a need to make the administration of “his” fund more consistent with his public statements rather than with the principles of efficiency and fairness.²⁴⁸

4. Creation of Written Records and Mechanisms for Appeal

Fourth, as discussed above, the creation of written records and the availability of appeal are important to the achievement of procedural fairness.²⁴⁹ They enhance the transparency of proceedings, increase the likelihood that decisions are consistent, and give claimants a sense of security and control. While they also have the potential to reduce the efficiency of victim compensation funds, there are ways of designing these features that minimize their impact on expediency.²⁵⁰ In short, the benefits of having written records and appeal seem to outweigh their drawbacks.

Additionally, the utilization both of written records and appeal mechanisms would have gone a long way towards reducing claimant dissatisfaction with the September 11th Victim Compensation Fund.²⁵¹ As such, legislators and Special Masters designing victim compensation funds should give serious consideration to providing them in the future.

243. Diller, *supra* note 33, at 755. At one point, Feinberg actually remarked to a reporter, “The law gives me unbelievable discretion. . . . It gives me discretion to do whatever I want. So I will.” Kolbert, *supra* note 191, at 48.

244. Diller, *supra* note 33, at 759.

245. *Id.* at 757, 759.

246. *See, e.g., id.* at 759.

247. *See* Diller, *supra* note 33, at 755-56 (summarizing Feinberg’s public comments).

248. *See* Schneider, *supra* note 33, at 477.

249. *See* discussion *supra* IV.E.

250. *See id.*

251. *See generally* Landsman, *supra* note 3, at 407 (discussing claimant dissatisfaction with the administration of the Fund).

5. A Note on the Importance of “Voice”

Lastly, a wide body of literature critiques the September 11th Fund for denying claimants a “voice” in the process.²⁵² With no mandatory hearings and little opportunity to provide testimonial evidence, many have argued that the Fund denied claimants an important component of relief and restoration—the opportunity to publicly express the impact of their losses.²⁵³ There is evidence that such opportunities are important to people’s assessment of adjudicatory institutions; that “[w]hen people are allowed voice—when they can speak up and are listened to—they tend to react positively.”²⁵⁴

This may be a legitimate critique and one deserving of greater attention. It is also, however, a critique outside of the scope of this analysis. While important, the provision of “voice” is not a criteria of either fairness or efficiency.²⁵⁵ Suffice it to say, however, that future developers of victim compensation funds may want to take the importance of “voice” into account when designing their institutions.

C. Concluding Thoughts

When disaster strikes in countries like the United States where mass tragedy is comparatively uncommon, there are strong and opposing tendencies to both categorize it as “anomalous” (the “this type of thing just doesn’t happen here” syndrome) and to respond to it with intense fear for the future (the “this might happen again” syndrome). It is important, however, to prevent either tendency from influencing the principles of our procedural systems. Fairness and efficiency are not only situationally important, but are important—though admittedly in different degrees—in all procedural institutions and under all circumstances. Only by attempting to encompass both will our procedural institutions have both short-term and long-lasting legitimacy.

252. See, e.g., *id.*

253. See, e.g., *id.*, at 406-07; Schneider, *supra* note 33, at 493.

254. Landsman, *supra* note 3, at 409.

255. Bone, *supra* note 102, at 505-06 (“There is a strong tendency today to equate procedural fairness with psychological states of mind. This approach relies on a body of work in empirical psychology known as the ‘procedural justice’ literature. . . . This approach has a fatal defect. Fairness is not the same as subjective feelings and cannot be reduced to psychological states.”).

