The Problematic Role of the Special Master: Undermining the Legitimacy of the September 11th Victim Compensation Fund

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INTRODUCTION

The immediate aftermath of the September 11, 2001 terrorist attacks was a time of intense national mourning which upended the normal political process. Less than two weeks after the collapse of the World Trade Center, a unified Congress passed the Air Transportation Safety and System Stabilization Act (ATSSSA, or "the Act"),¹ a bill intended to help stabilize the economy by protecting the airlines from an avalanche of litigation. The ATSSSA represents the largest single corporate bailout in history and the biggest no-fault compensation scheme in decades.² It provides five billion dollars in cash payments, ten billion dollars in a loan guarantee program, and a cap on litigation damages equal to the airlines’ six billion dollars of insurance coverage.³

Procedurally, the Act also installs a host of jurisdictional mandates designed to limit the scope of possible litigation and grant the airlines, as well as the financial markets, a modicum of certainty. Along these lines, it establishes a non-concurrent federal cause of action,⁴ vesting exclusive jurisdiction in the U.S. District Court for the Southern District of New York.⁵ The Act also tethers the available substantive law—often a dispositive factor in mass tort actions—to the sites of the individual plane crashes, namely New York, Pennsylvania, and Washington D.C.⁶

Congress’s goal, however, was not limited to protecting the economic fate

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³. Air Transportation Safety and System Stabilization Act §§ 101(a)(1)-(2), 408(a).
⁴. Id. § 408(b)(1).
⁵. Id. § 408(b)(3).
⁶. Id. § 408(b)(2).
of the airlines. In capping damage awards and limiting jurisdiction, the Act severely impairs the ability of victims and their families to receive appropriate recovery. Recognizing this problem, Congress provided a substitute source of reparations in the form of the September 11th Victim Compensation Fund of 2001 ("the Fund"). The final results of the Fund were released on November 18, 2004, making it an appropriate time to examine this important legislative endeavor.

Despite its practical and noble intentions, the ATSSSA, and the Fund in particular, is a hastily constructed legislative patchwork that fails on a variety of counts. Given the speed of its enactment, the ATSSSA establishes only the bare bones of the Fund, furnishing few details and delegating much of its formation to an administrator called the Special Master. As authorized by the Act, the Special Master singlehandedly controls all operations of the Fund, wields broad power to create procedural and substantive rules, adjudicates claims exempt from judicial or administrative review, and manages an unlimited budget with no cap on expenditures. Congress failed to set bright-line rules, enunciate exclusionary definitions, or articulate a principled system of compensation. There is simply no "rationale, restraint, ethic or coherence" in the definition of awards, leaving the Special Master unilaterally responsible for filling in nearly every detail of the program.

In certain respects, the power the Act entrusts to the Special Master is sensible. Significant judicial review or congressional oversight generally slows the process of compensation. Furthermore, a single individual, especially one with expertise like the Special Master, is better suited to issue appropriate awards through a uniformly administered compensation scheme and can promptly construct a reliable and efficient procedure providing more immediate closure to the victims. Notwithstanding these benefits, the role granted to the Special Master is highly problematic and represents a significant defect in the Act. The ATSSSA's Special Master is a powerful decision maker vested with unfettered discretion to craft and run the Fund. All of our traditions, constitutional, doctrinal, and otherwise, militate against such authority being

7. See id. § 401. Even Kenneth Feinberg, the Special Master appointed to head the Fund, conceded that Congress's main goal with the statute was to bail out the airlines. See KENNETH R. FEINBERG, WHAT IS LIFE WORTH? THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11, at 22 (2005).
9. See Lisa Belkin, Just Money, N.Y. TIMES MAG., Dec. 8, 2002, at 92 (describing Congress's last minute decision to add the Fund to the bailout package).
11. See id. §§ 404(a)-(b), 405(b)(3), 407.
12. George L. Priest, The Problematic Structure of the September 11th Victim Compensation Fund, 53 DEPAUL L. REV. 527, 544 (2003). As I show below, however, the Act still manages to satisfy the broad requirements of the nondelegation doctrine. See infra text accompanying notes 49-56.
concentrated in a single individual. Moreover, previous congressional experience with national compensation schemes warns against the vesting of such discretion in a single individual.\textsuperscript{13} "The September 11th Fund will remain controversial because the source of the definition of its awards—however able and committed—is not in any sense democratic."\textsuperscript{14}

More disconcerting is the effect the Fund might have on future policy. Some argue that because the Fund was a unique response to a national crisis of extraordinary proportions, the Fund will not shape succeeding compensation schemes, and the role of the Special Master will not present a model for the future.\textsuperscript{15} Indeed, Kenneth Feinberg, the Special Master appointed to head the Fund, has expressed reservations about the Fund's future relevance: "It is unlikely—and probably unwise—to establish a similar program for future implementation absent the profound conditions which existed immediately after the September 11 attacks."\textsuperscript{16} However, the fact that Congress considered extending the Fund to the victims of the African Embassy and Oklahoma City bombings suggests that Congress sees the Fund as a widely applicable answer to compensation problems.\textsuperscript{17} "Legislation has a way of assuming precedential proportions,"\textsuperscript{18} and since future funds will almost certainly look to the Fund for guidance,\textsuperscript{19} it is crucial to understand its significant shortcomings.\textsuperscript{20}

13. See infra text accompanying notes 220-252.
14. Priest, supra note 12, at 545.
15. See Robert L. Rabin, The September 11th Victim Compensation Fund: A Circumscribed Response or an Auspicious Model?, 53 DEPAUL L. REV. 769, 781 (2003); cf. Linda S. Mullenix & Kristen B. Stewart, The September 11th Victim Compensation Fund: Fund Approaches To Resolving Mass Tort Litigation, 9 CONN. INS. L.J. 121 (2002) (suggesting that the Victim Compensation Fund will probably not be utilized as a model for future alternatives to tort litigation, largely because each prior fund-approach to mass tort harms has been idiosyncratic in design).
This Article challenges the legitimacy of the Fund, and in part the statute that created it, by focusing on the role of the Special Master. Part I begins by detailing the legislative history of the ATSSSA and the statutory provisions that concentrate sweeping, unfettered, and unsupervised power in the Special Master. It inquires into the wisdom of creating a single piece of legislation which attempts to satisfy myriad congressional objectives, and it culminates in an analysis of how the grant of power extended to the Special Master conforms to the nondelegation doctrine. Part II questions the propriety of the Special Master’s position, and hence the Fund as a whole, by pointing to the Special Master’s unilateral role in crafting the Fund’s regulations. It then examines the Special Master’s conflicting functions, especially in relation to the absence of judicial review. Part III seizes on these conclusions in an attempt to place the Special Master within the pantheon of congressionally and judicially appointed officials. Examining a host of governmental positions, I conclude that the position of Special Master is a sui generis conflation that resists precise categorization. Never before in modern times has Congress created a position with so much discretion and so little oversight.

Part IV progresses by discussing the litigation option provided by the Act and demonstrates how the congressionally determined cap fails to safeguard the due process rights of plaintiffs. Here I argue that since the cap on litigation makes the Fund more attractive, it serves to enlarge the discretion of the Special Master, hence compounding the initial problem. This conclusion is refined by comparing the Fund to previous victim compensation programs in an attempt to highlight the uniquely powerful role delegated by Congress to the Special Master and the Act’s failure to offer true litigation alternatives. Finally, after illustrating these deep problems with the Fund, Part V calls for a congressional redetermination of the compensation question by examining other ways in which Congress might have realized its objectives, lending suggestions for the construction of future funds.

Because of the power and discretion the ATSSSA affords the Special Master, the Fund is inappropriate at best and illegitimate at worst. The ATSSSA generated more problems than it solved. Should Congress find it necessary to enact another compensation fund in the future, it must avoid the creation of another “[King] Solomon” by significantly limiting the role of the Special Master.

21. This Article discusses other aspects of the Fund only when necessary to support the main argument. While it addresses the Special Master’s regulations, a detailed discussion is beyond the scope of this Article.

I. CONGRESS CREATES A STATUTE

A. The Legislative History

The ATSSSA was proposed, debated, passed by the House, adopted by the Senate, and presented to the President all within eleven days of the terrorist attacks.\(^2\) As noted above, the Act provides the airline industry with a range of benefits, including federal loan guarantees of up to ten billion dollars;\(^{24}\) compensation of up to five billion dollars for "direct losses incurred . . . as a result of any Federal ground stop order;"\(^25\) compensation for "incremental losses" from September 11 to December 31, 2001;\(^26\) reimbursement for any increase in the cost of insurance through October 1, 2002;\(^27\) and a cash flow benefit from the deferral of the deposit of excise taxes.\(^28\) Beyond aiding the airlines, the Act also tends to victims' families through the establishment of the Fund.

Despite its tight time constraints, Congress received outside recommendations concerning the Fund before finalizing the ATSSSA. The Association of Trial Lawyers of America (ATLA) developed a draft proposal for a victim compensation fund to be administered by a new Article I "Compensation Court" headquartered at the U.S. District Court for the Southern District of New York.\(^{29}\) A proposal by representatives of President George W. Bush offered to consolidate a single lawsuit in the Southern District of New York where the government would step in to pay damages once the airline insurance coverage was depleted.\(^{30}\) The Democrats—not to be outdone on an issue such as victim compensation—offered a competing proposal that called for a freestanding program headed by a senior judge independent of any existing institutional framework.\(^{31}\) The Republicans eventually acceded to this plan but insisted on a compromise: In deference to budgetary concerns, they wanted to establish an autonomous administrator accountable to the executive branch who would protect the Treasury through wide-ranging managerial and

\(^{25}\) Id. § 101(a)(2)(A).
\(^{26}\) Id. § 101(a)(2)(B).
\(^{27}\) Id. § 201(b).
\(^{28}\) Id. § 301(a)(1).
adjudicatory powers.\textsuperscript{32} During twenty-four hours of highly charged debate, the details of the draft were negotiated and finalized, achieving a balance of conflicting political interests and ultimately producing the September 11th Victim Compensation Fund.\textsuperscript{33}

Given the pressure to act quickly, the committee process was bypassed and only an abbreviated debate occurred in both the House and Senate.\textsuperscript{34} Some criticized the excessive urgency to vote on the bill that day,\textsuperscript{35} remarking sarcastically that the statute "was [so] carefully crafted--[that] it took two hours in the middle of the night."\textsuperscript{36} Indeed, many members of Congress did not even read the statute before voting, and those who did spent more time discussing the airlines than the Fund. They spent even less time discussing the role of the Special Master.\textsuperscript{37} The bill was passed first by the Senate by a vote of ninety-six to one\textsuperscript{38} and then by the House by a vote of 356 to 54.\textsuperscript{39} A unanimous consent agreement in the Senate allowed the bill to be sent to the President immediately without the need for a conference committee.\textsuperscript{40} On September 22, 2001, President Bush signed the ATSSSA into law.\textsuperscript{41}

Because members of Congress wanted to activate the Fund immediately, there were never any substantive floor discussions about the Special Master's role, and the position was not made Senate confirmable.\textsuperscript{42} On November 26,
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2001, however, this vague Special Master became a reality, as Attorney General John Ashcroft selected Kenneth Feinberg to head the Fund. Feinberg had served as a court-appointed special settlement master in major litigation involving Westinghouse Electric Corporation, the RICO class action concerning the Shoreham Nuclear Facility, asbestos personal injury litigations, DES cases, and the Dalkon Shield Claimants Trust. Most notably, Feinberg had also mediated the Agent Orange product liability litigation, in which he settled thousands of cases of soldiers who sued the manufacturers of the Agent Orange defoliant used in Vietnam.

The myriad objectives of the Act combined with its hasty enactment during a period of turmoil caused many lawmakers to overlook key practical and constitutional problems. The following Section looks closely at the difficulties raised by the nondelegation doctrine, exposing the shortcomings of the Act and emphasizing the limited precedential role it should play in the future.

B. The Statute Raises Nondelegation Doctrine Issues

The nondelegation doctrine prohibits the legislature from delegating excessive power to administrative agencies, leaving to Congress the fundamental policy choices and to administrative agencies the detailed implementation of the statute. Delegating in broad terms and imputing discretion to administrative officers is only permissible so long as Congress has "la[id] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform." An "intelligible principle" consists of a clear delineation of the general policy, identification of the public agency applying it, and the boundaries of the delegated authority.

Feinberg has asserted that the ATSSSA demonstrates no breach of the nondelegation doctrine, and he is probably correct. The Supreme Court has

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*Bring Salvation or Frustration*, N.Y. L.J., Nov. 27, 2001, at 5. Feinberg, who lobbied for the position through his friend Senator Chuck Hagel, only learned that the position was not Senate confirmable upon interviewing with Attorney General John Ashcroft. See FEINBERG, supra note 7, at 25.


46. See Mistretta v. United States, 488 U.S. 361, 372 (1989) ("Congress simply cannot do its job absent an ability to delegate power under broad general directives.").

47. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).


49. See E-mail from Kenneth Feinberg, Special Master, the September 11th Victim Compensation Fund of 2001, to Elizabeth Berkowitz (Mar. 28, 2004, 07:26 EST) (on file with author).
rarely invalidated congressional delegations of power,\textsuperscript{50} determining that only excessive delegations, those providing no intelligible principle to constrain administrative discretion, are unconstitutional.\textsuperscript{51} The ATSSSA's intelligible principle is to "provide compensation,"\textsuperscript{52} which is qualified by § 405(b)'s brief articulation of the standards and definitions for determining awards.\textsuperscript{53} The statute does not provide exact mathematical calculations or formulas, but the case law does not necessitate such certainty.\textsuperscript{54} Nor is it necessary "that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program."\textsuperscript{55} Moreover, the Court has not distinguished between new agencies and existing ones in its approval of congressional delegation of authority.\textsuperscript{56}

That the ATSSSA is constitutional does not mean it is legitimate. The statute raises important questions with disturbing implications. This is particularly true of Title IV, which delineates the Fund in terse, vague, and undeveloped language, particularly in comparison to the rest of the statute.\textsuperscript{57} The ATSSSA was created in three sleepless days, and there was little debate and uniformity in congressional expectations.\textsuperscript{58} To some members of Congress, like Deputy Senate Minority Leader Don Nickles, this haste came at the expense of clarity:

[W]hy [establish the Fund] so fast? . . . We are creating this giant open-ended fund and we have no idea what the rules will be . . . . [O]r what it will cost. We're hearing estimates like $6 billion to fund this, but no one really knows . . . . We just heard this idea yesterday. Shouldn't we hold hearings and get some experts in here to help us? And the way I read this, this Special Master we are creating will have unlimited power to write checks for whatever amount he wants. No one has ever had that power in this government. We're creating a king! This is crazy.\textsuperscript{59}

\textsuperscript{53} Id. § 405(b). Specifically, the Act only instructs the Special Master to review filed claims to determine their eligibility and to refrain from awarding punitive or collateral damages. He is also instructed not to consider the negligence of any victims when determining awards. Everything else, including damage amounts, standards, appeals, etc., is left to his discretion.
\textsuperscript{54} See Allegheny Airlines, Inc. v. Vill. of Cedarhurst, 238 F.2d 812 (2d Cir. 1956).
\textsuperscript{55} Lichter v. United States, 334 U.S. 742, 785 (1948).
\textsuperscript{58} See supra text accompanying notes 23-44.
\textsuperscript{59} BRILL, supra note 30, at 95-96 (paraphrasing remarks of Sen. Nickles). These remarks are
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Then-Deputy Majority Whip Roy Blunt added that Congress "[is] making this new foray into a completely uncharted area of law with this fund and doing it at midnight just to get something else done, the bailout, that we have to do . . . . That's just wrong." 60

The legislative history fails to provide a legal or historical justification for the Fund, and it is difficult to attribute unknown intentions to Congress. What we do know, however, is that the Fund, which received overwhelming support in a normally divided Congress, is neither a reward in tort nor a no-fault government benefit program, 61 and the Special Master is neither a judicial official nor an agency administrator. 62 Although members of Congress remarked on the discretion granted to the Special Master, it is not clear that they really understood the full repercussions of exercising that discretion.

In crafting the ATSSSA, Congress spent far too little time outlining the specifications of the Fund, in the end providing precious few details. In granting the Special Master unbridled discretion, Congress essentially emasculated what minimal procedural guidance the statute provides. This inadequacy might have been reconciled had Congress reserved some kind of role in the formation, distribution, or examination of the compensation awards. But not only did Congress hand Feinberg broad operational discretion, it left him solely in charge of shaping every aspect of the awards process and then determining the ultimate fairness of these awards. As Feinberg himself remarked:

1 [was] the point man, the visible symbol of an unprecedented law. Never before had a government offered individuals millions of dollars in tax-free compensation for a tragic loss. And never before had government funds been so unregulated. There was no earmarked congressional appropriation limiting the size of awards or constraining my discretion. My budget was unlimited; the payouts would be determined only by personal judgment and experience. 63

Congress delegated a blank check to a then-unknown individual in an admittedly unprecedented position. The Act may survive a nondelegation challenge, but as the discussion below emphasizes, there is little that is "intelligible" about its Special Master.

Brill's approximation of the actual conversation.

60. Id. at 96 (paraphrasing remarks of Rep. Blunt).
61. See Priest, supra note 12, at 528.
62. See id.; see also infra text accompanying notes 143-176.
63. FEINBERG, supra note 7, at xvi (emphasis added). Feinberg made similar remarks in a recent television interview. See Q & A: Kenneth Feinberg, Special Master of the 9/11 Victim Compensation Fund (C-SPAN television broadcast July 10, 2005) [hereinafter Q & A].
II. PROBLEMS: THE DISCRETION OF THE SPECIAL MASTER

A. Excessive and Unrestrained Power

In order to fully understand the implications of the discretion granted to the Special Master, it is necessary to examine how Special Master Feinberg exercised it. As noted above, Title IV of the ATSSSA opens by introducing the Special Master as the central force behind the Fund. He is instructed to “administer the compensation program,”64 “promulgate all procedural and substantive rules,”65 and “employ and supervise hearing officers and other administrative personnel.”66 Concentrating power in this single individual has led commentators to exclaim that “[n]o king since the Magna Carta has had the power invested in the special master . . . . He will have the power of the monarch . . . .”67 To Feinberg it was even more than that, for the job “called for the wisdom of Solomon, the technical skill of H&R Block, and the insight of a mystic with a crystal ball.”68

One sovereign duty of the Special Master is to develop a claim form for determining eligibility69 and subsequently to review each claim and conduct a factual inquiry.70 Once eligibility is determined and the extent of harm is assessed, the ATSSSA mandates the calculation of awards based on a “vague” formula.71 It is left to the Special Master to compute a claimant’s “economic loss,” defined as “any pecuniary loss resulting from harm,” including, among other things, losses related to earnings, benefits related to employment, and loss of business or employment opportunities.72 The award is then reduced by “collateral sources,” such as life insurance, pension funds, and death benefit programs.73 A sum for “noneconomic losses,” such as physical and emotional pain and suffering, is added to the award.74 The Special Master is permitted to consider the “individual circumstances” of the claimant in increasing or reducing the award.75

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65. Id. § 404(a)(2).
66. Id. § 404(a)(3).
68. FEINBERG, supra note 7, at 87.
69. See Air Transportation Safety and System Stabilization Act § 405(a)(2)(A).
70. See id. § 405(b).
71. Id. § 405(b)(1)(B)(ii). As noted above, the Act’s “formula” is so broad and non-specific that it essentially translates into unfettered discretion for the Special Master. FEINBERG, supra note 7, at 34 (“The new law had established a vague . . . formula for computing individual awards.”).
72. Id. § 402(5).
73. Id. § 402(4).
74. Id. § 402(7).
75. Id. § 405(b)(1)(B)(ii).
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Although seemingly insignificant and inconspicuous, the Act's use of the term "individual circumstances" provides the Special Master with a loophole to evade the limitations mandated by the Act. Because the Special Master is permitted to make an award based on the individual circumstances of the claimant, he has the power to augment, restrict, or eliminate an award entirely. The Act instructs the Special Master to calculate economic losses, deduct collateral sources, and add noneconomic awards to ultimately arrive at a sum. At the same time, it allows the Special Master to override this formula by assessing a claimant's individual circumstances. In submitting individual circumstances to his discretion, Congress has given the Special Master unbounded discretion.

Beyond calculating awards, the Act empowers the Special Master to "promulgate regulations" for the Fund. These regulations provide another means, indeed the primary means, by which the Special Master can assert his power. He can act sua sponte, devising his awards as he pleases, disregarding the economic and emotional needs of vulnerable families, and issuing regulations to enforce his discretion. "[The Special Master] has become, instantly, the most important human being on the planet to [3],000 devastated families."

1. Kenneth Feinberg's Regulations

Feinberg's initial efforts at promulgating regulations led him to develop and publish tables of presumed economic loss calculations intended to provide the families and injured victims with some idea of what their economic damages would look like before entering the Fund and relinquishing their rights to civil action. Feinberg asserted that he "ben[t] over backwards" to give all claimants a free preview of the value of their claim before they decided whether to opt-into the Fund. Yet figures for the highest earning victims, the top two percent, were notably absent from the tables. Although Feinberg ultimately awarded the highest earners' families up to $7.1 million, he initially stipulated that he

80. E-mail from Kenneth Feinberg, supra note 49.
81. See TABLES, supra note 79.
would not give any claimant more than four million.83 This prompted many critics, including Stephan Landsman, to argue that the regulations were a radical departure from what Congress anticipated because the methodology for calculating economic damages allowed "highs and lows to be excised... Full compensation has been downplayed and horizontal equity highlighted, hence redefining the notion of fairness."84

Feinberg was instructed to qualify Congress's exceedingly expansive definitions, and his regulations restricted the ATSSSA in many ways.85 The statute defines "claimant" as "the individual filing"86 the claim and establishes that "[u]pon submission of a claim... the claimant waives the right to file [suit in court]."87 A plain reading of the statute allows other beneficiaries to forgo the waiver obligation and sue in court provided someone else files the claim. For example, if children of a decedent file a claim with the Fund, stepchildren or ex-wives could file a claim in court. Feinberg, however, narrowed the scope of this provision by deciding that "[t]he statute may be interpreted to mean that the submission of a claim for [a] deceased victim will waive the rights of other beneficiaries of that victim to file a lawsuit."88 Moreover, the instructions of the Special Master's 33-page claim form stated that the "waiver of rights could apply to the rights of individuals other than the personal representative,"89 and elsewhere the form required that the claimant and "the Victim's spouse or any of the Victim's dependents or beneficiaries"90 withdraw any civil damage action filed.91

Despite what appear to be inequities established by Feinberg's

83. Feinberg amended this figure a number of times. The Final Rule, the authoritative source on the distribution of awards, sets the highest award at four million dollars. See September 11th Victim Compensation Fund of 2001, Final Rule, 67 Fed. Reg. 11,233 (Mar. 13, 2002) (codified at 28 C.F.R. pt. 104), available at http://www.usdoj.gov/archive/victimcompensation/finalrule.pdf [hereinafter Final Rule]. This limit is confirmed in Schneider v. Feinberg, 345 F.3d 135, 137 (2d Cir. 2003). In his March 13, 2004 address at Lincoln Square Synagogue, however, Feinberg announced that the highest award to date was $6.9 million. Synagogue Address, supra note 22 (announcing $250,000 as the lowest award and $1.8 million as the average award).
84. Landsman, supra note 18, at 400.
87. Id. § 405(c)(3)(B)(i).
90. Id. at 8.
91. Feinberg has maintained that when it comes to family divisiveness and squabbles over the distribution of awards, the families must fight this out amongst themselves by resorting to the state laws regarding trusts and estates. See Synagogue Address, supra note 22.
The Special Master interpretation of the statute, not all of his regulations burdened the opportunities for claimants to seek adequate compensation, and many were even generous and liberal expansions of the statute. For example, his definition of "collateral sources" did not include charitable donations.\(^9\)\(^2\) Furthermore, the initial draft of the regulations, termed the Final Interim Rule, set noneconomic damages for dependents and a spouse at fifty thousand dollars each;\(^9\)\(^3\) Feinberg later doubled this sum in the Final Rule.\(^9\)\(^4\) Other regulations enlarged the pool of claimants—illegal aliens and domestic partners were eligible for the Fund, overriding any laws by the Department of Justice to prosecute for immigration violations as well as superceding state probate and estate law restrictions regarding same-sex partners.\(^9\)\(^5\)

All of Feinberg's regulations, whether restrictive or expansive, exhibited his vast discretion. He construed his grant of authority to include few governing standards and pointedly rejected the idea that he was obligated to provide reasoned explanations for decisions.\(^9\)\(^6\) Moreover, the highly malleable language of the statute gave courts no choice but to uphold Feinberg's interpretations. The U.S. Court of Appeals for the Second Circuit agreed with the Southern District of New York's decision to dismiss *Schneider v. Feinberg*, a case brought on behalf of family members of decedents challenging Feinberg's regulations as unfair and arbitrary.\(^9\)\(^7\) In an emphatic decision, the court decided that the regulations were an acceptable interpretation of the Act entitled to deference,\(^9\)\(^8\) explaining that

Congress has confided each award to the sealed box of a Special Master's mind, has refrained from meaningful prescriptions, and has placed the result beyond the reach of review. So while we agree with plaintiffs that the Special Master's comments are hard to square with the text of the Act, we decline to declare what we cannot enforce.

The court's reasoning was based on an explicit provision of the ATSSSA stating that the Special Master's "determination[s] shall be final and not subject

\(^9\)\(^2\) Final Rule, *supra* note 83.


\(^9\)\(^4\) Final Rule, *supra* note 83.

\(^9\)\(^5\) See *id.*; see also Editorial, 9/11 Fund Closes Its Doors, N.Y. TIMES, June 18, 2004, at A30.

\(^9\)\(^6\) According to Feinberg, "[t]he law gives me unbelievable discretion. It gives me discretion to do whatever I want. So I will." Kolbert, *supra* note 2, at 48. Furthermore, Feinberg's reasoning behind each award calculation is inconsistent and has varied from claimant to claimant. See *id.*; see also Belkin, *supra* note 9, at 96 (observing that Feinberg's answer to persistent questioning concerning his discretion was simply that "Congress decided").


\(^9\)\(^8\) 345 F.3d at 135.

\(^9\)\(^9\) *Id.* at 145 (citation omitted).
to judicial review." Respecting the broad language of the Act, the court had no choice but to approve Feinberg’s regulations.

2. **The Absence of Judicial Review**

As demonstrated above, the ATSSSA specifically denies the right of Fund recipients to have their awards judicially reviewed. Rather, it is the Special Master who oversees the review of his own reward decisions both theoretically and operationally. There is no right to a jury trial and no other means to appeal any perceived abuse of the Special Master’s discretion. Feinberg is both judge and jury; judge in the sense that he issues and reviews all determinations, and jury in the sense that he is responsible for setting award amounts.

In response to the absence of judicial review, Feinberg included in his regulations a superficial review process embedded in the choice claimants were offered between two procedural tracks. Track A allowed the claimant to either accept the award or request a hearing if the award was found to be unsatisfactory. At the hearing, the length of which was determined by the Special Master, the claimant was permitted to ask the Special Master to consider any evidence relating to the determination of the award, including factors and variables used in calculating economic loss; the identity of the victim’s spouse and dependents; the financial needs of the claimant; facts affecting noneconomic loss; and any other relevant factual or legal arguments. Claimants were able to present documents, witnesses and attorneys, and they were entitled to any other “due process rights determined appropriate by the Special Master.” Thereafter, the Special Master determined a final award and notified the claimant in writing, but he was not obligated to provide the claimant with a written explanation or reason for the final outcome. An appeal from this decision was not offered as an available recourse. Track B allowed the claimant to proceed directly to a hearing for the award determination, where the claimant was permitted to present evidence

101. See id.
102. See FEINBERG, supra note 7, at xvi (“I alone served as judge and jury in deciding appropriate compensation in individual cases.”).
103. INSTRUCTIONS, supra note 89, at 4-5.
104. See id. at 4.
105. See id.; see also FAQ, supra note 88, § 10.1.
106. See FAQ, supra note 88, § 7.7.
108. See FAQ, supra note 88, § 10.10.
109. See id.
110. See id. § 1.10.
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as in Track A. Likewise, no concessions were made for an appeal or review of Feinberg’s decisions.

The absence of judicial review generally hastens the process of determining awards, diminishes the need for counsel, and avoids technical and legalistic issues. The lack of evidentiary hearings, expert testimony, and other time-consuming procedures accelerates the process and reduces costs. Despite these advantages, significant dangers are always possible when review is limited to swift and wholly oral procedures. The depth of reflection is compromised, impairing more complex deliberation and thought-out determination required for a number of important functions, such as calculating individual circumstances. Errors, lapses in judgment, poor organization, and the appearance of arbitrariness and bias can arise when review is limited. The lack of a written explanation or reason for the outcome allows an adjudicator to abandon responsibility and reject deference to the fairness of due process. In the absence of judicial review, the importance of reasoned and articulated explanations is heightened because they are the only forms of accountability remaining. Yet the ATSSSA allows the Special Master to operate without the burden of explanation, unchecked and accountable to no one.

Defenders of the Fund, and the statute more broadly, would point out that the Supreme Court has repeatedly ruled that Congress is “free to establish a compensation scheme that operates without court participation.” Yet this does not mean that Congress is free to disregard the notion of due process. Looking at the legislative history, a case can be made that Congress never truly intended to allow Feinberg such independent discretion in the area of review. During the short congressional debate on the statute, several members of Congress stated their intention to supervise the operation of the Fund. Perhaps convinced that the Judiciary Committee would become actively involved in the review of the Fund’s

111. See INSTRUCTIONS, supra note 89, at 5.
112. See FAQ, supra note 88, § 1.10.
procedures, Congress rejected various proposals for greater supervision and failed to make any mention of specific oversight in the Act.

As noted above, among the discarded proposals was one submitted by the ATLA calling for a compensation program creating an Article I legislative court to administer the awards and integrate some form of judicial review.\textsuperscript{117} Robert Peck, Senior Director for Legal Affairs and Policy Research at ATLA, recounts:

> Our draft anticipated that the President would appoint a person to serve as the presiding judge of the court, subject to the advice and consent of the Senate, for a term of not more than five years. . . . We assumed that no single person could hear all the claims likely to inundate the tribunal. Thus, the presiding judge was responsible for hiring an appropriate number of hearing officers and other necessary administrative staff to oversee the work of the court. . . . [T]he court was to be located within and be affiliated with the United States District Court for the Southern District of New York. . . . Although we provided for review by a hearing officer at the September 11th Compensation Court with witnesses and other evidence and a subsequent final appeal to the U.S. District Court, Congress determined that the Special Master’s decision was “final and not subject to judicial review.”\textsuperscript{118}

Congress erred in dismissing the idea of an Article I court. Had the legislators allotted more time to think about the Victim Compensation Fund and its Special Master they might have recognized the overall deficiencies. What makes this oversight more disconcerting is that September 11 is not the first time Congress has made such a mistake.

B. A Former Compensation Fund with a Similar Special Master

A number of compensation funds, which can be described as precursors to the Victim Compensation Fund, were implemented by Congress during the course of the nineteenth and twentieth centuries. The reasons they were enacted vary widely, and because each was a unique response to a particular situation, there is little commonality to the plans. The Fund, however, draws variously from these antecedents.\textsuperscript{119}

The compensation scheme that best approximates the Fund is the commission set up by James Madison to compensate the victims of the War of 1812.\textsuperscript{120} In June of that year, the United States declared war on England, citing as justification England’s imposition of harsh trade restrictions and encouragement of Native American aggression towards territorial settlers.\textsuperscript{121}

\textsuperscript{117} See Peck, supra note 29, at 14.
\textsuperscript{119} See infra text accompanying notes 220-252.
\textsuperscript{120} See Feinberg, supra note 7, at 91; Kenneth Feinberg, Address to the Yale Law School Metaprocedure Seminar (May 7, 2003) [hereinafter Metaprocedure Address].
\textsuperscript{121} See Michelle Landis Dauber, The War of 1812, September 11th, and the Politics of
The Special Master

When the fighting ceased, most of the Northeast, including all of Washington, D.C., was pillaged, ravaged, and destroyed. The Special Master

Owing to the terrible loss of property and the public outrage over a pointless and humiliating war, Congress enacted a broadly worded statute providing relief to the victims. The statute was entitled "An Act to authorize the payment for property lost, captured, or destroyed by the enemy, while in the military service of the United States, and for other purposes." Like the ATSSSA, the 1812 statute was enacted hastily with very little debate, and what little discussion there was focused on proposals to increase the compensation for lost horses.

Section 11 of the statute appointed a Commissioner of Claims, Richard Bland Lee, who was granted broad authority to distribute federal funds and whose responsibilities entailed establishing, under the direction, or with the assent, of the President of the United States, such rules, as well in regard to the receipt of applications of claimants to compensation for losses provided for by this act, as the species and degree of evidence, the manner in which such evidence shall be taken and authenticated, as shall, in his opinion, be the best calculated to attain the objects of this act; paying a due regard, in the establishment of such regulations, as well to the claims of individual justice as to the interest of the United States . . .

Given the lack of clarity, Congress’s instruction to interpret the statute, define the terms, and issue rules and regulations posed a problem for Lee. He was directed to establish eligibility criteria, develop a claims and hearing process, and determine the final awards. Like the decisions of the Fund’s Special Master, Lee’s decisions were final and not subject to review.

Lee wrote to the Attorney General and the Secretary of War for an opinion, and their responses permitted him to fashion a liberal interpretation of the statute. Initially Lee’s broad construction of the statute was acceptable to a nation overcome by compassion and charity. Indeed, Lee would likely have been subjected to severe criticism in the press and in Congress had he implemented narrow standards for construction. Eventually, however, as memories began to fade, the public ceased to view the victims as vulnerable

122. See id. at 296.
123. See 29 Annals of Cong. 410 (1815).
126. See § 11, 3 Stat. 261.
127. Id. § 12.
128. See Dauber, supra note 121, at 298.
129. See §§ 11-14, 3 Stat. 261.
130. See id.
131. See Dauber, supra note 121, at 309-10.
132. See id. at 315-18.
and attacked Lee for his excessive generosity.\textsuperscript{133}

Specifically, Congress accused Lee of issuing interpretations that seemed intended to aid the claimants—now thought of as undeserving profiteers—in receiving compensation at the expense of the Treasury.\textsuperscript{134} Representative John Forsyth of Georgia called for Lee's dismissal: "From want of understanding, or from want of integrity, incorrect decisions had certainly been made by the Commissioner."\textsuperscript{135} Congress responded by amending the statute in order to strip Lee of his unreviewable discretion.\textsuperscript{136} The independent role of the Commissioner was supplemented by a bureaucratic process,\textsuperscript{137} which consisted of a second round of local investigators and a counter-commissioner who were responsible for restricting awards to protect the Treasury.\textsuperscript{138} Congressman Robert Wright of Maryland commented at the time that "[i]f there was any fault in regard to the law of the last session . . . it was in the selection of a man for Commissioner who wanted judgment."\textsuperscript{139} By the time the Twelfth Congress amended the statute, many of the victims received diminished and disproportionate awards, and some even received none.\textsuperscript{140} While Lee's culpability can be debated, Representative Wright was certainly wise to question Congress's judgment in hastily enacting a sparse statute.

The act of conferring broad power on a single person was viewed as a mistake in 1812. Despite the fact that many in Congress seem satisfied with Feinberg's ultimate awards,\textsuperscript{141} future funds replicating the Victim Compensation Fund could result in the adverse consequences of 1812. In addition, a future Congress could find Feinberg's awards seriously wanting, and it is conceivable that the public will be outraged at Congress for creating such an unfettered and unsupervised Fund. As Feinberg and Attorney General Ashcroft speculated during Feinberg's interview for the position of Special Master, "Congress might rue the day it established [the] compensation program."\textsuperscript{142} In 2001, Congress failed to heed the lesson of 1812, but it is precisely that lesson that should guide Congress in the creation of future funds.

\begin{enumerate}
\setcounter{enumi}{133}
\item \textit{See id. at 319.}
\item \textit{See id.}
\item \textit{Daily Report, Congressional: House of Representatives, NAT'L INTELLIGENCER, Dec. 16, 1816, at 2.}
\item \textit{See id. (reporting that Lee's decisions under the Act were suspended because there was no "appellate jurisdiction" over these decisions).}
\item \textit{See Act of March 3, 1817, ch. 110, 3 Stat. 397 (1817).}
\item \textit{See id.}
\item \textit{30 ANNALS OF CONG. 371 (1816).}
\item \textit{See Dauber, supra note 121, at 336.}
\item \textit{Cf. BRILL, supra note 30, at 276 (reporting Ted Kennedy's statement to Feinberg that awards of more than fifteen million dollars would outrage Congress). As Feinberg himself recently recognized: "If I had spent $25 billion I think I would have been fired, and the bipartisan unanimity that blessed the program . . . would have been bipartisan unanimity that Feinberg ought to be shipped to some foreign country." See Q & A, supra note 63.}
\item \textit{FEINBERG, supra note 7, at 25.}
\end{enumerate}
III. A BIFURCATED ROLE: COURT-APPOINTED SPECIAL MASTER OR ADMINISTRATIVE AGENCY?

This Article attempts to expose the failings of the Fund so as to ensure that the ATSSSA is not given substantial precedential authority in the future establishment of compensation funds. In putting forth this argument, it is helpful to compare the Fund's Special Master not only with the administrators of previous funds, but also with congressionally and judicially appointed officials carrying out administrative duties in other contexts.

Any comparisons involving the Fund's Special Master inevitably run into difficulties of categorization. Returning once again to 1812, when the compensation fund was administered by Commissioner of Claims Richard Bland Lee, it was unclear whether the statute had set up a rudimentary administrative agency or a court-appointed special master (sans court). When Congress subsequently amended the statute to include a bureaucracy, the 1812 fund was transformed into an institution resembling an administrative agency. The Fund created by the ATSSSA faces the same questions raised implicitly by the Twelfth Congress: What is the position of Special Master? How does the role differ in relation to similar positions in other contexts?

A. Court-Appointed Special Masters

Modern litigation has expanded the role of the court-appointed special master. Instead of working exclusively on limited organizational tasks, special masters now participate extensively in the process of judicial adjudication. They can perform passive judicial functions, such as overseeing discovery proceedings, managing cases in their pretrial stage, and making recommendations to the court for remedial orders. In addition, they can head more activist informal procedures, such as facilitating settlements.

This recent expansion has raised a number of constitutional difficulties. Sweeping delegations of judicial powers to special masters can abrogate the various safeguards of the Federal Rules of Civil Procedure, Federal Rules of

143. This Article is not intended to provide a detailed discussion of court-appointed special masters. For more on the subject, see generally Wayne D. Brazil, Special Masters in Complex Cases: Extending the Judiciary in Reshaping Adjudication, 53 U. CHI. L. REV. 394 (1986); and Margaret G. Farrell, The Role of Special Masters in Federal Litigation, SE99 A.L.I.-A.B.A. 837 (2000).


146. See id.

147. See id.

Evidence, and canons of judicial conduct. Rule 53 of the Federal Rules of Civil Procedure controls the conduct of special masters, but it is written in broad and generalized terms: "[A] master has authority to regulate all proceedings and take all appropriate measures to perform fairly and efficiently the assigned duties." Since this rule provides little guidance to special masters about what powers may be exercised, courts have come to read it expansively, allowing the role of special master to vary significantly. Moreover, the availability of appellate review for the decisions of special masters is limited. Litigants are afforded the opportunity to appeal the appointment of a special master by filing an objection in district court or by obtaining mandamus action in a circuit court. However, such objections are rarely able to meet the abuse of discretion standard necessary for success.

In many respects the power wielded by the Fund's Special Master is consistent with the position outlined above. Yet not all discretion is created equal. Despite the independence granted by the expansion of the court-appointed special master's role, special masters are always answerable to the judges who appoint them for a particular case and are further supervised by the rigor of the adversarial process. No such checks exist over the Fund's Special Master, making Feinberg a rare, and tenuous, judicial creature.

B. Administrative Agencies

In both federal and state agencies, most administrative hearings are directly managed by administrative law judges (ALJs), who work for the agency but are organizationally independent. They are hired via a process controlled by the Office of Personnel Management and are assigned to agencies to conduct hearings. Agency heads are typically selected on the ability to make policy consistent with the goals of the administration, leaving judicial functions to the ALJs.

ALJs can issue different types of decisions, all of which are governed by a review process. An "initial decision" rendered by an ALJ usually becomes

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149. FED. R. CIV. P. 53.
150. Id. 53(c).
152. See DeGraw, supra note 144, at 803.
153. See id. at 811.
154. See id. at 812.
the automatic or default decision of the agency unless there is an appeal to the agency or the agency decides on its own to review the decision. On review of the initial decision, the agency has all the power the ALJ had in making the initial decision. Conversely, a “recommended decision” is routinely sent to the agency for certification and final determination. Whether a case will result in an initial or recommended decision is decided by the agency. The Administrative Procedure Act (APA) makes clear that agency heads are not required to defer to the ALJ’s fact finding in the same way that an appellate court must defer to the trial judge’s factual determinations, thus allowing the agency the freedom to accept or reject the ALJ’s conclusions.

It is not uncommon for Congress to enact statutes precluding judicial review, especially in certain benefit-related fact findings by administrative agencies. Section 701(a)(1) of the APA provides that agency decisions are reviewable “except to the extent that . . . statutes preclude judicial review.” United States v. Erika, Inc. provides a precedent for honoring preclusion of judicial review under a government benefit program. The Court held that a Medicare statute’s precisely drawn provisions precluding review of benefits under the Medicare program, in addition to the legislative history of the statute, provided persuasive evidence that Congress intended to foreclose review of benefit claims.

Generally, however, courts have established a presumption of reviewability for statutes, especially in constitutional cases. For example, in Johnson v. Robison the Supreme Court encountered a provision in the Veterans’ Readjustment Benefits Act that exempted from judicial review all decisions on questions of law or fact regarding benefits issued by the Veterans Administration. Despite this extraordinarily clear expression of congressional intent, the Court found a way to grant limited review by holding that there was no functional, institutional, or policy reason for prohibiting review.

While statutes governing administrative agencies may preclude judicial

160. See id. § 557(b).
161. See id.
162. See id.
164. 5 U.S.C. § 701(a)(1). The ATSSSA’s text and structure show Congress’s clear intent to bar judicial review of the Special Master’s compensation awards. Because the statute rejects judicial review outright, the provisions of the APA governing judicial review of agency actions do not pertain to the ATSSSA. Only the APA’s provisions regarding statutory preclusion of judicial review are relevant.
166. Id.
review, the application of these standards to the ATSSSA would overlook the distinguishing features of the Fund. It is one thing to preclude judicial review; it is another to preclude review in a statute devoid of many other APA procedural protections. Among its many procedural deficiencies, the ATSSSA does not demand a hearing on the record,\textsuperscript{170} nor does it address the requirement of impartiality of rulemakers.\textsuperscript{171} When Congress exempts administrative agencies from the rigors of judicial review, it does so with the knowledge that adequate procedures are in place to preserve the constitutional mandate of due process. Congress made no such concessions when deeming Feinberg’s decisions unreviewable.

In sum, it is difficult to categorize the Fund’s Special Master in an administrative sense. Accountable to no one, Feinberg does not resemble an ALJ whose decisions are checked by an administrative agency. Further, the ATSSSA bars judicial review of Feinberg’s decisions in a manner that abandons conventional norms regarding the balance between due process and statutory preclusion of review. Feinberg simply has no analogue, leaving us once again with the question of how to characterize the position of Special Master.

C. An Imperfect Conflation

The above Sections indicate that the Fund’s Special Master is truly sui generis. Accordingly, the stunning absence of review over Feinberg’s decisions cannot be equated with similar omissions in other contexts. In addition to granting him unprecedented discretion and the keys to the national Treasury, Congress failed to define the Special Master’s position. Is he a court-appointed special master, an administrative official, or an amalgam of the two?

In many respects, the functions of the Special Master resemble those of an administrator. Feinberg was an executive branch appointee responsible for promulgating regulations, hearing claims, and dispensing benefits, duties generally associated with administrators.\textsuperscript{172} Like administrative heads, but unlike court-appointed special masters, the Fund’s Special Master does not directly report and answer to a judicial superior.

At the same time, however, the Special Master resembles court-appointed masters in a number of ways. Lacking the longevity of administrative agencies, the Fund’s Special Master and court-appointed special masters are ad hoc positions, specifically designed for a particular situation. Additionally, the head

\textsuperscript{170} See 5 U.S.C. § 554(a) (2000) (noting that formal procedures apply when a statute requires that a determination be made “on the record after opportunity for an agency hearing”).

\textsuperscript{171} See ERNEST GELLHORN & RONALD M. LEVIN, ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL 227-30 (1997).

\textsuperscript{172} See id. at 219-24, 296-323.
The Special Master

of the Fund is called a “Special Master” rather than a “Commissioner,” “Administrator,” or “Secretary,” which are administrative titles. The name alone is revealing since there is evidence indicating that the position was modeled after a court-appointed special master.

The architecture of the Fund was based in part on the Agent Orange settlement compensation scheme, and the Special Master was based on the Agent Orange court-appointed Special Master. Before Congress enacted the ATSSSA, David Crane, one of Senator Trent Lott’s congressional staffers, drafted a model of the Special Master which Congress soon incorporated into the statute. Crane based his conception of the Special Master on the example of the court-appointed Special Master in the Agent Orange litigation. As mentioned above, Feinberg had served as the Agent Orange Special Master, and it therefore seemed reasonable to select him to head the Fund. The Agent Orange settlement resulted in a court-directed compensation fund of $240 million, and its goal was to compensate victims as quickly as possible with no requirement to prove causation. Like the Fund’s Special Master, the special master of the Agent Orange fund was given broad authority to oversee the planning and development of the entire fund and consider whether special circumstances warranted a deviation from the plan’s fixed criteria. Of course in the Agent Orange context, the Special Master’s decisions were directly reviewed by federal Judge Jack Weinstein.

The functions and responsibilities of the Special Master suggest an agency administrator, yet the title and congressional intent evoke a court-appointed master. At best, the position of the Special Master is an imperfect conflation, resembling aspects of both positions but capturing the essence of neither. Accordingly, it is impossible to adjust our expectations to reflect awareness of the particular manner in which the Fund was meant to operate and perform. Moreover, the absence of an appropriate analogue underscores the point: Never before in modern times has Congress created a position with so much discretion and so little oversight. Power and independence are not usually ingredients that can be aligned with the precepts of due process, and this exemplifies the unsuitability of the Fund for use in future contexts.

The previous Parts have criticized the Fund on account of the Special Master’s authority and discretion. Yet the Fund’s problems extend beyond the broad powers granted to Feinberg. The ATSSSA allows family members and injured victims to choose a “litigation option” but places significant procedural

173. See Brill, supra note 30, at 94.
hurdles in front of those who make this choice. The next Part will temporarily turn away from the subject of the Special Master to discuss the problems inherent in the ATSSSA’s litigation option. I will then return to the Special Master to show how the limitations placed on the litigation option serve to enlarge the power of the Special Master and hence exacerbate, and perhaps magnify, the difficulties of the Fund.

IV. CURBING LITIGATION COMPOUNDS THE PROBLEM OF THE SPECIAL MASTER

A. The Limited Litigation Option and its Effects

With the enactment of the ATSSSA, Congress changed the status quo ante by granting the airlines immunity from tort liability, creating a federal cause of action, and constructing a fund intended to offer an alternative source of reparations. As mandated by Congress in the ATSSSA, participation in the Fund is contingent upon the waiver of all litigation rights. Thus, families were forced to choose between two limited alternatives: a compensation scheme with little flexibility and no opportunity to appeal, or a cause of action with a fixed forum and a cap on rewards.

In reality, the choice the ATSSSA purports to create is illusory. While the statute does offer the option of receiving a fairly generous award from a well-financed Fund, the litigation alternative is severely lacking. That the Fund may be magnanimous does not justify curtailing the tort option. The Fund competes with and replaces the tort system, substantially and improperly compromising the rights of individuals. Specifically, the limits on litigation restrict the rights of eligible claimants in three important ways.

First, and most obvious, is the previously discussed cap on damages. The roughly six billion dollars in available rewards was inadequate to support wrongful death claims from three thousand families. Knowing this, most families had no choice but to take the safe course and file with the Fund. Moreover, the cap created opportunities for the wealthiest and best represented families to gain an unfair advantage. They were able to live comfortably while waiting until right before the deadline to see how many claimants opted into the Fund. Realizing that the majority of their peers would be disinclined to litigate, the wealthier ones could then file and proceed to trial, jumping the line and winning a greater share of the Fund.


179. See Landsman, supra note 18, at 396, 407 (“[A] balanced assessment might conclude that only the shell of a court-based litigation option remains for injured individuals . . . . Congress weakened the appearance of integrity and accountability and narrowed the prospect that the victims would get an opportunity to be heard [in court].”).
they were able to take advantage of the choice to proceed to court, knowing that decreased competition for the insurance funds awaited them. Less affluent families, dependent on a speedy payout, were not afforded this luxury.

The vesting of exclusive jurisdiction in the Southern District of New York poses a second problem. Convenience, in the doctrine of forum non conveniens, has always been a part of venue determinations. The September 11 attacks involved travelers from all over the country, yet Congress did not consider the difficulties many of the families would face participating in lengthy trials in New York City. Beyond mere convenience, the Act precludes suits in state courts which are known for more sympathetic juries and higher awards. Finally, in all suits, the Act requires the federal court to apply the substantive law, including choice of law rules, of the state where the crashes occurred. Thus, under the Act, a California family with a loved one on United Flight 93 is bound to file suit in New York while receiving counsel from an unfamiliar Pennsylvania attorney. The exchange of this “right” for the option of the Fund is simply inadequate.

Finally, in addition to restricting jurisdiction for tort claims, the ATSSSA overlooks whole classes of individuals injured, in some manner, by the terrorist attacks. While every eligible claimant for compensation was allowed to choose between the Fund and tort, many ineligible claimants—those suffering property damage, business disruption, or psychological harm—still have no alternative but to litigate. Unfortunately, the reward cap, dictated by the airlines’ insurance coverage, applies to these Fund-ineligible “victims” as well. Estimates of the financial damage of the September 11 attacks range from thirty-five to one hundred billion dollars, far outstripping the approximately six billion dollars of insurance coverage carried by the airlines.

Tort, therefore, is clearly not a true option for most people suffering from the September 11 attacks—either those who were permitted to opt into the Fund or those ineligible for the Fund. This begs the question of why Congress offered it as an alternative at all rather than just limiting recovery exclusively to

180. See Air Transportation Safety and System Stabilization Act § 408(b).
181. See Mariani, supra note 23, at 171.
182. See Air Transportation Safety and System Stabilization Act § 408(b)(2).
184. The due process limitations become even more problematic when considering those victims who receive no balancing compensation through the Fund but must file to recover from the same pot of capped damages. In comparison, the victims of other attacks, such as the Oklahoma City bombing, are arguably better off. Their due process rights have not been constrained at all.
186. See Mariani, supra note 23, at 143.
A number of points, while only speculative, present possible answers.

While Congress left many of the Fund’s details to the discretion of the Special Master, the Act explicitly defines the class of eligible claimants. Section 405 stipulates that the Fund was created for the exclusive benefit of decedents’ families and injured victims of the September 11 attacks. Recognizing the broad nature of the attacks, Congress had no intention of including all those affected because it would simply make the Special Master’s job too difficult, slow down the rewards process, and perhaps cost too much. At the same time, Congress could not leave those excluded from the Fund without any legal remedy—people and businesses had to be allowed to pursue claims of injury along normal channels. In addition, Congress knew that eligible Fund claimants with substantial collateral source assets—life insurance holdings, pension benefits, accidental death coverage—would not collect much under the Fund. For political reasons, these people had to be granted alternative options.

But Congress also feared that if ineligible victims and those with substantial collateral sources of funds were allowed to litigate, they could conceivably receive more money than those who opted into the Fund. Such an outcome would be unfair to the claimants, not to mention politically untenable. Accordingly all eligible Fund claimants had to be given the right to bring suit. Realizing that the Fund would become meaningless if too many of these eligible claimants chose this path, Congress devised a cap intended to encourage them to forgo litigation and seek compensation from the Fund. In order to work, the cap had to apply to all, regardless of Fund eligibility. As a result, they were left with a watered-down tort option, with the lucky ones receiving the chance to submit to the Special Master’s discretion.

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187. Workers’ compensation schemes are enacted at the state level, unlike the federally funded compensation schemes discussed in this Article. A detailed examination is beyond the scope of this Article. See generally John G. Culhane, Tort, Compensation, and Two Kinds of Justice, 55 Rutgers L. Rev. 1027 (2003).


191. To allow these victims the possibility of tort recovery while excluding Fund beneficiaries “would arguably have created the appearance of treating [them] . . . as second-class citizens.” Robert Rabin, The Quest for Fairness in Compensating Victims of September 11 (Sept. 13, 2002) (unpublished manuscript, on file with author).
1. The Litigation Option Empowers the Special Master

As just demonstrated, the cap placed on possible rewards was designed to incentivize eligible claimants to participate in the Fund. As a result, the limited litigation option actually strengthens the authority of the Special Master and magnifies the scope of his arbitrary exercise of discretion.

This point was not lost on Feinberg, who made urging victims to join the Fund one of his top priorities: "One of my main objectives in administering the fund was to encourage full participation by all eligible families rather than have them pursue a costly, time consuming, and emotionally wrenching remedy through the courts." Feinberg deemed the Fund "the only game in town" and characterized litigation as a "loser's game." He embraced a strategy of offering awards that closely resembled the amounts given in tort damages, making it difficult for eligible parties to justify the risks of litigation. Feinberg referred to the Fund possessively as "my program" and described himself as an "assertive mediator," using "the voice of brutal honesty" to advise people to join the Fund.

But Feinberg did not stop at the door of mere persuasion. In addition to vigorously promoting the Fund to victims and families, Feinberg enlisted the help of Judge Alvin Hellerstein, the federal judge presiding over the September 11 cases. When a plaintiff decided to file suit, Feinberg and the judge convened a conference call with the lawyer and plaintiff to ensure that the plaintiff had received accurate information about the risks of proceeding with litigation and the benefits of opting into the Fund. In fact, on April 10, 2002, Judge Hellerstein initiated a requirement that all plaintiffs filing lawsuits acknowledge their awareness of the risks of litigation, including the fact that litigation precluded their right to file with the Fund. "Feinberg had tried to posture this as the judge's idea," notes Steven Brill, "but plaintiffs lawyers immediately saw his fingerprints on it, and they were outraged. How could he

192. FEINBERG, supra note 7, at xxii; see also id. at 6. For a discussion on Feinberg's efforts to get potential claimants to opt into previous funds, see Kenneth R. Feinberg, Reporting from the Front Line—One Mediator's Experience with Mass Torts, 31 LOY. L.A. L. REV. 359, 371 (1998).
194. Williams, supra note 22, at 23.
195. In addition to losing the suit, the risks of litigation involved here include winning an award that could be blocked by either the litigation cap or airline bankruptcies. See Rabin, supra note 15, at 792.
198. Id.
199. See BRILL, supra note 30, at 537.
200. See id.
and a judge interfere this way in the attorney-client relationship?202

The answer, for Feinberg, was congressional mandate. Feinberg believed, not incorrectly, that the ATSSSA charged him with the task of convincing victims to file a claim with the Fund.203 As discussed above, the cap placed on litigation seemed designed to make the Fund the most attractive option. Otherwise, Congress could have simply permitted unlimited litigation while indemnifying the airlines for awards exceeding their insurance coverage. Indeed, this might have been the cheaper option since the Fund’s coffers were effectively limitless.204 To Feinberg, Congress’s failure to take this course was indicative of its desire to provide the victims with the best possible option in the form of the Fund, regardless of the cost.

The problem, however, is that as constructed, the incentives to join the Fund give rise to many unconsidered dangers. Even as Feinberg actively promoted the Fund, he was aware of his own warning, given years earlier, that special masters occasionally attempt to “bludgeon the parties into a settlement which is not in their best interests,” particularly where litigants are “less sophisticated [and] unrepresented.”205 As Feinberg’s previous experiences as a mass torts mediator demonstrate, claimants tend to be risk averse, making them more likely to accept a guaranteed award despite the significantly greater sums available through tort.206

Recognizing these problems, some in the judiciary attempted to make the litigation option more viable. In response to In re September 11 Litigation,207 a lawsuit brought by seventy plaintiffs challenging the finality and impropriety of the ATSSSA’s cap, Judge Hellerstein ruled that the airlines and airport security companies owed a duty of care to screen passengers and that the World Trade Center had the responsibility to implement adequate fire safety measures.208 He concluded that the crash of the airplanes was a reasonably foreseeable result of negligent screening, and likewise, it was reasonably foreseeable that a failure to design a secure cockpit could contribute to the hijackings.209 While Congress passed the ATSSSA partly to deter litigation, Judge Hellerstein’s opinion

202. BRILL, supra note 30, at 537-38.
203. Cf. Dirk Olin, Thriving in the Crossfire, AM. LAW, Sept. 4, 2002, at 89 (reporting Feinberg’s statement that the statute gives him the ability to “do the right thing”). In response to attacks on his regulations, Feinberg has asserted numerous times that Congress instructed him to do exactly what he is doing and no more. See, e.g., Belkin, supra note 9; Metaprocedure Address, supra note 120.
206. See Feinberg, supra note 192, at 369.
208. Id. at 290, 299.
209. Id. at 295.
endorsed litigation by assuring victims and families that proceeding to court was a dependable choice.

Judge Hellerstein took the additional step of creating a suspense docket in November 2003 to accommodate those victims and families who wanted to preserve their ability to sue while their claims with the Fund were pending. He also extended the deadline to file a civil action to benefit those conflicted over whether to sue or opt into the Fund. As a result of these efforts, some eligible claimants delayed filing with the Fund, claiming that they were still grief-stricken, while others seriously contemplated litigation because they were “hungry” for facts, answers, and accountability that only litigation could provide. Still others kept the option of litigation open as they waited to hear the amounts Feinberg awarded. By the end of November 2003, only sixty percent of those eligible had filed.

In the end, however, the obstacles constructed by Congress along with Feinberg's promotional efforts determined the outcome. In the weeks before the Fund’s filing deadline, most of the litigants dropped their suits, bringing the Fund's participation to ninety-seven percent. Hours before the December 22, 2003, deadline, there was a mad rush to file—"Officials with the federal Victim Compensation Fund . . . said applications had come in by the hundreds as the hours to the midnight deadline wound down . . . ." By midnight of June 15, 2004, "all decisions were final, and the fund was officially shut down, save for a few thousand checks to be mailed out." As of November 2004, the Fund had dispensed awards to 2,880 of 2,973 eligible mortality claimants, seventy lawsuits remained pending, while thirteen families had neither filed a lawsuit nor joined the Fund.

Judge Hellerstein may have attempted to make litigation more attractive, but the limited litigation option combined with Feinberg's forceful championing of the Fund were strong obstacles to overcome. I will demonstrate below that the Fund would have succeeded in attracting claimants even without

213. Id.
215. See id.
216. See Synagogue Address, supra note 22.
218. Chen, supra note 82.
Feinberg’s actions or the constraints on litigation. Practical reasons embrace the Fund. But before turning to practicalities, a discussion of past funds is helpful in placing the Fund in context in order to argue that the Fund should not serve as a template for the future.

B. A Look at Prior Compensation Funds: Approaches to Litigation and Other Influences

A comparison with other victim compensation funds emphasizes the failure of the ATSSSA to provide for a suitable tort option. Tort replacement legislation is atypical—“Congress has never before offered compensation contingent upon complete abdication of the right to sue,” even though numerous compensation funds have been created in the past. The failure of the Fund to include a meaningful tort provision is surprising, given the clear influence previous funds have had on the ATSSSA’s construction. As mentioned above, the judicially developed Agent Orange compensation scheme greatly affected the construction of the Fund. Other influential funds include the National Vaccine Injury Compensation Program, the National Swine Flu Immunization Program, and the compensation plan established under the Price-Anderson Act. Examining the features of these precedents highlights the problems with the ATSSSA discussed above and helps reinforce the argument that the Fund should not serve as a model for the future.

The National Childhood Vaccine Injury Act of 1986 established the National Vaccine Injury Compensation Program to compensate children injured by exposure to vaccines required by the federal government. Internally funded through a tax imposed on the sale of each dose of vaccine, the Compensation Program was overseen by the Department of Health and Human Services, and plaintiffs petitioned for compensation with the U.S. Court of Federal Claims, where a special master gathered evidence and determined the award amounts. The special master’s decisions were appealable to the Court of Federal Claims and if necessary the Federal Circuit.

The Compensation Program closely resembles the structure of the Fund. In determining whether an injury was compensable, the special master relied on the Vaccine Injury Table, which recalls the tables used by Feinberg to calculate economic damages. If the injury was compensable, recovery was offered for nonreimbursable expenses and loss of earning capacity similar to the economic...

220. Holt, supra note 190, at 515.
222. See Culhane, supra note 187, at 1061.
224. See id. § 300aa-12(f).
225. See id. § 300aa-14.
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damage awards of the Fund. The same $250,000 offered by Feinberg for noneconomic losses was provided for the “pain . . . and emotional distress” suffered by the injured children. Payments from other sources, such as private insurance, counted against recovery, mirroring the collateral source rule of the Fund.

The Compensation Program’s approach to litigation, however, is different in that plaintiffs could turn to the courts after filing with the Program if they found the offered award unsatisfactory. A plaintiff could prevail only by showing some fault on the part of the manufacturer, such as insufficient testing or production of a “bad batch” of vaccine. Liability against the vaccine manufacturer was prohibited for injuries or death “that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings.” Thus, the manufacturer of the vaccine was only required to provide notice to the person administering the vaccine in order to receive protection. Although potential plaintiffs were discouraged from going to trial given the above obstacles, plaintiffs’ rights were not constrained if they decided to litigate, and full tort recovery was permitted. Liability was difficult to prove, but if successfully demonstrated, damages were free from caps or similar restrictions.

The National Swine Flu Act of 1976 established the National Swine Flu Immunization Program, a fund designed to compensate victims who died or were injured from inoculations administered by a government-mandated vaccine program. Just as the ATSSSA aided the airlines immediately after September 11, the Swine Flu Program shielded all participating manufacturers from liability by including a preemptive liability cap on any civil action for negligence or wrongful death. But unlike the ATSSSA, the federal government subjected itself to litigation by taking on vicarious liability for all participating manufacturers. The cause of action against the government replaced any other possible action by victims against the manufacturers.

Rather than deterring citizens from suing, the National Swine Flu Act limited liability of manufacturers once citizens actually did sue. Congress

226. See id. § 300aa-15(a)(1)(A).
227. See id. § 300aa-15(a)(4). The Victim Compensation Fund offered $250,000 as the base sum. Spouses and minor children could receive more. See Final Rule, supra note 83.
228. See id. § 300aa-15(g)-(h).
229. See id. § 300aa-21(a).
230. See id. § 300aa-22(b)(2).
231. Id. § 300aa-22(b)(1).
232. See id. § 300aa-22(c); Floering, supra note 145, at 199.
235. See Holt, supra note 190, at 527.
236. See id.
simply modified traditional tort procedures by taking on vicarious liability to encourage program participation, thereby assuring that plaintiffs’ due process rights were not adversely affected. The ATSSSA, on the other hand, discourages plaintiffs from filing a lawsuit altogether by offering immediate low-cost recovery and emphasizing the liability cap and jurisdictional limitations.

The Price-Anderson Act was another legislative effort to prevent potential litigants from suing. Congress passed the Act in 1957 to facilitate the entry of private industry into the field of nuclear energy while guaranteeing compensation in the event of a catastrophic nuclear accident. The Price-Anderson Act closely resembles the Fund, permitting comparisons to be drawn and further substantiating the argument that the Fund should never serve as a model.

The Price-Anderson Act required injured parties to waive all legal claims in order to participate in its fund, ensuring these participants the opportunity to receive full compensation without the burden of proving fault. The legislation established a federal cause of action with exclusive federal jurisdiction and provided immunity from state-based tort liability to the nuclear power industry. The Act’s compensation scheme was funded through a pooling mechanism in which each nuclear licensee was required to purchase $160 million in private liability insurance and to contribute a maximum of ten million dollars yearly to the compensation fund. A $560 million cap was imposed on all liability for nuclear accidents. The Price-Anderson Act did not address claims exceeding the $560 million cap because Congress assumed that it would develop a contingency plan in the event that the funds were depleted.

The Supreme Court approved the compensation scheme, arguing in Duke Power Co. v. Carolina Environmental Study Group, Inc. that Congress could bar the right to sue provided it offered a fair and reasonable substitute. The Court emphasized that this substitute did not need to correspond to litigation damages, maintaining:

[It is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy. . . . [T]he Price-Anderson Act does, in our

239. See id. at 419 (discussing the impact of the Price-Anderson Act, which “removes the nuclear industry from market risks”).
240. See Mullenix & Stewart, supra note 15, at 140.
241. See id.
242. See id.
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view, provide a reasonably just substitute for the common-law or state tort law remedies it replaces.\(^{244}\)

*Duke Power* suggests that the ATSSSA's limited litigation option is constitutional because the Fund is a reasonable substitute for litigation whether or not compensation awards and tort damages are commensurate. This inference, however, does not mean that the Act is ideal or even satisfactory. While the Fund provides a level of compensation that may be said to accomplish—in the words of *Duke Power*—"a reasonably just substitute for the common-law or state tort law remedies it replaces,"\(^ {245}\) it retroactively revokes substantial litigation rights from eligible claimants. The ATSSSA limits liability for claims arising from an event that occurred in the past. This is a fundamental flaw of the ATSSSA: "[I]t forces a . . . [federally funded] compensation scheme to work in tandem with an unprecedented retroactive liability cap."\(^ {246}\) Retroactivity is not favored in the law, and courts are reluctant to construe statutes retroactively without an express statutory grant of authority.\(^ {247}\)

Because "prospective caps . . . serve[] as notice to potential victims, their reliance interest in invoking a previously unfettered right remain[s] unharmed."\(^ {248}\) The statute at issue in *Duke Power* involved prospective rights exclusively, meaning that the "reasonably just substitute" standard developed there was not necessarily meant to apply to funds that retroactively alter fundamental procedural rights.

The Court's rationale for its decision in *Duke Power* may not be sufficient to legitimize the litigation option of the ATSSSA. Justifying Price-Anderson's liability cap, the Court observed that

It is by now well established that . . . legislative acts [which structure and accommodate the burdens and benefits of economic life] . . . come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. That the accommodation struck may have profound and far-reaching consequences, contrary to appellees' suggestion, provides all the more reason for this Court to defer to the congressional judgment unless it is demonstrably arbitrary or irrational.\(^ {249}\)

The *Duke Power* Court concluded that the $560 million cap was not arbitrary because it was only a base for compensation, not the ultimate sum.\(^ {250}\) Should claims exceed the $560 million cap, the Act anticipated that Congress

\(^{244}\) Id. at 88.

\(^{245}\) Id.

\(^{246}\) Holt, *supra* note 190, at 535.


\(^{248}\) Holt, *supra* note 190, at 529.

\(^{249}\) *Duke Power*, 438 U.S. at 83-84 (internal quotation marks and citation omitted).

\(^{250}\) See id. at 86 (quoting H.R. REP. No. 883, 89th Cong., 1st Sess., 6-7 (1965)) ("The limitation of liability serves primarily as a device for facilitating further congressional review of such a situation, rather than an ultimate bar to further relief of the public.").
would then decide "whether it should act to provide greater public compensation."251 The cap was further justified as rational and not arbitrary because there was only a small risk that an accident creating liability would exceed the cap.252

Conversely, because the event requiring compensation and liability limitation had already occurred, Congress did not consider the issue of risk when creating the ATSSSA liability cap. Furthermore, the ATSSSA’s six billion dollar cap—reflecting the airlines’ insurance coverage—would be insufficient to cover all possible claims arising from the terrorist attacks. As discussed above, the ATSSSA excludes from the Fund many individuals harmed physically, emotionally, and financially from the September 11 attacks. The cap, it can therefore be argued, is both “arbitrary and irrational” in light of other less problematic alternatives that Congress might have devised.

V. PROPOSALS FOR REFORM

A. Practicalities

Congress chose to place a cap on damage awards to deter potential plaintiffs from suing the airlines. This Section argues that Congress could have achieved its goals through means more respectful of due process. The benefits of the Fund are numerous, making it more attractive than capped litigation. But even absent the cap, many eligible claimants would have welcomed the security of the Fund. Both procedurally and economically, the Fund is the superior option. Hence, as I will demonstrate, if faced again with the need to develop a compensation scheme, Congress can realize its goals absent the disturbing litigation constraints.

The Fund is procedurally advantageous because the ATSSSA promises the claimants an assured and relatively predictable monetary award. Litigation can never guarantee such an outcome. Negligence of the airlines and baggage inspectors would be difficult for the families of passengers to prove253 since the weapons used by the terrorists were not banned items at the time.254 While the absence of negligence does not immunize a defendant from tort liability, litigants would bear the burden of proving that the airlines should have reasonablyforeseen the risk of harm, which is equally difficult to

252. 438 U.S. at 85-86.
253. See Rabin, supra note 15, at 792.
The Special Master demonstrate.255

The speed a fund offers is another appealing quality. Awards can be settled immediately since the statute requires the Special Master to finalize awards within 120 days of the filing256 and make payments within twenty days of the award determination.257 In addition, the enacting regulations permitted an eligible claimant to receive an advance payment if necessary.258 As Senator Orrin Hatch noted during the congressional debate, "[t]his [Fund] will help ensure that injured people receive money and receive it faster than they otherwise would if left to pursue claims through litigation."259 Litigation indeed is a protracted and drawn-out process. Appeals might take years, even assuming that plaintiffs could meet the steep evidentiary burdens. Furthermore, damages could be effectively unenforceable if they exhaust the airlines' insurance coverage and force them into bankruptcy.

Congress designed the Fund to be less complicated and easier to navigate. The claims process does not require claimants to hire lawyers,260 while litigation involves substantial attorney's fees, slow-moving dockets, numerous motions, and other requirements. After deducting transactional and attorney's fees, the net award issued at trial might be lower than the award offered by the Fund.

Legal award provisions also point towards the Fund. New York law does not permit plaintiffs to recover damages for grief or hedonic damages for loss of enjoyment of life.261 Plaintiffs could obtain an award for pre-impact emotional distress, but this would likely be far less than the noneconomic loss provided by the Fund.262 Moreover, under tort damages, the portion of recovery for lost income would be taxable.263

Recoveries in civil litigation are unpredictable. Compassionate juries may render large awards, surpassing those available from the Fund. "Where victims are sympathetic and the defendant is liquid, tort liability has been known to spontaneously materialize."264 Relying on the benevolence of the jury, however, is always risky, as any outsized jury award would be a candidate for

255. See BRILL, supra note 30, at 137 ("Besides, winning a case against the airlines was not going to be easy . . . . It's hard to argue that any of these crashes—that what these hijackers did—was foreseeable, which is the benchmark standard for liability."); Kushlefsky, supra note 76, at 16-17.
257. See id. § 406(a).
260. See INSTRUCTIONS, supra note 89, at 3.
262. See N.Y. EST. POWERS & TRUSTS LAW § 11-3.2(b) (McKinney 2001).
263. See id.
264. Maginnis, supra note 85, at 12.
appellate rescission. Furthermore, juries may award less in damages if they sense that plaintiffs are too greedy or if they sympathize with the airlines, which were also injured by the attacks.\textsuperscript{265} Aware of the sheer number of plaintiffs, a jury may be reluctant to give each one a generous award.\textsuperscript{266}

Notwithstanding the risk calculus developed above, some argue that in the absence of a cap, victims and families would certainly elect to litigate. The increased pool of funds and the potential to win higher awards tilt any decision in favor of litigation. This reasoning, which has some initial merit, revolves around a simple exercise in game theory. With the cap in place, all victims recognize the limitations on litigation awards. In other words, they recognize that if they all choose the litigation option, they might collectively exhaust the cap and end up with nothing. Accordingly, the victims realize that with the cap in place, the only way to ensure payment is if all select the Fund.\textsuperscript{267}

Without a cap, it is argued, the calculation changes. Since conceivably there would be funds in excess of six billion dollars available to cover jury rewards, victims would only need to consider the usual risks of litigation in making their decision. The collective decision pointing towards the Fund would seemingly evaporate. Yet, a cursory look at the finances of the airlines, as well as the claims of victims ineligible for the Fund, reveals the argument's severe limitations.

As noted above, many parties who suffered some kind of injury as a result of the September 11 attacks were nonetheless deemed ineligible for the Fund. They are entitled to sue the airlines but are likely reluctant to pursue this course because of the cap on available damages and the difficulties in meeting the evidentiary standard. Absent the cap, the number of suits from these Fund-ineligible victims would likely multiply. Suddenly, any Fund-eligible parties considering the tort option would find themselves vying to litigate with a host of new parties. While this might not be a problem if the airlines had unlimited funds, the airline industry was struggling in a sluggish economy even before September 11, and the attacks only made this condition worse. If the airlines were inundated with litigation without the protection of a cap, they would likely be forced into bankruptcy, leaving litigants to scrap for assets along with a host of more senior creditors. The airlines' financial predicament is effectively a cap—the industry's inevitable bankruptcy in a climate of unconstrained litigation precludes the possibility of obtaining awards larger than the Fund could offer.

Returning to the game theory analysis demonstrates that this "cap-in-effect"


\textsuperscript{266} See Floering, supra note 145, at 211.

\textsuperscript{267} There may, of course, be several free-riders waiting until the last minute in the hopes of litigating alone, but any such individuals would be relying on the contrary behavior of fellow claimants.
yields the same results as the congressionally mandated cap. Without the statutory cap, victims would nonetheless understand that if too many chose litigation, the airlines’ insurance would be depleted, forcing the airlines to seek bankruptcy protection. Victims would also recognize that their peers would be making similar calculations and that, therefore, the safe game theory move would be to join the Fund collectively, thereby ensuring a guaranteed payment. Had Congress left out the statutory cap, the practical outcome would likely have remained unchanged, and a precedentially difficult statute never would have made its way on to the books.

B. Possibilities

As demonstrated above, injured victims and families of decedents would be better off filing a claim with the Fund regardless of the cap. Yet, if potential claimants had ignored this conclusion and chosen to litigate in spite of the Fund’s benefits, then the airlines would likely have gone bankrupt. Thus, some might maintain, instituting the cap was crucial to protect the airlines. This argument, however, overlooks the many other ways Congress could have protected the airlines had it taken the time to actively debate and think through the legislation. This Section will discuss a few of these alternatives, addressing challenges to the predicament of the airlines, the power of the Special Master, and the limited litigation option.

Other than ensuring the airlines’ viability through a cap, Congress could have increased the bail-out section of the ATSSSA, making it sufficient to cover the costs of uncapped litigation. Alternatively, Congress could have assumed vicarious liability and distributed damages on behalf of the airlines. In such a situation, the victims and families would file a suit against whomever they believed culpable, proceed to a verdict before a jury, and then collect damages from the government. After all, the government is really the “defendant” under the ATSSSA. The government has previously turned to the idea of vicarious liability in the context of victim compensation, most notably in the National Swine Flu Act. In fact, Steven Brill discloses that the Bush administration was willing to resolve the due process quandary by paying off all the verdicts plaintiffs won in court that exceeded the airlines’ coverage. Instead, Congress chose the more limited vehicle of recovery in the form of the Victim Compensation Fund.

Both of these options, increasing the bail-out section of the ATSSSA and assuming vicarious liability, would have offered the added benefit of deterring airlines from careless behavior. The airlines were given no motivation—beyond public relations—to change their conduct or take greater precautions because

268. See supra text accompanying notes 234-236.
269. BRILL, supra note 30, at 94.
potential damages were capped and litigation stymied. Had Congress adopted one of the two options discussed above, the airlines would have been placed in the unenviable position of engaging in tedious and cumbersome trials. Though they would not have shouldered the full financial effects of the verdicts, the long and public trials, among other burdens, might have served as a powerful deterrent to future careless behavior.\textsuperscript{270}

Congress could have also approached the position of the Special Master in a number of other ways. For example, establishing several special masters would have diminished the centralized power eventually vested in Feinberg.\textsuperscript{271} A substantial number of highly individualized claims calls for more than one expert adjudicator. Perhaps federal magistrates\textsuperscript{272} or senior federal judges should have been appointed.\textsuperscript{273} One reason to favor these officials is their institutional accountability. They operate as judicial officers with a formal judicial role. More importantly, their decisions would ostensibly be subject to standard review from higher courts.

Of course, appointing a number of special masters could have led to wrangling, which would have frustrated the Fund's ability to deliver immediate compensation. Yet some sort of congressional monitoring of the special masters might have overcome this difficulty while preserving the benefits produced by the diffusion of power. Additionally, the Attorney General, whom the ATSSSA permits to "act[] through a Special Master," should have been afforded greater oversight.\textsuperscript{274} After all, "[i]nstitutional design should not depend on finding a single individual with a unique set of talents and experience; rather, it should assist whoever is assigned to the institution to make good decisions."\textsuperscript{275}

Even if Congress was intent on having a single Special Master, the appointment process might have been improved. While Feinberg has been widely praised for his conduct as Special Master, his actions and personality have troubled certain Fund claimants and commentators.\textsuperscript{276} In light of these objections, Congress might have considered a more transparent, perhaps confirmable, appointment process in order to avoid the perception of partiality.


\textsuperscript{271} See Degraw, supra note 144, at 839. Such a plan would of course have required detailed congressional guidance on the nature of the collaboration between special masters. One possibility would be a panel, majority vote as is used in federal appellate courts and administrative commissions such as the SEC and FEC.

\textsuperscript{272} See, e.g., Judith Resnik, Managerial Judges, 96 Harv. L. Rev. 374, 425 (1982).


\textsuperscript{275} Alexander, supra note 31, at 668.

\textsuperscript{276} See Kolbert, supra note 2.
Alternatively, Congress could have utilized the more regularized procedures employed by administrative agencies in selecting ALJs.\textsuperscript{277}

Linda Silberman suggests that Congress should have revised Rule 53 to expand the category of court-appointed special masters to cover roles like that of the Fund’s Special Master.\textsuperscript{278} Such an expansion would include provisions setting standards for selecting special masters, criteria for the appropriate use of special masters, provisions restraining the role of special masters, and conditions granting independence and control.\textsuperscript{279} Per Silberman’s argument, the Special Master would have been governed by this expanded version of Rule 53.

A similar proposal might have incorporated the Fund into an existing administrative agency bound by the provisions of the APA. The Social Security Administration, FEMA, or the Terrorism Risk Insurance Program within the Department of the Treasury all could have served in this function and assumed the responsibilities of the Special Master.\textsuperscript{280} Congress could have also created a new administrative agency subject to judicial review under a deferential standard. Unlike a court or an existing administrative agency, this option would have allowed specialization and flexibility. While it did not exist at the time, the Department of Homeland Security would be an especially logical option for future funds, as victim compensation and other responses to terrorist acts could be comprehensively coordinated.\textsuperscript{281}

Finally, Congress could have formed a new Article I court to manage the Fund. Under such a plan, the Special Master’s findings of fact would be accepted for formal proceedings unless clearly erroneous. For informal proceedings, findings of fact would be accorded a rebuttable presumption of correctness. The Special Master’s findings of law would be considered only advisory. Congress could have located this Article I court within the U.S. Court of Federal Claims, similar to the compensation scheme developed by the National Vaccine Injury Compensation Program discussed above.\textsuperscript{282} Under that earlier scheme, claimants were required to file with the Compensation Program in order to litigate within the Court of Federal Claims. Requiring injured parties to first file an administrative claim both reduces the number of tort claims and grants most people much of what they want—financial recovery within a medium that secures the full pantheon of procedural rights.

The ATSSSA was an important congressional response in a time of great uncertainty. But it was clearly only one of many possibilities. Had Congress spent more time debating and thinking about the statute, it might have

\textsuperscript{277} See supra text accompanying notes 156-171.
\textsuperscript{278} Silberman, supra note 144, at 2174-75.
\textsuperscript{279} See id.
\textsuperscript{280} See Alexander, supra note 31, at 662.
\textsuperscript{281} See id.
\textsuperscript{282} See supra text accompanying notes 221-233.
developed alternatives more consistent with traditional notions of due process.

**CONCLUSION**

The deadline for filing claims with the Fund was December 22, 2003. Claims were computed in the summer of 2004, and findings were published in November of 2004. The long and cumbersome process has finally ended, and it is now, therefore, the best time to assess the work of the Fund. The goal of this Article is not to malign the Special Master nor is it to impugn all of Congress's actions and intentions. But it cannot be denied that Congress enacted a statute riddled with litigation inadequacies and constructed a fund controlled by a "Tsar." Even Feinberg, who has generally lauded the Fund as a wise response to the problems posed by September 11, concedes that "it would be a mistake for Congress or the public to take the 9/11 fund as a model in the event of future attacks."

The 9/11 Fund... is an aberration, it is unique, and I don’t think Congress will do this again. I think Congress will view this as a response to a very unique historical disaster, like Pearl Harbor. The next time it happens, God forbid, I’m dubious that Congress will replicate the program, and if it does... Congress will probably... give everybody the same amount and not ask one person to say "You get three million, you get two million, you get four million." I don’t think they’ll ever do that again.

As the *Los Angeles Times* remarked in somewhat embellished language, "September 11th is one of the defining events in the history of the world... and [the Special Master] get[s] to write one of the closing chapters in that event."

While the Fund creates the Special Master, the Special Master commands the Fund. If the role of Special Master lacks legitimacy, then the Fund lacks credibility. This is not to say that the Fund failed to provide sufficiently for many of the injured victims and the families of decedents. It most certainly did. It is also not to say that Feinberg acted arbitrarily or unfairly. He most certainly did not. But in that regard, it can only be said that Congress got lucky. It very easily could have ended up with another Richard Bland Lee.

If the Fund is defective, then, arguably, the ATSSSA is unsound. Yet let us go back to the weeks following September 11 and think about the benchmark of success. How do you measure the success of a statute created in a tumultuous period of national tragedy? More than four years later, is it fair to assess the ATSSSA with current standards, to witheringly criticize the Fund,

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283. See Synagogue Address, supra note 22.
284. Shapo, supra note 270, at 1246.
285. FEINBERG, supra note 7, at 23.
286. Id. at 178.
287. See Q & A, supra note 63.
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and to judge it with the hindsight of the September 12 Era?\textsuperscript{289} Under this new perspective, the Fund can be seen as a monumental accomplishment. Still, it should leave no legacy in the form of precedent or universal principles.

\textsuperscript{289} See BRILL, supra note 30.