ARE WE IN GOOD HANDS? A COMPARATIVE ANALYSIS OF COMPENSATION SCHEMES CONCERNING CATASTROPHES AND THEIR ADMINISTRATIVE STRUCTURE

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I. INTRODUCTION

On September 11, 2001, "[n]early 3,000 people" were killed due to terrorist-related aircraft crashes into the World Trade Center towers, the Pentagon, and Shanksville, Pennsylvania.[1] Eleven days later, President George W. Bush and the U.S. Congress enacted the Air Transportation Safety and System Stabilization Act (the "ATSSSA").[2] The rationale behind the ATSSSA's formation was to "[limit] the liability of air carriers for all claims," these claims would be funneled into the "VCF as a source of compensation for those physically injured by, or who lost family members in, the attacks."[3] In Title IV of the ATSSSA, "captioned 'Victim Compensation'" created the "September 11th Victim Compensation Fund of 2001 (the "VCF")."[4] The objective of Title IV was "to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001."[5] Pursuant to "section 407 of the Act," a "Notice of Inquiry initiated a process of rule-making under the Act" whereby

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1 Pamela Engel, *What Happened on 9/11, 17 Years Ago*, BUS. INSIDER (Sept. 11, 2018), https://www.businessinsider.com/what-happened-on-911-why-2016-9.

2 Colaio v. Feinberg, 262 F. Supp. 2d 273, 278-79 (S.D.N.Y. 2003) (ATSSSA was codified into 49 U.S.C. § 40101 (2000) and subsequently amended on Nov. 19, 2001, and Jan. 23, 2002); *see also* Edward Sherman, *Compensating Victims of Mass Disasters Through the Court System: Procedural Challenges and Innovations*, 1 RUSSIAN L.J. 66, 68 (2013).

3 Gillian K. Hadfield, *Framing the Choice between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 L. & SOC. REV. 645, 649-50 (2008).

4 *See Colaio*, 262 F. Supp. 2d at 279.

5 *Id.* at 279.

a Special Master is appointed by the Department of Justice (the "DOJ") as to promulgate the regulations of the VCF.[6]

On November 26, 2001, Kenneth R. Feinberg was appointed the Special Master of the VCF, followed by the DOJ's "Interim Final Rule," which were the guidelines set out to regulate the fund.[7] Feinberg accompanied the Interim Final Rule with his "Statement by the Special Master," which provided "methodolog[ies] for determining awards" along with logistical guidelines, such as the timelines, schedules and eligibility tables.[8] Finally, a "Final Rule" was published by the DOJ following public comments, "modifying some provisions in the Interim Final Rule but otherwise leaving the Interim Final Rule in full force as the law governing the administration of the Fund," which was followed by another "Statement by the Special Master."[9]

Since the inception of the VCF in 2001, the compensation fund has been amended with several administrative changes. This compensation fund was provided as an alternative to tort litigation.[10] The initial VCF resembled a no-fault compensation scheme that had with a federal cause of action against the fund, with exclusive jurisdiction in the federal court for the S.D.N.Y.[11] In December 2003, the first VCF closed, but was later reopened under "H.R. 847, the James Zadroga 9/11 Health and Compensation Act," which set forth new regulations to "explain in detail how people will be compensated" so that the people "will have a clearer idea of where they stand."[12] Because of H.R. 847, the VCF will remain until "the end of [the] fiscal year 2020."[13]

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6 *Id.* at 281 (Special Master is appointed by Attorney General John Ashcroft in order to regulate the VCF).

7 *Id.*

8 *Id.* at 282

9 *Id.* at 281; *see* 67 Fed. Reg. 11, 233 (Mar. 13, 2002) (codified at 28 C.F.R. pt. 104).

10 *See Colaio*, 262 F. Supp. 2d at 282 (by electing to file a claim with the VCF, the claimant waives their right to litigation).

11 Robert M. Ackerman, *The September 11th Victim Compensation Fund: An Effective Administrative Response to National Tragedy*, 10 HARV. NEGOT. L. REV. 135, 145 (2005).

12 Press Release, Rep. Carolyn B. Maloney, Zadroga Bill Authors Applaud Commitment to Reopen 9/11 Victim Compensation Fund by October 1st (May 4, 2011), https://maloney.house.gov/media-center/press-releases/zadroga-bill-authors-applaud-commitment-reopen-911-victim-compensation-fund-october.

13 H.R. 847, 111th Cong. (2010) (enacted).

Moreover, the 9/11 VCF was unique, in that it was "unlike any other government benefit program"[14] as "the most comprehensive no-fault schemes [of the past] addressing nationwide injury tolls – workers' compensation and auto no-fault – have been adopted at the state level, rather than through Congressional action."[15] Due to the disaster's unique cause and the emotional devastation it left within its take, this ad-hoc response was justified under special circumstances of the disaster—"[i]n short, the Fund was created under singular circumstances."[16]

However, despite the innovative approach of the VCF[17] and its compensatory boons to the claimants, there are still issues such as a cap on funds and claim eligibility.[18] Furthermore, because of the "[VCF] limited resource[s]," the Special Master will ultimately have to "compare the urgency of each claimant's needs" when the number of claims increases.[19]

Once the immediate disaster—especially one as devastating as 9/11 has occurred—"the question of what should be done to compensate the victims for their personal [loss]" is asked.[20] In order

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14 Matthew Diller, *Tort and Social Welfare Principles in the Victim Compensation Fund*, 53 DEPAUL L. REV. 719, 720 (2013) (explaining that previous governmental programs only provided for death benefits or pensions, however, the 911 VCF is attempts to "compensate" survivors in making them "financially whole again.").

15 Robert L. Rabin, *The Quest for Fairness in Compensating Victims of September 11*, 49 CLEV. ST. L. REV. 573, 574 (2001) [hereinafter Rabin, *Quest for Fairness*]; *see also* Robert L. Rabin, *Some Thoughts on the Efficacy of a Mass Toxics Administrative Compensation Scheme*, 52 MD. L. REV. 951, 955 (1993) (explaining how Congress enacted the Price-Anderson Act "with the express intent of encouraging investment in nuclear energy research and operations by a private sector daunted by the prospect of multimillion-dollar claims and a constrained insurance market.").

16 Rabin, *supra* note 15, at 574.

17 *Id.* at 585 (explaining the hybrid nature of the 9/11 VCF due to the "game plan for implementation from the Fund and its subsequent interpretation in the Final Rule" as its conception blends the "no-fault precepts" and "tort principles.").

18 Adam Zimmerman, *The September 11 Victim Compensation Fund (Redux?)*, PRAWFSBLAWG (Jan. 2, 2012), http://prawfsblawg.blogs.com/prawfsblawg/2012/01/the-september-11-victim-compensation-fund-redux.html (explaining the difference between the original VCF from 2003 against the renewed VCF in 2011, and how the first VCF allowed wrongful death claims which had no proof of fault, whereas the second VCF operates under personal injury claims. Personal injury claims require a higher factual causation which ultimately decreases potential awards for claimants, in addition to lowering the efficiency of acquiring funds).

19 *Id.*

20 Edward Sherman, *Compensating Victims of Mass Disasters Through the Court System: Procedural Challenges and Innovations*, 1 RUSSIAN L. J. 66 (2013).

to assess the optimal route of compensation from the government, a multitude of domestic and foreign compensation models for victims of "unique disasters"[21] must be analyzed. The objective is to remedy any potential administrative burdens for claimants, through the optimization of the compensation fund's administrative functions. Specifically, the comparative analysis will focus on the administrative procedures and force of law between the United States, Germany,[22] and Japan, in terms of their national compensation schemes. The goal is to analyze the underlying administrative function of various compensation schemes so as to streamline statutory compensation in America against unique catastrophes of man-made nature. Part I will set out a brief overview of the 9/11 VCF along with its history. Part II will analyze the VCF's administrative components and the assessment of its administrative powers. Part III will follow with the analysis of specific nations and their respective administrative procedures when faced with disasters of a similar caliber, such as 9/11. Finally, Part IV will assess the various benefits from each administrative system and propose their potential integration into the United States compensatory scheme.

II. FRAMEWORKS FOR ANALYSIS

In proposing a more efficient and streamlined means of compensation, this note will define the bounds of the analysis. Part II will define the scope of a unique catastrophe and how mass disasters and man-made disasters fit into this frame. Part II will also describe the administrative structure of the 9/11 VCF and how proceedings are facilitated. This outline will showcase the potential issues of the fund, along with prospective remedies that concern compensation schemes from Japan and Germany. In short, Part II aims to illuminate potential drawbacks to the American compensatory scheme while discussing possible solutions to these issues.

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21 *See generally* Thomson Reuters Foundation Et Al., *Compensation Schemes – A Comparative Report on National State Compensation Schemes*, THOMSON REUTERS FOUND. (July 20, 2015, 06:17 AM), http://www.trust.org/publications/i/?id=038ad26c-b7c2-4ce1-8e22-d57dad736f9c.

22 Hermann Pünder, *German Administrative Procedure in a Comparative Perspective: Observations on the Path to a Transnational Ius Commune Proceduralis in Administrative Law*, 4 INT'L J. CONST. L. 11, 940-61 (2013); *see also* Michael G. Faure, *Financial Compensation for Victims of Catastrophes: A Law and Economics Perspective*, 29 L. & POL. 339-42 (2004) (comparing the "four different legislative approaches in relation to financial compensation for catastrophes.").

A. What Is a Unique Catastrophe?

Disasters are ultimately inevitable, whether they are perpetrated by man or through a whim of nature. One thing is for certain—that disasters will happen, and that they will happen regardless of the location. Logically, the next question that follows is: "[a]re [y]ou [i]n [g]ood [h]ands?"[23] When assessing disasters and their subsequent compensation, these systems may be analyzed in two ways—micro and macro. On the micro or "individual level, even if no else is directly impacted, a loss may be disastrous (or catastrophic)," whereas a macro framework will focus on mass disasters, which can inflict multiple losses to a large group of people.[24] For the purpose of this note, the focus will be on the macro aspect of catastrophes of large magnitudes.

Disasters, whether major or minor, do not discriminate between borders. As such, this is an issue that every nation has faced. Because of this, various countries have developed different types of remedial actions relating to disasters which plague them.[25] This is illustrated through the criterion established in the nations' laws and regulations in response to the disasters they face.[26] "Where no tortfeasor is (easily) . . . held liable, and when no insurance coverage is available, victims often turn to the government for some form of compensation."[27]

For example, in the United States, the Federal Emergency Management Agency ("FEMA") declares a "major disaster" when an event is announced as such by "the President, in response to a request from a state governor."[28] This categorization is initiated in the face of disasters "with widespread and very grave consequences that are seen to overwhelm the capacities of state and local governments," which is "the result either of a 'natural catastrophe' or of a fire, explosion, or flood, regardless of the cause."[29]

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23 *See* Lewis Lazare, *Allstate's Dennis Haysbert Muses on 'Truth' in New Ads*, CHICAGO BUS. J. (July 23, 2018, 3:36 PM), https://www.bizjournals.com/chicago/news/2018/07/23/allstate-haysbert-muses-on-truth-in-new-ads.html.

24 Stephen D. Sugarman, *Roles of Government in Compensating Disaster Victims*, 6 ISSUES IN LEGAL SCHOLARSHIP 1 (2007) (explaining that disasters may be different from different points of view, such as individuals versus societal).

25 *See* Faure, *supra* note 22, at 340 (explaining that some nations may suffer from more natural disasters, whereas others suffer from technological disasters such as "great fires, explosions.").

26 *See id.*

27 *See id.*

28 *See* Sugarman, *supra* note 24; *see also* FEMA, http://www.fema.gov (last visited May 26, 2020).

29 Sugarman, *supra* note 24, at 2.

However, despite FEMA's definitions, the factual circumstances of each catastrophe can prove to be quite unique. The temporal differences between "the beginning and ending" of each "event may be quite fuzzy, and, in turn, just who is a victim . . . may be especially uncertain."[30] Given the fickle nature of calamities, and the sheer number of events that can be categorized as disasters,[31] to round out the definition of a unique catastrophe, scholars have stated that it would be '"perhaps helpful to focus on the idea of 'major disasters' (as does FEMA)" as events which "imply[] relatively large aggregate losses," which harm many individuals, and "are often sufficiently grave to overtax the capacity of . . . moderate size or larger communities to deal with the consequences."[32]

In general, major disasters are often viewed as natural disasters, such as Hurricane Katrina or the Japanese earthquake and tsunami of 2011. However, "a moment's reflection makes clear that many major disasters are the result of human acts – like the terrorist attacks on 9/11/01, wars, [along with] . . . the chemical leak in Bhopal and the nuclear reactor meltdown in Chernobyl."[33] Because mass disasters can appear in many permutations—whether they arise from aircraft crashes, devastating oil spills, or nuclear reactor meltdowns, the definition of a unique catastrophe ought to be narrower in scope. The defining aspect for a unique catastrophe has to be an event so devastating that it has "violat[ed] to some degree nearly all standard conditions for insurability. These [disasters] are low-frequency, high-severity [events] that violate statistical independence by affecting many [people] at one time."[34]

B. Claim Process in the 9/11 VCF

Generally, the claim process involves actions taken by the administrators of the compensation scheme in relation to the claimants. For American federal compensation schemes, a "formal rule making process [is] required under the federal Administrative Procedure Act (the "APA")—that is, publishing a notice of proposed rules in the *Federal Register* calling for public comment, considering

30 Sugarman, *supra* note 24, at 3.

31 *See generally* THE DISASTER CENTER, http://www.disastercenter.com/ (last visited Oct. 21, 2018).

32 *See* Sugarman, *supra* note 24.

33 *Id.* at 4.

34 J. David Cummins, *Should the Government Provide Insurance for Catastrophes?*, 88 FED. RES. BANK ST. LOUIS REV. 337, 338 (2006).

comments, and finalizing the rules."[35] The rules in the scheme typically list out the eligibility of claimants for compensation, and "formulas [for] determining the amounts of compensation to be paid to each eligible victim."[36] Additionally, transparency of the funds' administration is an important factor to consider. This was emphasized by the 9/11 VCF through its inception, with Special Master Feinberg "provi[ding] almost daily updates regarding the median awards and average awards. He indicated the range of awards for each income level and provided examples of [them], describing the circumstances while maintaining [the] anonymity of the claimants."[37]

C. Administrative Issues of the 9/11 VCF

1. Foundation of 9/11 VCF administration powers

Despite the prompt response to a national tragedy, Congress's formulation of the VCF is not without its problems. Because of the 9/11 VCF's unique circumstances,[38] its inception embodied various administrative processes that "was distinguished by its capacity to fill gaps in legislation," while allowed it to "tak[e] advantage of the subject-matter expertise of . . . administrative agenc[ies]."[39] The underlying force of law for rulemaking was the "emergency legislation" which was reinforced by "Feinberg's expertise[.]"[40] Furthermore, the application of the VCF (which was largely through rulemaking) was more efficient when compared against the "traditional judicial process."[41]

In order to create an emergency fund that was highly fine-tuned for claimants, the regulations initiated by Feinberg in the VCF were "not subject to Senate confirmation but appointed by a Senate-confirmed Cabinet officer who was in turn appointed by a President who reached office while failing to obtain a majority of the popular

35 STEVEN GARBER, DESIGNING COMPENSATION PROGRAMS FOR INDIVIDUALS AND HOUSEHOLDS AFTER MAN-MADE AND NATURAL DISASTERS IN THE UNITED STATES, 30 (2016).

36 *Id.*

37 Ackerman, *supra* note 11, at 214.

38 *Id.* at 205.

39 *See* Ackerman, *supra* note 11, at 148 (Professor Ackerman explains the "upstream process" of the VCF).

40 *Id.*

41 *See id.* (explaining the terminology behind "upstream" and "downstream" in footnote 51); *see also id.* at 205.

vote."[42] In other words, even though the review and comment process in the VCF was efficient in its individualized delivery of compensation, its "ad hoc government[al rulemaking] smacked of authoritarianism and disregard for conventional . . . processes."[43]

2. Administrative Boundaries of the VCF

In assessing accountability, this "refers to the degree to which the government can be held responsible to the citizenry for its policies, words, and actions."[44] Under Professor Ackerman's definition of "upstream," or the process of lawmaking, the accountability aspect of the VCF is assessed on its ability to promulgate its lawmaking ability, or in short, the VCF's regulatory processes.[45] In his analysis, Ackerman states that, "[w]ere we to grade the [VCF's] accountability . . . we would give it a 'C,' and the C is for *Chevron*."[46] Though the basic foundation is established by Congress, "which remains accountable to the electrical process,"[47] the VCF's rulemaking abilities are left to the Special Master. Following the VCF's creation, most of its rulemaking abilities and application were to be filled in under the discretion of the "[s]pecial [m]aster with no direct accountability to the electorate."[48] In *Colaio*, the court assessed the validity of *Chevron* in an action against Feinberg, the Attorney General, and the DOJ over award compensation pursuant to the VCF.[49] The claimants argued that the Special Master's proposed awards failed to compensate the bereaved because of the scheme which:

> (1) imposed an arbitrary and unreasonable "cap" on awards; (2) improperly imposed a "needs" test in determining the "individual circumstances of the claimant;"(3) imposed a restrictive interpretation of "economic loss" contrary to New York law; (4)

42 Ackerman, *supra* note 11, at 208.

43 *Id.* (arguing that the VCF's administrative processes have been critiqued for appearing less "democratic" than if they were fully enacted by Congress).

44 *Id.* at 211.

45 *See id.* at 148 (explaining both the procedural and substantive rulemaking processes within the administration of the fund).

46 Ackerman, *supra* note 11, at 211 (explaining how the VCF's legal authority is founded on the discretion given the agencies in the Fund because of *Chevron*); *see also* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984).

47 Ackerman, *supra* note 11, at 211.

48 *Id.*; *see also Colaio*, 262 F. Supp. 2d at 273.

49 *See Colaio*, 262 F. Supp. 2d at 273.

> improperly failed to publish [his] methodology for determination; (5) required that claimants present "circumstances" for claims not adequately addressed by the presumptive award methodology; (6) improperly used post-tax income as the basis for calculating economic loss; (7) arbitrary and unreasonably used a higher consumption rate for single decedents than for those who were married or had children in determining economic loss, and; (8) violated equal protection and due process rights in making award determinations.[50]

Chevron requires a two-step analysis, which states that:

> (1) if Congress has directly spoken to the precise question at issue in the text of the statute, the text governs or (2) if the statute is silent or ambiguous with respect to the specific issue, then the court reviews whether the agency's answer is based on permissible construction of the statute.[51]

In *Colaio v.Feinberg*, the court's analysis of *Chevron* also included an application of the rule in *Skidmore v. Swift & Co.*; in applying the rule, the *Colaio* court held that "agency policies not promulgated in accordance with the APA's notice and comment procedures (here, that would include the Special Master's tables and determinations) are still accorded a measure of deference."[52]

The court established that "while precluding the review of the Special Master's *determinations*, [the statute] did not preclude judicial review of his regulations, methodologies, and policies prior to such determinations."[53] Thus, "[t]he judicial scrutiny was, in turn, subject to *Chevron* deference"[54] and "or, at minimum, *Skidmore* respect."[55] Utilizing the *Chevron* and *Skidmore* standards, the court reviewed each of the plaintiff's elements which alleged that the Special Master had imposed a "de facto cap" on awards through arbitrary and

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50 *See* Ackerman, *supra* note 11, at 165-66 (explaining the plaintiff's elements for their cause of action against Feinberg, the Attorney General and DOJ).

51 *Id.* at 165-66.

52 *See id.* at 166; *see also* Skidmore v. Swift, 323 U.S. 135 (1944).

53 Ackerman, *supra* note 11, at 211.

54 *See id.* at 211.

55 *Id.* at 166 ("The weight of [the agency's] judgment . . . will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."); *see Colaio*, 262 F. Supp. 2d at 288 (quoting *Skidmore*, 323 U.S. at 140 (1944)).

capricious calculation methods. Ultimately, the court found that there was no evidence of a cap on award compensation.[56] The court recognized that each individual had a "right to a hearing," where she might provide additional "individualized circumstances" and argue that the "methodology is inadequate."[57] Furthermore, on the question of economic loss beyond the 98th percentile, "even the plaintiffs had conceded that one [might] more readily forecast future income streams for low- and middle-income employees than for decedents with high incomes."[58] Therefore, asking the Special Master to calculate awards for the 98th percentile could be highly speculative, and because of this, Feinberg's calculations are reasonable.[59]

Following the challenge against the use of the "needs" test, the *Colaio* court decided that the determination of "individual circumstances" includes the "financial needs and resources of the claimant, in addition to the victim's dependents and beneficiaries."[60] Subsequently, because the issue pertaining to this test focuses on the economic disparity of awards between different economic standings, the court looked to legislative history, such as then-Senator John McCain's (R-AZ) speech regarding the intent of the VCF:[61]

> No amount of money can begin to compensate the victims for their suffering. Nothing will make them and their families "whole." It is not the intent of the federal Fund to do this. Nor is it the intent of the Fund to duplicate the arbitrary, wildly divergent awards that sometimes come from our deeply flawed tort system—awards from which up to one third or more of the victims' award is often taken by attorneys.
>
> The intent of the Fund is to ensure that the victims of this unprecedented, unforeseeable, and horrific event, and their families do not suffer financial hardship in addition to the terrible hardships they already have been forced to endure.[62]

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56 *Colaio*, 262 F. Supp. 2d at 290.

57 *See* Ackerman, *supra* note 11, at 167.

58 *Id.*

59 *See id.* (additionally, it was also not unreasonable to utilize a "three-year earnings average to determine presumed economic loss") (quoting *Colaio*, 262 F. Supp. 2d at 291-92).

60 *Id.*

61 Ackerman, *supra* note 11, at 168 (citing to *Colaio* quoting 147 CONG REC. S9594 (daily ed. Sept. 21, 2001) (statement of Sen. McCain)).

62 *Id.*

The crux of Senator McCain's speech illustrates the intent of the VCF as the device to mitigate financial hardships that are inevitable following a disaster of this magnitude. Furthermore, Senator McCain concluded that "[t]he Fund was not intended to replicate tort damage awards in wrongful death cases." [63] Applying Senator McCain's speech, the *Colaio* court ruled that Congress's message was clear—the Special Master was to have full discretion for financial determination of the VCF and that "discretion beyond the 98th percentile level [for determination] according to the claimant's needs, resources, and other individual circumstances" was a "discretion that Congress wanted the Special Master to have."[64]

In regards to the plaintiff's economic loss argument being contrary to New York law, *Colaio* explained that "economic loss" defined within § 402(7) "refers to the types or categories of loss under state law, and does not deal with the calculation of damages."[65] The court also stated that "[C]ongress did not instruct the Special Master to engage in . . . intricate calculations mandated by state tort law in crafting awards." [66]

Furthermore, because § 402(7) is ambiguous, the *Colaio* court extended *Chevron*'s deference to the agency's interpretation of its guidelines.[67] As a result, the Special Master did not have to follow New York law in his determination of compensation.

3. Delegation Issue

In *Colaio*, the plaintiffs also challenged the "nature and scope" of the VCF pursuant to its power "by Congress to DOJ and the Special master."[68] First, the plaintiffs stated that the Special Master was a "quasi-judicial official responsible for assessing evidence and calculating awards" pursuant to Congress' regulations and that the DOJ should distribute the funds, in conjunction with the Department of Health and Human Services ("HHS") administering it.[69] Second, the plaintiffs argued that even if Congress did grant discretion to the

63 *Id.*
64 *Colaio*, 262 F. Supp. 2d at 291-93.
65 *Id.* at 294.
66 *Id.*
67 *See* Ackerman, *supra* note 11, at 169.
68 *Colaio*, 262 F. Supp. 2d. at 294.
69 *Id.* at 294.

Special Master, this delegation was "not guided by any 'intelligible principle.'"[70]

The *Colaio* court's answer to the first question is merely a textualist one, pointing to the language in § 404(a), which states that the Special Master is authorized to "promulgate all procedural and substantive rules for the administrative of this title[.]"[71] The second question of "intelligible principle" invokes a bigger issue of separation of powers, [72] in that "a Congressional delegation of lawmaking power to an administrative agency presents a separation of powers issue," because Congress must provide this agency with an "intelligible principle" as a guideline. [73] This is a question of extraordinary magnitude as it sought to invalidate a statutory delegation, that struck into the heart of administrative powers.[74] In resolving this question, the court stated that § 403 provided such intelligible principles as to "provide compensation" and that it is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."[75] In analyzing the issue, *Colaio* stated that "[a]lthough plaintiffs may disagree with how the Special Master proposes to exercise his discretion, and perhaps even with Congress' decision to grant him discretion, it cannot be said that the Act fails to provide an 'intelligible principle.'"[76]

4. The VCF's Objective

Furthermore, the rational aspect of the VCF has been critiqued, under the APA, throughout the implementation of the VCF.[77] The focus of this critique "stemmed from the Congress' failure to articulate

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70 *Id.*

71 *Id.* at 295.

72 *Id.*

73 *See* Ackerman, *supra* note 11, at 169-70 (the crux of the "intelligible principle" argument is that it challenges the lawmaking discretion of administrative agencies. Ackerman cites to the *Schechter Poultry* case where Supreme Court Justice Thomas expressed concern that the existence of the "intelligible principle" has strayed too far "from [the] Founders' understanding of separation of powers.").

74 *Id.* at 170 (in Whitman v. American Trucking Ass'n, Inc., 531 U.S. 457 (2001), "Justice [Clarence] Thomas invited the Court "[o]n a future day" to "address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers.").

75 *Colaio*, 262 F. Supp. 2d at 294-96 (quoting Mistretta v. United States, 488 U.S. 361, 372-73 (1989)).

76 *Id.* at 294-96.

77 *See generally id.*

a consistent rationale for compensation." [78] This question is exemplified through the formation of the VCF and "its subsequent interpretation in the Final Rule," which "can be seen as curious hybrid[.]"[79] This was depicted through Feinberg's regulations, which "[edged] up closely . . . to the range of tort compensation [as] to make no-fault benefits under the Fund"[80] through his case-by-case basis of claim determination. [81] In the end, "Feinberg . . . [crafted] a compromise that had elements of distributive justice (and perhaps practical politics) at the high and low ends, but which for the great majority of claims employed a corrective justice model."[82] In other words, Feinberg's amalgamation of "distributive justice" and "corrective justice," [83] pursuant to *Chevron*, lacked procedural safeguards because of the heightened discretionary powers bestowed to him.[84]

D. Through the Looking Glass: Prospective Remedies from Abroad

By analyzing the compensatory schemes and the administrative laws accompanying them, the goal is to gain a greater perspective to augment the process domestically. By studying Germany's regime and its administrative laws, we can evaluate the history of the system's inception, norms and overall purpose. With this understanding, we can gauge the effectiveness of Germany's system for disaster relief and measure it against the United States, specifically, as it pertains to disasters of 9/11's caliber. The goal of this comparison is to highlight varying concepts of administrative law that concern public interests, such as disaster relief.

Additionally, by looking at Japan's relatively new administrative regime, I hope to gain insight about the development of their ad-hoc compensation system as it relates to the Fukushima incident. [85] Pursuant to this, we can evaluate the boons and vices of such a system, and assess the viability of incorporating it within the United States.

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78 *Id.* at 215.

79 *See* Rabin, *Quest for Fairness*, *supra* note 15, at 576.

80 *Id.*

81 *See* Ackerman, *supra* note 11, at 215.

82 *Id.*

83 Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 511 (2011).

84 *Id.* at 512-18 (explaining that critics view Feinberg's scheme as "arbitrary and subjective.").

85 *See* Yoichi Funabashi & Kay Kitazawa, *Fukushima in Review: A Complex Disaster, a Disastrous Response*, 68 BULL. ATOMIC SCIENTISTS 9 (Mar. 1, 2012).

III. EVALUATING GERMANY'S COMPENSATION SYSTEMS

A. Germany's Administrative System

1. Overview the German Administrative Procedure Act

The German Administrative Procedure Act ("VwVfG") was codified as an act to "regulate the legal relationship between the administrative agencies and citizens" in order to increase civil accessibility to "administrative decision making" and "lend a necessary degree of clarity and unity to [the] complex procedural [systems]."[86] The general objective, as stated in section 1 of the VwVfG, "binds [to] only administrative agencies or [similar] public law bodies."[87] On a federal level, this translates to "public law administrative activities," which concern "federal agencies, bodies, institutions, and foundations."[88] Subsequently, the VwVfG's power cascades down into state agencies and regulatory bodies relating to public law, unless "federal regulations specify otherwise."[89]

The VwVfG's public law focus is pursuant to section 9 of the act, which states that: "[a]dministrative procedure in the sense of this law is the externally-affecting activity of executive agencies, which are directed toward the testing of requirements, preparation and issuance of administrative acts or conclusion of public law contracts; it includes the issuance of administrative acts or conclusion of public law contracts."[90]

Furthermore, in German law, "public law contracts" and "administrative acts" are considered terms of art.[91] A public law contract is a general contract which "concern[s] a matter of public law," and requires one party to be a public entity, whereas the other

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86 Edward J. Eberle, *The West German Administrative Procedure Act: A Study In Administrative Decision Making*, 3 PENN. ST. INT'L L. REV. 67 (1984); *see also* Susan Rose-Ackerman, *American Administrative Law Under Siege: Is Germany a Model?*, 107 HARV. L. REV. 1279 (1994).

87 Eberle, *supra* note 86, at 71-72 nn.18-19 (explaining that section 1 of the VwVfG is an amalgam of procedure and substantive acts, with substantive portions covering for the procedural. Additionally, the "[r]estriction of the VwVfG's application to federal agencies or law is a result of the Grungesetz (Basic Law)'s allocation of governmental power between federal and state levels.").

88 Eberle, *supra* note 86, at 71.

89 *Id.* at 71-72.

90 *Id.* at 70.

91 *Id.*

party may be a public entity or private institute.[92] In contrast, an administrative action is defined broadly within section 35 of the VwVfG as:

> [*E*]*very* disposition, decision, or other official measure[s], which is reached by an agency to regulate a single case in the area of public law and which is directed toward an immediate, external legal effect. A general disposition is an administrative act, which is directed toward [a] general criterion or a defined or definable circle of people or which affects public property or its use.[93]

Thus, the VwVfG's role is to act as a bridge between the executive agency and its citizens in "administrative decision making" as to "adhere to legal principles, realize justice, and create a climate of reliable and certain legal expectations."[94]

In practice, the administrative proceeding utilizes a "consensual process" whereby technical decisions and expertise are delegated to private groups, federal advisory committees, and interest groups with the relevant technical background.[95] In addition to delegating technical expertise, the administrative proceedings also rely on "private norm-setting organizations," such as the "German Institute for Norms (*Deutsches Institut für Normung*, DIN)."[96] The utilization of DIN has been criticized by scholars for "introduc[ing] systematic bias into the policymaking process" through the norms generated with their private expertise[97] (not necessarily technical expertise) because

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92 *Id.*; *see also* ACHTERBEG, ALLEGEMEINES VERWALTHUNGSRECHT 13-19 (1982).

93 *See* Eberle, *supra* note 86, at 70 (providing the original German text stated in VwVfG § 35 (emphasis added) provides: "Verwaltungsakt isl jede Verfiigung, Entscheidung oder andere hoheitliche Mass-nahme, die eine Behorde zur Regelung eines Einzelfalles auf dem Gebiet des offentlichen Rechts trifft und die auf unmittelbare Rechtswirkung nach aussen gerichtet ist. Allgemeinverfiigung isl ein Verwaltungsakt, der sich an einen nach allgemeinen Merkmalen bestimmten oder bestimmbaren Personenkreis richtet oder die offentlich-rechtliche Eigenschaft einer Sache oder ihre Benutzung durch die Allgemeinheit betrifft.").

94 Eberle, *supra* note 86, at 72-73.

95 *See* Rose-Ackerman, *supra* note 86, at 1290.

96 *Id.*

97 *See A brief introduction to standards*, DIN, https://www.din.de/en/about-standards/a-brief-introduction-to-standards (lasted visited Nov. 16, 2018); *see also* Rose-Ackerman, *supra* note 84, at 1291.

agencies have frequently relied on DIN's standards for regulations.[98] Furthermore, even though the preliminary proposals between agencies and norm-setting organizations are made public, most of the citizens lack sufficient funds or technical resources to combat their bias.[99] Additionally, norm-setting organizations do not have the necessary expertise and "do not adequately represent all affects interests."[100] Because of this, "excluded interests cannot provide [a] review," which makes the comment review process all the more troubling.[101] However, despite the concerns of bias from various parties, overall, the VwVfG is highly receptive to a public, collaborative approach. This approach is highlighted by the participants of Germany's administrative proceedings—both private citizens and interested third parties—who contribute to the comment and notice process. As a result, such administrative proceedings demonstrate a highly factual and individualized process.

2. Foundation of Rule Interpretation

In Germany, the regulatory approach for rulemaking and rule interpretation is limited through the separation of powers under the *Grundgesetz* ("Basic Law").[102] Before any regulations are to be issued, "the [Basic Law] requires the *Bundestag* ('German federal parliament') to delegate regulatory authority by specifying the 'content, purpose, and scope' of the authorization in the statutory language."[103] To acquire authority to interpret the rules, the agency must adhere to the "prerequisites of a legal norm in contrast to discretion."[104] Scholars have described this legal method as the "normative authorization doctrine."[105] First, this doctrine is utilized when there is an "indefinite legal term" in need of review, and second,

98 *See* Rose-Ackerman, *supra* note 86, at 1291 (agencies such as the Environmental Ministry have "sometimes used their standards as guidelines to the implementation of statutes in the environmental area.").

99 Rose-Ackerman, *supra* note 86, at 1291.

100 *Id.* at 1291.

101 *Id.* at 1291-92.

102 *See id.* at 1288 n.50; *see also* Jan S. Oster, *The Scope of Judicial Review in the German and U.S. Administrative Legal System*, 9 GERMAN L. J. 1268, 1273 (2008).

103 Rose-Ackerman, *supra* note 86, at 1288; *see* also GRUNDGESETZ [GG] [BASIC LAW], *translation at* https://www.btg-bestellservice.de/pdf/80201000.pdf.

104 *See* Oster, *supra* note 102, at 1271.

105 *Id.*

when the "legislature must have granted deference to the agency to define the legal term."[106]

The first requirement of the normative authorization doctrine mirrors the *Chevron*'s deference whereby if "the legislative grants deference to the agency's decision, courts can only review the agency's discretion to a certain extent."[107] The extent of this review states that: "[c]ourt[s] may control whether: (1) the agency abided by the rules of procedure; (2) the facts are correctly investigated; (3) the agency did not violate the principle of equality; (4) the agency kept general standards of evaluation, and; (5) the agency did not consider irrelevant elements."[108] The extent of review concerning an indefinite legal term echoes the sentiment of a *Chevron* deference, through its presumption toward agency expertise.

In examining the second requirement of the normative authorization doctrine, the inquiry of a legal term, scholars have investigated the function of legislative authorization to assess the scope of the inquiry. According to Art. 19 (4) sentence 1 of the Basic Law: the scope of judicial review is assessed through the "coherent interpretation of . . . sentence 1," in addition to the "separation of powers" principle, which requires that "agencies be given some latitude not only against the legislative but also against the judicative."[109] Art. 19(4), states that any "person's rights" that are violated by the public authority must have "recourse to the courts" and that all agency actions must be determined under "questions of fact and . . . of law."[110] This has been interpreted as courts granting deference to "an agency's decisions" where public law is concerned.[111] Furthermore, the separation of the powers prong, is governed under Art. 20 (3) of the Basic Law, which states that "[t]he legislature shall be bound by the constitutional order, the executive

106 *Id.* at 1272.

107 *Id.*

108 *See id.*; *see also* Verwaltungsverfahrensgesetz [VwVfG] [Administrative Procedure Act], May 25, 1976, FEDERAL LAW GAZ. I at p. 2418, as amended Dec. 11 2008, http://germanlawarchive.iuscomp.org/?p=289; *see also* Verwaltungsgerichtsordnung [VwGO] [Code of Administrative Court Procedure], §114, *translation at* http://germanlawarchive.iuscomp.org/?p=292#114 (used in conjunction with Section 40 of the VwVfG, § 114 expands on review process by the courts on agency discretion).

109 Oster, *supra* note 102, at 1273; *see also* GRUNDGESETZ [GG] [BASIC LAW], Art. 19 (4), *translation at* https://www.btg-bestellservice.de/pdf/80201000.pdf.

110 GRUNDGESETZ, *supra* note 109, at 25; *see* Oster, *supra* note 102, at 1274 n.24.

111 Oster, *supra* note 102, at 1274; *see also* GRUNDGESETZ, *supra* note 103.

and the judiciary by law and justice."[112] Due to the way the government is structured, the legislature is governed under a constitutional order, but the "executive and judiciary [is ruled]" by statutory law "made by the legislative."[113] Also, "Art. 97(1) of the Basic Law states that 'Judges shall be independent and subject *only to the [statutory] law*."[114] In short, the legislature governs the courts, which ultimately decide the level of discretion for agencies.

Though Germany's judicial review favors the protection of individual rights, this can come at the cost of overlooking the review of "political and policymaking activities of [the] government."[115] As described by Professor Rose-Ackerman, "[r]ules of standing and private rights action exemplify the German understanding of democracy."[116] In Germany, outsiders may not challenge administrative instruments unless there is a substantial breach of an individual's "subjective right."[117] Because of this rationale, Germany's citizens lack "the range of private rights of action found in American law," as they can merely "defend their individual rights but cannot act as private attorneys general to help enforce the law [and subsequently, challenge its validity.]"[118] Thus, if an individual is granted the right of action because of standing, he may only challenge the subjective rights that have been violated, but not the entire regulation.[119] Due to this, the administrative court tends to tailor individualized solutions based on German law and as a result, the "[r]eview of high-level actions [are overlooked] because no statute sets the procedural parameters for ministry policymaking."[120]

Even though the VwVfG has invited the public to collaborate on its rulemaking process, much akin to *Chevron*'s "notice-and-comment-procedure," this process of rulemaking is ultimately decided

112 *See* Oster, *supra* note 102, at 1274.

113 *Id.* at 1274.

114 *Id.*

115 *See* Rose-Ackerman, *supra* note 86, at 1297.

116 *Id.*

117 *Id.*

118 *Id.* at 1297 nn. 92-93.

119 *See id.* at 1299 (in an example of an atomic plant construction, this may "benefit nature lovers living far from the site but arouse opposition from nearby neighbors." As a result, standing is very difficult to achieve due to the logistics of the geography and alleged "long-distance harm" that one might suffer from a nuclear explosion. Because of this, the courts have balanced solutions tailored to specific needs, or "whose rights [have been] implicated under German law.").

120 *See id.* at 1300.

on the discretion of its agency.[121] Because the general rule of the German administrative process does not *necessarily* require public involvement, there is no need for a "rulemaking-record" involving a "thoroughly reasoned 'statement of basis and purpose'" like its United States' counterpart.[122] However, some modern statutes in Germany have begun to "provide for a certain public participation" in order to increase levels of expertise.[123] While the traditional view in Germany generally precludes public involvement because "there is no constitutional requirement of public input into the administrative rule-making process," it has not explicitly precluded public involvement.[124]

3. Formal and Informal Adjudications

Concerning formal adjudications, both Germany and the United States share a similar approach. Under the German system, formal adjudication is used when a formal procedure ("*formelles Verfahren*") is statutorily required, and when public infrastructures such as urban highways are at stake.[125] Accordingly, as a means to promote "democratic legitimacy and . . . to secure procedural legal protection," a hearing procedure is initiated.[126] This is conducted by a separate hearing authority ("*Anhörungbehörde*"), which drafts a proposal that is "'publicly exhibited for one month in those municipalities' [affected by the issue at [the] hearing]."[127] The rationale behind the publication is to garner public input for "any person[s] whose interests are affected by the project," who may then object to the plan within "two weeks after the end of the inspection period."[128] After this, the hearing authority sends the results to the "planning approval authority," that ultimately issues an administrative act known as the "planning approval decision," which contains all details of deliberation/objections during the process conducted by the hearing

121 *See* Pünder, *supra* note 22, at 946-47.

122 *Id.* at 947.

123 *Id.*

124 *Id.* at 948; *see also* Herman Pünder, *Democratic Legitimation of Delegated Legislation: A Comparative View on the American, British and German Law*, 58 INT'L & COMP. L.Q. 354, 371 (2009) (explaining that the German approach is relatively free from "external requirements" when contrasted with the American rule-making scheme. However, modern statutes have begun to incorporate public opinion as to enhance expertise).

125 *See* Pünder, *supra* note 22, at 949-50; *see also* VwVfG §§ 63-71.

126 *Id.* at 949.

127 *Id.* at 950.

128 *Id.*; *see also id.* at 947 (discussing how "[s]ome modern statutes . . . provide for some public participation in form of hearings of affected interests.").

authority.[129] The objective of the hearing procedure is to reach a mutual agreement between all the parties involved, while maintaining democratic decision-making.

Similarly, the American equivalent of formal adjudication, within the confines of the APA, is known as for its "trial-type" procedure, where the "public has to be informed about the administrative intent to conduct a decision-making process."[130] Subsequently, this is conducted by a third-party administrative judge, much like the separate hearing authority, and during this process, both parties will support their position with evidence and make their case before the judge.[131] As a result, all the parties with interests concerning the issue have an opportunity to voice their opinions.

Regarding informal adjudications, generally, most of the administrative decisions are reached as "informal adjudications."[132] The VwVfG is quite explicit in the regulation of its procedures and enactment. Stated in § 28 (1), "[b]efore an administrative act affecting the rights of a participant may be executed, the latter must be given the opportunity of commenting on the facts relevant to the decision."[133] Accordingly, this language is applicable to "anyone whose rights can be negatively affected by the administrative decision," which also includes third parties, if their rights are implicated.[134] Furthermore, section 39 of the VwVfG explains that all administrative acts must be accompanied by a "statement of grounds," which contains the legal grounds and chief material leading up to the decision.[135] In short, such rules are promogulated to facilitate the intent of protecting "fundamental constitutional rights" and ultimately

129 *Id.* at 950.

130 *Id.* at 949-50 n.50 (explaining the specific provisions in which a formal adjudication is generally triggered. Generally, formal adjudications are triggered via the phrase, "hearing on the record.").

131 *See* Pünder, *supra* note 22, at 949.

132 *Id.* at 950 n. 64; *see also* Gary J. Edles, *An APA-Default Presumption for Administrative Hearings: Some Thoughts on "Ossifying" the Adjudication Process*, 55 ADMIN. L. REV. 787, 795 (2003) (stating that a "broad range of agency adjudication is conducted informally, with a formal hearing procedure reserved for a limited group of cases."); Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 741 (1976) (stating that "informal adjudication[s]" affect "about 90 percent" of the governments' proceedings concerning individuals).

133 VwVfG § 28(1).

134 Pünder, *supra* note 22, at 951.

135 VwVfG § 39(1).

reinforce the theme of VwVfG as an extension of public law governance. [136]

In contrast, the APA is not as extensive as the VwVfG when it comes to informal adjudications. [137] At the outset, the majority of procedural rules for informal adjudication arise from the Due Process Clauses of the United States Constitution.[138] In comparing Germany's administrative approach to the individual's right to be undisturbed by "unlawful government actions," the recourse to unlawful administrative decisions under the Due Process Clause cannot be adequately aligned. [139] Under the German approach, the VwVfG's scope is balanced by the intent of its public law inception; that is, there is a general obligation for the government to prevent unlawful administrative decisions from reaching the public.[140] However, in the United States, as a "constitutional matter, not all administrative decisions in individual cases are protected by hearing rights or rights to reasons." [141] As an example, if an individual is denied social benefits, "deprivation of property rights" is only valid where is there is a finding of the individual being "entitled" to such benefits and "they have been revoked or not prolonged."[142] Furthermore, under the APA, "reasoning must only be given when the written request of an interested person has been dismissed, but not for all actions directly interfering with individual rights." [143] For the sake of democratic legitimation and efficiency,[144] it is worth noting the emphasis that Germany places on public participation within their administrative proceedings, especially for informal adjudications, even to third parties. As a result, adopting certain elements of Germany's norm-

136 *See* Pünder, *supra* note 22, at 944; *see also* Eberle, *supra* note 86, at 87.

137 *See* Pünder, *supra* note 22, at 951.

138 *Id.*; *see generally* Edles, *supra* note 132; *see also* Jerry L. Mashaw, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 GEO. WASH. L. REV. 99, 105 (2007) (explains that individual hearings rights are only allowed under Due Process or specific statutes under the APA. The Constitution does not make independent requirement for "hearings, including reason giving, where general rules or regulations are at issue.").

139 Pünder, *supra* note 22, at 951-52.

140 *Id*.

141 Mashaw, *supra* note 138, at 105-06.

142 Pünder, *supra* note 22, at 952 n.76 (the due process clause, in the United States, is generally a procedural protection concerning "deprivations." This is demonstrated "[i]n cases where the affected person has already received benefits" but are then "deprived" of the interest).

143 *Id.* at 952; *see also* APA § 555(e).

144 *See* Pünder, *supra* note 22, at 948.

based approach could enhance the speed of the United States' informal rulemaking process,[145] without spiraling beyond judicial bounds.

B. Examples of German Compensatory Schemes

1. Ad Hoc, Ex-Post Compensation for Natural Disasters

Generally, for natural disasters such as hurricanes or flooding, Germany's mode of relief is an ad hoc, ex-post compensation scheme.[146] As a result, Germany does not have a "single instrument" that deals exclusively with "financial compensation of victims of (natural) catastrophes."[147] As a result, the country does not have a pre-emptive measure to remedy most natural disasters, unless they are of great magnitudes, such as immense property damage.[148] As Germany does not have a single, unified tool for catastrophe compensation, most victims of minor natural disasters, such as flooding, will end up relying on private insurance policies.[149] However, in extreme circumstances, the "German government or a specific *Länder* (state) will intervene with *ad hoc* legislation" to provide relief for the victims of the disaster due to the magnitude of the event.[150] This type of legislation has been used in the Elbe flood, or the "flood of the century (*Jahrhundert Flut*) in 2002,"[151] which was caused by an "enormous amount[] of rain over central Europe," marking it one of the "worst flood[s] in central Europe since the middle ages."[152] "The [Elbe] floods have killed more than 100 people in Germany, Russia, Austria, Hungary and the Czech Republic and have led to as much as $20

145 *See* Christopher DeMuth, *Can the Administrative State be Tamed?*, 8 J. LEGAL ANALYSIS 121, 153 (2016) (quoting Mashaw, arguing that "executive officials have exercised wide discretion back to the earliest days of the Republic, and that modern agency procedures and judicial review provide fair process and protection against abuse.").

146 Véronique Bruggeman & Michael Faure, *Compensation for Victims of Disasters in Belgium, France, Germany and the Netherlands* 47 (WRR Working Paper No. 30, 2018), https://english.wrr.nl/publications/working-papers/2018/10/10/wp30.

147 *Id.* at 47.

148 *Elbe Flood in 2002*, FLOODSITE, http://www.floodsite.net/juniorfloodsite/html/en/student/thingstoknow/geography/elbeflood2002.html (last visited Nov. 13, 2018).

149 *See* Bruggeman & Faure, *supra* note 146, at 47-48.

150 *Id.* at 47.

151 *Id.* at 47.

152 Diller, *supra* note 14, at 720; FLOODSITE, *supra* note 148.

billion in damages."[153] As a result of the 2002 Elbe flood, the *Flutopferhilfesolidaritätsgesetz* (Flood Victims Solidarity Law) was created as "a fund in order to support the victims of the catastrophe," its "[p]urpose . . . was to give first and limited financial assistance on a primary level (*Sofor-thilfe*) and then to finance measures for removing the damage caused by the 2002 flood and for reconstruction efforts (*Aufbauhilfe*)."[154]

However, scholars researching crises management within Europe have been critical of ad hoc, ex-post compensation much like Germany's response to the Elbe floods.[155] One critique describes the fact that there would be no incentives for potential victims "to take effective preventive measures" due to the existence of a "lump-sum payment under [a] government relief" program.[156] Secondly, because of the existence of this compensation, potential victims may be dissuaded from purchasing insurance "since victims could simply free ride on the State."[157] Finally, there may be an issue of a "negative distributional effect[s]," in which some victims who may have purchased homes at a lower price and "free ride on other individuals (the general taxpayers) who finance the *ex-post* relief."[158]

Despite these critiques, a notable takeaway from a governmental pool is the fact that the Elbe flood was a highly atypical flood, which subsequently caused immense, unforeseeable damages. As these disasters are generally infrequent, an ad hoc ex-post solution for unique catastrophes might not necessarily be as much of a burden on taxpayers.

2. Terrorism Compensation Pools

In contrast to the ad hoc, ex-post relief used in response to natural disasters, man-made disasters such as terrorism have been excluded from reinsurance markets, which has "led to the creation of a so-called terrorism pool"[159] by various countries in response to events like

153 *Flooding on Elbe River*, NASA EARTH OBSERVATORY (Aug. 19, 2002, 12:00 PM), https://earthobservatory.nasa.gov/images/10053/flooding-on-elbe-river.

154 *See* Bruggeman & Faure, *supra* note 146, at 48.

155 Michael Faure & Klaus Heine, *Can European State Aid Control Learn from the Management of Disastrous Crises?* [Europäische Beihilfenkontrolle im Lichte der Herausforderung von Krisen] (Sept. 5-7, 2010), http://www.wiwi.uni-muenster.de/06/nd/fileadmin/vs/2010/Heine-Faure_Referat.pdf.

156 *Id.* at 8.

157 *Id.*

158 *Id.*

159 *See* Bruggeman & Faure, *supra* note 146, at 52.

9/11.[160] In Germany, this is known as the Extremus Versicherungs-AG ("Extremus") which is "a pool consisting of [seventeen] insurers and reinsurers founded . . . in September 2002."[161] The pool acts as a "primary insurer" by purchasing insurance from other shareholders, along with its own and global reinsurers.[162] However, the Extremus pool only covers material damages to property and losses due to interruption of business operations and "[n]uclear, chemical, biological and radiological (NCBR) contamination are generally excluded, as well as cyber-terrorism."[163]

As compared to the American response to terrorism, the 9/11 VCF, a creation of a pool similar to Extermus is a plausible solution. However, the answer to victim compensation differs depending on the approach you take. From an economic point of view, scholars have argued that "structural compensation funds" will lead to '"[v]ictims . . . willingly choos[ing] to 'free ride.'" [164] On the flip side, legal scholars have argued for inclusion of ad hoc, structural compensation funds as they create uncertainty.[165] This uncertainty lies in the fact that ad hoc solutions will only be created for certain catastrophes, but not others and that every ad hoc solution will be tailored to a specific disaster.[166] In short, the legal scholars' argument proposes a fluid solution to an uncertain problem, a solution that this note fully adopts.

3. Technological Catastrophes, a Governmental Approach to Minimizing Risks

For technological disasters such as a nuclear meltdown, or possibly worse, liability is administered under the Atomic Energy Act (*Atomge-setz*). [167] The Atomic Energy Act is "aim[ed] both at promoting the use of nuclear energy and preventing damages"[168] and

160 *See generally* Willis Towers Watson, *The Terrorism Pool Index: Review of Terrorism Insurance Programs in Selected Countries* (2018-19), https://www.willistowerswatson.com/en/insights/2018/11/the-terrorism-pool-index (showing an overview of countries that have terrorism insurance pools).

161 *Id.*

162 *Id.*

163 *Id.* at 19-20.

164 VÉRONIQUE BRUGGEMAN, COMPENSATING CATASTROPHE VICTIMS: A COMPARATIVE LAW AND ECONOMICS APPROACH 204-05 (Kluwer Law International 2010).

165 *Id.* at 205.

166 *See id.*

167 *See* Bruggeman & Faure, *supra* note 146, at 50.

168 *Id.* (the Atomic Energy Act "was passed in 1959, recast in 1985 and modified in 2002, 2011 and 2017.").

is to be utilized in conjunction with the Paris Convention.[169] According to the Atomic Energy Act, the "provisions of the Paris Convention provide the basis for nuclear liability in Germany," while being "complemented by Sections 25 – 40 of the [act]."[170] Since this is an international compensation scheme, the operators are held to be strictly liable for damages, and if "damages are abroad, financial compensation is only due if that country provides reciprocal benefits."[171] Much like other compensations such as the 9/11 VCF, the coverage for potential liability is governed by an administrative authority through its determination of "the type, terms and amount of the financial security, but within the limit of EUR 2.5 billion (§ 13(2)), a limit that was established in 2002."[172] Furthermore, if liability cannot be covered by financial security, indemnification will be covered under the 2.5 billion fund (pursuant to § 34(1))—"to the extent that the damages are not covered by private financial security or that claims cannot be paid out of such security."[173]

However, scholars have criticized nuclear liability coverage of this caliber in literature.[174] The crux of the criticism lies in the fact that this scheme "internal[izes] . . . the risk costs by the operator" due to internal coverage by the fund, and only up to a fixed amount, "and thus only partially."[175] As a result, "it is implicitly admitted that if a nuclear accident costs more than this limit (which is more than probable), the operator will not provide complete compensation to the victims."[176] In short, the rationale of this "implicit [governmental] subsidy coverage aims to supplement compensation from injurers (most likely the nuclear operators) to victims in the event of a nuclear accident by "artificially decreas[ing the operator's] risk costs."[177]

C. Lessons from Germany: Administrative Takeaways

Under the German administrative model, judicial review within its rulemaking process is generally more lenient than its American counterpart. As examined by Professor Rose-Ackerman, the German

169 *Id.*
170 *Id.*
171 *See id.* at 51-52.
172 *Id.*
173 Bruggeman & Faure, *supra* note 146, at 51-52.
174 *See* Faure & Heine, *supra* note 155, at 14.
175 *Id.*
176 *See id.*
177 *Id.*

model hinges on a consensual process that is facilitated through the cooperation of the "regulatory negotiation, business-government cooperation, and advisory committee structures."[178] As a byproduct of favoring private expertise and agency discretion, informal adjudications have become a norm within the German administrative process.[179] Similarly, the United States has adopted a limited form of regulatory negotiations under the guise of the Negotiated Rulemaking Act of 1990.[180] Within the Act, affected parties collaborate with an agency representative, along with a third-party "facilitator"[181] much like the separate hearing authority for Germany.[182] Under the APA, this informal rulemaking process still undergoes judicial review,[183] but the intent of this negotiation is to streamline the administrative process. However, this process is not without its faults. Under the German model, there is limited judicial oversight (and thus, review) over procedures and the rulemaking process. [184] Therefore, to incorporate the German model into the American system, might be troubling as the American system lacks the "close connection between the executive and legislature" of the German government.[185] Because of this, there is an issue that the American bureaucracy might become "even more independent . . . if not constrained by procedural limits."[186] In short, mass incorporation of the German administrative state into America's bureaucracy might be problematic as judicial review of "high-level policymaking processes provides a needed check on agencies."[187] An opposite view is found in Justice Scalia's first opinion in *Lujan v. National Wildlife Federation*,[188] which stated:

> a regulation is not ordinarily considered . . . "ripe" for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some

178 *See* Rose-Ackerman, *supra* note 86, at 1282, 1290.

179 *See* Pünder, *supra* note 22, at 950 n.64.

180 *See* Rose-Ackerman, *supra* at note 86, at 1282.

181 *See id.*

182 *See* Pünder, *supra* note 22 at 949-50; *see also* VwVfG §§ 63-71.

183 *See* 5 U.S.C. § 553 (1988).

184 *See generally* Oster, *supra* note 102, at 1268-72.

185 *See* Rose-Ackerman, *supra* note 86, at 1281, 1301-02; *see generally* Pünder, *supra* note 22.

186 *See* Rose-Ackerman, *supra* note 86, at 1301.

187 *Id.*

188 Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 891 (1990).

> concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him.[189]

Furthermore, in another Supreme Court case, *Lujan v. Defenders of Wildlife*,[190] a wildlife group challenged the scope of the Endanger Species Act of 1973 in an attempt to seek judicial review of the Endanger Species Act's provisions. In *Lujan*, Justice Scalia's opinion dealt with the issue of "procedural injury" and recognized that "procedural rights have . . . special status when concrete interests are at stake [b]ut his opinion rejected . . . the notion that courts may vindicate the public interest."[191] In short, the two *Lujan*[192] opinions illustrate Justice Scalia's idea that might be a possible bypass of judicial review in the face of public interests.[193]

In the face of mass disasters, such as 9/11, a streamlined solution akin to the German model might be necessary. Given the nature of man-made disasters, especially if they are technological in nature, speed and knowledge may be the greatest assets for compensation in the event of atypical and unique catastrophes.

As exemplified in the ad hoc response to the Elbe flood, "policy experience and routine have [generally been] . . . a major hindrance" for crises of this caliber.[194] Because of this, expertise from affected groups can provide for a more streamlined process due to the uncertain nature of catastrophes.[195] Furthermore, the boons derived from a negotiated rulemaking scheme will alleviate issues over general uncertainty, as they relate to the tort system in the United States. In retrospect, similar issues plagued the 9/11 VCF before its expansion, which resulted in the second VCF.[196]

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189 Rose-Ackerman, *supra* note 86, at 1285.

190 Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

191 Rose-Ackerman, *supra* note 86, at 1285-86; *see also* Lujan v. Defenders of Wildlife, 504 U.S. at 572 (1992).

192 *Lujan*, 497 U.S 871 (1990); *Lujan*, 504 U.S. 555 (1992).

193 *See* Rose-Ackerman, *supra* note 85, at 1285-86.

194 *See* Faure & Heine, *supra* note 155, at 26-28 (explaining that there is no "established legal framework for granting state aids in the event of a natural or technological disaster.").

195 *See id.* at 31 (regulatory competition can induce "policy learning" due to the existence of potential regulatory remedies. This will "stimulate[] the creation of better regulations [so] it [will] help overcome policy uncertainty.").

196 *Joint Hearing on Paying With Their Lives: The Status of Compensation for 9/11 Health Effect*, 110th Cong. 44-57 (2008) (statement of Theodore H. Frank, Resident Fellow AEI, Director, AEI Legal Center for the Public Interest) https://www.govinfo.gov/content/pkg/CHRG-110hhrg41582/pdf/CHRG-110hhrg41582.pdf.

During the joint hearing concerning the 9/11 VCF, the statement by Theodore H. Frank proposed that "claimants will not opt [into] a voluntary administrative compensation unless . . . the administrative system will provide a superior alternative."[197] Furthermore, Theodore H. Frank proposes three remedies to attract claimants toward the administrative compensation scheme: (1) by making the compensation system more generous/lenient; (2) decreasing attractiveness of tort through limiting liability and; (3) eliminating the voluntary aspect of the administrative system.[198] In the German model, expertise groups provide an alternative to the tort system through the collaborative nature of negotiations,[199] in addition to limiting liability as to the affected parties.[200] However, the German model does not necessarily eliminate the aspect of becoming a claimant voluntarily, but it does limit standing to individuals whose rights have been violated.[201]

IV. A REVIEW OF THE FUKUSHIMA IINCIDENT AND THE GOVERNMENTAL RESPONSE

A. Brief Overview of Japanese Administrative Law

Administrative law in Japan has generally been characterized as judicial deference to the administration.[202] Passed in 1993, the Administrative Procedure Law ("APL") "has not had a revolutionary impact on state-society relations in Japan."[203] Professor Ginsburg has surmised that this is most likely due to the government's interactions with businesses, ultimately aiming to "minimize outside interference and to preserve order."[204] As a result, this translates to a system dominated by informal "administrative guidance," which means "pressure without formal legal effect on regulated parties to modify

197 *Id.* at 55.

198 *Id.*

199 *See* Pünder, *supra* note 22, at 950 n. 64; *see also* Rose-Ackerman, *supra* at note 84, at 1282.

200 *See* Pünder, *supra* note 124, at 247.

201 *See* Rose-Ackerman, *supra* note 86, at 1297.

202 Tom Ginsburg, *Comparative Administrative Procedure: Evidence from Northeast Asia*, 13 CONST. POL. ECON. 247, 253 (2002), [hereinafter Ginsburg, *Comparative Administrative Procedure*].

203 Tom Ginsburg, *System Change? A New Perspective on Japan's Administrative Procedure Law*, 13 ZEITSCHRIFT FÜR JAPANISCHES RECHT 55 (2002).

204 *Id.* at 84.

their behavior."[205] As such, judicial review is generally curtailed unless the action was a formal disposition that affects the legal rights and duties of the affected party, and the complaint was brought by the affected party itself.[206] However, this complaint follows a high standard of review in which the "complainant must show that the agency acted illegally or exceeded the scope of its discretion."[207]

Additionally, the APL is more concerned with business issues than those of the average citizen.[208] Historically within the development of administrative law in Japan, the Liberal Democratic Party ("LDP") has entrenched the state's bureaucracy of the "iron triangle," which consists of the "LDP, big business and the elite national bureaucracy."[209] Post-LDP, Prime Minister Morihiro Hosokawa passed the APL in an attempt to limit bureaucratic discretion of the past.[210] Subsequently, like in any transition, there is always uncertainty and what better way to allay those fears than to resort to the past—specifically, incorporating the pro-business attitude of the prior Diet (Japanese legislature).[211] As a result, policymaking was ultimately limited, even under the APL, as "there was no need to . . . open up decision-making to the public."[212] Furthermore, Professor Ginsburg notes that this might explain why the APL does not have a notice-and-comment policy for its rulemaking.[213] Professor Ginsburg goes further to name this phenomenon as a "hierarchy" system in which agency costs are curtailed through limitations on their overall judicial review process by centralizing agency decision-making away from the courts.[214] The hierarchy concept was demonstrated in the "Administrative Appeals Act and the 1997 Civil Petitions Act" which, instead of "vertically segment[ing] administrative adjudication in individual ministries, a new Administrative Appeals Commission

205 *Id.* (explaining that the "Japanese [government] does not impose its preference on private parties; rather it structures the bargaining arena and allows carefully selected private parties to proceed to work out policy.").

206 *Id.* at 73, 75-76 ("Japanese administrative law takes a hands-off approach to administrative discretion, and thus encourages the use of administrative guidance and informal means of regulation." In short, because of the scheme provided by the *Keidanren*, or the "APL hotline," judicial review of administrative issues have decreased).

207 *See id.*

208 *Id.* at 79-80.

209 Ginsburg, *supra* note 203, at 56.

210 *Id.*

211 *Id.* at 56, 60.

212 *Id.* at 80.

213 *Id.*

214 *Id.* at 252, 256.

under the Prime Minister was created to handle non-judicial appeals against the central government."[215] In short, the current structure of the APL "delegate[s] lawmaking in the realm of hierarchy [consists of long-standing bureaucrats] rather than the potentially more cost third-party forum [of judicial review]."[216]

Additionally, the existence of the *Keidanren* ("hotline") seems to reinforce this notion as complaints about the law are generally not brought to the court, "but filtered through the peak business association, *Keidanren*."[217] The rationale behind this structure is to channel complaints through this central unit and filter out non-business related complaints.[218] The *Keidanren*'s members primarily consist of large firms of the nation and this mechanism "means that the APL created not a public right of action, but a mechanism by which the system itself can control the resolution of complaints through internal communication."[219] In sum, the effects of APL have been largely dampened through the existence of the *Keidanren*.[220]

B. The Fukushima Disaster

On March 11, 2001, Japan was struck with a magnitude 9.0 earthquake along with a tsunami that damaged the Fukushima Daiichi Nuclear Power Station.[221] Due to the combined effects of both the tsunami and the earthquake, the power supply for the Fukushima plant was disrupted, resulting in a reactor meltdown due to insufficient cooling from power supplies.[222] Because of this, radionuclides and subsequent carcinogens were released into the environment. [223] Evacuation plans and quarantines were set in motion, which were subsequently expanded as "environmental monitoring data increased."[224]

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215 Ginsburg, *Comparative Administrative Procedure*, *supra* note 201, at 253-54 (this new Commission has the ability to "revoke or alter administrative dispositions as necessary." It is composed of senior public officials).

216 *Id.* at 256.

217 Ginsburg, *supra* note 203, at 80.

218 Ginsburg, *Comparative Administrative Procedure*, *supra* note 202, at 255.

219 *Id.*

220 *See id.* at 254-55 (highlighting the impact that impact of the APL has been predicted to be marginal as the *Keidanren*'s influence in policymaking is still felt).

221 Yoichi Funabashi & Kay Kitazawa, *supra* note 85, at 9.

222 *See* WORLD HEALTH ORG. [WHO], HEALTH RISK ASSESSMENT FROM THE NUCLEAR ACCIDENT AFTER THE 2011 GREAT EAST JAPAN EARTHQUAKE & TSUNAMI (2013), https://www.who.int/publications/i/item/9789241505130.

223 *See id.* at 12.

224 *Id.*

With over 1,000 deaths reported due to evacuation protocols from the Fukushima incident,[225] and astronomical casualties and property damage from the subsequent tsunami,[226] Fukushima has become one of the "worst nuclear disasters in human history."[227] However, despite Fukushima's immense impact on the lives of the Japanese people, its wake of destruction did not "spark a moral of political discussion about whether victims of mass tragedies should benefit from government action to compensation."[228] However, looking at the history of Japan and its natural disasters, it appears that the nation holds "little appetite for compensation."[229] This attitude is demonstrated by the country's reaction to the 1959 Isewan Typhoon, which "killed over 5,000 people, injured more than 40,000, and destroyed 120,000 homes."[230] In response, the government rebuilt the homes but offered no monetary compensation for deaths.[231] Once again, during the 1995 Hanshin (Kobe) Earthquake, which injured 40,000, killed 6,000, and destroyed 400,000 homes, the government's response was "infrastructure reconstruction" and "a charity payment of $2,500 per family from the Japanese Red Cross," along with "small condolence payments (*minimaikin*)."[232] As illustrated by David Edgington in his book concerning the Kobe earthquake—"[the] government cannot help people . . . reconstruct their lives, and that 'all Japan[ese] people should be treated equally in the provision of government services and support."[233] Looking at the history of Japan, a compensation scheme would seem to be profoundly antithetical to its nature. However, although Japan does not have a compensation scheme for all victims of the Fukushima disaster, there is one unique group that may have found recourse—"[t]hose harmed by the nuclear

225 *Fukishima Daiichi Accident*, WORLD NUCLEAR ASS'N (Oct. 2018), https://www.world-nuclear.org/information-library/safety-and-security/safety-of-plants/fukushima-accident.aspx.

226 *Police Countermeasures and Damage Situation Associated with 2011 Tokohu District – Off the Pacific Ocean Earthquake*, NAT'L POLICE AGENCY OF JAPAN (Dec. 10, 2019), https://www.npa.go.jp/news/other/earthquake2011/pdf/higaijokyo_e.pdf.

227 Whitney Webb, *Fukushima Passes Chernobyl as Worst Nuclear Disaster in History: Does Anyone Care?*, MINT PRESS NEWS (May 1, 2018), https://www.mintpressnews.com/fukushima-passes-chernobyl-as-worst-nuclear-disaster-in-history/241314/.

228 Eric Feldman, *Fukushima: Catastrophe, Compensation, and Justice in Japan*, 62 DEPAUL L. REV. 335, 337 (2013).

229 *Id.*

230 *Id.*

231 *Id.*

232 *Id.* at 338.

233 *Id.* at 340.

accident, as distinguished from those whose injuries were caused by the earthquake or [the] tsunami."[234]

1. State Compensation Law and Nuclear Damage Compensation Act

Generally, the Japanese government does not bear direct liability for compensation to the victims of Fukushima under the 1961 Nuclear Damage Compensation Act ("NDCA"); however, liability may be found under the State Compensation Law, which outlines "special provisions for the tort liability of public authorities."[235] This type of action would ultimately be based on the government's failure to "adequately regulate TEPCO [Tokyo Electric Power Company]."[236] Furthermore, this action is grounded in Article 1(1) of the State Compensation Law which states: "[w]here an officer exercising the public functions of the State or of a public authority has, in the course of their duties, unlawfully inflicted damage upon another person whether intentionally or negligently, the State or public authority shall be liable for compensation."[237] However, the State Compensation Law does not explicitly refer to omissions, and Japanese courts have been "reluctant to recognize the 'unlawfulness' (the traditional standard for fault in Japanese tort law) of a failure to exercise a regulatory function." [238] Ultimately, this was due to "both deference to administrative discretion and a narrow reading of the scope of [the] duty of care in the absence of positive Government conduct."[239]

The NDCA provides no-fault responsibility to private power providers concerning nuclear accidents, "with liability capped at 120 billion yen," and beyond this limit, the "government may (but is not legally obligated to) shoulder the cost of compensation." [240] Furthermore, the NDCA releases insurers from liability when the nuclear accident is caused by "grave natural disasters" (such as

234 Feldman, *supra* note 228, at 341.

235 Joel Rheuben, *Governmental Liability For Regulatory Failure in the Fukushima Disaster: A Common Law Comparison*, 23 PAC. RIM. L. POL'Y 113, 131 (2014); *see* SIMON BUTT ET AL., ASIA-PACIFIC DISASTER MANAGEMENT 102 (2014).

236 BUTT ET AL., *supra* note 235, at 108.

237 Rheuben, *supra* note 235, at 131.

238 BUTT ET AL., *supra* note 235, at 108.

239 *Id.*

240 *See* Feldman, *supra* note 228, at 341; *see also* Act on Compensation for Nuclear Damage, Act No. 147 of 1961 (Japan), *available at* http://www.oecd-nea.org/law/legislation/japan-docs/Japan-Nuclear-Damage-Compensation-Act.pdf.

earthquakes and tsunamis).[241] As a result, compensation funds were extracted from the Tokyo Electric Power Company ("TEPCO") as part of their "indemnity contract with the state."[242]

2. Compensation Crossroads: TEPCO, ADR, or Litigation

Though there were many victims as a result of the Fukushima incident, it wasn't necessarily clear who was eligible for compensation and what type of compensation at the time. Because of this, compensation came from three different sources: (1) the TEPCO compensation scheme; (2) an alternative dispute resolution ("ADR") program set up by the Ministry of Education, Culture, Sports, Science, and Technology ("MEXT") which focused on "people not included in the guidelines, including children, the disabled, and pregnant women"; (3) and finally, in the alternative, claimants may seek litigation on the "basis of the Nuclear Compensation [Act]."[243]

As part of the government's initial response to the incident, in conjunction with the NDCA, the Dispute Reconciliation Committee for Nuclear Damage Compensation ("DRC") was created.[244] In conjunction with the DRC, TEPCO could facilitate a direct compensation fund.[245] The purpose of the DRC was to address the issue of eligibility surrounding the Fukushima incident during TEPCO's compensation program.[246] Also, the DRC's framework as

241 Eric A. Feldman, *Compensating the Victims of Japan's 3-11 Fukushima Disaster*, 16 ASIAN-PAC. L. & POL'Y J. 127, 133 (2015) [hereinafter Feldman, *Compensating the Victims*].

242 *Id.* (as a result of TEPCO's indemnity contract with the state, they have tried to exempt themselves by arguing Fukushima was caused by a "grave natural disaster" instead. This was rejected by the state which proceeded forward with NDCA provisions).

243 *Id.* at 135; *see also* Joel Rheuben, *supra* note 235, at 115.

244 Toyohiro Nomura, *The Japanese Experience on Compensation of Nuclear Damage Caused by Fukushima Accident* 1 (2016), http://www.jeli.gr.jp/img/jeli-INLA@2016_FukushimaCompensation1.pdf.

245 Feldman, *Compensating the Victims*, *supra* note 241, at 135.

246 *Compensating the Victims*, *supra* note 240, at 1-2; *see also* Feldman, *Compensating the Victims*, *supra* note 237, at 134 (explaining that, although Japan has a general insurance system with a high-quality medical care in place, for care not particular covered within the system—such as property damage pursuant to Fukushima's destruction, litigation may be an answer. However, litigation is often very costly and very random as there are many parties that can make the victims whole (TEPCO, government, manufacturers of power plant facilities). Additionally, litigation can be financially and emotionally draining); *see also* Feldman, *supra* note 228, at 343.

an ADR program under MEXT allowed flexibility in its compensatory efforts as it deviates from TEPCO's initial guidelines.[247]

3. The First Option: The TEPCO Compensation Fund

Much like the 9/11 VCF, this was led by an experienced scholar in the field of civil law, Yoshihisa Nomi from Gakushuiin University, along with a panel consisting of "nine additional members, five of whom are prominent legal experts and four of whom have expertise in medicine, science, and radiation."[248] The infrastructure of this process involves the government providing bonds to TEPCO, which allows it to run the compensation program for victims of the nuclear accident without fear of bankruptcy.[249] In August 2011, the government released a preliminary compensation guideline that focused on "emergency compensation payments to those who were subject to official orders in the wake of the nuclear accident."[250] This guideline encompassed people that were generally "affected by state mandates."[251] However, the preliminary interim guidelines, along with the administrative actions from TEPCO's compensation scheme, "generated a significant amount of controversy" because of how victims were treated.[252] An example includes the extremely lengthy physical claim forms required by victims that were recently evacuated from their homes and were forced to live in temporary shelters.[253]

247 *See* Feldman, *Compensating the Victims*, *supra* note 241, at 135, 142.

248 Feldman, *supra* note 228, at 342; *see also* Feldman, *Compensating the Victims*, *supra* note 241, at 136-37 (discussing how TEPCO's committee guidelines were "operationalized by a ten-thousand persona bureaucracy . . . manage the claims process).

249 Feldman, *supra* note 228, at 342; *see also* Feldman, *Compensating the Victims*, *supra* note 241, at 136-37; Feldman, *supra* note 228, at 344 n.37 (submission for compensation goes directly to TEPCO and decision regarding compensation lies with TEPCO); *see* Feldman, *Compensating the Victims*, *supra* note 241, at 141; *see also* Joel Rheuben, *supra* note 235, at 115.

250 Feldman, *supra* note 228, at 344 n.37 (submission for compensation goes directly to TEPCO and decision regarding compensation lies with TEPCO); *see* Feldman, *Compensating the Victims*, *supra* note 241, at 141; *see also* Rheuben, *supra* note 235.

251 Feldman, *supra* note 228, at 345 (this included people harmed in the mandatory evacuation zone within the 20-kilometer area (approximately 60,000), harmed by prohibition of flight in designated zones, limitation on the sale of certain products, and negative publicity due to drop in commodity prices); *see also* Feldman, *Compensating the Victims*, *supra* note at 241, at 137 (these guidelines also included emotional distress and lost or decreased property values; lost income; and decontamination costs).

252 *See* Feldman, *Compensating the Victims*, *supra* note 241, at 138.

253 *See id.*

Critics of this scheme point out the "fox guarding the henhouse" issue in which there is a fundamental problem with "entrusting the compensation process to the party they believed to be responsible for their harms, and [claimants] refused to seek compensation so as [not to] put themselves at the mercy of TEPCO."[254] There is also contention regarding the compensation criteria for types of injuries. The issue is determining the "right" amount of compensation for property damages and emotional distress.[255]

Comparing TEPCO's fund to American tort law, the application of "stand-alone, regularized emotional distress claims are notable."[256] The comparison can be made to emotional distress claims in the United States, which are generally individualized with a showing of reasonable fear to "physical injury or witness tortious, serious injury to a family member."[257] However, the Japanese Civil Code only allows for stand-alone payments for emotional distress claims.[258] Despite similarities to American disaster funds, such as the 9/11 VCF, the TEPCO compensation scheme still falls short for its inability to produce individualized awards due to the way the Japanese Civil Code operates. However, even if emotional damages may fall short (relative to the American counterpart), there are still other means of compensation concerning Fukushima victims.

4. The Second Path: Alternative Dispute Resolution

The ADR program is the second alternative to the TEPCO compensation fund. Created in May 2011 by MEXT, it began to fully operate during September 2011 with a head office in Tokyo and

254 *Id.*

255 *Id.* at 138-39 (property damage is contentious because some victims were able to return home relatively quickly, whereas in heavily contaminated areas, some people may never return. Emotional distress, under the guidelines, hinges on whether the evacuation was mandatory or voluntary. The payments for emotional distress are usually made in monthly payments of "100,000-120,000 yen" but "some payments are considerably lower.").

256 *Id.* at 139.

257 *Id.*

258 Feldman, *Compensating the Victims*, *supra* note 241, at 139*; see also* MINPŌ [CIVIL C.] art. 710, Law No. 9 of 1898 (Japan) [hereinafter MINPŌ] (English translation *available at* https://ecollections.law.fiu.edu/civil_codes/9/) (Non-pecuniary damages, ("isha-ryo"), are recoverable for pain and suffering but the amount of damages are minimal and set by the court; *see also* Nobutoshi Yamanouchi & Samuel J. Cohen, *Understanding the Incidence of Litigation in Japan: A Structural Analysis*, 25 INT'L LAYWER 443, 447-49 (1991) (explaining that non-pecuniary damages (isha-ryo) in Japan in the past have "rarely exceeded twenty million yen (about $154,000 [USD]).").

multiple branches in the Fukushima area.[259] The scope of the MEXT proceedings is guided by the Arbitration Law ("Chusai") of 2003, which dictates the procedural rules and obligations of arbitrators.[260] The purpose of the ADR system was to handle issues not covered within TEPCO's criteria and is primarily used by claimants unhappy with TEPCO.[261] "The ADR process begins when claimants—both individuals and groups—submit a relatively short and simple claim form. An investigator then reviews and researches the claim and invites claimants to a mediation session."[262] The majority of the guidelines utilized by the mediators are under the preliminary interim guidelines followed by TEPCO along with "General Standards" created by the ADR administration.[263] The General Standards are an extension of TEPCO's guidelines, which allows for tailored and individualized mediation.[264]

However, even though the ADR system is tailored to individualized claims and thus open to a wide variety of potential claims, the program has heard "relatively few cases."[265] A notable issue is the inefficiency of the process because of the location of offices, difficulty in acquiring the immense amount of documentation necessary for proof (by the claimants), concerns on whether mediators are treating "like cases alike" and the restrictive nature of TEPCO's overarching guidelines.[266] There is also evidence of a 50% rule by the

259 Feldman, *Compensating the Victims*, *supra* note 241, at 142; *see generally* AYA YASUI, ALTERNATIVE DISPUTE RESOLUTION SYSTEM IN JAPAN, http://www.iadcmeetings.mobi/assets/1/7/18.2_-_Yasui-_ADR_System_in_Japan.pdf.

260 YASUI, *supra* note 258, at 2-4 (explains the power pursuant to the Arbitration Act along with mediation (*chotei*) proceedings both in-court and out-of-court. This report also outlines the general characteristics of typical Japanese ADR proceedings).

261 *Id.*

262 *Id.*

263 Feldman, *Compensating the Victims*, *supra* note 241, at 142 n.48; *see also* Feldman, *supra* note 228, at 142 n.48.

264 Feldman, *Compensating the Victims*, *supra* note 241, at 143 (as an example of individualized mediation, emotional distress payments have been extended until the General Standards. This allows mediators to tailor payment to claimants such as pregnant woman. Additionally, the General Standard allows for greater loss coverage such as damages not provided under TEPCO's guidelines).

265 *Id.* (relative to TEPCO's compensation fund, the ADR scheme has heard fewer cases).

266 *Id.* at 143.

ADR program, in which the mediators were awarding 50% of compensation award as to hasten the overall process.[267]

5. The Third Way—Litigation

However, the crux of the ADR system's issues stem from TEPCO—primarily, "[b]ecause the resolution of ADR cases" requires assent from TEPCO.[268] Litigation has always been an option available to all claimants, but given the data, it seems most claimants have chosen either TEPCO or ADR.[269] However, "nothing precludes the possibility of parties pursuing multiple routes to compensation."[270] As Feldman says, "one might think it would be an attractive option given the emerging evidence of potential carelessness [by TEPCO] in managing the nuclear reactors."[271] However, the issue with litigation concerning Fukushima is primarily foreseeability (was the Fukushima incident foreseeable?) and causation (was the plaintiff's depression brought forth by the incident or prior?).[272] The substances of these claims vary, spanning from plaintiffs attempting to sidestep the NDCA by bringing a cause of action against "TEPCO under Section 709 of Japan's Civil Code," to other plaintiffs having sought damages from TEPCO under civil liability rules in hopes of netting awards dwarfing TEPCO's compensation fund and the ADR program.[273]

The consensus is that litigation is messy and extremely lengthy. However, the governmental efforts provided by TEPCO's fund and the ADR systems do not do much to alleviate these concerns. TEPCO guidelines have demonstrated weakness in its eligibility determination, especially between "mandatory and voluntary evacuees," which has delayed compensation.[274] Furthermore, ADR awards are often too low and do not adequately compensate victims.[275]

267 *Id.* at 144 (in July 2014, the ADR administrator mandated a 50% award rule to mediators in order to expedite the nature of the process. The justification for this stemmed from the immense time it would take to gather expert medical opinions).

268 Feldman, *supra* note 228, at 353.

269 *Id.* at 353 n.64.

270 *Id*, at 353.

271 *Id.*

272 Feldman, *Compensating the Victims*, *supra* note 241, at 145.

273 *Id.*

274 *Id.*

275 *Id.* at 142-43.

C. Conclusions from Fukushima and Takeaways

As a general note, this was an overview of the Fukushima incident and the government's response within its earlier stages, as to evaluate its ad-hoc scheme and its initial development within the crisis. The architecture of the TEPCO fund is largely ad-hoc and mirrors most natural disaster responses of this caliber, such as the Elbe floods or 9/11; however, the distinction is that the fund was not procedurally controlled by the government.[276] Subsequently, the ADR system working in conjunction with the fund had governmental control through its nature of the arbitration.[277] However, because of the interplay between TEPCO's guidelines and the ADR system,[278] resolution of claims can be interestingly frustrating.[279] Also, due to the nature of the APL and its lack of public transparency,[280] claimants may be stuck without recourse or direction.

Furthermore, when comparing Japan's APL and subsequent policymaking to its American counterparts, this lack of transparency can be startling since "there are no provisions for rule-making" within the Japanese administrative system and appeals are generally limited to "formal dispositions" within the agencies themselves.[281] In short, these two elements, when combined, generally limit judicial intervention "in reviewing administrative action," However, this hierarchy of policymaking can yield positive gains such as cost efficiency and speed.[282] Such efficiency is primarily shown through the *Keidanren* influence within policymaking in administrative

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[276] *See generally* Feldman, *Compensating the Victims*, *supra* note 241, at 133-35.

[277] *See* YASUI, *supra* note 259, T43.

[278] Feldman, *supra* note 228, at 353.

[279] *Id.* at 355 (noting that the architecture of the compensation scheme makes it hard for claimants to decide which path to take. Additionally, there is a lack of transparency and accountability as key decisions are made behind closed doors. Due to the culmination of such factors, the initial stages of the Fukushima compensation system are extremely difficult to navigate).

[280] *Id.*; *see* Ginsburg, *supra* note 203, at 73 ("[T]here are no provisions for rule-making . . . [s]econd, Article 27 expressly states that Dispositions are not reviewable under the Administrative Complaints Investigation Law of 1962. Under that law, appeals are limited to formal dispositions and must be carried out inside the agency itself."); *see also* Ginsburg, *Comparative Administrative Procedure*, *supra* note 202, at 253 ("Japanese administrative law has imposed constraints on justiciability and standing to limit effective reviewability.").

[281] Ginsburg, *supra* note 203, at 73 (under Article 27, Dispositions are stated to be "not reviewable under the Administrative Complaints Investigation Law of 1962." As a result, there is a general bar to "[judicial] review[] by ordinary courts.").

[282] *See e.g.*, Ginsburg, *Comparative Administrative Procedure*, *supra* note 202, at 252-54.

matters,[283] along with the centralized process of adjudication.[284] However, in the event of disasters such as Fukushima and its kind, centralized policymaking, though accelerated, may not be a phenomenon that American bureaucracy is willing to adopt.[285] Though Justice Scalia has discussed certain possible leeway given concerning judicial review by courts,[286] it is unclear if the U.S system is ready to adopt the hierarchy status of Japanese administrative law.

V. OVERVIEW OF THE THREE SYSTEMS

In general, the United States' administrative system favors the judicial review of its agencies along with the review of its subsequent rulemaking through the notice-and-comment provision under the APA.[287] However, with the heightened review process comes the burdensome nature of administrative inefficiency, as demonstrated by the first VCF's guidelines and the hurdles it faced within the court.[288] Comparing the American model to the German model under the VwVfG, administrative actions cascade downwards with minimal judicial review as the entire proceeding is structured under norms[289] and guidance of experts. Arising from the VwVfG is a government shepherded by a public-focused [290] objective where most administrative adjudication spawns from the executive. This lenient form of judicial review can expedite the process while maintaining the need of the public in the event of great disasters.

In the Japanese administrative scheme, Professor Ginsburg describes this as a hierarchy structure with a pro-business focus under the influence of the *Keidanran*.[291] This process has led to the rapid deployment of ad hoc situations in the face of the Fukushima incident, which brought forth the TEPCO compensation fund and the ADR system. However, various controversies have sprung forth in response

283 *See* Ginsburg, *supra* note 203, at 75.

284 Ginsburg, *Comparative Administrative Procedure*, *supra* note 202, at 252, 256.

285 *See generally* Rose-Ackerman, *supra* note 86, at 1281, 1301-02.

286 *See id.* at 1285 (reviewing Lujan v. Nat'l Wildlife Fed'n, 497 U.S. at 871, describing Justice Scalia's positions in the two *Lujan* cases concerning judicial review by the courts).

287 *See* Pünder, *supra* note 22, at 946-47.

288 *See generally Colaio*, 262 F. Supp. 2d at 279.

289 Rose-Ackerman, *supra* note 86, at 1291.

290 Eberle, *supra* note 86, at 71-72 nn.18-19.

291 *See generally* Ginsburg, *Comparative Administrative Procedure*, *supra* note at 202.

to this scheme, citing the inefficiencies in TEPCO's guidelines[292] or various problems surrounding the ADR system.[293]

Ultimately, developing a universal, fool-proof system for compensation in the face of unique disasters may be nigh impossible as technological leaps will generally outpace our legal system, rendering most of our legal safeguards moot. Because of the mercurial nature of catastrophes, are we to be paralyzed by indecision and do nothing? To that, I will rebut with a passage from Dylan Thomas in that we shall not "go gentle into that good night,"[294] but we shall "[r]age, rage against the dying of the light."[295] In the face of such unpredictable catastrophe, we shall take notes from global initiatives to vigilantly plan against the unknown so that when such incidents arrive—and they will—we shall be ready. As such, it is imperative for governmental entities to take note in order to keep us in good hands.

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292 *See generally* Feldman, *Compensating the Victims*, *supra* note 241, at 138-39.

293 Feldman, *supra* note 228, at 352-53.

294 Dylan Thomas, *Do Not Go Gentle Into That Good Night*, POETS.ORG, https://poets.org/poem/do-not-go-gentle-good-night (last visited May 26, 2020).

295 *Id.*