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Chapman Dialogue Series: Unconventional Responses to Unique Catastrophes: Tailoring the Law to Meet the Challenges

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Chapman Dialogue Series: Unconventional Responses to Unique Catastrophes: Tailoring the Law to Meet the Challenges*

Wednesday, October 23, 2013

*Kenneth Feinberg***

I am here because of Chapman and the distinguished business program. Also, Dean Bogart was so nice to me in explaining how wonderful it would be to visit Chapman. I have heard about Chapman, and I know about Chapman, so here I am and I am honored to be part of the Dialogue Series.

Dean Bogart did not mention my books in his introduction. He neglected to mention *What Is Life Worth?*,¹ the book I wrote after 9/11. And he did not mention *Who Gets What: Fair Compensation After Tragedy and Financial Upheaval*.² Now, you may have trouble finding these books. If you look around, they might not be readily available. Do not worry, my personal supply of these books is virtually inexhaustible, and if anybody has trouble, we will get you copies.

The Dean is correct when he mentions the unique assignments I receive occasionally. Now remember at the outset, I am not the one who decides that there ought to be special compensation programs in particular situations in America. I do

* This transcript has been edited and excerpted. For the full video presentation, visit <http://www.chapman.edu/law/events/dialogue-series.aspx>.

** Kenneth R. Feinberg served as the Special Master of the Federal September 11th Victim Compensation Fund of 2001; the Fund Administrator for the Hokie Spirit Memorial Fund following the tragic shootings at Virginia Tech; the Distribution Agent for AIG Fair Fund claimants; and, as an arbitrator, Mr. Feinberg helped determine the fair market value of the original Zapruder film of the Kennedy assassination, and the legal fees in Holocaust slave labor litigation. Mr. Feinberg has been appointed to two presidential-level commissions, and has had a distinguished teaching career as an Adjunct Professor of Law at Harvard Law School, Georgetown University, the University of Pennsylvania, Columbia University, New York University, and the University of Virginia. Mr. Feinberg founded Feinberg Rozen, LLP in 1992. In 2004, he was named "Lawyer of the Year" by the National Law Journal (2004), and has been repeatedly named as one of "The 100 Most Influential Lawyers in America" by the National Law Journal.

¹ KENNETH R. FEINBERG, *WHAT IS LIFE WORTH?: THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11* (2005).

² KENNETH R. FEINBERG, *WHO GETS WHAT: FAIR COMPENSATION AFTER TRAGEDY AND FINANCIAL UPHEAVAL* (2012).

not do that. Policy makers do that: President Bush, President Obama, Mayor Menino after the Boston Marathon Bombings with Governor Patrick, the President of Virginia Tech after the Virginia Tech shootings, or Governor Hickenlooper in Colorado after the Aurora movie shootings at the *Dark Knight* movie. Policy makers occasionally decide that for a particular tragedy we have to think out of the box to compensate victims. Now, when you make a decision to set up a special compensation program just for these victims, while everybody else fends for him or herself, but for these victims we pass a law, or we set up a special program. It raises some very thorny political science issues.

Take the 9/11 Fund. Eleven days after the attacks, Congress passed a law, and the law simply said: “Anybody who would rather come into a special compensation program, if you lost a loved one on the airplanes, the World Trade Center, the Pentagon; anybody who would voluntarily surrender their right to litigate against the airlines, the World Trade Center, Boeing, Massport, the Port Authority, the FAA; anybody who would rather come into a no-fault compensation program and get paid, and waive your right to litigate, you can do so. You do not have to, but if you want to come in, Ken Feinberg is designated to administer that program. You will be paid; you will fill out a form, and Feinberg will decide how much you will receive.” Now that program was a stunning exercise in creative legislating. I happen to think the program was the right thing to do. We distributed, in thirty-three months, all taxpayer money—over \$7 billion. The average award in that 9/11 Fund for a death claim was around \$2 million tax-free. The average award for a physical injury claim was about \$400,000 tax-free. Ninety-seven percent of all the eligible family claimants came into the Fund voluntarily. They decided to take the money, waive their right to litigate—end it. Only ninety-four families decided to litigate. We paid 5,300 people. Only ninety-four opted out and sued, and they all settled their cases five years later. It worked.

I say to anybody who asks me, “Was the 9/11 Fund sound public policy?” Yes, it was. “Was it the right thing to do?” Yes. “Did it work?” Yes. But then I always add, “Do not ever do it again.” The idea that public money will be used to compensate victims while everybody else fends for him or herself raises some serious public policy questions. You should have read some of the emails I received during the administration of the 9/11 Fund. “Dear Mr. Feinberg, my son died in Oklahoma City, where’s my check?” “Dear Mr. Feinberg, I don’t get it. My daughter died in the basement of the World Trade Center in the original 1993

attacks committed by the very same people, why aren't I eligible?" And it was not just terrorism. "Dear Mr. Feinberg, last year my wife saved three little girls from drowning in the Mississippi River, and then she drowned a heroine, where's my check?" You better be careful when you earmark public taxpayer money just to pay certain people. Everybody else: ineligible.

The same with the BP oil spill. BP, after that Gulf of Mexico oil spill, walked into the White House, saw President Obama, came out, and said, "We will front \$20 billion to pay all eligible claims to people and businesses who suffered damages as a result of that horrific oil spill in the Gulf of Mexico." President Obama and BP said, "Will you do it?" And I said, "Yes, I will do it." Over sixteen months we paid \$6.5 billion to 220,000 individuals and businesses who suffered damages as a result of the spill. "Here's your check; you waive your right to sue." But again, "Dear Mr. Feinberg, I'm still waiting for my money from the Exxon-Valdez oil spill. Why can't I file a claim?" The BP oil spill was very interesting. You will recall that BP announced, "Anybody who suffered as a result of the spill, come one, come all." I received in connection with the BP oil spill, in sixteen months, 1.2 million claims from fifty states. I received hundreds of claims from California, most of which we denied, not all, but most of which we denied. But I received claims from fifty states, from thirty-five foreign countries. Build it, and they will come.

But these programs, as you see, raise serious questions about fairness. Because it is policy makers in Washington deciding, "Just for you, special treatment, special generosity, efficiency, and speed. Everybody else, sorry." And I question the serendipitous, haphazard nature of earmarking certain tragedies. You will never see the 9/11 Fund again. That was a unique response to an unprecedented catastrophe—rivalled only by maybe the Civil War, Pearl Harbor, and the assassination of President Kennedy. You will never see that again. I do not think a BP claims program will be seen again unless some company wants to front \$20 billion. That is not chump change, without any litigation, to pay victims. But it raises questions about fairness and appropriateness, and what is right for the community and our nation.

Now those types of cases—BP, 9/11—those are very, very different from funds like the One Fund Boston, after the Marathon bombings; Virginia Tech; Colorado; and the killing of the first graders at Sandy Hook in Newtown, Connecticut. Those programs are very different. Those programs, unlike BP and 9/11, are funded by private money that is donated by the American people. They are a gift. If you accept money from those

funds you are not waiving your right to sue. You are not signing away any rights; you are accepting a gift. You can do whatever you want with that money. You can go hire a lawyer and litigate with that money. They are not alternatives to the tort system; those are programs funded entirely by you, the American people, who watch on TV what is going on. "Oh my goodness!" The viewers write out a check for \$50, \$100, \$500, \$25, and send it in. And I am asked to design and distribute those funds, but those funds come without any conditions. They are cousins maybe to 9/11 and BP because they offer compensation, special compensation, but they are not in any way tied to the existing tort system. They are free gifts funded by the amazing, charitable impulse of the American people. I have never seen anything quite like this: \$7 million, Virginia Tech; \$5 million, Aurora, Colorado; \$11.5 million, Connecticut; \$60 million, the Boston Marathon. The Mayor calls, Mayor Menino, and says, "We are getting all of this money. We need you to come in, design the protocol, and get the money out." Which we did. In sixty days, we distributed \$60 million.

Now all of these programs—whether it is 9/11 or BP—they are very unconventional. They are tailored to a particular tragedy, and they raise these political science questions. Five people die in a fire—innocent victims—there is no fund for them. People die every day, innocent victims of tragedy, but they do not have these funds. It is one thing for the government to step in and create a fund. It is another thing if private citizens are so moved by these tragedies that they send money in for distribution. You cannot fault that. But it still raises questions of fairness.

Now, every time I am asked to do one of these programs, it is unbelievably stressful because you are dealing with people who are innocent victims of horror and tragedy. You do not expect any of these families or these survivors to express thanks or gratitude or appreciation. It does not work that way. These are traumatized people, innocent victims, who are angry, frustrated, and uncertain about the future. And the reaction you get from people is what makes the job so stressful. Whenever I am asked to do this, my first reaction is, "Brace yourself. Brace yourself for what you are going to hear from people." And it is important in these programs—whether they are government programs or private donations like the Boston Marathon—to reach out to people. To offer to meet with them, to hear what they have to say, and what their reaction is to the horror. You let them vent. Very few people come to talk with me privately about money. That is rarely the topic. The topic almost every time is venting about

life's unfairness. A couple of months ago, I went to a small rehab hospital in Boston, and I met with a victim of the marathon bombing who lost a limb. He was in the hospital bed, with his wife, his nine-year-old son, his brother, and his mother in the room. I said, "Mr. Jones, you are going to receive a check from One Fund Boston, tax-free, for \$1,250,000." He looked at me. He said, "\$1,250,000? I have a better idea, Mr. Feinberg. Give me my leg back. You keep the money. I want my leg back!" "I don't have that power, I wish I did. All I can do is give you a check." "Yeah, well, a check, what about my leg?" That is what you confront.

After 9/11, a lady came to see me—twenty-four years old, sobbing—and she said, "Mr. Feinberg, I lost my husband, he was a fireman at the World Trade Center, and he left me with our two kids, six and four. Now you are going to give me \$2 million, tax-free. I want it in thirty days." I said to her, "Well, you know, it is going to take time for the Treasury to verify and cut the check. Why do you need this money in thirty days?" She said, "Why? I will tell you why. I have terminal cancer. I have ten weeks to live. My husband was going to survive me and take care of our two children. Now, they are going to be orphans. And I have to get this money, and I have got to set up this trust fund while I have my faculties and my ability to do this." We accelerated the payment, and eight weeks later she died. It is incredible.

The tough part of this job is not being a lawyer. My law degree is a wash. Better a divinity degree, or a degree in psychiatry. Dealing with these people—their horrors, and the problems they face—test your judgment. A lady came to see me sobbing, "I lost my husband. He was a fireman at the World Trade Center, Mr. Feinberg. And he left me with our three kids—six, four, and two. My husband was Mr. Mom. Every day that he was not at the firehouse, he was home teaching the six-year-old how to play baseball, or teaching the four-year-old how to read, or reading a bedtime story to the two-year-old. And what a cook! He cooked all the meals. He was the gardener around the house. He was Mr. Mom. And, you know, Mr. Feinberg, you can give me all the money in the world, it does not matter. My life is over. The only reason I have not jumped out a window to join him is our three kids—six, four, and two—but I will never be the same. Without him, I am lost." She left. The next day I received a telephone call from a lawyer in Queens. "Mr. Feinberg, did you meet yesterday with the woman with the three kids—six, four, and two?" "Terrible. Mr. Mom? Yes, I did." "Well, Mr. Feinberg, look. You have a very difficult job. I do not envy what you are doing. But I have to tell you, she does not know that Mr. Mom

has two other kids by his girlfriend in Queens—five and three. Now I am telling you this because when you cut your check from the 9/11 Fund, there are not three surviving children, there are five surviving children. But I am sure you will do the right thing.” Click. He hung up. Do you tell her? That is what keeps you up at 3 a.m. Do you tell her about this call? Paternity and proving it; that is not the issue. Do you tell her? Myself and a couple of people working with me went around and around on this. We never told her. I think she must know by now. It is over ten years later. But we cut one check to the widow and the three children, and we cut—unbeknownst to her—a second check to the girlfriend as guardian of the two other children. I am not a family counselor. I do not know all the facts. I am getting money out the door. That is my job. I felt, at the end of the day, that it was not my place. She has a memory of her husband, and who am I to prick that bubble? But I am not sure. There were people saying, “This woman is in grief. She ought to know.”

But people ask me all the time: “What is the toughest part of the job?” The toughest part of the job is psychological challenges. When you confront innocent victims who have been thrown a curveball. It is not their fault; they are adrift suddenly, traumatically. And it is difficult to cope with people like that. But you have to do it. It is very interesting. Half the people never want to see you. They send in their claim forms; they say, “Here is the information. Send me the check. We have not the slightest interest in sharing our memories with you or anybody else.” But the other half want to see you, and they come to see me. In the 9/11 Fund, I conducted 900 individual interviews. “Dear Mr. Feinberg, I lost my wife at the Pentagon. We were married for twenty-five years. At this hearing today, I want to show you a video of our wedding twenty-five years ago. I want you to see my angel. I want you to see what those murderers did.” “Well, Mr. Jones, look. It will not have any bearing on the compensation and it will be very emotional, and are you sure you. . .” “You are going to watch it! I want you to see it!” “Show the video.” My office in 9/11 was filled with memorabilia: ribbons, memorials, certificates, medals, films, videos—unbelievable.

When you dispense money in these programs—whether it is a government program like in 9/11 and BP, or it is a private program like the Boston Marathon—you learn a few valuable lessons about human nature. One: money to victims is a pretty poor substitute for loss. It is pretty hollow. We can sit and reasonably declare that giving somebody \$2 million tax-free should have a profound impact on surviving lives. But do not expect to receive thanks from those victims to whom you are

offering money. People know it is pretty hollow. Second: you have to decide how much money to pay somebody. What is life worth? And that raises tough issues. “Mrs. Jones, you are going to get \$2 million because you lost your daughter in the Boston Marathon. Thoughts?” “\$2 million? Why not \$4 million? Why not \$1 million? Why not \$8 million? Why not \$500,000? Where did you come up with \$2 million? I am just curious.” “Well, we figured in our judgment . . .” “Oh. In your judgment.” “Mr. Jones, you lost one limb. You are going to receive \$1,250,000.” “\$1,250,000? What is a guy who lost two limbs going to receive?” “\$2 million.” “Well, just because I lost one less limb, I get \$1 million less? Where is that written?” Problem number two, after money being hollow, is deciding the absolute dollar amount that you earmark for a victim. That is very difficult to do. But that difficulty is insignificant compared to problem number three. Problem number three is not what you are going to pay a victim, but what her next-door neighbor is going to receive. *Everybody counts other peoples’ money*, and if you say to somebody, “You are going to receive \$2 million,” then brace yourself for that person to say, “Why are you giving me \$2 million and you are giving my next-door neighbor \$3 million? What do you have against me? Why are you demeaning the memory of my wife who died? You did not even know her, and you are only giving her \$2 million? And you are giving the next-door neighbor \$3 million? You are denigrating the memory, and you are invalidating the memory of my wife. You ought to be ashamed.” You have to deal with that. Everybody counts other peoples’ money. It is not just one case with one claim. It is collective. Everybody is in the same basket. And everybody talks, and everybody figures out what the next-door neighbor received. You have to be prepared. It happens.

I guess the point I make in conclusion, as the title of the talk suggests, is that these are very unconventional responses. Jim Capretz is here today, one of the best lawyers here in Orange County. And he deals every day in the courtroom with litigants—one litigant, five litigants, ten litigants, and victims—and he does it as well as anybody. These programs are an aberration. They are not the traditional way that we compensate innocent victims of wrong. The way we compensate innocent victims is in the courtroom, and the courtroom works pretty well. But every once in a while, there is a new program, an unconventional response. A rare occurrence. And then you are in uncertain seas, when you try and decide who gets what, who is eligible, what is the methodology for calculating damage, what are the proof requirements, how much due process should you provide people?

It gets thorny. Fortunately, these programs—so far at least—have been successful. They have worked.

What I do is not rocket science. The people in this room could do exactly what I do. I do not have a patent on these types of programs. There are people in this room, like Jim or others, who could do what I do. I am asked to do it. As a citizen, I do it. If you were asked, you would do it. So that is the summary of what I do. We could spend at Chapman a whole semester talking about the unique features of these programs, but at least that gives you the tip of the iceberg. If you want to get into more depth, there are two books I have written in which I get into this at great length. Thank you very much.

[Chapman University Dale E. Fowler School of Law Professors Nancy Schultz and David Dowling facilitated the audience questions.]

Schultz: Excuse me, since [Dean Bogart] was foolish enough to give me the microphone, I am going to ask the first question. My question actually goes to what you were just talking about being the hardest part of the job. I always tell my students, “If you can’t handle conflict, don’t be a mediator.” You get it in floods, and you obviously feel it. I think we could all hear that. How do you handle it? How do you process that when you get 900 people telling you about the worst thing that ever happened to them?

Feinberg: It is devastating. It is stressful, and you do not forget it. Unless you have a heart of stone, you cannot help but be impacted by these events. But, I must say, if President Bush or Attorney General Ashcroft or Senator Kennedy all call you and say, “Thanks for doing this,” it reinforces your resolve to do it as a professional, as a lawyer, as best you can. People say, “Well, when people come to see you and they start crying and lamenting life’s misfortune, do they get more money?” And I say, “Well, sometimes they do. I am only human, but money is a pretty poor substitute for many of these people.” You try and do it, you have a loving family that is very supportive, and, I am surprised, the public is very supportive. I would have thought that, especially with 9/11 where you are spending taxpayer money, it would be like “Watch out!” at the airport and hide; but to this day, people come up, “Thank you, what a horrible task. You did it so well.” And that again reinforces your determination if you are asked to do it.

Dowling: I would like to ask a question. You said your law degree is not applicable, and a degree in divinity would be more helpful. What kind of background do those who work with you

have? I have students in this room who come out and mediate cases with me, and they have a passion and interest in mediation and resolving conflicts and disputes, so it would be helpful for them to understand what skill base is important in a role like this.

Feinberg: When I do one of these programs, I outsource everything. My law firm is me, my partner Mike Rozen in New York City, and my colleague Camille Biros in Washington. So anytime we have one of these assignments, we outsource. Now the lawyers, the immediate staff, the deputies, are all lawyers. When I say a law degree is not helpful, I think the law degree is very helpful in designing the program. What I meant to say about a law degree is that you quickly lose the advantage of a law degree once you start dealing one-on-one with victims. But the law degree in designing the program is very helpful. Second, I almost always hire former students who were part of the course that I have taught at Harvard, Columbia, Georgetown, NYU, or wherever. Students who have kept in touch with me, and want to leave their current job and take a sabbatical to work on one of these funds, I almost always hire as part of my immediate staff. Feinberg-trained lawyers. And then of course, the infrastructure of these programs—accountants, claims adjusters, lawyers in local offices, political figures, PR people, anti-fraud unit—we had 4,000 people working in the BP fund.

Audience member: Which case has been the most interesting to you personally?

Feinberg: 9/11. 9/11 was the most interesting because it had a traumatic impact on everybody in the country. And I learned doing the 9/11 Fund that you make mistakes that you hope you will never repeat. You are dealing with individuals; you are not dealing with some abstract legal theory like a tort. You are dealing with real individuals who come to you with tissues and tears, and you are trying to give them some lifeline, at least some financial stability, and you learn. In 9/11 I learned every day on the job the mistakes you make. A man came to see me. He was seventy-one years old and he had lost his son at the Pentagon. He said to me, "Mr. Feinberg, I lost my son. He escaped after the plane hit, but he thought his sister who also worked in the Pentagon was trapped, so he went back into the building to look for her. She had escaped through a side door. He died looking for her." And as this man was crying, he said to me, "It is not right that a parent should bury a child. It is not right, Mr. Feinberg." And I looked at him, and I said to him, "Mr. Jones, this is terrible. I know how you feel." This man, a very nice man, he looked at me and he said, "Mr. Feinberg, you have a tough job,

but I want to tell you something: do not ever tell me, or anybody like me, that you know how I feel. You have no idea how I feel. And just a constructive criticism, be careful what you say to people, because it strikes a raw wound." I will never do that again. 9/11 was the most difficult.

BP was tough because of the volume of claims and problems of proof. "Oh, Mr. Feinberg, I lost \$100,000 because I could not fish." "Oh, do you have a tax return?" "No, we do things with a handshake down here." "I am not paying \$100,000 with a handshake. Do you have corporate records? Do you have a checkbook?" "Yes, here." "Okay, I am going to send you a check for \$100,000. You will have it in two weeks. Now with it, I am sending a 1099 from the IRS." He says to me, "I waive it." You cannot waive a 1099. I said, "You know, I have to send the 1099." He says, "Rip up my claim. Rip it up!" There were problems with people who could not prove their claims.

Schultz: So how do you decide? New Orleans is very near and dear to me, and I know how a lot of businesses operate there.

Feinberg: I want to come to the defense of New Orleans. I do not think that New Orleans is any different than anywhere else in the United States when it comes to compensation claims. How do you deal with an unsubstantiated claim? We are not paying it. Go criticize all you want to the press that I am being cheap, but if you cannot prove your claim, the integrity of the program—the American people would be furious. "We pay our taxes. This guy is getting money, and he does not have any taxes." They would howl over something like this. So, we do not pay it. Now, how much proof we need, we will be as flexible as we can, but you have to show me something.

Audience member: You mentioned ninety-four people decided to litigate. How much did they get? How did it compare to what you gave out on an average?

Feinberg: It is all over the lot. Ninety-four people in 9/11 decided to litigate, and they settled their cases against the airlines and the World Trade Center five years later. Those amounts are sealed. I suppose some received less, some may have received more, but after you pay the costs and twenty-five percent to your lawyer, I would be surprised if more than a handful of people received more. And even if they received more, good luck to them. If they want to litigate for five years and relive 9/11, instead of "here is money, move on as best you can," I think those people made the wrong choice, but that was a choice they could make and that is fine.

What really bothered me in 9/11, were the two people who took nothing. They did not file a claim, and they did not file a lawsuit. One was a priest who lost a brother who told me he did not think it appropriate to take the money. I said, "Father, have you lost your mind? Take the \$2 million, give it to Catholic charities." Nope, he wouldn't do it. The other lady, I went to see her at her home, she was seventy-five years old, and she had lost her son. She said, "You're here to talk to me about money? I lost my son, and you are giving me dollars? Leave the application on the kitchen table." She never filled it out, she never filed a claim, and she never filed a lawsuit. You learn that grief can paralyze people, and they can act very unreasonably. Only two—those two were the ones that hurt the most. Those were the ones we could not get to take the money.

Audience member: If I may ask, what is the value of the Zapruder film?

Feinberg: The Zapruder film is the only contemporary recording of the actual assassination of President Kennedy in Dallas. Mr. Zapruder happened to be filming to show his children that night at the dinner table. And he caught it on film. The minute he realized it, he ran to the FBI, the FBI seized the film, and it sat in the National Archives for about thirty-five years. On loan. It is Mr. Zapruder's film. Congress passed a law, calling for government possession based upon eminent domain. We are going to seize that film as a historical artifact to be preserved in the National Archives. And there will be an arbitration established by law to determine the amount that should be paid to Mr. Zapruder's family. Mr. Zapruder was long since dead. So the government chose Walter Dellinger, the Solicitor General, to be its arbitrator. The Zapruder family asked me to be their arbitrator. We together chose the former Chief Judge of the Third Circuit Court of Appeals in Philadelphia, Arlin Adams, to be the third arbitrator. We held a two-day hearing to determine what the film was worth. The government called witnesses and said it was worth maybe \$3 million. The Zapruder family called experts from Sotheby's and Christie's, the auction houses, to say, "It's priceless! It's worth at least \$35 million as a historical treasure, unique in American history." And the three arbitrators met, and one side said three, and the other side said thirty-five—well, sixteen is about the right price. And that was the value we placed on it. The United States Treasury paid the Zapruder family \$16 million, and the film today is in a plastic, enclosed case protected from the elements. The spool is unraveled. It is not exactly a Da Vinci painting. It has no aesthetic value at all, but it is there to be kept for all time by the government on behalf of the American

people as the best evidence of that fateful day, fifty years next month actually, when the film was taken by Mr. Zapruder.

Schultz: I have a question about the BP money in New Orleans. It was not all paid out. Do they get to keep the rest, or is it going somewhere?

Feinberg: I paid out \$6.5 billion of the \$20 billion. Then BP, out of that amount, paid about \$2 billion for clean up in the Gulf. That's about \$8.5 total. Then about \$2 billion was paid to governmental entities—state and local governments—that lost tax revenue or sales tax revenue. The rest was maintained by BP.

Audience member: Why was BP a government program if it was private money?

Feinberg: The money was private, but the money was distributed pursuant to an escrow agreement entered into with the Department of Justice in which the rules and regulations governing the program would be established consistent with the Federal Oil Pollution Control Act, a federal statute. So you are right. It is more quasi-government in the sense that BP funded it, not the taxpayers, but it was a rather unique hybrid in terms of how the program would operate.

Dowling: I think Professor [David] Gibbs had a question.

Gibbs: I heard you speak more than ten years ago, and it was a time where there were several thousand people not filing claims and the deadline was approaching, and you were very unhappy about that. It was in the thousands! How did you get the number down from thousands to two?

Feinberg: Here is how you do it. That is a fabulous question. I have learned what some of you know from your mediation and arbitration classes. If you set a firm deadline, you have to tell people this is it—"You either come into the program by this date, or you are out of luck." Or you do a mediation and you say, "We are going to start today. This mediation will end tomorrow at noon. So whatever you are holding in your back pocket, if we are going to have a settlement by noon tomorrow, you better put it on the table." Invariably, people wait until the last second. In 9/11, two-thirds of all the claims were filed in the last six months of the program. People delay the day of reckoning. They do not want to make decisions. They will wait until the last minute, and then they will file in droves. In 9/11, I think the last 1,000 claims were filed in the last forty-eight hours. "We are running out of time!" And you know you better come to grips with this because the statute will not be extended. Senator Kennedy came to me about six months before the

program was to expire, and he said, “Ken, only thirty-five percent of the people have filed. Why don’t I try and extend the program another year?” “Senator, don’t you dare. If you extend the program another year, people will wait and wait, and they will still procrastinate.” It does not matter that they are going to get millions instead of paying millions to the IRS when people wait until April 15 at midnight to file their tax returns. This is the other way around! We are ready to give you the money. Nope. People wait and procrastinate until there is no more time. So ten years ago when I was lamenting this, it must have been six months before the end of the program when I was saying, “Oh my goodness, I hope they file.” They all came in virtually at the last minute. Everybody just came in.

Professor David Finley: So for the 9/11 program, was there an underlying assumption of liability on the part of the government? Was this just an extraordinary circumstance?

Feinberg: Nope, there were two reasons there was a 9/11 Fund. To this day, as you know, the federal government has never apologized for 9/11. The federal government has never once said that the government was in any way to blame. Not in the slightest. Two reasons for the 9/11 Fund: One, the airlines ran to Congress and said, “If you do not set up an alternative program, you know Jim Capretz and the others are going to sue! And if they sue us, it does not matter whether we will win the case or not, we will be in court for years, everybody will be reading about the airlines, they will be afraid to fly and we will all go bankrupt.” That was one reason. The other reason was the American people, and the desire of the American people to come to the rescue of their own. “We will show the world how we take care of our own and we’ll rally the troops. The American people will stand as one with the victims. We are their cousins, their family. We are one nation, and we are going to show how generous we can be.” And those are the reasons. It had nothing to do with government responsibility. One time I know that the government apologized for a government wrong was in 1980, when President Reagan signed that bill compensating the families of Japanese-American citizens who were interned after Pearl Harbor and were sent to New Mexico and Arizona. The President apologized and said we are sending a check—it was around \$20,000—to every member of the next generation. Reparations. The 9/11 Fund was certainly not reparations.

Audience member: Do you think the difference between 9/11 and the Oklahoma City bombing was that it was someone that was American as opposed to someone who was not?

Feinberg: Is the reason we had a 9/11 Fund but not an Oklahoma City fund because the Oklahoma City bomber was an American citizen? I do not know. That does not sound very convincing to me. Whether the terrorist was a foreigner or a domestic terrorist, terrorism is terrorism as far as the victims on the ground. You try explaining that distinction to people. I do not get it. And even if you are right, I do not like the distinction. But the 1993 World Trade Center victims, those were the same people! Same type of foreign terrorism. They were not eligible. The people who died in Kenya when the African Embassy was blown up in 1998, 200 people killed—no fund for them. This was an emotional thing, 9/11. I think if Congress had waited two more weeks, it would not have done it. But, having done it, I think it worked, and I think it was the right thing to do.

Audience member: I am really happy you came today, and I am really happy for you that you have this job because I think you get to cultivate more compassion than most human beings in their whole lifetime. I was wondering after we leave here today, knowing what you know about the human heart and life experience, how do you recommend we all leave here treating each other?

Feinberg: That is a great final question. And I think it is appropriate particularly as we honor the fiftieth anniversary of President Kennedy. I grew up in Massachusetts where a son of Massachusetts was in the White House. I am part of a noble profession. I think it is so important that we lawyers give back to the community. And that does not mean you have to be a legal aid lawyer—although that is wonderful—or work for a non-profit. You can work for a large law firm in Orange County, but I think it is so important that we honor the legacy of President Kennedy, who told all of us how important it was to give back to the country, in any way you can. Even in small ways, but if everyone acts in a way—does something—for the community and for their fellow citizens—it does not have to be what I do. I roll in and roll out with these big programs, and like you said, they are very visible. These programs, fortunately, are few and far between. And if you are going to mediate, you are going to litigate, or you are going to be a corporate merger and acquisitions specialist, just think about the honor of being a member of our profession, and how important it is somehow in your own personal way to give something back to the community in the public interest. And I think that is the best way we honor President Kennedy on this fiftieth anniversary of his death. I think that is important, so thank you all very much.