

**IMPLEMENTATION OF THE SEPTEMBER 11TH VICTIMS COMPENSATION FUND OF
2001: TWO STEPS FORWARD/ONE STEP BACK¹**

By: Richard P. Campbell²

Accepted for Publication in DEFENSE COUNSEL JOURNAL

On September 22, 2001 (11) days after the most deadly and devastating attack in the history of the Republic), the President of the United States signed into law H.R. 2926, the Air Transportation Safety and System Stabilization Act (“the ATSSSA” or the “Act”), Public Law No. 107-42³. In Title IV of ATSSSA, entitled September 11th Victims Compensation Fund of 2001⁴, the federal government curiously chose a tort model to assist the individual victims and their families. It could have selected other paths to follow, like low interest or no-interest loans or transitional assistance programs parroting some state based unemployment compensation or workers compensation programs. But it did not. Instead, the Congress chose to enact a law that provides full, fair, and reasonable compensation, without regard to fault, for the entire loss suffered by each victim and each family in this horrific tragedy. Without doubt, the September 11th Victims Compensation Fund of 2001 is the single largest and most comprehensive no-fault statute in the history of the United States.

In typical fashion, the Congress painted the canvas of the Fund in broad strokes, setting policies and standards and the appropriating funds to pay the claims. Responsibility for implementing the details was delegated to the Attorney General and his “Special Master”, Kenneth Feinberg. On December 21, 2001 (in accordance with the time frames set by the Congress in ATSSSA), the Department of Justice issued an “Interim Final Rule” that established the regulations that would govern the administration of the Fund. After receiving and considering numerous comments from

interested parties, lawyers, academics and others, the Department of Justice issued its Final Rule on March 13, 2002.

With the rules of the game now firmly set, it is appropriate to evaluate the legal issues that arise in conjunction with the Fund. The issues are manifold and manifest:

Constitutional and other issues arising from the Act

a. Did Congress have the power to create a no-fault compensation scheme that benefits a narrow class of tort or crime victims and that is paid for by federal tax dollars?

b. Did Congress have the power to grant full or partial immunity from tort-based judgments:

i. to specific private parties (rather than classes of individuals);

ii. *ex post facto*;

iii. without full, unrestricted compensation; and

iv. triggered by exhaustion of available casualty insurance proceeds?

c. Did the Congress have the power to mandate waiver of civil lawsuits against putative tortfeasors by individuals who file claims against the Fund and who are later determined to be ineligible for Fund benefits?

d. Did Congress have the power to create federal causes of action for damages arising out of a connected series of tortious/criminal acts and tie liability to the tort law of the state where the incident occurred?

e. Did Congress have the power to assign all lawsuits of this type to one federal district court regardless of the site of the incident, the location and convenience of witnesses, or the domicile or residence of the plaintiffs or defendants?

f. Who has standing to challenge the Act, the regulations promulgated under it, or the decisions, actions, or inactions of the Special Master?

g. What are the proper procedures to follow in raising challenges to the Act, the regulations, or the actions of the Special Master?

The fundamental issues arising from the Regulations

h. Did the Department of Justice materially and wrongfully deviate from Congress' delegation of authority by:

- i. assuming powers beyond the express grant of authority;
- ii. excluding victims from the Fund;
- iii. minimizing the authorized scope of recovery for victims; and
- iv. abandoning individualized fact finding?

i. Is explicitly unequal treatment of rescue workers from other victims proper and sustainable?

j. Can the Special Master control distribution of Fund proceeds in frank disregard of state probate law? and

k. What are the proper procedures to follow in challenging the Regulations?

In order to put these and related legal issues into a context, it is helpful to review again the essential features of the statute and the final regulations designed to implement them.

A. ATSSSA TITLE IV- VICTIM COMPENSATION

Title IV of ATSSSA is relatively simple and straightforward. Its stated purpose is “**to provide compensation** to any individual (or relatives⁵ of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001”.⁶

Participation in the Fund is limited to physical injury and wrongful death claims only. By statute, the “Special Master” appointed by the Attorney General has the job of **“administering the compensation program”**⁷ through “hearing officers and other administrative personnel” to be employed for that purpose. The Special Master’s statutory duty is clear and unequivocal: **he “shall ... determine” (1) a claimant’s eligibility, (2) the extent of harm (including economic and non-economic losses), and (3) the amount of compensation “not later than 120 days after that date on which a claim is filed”**.⁸ The statute mandates action; the Special Master shall make the three findings and act. The statute does not grant him discretion to act as and when he sees fit. Congress set a broad scope of recovery; indeed, as a cursory review of the language shows, the scope of recovery is greater under this pure no-fault scheme than virtually any state tort law system. The statute requires the Special Master to award economic and non-economic damages. Economic damages are assessed “to the extent recovery for such loss is allowed under applicable State law.”⁹ The statute does not create a ceiling on recovery of damages generally or in any single category of damages.

The statute defines economic losses as:

“any pecuniary loss, including loss of earnings or other employment benefits, medical expense loss, the costs of replacement services, burial expenses, and loss of business opportunities.”¹⁰

Non-economic damages are defined as:

“physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium, hedonic

damages, injury to reputation, and all other nonpecuniary losses of any kind or nature.”¹¹

Statutory recognition of hedonic damages is unique but generally welcome; identification of it as something different from the loss of enjoyment of life is puzzling.¹²

The Special Master must reduce the award by any ‘collateral source “compensation”¹³, including life insurance, pension funds, death benefit programs, and payments by federal, state, and local governments, “related to the September 11th aircraft crashes”. Collateral source compensation is described in the aggregate; it is neither described as the net collateral source benefit actually received by the claimant nor the present value of any future stream of income. So, for example, the statute on its face requires any award under the Fund to be reduced by the full amount of the collateral source compensation without regard to any payments made to obtain the benefit (like premiums on life insurance) or to any contingency applicable to future receipt of the payments (like death on a future income stream). While no explicit mention is made in the statute of charitable gifts by the numerous special funds set up to assist victims and their families, it is difficult to reconcile exclusion as a collateral source of income received from charities but inclusion of social security payments. Claim awards are not subject to state or federal taxes.¹⁴

The claimant (i.e., the victim or the victim’s “personal representative”) has a statutory right to present evidence through witnesses and documents and to such other “due process” as determined by the Special Master.¹⁵ The right to an evidentiary hearing, therefore, is protected. The statute also assures the claimant the right to be represented by an attorney throughout the process.¹⁶ There is no statutory provision for government representation by the Justice Department (or otherwise) or for an adversary process of any stage in the proceedings.

1. The Victim Compensation Procedure

The claimant must submit a claim form developed by the Special Master which requires: (1) information detailing the physical harm that claimant suffered or information confirming the decedent's death; (2) disclosure of any possible economic¹⁷ and non-economic¹⁸ losses; and (3) information about all collateral source compensation.¹⁹ While fraud prevention and detection are not explicitly covered by ATSSSA, claimants who make factual misrepresentations on the Special Master's designated claim form are subject to criminal penalties under the False Statements Act.²⁰

a. Eligibility and Restrictions

Those individuals who are eligible to file claims before the Special Master are persons who were “**present**” at the crash sites at the time, or in the “**immediate aftermath**” of the terrorist-related aircraft crashes of September 11, 2001.²¹ The Fund also covers individuals who were members of the flight crew and passengers aboard American Airlines Flights 11 and 77 and United Airlines Flights 93 and 175. The Fund expressly excludes any individual identified by the Attorney General as a participant or conspirator in the terrorist crashes of September 11, 2001.²²

b. Decision Of The “Special Master”

The Special Master only decides whether claimants are eligible and (if so) the amount of compensation (damages) that they receive. The Special Master may not award punitive damages and shall reduce the amount of the compensation award by the amount of an individual's collateral source compensation. Not later than 120 days after the date on which a claim is filed, the Special Master shall provide a written notice of his determination to the claimant. The determination of the Special Master is final and not subject to judicial review.²³

c. Waiver and Withdrawal of Claim

Pursuant to the statute a claimant filing a claim under Title IV waives the right to file a civil action in any Federal or State court,²⁴ except civil actions against any parties who are alleged to be responsible for the attacks. An individual who first filed a civil action may not thereafter submit a claim to the Special Master unless and until the individual withdrew from the pending civil action within 90 days after the date on which Regulations are promulgated (i.e., 90 days after December 22, 2001).²⁵

d. Limitation on Air Carrier Liability

The liability of an air carrier for “all claims”, including claims for punitive as well as compensatory damages, arising from the terrorist actions of September 11, 2001, shall not be greater than the “limits of the liability insurance coverage maintained by the air carrier.”²⁶ This grant of immunity from tort claims was also extended to other potentially liable entities.²⁷ The grant of immunity is not co-extensive with compensation eligibility; i.e., putative tortfeasors enjoy immunity from tort claims above the limits of their casualty insurance coverages brought by individuals and entities who are not entitled to recovery from the Fund.

e. Federal Cause of Action/ Exclusive Jurisdiction in Southern District of New York

For individuals who opt out of the Fund (and for other persons and entities who are not eligible for that program), ATSSSA creates a “federal cause of action” for all claims arising out of the terrorist attacks of September 11, 2001²⁸ with the United States District Court for the Southern District of New York having exclusive jurisdiction over all actions, including any claim for loss of property, personal injury, or death resulting from or relating to the terrorist actions of September 11,

2001.²⁹ The Congress did not address either the fairness or the hardship to families of decedents from states other than New York to litigate their claims in the Southern District of New York. The substantive law applied to these federal causes of action will be derived from the substantive law of the State in which the crash occurred, including choice of law principles, unless the substantive state law is inconsistent with or preempted by Federal law.³⁰ Cases arising from the Pennsylvania crash will be governed by the Pennsylvania standard; cases arising from the New York cases will be governed by New York law.

f. Subrogation

The federal government has the right of subrogation against any culpable party. The statute does not detail the resolution of subrogation rights against businesses like commercial airlines with the grant of immunity above the limits of available casualty insurance coverages. As stated above, ATSSSA expressly reserves claimants' rights to pursue the full limits of liability of those individuals who were knowing participants in the terrorist conspiracy and actions of September 11, 2001.³¹ And indeed, lawsuits have been filed against terrorist organizations or their alleged financial backers.³²

2. Some Primary Issues Arising Under The Act

As it does with any statute, Congress addressed the problem (here, compensation for innocent victims) and left for its chosen delegate (here, the Attorney General and the Special Master) the job of implementing its plan through the promulgation of regulations. The devil, as the cliché goes, is in the details. Among other matters, the Attorney General and the Special Master had to decide (1) the policy, approach, and attitude toward claims, including the means for meeting the Congressional mandate for timely disposition of claims; (2) the extent, *vel non*, that proceedings will be conducted in an adversary manner; (3) the means and methods of claimant access to information that may be relevant to determining awards; (4) public access to proceedings and to award determinations; (5) the accountability of hearing officers and other officials of the Office of the Special Master; (6) the role of private lawyers and expert witnesses in the proceedings; and (7) the regulatory controls over lawyers' fees. As will be shown later, the Attorney General and Special Master also took on the authority to determine other significant matters: (1) the degree to which proceedings will mirror the civil jury trial system in making awards; (2) the class of individuals entitled to recover awards for the deaths of their loved ones; and (3) the reach of the statute to remote victims.

a. The Policy, Approach, And Attitude Toward Claims.

The administration of the Fund reflects the fundamental attitude that the Special Master and his subordinates bring to the task before them. If the Special Master directly, or indirectly in carrying out instructions of the Attorney General, looks at the Fund as precious government monies that should be controlled and dispersed with caution and circumspection, then the awards will reflect that attitude. At a continuing legal education program held in Washington in October 2001, a highly respected member of Department of Justice expressed her personal view that society generally and the bar

specifically should not look at the Fund as it would ordinary tort recoveries.³³ The Special Master could not, in her mind, administer the Fund as a jury would do because he will be dispersing government monies. The government, in her sense, should not be held to the same standard as a property and casualty insurer or a commercial airline. It must pay less for the same claim of damages than the amount that private parties would have to pay. The likelihood that the government will adopt this attitude and approach to the administration of the Fund is manifested by its response to other entitlement programs. The Veterans Administration, for example, rejected soft tissue lymphoma claims by Viet Nam era veterans who were exposed to Agent Orange for a decade or more, relenting only when toxicological and epidemiological studies in peer reviewed medical journals proved the causal connection that the suffering veterans knew intuitively existed as they lost their lives or body parts to the cancers. Government officials have a knee jerk reaction to deny claims – not to award them. Here, one relevant comparison is the fulsome largesse that Congress exhibited to the commercial airlines.

i. Resolution

Congress' clear purpose in establishing the Fund is the fair and just compensation of eligible individuals present at the sites of the terrorist-related aircraft crashes of September 11, 2001 who were physically injured or killed as a direct result of the crashes or in the immediate aftermath of them. In his statement accompanying the Regulations, the Special Master opened a window to the government's policy and approach to these claims. He called the Fund an "unprecedented expression of compassion on the part of the American people to the victims and their families . . . designed to bring **some measure of financial relief** to those most devastated by the events of September 11 . . . [and] an example of how Americans rally around the less fortunate."³⁴ In his preamble and statement

accompanying the Final Rule, the Special Master articulated a rationale for the regulatory decisions he made on the critical issues left open to him by the Congress that is founded on victims' considerations of risk and reward:

The September 11th Victim Compensation Fund is a unique federal program created by Congress in recognition of the special circumstances these victims and their families confront. The Fund provides an alternative to the significant risk, expense, and delay inherent in civil litigation by offering victims and their families an opportunity to receive swift, inexpensive, and predictable resolution of claims. The Fund provides an *unprecedented* level of federal financial assistance for surviving victims and the families of deceased victims.³⁵

Awards, therefore, will not compensate claimants for their provable economic losses (as defined by state law) and non-economic losses (as defined by the Congress) that could be recoverable against a tortfeasor in wrongful death or personal injury litigation. Instead, the regulatory framework rejects the uniqueness of each individual injured or killed in the attacks and opts instead for commonality of compensation and ease of administration. Comparing the Congressional mandate with the regulatory results proves the point. Congress intended to provide full compensation for loss of love, affection, guidance, companionship, pain, suffering, and other intangibles based on the individualized proofs offered to the Special Master by the claimant. As discussed below, the Special Master instead chose to award each decedent's estate \$250,000 and each spouse or child \$100,000 for non-economic damages.³⁶ Consequently, an infant child of a decedent will receive the same award for non-economic damages as an 18-year-old child living apart from the same parent. A 25-year-old widow who worked at home and cared for four minor children will receive the same \$100,000 in non-economic damages as the 60-year-old widow who was estranged from her spouse. Special Master Feinberg offered his opinion that an award in excess of \$3 million (tax-free) would rarely be

appropriate in light of individual needs and resources.³⁷ However, sufficient compensation would be provided to ensure that victims' families receive at least a minimum level of resources to help meet their needs and rebuild their lives. Families of deceased victims should receive a minimum of \$500,000 from a combination of the Victim Compensation Fund, other state and federal programs, life insurance policies and other sources of compensation, with single decedents receiving a minimum of \$300,000.³⁸

b. The Claims Process

i. The Use of Adversary Proceedings.

The statute spells out in broad terms a proceeding initiated by a claimant and considered by a hearing officer reporting to the Special Master. The statute does not explicitly provide any role for or participation by Department of Justice lawyers. Indeed, the statute forbids the Special Master from considering fault of any type by any person in making the award. Since fault is not a consideration, and since eligible claimants are entitled to an award, one can fairly question the need for any participation by government lawyers or government witnesses (expert or otherwise). The only issues arguably open to challenge are ones dealing with the claimant's evidence on eligibility and damages. Hearing officers will consider testimony and reports from expert witnesses and others on such matters as work history, earning capacity and family relationships. The hearing officers in the first instance and the Special Master in final review are fully empowered to protect the government from fraudulent claims.

ii. Discovery And Access To Evidence.

Claimants will need subpoena power to compel production of documents, other evidence, and witnesses (if a hearing is convened). Evidence gathered by and for the claimant for presentation at a hearing before the Special Master or his designee is a different kettle of fish from evidence gathered for the purpose of discrediting the claimant's documents and witnesses. "Discovery" as it exists in conventional civil practice would add significant time, unnecessary expense (including attorneys' fees), delay in making awards, and risk to the claimant (in reduced net awards if nothing more).

iii. Resolution of the Claims Process

1. Claims Evaluation

Except for an advance benefits request, the claimant begins the claims process by submitting an Eligibility Form and either a Personal Injury Compensation Form or a Death Compensation Form, along with required documentation establishing eligibility. Claims will be deemed “filed” when a Claims Evaluator determines that the Eligibility Form and either a Personal Injury Compensation Form or a Death Compensation Form are substantially complete. Claimants have the choice of two procedural options: Track A or Track B. If a claimant selects Track A, a Claims Evaluator will determine the claimant’s eligibility and set a presumed award according to the Special Master’s economic and non-economic loss charts, which are discussed below.

Any claimant deemed ineligible may appeal the decision to the Special Master or his designee. Within 45 days of filing, the Claims Evaluator must notify the Track A claimant of the eligibility determination, the amount of the presumed award, and the right to request a hearing before the Special Master. The claimant may accept the award and request payment or request a review before the Special Master or his designee. No further review or appeal is permitted.

Under Track B, a Claims Evaluator also shall determine eligibility within 45 days of the date the claim was filed, but shall not determine a presumed award. After notification of eligibility, the Track B claimant then will have a hearing before the Special Master or his designee, who will utilize the presumed award methodology but may modify the award if the claimant demonstrates “extraordinary circumstances” not adequately addressed by the presumed award methodology. There shall be no review or appeal from this determination.³⁹

2. Hearings

Hearings will be non-adversarial; the regulations do not provide for appearances by Justice Department lawyers. “The objective is to permit the claimant to present evidence the claimant believes is necessary to a full understanding of the claim.”⁴⁰ If a claimant opts for a hearing under either track, the claimant may make supplemental submissions and present witnesses, including experts. The Special Master is permitted to question witnesses and examine the credentials of experts. Hearings are not limited to a proscribed amount of time.⁴¹ The Special Master or hearing officer will determine the conduct of the hearing (as in any tribunal).⁴² The hearings will take place to the extent possible in venues convenient to the claimant or representative.⁴³

c. Public Access

i. To Information And Awards.

Before September 11th, the public was embroiled in fractious debates about individual privacy and the extraordinary reach of public and private organizations into private lives with modern technology. The regulations determine the extent to which information generated in presentations by claimants and the awards made in the process are public. All proceedings, pleadings, and filings of other types in the criminal and civil courts are generally open and available to the public. The Special Master will be administering a public Fund that is intended as an alternative to civil courts. There is no sound reason to limit public access to the information, evidence, and awards that arise from this program. In fact, the empirical data generated by the fund will be a treasure trove of information on claims values for lawyers and claims executives alike. One possible side benefit from the administration of the Fund may be ready access to the largest, single event, publicly available database of wrongful death claims in history.

ii. To Official's Conduct

All public officials should be held accountable for their actions. No less of a rule is acceptable in our democracy. In the context of the Fund, accountability can be afforded in two ways. First, hearing officers could set forth the factual basis of each category of damages awarded as well as precise dollar amounts for each element of damages. A written set of findings would facilitate the Special Master's oversight of his subordinates' work product and his assessment of any aberrational awards. Second, detailed findings and specific awards will enhance public oversight of the Special Master's administration of the Fund in part by permitting easy searches of the claims database.

iii. Resolution of Accountability and Public Access to Information

The Special Master has published a list of all individuals making claims against the Fund. His stated purpose is the delivery of notice to all potential beneficiaries of Fund proceeds of the identity of the persons making claims as personal representatives.⁴⁴ He also maintains a website, accessible at www.usdoj.gov/victimcompensation that provides substantial information about the operation of the Fund, including presumptive awards and mathematical tables to assist in calculating economic losses.⁴⁵ Regarding the unique potential utility of aggregate claims data from the Fund, the regulations provide the Special Master with discretion to publish data generally while keeping the identity of individual claimants confidential. Section 104.34 (Publication of Awards) provides:

In order to assist potential claimants in evaluating their options of either filing a claim with the Special Master or filing a lawsuit in tort, the Special Master reserves the right to publicize the amounts of some or all of the awards, but shall not publish the name of the claimants or victims that received each award. If published, these decisions would be intended by the Special Master as general guides for potential claimants and should not be viewed as precedent binding on the Special Master or his staff.

d. The Role Of Private Lawyers And Experts.

The statute protects a claimant's right to counsel and mandates an evidentiary hearing if the claimant requests one. Since competent evidence supporting substantial awards for economic and non-economic damages is anything but intuitive, the lawyer's role is fundamentally important. Likewise, the statute explicitly provides the claimant the opportunity to present "witnesses" at hearings. In the field of economic loss, the testimony of economists may be quite valuable.

i. Lawyers Fees.

Attorneys are always easy targets for vocal critics. Government control over lawyers fees paid from awards against the government is not a new or novel concept.⁴⁶ However, the marketplace best establishes lawyers' fees, like all other pricing decisions.

ii. Resolution of Use of Lawyers and Their Fees

An attorney in good standing may represent the claimant, but legal representation is not necessary.⁴⁷ The Special Master chose to comment on lawyers' fees but refrained from regulating them.⁴⁸

e. Mirroring Jury Awards.

The statute gives claimants a choice between presenting a claim for damages to the Special Master on the one hand and pursuing conventional civil litigation against potentially legally responsible parties in the United States District Court for the Southern District of New York on the other. At the same time, of course, the Congress gave the commercial airlines tort immunity from awards in excess of the limits of their property and casualty insurance coverages. (Other entities, like airport authorities, were later granted limited tort immunity.) Choosing conventional litigation (in the precise jurisdiction where the tragedy occurred) in the face of limited pools of insurance proceeds,

tenuous liability, and massive direct and indirect property damage claims is extraordinarily risky to say the least. The *quid pro quo* offered up to the eligible claimant who foregoes civil litigation and presents a claim to the Special Master is the unequivocal promise of an award made without regard to fault that mirrors in some fashion an award from civil litigation and that is backed by the Treasury of the United States of America. Indeed, the measure of damages established by the statute exceeds those typically given to juries for use in state law personal injury and wrongful death cases. Few state courts instruct juries on hedonic damages and the value of life.

Damage matrices that predetermine awards for economic and non-economic losses regardless of evidence pertinent to individual claimants are not part of the American civil justice system.⁴⁹ Civil juries do not receive damage evidence in neatly predetermined lots. In jury trials every individual is different; every award is idiosyncratic. The common law recognizes the diversity of life's circumstances. Every claimant is in fact unique. In the statute, Congress assures each claimant a hearing in part to demonstrate the unique considerations applicable to his or her claim.

i. Resolution of Awards from the Compensation Fund

The regulations pertaining to the determination of awards for economic and non-economic losses are by far the most controversial and raise the potential for litigation over the Special Master's deviation, *vel non*, from the Congressional mandate and delegation of authority. The Congress was clear in its intent – full and fair compensation based on the particular circumstances applicable to the individual claimant.

1. Principal Objectives

Section 104.41 reiterates the Congressional intent:

As provided in section 405 (b) (1) (B) (ii) of the Act, in determining the amount of compensation to which a claimant is entitled, the Special Master shall take into consideration the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant. The individual circumstances of the claimant may include the financial needs or financial resources of the claimant or the victim's dependents and beneficiaries.

The regulations and related statements and mathematical table demonstrate, however, intent to depart from the wishes of the Congress and to distribute awards from the Fund with a general sense of equality and without significant regard to individualized facts and circumstances. The promise of a minimum amount of an award demonstrates the point. In Section 104.41, the claimants are promised that “[i]n no event shall an award (before collateral source compensation has been deducted) be less than \$500,000 in any case brought on behalf of a deceased victim with a spouse or dependent, or \$300,000 in any case brought on behalf of a deceased victim who was single with no dependents.” The point is made evident when considering the regulations on non-economic damages.

2. Non-economic Loss

Decedents, injured survivors, and their families in fact sustained non-economic losses. There is nothing feigned or hypothecated about the pain and suffering endured by the individuals burned to death in flaming buildings, or those who leaped to their deaths from 105 stories above the ground, or those who survived with disfiguring injuries. Children who grow up without fathers and mothers suffer greatly and surviving spouses who are left to raise children on their own have long and difficult roads ahead of them. The Congress recognized the nature and types of loss these individuals would incur and called for compensation for each element of their damages: physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service),

hedonic damages, injury to reputation, and all other nonpecuniary losses of any kind or nature. The Special Master chose instead to establish fixed “presumed” non-economic loss awards.

Section 104.44 (Determination of presumed losses for decedents) provides: “The presumed non-economic losses for decedents shall be \$250,000 plus an additional \$100,000 for the spouse and each dependent of the deceased victim.” Section 104.46 (Determination of presumed noneconomic losses for claimants who suffered physical harm) provides: “The Special Master may determine the presumed noneconomic losses for claimants who suffered physical harm (but did not die) by relying upon the noneconomic losses described in Sec. 104.44 and adjusting the losses based upon the extent of the victim’s physical harm. Such presumed losses include any noneconomic component of replacement services loss.” The reference back to Section 104.44 for a description of non-economic losses is meaningless as the regulation contains only the presumptive amounts of compensation. The obvious bottom line is that the Special Master will award the presumed amounts in death cases and some factored (and probably lesser) amount in cases brought by survivors. The regulations on non-economic loss flatly ignore the standard set by the Congress.

3. Economic Loss

Compensation for economic losses in death cases is determined by consideration of loss of earnings and employment benefits⁵⁰, medical expense loss⁵¹, replacement services loss⁵², burial costs⁵³, and loss of business or employment opportunities.⁵⁴ Comparable considerations, including the nature and type of any permanent or partial disability, are made in cases involving economic losses by injured survivors.⁵⁵ The regulatory standard meets the Congressional mandate in that the particular earnings history (medical and burial expenses and disability for survivors) serves as the factual basis for rendering an award.

However, the Special Master developed and published a statistical matrix for calculating “presumed” economic losses based on readily identifiable circumstances such as a claimant’s age, prior income levels, marital status and the number and age of any dependents. The Special Master’s published presumed loss charts were not incorporated into the regulations and do not facially constitute the law related to the grant of awards for economic loss. The economic loss awards identify presumed losses up to a salary level commensurate with the 98th percentile of individual income in the United States, or \$231,000. In his statement and preamble to the final rule, the Special Master repeatedly avers that the use of the matrixes and the use of the 98th percentile salary do not constitute a cap on economic damage awards.

To be absolutely clear: The fact that the “presumed awards” address incomes only up to the 98th percentile does *not* indicate that awards from the Fund are “capped” at that level. In extending the presumed awards only up to the 98th percentile, we merely recognized that calculation of awards for many victims with extraordinary incomes beyond the 98th percentile could be a highly speculative exercise and that, moreover, providing compensation above that level would rarely be necessary to ensure that the financial needs of a claimant are met...

While not part of the regulations, the charts and methodology for using them provide useful information for claimants and their lawyers and assist them in making the choice between civil litigation and pursuing a claim against the Fund. The proper use of the methodology is detailed in a four-page set of detailed instructions (last revised on April 2, 2002).⁵⁶ Table 1 demonstrates the likely effective rates of taxation on pre-tax income.

Table 1

Presumed Future Effective Combined Federal, State and Local Income Tax Rates for New York

Income								
\$ 10,000	\$ 20,000	\$ 25,000	\$ 30,000	\$ 35,000	\$ 40,000	\$ 45,000	\$ 50,000	\$ 60,000
5.27%	8.50%	10.45%	12.25%	14.03%	14.72%	15.41%	16.10%	17.27%
\$ 70,000	\$ 80,000	\$ 90,000	\$ 100,000	\$ 125,000	\$ 150,000	\$ 175,000	\$ 200,000	\$ 225,000
18.44%	19.50%	20.55%	21.60%	25.00%	26.35%	27.70%	29.05%	30.39%

Note

Calculated from data reported in United States Selected Income and Tax Items for Individual Income Tax Returns: Forms 1040, 1040A & 1040EZ for Tax Years 1997, 1998 and 1999 (files 97IN33NY.XLS, 98IN33NY.XLS and 99IN33NY.XLS obtained from the IRS website www.irs.gov). Rates shown reflect a reduction of 5% from the reported data.

Table 2

Expected Remaining Years of Workforce Participation

Age	All Active Males
25	33.63
30	29.36
35	25.04
40	20.78
45	16.65
50	12.64
55	8.97
60	5.97
65	4.20

Source:

"A Markov Process Model of Work-Life Expectancies Based on Labor Market Activity in 1997-1998," by James Ciecka, Thomas Donley, and Jerry Goldman in the *Journal of Legal Economics*, Winter 1999-2000.

Table 2 shows the probable number of years that a decedent or injured survivor would likely continue to work.

Table 3 exhibits the impact of inflation, productivity, and wage growth on real earnings growth by age.

Table 3
Presumed Age-Specific Earnings
Growth Rates
(Including Life-Cycle, Inflation, and Overall
Productivity Increases)

Age	Earnings Growth Rate
18	9.744%
19	9.580%
20	9.419%
21	9.263%
22	9.055%
23	8.847%
24	8.640%
25	8.434%
26	8.227%
27	8.021%
28	7.816%
29	7.611%
30	7.406%
31	7.201%
32	6.997%
33	6.794%
34	6.591%
35	6.388%
36	6.185%
37	5.983%
38	5.781%
39	5.580%
40	5.379%
41	5.179%
42	4.979%
43	4.779%
44	4.579%
45	4.380%
46	4.182%
47	3.984%
48	3.786%
49	3.588%
50	3.391%
51	3.194%
52+	3.000%

Note: Nominal percentage changes assume annual inflation or cost of living increases of 2.0% plus overall productivity adjustments of 1.0% per year. The underlying real life-cycle percentage change is calculated using a regression analysis of log of total earnings on experience and experience squared using earnings for full-time year-round male workers from the 2001 Current Population Survey (CPS) table P1NC 04

Table 4 plots personal consumption rates by age and family status.

Table 4
Decedent's Personal Expenditures or Consumption as Percent of Income

	Income									
	\$ 10,000	\$ 20,000	\$ 25,000	\$ 30,000	\$ 35,000	\$ 40,000	\$ 45,000	\$ 50,000	\$ 60,000	\$ 60,000
Single	76.4%	74.6%	73.5%	71.8%	68.0%	64.4%	63.5%	62.6%	61.7%	
Single, 1 dependent child	21.6%	21.6%	21.6%	21.6%	20.6%	19.7%	19.0%	18.3%	17.8%	
Married, no children	30.7%	28.3%	26.7%	26.7%	24.7%	22.8%	20.5%	18.3%	17.8%	
Married, 1 dependent child	19.0%	17.6%	16.9%	16.9%	15.9%	14.9%	13.6%	12.4%	12.1%	
Married, 2 dependant children	13.6%	12.8%	12.5%	12.5%	11.8%	11.1%	10.2%	9.4%	9.1%	
	\$ 70,000	\$ 80,000	\$ 90,000	\$ 100,000	\$ 125,000	\$ 150,000	\$ 175,000	\$ 200,000	\$ 225,000	
Single	60.8%	53.5%	48.0%	48.0%	48.0%	48.0%	48.0%	48.0%	48.0%	
Single, 1 dependent child	17.4%	15.1%	13.7%	13.7%	13.7%	13.7%	13.7%	13.7%	13.7%	
Married, no children	17.4%	14.5%	12.5%	12.5%	12.5%	12.5%	12.5%	12.5%	12.5%	
Married, 1 dependent child	11.8%	9.9%	8.7%	8.7%	8.7%	8.7%	8.7%	8.7%	8.7%	
Married, 2 dependent children	8.9%	7.6%	6.7%	6.7%	6.7%	6.7%	6.7%	6.7%	6.7%	

Table 5
Assumed Before-tax and After-tax Discount Rates

Age of Victim	Before-Tax Discount Rate	After-Tax Discount Rate
35 & Under	5.1%	4.2%
36-54	4.8%	3.9%
55 & Over	4.2%	3.4%

Note:
The present value of presumed economic loss is calculated by applying the after-tax discount rate corresponding to the victim's age at death to all future periods. For example, projected earnings and benefits for a victim who was 30 years old at the time of death will be discounted to present value at 4.2% per year for all future years, and projected earnings and benefits for a 45-year-old victim will be discounted to present value at 3.9% per year for all future years.

Table 5 provides information on discount rates.

The remaining tables show the presumed total awards (for economic and non-economic losses) by age and family status after taking into consideration the various confounding factors and before subtracting any collateral source income.

The tables and the underlying sources supporting the data will likely have a significant effect on economic loss calculations in civil litigation. One can easily imagine economists called to testify by plaintiffs or defendants utilizing the methodology outlined by the Special Master (and attributing it to him in testimony before the jury) as a means to lend credit to the damages calculations.

f. The Class Of Beneficiaries In Death Cases.

The statute calls for use of “applicable state law” when considering awards of **economic** losses. This was an unfortunate lapse by the Congress in an otherwise remarkable definition of assessable damages to victims and their families. Why impose a choice of law decision on the Special Master on economic damages but craft a national standard on non-economic damages? Why should a family, burdened by New York wrongful death law, be denied the same measure of damages afforded to a Connecticut family, particularly when the funds are derived from a common government source?⁵⁷ Why should an elderly parent who lived with a divorced son estranged from his minor children and who was physically and emotionally totally dependent on him be denied recovery because the decedent was domiciled in Massachusetts instead of another state with less antiquated and draconian wrongful death laws? Why should a life partner from Vermont receive a recovery when another person domiciled in a less accommodating state with an equally tragic loss recover nothing? State laws define familial relationships and the lines of intestate succession. The statutory

incorporation of state law in this manner assured certain classes of loved ones further hardship in the form of exclusion from the Fund.

On the other hand, the statute left the Special Master free to make awards to “personal representatives” (i.e., the individual appointed by a probate court or similar authority) for the benefit of individuals who suffered actual, **non-economic** losses of the type outlined in the statute: loss of consortium, society, companionship, affection (loss of enjoyment of life and hedonic damages), mental anguish, inconvenience, and emotional suffering resulting from a loved one’s death. Nothing in the statute limits awards of non-economic damages to spouses and minor children.

i. Resolution of Issues Related to the “Personal Representative”.

With respect to eligibility, the Regulations define “personal representative” as an individual appointed by a court to be the decedent’s personal representative as the executor or administrator of the decedent’s estate.⁵⁸ However, before filing a claim as a personal representative, the purported personal representative must give written notice to the immediate family of the decedent, the executor of the decedent’s will, and any other persons who may reasonably be expected to assert an interest in an award or to have a cause of action to recover damages relating to the wrongful death of the decedent.⁵⁹

The Special Master has no duty to arbitrate, litigate, or resolve in any way disputes regarding the personal representative.⁶⁰ Once an award is determined, the Special Master shall review the personal representative’s plan to distribute the award to the decedent’s beneficiaries and may order a redistribution of the award to ensure that the members (beneficiaries) of the families are compensated quickly.⁶¹ Simply put, the Special Master retains the authority to see to the distribution of federal funds so as to accomplish the purposes of the statute. Advance benefits are available for needy,

eligible claimants. Although not specifically provided for in the ATSSSA, the Regulations permit claimants to seek advance benefits in fixed amounts of \$50,000 in the case of deceased individuals and \$25,000 for severely injured individuals. The filing of an advance benefits claim waives the right to file a civil action and the advance payment will be deducted from the ultimate award.⁶²

g. Remote Victims.

All of us vividly recall the panic and horror evident on the faces of thousands of people running from the collapsing World Trade Towers. We also easily bring to mind the swirling clouds of gray smoke, dirt and debris that enveloped most of lower Manhattan. People were covered from head to toe with the grit that was once mortar, insulation, and glass. We have no doubt that these individuals suffered some harm. Were they “present” at the World Trade Center? Did they suffer “physical harm”? Did they suffer physical harm of sufficient kind and quality to receive an award from the Fund?⁶³ Literally thousands of individuals will be included or excluded by the regulations addressing this thorny problem.

i. Resolution of Eligibility Issues

The ATSSSA provided that claimants eligible for compensation include: (1) the “personal representatives” of those aboard the flights that crashed on September 11, 2001 (excepting the terrorists); and (2) those who were “present at” the sites or in the “immediate aftermath” and suffered “physical harm” or death as a direct result of the crashes, or their personal representatives. The Regulations provide the requisite definitions of the key terms used in determining eligibility: “immediate aftermath”; “physical harm”; and “present at the site”.

1. Persons “Present” at the Sites. A person who was killed while in one of the crashed aircraft or inside a collapsed building is clearly covered by the statute. Persons who were near the sites may be eligible for awards if they meet these criteria:

- they were physically present at the time of the crashes or in the immediate aftermath;
- in the buildings or portions of the buildings that were destroyed;
- or in any area contiguous to the crash sites “that the Special Master determines was sufficiently close to the site that there was a demonstrable risk of physical harm from the impact of the aircraft or any subsequent fire, explosions, or building collapses... .”⁶⁴

The import of the regulations is that persons who were injured in some fashion but who were physically remote from the crash sites are not eligible for an award from the Fund.⁶⁵ So, for example, the millions of people who were “present” in Manhattan (or Brooklyn or Jersey City) and who were exposed to and “injured” by airborne contaminants like asbestos fibers must resort to civil litigation against tortfeasors unprotected by federal grants of immunity.

2. The “Immediate Aftermath” of the Crashes. Physical presence at the site has also been conditioned by a temporal element as well. In order to recover an award, the person must show that he was at the site:

- within 12 hours of the crashes if he was not a rescue worker; or
- within 96 hours of the crashes if he was a rescue worker who assisted in the search for injured victims.⁶⁶

The limitation to 12 hours for non-rescue personnel excludes from awards individuals who suffered physical injury at the sites in the early and late evening of September 11th. The longer period of coverage for rescue workers (4 days as opposed to ½ day) makes sense given the significant danger presented by the unstable rubble. Rescue workers who suffered injury on the 5th day after the crashes (or any other day over the course of the many months of work at the sites) have no claim against the Fund.⁶⁷

3. “Physical Harm”. Persons who were present at the site within the time limits set by the regulations must also show substantial, medically treated, and properly documented bodily injuries. The requirements are as follows:

- physical injury to the body;
- that results in treatment by a medical professional;
- within 24 hours of the injury event; or within 24 hours of rescue; or within 72 hours of the injury event or rescue for victims who were unable to realize the extent of their injuries or get medical treatment (or under such circumstances as the Special Master may deem appropriate for rescue workers);
- that results in hospitalization as an in-patient for at least 24 hours or that caused disability, incapacity, or disfigurement.; and
- that is verified by contemporaneous medical records.⁶⁸

The regulations exclude virtually all soft-tissue injury cases that produce pain and discomfort but do not result in overnight stays at hospitals or work related disability (like muscle strains from slip and falls or bouts of asthma from breathing airborne contaminants). Likewise, claims involving

exclusively emotional injuries are excluded. Indeed, the defining qualities of eligible claims are sufficiently exclusionary so that few personal injury claims (as opposed to ones for wrongful death) will make the grade.⁶⁹

g. Resolution of “Collateral Sources Income”

Section 405(b)(6) of the ATSSSA requires the reduction of all awards by the amount of collateral source compensation a claimant received or is entitled to receive as a result of the terrorist-related aircraft crashes. The Regulations specify that collateral sources include life insurance, pension funds, death benefit programs, and payments by federal, state or local governments related to the aircraft crashes, all of which the ATSSSA expressly includes in the definition of collateral sources.⁷⁰

According to the Special Master, the most troublesome ambiguity in the categories of collateral source compensation involved the treatment of charitable donations following the events of September 11, 2001, which according to New York Times reports exceeds \$1.3 billion. The Regulations establish that the value of services or in-kind charitable gifts such as emergency housing, food or clothing is not collateral source compensation.⁷¹ Charitable donations distributed to victims or their beneficiaries by private charitable entities are not collateral sources except that funds provided to victims or their families through a private charitable entity (like a family foundation) might, in substance, constitute a collateral source.⁷² Likewise, tax benefits under Victims of Terrorist Tax Relief Act of 2001⁷³ are deemed to be other than a collateral source.⁷⁴

Collateral source income that is contingent (for example where the income terminates on remarriage) is reduced to its present value as a future benefit in light of the contingency.⁷⁵ T h e discretion imparted to the Special Master in the regulation to calculate the v a l u e o f c o n t i n g e n t collateral source income permitted him to make this statement:

Where the benefits to be paid due to death of the victim are uncertain, unpredictable, or contingent on unknown future events, the amount of the compensation to which the survivor is entitled can be impossible to

compute with reasonable certainty. In those instances, the Special Master has discretion not to require a *full* deduction where the amount of the collateral source compensation cannot be determined with reasonable certainty. Thus, for example, the Special Master has determined that workers' compensation benefits that are payable only if the spouse does not re-marry will only be offset to the extent they have already been paid.⁷⁶

The message certainly was not lost on widows of New York City's firemen and police officers who are entitled to lifetime income because their loved ones were lost in the line of duty.

B. CHALLENGES TO THE ACT AND REGULATIONS

1. Jurisdiction

ATSSSA is a federal statute promulgated by the Congress of the United States. As such issues regarding its proper reach and application or the power of the Congress to undertake the actions set forth in the law are all federal questions. Jurisdiction in the federal courts is founded on 28 U.S.C. § 1331. In their treatise *Administrative Law*, Professors Aman and Mayton point out that federal question jurisdiction is always available to review agency actions when "special statutory review"⁷⁷ is unavailable or inadequate.⁷⁸

Since the amount in controversy was removed from it, Sec. 1331 has been a comprehensive basis of jurisdiction. It broadly provides subject-matter jurisdiction in federal district court for cases arising under the Constitution and laws of the United States in the federal district courts. Because federal agency actions involve questions about the construction and application of federal law (either agency rules, federal statutes, or the Constitution), they are generally subject to federal-question jurisdiction.⁷⁹

ATSSSA does not provide for special statutory review.

2. Preclusion

The Congress included a provision in ATSSSA to the effect that all decisions of the Special Master are final and non-reviewable. Specifically, Section 405(b)(3) of the Act states: that the

Special Master’s “determination shall be final and not subject to judicial review.” So-called “preclusions” of review are occasionally imposed by the Congress with respect to a particular agency. For example, until 1988, the Veterans Administration enjoyed an absolute preclusion from judicial review (its decisions of law or fact “shall be final and conclusive and no ... court of the United States shall have power or jurisdiction to review any such decision. ...”).⁸⁰ The Supreme Court explained that preclusion of review of Veterans’ Administration decisions was justified because it “prevent[ed] the courts from becoming involved in the day-to-day determinations and interpretation of Veterans’ Administration policy” and assured “that the technical and complex determinations and applications of Veterans’ Administration policy connected with veterans’ benefits will be adequately and uniformly made.”⁸¹ Certainly, one can understand the desire of the Congress to finalize the Special Master’s decisions regarding awards from the Fund to specific claimants. Closure for the claimants and the government is a worthy goal. So too are economies of time and scale. *Compare, e.g., United States v. Erika, Inc.*, 456 U.S. 201, 203 (1982). Limited preclusion (as in ATSSSA) is not disfavored by the courts. Professors Aman and Mayton offer this explanation:

When Congress limits review, it generally does so in a limited way, merely to provide the agency with a space in which its expertise and specialized processes can operate uninterrupted by the courts. Judicial review may be shaped or postponed, to allow the agencies to filter a myriad of fact-based claims, such as Social Security claims, that are suited to resolution by specialist agencies and special procedures. Also filtering claims through a single agency – in contrast to decentralization through the courts – enhances a uniformity in determining these claims.

A. Aman and W. Mayton, *Administrative Law*, § 12.5.2 at 366-367 (West 1993); *see also, Id.* at n.23.

However, Article III courts have a duty and power founded in the Constitution to assure that federal agencies act in conformity with the Constitution and not in an uncontrolled and arbitrary

manner. “So, under Article III and in a government of separated powers, the undiminished function of the courts is to assure that agencies conform to the Constitution and to the power delegated to them by Congress.” A. Aman and W. Mayton, *Administrative Law*, § 12.4 at 364 (West 1993); *see also, Id.* at n.12.

It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.

Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986); *see also, Barlow v. Collins*, 397 U.S. 159 (1970); American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902).

Simply put, ATSSSA’s limited preclusion of judicial review of the Special Master’s award decisions does not operate generally to insulate him or his rules from conformity with the Constitution and the law.

3. Venue

ATSSSA incorporates a special venue statute that directs all lawsuits arising out of the September 11th terrorist attacks to be filed in the United States District Court for the District of New York.⁸² The Congress unquestionably has the power under the Constitution to allocate judicial assignments among the various Article III courts.⁸³ And special venue statutes are exclusive where they apply.⁸⁴ Here, however, ATSSSA’s venue statute expressly applies to lawsuits against putative tortfeasors; it does not speak to lawsuits against the Special Master or the Attorney General over their rules and conduct implementing the Fund. As to the latter type of suit, the general venue statute seems to govern:

A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, (2) a substantial part of the events or omissions giving rise to the claim occurred or a substantial part of property that is the subject of the action is situated, or (3) the plaintiff resides if no real property is involved in the action.⁸⁵

Convenience and tactical advantage will dictate selection of venue. Some litigants may view the United States District Court for the Southern District of New York as uncomfortably close to the tragedy and committed to success of the Fund to warrant selection as the venue of choice.

4. Standing

Many people from different walks of life have an interest in the Fund, the rules that define entitlement and the methods and means by which awards are made, and the Special Master's *de facto* administration of it over the next few years. The individuals most directly affected are the people whose fulsome rights against putative tortfeasors were substantively changed on September 22, 2001 with passage of ATSSSA and who may be entitled to an award from the Fund. But other classes of individuals, like domestic partners of decedents killed in the September 11th attacks domiciled in states that do not afford them recoveries in common law wrongful death actions, have interests as well. Disgruntled taxpayers, politicians, single interest advocacy groups, lawyers, academics, and news reporters may stake out an interest in the Act, the rules promulgated under it, and the actual distribution of money from the Fund. Standing, therefore, will be an important consideration in litigation over this legislation and its regulatory wake.

The Supreme Court in Baker v. Carr⁸⁶ held that Article III of the Constitution required plaintiffs to have "such a personal stake in the outcome of the controversy as to assure the concrete

adverseness which sharpens the presentation of issues.”⁸⁷ In the first instance, the plaintiff must demonstrate actual or threatened “injury in fact” in order to invoke properly the jurisdiction of the federal court.

In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a ‘case or controversy’ between himself and the defendant within the meaning of Art. III. That is the threshold question in every federal case, determining the power of the court to entertain the suit. As an aspect of justiciability, the standing question is whether the plaintiff has ‘alleged such a personal stake in the outcome of the controversy’ as to warrant *his* invocation of federal court jurisdiction and to justify exercise of the court’s remedial powers on his behalf... .

Warth v. Seldin, 422 U.S. 490, 498-499 (1975). Injury can be derived from rights created by statute and can include a wide range of immediate and prospective economic and non-economic interests.⁸⁸ Purely ideological interests in a problem are insufficient however.⁸⁹ In suits against regulatory agencies, the plaintiff must also demonstrate that the interest sought to be protected is “arguably within the zone of interests to be protected or regulated by the statute ... in question.”⁹⁰ Section 702 of the Administrative Procedure Act codifies the concept and provides that a person “adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review”⁹¹

In the context of the Fund, the courts are likely to find allegedly aggrieved “victims” imbued with sufficient direct interest in the rights and immunities created by Act and administered through the regulations to warrant standing. Thus, for example, individuals who believed they were injured in the attacks by exposure to contaminants but who are excluded from the Fund by the regulations will probably have standing to challenge the Special Master’s regulations in federal court. The same should be true for domestic partners. Academics, lawyers, and news reporters interested in details of

individual awards or evidence presented to the Special Master should find standing in the provisions of the Administrative Procedure Act that provide for access to agency information. Ideological plaintiffs, like single interest advocacy groups and general taxpayers, are unlikely to have standing.

5. Ripeness/ Exhaustion of Administrative Remedies

As a general principle of administrative law, courts refrain from premature responses to complaints about the actions or inactions of administrative agencies. From the perspective of the administrative agency, the tenet requires the complaining party first to exhaust all avenues of administrative processes and to secure a final action from the agency before requesting court review.⁹² From the perspective of the court, the tenet mandates that matters presented to the court for review develop sufficiently so that they are neither remote nor abstract. The requirement that a complaining party exhaust administrative remedies helps assure efficiency and integrity in the agency process. Professors Aman's and Mayton's justification for the rule resonates in the context of the Fund:

Giving the agency first crack should help it, by giving the agency the chance to resolve things in light of its own priorities. Litigation costs and judicial intervention may so stifle a new and unfolding agency program that its fruition (the time when the program's merits and demerits can probably be most usefully assessed) is defeated. Also, a first resort to the agencies is usually efficient. Specialized agencies can provide relatively efficient processes, streamlined to fit the matter at hand.⁹³

One can readily imagine the sensitivity that a federal district court judge will have to this new and unique program and to the social, political, and economic pressures brought to bear on the Special Master. Likewise, the requirement that a claim be ripe helps the courts avoid "entangling themselves in abstract disagreements over administrative policies."⁹⁴ Moreover, from the most practical of viewpoints, the doctrine of exhaustion of administrative remedies provides some cover for the courts

to keep the dogs of controversy at bay. Why redirect the focus of news reports by the Times and the Post, and the enmity of disgruntled putative victims, away from the Special Master's office?

The application of the doctrines of ripeness and exhaustion of administrative remedies will likely vary depending on the status of the individual plaintiff and the nature of the challenge raised. Final action will trigger court review, but final action does not necessarily require a plaintiff to file a claim, to present evidence at a hearing, and to receive an adverse decision from the Special Master. Agency action is fit for review when there is finality with regard to the agency's position on the challenged topic.⁹⁵ The Department of Justice and its Special Master have staked out in the final rule (and the articulated reasoning for their decisions) their positions on many significant issues related to administration of the Fund. Temporally and geographically remote victims of the attacks are clearly excluded by the regulations. So too are victims who were physically and emotionally injured at the sites during the attack or in its immediate aftermath but who were not hospitalized for the requisite number of hours or days under the regulations. The final rule, read in conjunction with the Congressional mandate, constitutes final action adequate for judicial review of complaints by victims excluded from the Fund. "With legal issues, involving as they do interpretations of text such as statutes, the courts are doing what they are familiar with and best at, and they are unlikely to benefit from further agency proceedings."⁹⁶ The same may be said for challenges by academics, lawyers, and news reporters who stand in opposition to the Special Master's rules that keep decision-making and analyses on individual claims secret.⁹⁷ A different result may come about in challenges made to the regulations defining the scope of recovery for economic and non-economic losses. The regulations do not expressly incorporate the economic loss charts (which are published and available at the government's website). Instead, the regulations are drafted in such a way as to leave open to the

Special Master discretion to evaluate claimants' evidence of economic loss and to render awards that deviate from the charts. Simply stated, the regulations on their face do not openly flout the statutory mandate on this item of recovery. Final action on an individual claim for economic loss, therefore, is not demonstrably evident. As for the regulations on non-economic losses, the "presumptive" awards for decedents (or surviving victims) and their spouses and children coupled with (1) the absence of any articulated reasoning for these regulations (as required by the Administrative Procedure Act⁹⁸), (2) the enumeration of precise categories of losses in the Act (like hedonic damages), and (3) the Special Master's public statements announcing his intent to avoid individualized fact finding on non-economic losses collectively may be sufficient for a court to review challenges prior to the rendering of awards. The end result seems clear enough – victims and their spouses and children will receive preordained amounts for their losses regardless of their individual circumstances.

6. Constitutional And Other Challenges

a. To The Act

On September 10, 2001, the common laws of New York, Pennsylvania, and Virginia as well as the common laws of a host of other states (like Massachusetts where two of the fated flights departed and scores of passengers were domiciled) provided well-established constructs for the imposition of duties and the provision of remedies for violation of those duties. On the morning of September 11th with thousands of souls lost, untold numbers of survivors physically and emotionally injured, families forever torn apart, vast property damage, and economic dislocation that can only be estimated in the trillions of dollars, state-based common law causes of action fully accrued. Victims had the right to pursue lawsuits for money damages against those persons and entities that they believed caused them harm in state courts of general jurisdiction where personal jurisdiction could be

perfected. On September 22, 2001, with the enactment of ATSSSA, the Congress changed the *status quo ante* for these victims by creating a federal cause of action, complete practical immunity for tort liabilities⁹⁹ for the commercial airlines whose aircraft were turned into guided missiles,¹⁰⁰ a single venue for lawsuits arising out of the incidents, and a fund intended to offer an alternative source of reparations for individual victims who sustained bodily injuries or whose loved ones died but not for victims who owned real property and or other businesses. Some victims (and critics of the legislation) will cry foul. How can the Congress take away their common law rights founded in state law? How can the Congress take the action it did without providing full and adequate compensation? How can the Congress provide a fund for personal injury and wrongful death victims but not for real property owners and businesses?

The fundamental answers to these questions repose in Article I, Section 8 of the United States Constitution which grants the Congress the power:

- To provide for the common defense and general welfare of the United States;
- To regulate commerce; and
- To make all laws that shall be necessary and proper for into execution the foregoing powers.

The constitutional authority to take all actions necessary for the general welfare of the nation, the various states, and citizens and to regulate commerce is tempered by the Fifth Amendment:

No person shall ... be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

Simply stated, there is no sustainable argument that the Congress acted outside the scope of its authority when, in the face of war-like attacks on United States soil, it promulgated an act largely intended to shore up a fatally wounded commercial airline industry and thereby also prevent potential

catastrophic collapse of the entire United States economy. A secondary feature of its dramatic legislative response was the creation of the Victims Compensation Fund so that the individuals and families victimized by terrorist murderers could recover financially. Indeed, it is difficult to imagine a more clear cut example of actions by the Congress intended to regulate commerce and provide for the common defense and welfare of the people. While professional second guessers may speculate to the contrary, the Congress confronted credible evidence of imminent financial devastation if the commercial airlines went out of business.¹⁰¹ The United States' economy is cross-continental, if not international, in scope and fully dependent on air travel under present circumstances.

The Congress has experience with creating tax supported common funds for the good of the national economy and for the collateral benefit of particular industries and classes of individuals.¹⁰² The Supreme Court has reviewed and upheld such actions in the past. The Price-Anderson Act, 42 U.S.C. § 2210 et seq., is a good example of such an action. Congress passed the Price-Anderson Act in 1957 (and amended it and kept it in force thereafter)¹⁰³ for the purpose of encouraging the development of nuclear power plants. A central feature of the Act was financial assistance to the nuclear power industry in the form of a federal grant of limited immunity from state based tort liabilities in the amount of \$500 million in excess of available casualty insurance. More specifically, the Act provided that the federal government would indemnify the nuclear power plant licensee “and any other person who may be liable for public liability”¹⁰⁴ for damages arising out of a nuclear power plant disaster in an amount not to exceed \$500 million after exhaustion of privately placed casualty insurance.

In 1973, 40 individuals living in close proximity to a planned nuclear power plant in North Carolina, along with a single issue advocacy group (Carolina Environmental Study Group) and a

union (Catawba Central Labor Union), brought a declaratory judgment action against Duke Power Co., the licensee and a public utility, seeking to have the Price-Anderson Act ruled unconstitutional. The plaintiffs prevailed in the district court where the Act was held to be unconstitutional on two grounds. First, the district court held that the Act violated the Fifth Amendment's Due Process Clause because it immunized putative tortfeasors without assuring adequate compensation. Second, the district court held that the Act violated the Fifth Amendment's Equal Protection Clause because a small subset of society, namely victims, would suffer the consequences of a nuclear disaster while society as a whole would enjoy the benefits of nuclear power. The Supreme Court reversed the district court and remanded the case.¹⁰⁵

In its ruling on the Fifth Amendment's Due Process Clause, the district court raised justifications that will resonate with persons unhappy with the September 11th Victims Compensation Fund of 2001. Among other reasons, the district court found that "[the] amount of recovery is not rationally related to the potential losses" and that "[there] is no *quid pro quo*" for the tort immunity granted at the victims expense.¹⁰⁶ The Supreme Court's rejection of the district court's judgment in Duke Power Co. instructs on the likely analysis and outcome of any constitutional challenge to Fund. The Supreme Court began by affording the Price-Anderson Act "the traditional presumption of constitutionality generally accorded economic regulations" and the preordained approval "absent proof of arbitrariness or irrationality on the part of Congress."¹⁰⁷ The Court then looked at the then prevailing economic circumstances that motivated the Congress to enact Price-Anderson:

As we read the Act and its legislative history, it is clear that Congress' purpose was to remove the economic impediments in order to stimulate the private development of electric energy by nuclear power while simultaneously providing the public compensation in the event of a catastrophic nuclear incident. ... The liability-limitation provision thus

emerges as a classic example of an economic regulation – a legislative effort to structure and accommodate “the burdens and benefits of economic life.” It is by now well established that [such] legislative Acts ... come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. That the accommodation struck may have profound and far-reaching consequences, contrary to appellees’ suggestion, provides all the more reason for this Court to defer to the congressional judgment unless it is demonstrably arbitrary or irrational.¹⁰⁸

The Court went further and acknowledged that the damages/immunity ceiling was “of necessity...arbitrary in the sense that any choice of a figure ... can always be so characterized.” Arbitrariness of that type, it pronounced, is not “the kind of arbitrariness which flaws otherwise constitutional action.”¹⁰⁹ In support of its statement, the Court recounted past occasions where the Congress provided assistance to victims of catastrophic events, including relief for victims of the flood resulting from the collapse of the Teton Dam in Idaho.¹¹⁰ Under that Act, the Secretary of the Interior was authorized to pay full compensation for any deaths, personal injuries, or property damage caused by failure of the dam.

The Court flatly rejected the Fifth Amendment due process argument premised on the notion that the Congress had to provide a *quid pro quo* to victims of a nuclear disaster for the abrogation of their common law rights. Again, the Court’s holding instructs on the outcome of any similar challenge to the September 11th Victims Compensation Fund of 2001:

Initially, it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy. However, we need not resolve this question here since the Price-Anderson Act does, in our view, provide a reasonably just substitute for the common-law or state tort law remedies it replaces. ... Our cases have clearly established that “[a] person has no property, no vested interest, in any rule of the common law.” ... The “Constitution does not forbid the

creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object,” despite the fact that “otherwise settled expectations” may be upset thereby. ... Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.¹¹¹

The Court took special note of the fact that Congress perceived state tort law remedies and court procedures were unsatisfactory. In a nuclear disaster, the Court observed, unlimited liability at common law left victims no assurance of collecting a recovery. Collection of a judgment is the critical determinant of success, not the filing of a lawsuit. Price-Anderson assured “prompt and equitable compensation under a pre-structured and nationally applicable protective system”.¹¹²

There seems little doubt that the Supreme Court will find the certainty of substantial and efficient recoveries against the September 11th Victims Compensation Fund of 2001 a reasonable substitute for the victims eligible under its terms. After all, even the most strident advocate of personal injury claimants’ rights would (or should) acknowledge that the putative liabilities of the commercial airlines, airport managers, building owners, and security companies for the 9/11 disaster are far-fetched at best and would be extraordinarily difficult to prove. Moreover, the aggregate liability exposure for any one company or person (or any group of them) far exceeds their ability to satisfy all potential judgments across the spectrum of wrongful death, personal injury, property damage, and business interruption losses. As for victims of property damage and business losses, the Supreme Court’s suggestion that a compensation scheme need not duplicate common law rights, coupled with its recitation of the case law holding that holders of common law tort rights may have their settled expectations upset, foreshadows an unfavorable outcome to any constitutional challenges to ATSSSA.

b. To The Regulations

The obvious challenge to the regulations will come, if at all, from victims who are left out of the Fund or from personal representatives of decedents who perceive that they will receive inadequate awards by dint of the Department of Justice's final rule. The reach of the statute to victims of the attacks is plainly broader than the reach given to it by the regulations. The statute calls for compensation to any person (and the relatives of any person killed) who was physically injured (or killed) while present at the sites of the crashes or in the immediate aftermath of the crashes. The Special Master has chosen to minimize substantially the number of victims who can recover awards from the Fund. Under the regulations, thousands of people who were present at the site at the time of the crashes and who sustained some measure of physical injury will be excluded from the Fund because they do not meet the additional requirements of time, injury severity, and overnight hospitalization imposed by the regulations. They have a justiciable gripe with the Special Master. Likewise, the breadth of recovery for eligible victims or personal representatives provided by the statute is notably different from the breadth of awards outlined in the regulations. The statute calls on the Special Master to make individualized assessments of economic and non-economic losses following rather explicit categories or types of damages. The Special Master has chosen to minimize the potential awards to eligible claimants by utilizing damage matrices that implicitly suggest caps on awards for economic losses and "presumptive" awards for non-economic losses that make no use whatsoever of actual facts and circumstances relevant to victims or decedents. High-income earners (or their personal representatives) may have a cause to complain about economic loss awards. All victims have a fairly clear-cut complaint regarding awards for non-economic losses.

Victims rendered ineligible for awards from the Fund by the exclusory definitions of the regulations have ripe claims for presentation to a federal district court. The courts will compare the statutory grant of authority to the Special Master with the regulations that he issued. The standard of review is best described as de novo review and “... the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions ... and hold unlawful and set aside agency action ... found to be contrary to constitutional right ... or in excess of statutory authority...”¹¹³. Even if the courts conclude that the Special Master was empowered to craft regulations limiting the reach of the Fund to remote victims, the defining criteria for eligibility are subject to challenge as arbitrary and unreasonable.¹¹⁴ For example, victims (who were not rescue workers) who sustained physical injuries at the site more than 12 hours after the attacks (but say less than 96 hours later) have a legitimate complaint about the regulatory exclusion of them from the Fund. The same can be said for victims who sustained contemporaneous physical injuries (like inhalation of toxic contaminants) at the site and who sought and received medical treatment as a result but who were not hospitalized overnight. Indeed, victims can legitimately contest regulations that arbitrarily exclude them from the Fund simply because their injuries did not cause overnight hospitalization or immediate disabilities or because contemporaneous medical records do not exist. There is an obvious disconnect between the regulatory imposition of bright line tests and the objectivity of contemporaneous medical records on the one hand and the full panoply of diverse circumstances that make up the lives of millions of people affected by these murderous acts. The common law courts do not make such demands on victims seeking redress of wrongs. The courts leave it to juries to ferret out the truth and do substantial justice for all concerned. Congress could have set bright lines and exclusionary definitions but did not do so. Instead, it directed the Special Master to make factual inquiries to

determine (1) a claimant's eligibility, (2) the extent of harm (including economic and non-economic losses), and (3) the amount of compensation "not later than 120 days after that date on which a claim is filed".¹¹⁵ The excluded victims have reasonable grounds to complain that, through the regulations, the Special Master has defaulted on his duty to consider their particularized circumstances.¹¹⁶

Victims who are not automatically excluded from the Fund by the regulatory definitions have a difficult road to hoe. For example, in determining eligibility based on a victim's presence at the site or in any area contiguous to the crash sites, the regulations provide "that the Special Master [will determine if the person] was sufficiently close to the site that there was a demonstrable risk of physical harm from the impact of the aircraft or any subsequent fire, explosions, or building collapses... ." ¹¹⁷ That is precisely the type of individualized fact finding that the Congress delegated to the Special Master. And the statute precludes judicial review of his findings.¹¹⁸ It remains to be seen what will happen with the Special Master's treatment of economic losses. The economic loss charts and explanatory memoranda regarding their intended use by victims and personal representatives were not incorporated into the regulations. Moreover, the Special Master made a point of disclaiming any intent to impose a cap on economic losses through the use of the matrices and to leave open to any claimant the opportunity to present evidence on the subject for consideration.¹¹⁹ So long as the procedure is not a sham, the Special Master's ultimate findings will be unreviewable.¹²⁰

CONCLUSION

The Victims Compensation Fund is probably the most significant piece of tort based legislation passed anywhere in the United States in the last few decades. It is certainly the most unique. The Fund is a pure no-fault statute that is structured so as to compensate victims (or their

families) with average incomes fully for their economic damages and to do so quickly and inexpensively. Compensation for non-economic losses, while supposedly full, fair, and individualized, likely will be in flat amounts regardless of the particular circumstances applicable to each victim. Nonetheless, the victims will receive substantial amounts of compensation for non-economic losses quickly, inexpensively, and without regard to fault. The Fund recognizes the reality of collateral source income and indeed has raised the discussion of the topic nationally to levels previously unimagined. It is unlikely that any reasonably well-read juror will be ignorant of the concept for the foreseeable future. The use of common economic analyses and published charts assisting claimants in predetermining their recoverable losses will guide decision-making on entry into the Fund. It will also likely have an impact on personal injury litigation generally. The greatest potential benefit of the Fund will come in its introduction of society to an alternative means for compensating seriously injured victims or the families of killed in accidents. In the end, society benefits by finding an efficient and inexpensive means for delivering funds of this type to needy victims

¹ This is the author's second article published in the Defense Counsel Journal on the subject of the federal legislation enacted in the wake of the September 11th attacks on the country. The first article, *America Acts: Swift Legislative Responses to the September 11th Attacks*, appeared in the April 2002 edition beginning on page 139.

² Mr. Campbell is the Founder and Chairman of Campbell Campbell Edwards & Conroy Professional Corporation, a nationally prominent firm of trial lawyers with offices in Boston, Philadelphia, and other cities in New England and New Jersey.

³ The so-called airline bailout bill was promulgated to shore up the industry financially for the short term and to assure our cross-continental economy a viable air transportation system. But, America is also founded on the principle that the individual is as important as the business corporation. How could the government rescue “innocent” commercial airlines and leave equally innocent individual victims behind? How could the government (through its industry bailout) guarantee commercial airline executives their six and seven figure compensation, yet leave the spouses and children of thousands of office workers, firemen, and policemen empty handed? Politically, our elected officials could not do so. And they were fundamentally right. Care of orphans and widows is a primary governmental task.

⁴ Title IV of ATSSSA will be referred to throughout the article as the “Fund” or “Act” for ease and convenience.

⁵ The Act does not explain who may be considered a “relative.” ATSSSA § 403.

⁶ ATSSSA § 403 (emphasis added).

⁷ Not “rewrite” or “undo”.

⁸ ATSSSA §§ 405(b)(1), 405(b)(3) (emphasis added).

⁹ ATSSSA § 402(5).

¹⁰ ATSSSA § 402(5) (emphasis added).

¹¹ ATSSSA § 405(7) (emphasis added).

¹² Several states recognize hedonic damages in their common law. For example, Alaska, Maryland, Michigan, Nebraska, Ohio and Wyoming all recognize loss of enjoyment as a separate element of damages. *See, e.g., Feldman v. Allegheny Airlines Inc.*, 452 F. Supp 151 (D. Conn. 1978) (holding loss of earning capacity and loss of capacity to carry on life’s nonremunerative activities must be valued independently); *Swiler v. Baker’s Super Mkt.*, 277 N.W.2d 697 (Neb. 1979) (same); *Fantozzi v. Sandusky Cement Prods. Co.*, 597 N.E.2d 474 (Oh. 1992) (same); *Pierce v. New York R.R. Co.*, 409 F.2d 1392 (6th Cir. 1969) (applying Michigan law) (same); *Culley v. Pennsylvania R.R. Co.*, 244 F. Supp 710 (D.C.Del. 1965) (applying Maryland law) (same); *Buoy v. Era Helicopters, Inc.*, 771 P.2d 439 (Alaska 1989) (same); *McAlister v. Carl*, 197 A.2d 140 (Md. 1964) (same); *Mariner v. Marsden*, 610 P.2d 6 (Wyo. 1980) (same). On the other hand, California, Iowa, Indiana, Kansas, Minnesota, Missouri, New York, Texas and Washington all recognize loss of enjoyment as a factor in determining general damages. *See, e.g., Conchola v. Kraft*, 575 S.W. 2d 792 (Mo. App. W.D. 1978) (holding loss of enjoyment a factor in determining damages); *Blodgett v. Olympic Sav. and Loan Ass’n*, 646 P.2d 139 (Wash. App. 1982) (same); *Poyzer v. McGraw*, 360 N.W. 2d 748 (Iowa 1985) (same); *Missouri Pac. R.R. Co. v. Lane*, 720 S.W. 2d 830, 834 (Tex. App. 1986) (same); *Orkin Exterminating Co. v. Traina*, 461 N.E.2d 693 (Ind. App. 1984) (same), *rev’d on other grounds*, 486 N.E. 2d 1019 (Ind. 1986); *Leiker v. Gafford*, 778 P. 2d 823 (Kan. 1989) (same); *Leonard v. Parrish*, 420 N.W. 2d 629 (Minn. App. 1988) (same); *Nussbaum v. Gibstein*, 536 N.E. 2d 618 (N.Y. 1989) (same); *Huff v. Tracy*, 129 Cal Rptr. 551 (Ca. 1976) (same). *See also*, David R. Kamerschen and Robert W. Kamerschen, *Hedonic Damages in Personal Injury and Wrongful Death Cases*, Defense Counsel Journal, January 1993, at page 118-121; Ronald C. Wernette, Jr., *Hedonic Damages: Their Recoverability, Proof, and Valuation in Michigan*, Defense Counsel Journal, June 1995, at page 15-19.

¹³ ATSSSA § 405(b) (6) (emphasis added).

¹⁴ 67 Fed. Reg. 11,235 (March 13, 2002) (codified at 28 C.F.R. pt. 104).

¹⁵ ATSSSA § 405(b)(4)(C). *See also* Administrative Procedure Act (“APA”), 5 U.S.C.A. § 554.

¹⁶ ATSSSA § 405(b)(4)(A). *See also* APA § 555(b).

¹⁷ The Act defines “Economic Loss” as:

any pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable State law.

ATSSSA § 402(5).

¹⁸ The Act defines “Noneconomic Losses” as:

losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation, and all other nonpecuniary losses of any kind or nature.

ATSSSA § 402(7).

¹⁹ Collateral Source means “all collateral sources, *including* life insurance, pension funds, death benefit programs, and payments by Federal, State, or local governments related to the terrorist-related aircraft crashes of September 11, 2001.” ATSSSA § 402(4) (emphasis added). Special Master Feinberg has determined that charitable contributions received by victims’ families will not be deemed collateral sources. 67 Fed. Reg. 11,239 (March 13, 2002) (codified at 28 C.F.R. pt. 104) (hereinafter “Regulations”).

²⁰ 18 U.S.C.A. § 1001 (as amended October 11, 1996, Public Law No. 104-292, § 2, 110 Stat. 3459).

²¹ Regulations § 104.2(e).

²² Regulations § 104.2(a)(4).

²³ ATSSSA § 405(b)(3); *see also* APA § 701(a) (providing that the APA’s provisions relating to judicial review apply “except to the extent that - (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law”). As Congress controls the jurisdiction of the federal courts under Article III, Congress can preclude judicial review by statute. These so-called “preclusions” of judicial review are not uncommon in certain benefit-related fact findings by administrative agencies. Perhaps the best example of a statute precluding review is the preclusion provision provided in § 211(a) of the Veterans’ Administration Act, which until recently was absolute. *See*, 38 U.S.C.A. § 211(a). However, the Act was amended in 1988, Public Law No. 100-687, 102 Stat. 4105, 4122 (codified at 38 U.S.C § 511(a)), to remove the restriction against judicial review of legal questions. *See also Johnson v. Robison*, 415 U.S. 361 (1974) (holding preclusion of review under VA did not prevent judicial review of constitutional claim); *Traynor v. Turnage*, 485 U.S. 535 (1988) (holding VA allegedly violated Rehabilitation Act by refusing to treat alcoholism as a disease); *Lindalh v. Office of Personnel Management*, 470 U.S. 768 (1985) (holding VA violated Civil Service Retirement Act by not properly allocating burden of proof in disability retirement claim).

²⁴ ATSSSA § 405(c)(3)(B)(i).

²⁵ ATSSSA § 405(c)(3)(B)(ii).

²⁶ ATSSSA § 408(a).

²⁷ ATSSSA § 202.

²⁸ The Congress clearly has the power to occupy a field and thereby preempt state law. *See, e.g., Jones v. Rath Paking Co.*, 430 U.S. 519, 525 (1977); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). Its ability to preempt extant state-based claims is likewise well established. *See, e.g., Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132

(1963); Hines v. Davidowitz, 312 U.S. 52 (1941). The Congress' power to assign lawsuits to a particular venue within the federal court system is founded in Article III of the Constitution, which gives Congress plenary power to delineate the jurisdictional limits, both original and appellate, of these courts.

²⁹ ATSSSA § 408(b)(3).

³⁰ ATSSSA § 408(b)(2).

³¹ ATSSSA § 408(c).

³² See, e.g., Susan Schmidt, *Sept. 11 Families Join to Sue Saudis; Banks, Charities and Royals Accused Of Funding al Qaeda Terrorist Network*, The Washington Post, August 16, 2002, at A4; Thanassis Cambanis, *Seeking Answers at Any Cost, 9/11 Widow Passes Up \$1.85 Million Payment, Presses Wrongful-Death Suit*, The Boston Globe, May 14, 2002, at A1.

³³ American Bar Association, Tort & Insurance Practice Section program on Aviation Litigation held at the Swissotel in Washington, D.C. in October, 2001.

³⁴ 66 Fed. Reg. 66,274 (December 21, 2001) (codified at 28 C.F.R. pt. 104).

³⁵ 67 Fed. Reg. 11,233 (March 13, 2002) (codified at 28 C.F.R. pt. 104). The Special Master also stated that no “monetary compensation can possibly provide a full measure of relief to those who have suffered . . . [b]ut the Fund will provide appropriate compensation and some measure of comfort to those whose lives have been torn asunder by the events of September 11.”

³⁶ A number of states have capped damages for non-economic loss. See, e.g., Fein v. Permanente Medical Group, 695 P.2d 665 (cal. 1985) (holding state's \$250,000 limit on non-economic damages in medical malpractice actions and collateral source reform statute did not violate the equal protection or due process clauses of the state or federal constitutions); Scholz v. Metropolitan Pathologists, P.C., 851 P.2d 901 (Colo. 1993) (holding state's \$1,000,000 limit on damages recoverable in health care liability actions did not violate the equal protection or due process clauses of the state constitution); University of Miami v. Echarte, 618 So.2d 189 (Fla. 1993) (holding statute providing for recovery of eighty percent of lost wages and earning capacity and capping non-economic damages at \$250,000 in medical malpractice claims did not violate equal protection, due process or takings provisions of the state or federal constitutions); Kirkland v. Baline County Medical Center, 4 P.3d 1115 (Idaho 2000) (holding that \$400,000 cap on noneconomic damages in personal injury and wrongful death actions did not violate state constitution); Samsel v. Wheeler Transport Services, Inc., 789 P.2d 541 (Kan. 1990) (holding provision which set a \$250,000 limit on non-economic losses in health care liability actions did not violate the due process clause of the state constitution); Leiker v. Gafford, 778 P.2d 823 (Kan. 1989) (holding a \$100,000 limit on non-economic damages for wrongful death did not violate the equal protection or due process clauses of the state and federal constitutions); Butler v. Flint Goodrich Hospital of Dillard University, 607 So.2d 517 (La. 1992) (holding statute which set a \$500,000 limit on general damages in medical malpractice actions did not violate the equal protection clauses of the state and federal constitutions); Peters v. Saft, 597 A.2d 50 (Me. 1991) (holding \$250,000 limit on non-medical damages recoverable against servers of liquor did not violate the equal protection or due process clauses of the state and federal constitutions); Murphy v. Edmonds, 601 A.2d 102 (Md. 1992) (holding a \$350,000 limit on non-economic damages in personal injury actions did not violate the equal protection clause of the state constitution); English v. New England Medical Center, Inc., 541 N.E.2d 329 (Mass. 1989) (holding statute limiting liability of charitable organizations to \$20,000 did not violate the equal protection or due process clauses of the state and federal constitutions); Heinz v. Chicago Road Investment Co., 549 N.W.2d 47 (Mich.Ct.App. 1996) (holding statute providing for the admissibility of collateral source payments in personal injury actions did not constitute an unconstitutional taking of property and did not violate the equal protection clause of the state constitution); Imlay v. Ciy of lake Crystal, 453 N.W.2d 326 (Minn. 1990) (holding statutory provision allowing the court to offset collateral source payments from damages awards in personal injury actions did not violate the equal protection clauses of the state and federal constitutions); Johnson v. Farmers Union Central Exchange, Inc., 414 N.W.2d 425 (Minn.Ct.App. 1987) (same with respect to due

process); Schweich v. Zeigler, Inc., 463 N.W.2d 722 (Minn. 1990) (holding \$400,000 limit on damages for embarrassment, emotional distress, and loss of consortium did not violate the “certain remedy” clause of the state constitution); Wells v. Panola County Board of Education, 645 So.2d 883 (Miss. 1994) (holding statute which limited recovery against political subdivisions for injuries arising out of school bus accidents did not violate the takings and equal protection clauses of the federal constitution); Richardson v. State Highway & Transportation Commission, 863 S.W.2d 876 (Mo. 1993) (holding statute limiting tort recoveries against state agencies to \$100,000 did not violate the equal protection clauses of the state and federal constitutions); Adams v. Children’s Mercy Hospital, 832 S.W.2d 898 (Mo. 1992) (holding \$350,000 limit on non-economic damages recoverable from any individual defendant in a health care liability action did not violate the equal protections clauses of the state and federal constitutions); Greist v. Phillips, 906 P.2d 789 (Or. 1995) (holding \$500,000 limit on non-economic damages in personal injury and wrongful death actions did not violate the due process or equal protection clauses of the federal constitution); Rose v. Doctors Hospital, 801 S.W.2d 841 (Tex. 1990) (holding \$500,000 limit on general damages against health care providers did not violate the equal protection clauses of the state and federal constitutions); Pulliam v. Coastal Emergency Services of Richmond, Inc., 509 S.E.2d 307 (Va. 1999) (holding \$1,000,000 limit on recoveries in medical malpractice actions did not violate the takings, due process or equal protections clauses of the state and federal constitutions); Robinson v. Charleston Area Medical Center, Inc., 414 S.E.2d 877 (W.Va. 1991) (holding \$1,000,000 cap on non-economic damages in medical malpractice actions did not violate the due process or equal protections clauses of the state constitution); Guzman v. St. Francis Hospital, Inc., 623 N.W.2d 776 (Wis.Ct.App. 2000) (holding \$350,000 limit on non-economic damages in medical malpractice actions did not violate due process or equal protection clauses of the state constitution).

³⁷ 66 Fed. Reg. 66,274 (December 21, 2001) (codified at 28 C.F.R. 104).

³⁸ 66 Fed. Reg. 66, 275 (December 21, 2001 (codified at 28 C.F.R. 104).

³⁹ Regulations § 104.31(a)-(c).

⁴⁰ Regulations § 104.33(b).

⁴¹ In the Interim Final Rule, 66 Fed. Reg. 66,280 (December 21, 2001) (codified at 28 C.F.R. pt. 104), hearings were limited to two hours. Presumably, the Final Rule was changed on realization that a two hour time limit was arbitrary and capricious and likely to render hearings mere shams. 67 Fed. Reg. 11,244 (March 13, 2002) (codified at 28 C.F.R. pt. 104).

⁴² The APA provides direct authority to federal agency hearing officers to control the conduct of hearings, consistent with due process considerations. APA § 556.

⁴³ Regulations § 104.33(c).

⁴⁴ *See, generally*, Regulations § 104.4(b).

⁴⁵ *See*, www.usdoj.gov/victimcompensation.

⁴⁶ The Federal Tort Claims Act regulates fees for claimants’ attorneys. *See*, 28 U.S.C. § 1346.

⁴⁷ Regulations § 104.33.

⁴⁸ 66 Fed. Reg. 66,291 (December 21, 2001) (codified at 28 C.F.R. pt. 104) (noting the Department of Justice requested comments on whether the Special Master has the authority to limit the types and amounts of fees that can be charged by counsel, accountants, experts or others who are retained by claimants to assist them in filing and pursuing compensation claims, and whether such fees can and should be paid by the Special Master directly out of compensation awards.

⁴⁹ Some social planners and legal commentators called on the Special Master to develop regulations that would assure so-called “horizontal fairness,” a term meaning equivalent awards to claimants regardless of individual circumstances.

⁵⁰ Regulations § 104.43(a) (utilizing salary or income data for the years 1998 through 2000 and “all forms of compensation” for government employees, like housing allowances).

⁵¹ Regulations § 104.43(b).

⁵² Regulations § 104.43(c).

⁵³ Regulations § 104.43(d).

⁵⁴ Regulations § 104.43(e).

⁵⁵ Regulations § 104.45(a)-(d).

⁵⁶ The instructions may be found at the Special Master’s website, which is located at www.usdoj.gov/victimcompensation.

⁵⁷ New York law awards damages in wrongful death cases based largely on economic loss. *See, e.g., McKinney’s Consolidated Laws of New York, New York Estate Powers & Trust Law, § 5-4.3; See also Klos v. New York City Transit Authority*, 659 N.Y.S.2d 97, 240 A.D.2d 635 (1997) (holding in a wrongful death action, an award of damages is limited to fair and just compensation for the pecuniary injuries resulting from the decedent’s death to the persons for whose benefit the action is brought). Connecticut law awards damages in such cases based on the loss the decedent would have experienced had he lived, including the value of the enjoyment of life. *See, e.g., Conn. Gen. Stat. §§ 52-555 (2001); See also Lanier v. Hochman*, 1998 Conn. Super. LEXIS 1755 (1998) (holding \$5,000,000 verdict in noneconomic damages against a doctor was not excessive based on patient’s permanent brain injury and loss of quality of life).

⁵⁸ Regulations § 104.4(a).

⁵⁹ Regulations § 104.4(b).

⁶⁰ Regulations § 104.4(d)

⁶¹ If no personal representative has been appointed and such appointment is not the subject of pending litigation, the Special Master may determine in his discretion the personal representative for purposes of the Compensation Fund. Recognizing that the Special Master could not intercede in disputes over the identity of a decedent’s personal representative and still perform his required duties, the disputing parties may agree in writing to a personal representative who may seek and accept payment from the Compensation Fund while the parties resolve their disputes. Alternatively, the Special Master may suspend adjudication of the claim or place in escrow the award that is granted. *See*, Regulations § 104.4.

⁶² Regulations § 104.21 *et seq.*

⁶³ The civil courts have been deluged with claims of injury based on exposure to asbestos. In the view of certain toxicologists, exposure to a single asbestos fiber causes physical harm.

⁶⁴ Regulations § 104.2(d).

⁶⁵ An analogy to the “zone of danger” rule may be appropriate. *Dillon v. Legg*, 68 Cal. 2d 728 (1968).

66 Regulations § 104.2(b).

67 There does not appear to be a ready comparison with conventional tort law. Delay from exposure to a hazard and manifestation of injury does not preclude recovery. In fact, in toxic tort cases (like asbestos exposure/mesothelioma cases) the delays between exposure to the hazard and onset of disease can extend to decades. The regulatory requirement here may result in the need to close out the Fund in a short period.

68 Regulations § 104.2(c).

69 The regulation is reminiscent of the Spade impact rule, which required physical contact in order for plaintiff to recover for negligent infliction of emotional distress. Spade v. Lynn & Boston R.R., 168 Mass. 285 (1897). The Spade impact rule law has been the subject of substantial criticism and led to the development of “modern” rules like the zone of danger rule, which permits recovery of damages for negligent infliction of emotional distress if the plaintiff was both located in the dangerous area created by the defendant’s negligence and frightened by the risk of harm. Dillon v. Legg, 68 Cal. 2d 728 (1968). See also Restatement (Second) of Torts § 313(2) (1965).

70 ATSSSA, § 402(4).

71 Regulations § 104.47(b)(1).

72 Regulations § 104.47(b)(2).

73 Pub. L. No. 107-134, 115 Stat. 2427.

74 Regulations § 104.47(b)(3).

75 Regulations § 104.47(a).

76 66 Fed. Reg. 11,241 (March 13, 2002) (codified at 28 C.F.R. 104).

77 “Special statutory jurisdiction is simply the jurisdiction conferred when Congress, as it often does, specially provides a form of review for an agency.” A. Aman and W. Mayton, *Administrative Law*, § 12.4 at 353 (West 1993). “Under the Administrative Procedure Act, ‘the form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter’ and only in the ‘absence or inadequacy’ of statutory review may an action be brought under a general jurisdiction statute.” *Id.*, at 352, citing 5 U.S.C. § 702.

78 ATSSSA is silent on judicial review of agency action except with regard to preclusion. ATSSSA § 405(b)(3).

79 A. Aman and W. Mayton, *Administrative Law*, § 12.4 at 354 (West 1993).

80 38 U.S.C. § 211(a), amended by Public Law. No. 100-687, 102 Stat. 4105, 4122 (1988).

81 Johnson v. Robinson, 415 U.S. 361, 370-372 (1974); see also, A. Aman and W. Mayton, *Administrative Law*, § 12.4 at 362, n.5 (West 1993).

82 ATSSSA § 408(a)(b)(3).

83 U.S. Const. Art. III. Indeed, the Congress has the power to reduce or eliminate the District Courts altogether. U.S. Const. Art. III.

84 A provision of any statute creating in addition to its substantive provisions a particular venue for actions brought under that statute is commonly referred to as a “**special venue statute.**” See, e.g., Fourco Glass Co. v. Transmirra Prod. Corp., 353 U.S. 222 (1957). In this respect, the Fund is a **special venue statute as it provides that liability for all claims**

resulting from or relating to the terrorist attacks of September 11th have to be brought in the United States District Court for the Southern District of New York. ATSSSA § 408(b)(3). *See also* Suttle v. Reich Bros. Const. Co., 333 U.S. 163 (1948) (holding residence of corporation was dictated by federal law where **special venue statutes** has been enacted by Congress); Save Our Cumberland Mountains, Inc. v. Clark, 725 F.2d 1422, 1429-1431 (D.C. Cir. 1984), *vacated on other grounds*, 857 F.2d 1516 (1988).

⁸⁵ 28 U.S.C. § 1331(e).

⁸⁶ 369 U.S. 186 (1962).

⁸⁷ *Id.*, at 204.

⁸⁸ *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727 (1972); United States v. SCRAP, 412 U.S. 669 (1973). The Administrative Procedure Act and the Freedom of Information Act create relevant statutory rights to information aggregated, organized, and analyzed by agencies like the Office of the Special Master. *See, e.g.*, 5 U.S.C. § 552 (which specifies the circumstances under which members of the public may inspect those records).

⁸⁹ Sierra Club v. Morton, 405 U.S. 727, 734 (1972).

⁹⁰ Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970).

⁹¹ 5 U.S.C. § 702. In Clark v. Securitites Industry Ass'n, 479 U.S. 388, the Supreme Court ruled that Section 702 of the Act was directed at reviewability and created a presumption of judicial review of agency action. Standing, the Court said, “denies a right of review if the plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.” *Id.*, at 399.

⁹² *See also*, 5 U.S.C. § 704 (providing that “final agency action for which there is no adequate remedy in a court” may be reviewed by the court)

⁹³ A. Aman and W. Mayton, *Administrative Law*, § 12.9 at 405 (West 1993).

⁹⁴ Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967).

⁹⁵ Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967); Ciba-Geigy Corp. v. United States Environmental Protection Agency, 801 F.2d 430, 436-437 (D.C. Cir. 1986).

⁹⁶ A. Aman and W. Mayton, *Administrative Law*, § 12.10.1 at 415 (West 1993).

⁹⁷ 67 Fed. Reg. 11,239 (March 13, 2002) (codified at 28 C.F.R. pt. 104) (providing for individualized hearings); APA §552; Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978) (recognizing a common law public right of access to court records); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (recognizing a First Amendment public right of access to attend a criminal trial). The recognition of a First Amendment right in this context has subsequently been extended. *See, e.g.*, Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (recognizing a First Amendment public right of access to attend preliminary hearings in criminal proceedings); Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (recognizing a First Amendment public right of access to attend voir dire examinations of jurors in criminal proceedings). While the Supreme Court has never recognized a First Amendment right to attend civil trials, at least three circuit courts of appeals have done so. *See, e.g.*, Wilson v. American Motors Corp., 759 F.2d 1568 (11th Cir. 1985); Publicker Indus., Inc. v. Cohen, Inc., 733 F.2d 1059 (3rd Cir. 1984); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165 (6th Cir. 1983); *see also* Westmoreland v. Columbia Broadcasting Sys., 752 F.2d 16, 23 (2nd Cir. 1984) (dicta); *cf.* In Re Reporters Comm. for Freedom of the Press, 773 F.2d 1325 (D.C. Cir. 1985) (holding no public right of access to civil trials).

⁹⁸ APA § 557(b)(3) (“... All decisions, including initial, recommended, and tentative decisions ... shall include a statement of findings and conclusions, and the reasons or basis therefore, on all the material issue of fact, law or discretion presented on the record ...”).

⁹⁹ For damage assessments above the limits of available casualty insurance coverages. ATSSSA § 408.

¹⁰⁰ And later for others as well. ATSSSA § 202.

¹⁰¹ Shortly after September 11th, the commercial airlines delivered statements of cash flows to the President and leaders of Congress to demonstrate their precarious financial positions. Some were said to be days from closing.

¹⁰² See, e.g., National Childhood Vaccine Injury Act of 1986, Public Law. No. 99-660, 100 Stat. 3756 (1986) (codified at 42 U.S.C. §§ 300aa-1-33 (1986) (which created no-fault compensation scheme for children who suffered injuries associated with mandatory childhood vaccines); The Vaccine Injury Compensation Trust Fund, 26 U.S.C. 9510 (1994) (setting up a compensation system for victims of vaccine injury); National Swine Flu Immunization Program of 1976, Public Law. No. 94-380, 90 Stat. 1113 (1976) (codified at 42 U.S.C. § 247b) (which created no-fault compensation scheme for persons who suffered injuries associated with swine flu vaccine); Ducharme v. Merrill-National Laboratories, 574 F.2d 1307 (7th Cir. 1978), cert. denied, 439 U.S. 1002 (1979) (where the court found that the Swine Flue Act, which abrogated a state cause of action against the manufacturer for injuries resulting from an adverse reaction to the vaccine and provided that no trial by jury was afforded, did not violate the Seventh Amendment or the due process and equal protection clauses of the federal constitution); see also Richard Cooper, *Makers of AIDS Vaccines Will Need Protection From Product Liability Suits*, Manhattan Lawyer, June 14, 1988, page. 38. A number of states have also adopted immunity statutes. See, e.g., Ketchum v. State, 79 Cal. Rptr.2d 152 (Ct.App. 1998) (holding statute providing immunity for public agencies employing peace officers for claims arising out of pursuits did not violate the equal protection clauses of the state or federal constitutions); Pizza v. Wolf Creek Development Corp., 711 P.2d 671 (Colo. 1985) (holding statutory tort immunity for ski area operators did not violate the due process clause of the federal constitution); Mizrahi v. North Medical Center, Ltd., 761 So.2d 1040 (Fla. 2000) (holding a provision in wrongful death statute that precluded adult children from recovering nonpecuniary damages in action for a parent’s death due to medical malpractice did not violate the equal protection clauses of the state or federal constitutions); Northcutt v. Sun Valley Co., 787 P.2d 1159 (Idaho 1990) (holding statutory tort immunity for ski area operators did not violate the equal protection clauses of the state and federal constitutions); Bilyk v. Chicago Transit Authority, 531 N.E.2d 1 (Ill. 1988) (holding statutory tort immunity for transit authority for injuries sustained by passengers as a result of criminal actions committed by third parties did not violate the equal protection clause of the state constitution); Grieb v. Alpine Valley Ski Area, Inc., 400 N.W.2d 653 (Mich.Ct.App. 1986) (holding statutory tort immunity for ski area operators did not violate the equal protection or due process clauses of the state and federal constitutions); Lewis v. Canaan Valley Resorts, Inc., 408 S.E.2d 634 (W.Va. 1991) (holding statutory tort immunity for ski area operators did not violate the equal protection clause of the state constitution).

¹⁰³ The Act was amended in 1966 to provide for the transfer of all civil litigation from a nuclear disaster to a single federal district court. 42 U.S.C. § 2210 (n) (2). It was extended in 1987 and amended by requiring the various power plant licensees to contribute to victim compensation. 42 U.S.C. § 2210 (b).

¹⁰⁴ 42 U.S.C. § 2014 (t).

¹⁰⁵ Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978).

¹⁰⁶ Carolina Environmental Study Group, Inc v. Duke Power Co, 431 F.Supp.203, 222-223 (W.D.N.C. [add date]); Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 82 (1978).

¹⁰⁷ Duke Power Co v. Carolina Environmental Study Group, Inc. 438 U.S. 59, 83 (1978). The presumption of constitutionality for economic regulations and the consequent assignment of the heavy burden of proving arbitrariness and irrationality on the parties challenging them is a staple of federal and state constitutional law. See, e.g., Etheridge v.

Medical Center Hospitals, 237 Va. 87, 94 (1989) (the amount of recoverable damages in medical malpractice actions); Shavers v. Attorney General, 402 Mich. 554, 613 (1978) (Michigan automobile no-fault statute); Adams v. The Children's Mercy Hospital, 832 S.W. 2d 898, 903 (Mo. 1992) (caps on non-economic damages in medical malpractice cases); McDougall v. Schanz, 461 Mich. 15, 24 (1999) (standards for admissibility of expert testimony in medical malpractice cases). The Maryland Court of Appeals in Murphy v. Edmonds, 325 Md. 342, 355- 365 (1992) provides a comprehensive examination of the case law applying the rational basis standard and rejecting other more stringent standards in judgments on the constitutionality of economic regulation. The Court of Appeals upheld Maryland's statutory cap on non-economic damages. Comparable decisions on constitutional challenges to statutory caps on damages were rendered in Davis v. Omitwoju, 883 F.2d 1155 (3d Cir. 1989); Boyd v. Bulala, 877 F.2d 1191 (4th Cir. 1989); Hoffman v. United States, 767 F.2d 1431 (9th Cir. 1985); Fein v. Permanente Medical Group, 38 Cal. 3d 137 (1985); Johnson v. St. Vincent's Hospital, 237 Ind. 374 (1980); LaMark v. NME Hospitals, Inc., 542 So.2d 1334 (La.1989); English v. New England Medical Center, Inc., 405 Mass. 423 (1989); Meech v. Hillhaven West, Inc., 238 Mont. 21 (1989); Prendergast v. Nelson, 199 Neb. 97 (1997); Wright v. Colleton County School Dist., 301 S.C. 282 (1990).

¹⁰⁸ Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 83-84 (1978) (citations omitted).

¹⁰⁹ *Id.*, at 86.

¹¹⁰ *Id.*, at 86, n. 31.

¹¹¹ *Id.*, at 88 (citations omitted). Similar statements regarding the dynamic nature of change in common law rights, duties, and immunities are found in the opinions of state courts of last resort. *See, e.g.*, Murphy v. Edmonds, 325 Md. 342, 362 (1992); O'Brien v. Hazelet & Erdal, 410 Mich. 1, 15 (1980). Legislative change to existing tort law liabilities found to be constitutional by state courts is demonstrated by Church v. Rawson Drug & Sundry Co., 173 Ariz. 342 (App. Div.1992) (statute abolishing joint liability), Neil v. Kavena, 176 Ariz. 93 (App. Div. 1993) (joint liability reform statute), Evangelatos v. Superior Court, 44 Cal. 3d 1188 (1988) (abolition of joint liability for non-economic damages), Imlay v. City of Lake Crystal, 453 N.W.2d 326 (Minn. 1990) (statutory limit on municipal joint liability). State supreme court change to existing tort law liabilities is too extensive to survey here. However, these state supreme courts changed the law on joint liability on their own. Brown v. Keill, 224 Kan.195 (1978); Prudential Life Ins. Co. v. Moody, 696 S.W. 2d 503 (Ky. 1978); McIntyre v. Balentine, 833 S.W. 2d 52 (Tenn.1992).

¹¹² Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 89-90 (1978). At page 93, the Court compares the Fifth Amendment due process challenge to the Price-Anderson Act compensation scheme with the Fourteenth Amendment due process challenge to the New York workers compensation scheme in New York Central R. Co. v. White, 243 U.S. 188 (1917). In that case, the Court "observed that the Due Process Clause of the Fourteenth Amendment was not violated simply because an injured party would not be able to recover as much under the Act as before its enactment. '[He] is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages.' The logic of *New York Central* would seem to apply with renewed force in the context of this challenge to the Price-Anderson Act. The Price-Anderson Act not only provides a reasonable, prompt, and equitable mechanism for compensating victims of a catastrophic nuclear incident, it also guarantees a level of net compensation generally exceeding that recoverable in private litigation." Presumably, the Court is making a slightly veiled reference to lawyers' fees. The Court concludes the comparison by stating "[n]othing more is required by the Due Process Clause."

¹¹³ APA § 706. As a general rule, a reviewing court will give less deference to an agency's legal conclusions than its factual or discretionary determinations. SEC v. Sloan, 436 U.S. 103, 118 (1978) (holding courts are "final authorities on issues of statutory construction"); *cf.* Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984) (*where statute is ambiguous, court should defer to agencies' legal interpretations*) (emphasis added).

¹¹⁴ Like all other forms of agency action reviewed under the APA, rules must be consistent with the agency's statutory mandate (§ 706(2)(C)), the Constitution (§ 706(2)(B) and procedural requirements (§ 706(2)(D)). Additionally, they must not be "arbitrary or capricious" (§ 706(2)(A)); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402

(1971) (holding arbitrariness review as an inquiry into “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment); *cf.* NLRB v. Curtis Matheson Scientific, Inc., 494 U.S. 775 (1990) (holding emphasis in arbitrariness review has shifted towards scrutiny of the quality of an agency’s reasoning in light of the record, the parties’ contentions and the constraints of the underlying statute).

¹¹⁵ ATSSSA §§ 405(b)(1), 405(b)(3) (emphasis added).

¹¹⁶ Excluded victims who choose to challenge the regulations will confront the provision in ATSSSA that delegates to the Attorney General and the Special Master the authority to “promulgate all procedural and substantive rules for the administration of this title.” Certainly, eligibility rules for an award are substantive.

¹¹⁷ Regulations § 104.2(d).

¹¹⁸ ATSSSA § 405(b)(3).

¹¹⁹ 67 Fed. Reg. 11,234 (March 13, 2002) (codified at 28 C.F.R. pt. 104) (“... The efforts that I have taken to inform potential claimants of the likely range of their awards should not be mistaken for some sort of cap on awards ... To the contrary, each claimant has the option to ask for a hearing at which he or she may assert additional individualized circumstances and argue that the presumed award methodology is inadequate to resolve his or her particular claim in a fair manner. We will consider all such individual circumstances, including, but not limited to, the financial needs of victims and victims’ families ...).

¹²⁰ The Special Master holds out language from ATSSSA as statutory support for avoiding payment of large economic loss awards to high wage earners. The Act provides that the Special Master will determine “the amount of compensation to which the claimant is entitled based on the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant”. The Special Master uses that language as follows: “We will consider all such individual circumstances, including, but not limited to, the financial needs of victims and victims families.” He will “ ‘consider the individual circumstances of the claimant’ in fashioning awards, including the *financial needs* of victims and surviving families in rebuilding their lives.” And he avers “providing compensation above that level would rarely be necessary to ensure that the financial needs of a claimant are met.” Restated, the Special Master takes language from ATSSSA intended to bring about consideration of individual circumstances for damages assessment and uses it as a ground for “equitable” downward adjustment of awards for high-income victims and families based on absence of need.