

# NOTES

## AN ACT OF DISCRETION: REBUTTING CANTOR FITZGERALD'S CRITIQUE OF THE VICTIM COMPENSATION FUND

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*In response to September 11, 2001, Congress established a victim compensation fund, charging the Department of Justice with the responsibility for creating and administering the fund regulations. Several months after the Department of Justice announced its final rules, Cantor Fitzgerald publicly alleged that a number of the regulations were contrary to the congressional act governing the fund. Jonathan Melber examines Cantor Fitzgerald's arguments and shows that they do not hold up under current principles of administrative law because the challenged regulations fall within the range of discretion Congress delegated to the Department of Justice.*

### INTRODUCTION

Shortly after September 11, 2001, as the nation reeled from the enormity and ruthlessness of the terrorist attacks, Congress created and funded a no-fault victim compensation scheme.<sup>1</sup> It did so primarily out of concern for the airline industry, which faced potentially crippling lawsuits, and out of concern for the victims and their families—many of whom, members of Congress likely believed, would benefit more from immediate and reliable compensation than from unpredictable and protracted litigation.<sup>2</sup> Congress charged the Department of Justice (DOJ) with developing rules for the September 11th Victim Compensation Fund (Victim Compensation Fund or Fund) and administering its claims process, and the DOJ, after several

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<sup>1</sup> See Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001).

<sup>2</sup> See Lisa Belkin, Just Money, N.Y. Times, Dec. 8, 2002, § 6 (Magazine), at 92 (recounting Democrats' last-minute effort to add Victim Compensation Fund to airline bailout).

rounds of public comment, published the Fund regulations in March 2002.<sup>3</sup>

Seven months later, Cantor Fitzgerald—the bond-trading firm so devastated in the attacks that its name will forever be linked with September 11th—criticized the Fund regulations in a seventy-six-page document it submitted publicly to the DOJ.<sup>4</sup> The Submission, as Cantor Fitzgerald titled it, calls a number of aspects of the Fund “contrary to law” and insists that the DOJ change those aspects in ways that would lead to larger awards for Cantor Fitzgerald families.<sup>5</sup> Many of the Cantor Fitzgerald employees who died on September 11th earned incomes in the top two percent nationwide, and Cantor Fitzgerald alleges that the Fund regulations unfairly—and illegally—undercompensate high-income earners.<sup>6</sup>

It is easy to react to the Submission purely from a policy point of view. Those who believe the government should guarantee each family what it would receive in a successful lawsuit may rally to Cantor Fitzgerald’s support, while those who favor need-based compensation (or indeed, those who oppose any federal compensation at all) are likely to dismiss Cantor Fitzgerald’s arguments out of hand.

But whatever one’s policy predilections, it is important to analyze Cantor Fitzgerald’s position from a legal perspective. Most of Cantor Fitzgerald’s arguments are, after all, legal ones and deserve to be treated as such. Several Cantor Fitzgerald families recently filed a class action against the DOJ, apparently basing part of their complaint on arguments in the Submission,<sup>7</sup> making it all the more imperative to examine these contentions and the light they shed on the rulemaking process that led to the Victim Compensation Fund. The scope of this Note is therefore rather narrow: Regardless of whether the DOJ set up the Fund in the fairest and wisest of ways, did it set up the Fund in a legal way?

In this Note I argue that under current principles of administrative law, the challenged Fund regulations and methodologies are within the range of discretion that Congress delegated to the Department of Justice. Put simply, the regulations are legal.

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<sup>3</sup> See *infra* Part I.B.

<sup>4</sup> See Cantor Fitzgerald, L.P. et al., Submission of Cantor Fitzgerald, L.P., eSpeed, Inc. and TradeSpark, L.P., to the Special Master of the September 11th Victim Compensation Fund of 2001 and to the United States Department of Justice, <http://www.cantorusa.com/vcf/DOJsubmission.pdf> (Sept. 12, 2002) [hereinafter Submission].

<sup>5</sup> See *infra* Part I.C.

<sup>6</sup> See *infra* Parts II and III.

<sup>7</sup> See David W. Chen, 7 Families Sue Administrator of 9/11 Fund: Victims’ Relatives Say They’ve Been Cheated, *N.Y. Times*, Jan. 27, 2003, at B1.

I review the history of the Victim Compensation Fund in Part I, from its contemplation in Congress, to its administration by the Department of Justice, to its critique by Cantor Fitzgerald. In Part II, I assess the merits of Cantor Fitzgerald's legal objections to the DOJ's interpretations of the governing statutory language. Finally, in Part III, I analyze Cantor Fitzgerald's challenges to the methodologies the DOJ chose for calculating Fund awards.

## I

### CONGRESS, THE DEPARTMENT OF JUSTICE, AND CANTOR FITZGERALD

In this Part, I describe the Victim Compensation Fund and Cantor Fitzgerald's critique. In Section A, I explain key sections of the congressional Act authorizing the Department of Justice to create the Fund. In Section B, I review the process through which the Department of Justice established the Fund rules and give a brief explanation of how the Fund works. In Section C, I describe Cantor Fitzgerald's Submission to the Department of Justice protesting a number of aspects of the Fund rules.

#### A. *The Act*

Title IV of the Air Transportation Safety and System Stabilization Act (Act or ATSSSA) establishes the Victim Compensation Fund.<sup>8</sup> Its stated purpose is "to provide compensation to any individual . . . physically injured or killed" in the September 11th attacks.<sup>9</sup> The Act does not place a limit on the total amount of money that the federal government could ultimately pay out through the Fund.<sup>10</sup>

The Act instructs the United States Attorney General to "promulgate all procedural and substantive rules" for the Fund and to administer the Fund once he has established the rules.<sup>11</sup> The Act states that the Attorney General shall do so through a Special Master of his choosing who may further delegate duties and hire administrative personnel as needed.<sup>12</sup> The Act explicitly delegates rulemaking authority

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<sup>8</sup> Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001). The short title of Title IV is "September 11th Victim Compensation Fund of 2001." § 401, 115 Stat. at 237. However, I will use "Act" or "ATSSSA" whenever referring to the statutory language governing the Fund (which is in Title IV) and "Fund" only when referring to the actual compensation scheme itself.

<sup>9</sup> § 403, 115 Stat. at 237.

<sup>10</sup> See § 406(b), 115 Stat. at 240.

<sup>11</sup> § 404(a), 115 Stat. at 237-38.

<sup>12</sup> § 404(a), 115 Stat. at 237-38.

to the Attorney General, requiring him to “promulgate regulations to carry out this title” within ninety days of the Act’s enactment.<sup>13</sup>

Section 405 of the Act sets the substantive guidelines for creating and administering the Fund. It mandates the creation of a claims process and specifies the information the Special Master must require claimants to provide on their claim forms.<sup>14</sup> The Special Master must determine whether a claimant qualifies for compensation and, if so, both the extent of harm the claimant suffered—“including any economic and noneconomic losses”—and “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.”<sup>15</sup> In making these determinations, the Special Master may not consider theories of liability nor award punitive damages, and the Special Master must offset every award by the amount of a claimant’s “collateral source[s].”<sup>16</sup> Although claimants have the right to be represented and to present evidence during the claims process (as well as “any other due process rights determined appropriate by the Special Master”), the Act explicitly precludes judicial review of the Special Master’s determinations, which “shall be final.”<sup>17</sup> The Act limits eligibility to those physically injured or killed in the terrorist attacks and prohibits anyone seeking compensation through the Fund from filing any civil action in state or federal courts for damages related to the attacks.<sup>18</sup>

In an apparent effort both to protect the airline industry and to induce victims eligible for Fund compensation to choose that route over litigation, section 408 of the Act limits the total liability of “any air carrier” to the airlines’ preexisting insurance coverage,<sup>19</sup> which amounts to roughly six billion dollars.<sup>20</sup> This provision applies to *all* potential claims arising out of the September 11th attacks, not just to

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<sup>13</sup> § 407, 115 Stat. at 240.

<sup>14</sup> See § 405(a), 115 Stat. at 238. Claimants are required to file no later than two years after the Department of Justice promulgates the Fund’s rules. § 405(a)(3), 115 Stat. at 238.

<sup>15</sup> § 405(b)(1), 115 Stat. at 238.

<sup>16</sup> See § 405(b), 115 Stat. at 238-39. The Act defines “collateral source[s]” as “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.” § 402(4), 115 Stat. at 237.

<sup>17</sup> § 405(b)(3)-(b)(4), 115 Stat. at 239.

<sup>18</sup> See § 405(c), 115 Stat. at 239-40.

<sup>19</sup> See § 408, 115 Stat. at 240. Congress later expanded this liability shield to cover airplane manufacturers and airport operators and owners. See Aviation and Transportation Security Act, Pub. L. No. 107-71, § 201(b)(2), 115 Stat. 597, 645-46 (2001).

<sup>20</sup> See Elizabeth Kolbert, *The Calculator: How Kenneth Feinberg Determines the Value of Three Thousand Lives*, *New Yorker*, Nov. 25, 2002, at 46.

victims eligible for the Fund.<sup>21</sup> A victim choosing litigation over the Fund thus could end up competing with businesses (and probably other entities ineligible for Fund compensation) for a share of the six billion dollars of insurance money, when many estimates put total economic damages from the attacks between thirty-five and seventy billion dollars.<sup>22</sup>

### *B. The Rules*

On November 5, 2001, the Department of Justice began notice-and-comment rulemaking procedures by requesting comments from the public on how best to establish and administer the Fund.<sup>23</sup> The notice of inquiry asked for comment on its intention to issue immediately effective “interim final rules” that would be subject to a second round of public comment before being replaced by “final” final rules, as well as on a number of substantive topics: the design of the claim forms, the procedures for hearings, the interpretation of statutory terms affecting eligibility such as “physical harm” and “immediate aftermath,” the fair calculation of economic and noneconomic losses, and other issues.<sup>24</sup> The DOJ received 806 comments by the announced deadline of November 26, 2001.<sup>25</sup>

On the day of the deadline for public comments, Attorney General John Ashcroft appointed Kenneth Feinberg as the Special Master of the Fund.<sup>26</sup> Feinberg had many years of experience settling complex class action suits (so-called mass torts) as a court-appointed Spe-

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<sup>21</sup> Air Transportation Safety and System Stabilization Act § 408, 115 Stat. at 240.

<sup>22</sup> See Robert S. Kelner & Gail S. Kelner, *Victim Compensation Fund: An Update*, 227 N.Y. L.J. 3 (2002); Abraham McLaughlin, *Insurance Rates Spiral Up in Wake of Sept. 11*, *Christian Sci. Monitor*, Apr. 8, 2002, at 1; Christopher Oster, *Questions of Security: Property Claims Linked to Attacks to Hit \$16.6 Billion*, *Wall St. J.*, Nov. 5, 2001, at A14; Liz Pulliam Weston, *Insurers in State Must Provide Terror Coverage Regulation: Language of Exemptions OKd Outside California Raises Concern That Hate Crimes Also Could Be Excluded*, *L.A. Times*, Jan. 7, 2002, at C1; Jackie Spinner, *Terrorism Insurance Bill Passed by Senate: Battle Expected over Competing Versions*, *Wash. Post*, June 19, 2002, at E1.

<sup>23</sup> See Notice of Inquiry and Advance Notice of Rulemaking, September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 55,901 (Nov. 5, 2001) (codified at 28 C.F.R. pt. 104).

<sup>24</sup> See *id.* at 55,902-05.

<sup>25</sup> The DOJ loaded all public comments onto its website for the Fund (whether the comments were received before or after the deadline). See September 11th Victim Comp. Fund of 2001, U.S. Dep’t of Justice, Search Comments, at [http://www.usdoj.gov/victimcompensation/civil\\_03a.html](http://www.usdoj.gov/victimcompensation/civil_03a.html) (last visited Feb. 3, 2003).

<sup>26</sup> Press Release, Department of Justice, Attorney General Ashcroft Names Special Master to Head September 11th Compensation Program (Nov. 26, 2001), <http://www.usdoj.gov/victimcompensation/dojpr2.pdf>.

cial Settlement Master in the Agent Orange settlement, DES cases, and several asbestos cases.<sup>27</sup>

On December 21, 2001, after reviewing the public comments and consulting with victims, public officials, and other concerned groups, Feinberg announced the publication of the "Interim Final Rule."<sup>28</sup> During the thirty days allowed for public comments on the Interim Final Rule, the Department of Justice received 2687.<sup>29</sup>

On March 13, 2002, Feinberg issued the Final Rule for the Victim Compensation Fund.<sup>30</sup> The Final Rule included a summary of the comments the DOJ received on the Interim Final Rule and an explanation of the amendments the DOJ decided to make in promulgating the Final Rule.<sup>31</sup> For example, the Interim Final Rule determined across-the-board amounts for pain and suffering (that is, the "noneconomic loss" component of the award) of \$250,000 per victim plus \$50,000 for the spouse and each dependent of the victim;<sup>32</sup> the Final Rule increased the latter amount to \$100,000.<sup>33</sup>

Although the array of legal interpretations and policy decisions necessary to create the Fund were complex—not to mention the mathematical models needed for calculating economic losses—the actual structure of the Fund as prescribed in the Final Rule is fairly straightforward. Claimants choose between two "tracks" for receiving an award determination, depending on how involved they wish to be in the claims process.<sup>34</sup> Track A requires somewhat less involvement: Assuming eligibility, a claims evaluator determines the presumed award based on the information the claimant provides, at which point the claimant may either accept payment or seek a hearing for review.<sup>35</sup> In Track B, on the other hand, the claimant proceeds directly

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<sup>27</sup> See Bios, Kenneth R. Feinberg, at <http://www.feinberggroup.com/biosFeinberg.htm> (last visited Feb. 3, 2003).

<sup>28</sup> See Interim Final Rule, September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,274 (Dec. 21, 2001) (codified at 28 C.F.R. pt. 104).

<sup>29</sup> See September 11th Victim Comp. Fund of 2001, U.S. Dep't of Justice, Links to Comments on Interim Final Rule by Date Loaded, at [http://www.usdoj.gov/victimcompensation/interim\\_03n.html](http://www.usdoj.gov/victimcompensation/interim_03n.html) (last visited Feb. 3, 2003). The DOJ received another 628 comments after the deadline of January 22, 2002. See *id.*

<sup>30</sup> See September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,233 (Mar. 13, 2002) (codified at 28 C.F.R. pt. 104).

<sup>31</sup> See *id.*

<sup>32</sup> See Interim Final Rule, September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. at 66,279.

<sup>33</sup> See September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. at 11,234.

<sup>34</sup> See *id.* at 11,245 (leaving unchanged basic structure established in Interim Final Rule); see also Interim Final Rule, September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. at 66,285.

<sup>35</sup> Interim Final Rule, September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. at 66,285.

to a hearing for the initial (and final) award determination.<sup>36</sup> To assist the families of victims in deciding whether to file a claim at all, the DOJ published “presumed award charts” showing general estimates by age, income, and number of dependents, along with instructions for calculating individual awards based on more specific information.<sup>37</sup>

### C. *The Challenge*

Cantor Fitzgerald was one of the firms hit hardest in the terrorist attacks, losing all 658 employees that were in its World Trade Center offices that morning.<sup>38</sup> This is more than a fifth of the total number of victims potentially eligible to file claims with the Fund.<sup>39</sup> Cantor Fitzgerald has since gone to great lengths to support the families of its employees who perished on September 11, pledging to them a substantial amount of the firm’s future profits and creating and funding a charitable relief organization to accept donations from the public.<sup>40</sup>

On September 12, 2002, Cantor Fitzgerald made its public Submission to Feinberg and the Department of Justice, a seventy-six-page document with the stated purposes of “provid[ing] information about Cantor Fitzgerald . . . to the Special Master in order to assist Cantor Fitzgerald families in applying for compensation from the Fund” and “explain[ing] why certain [Fund regulations] are contrary to law.”<sup>41</sup> As for the purpose of providing information, the first twenty-five pages of the Submission present a detailed explanation of Cantor Fitzgerald’s business and employee-compensation plans, and the last seventeen pages contain, in the form of an appendix, an “analysis of earnings data” by an economic, risk management, and litigation consulting firm.<sup>42</sup>

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<sup>36</sup> See *id.*

<sup>37</sup> See September 11th Victim Comp. Fund of 2001, U.S. Dep’t of Justice, Explanation of Process for Calculating Presumed Economic Loss, at [http://www.usdoj.gov/victimcompensation/vc\\_matrices.pdf](http://www.usdoj.gov/victimcompensation/vc_matrices.pdf) (last modified Aug. 27, 2002) [hereinafter *Explanation*].

<sup>38</sup> See Submission, *supra* note 4, at 5.

<sup>39</sup> See Press Release, Federal Bureau of Investigation, Crime in the United States, 2001 (Oct. 28, 2002), available at <http://www.fbi.gov/pressrel/pressrel02/cius2001.htm> (“In all, there were 3,047 deaths as a result of the events of September 11, 2001: 2,823 homicide victims were attributed to the attacks on the World Trade Center, 184 murder victims to the Pentagon, and 40 murder victims to the airliner crash site in Somerset County, Pennsylvania.”); see also War Against Terror: Victims, at <http://www.cnn.com/SPECIALS/2001/trade.center/victims.section.html> (last visited Feb. 3, 2003) (listing every known victim by name, city, crash site, employer, and age).

<sup>40</sup> See Submission, *supra* note 4, at 54.

<sup>41</sup> *Id.* at 5.

<sup>42</sup> See *id.*; Chi. Partners, LLC, Summary Report and Analysis of Earnings Data for Cantor Fitzgerald September 11 Victim Compensation Fund Participants (n.d.), in Submission, *supra* note 4, app.

I am concerned in this Note with the remaining thirty-four pages of the Submission, which argue that aspects of the Fund are contrary to law. Cantor Fitzgerald makes serious allegations of illegality on the part of Feinberg and the Department of Justice—allegations that, as I argue below, should not hold up in court.<sup>43</sup>

For the sake of analysis I assume that a court would grant standing to families of Cantor Fitzgerald victims. That is, I assume they satisfy the requirements of imminent injury-in-fact, fall within the statute's zone of interests, were caused by the defendant agency, and are redressable by a decree in the plaintiffs' favor.<sup>44</sup> The federal district court in Manhattan assigned to the actual case<sup>45</sup> could, of course, deny standing to the Cantor Fitzgerald plaintiffs on the particular facts before it, deny their petition for class certification, or deny any number of procedural motions so as to effectively stop their suit. But because I am concerned with the substance of Cantor Fitzgerald's arguments, I will sidestep such procedural matters. The only aspect of the Fund explicitly shielded from judicial review is the final determination of an award.<sup>46</sup> A court may review all other DOJ rulemaking for and administration of the Fund under the Administrative Procedure Act.<sup>47</sup>

## II

### CHEVRON ANALYSIS OF STATUTORY INTERPRETATION

In this Part, I show that three of Cantor Fitzgerald's arguments fail under the Supreme Court's analysis in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, which is the proper standard for challenges to an administrative agency's interpretation of its gov-

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<sup>43</sup> I do not address all of Cantor Fitzgerald's claims. Some of them are couched in policy terms rather than imperative legal language and therefore do not present actual legal claims. See, e.g., Submission, *supra* note 4, at 47 ("The Cantor Fitzgerald families should at least be given the choice of selecting whether a two-year average . . . or whether 2001 income data alone . . . is used."). Others raise important legal issues but do not assert that the Department of Justice has acted or will act illegally with respect to those issues. See *id.* at 57 ("Cantor Fitzgerald families, if they choose, may present evidence in support of a claim for non-economic losses in excess of the presumed amounts."); *id.* at 58 ("We request that the Special Master consider the claims of these three [severely burned survivors] on an individual basis and that they receive full and just compensation . . .").

<sup>44</sup> See, e.g., *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152-56 (1970) (conferring standing to plaintiffs based on future economic injury and presumption of judicial review under Administrative Procedure Act).

<sup>45</sup> See *supra* note 7 and accompanying text.

<sup>46</sup> See Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 405(b)(3), 115 Stat. 230, 239 (2001).

<sup>47</sup> See 5 U.S.C. §§ 701-702 (2000).



erning statute.<sup>48</sup> Courts will apply *Chevron* to such challenges if an agency has received an explicit legislative mandate to engage in the rulemaking process.<sup>49</sup> Given that Congress expressly delegated rulemaking authority to the Department of Justice in order to carry out Title IV of the Act and that the Department of Justice engaged in thorough notice-and-comment procedures as part of its rulemaking process,<sup>50</sup> a court should assess objections to the DOJ's statutory interpretations according to the *Chevron* standard.

The two-step *Chevron* test is well known and I will not spend time exploring its rationale or theoretical boundaries, a task already taken up by many others.<sup>51</sup> Step one asks whether "the intent of Congress is clear."<sup>52</sup> If a court, "employing traditional tools of statutory construction," holds that Congress had a clear intent on the issue in question, then "that intention is the law and must be given effect."<sup>53</sup> If, however, the statute is "silent or ambiguous," then the court must go on to step two and decide "whether the agency's answer is based on a permissible construction of the statute."<sup>54</sup> Only twice has the Supreme Court struck down an agency's interpretation under the second step of *Chevron*.<sup>55</sup>

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<sup>48</sup> See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (establishing two-part test for determining when courts must defer to agency interpretations of congressional statutes).

<sup>49</sup> See *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) ("We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.").

<sup>50</sup> See *supra* Part I.

<sup>51</sup> See, e.g., Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2078-2104 (1990) (discussing history of and principles behind *Chevron*).

<sup>52</sup> *Chevron*, 467 U.S. at 842.

<sup>53</sup> *Id.* at 843 n.9.

<sup>54</sup> *Id.* at 843.

<sup>55</sup> See *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 721 (2001) (finding National Labor Relations Board's textual interpretation "unlawful" because it "contradict[s] both the text and structure of the statute"); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 485 (2001) (rejecting Environmental Protection Agency's interpretation of ambiguous text because interpretation "completely nullifies textually applicable provisions meant to limit [Environmental Protection Agency's (EPA's)] discretion"); Stephen G. Breyer et al., *Administrative Law and Regulatory Policy* 324 (4th ed. 1999) (noting that, as of publication date, no Supreme Court decision had ever found agency interpretation impermissible under second step of *Chevron*). Of the eleven other Supreme Court decisions since 1999 that apply *Chevron*, four hold the statutory text in question to be unambiguous, see *Dep't of Hous. & Human Servs. v. Rucker*, 535 U.S. 125, 130 (2002); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002); *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 333 (2002); *INS v. St. Cyr*, 533 U.S. 289, 320-21 n.45 (2001), and seven hold the agency interpretation to be a permissible construction of an ambiguous provision, see *Yellow Transp., Inc. v. Michigan*, 123 S. Ct. 371 (2002); *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 538-39 (2002); *Barnhart v. Walton*, 535 U.S. 212, 224 (2002); *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 113, 118 (2002); *New York v. FERC*, 535 U.S. 1, 28 (2002);

It is worth emphasizing, as the Supreme Court did just this year, a passage from *Chevron* that summarizes the thrust of the two-step analysis: "When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail."<sup>56</sup> In a footnote to that decision, the Court explained that judicial review should be even more deferential when confronting an agency's "first interpretation of a new statute."<sup>57</sup>

There is a long-standing debate in administrative law over whether *Chevron*'s invocation of the "traditional tools of statutory construction"<sup>58</sup> extends to legislative history.<sup>59</sup> Although this question is beyond the scope of my Note, if ever there were a case in which a court should not rely on legislative history, this would be it. None of the floor comments from either house of Congress address the issues Cantor Fitzgerald raises requiring statutory construction; the bulk of the discussion in the congressional record relates to those titles of the Act<sup>60</sup> providing the airline industry with a five-billion-dollar bailout and up to ten billion dollars in favorable loans. Given the hasty nature of this piece of legislation—the language establishing the Fund was conceived, drafted, and finalized in only three days<sup>61</sup>—and the absence of official congressional comment on the issues below, I will not discuss the Act's legislative history when applying *Chevron* to Cantor Fitzgerald's arguments.

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Lopez v. Davis, 531 U.S. 230, 244 (2001); Shalala v. Ill. Council on Long Term Care, Inc., 529 U.S. 1, 21 (2000).

<sup>56</sup> *Verizon Communications*, 535 U.S. at 502 (upholding Federal Communications Commission regulations under 1996 Telecommunications Act) (quoting *Chevron*, 467 U.S. at 866).

<sup>57</sup> See *id.* at 1668 n.20.

<sup>58</sup> See *supra* note 53 and accompanying text.

<sup>59</sup> Compare Antonin Scalia, A Matter of Interpretation 32 (1997) (arguing that legislative intent does not really exist and that even if it did, it "is not likely to be found in the archives of legislative history"), with Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. Cal. L. Rev. 845, 859-60 (1992) ("Why should the fairly public congressional legislative process, which involves checking with those whom the legislation will most likely affect, and then perhaps publicly adopting and explaining their related points of view, diminish the legitimacy of the resulting legislative history?").

<sup>60</sup> Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 101(a), 115 Stat. 230, 230 (2001).

<sup>61</sup> Belkin, *supra* note 2, at 92 ("The entire \$6 billion program took 72 hours, just three days, from Wednesday the 19th through Saturday the 22nd, from first glimmer to presidential signature.").

### A. Individual Circumstances

Section 405(b)(1)(B) instructs the Special Master to determine “(i) the extent of harm to the claimant, including any economic and noneconomic losses; and (ii) 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.*”<sup>62</sup> In his statement accompanying the Interim Final Rule, Feinberg implied that the DOJ interpreted this mandate as one that permitted adjusting awards either upwards or downwards on a case-by-case basis:

We have concluded that any methodology that does nothing more than attempt to replicate a theoretically possible future income stream would lead to awards that would be insufficient relative to the needs of some victims’ families, *and excessive relative to the needs of others . . . .* It is our view that, absent extraordinary circumstances, *awards in excess of \$3 million, tax-free, will rarely be appropriate in light of individual needs and resources.*<sup>63</sup>

Although this language does not appear in the Special Master’s statement published with the Final Rule, neither does language specifically altering the position. What does appear is the Special Master’s intention to consider “the financial needs of victims and victims’ families,”<sup>64</sup> strongly suggesting that the Department’s interpretation did not change.

According to the Submission, the congressional instruction to the Special Master to consider “individual circumstances” when calculating awards<sup>65</sup> permits Feinberg to *increase* an award but not to *decrease* one.<sup>66</sup> The collateral-offsets section of the Act lists specific items that operate to reduce awards, and therefore, reasons Cantor Fitzgerald, had Congress wanted to allow individual circumstances to justify reducing awards, it would have placed such language in the collateral-offsets section.<sup>67</sup>

#### 1. Step One: The Ambiguity of “Individual Circumstances”

The debate over “individual circumstances” is less about the *meaning* of that term than about its function. In other words, the question is whether the Act is ambiguous when it instructs the Special

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<sup>62</sup> § 405(b)(1), 115 Stat. at 238 (emphasis added).

<sup>63</sup> Interim Final Rule, September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,274, 66,274 (Dec. 21, 2001) (codified at 28 C.F.R. pt. 104) (emphasis added).

<sup>64</sup> September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,233, 11,234 (Mar. 13, 2002) (codified at 28 C.F.R. pt. 104).

<sup>65</sup> See § 405(b)(1)(B)(ii), 115 Stat. at 238.

<sup>66</sup> See Submission, *supra* note 4, at 48.

<sup>67</sup> *Id.* at 49.

Master to “base” compensation determinations on the individual circumstances of the claimant (as well as the facts of the claim and harm).

It is clear that Congress gave the Special Master discretion to consider factors other than economic and noneconomic loss, but it is far from obvious how Congress expected those factors to affect final awards.<sup>68</sup> The Act requires the Special Master to determine the extent of harm, including economic and noneconomic losses, to calculate a preliminary award.<sup>69</sup> He then must calculate the amount of collateral sources a claimant has received and reduce the preliminary award by that amount.<sup>70</sup> This part of the formula is straightforward enough, but Congress also instructs the Special Master, in determining an award, to “base” a claimant’s compensation on two factors in addition to harm: “the facts of the claim” and “the individual circumstances of the claimant.”<sup>71</sup>

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<sup>68</sup> Section 405(b) reads in full: (b) Review and Determination.—

(1) Review.—The Special Master shall review a claim submitted under subsection (a) and determine—

(A) whether the claimant is an eligible individual under subsection (c);

(B) with respect to a claimant determined to be an eligible individual—

(i) *the extent of the harm to the claimant, including any economic and noneconomic losses; and*

(ii) *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.*

(2) Negligence.—With respect to a claimant, the Special Master shall not consider negligence or any other theory of liability.

(3) Determination.—Not later than 120 days after that date on which a claim is filed under subsection (a), the Special Master shall complete a review, make a determination, and provide written notice to the claimant, with respect to the matters that were the subject of the claim under review. Such a determination shall be final and not subject to judicial review.

(4) Rights of Claimant.—A claimant in a review under paragraph (1) shall have—

(A) the right to be represented by an attorney;

(B) the right to present evidence, including the presentation of witnesses and documents; and

(C) any other due process rights determined appropriate by the Special Master.

(5) No Punitive Damages.—The Special Master may not include amounts for punitive damages in any compensation paid under a claim under this title.

(6) *Collateral Compensation.*—*The Special Master shall reduce the amount of compensation determined under paragraph (1)(B)(ii) by the amount of the collateral source compensation the claimant has received or is entitled to receive as a result of the terrorist-related aircraft crashes of September 11, 2001.*

§ 405(b), 115 Stat. at 238-39 (emphasis added).

<sup>69</sup> § 405(b)(1)(B), 115 Stat. at 238.

<sup>70</sup> § 405(b)(6), 115 Stat. at 239.

<sup>71</sup> § 405(b)(1)(B)(ii), 115 Stat. at 238.

Cantor Fitzgerald apparently assumes that because the term “individual circumstances” appears in the paragraph that addresses the calculation of harm, rather than in the paragraph dealing with collateral sources, it functions solely to increase awards. But this simply begs the question. Nothing in the paragraph on collateral sources suggests that the factors it covers are the *only* factors that could lead to the reduction of an award.<sup>72</sup> Indeed, other paragraphs, such as the one prohibiting the Special Master from considering punitive damages, effectively decrease awards.<sup>73</sup> The fact that one part of the paragraph—the calculation of harm—serves to increase an award, does not, by itself, entail that every part of the paragraph functions identically.

A closer look confirms that Congress is at best silent on the intended function of “individual circumstances.” The Act does not limit “harm” to the sum of economic and noneconomic losses but rather describes harm as “including” these calculations—implying that the Special Master may add other factors to his determinations of harm.<sup>74</sup> Had Congress included “individual circumstances” in this list of factors, there might be a strong argument for allowing that factor to have only an augmenting effect on award calculations.

But Congress did not list “individual circumstances” among the factors comprising harm; Congress listed it as one of the factors determining compensation in general.<sup>75</sup> Note that unlike “harm,” the third factor—“the facts of the claim”—does not obviously increase or decrease awards, leaving even less reason to believe that Congress meant “individual circumstances” to be a one-way ratchet.

In fact, by Cantor Fitzgerald’s strict logic, “individual circumstances” could not have *any* effect on award determinations. If individual circumstances cannot operate to reduce an award because Congress specified award-reducing factors in its definition of collateral sources, then individual circumstances could not operate to *increase* an award, either, since Congress specified award-*increasing* factors in its definition of economic and noneconomic losses. Of course, if that is what Congress wanted, it should have left the term out altogether.

Surveying federal statutory use of “individual circumstances” does not necessarily resolve the ambiguity, although it does tend to undermine Cantor Fitzgerald’s interpretation. The term appears in the U.S. Code six other times. In four of those instances, the term

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<sup>72</sup> See § 405(b)(6), 115 Stat. at 239.

<sup>73</sup> See § 405(b)(5), 115 Stat. at 239.

<sup>74</sup> See § 405(b)(1)(B)(i), 115 Stat. at 238.

<sup>75</sup> § 405(b)(1)(B)(ii), 115 Stat. at 238.

grants flexibility to depart from a general rule;<sup>76</sup> in the other two, the term figures as a factor in certain review procedures (for which there is no default rule).<sup>77</sup> Thus, the term “individual circumstances” operates in the U.S. Code as a catchall, expanding an official’s authority to address situations that are either unpredictable or too specific and varying to codify effectively. While this suggests that including “individual circumstances” as a determining factor signifies congressional intent to delegate more flexibility than would otherwise derive from a particular clause, it does not definitively decide the issue. The function of “individual circumstances” in the ATSSSA is still ambiguous.

## 2. *Step Two: The Reasonableness of the DOJ’s Interpretation of “Individual Circumstances”*

The question, then, is whether it is reasonable for the DOJ to interpret the term “individual circumstances” as permission to adjust an award, upwards *or downwards*, because of considerations separate from economic loss. Case law appears to be of little help here: There is not a single opinion construing the use or otherwise describing the function of “individual circumstances” in a federal statute. As one would expect, there are hundreds of examples of courts construing the proper application of one or another statute as varying according to an individual’s circumstances, but even these tend to assume that the

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<sup>76</sup> See 10 U.S.C.A. § 12205(d) (West, WESTLAW through P.L. 108-6 approved Feb. 13, 2003) (allowing Secretaries of Army and Navy to waive, “considering the individual circumstances of the officer involved,” normal baccalaureate degree requirement for exceeding specific rank); 11 U.S.C. § 102 (2000) (Historical and Statutory Notes) (“The phrase [‘after notice and a hearing’] means after such notice as is appropriate in the particular circumstances (to be prescribed by either the Rules of Bankruptcy Procedure *or by the court in individual circumstances that the Rules do not cover*).” (emphasis added)); 30 U.S.C. § 1008 (2000) (requiring “substantial beneficial production” of valuable byproducts of geothermal steam by users “unless, in individual circumstances [the Secretary of Interior] modifies or waives this requirement in the interest of conservation of natural resources or for other reasons satisfactory to him”); Foreign Relations Authorizing Act, Pub. L. No. 107-228, 116 Stat. 1350 (2002) (requiring Secretary of State, pursuant to 22 U.S.C. § 2601, to report on “procedures for the identification of refugees who are particularly vulnerable *or whose individual circumstances otherwise suggest* an urgent need for resettlement”) (emphasis added)).

<sup>77</sup> See Veterans’ Benefits Improvements Act of 1994, Pub. L. No. 103-446, § 201(c)(3), 108 Stat. 4655, 4655 (codified as amended at 38 U.S.C. § 7101A (2000)) (giving board chairman choice, “based upon the individual circumstances,” of granting underperforming board member conditional recertification for board membership or recommending noncertification); National Defense Authorization Act for Fiscal Year 1994, § 507(a), Pub. L. No. 103-160, 107 Stat. 1547, 1646 (1993) (directing, pursuant to 10 U.S.C. § 1174a, that “Secretary of each military department shall establish a procedure for the review of individual circumstances of [discharged or separated] officer . . . [who] elected not to accept such discharge or separation” and mentioning officer’s proper notification as material factor regarding fairness of discharge or separation).

meaning of the phrase is obvious. Nevertheless, the DOJ should not have trouble defending its interpretation as a reasonable one.

Without repeating them in detail, the reasons discussed above for concluding that the statute is ambiguous in its use of “individual circumstances” are the same grounds for concluding that the Department of Justice’s interpretation is at the very least a reasonable one.<sup>78</sup> But they are not the only reasons to think so.

The DOJ’s interpretation comports with the Act’s stated purpose in establishing the Fund. Congress created the Fund both to spare the beleaguered airline industry from potentially enormous judgments and to spare grieving families from the contentiousness, uncertainty, and protracted nature of litigation. Congress did not establish the Fund to mimic litigation nor did it purport to offer victims compensation identical to that which they would get from a jury. The Special Master may not consider negligence,<sup>79</sup> may not award punitive damages, and may not award full compensation to claimants with life insurance policies—all of which a New York jury could do in a wrongful death suit.<sup>80</sup> The Special Master has wide discretion in establishing hearings procedures, including the discretion to consider evidence that would not get into court,<sup>81</sup> and he can create “any other due process rights [he determines] appropriate.”<sup>82</sup> In light of the Special Master’s wide discretion, the unique nature of this alternative to litigation, and the explicit mandate to consider factors other than pure economic and noneconomic losses, it is quite reasonable to conclude that the phrase “based on . . . individual circumstances” permits Feinberg to increase or decrease compensation.<sup>83</sup>

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<sup>78</sup> To those unfamiliar with *Chevron*, this may appear to collapse the second step of the test into the first step. The point, however, is not that legislative ambiguity entails administrative reasonableness, but rather that arguing that a particular passage is ambiguous often consists of showing how that passage can be (reasonably) interpreted in more than one way. Whether an agency in fact interpreted the passage in one of those reasonable ways is the question in step two; if it did, then the analysis in step two may overlap with that in step one.

<sup>79</sup> Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 405(b), 115 Stat. 230, 238 (2001).

<sup>80</sup> See N.Y. Est. Powers & Trusts § 5-4.3(b) (McKinney 1999) (allowing punitive damages in wrongful death awards); N.Y. C.P.L.R. 4545(c) (McKinney 2002) (exempting life insurance from collateral sources “admissible for consideration by the court . . . [to] reduce the amount of the award”).

<sup>81</sup> § 407(3), 115 Stat. at 240 (“[T]he Attorney General, in consultation with the Special Master, shall promulgate regulations . . . with respect to . . . procedures for hearing and the presentation of evidence.”).

<sup>82</sup> § 405(b)(4)(C), 115 Stat. at 239.

<sup>83</sup> For an argument that “individual circumstances” allow the Special Master to reduce an award but not to increase one, see Henry Cohen, *The September 11th Victim Compen-*

### B. *Extraordinary Circumstances*

Cantor Fitzgerald describes as “manifestly inappropriate” the requirement that claimants demonstrate extraordinary circumstances in order to receive more than an amount based on the presumptive award methodology, which Cantor Fitzgerald calls “a high burden of proof” for which “[t]here is no basis in the Act.”<sup>84</sup> The presumptive methodologies in question apply general assumptions, such as average work-life expectancy and personal consumption, to individual factors, such as age, marital status, and number of dependents.<sup>85</sup>

It is not clear from the Submission whether Cantor Fitzgerald wants the DOJ to lower the burden or drop the requirement entirely, but this is understandable given that the DOJ is not very clear about how the requirement functions. The DOJ does not define “extraordinary circumstances,” give examples of factors suggesting such circumstances, or explain how it will determine whether a claimant has demonstrated them. The Final Rule seems to imply that individuals with incomes in the top two percent meet the burden by virtue of their income, but the DOJ does not come right out and say that such individuals automatically qualify for departure from the presumptive award methodology:

The term “extraordinary circumstances” is not intended to signal that there is an unsustainable burden to justify departure from the presumed award. . . . A number of factors could support a determination to depart from the presumed award methodology. *For victims who had extremely high incomes (beyond the 98th percentile of individuals in the United States), the Special Master may consider any relevant individual circumstances, including whether the financial needs of those victims’ families are being met.*<sup>86</sup>

However helpful it would be for the DOJ to elaborate on the “extraordinary circumstances” requirement, the DOJ does not have to do so in order to meet the *Chevron* standard.

#### 1. *Step One: The Implicit Discretion in the Term “Determine”*

The Act gives the DOJ a great deal of latitude in deciding how to calculate awards. Unlike the relatively specific parameters Congress set for determining who is eligible to file a claim,<sup>87</sup> when it comes to

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sation Fund of 2001, at 4 (Cong. Research Serv., Order Code RL31179, Mar. 13, 2002) (on file with the *New York University Law Review*).

<sup>84</sup> Submission, *supra* note 4, at 30.

<sup>85</sup> See Explanation, *supra* note 37.

<sup>86</sup> September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,233, 11,243-44 (Mar. 13, 2002) (codified at 28 C.F.R. pt. 104) (emphasis added).

<sup>87</sup> See § 405(c), 115 Stat. at 239.



calculating awards, the Act simply instructs the Special Master to “determine” economic and noneconomic losses and to “determine” how these losses, the facts of the claim, and individual circumstances of the claimant should affect the amount of compensation.<sup>88</sup> Although the Act does list the mandatory components of economic and noneconomic losses,<sup>89</sup> Congress does not tell the DOJ *how* to calculate those losses or *how* to determine final compensation.

A court therefore could decide that this statutory instruction is ambiguous in the sense that Congress left unclear its intentions with respect to the method of determining awards. As I explain below, however, a recent Supreme Court decision suggests that a court also could rule as a matter of law that the instruction is unambiguous (and in the DOJ’s favor) in that Congress clearly delegated the authority to create both generalized calculation methodologies and exceptions to using them. Either way, the extraordinary circumstances requirement should withstand legal challenge.

Last year, the Supreme Court held that the Internal Revenue Service’s congressional authorization to “‘make the inquiries, determinations, and assessments of all taxes,’ . . . must simultaneously grant the IRS power to decide *how* to make that assessment.”<sup>90</sup> Likewise, by instructing the DOJ to “determine”<sup>91</sup> final awards, Congress simultaneously delegated the authority to decide how to make the determinations.

The DOJ has an explicit mandate to “promulgate all procedural and substantive rules for the administration of this title,”<sup>92</sup> which includes, of course, rules for determining final awards. Congress does not address the use of methodologies for calculating awards at all. Thus the Act does not explicitly—or otherwise unambiguously—preclude applying generalized assumptions to individual situations.

The Supreme Court has approved just this kind of administrative rulemaking in other contexts. In *Heckler v. Campbell*,<sup>93</sup> the Court upheld the use of generalized tables (“medical-vocational guidelines”) by the Secretary of Health and Human Services in determining whether a claimant is disabled or whether work exists that the claim-

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<sup>88</sup> § 405(b)(1)(B), 115 Stat. at 238.

<sup>89</sup> § 402(5), (7), 115 Stat. at 237.

<sup>90</sup> *United States v. Fior D'Italia, Inc.*, 536 U.S. 238, 243 (2002) (emphasis omitted) (quoting 26 U.S.C. § 6201(a) (2000)) (allowing IRS to use aggregation methodology to estimate total tips restaurant customers gave employees, rather than adding individual employee tips separately, when assessing restaurant tax liability for unreported tips).

<sup>91</sup> Air Transportation Safety and System Stabilization Act § 405(b)(1), 115 Stat. at 238.

<sup>92</sup> § 404(a)(2), 115 Stat. at 238.

<sup>93</sup> 461 U.S. 458 (1983).

ant could perform.<sup>94</sup> Pointing out that the regulations “afford claimants ample opportunity both to present evidence relating to their own abilities and to offer evidence that the guidelines do not apply to them,” the Court stated that “even where an agency’s enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking authority to determine issues that do not require case-by-case consideration.”<sup>95</sup>

More recently, in *American Hospital Ass’n v. NLRB*,<sup>96</sup> the National Labor Relations Board, carrying out its congressional mandate to “make a . . . determination in each case”<sup>97</sup> whether a hospital collective bargaining unit is “appropriate,” promulgated a general rule requiring exactly eight units for every hospital with three specific exceptions allowing for more or fewer units.<sup>98</sup> One of those exceptions was for “extraordinary circumstances.”<sup>99</sup> Though the phrase “in each case” clearly contemplated individual determinations, the Supreme Court held that “even if a statutory scheme requires individualized determinations, the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability *unless Congress clearly expresses an intent to withhold that authority*.”<sup>100</sup>

Thus, a court could hold that the Special Master’s mandate to develop all procedural and substantive rules necessary to determine final awards for all claimants, without statutory language specifically prohibiting the use of any generalized assumptions, operates as unambiguous permission to do just that. In other words, the Act delegates to the DOJ the discretion to decide, as a preliminary matter, to use generalized statistical data to calculate awards; simple logic dictates that the DOJ also has the discretion to decide how and why to individualize those generalizations. This, then, is the “basis in the Act”<sup>101</sup> for requiring a demonstration of extraordinary circumstances to depart from the presumptive award methodology; it is the same basis for establishing the presumptive award methodology in the first place.<sup>102</sup>

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<sup>94</sup> Id. at 468.

<sup>95</sup> Id. at 467.

<sup>96</sup> 499 U.S. 606 (1991).

<sup>97</sup> Id. at 608 (citing National Labor Relations Act, § 9(b), 29 U.S.C. § 159(b) (2000)) (internal quotations omitted).

<sup>98</sup> See id. (citing 29 C.F.R. § 103.30 (1990)).

<sup>99</sup> Id.

<sup>100</sup> Id. at 612 (emphasis added) (citing *Heckler*, 461 U.S. at 467).

<sup>101</sup> See supra note 84 and accompanying text.

<sup>102</sup> See infra Part III.B.2 for an application of this principle to the presumed growth rate component of the award methodology.

If, on the other hand, a court characterized the statutory language as ambiguous, then it would proceed to the second step of *Chevron* analysis.

## 2. *Step Two: The Reasonableness of the DOJ Requirement*

A court deciding that the Act is ambiguous or silent about the issue of requiring extraordinary circumstances to depart from presumed award methodologies still should ultimately uphold the DOJ interpretation as permissible for all of the reasons just discussed in the Section above.<sup>103</sup>

Surely it was at least *reasonable* for the DOJ to conclude that the best way (indeed, arguably the only way) to meet the stringent time frame for processing and distributing awards to thousands of claimants was to create and work from a presumptive award methodology rather than recalculating all assumptions for each claimant. After all, the Supreme Court has approved similar use of standardized guidelines and generalized assumptions by other agencies.<sup>104</sup> Like the Secretary of Health and Human Services in *Heckler* and the National Labor Relations Board in *American Hospital Ass'n*, the DOJ allows claimants the opportunity to show that the generalized assumptions should not apply to them. It simply defies the notion of reasonableness to argue that the DOJ had no basis<sup>105</sup> for concluding that it could establish certain generally applicable assumptions and determine the criteria for adjusting those assumptions.

It is worth noting that the Supreme Court, after deciding in *American Hospital Ass'n* that the NLRB had unambiguous authority to promulgate its generalized rule, stated that “[e]ven if we could find any ambiguity in § 9(b) after employing the traditional tools of statutory construction, we would still defer to the Board’s reasonable interpretation of the statutory text.”<sup>106</sup>

### C. *Taxes*

Cantor Fitzgerald insists that the statutory definition of economic loss requires Feinberg to calculate awards based on gross income rather than after-tax income.<sup>107</sup> This is no trifling matter: For the high-income brackets typical of Cantor Fitzgerald employees, taxes

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<sup>103</sup> See supra note 78.

<sup>104</sup> See supra notes 93-100 and accompanying text.

<sup>105</sup> See supra note 84 and accompanying text.

<sup>106</sup> 499 U.S. 606, 614 (1991) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

<sup>107</sup> See Submission, supra note 4, at 31-32.

could reduce the economic component of awards by up to forty percent.<sup>108</sup>

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.*”<sup>109</sup>

Pointing to this definition, Cantor Fitzgerald argues that New York law is the applicable State law,<sup>110</sup> and because New York courts prohibit juries from calculating wrongful death damages based on net, after-tax income rather than gross income, the DOJ must calculate its awards based on gross income as well.<sup>111</sup> While it is true that under New York law, juries are instructed not to take taxes into account when determining future lost wages,<sup>112</sup> it is not true that the Act requires the Special Master to do the same thing.

### 1. *Step One: The Ambiguity of “to the Extent Allowed”*

Applying the first step of *Chevron*, the definition of economic loss appears to be ambiguous in a crucial way: The phrase “to the extent . . . allowed” could be a standard limiting clause, meaning simply “no more than State law would allow,” or it could mean “as State law would calculate.”

Under the first interpretation, the DOJ could choose what it considered the best methodology to approximate pecuniary loss as long as it accounted for every component of loss identified in the Act and any relevant state statutes and as long as it did not add anything that (in this case) New York law prohibited from counting towards economic loss. The DOJ has embraced this interpretation in the Final Rule: “[T]he Special Master is not permitted to compensate claimants for those categories or types of economic losses that would not be com-

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<sup>108</sup> See Kent C. Krause & John A. Swiger, Analysis of the Department of Justice Regulations for the September 11th Victim Compensation Fund, 67 J. Air L. & Com. 117, 124 (2002) (comparing presumed awards under Fund rules to traditional judicial award calculations); Submission, *supra* note 4, at 32 (citing Krause & Swiger, *supra*).

<sup>109</sup> Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 402(5), 115 Stat. 230, 237 (2001) (emphasis added).

<sup>110</sup> See Submission, *supra* note 4, at 26.

<sup>111</sup> See *id.* at 31-32.

<sup>112</sup> See *McKee v. Colt Elecs. Co.*, 849 F.2d 46, 49 (2d Cir. 1988) (“[U]nder New York law, the calculation of future lost wages as a component of a plaintiff’s damage award must be based on projected gross earnings . . . .”); *Lanzano v. City of New York*, 519 N.E.2d 331, 332 (N.Y. 1988) (approving jury instruction not to “add or subtract from the award on account of income taxes”).

pensable under the law of the state that would be applicable to any tort claims brought by or on behalf of the victim.”<sup>113</sup>

According to the second interpretation—on which Cantor Fitzgerald’s argument implicitly relies—the DOJ would have to calculate economic loss exactly as New York does. That is, “applicable State law” refers not just to statutes and common law doctrines but also to the damages methodologies of state courts.

Both readings are at least plausible, and nothing in the rest of the statutory text helps resolve this ambiguity. As I discussed in the preceding Section, Congress did not elaborate on its instruction to “determine” economic loss other than by listing minimum factors such as “loss of earnings or other benefits related to employment.”<sup>114</sup> The Act does not specify whether to calculate loss of earnings on a net or gross base.

Nor is anything clarified by the fact that the definition of noneconomic loss *omits* the “to the extent . . . allowed” phrase.<sup>115</sup> On its face, this could be because the phrase is indeed a limiting clause or it could derive from a congressional desire to bind the DOJ to state methodologies for calculating economic loss while freeing it to implement its own policy on compensating pain and suffering. The Act simply does not say.

The statutory silence on this question is not surprising considering that the statute’s definitions of economic and noneconomic loss were likely taken from one of three statutes granting certain kinds of immunity—statutes, in other words, that had nothing to do with calculating victim compensation awards.<sup>116</sup> Given that the definitions of economic and noneconomic loss appear *verbatim* in these three acts, that the ATSSSA is the only other piece of federal legislation to use the exact same language, and that Congress drafted the Fund legislation in all of three days,<sup>117</sup> it does not seem much of a stretch to conclude that the ATSSSA drafters borrowed the definitions from one of the other three acts.

Understanding the meaning of the “to the extent” clause in its original context strongly reinforces the notion that its use in the

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<sup>113</sup> 28 C.F.R. § 104.42 (2002).

<sup>114</sup> Air Transportation Safety and System Stabilization Act § 402(5), 115 Stat. at 237.

<sup>115</sup> § 402(7), 115 Stat. at 237.

<sup>116</sup> See Paul D. Coverdale Teacher Protection Act of 2001, 20 U.S.C.A. § 6733 (West Supp. 2002) (originally enacted as part of No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 2363, 115 Stat. 1425, 1667-68) (extending immunity to teachers); Public Health Improvement Act, 42 U.S.C.A. § 238q (West Supp. 2002) (extending immunity to good Samaritans using automated external defibrillator in emergency); Volunteer Protection Act of 1997, 42 U.S.C. § 14505 (2000) (conferring partial immunity to volunteers).

<sup>117</sup> See *supra* note 61 and accompanying text.

ATSSSA does not, as Cantor Fitzgerald argues, unambiguously refer to the discrete issue of basing economic-loss calculations on gross or net income.<sup>118</sup> The “to the extent” clause in these three other pieces of legislation operates to ensure a certain level of immunity for specific damage claims. For example, the Volunteer Protection Act (VPA)—on which the latter two acts appear to be modeled<sup>119</sup>—shields volunteers from liability for damages due to economic loss, defined as “any pecuniary loss resulting from harm . . . to the extent recovery for such loss is allowed under applicable State law.”<sup>120</sup> Thus, the clause guarantees that volunteers will be fully immune from economic-loss damages no matter the state in which they volunteer; the immunity reaches up to, but no further than, whatever level of liability otherwise would exist in that state.<sup>121</sup> The VPA does not include the “to the extent” clause in its definition of noneconomic damages because *it does not grant volunteers full immunity from damages for pain and suffering*.<sup>122</sup> Instead, the VPA dictates a national standard for determining such liability, preempting state law variations on this determination.<sup>123</sup>

In short, the clause on which Cantor Fitzgerald puts so much weight comes from a piece of legislation that simply did not consider the issue of calculating future lost wages on a net or gross base because that issue was completely irrelevant to the legislative purpose of conferring immunity. This does not mean that the clause cannot make sense in the context of calculating awards under the ATSSSA, but, at the very least, it should extinguish any lingering suspicion that the clause “to the extent . . . allowed under State law” unambiguously requires the Special Master to base Fund awards on gross income.

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<sup>118</sup> Unfortunately, this discussion proceeds without the benefit of commentary from the bench, as courts have yet to face issues arising out of any of these recent pieces of legislation. Only one federal court has mentioned the Volunteer Protection Act, and it did so only to note that its holding rested on other grounds. See *Collier v. Clayton County Cmty. Serv. Bd.*, 236 F. Supp. 2d 1345, 1368-69 n.28 (N.D. Ga. 2002). No court has dealt with the Public Health Improvement Act or the Teacher Protection Act.

<sup>119</sup> See Terry Carter, *Piecemeal Tort Reform*, 87 A.B.A. J. 50, 69 (2001) (“The Teacher Protection Act in the congressional hopper this year was modeled on the Volunteer Protection Act of 1997, which bars negligence suits against volunteers for nonprofits and government agencies.”).

<sup>120</sup> 42 U.S.C.A. § 14505(1) (West Supp. 2002).

<sup>121</sup> See § 14505(1).

<sup>122</sup> See § 14504 (prohibiting joint and several liability and limiting noneconomic-loss liability to percentage of responsibility for harm).

<sup>123</sup> See § 14504.

## 2. Step Two: The Reasonableness of the DOJ Interpretation

The DOJ's treatment of the phrase "to the extent such recovery is allowed under State law" as a purely limiting clause is consistent with the Act's language and stated purpose. It does not violate the Act as Cantor Fitzgerald asserts.

Such an interpretation does not conflict with the plain meaning of the statutory text. Again, 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."<sup>124</sup> It is reasonable to conclude from the use of "any" in front of "pecuniary loss," followed by the parenthetical list of *kinds* of losses comprising pecuniary loss, that "to the extent" serves only to limit the *kinds* of losses the DOJ can count in its economic-loss calculations. If state law prohibits counting a certain *kind* of loss, the DOJ may not use it; otherwise the DOJ must count *every kind* of pecuniary loss. On this reading, "to the extent" does not mean that the DOJ must calculate each kind of pecuniary loss *in the exact same way* as do juries in the relevant state court system.

This DOJ interpretation is consistent with the range of discretion Congress gave the Special Master in determining two other important components of compensation—individual circumstances<sup>125</sup> and noneconomic losses—as well as in choosing the best methodology for making those determinations.<sup>126</sup> That is not to say that the discretion Feinberg has in evaluating individual circumstances, in deciding how best to approach the controversial issue of pain and suffering, or in choosing computation methodologies, logically requires the same degree of discretion in the realm of economic loss; if it did, there would be no need to go to the second step of *Chevron* analysis. But neither does the degree of discretion delegated elsewhere in the Act *preclude* interpreting the economic-loss definition as permitting calculations based on net income. That interpretation reserves agency discretion over the kind of calculation decisions the Special Master has in other aspects of award determinations—namely, choosing the most appropriate method—while giving a plausible meaning to the limiting language.

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<sup>124</sup> Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 402(5), 115 Stat. 230, 237 (2001) (emphasis added).

<sup>125</sup> See *supra* notes 68-83 and accompanying text.

<sup>126</sup> See *supra* notes 87-95 and accompanying text.

This interpretation is also consistent with congressional action in a closely related area of tax: the Victims of Terrorism Tax Relief Act (Tax Relief Act).<sup>127</sup> The Tax Relief Act specifically exempts Victim Compensation Fund awards from taxation.<sup>128</sup> Given that Congress passed the Tax Relief Act over a month after the DOJ published its Interim Final Rule and given that the Tax Relief Act addresses a range of complex tax issues that surfaced in the wake of September 11 (such as exclusions for death benefits<sup>129</sup> and disaster relief payments,<sup>130</sup> exemptions for disability trusts,<sup>131</sup> and postponements of certain deadlines<sup>132</sup>), it is reasonable for the DOJ to conclude that Congress had the opportunity to specify a gross-income calculation requirement but chose not to. Indeed, the Tax Relief Act even amends the ATSSSA itself with a "Clarification of Due Date for Airline Excise Tax Deposits."<sup>133</sup> Again, the fact that Congress did not address the issue of calculating economic loss is not conclusive because Congress already exempts from taxation wrongful death awards<sup>134</sup> even though many states base those awards on gross income.<sup>135</sup> Thus it is conceivable that Congress intended for claimants to receive the same double benefit as recipients of many (though not all) wrongful death awards. But this is not *obvious*; it is also conceivable that Congress explicitly conferred to recipients of Fund awards all the tax benefits it intended to confer with the passage of the Tax Relief Act.

Finally, the DOJ interpretation finds support in the Supreme Court's approval of net-income calculations in other government compensation schemes. In *Norfolk & Western Railway Co. v. Liepelt*, the Supreme Court had this to say about wrongful death calculations under the Federal Employers' Liability Act:

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<sup>127</sup> See Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, 115 Stat. 2427 (2002) (codified in scattered sections of 26 U.S.C.).

<sup>128</sup> § 111, 115 Stat. at 2433.

<sup>129</sup> § 102, 115 Stat. at 2429.

<sup>130</sup> § 111, 115 Stat. at 2432.

<sup>131</sup> § 116, 115 Stat. at 2439.

<sup>132</sup> § 112, 115 Stat. at 2433.

<sup>133</sup> § 114, 115 Stat. at 2435.

<sup>134</sup> See 26 U.S.C. § 104(a)(2) (2000) (exempting "damages . . . received . . . on account of personal physical injuries"); *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490, 496 (1980) ("The section is construed to apply to wrongful-death awards; they are not taxable income to the recipient.").

<sup>135</sup> For a list of states that keep tax calculations out of the jury room and their policy reasons for doing so, see Todd C. McKee, Comment, *Klawonn v. Mitchell*: Does a Refusal to Instruct a Jury That Wrongful Death Damages Are Excluded from Income Taxation Make the Jury's Task Simpler or More Difficult?, 19 Am. J. Trial Advoc. 211, 215-16 & nn.31-33 (1995).



The amount of money that a wage earner is able to contribute to the support of his family is unquestionably affected by the amount of the tax he must pay to the Federal Government. It is his after-tax income, rather than his gross income before taxes, that provides the only realistic measure of his ability to support his family. *It follows inexorably that the wage earner's income tax is a relevant factor in calculating the monetary loss suffered by his dependents when he dies.*<sup>136</sup>

Without an unambiguous congressional instruction to track the income calculations of each state when determining economic loss, the DOJ should not be accused of abusing its discretion and violating the Act when it adopts the reasoning of the Supreme Court with respect to a government compensation scheme that provides a better analogy to the Fund than does a jury trial.

### III

#### HARD LOOK ANALYSIS OF AGENCY IMPLEMENTATION

In this Part, I argue that the rest of the points in the Submission—which challenge aspects of the DOJ's *implementation*, rather than interpretation, of the statute—fail under the “hard look” doctrine. This standard evolved from judicial application of the Administrative Procedure Act requirement that “[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>137</sup> As elucidated by the Supreme Court, this means that

a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute. . . . [T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a “rational connection between the facts found and the choice made.”<sup>138</sup>

There are at least three ways an agency decision could be arbitrary and capricious: The agency has (1) “relied on factors which Congress has not intended it to consider,” (2) “entirely failed to consider an important aspect of the problem,” or (3) “offered an explanation for its decision that runs counter to the evidence before the agency, or is

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<sup>136</sup> 444 U.S. at 493-94 (emphasis added); id. at 494 (rejecting “the notion that the introduction of evidence describing a decedent’s estimated after-tax earnings is too speculative or complex for a jury”).

<sup>137</sup> 5 U.S.C. § 706.

<sup>138</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”<sup>139</sup> In evaluating an agency’s rationale for a particular decision, the Supreme Court has said that “[w]hile we may not supply a reasoned basis for the agency’s action that the agency itself has not given, we will uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.”<sup>140</sup>

If a court finds that an agency decision was arbitrary and capricious, it normally will remand the case to the agency for reconsideration, allowing the agency to go through its decisionmaking process again in light of the specific issues grounding the court’s opinion. But the agency is not bound to reverse its original position; it is only required to base its new decision (in part) on whatever factors the court held the agency not to have considered adequately the first time.<sup>141</sup>

### A. Publishing Presumed Awards

Cantor Fitzgerald insists that Feinberg must calculate and publish presumed awards for all income levels, not just those through the ninety-eighth percentile.<sup>142</sup> This argument cannot satisfy the arbitrary and capricious standard.

To begin with, as the Department of Justice explains in its preamble to the Final Rule, the presumptive awards are “non-binding” and the charts the DOJ published “*are not part of the Department’s rulemaking*.”<sup>143</sup> They are examples of fictitious awards based on hypothetical and limited factors to give potential claimants a sense of the range of awards and where, within that range, they are likely to fall.

Although it would make for an administrative nightmare, nothing in the Act prevents the Special Master from deciding to determine every award on a case-by-case basis, using unpublished calculation methodologies.<sup>144</sup> Section 407, which sets out the only information the DOJ must publish, requires the Attorney General to:

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<sup>139</sup> Id. at 43.

<sup>140</sup> *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86 (1974) (citations omitted).

<sup>141</sup> Compare, e.g., *Nat’l Coalition Against the Misuse of Pesticides v. Thomas*, 809 F.2d 875, 883-84 (D.C. Cir. 1987) (rejecting EPA’s rationale for liberalizing zero-tolerance policy on specific pesticide because EPA cited irrelevant factor to justify decision), with *Nat’l Coalition Against the Misuse of Pesticides v. Thomas*, 815 F.2d 1579, 1582 (D.C. Cir. 1987) (accepting new EPA rationale for same EPA decision).

<sup>142</sup> See Submission, *supra* note 4, at 37.

<sup>143</sup> September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,233, 11,236 (Mar. 13, 2002) (codified at 28 C.F.R. pt. 104) (emphasis added).

<sup>144</sup> See id. (“The Act . . . permits the Special Master to determine the amount of awards on a case-by-case basis without giving any guidance to potential claimants regarding the awards that they would likely receive if they . . . opted into the Fund.”).

[P]romulgate regulations to carry out this title, including regulations with respect to—

- (1) forms to be used in submitting claims under this title;
- (2) the information to be included in such forms;
- (3) procedures for hearing and the presentation of evidence;
- (4) procedures to assist an individual in filing and pursuing claims under this title; and
- (5) other matters determined appropriate by the Attorney General.<sup>145</sup>

The first four clauses are mandatory; the DOJ must at the very least publish rules for claim forms, the information claimants must give to the Special Master, hearings, evidence, and government assistance for claimants. That is it. The fifth clause permits the DOJ to go beyond these requirements but does not require the DOJ to do so.

Conspicuously absent from section 407 is any language requiring the DOJ to publish its methodologies and calculation assumptions, let alone presumed award charts. The DOJ chose to publish generalized charts and the components of the calculations it used to create them for three explicit reasons: “to ensure a measure of consistency among awards to similarly situated claimants, to give potential claimants some idea of their likely range of awards, and to make the Fund administratively feasible.”<sup>146</sup>

Cantor Fitzgerald asserts that “the refusal to publish presumed economic losses above the 98th percentile of income is arbitrary” since doing so will “deprive [Cantor Fitzgerald] families of an informed decision [to file a claim with the Fund in lieu of litigation] when others are offered such information.”<sup>147</sup> This charge simply has it backwards. As the Department of Justice explains in the Final Rule’s preamble, “calculation of awards for many victims with extraordinary incomes beyond the 98th percentile could be a highly speculative exercise . . . . [U]sing the presumed award methodology without a detailed record could very well produce inappropriate results.”<sup>148</sup>

In other words, the statistical models the Special Master used to calculate generalized awards break down after the ninety-eighth percentile just because the assumptions behind various components of economic loss are not reliable beyond that point. The DOJ said as much in the preamble to the Interim Final Rule:

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<sup>145</sup> Air Transportation Safety and Stabilization Act, Pub. L. No. 107-42, § 407, 115 Stat. 230, 240 (2001).

<sup>146</sup> September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. at 11,236.

<sup>147</sup> Submission, *supra* note 4, at 38-39.

<sup>148</sup> September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. at 11,237.

[P]rojecting earnings over worklife for people with extraordinary annual incomes is a very complex exercise, often requiring a detailed evaluation of variable and often complex formulae for nonvariable income, differing work life expectations, often highly volatile industries or markets, and other factors *that are not often subject to easy generalization*.<sup>149</sup>

This does not mean that the awards are “capped” at the ninety-eighth percentile (a common misperception) but rather that calculating awards above that level requires the kind of specific, individualized, and detailed data that is only possible on a case-by-case basis.<sup>150</sup>

To revisit the Supreme Court’s test for arbitrary and capricious agency action, this is simply not a case of the DOJ (1) relying on factors Congress did not intend it to consider, (2) failing to consider an important aspect of the problem, or (3) “offer[ing] an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”<sup>151</sup> The DOJ made a considered decision to publish presumed awards and it offered a well-reasoned justification for its decision.<sup>152</sup>

### *B. Assumptions and Methodologies*

Cantor Fitzgerald alleges that certain aspects of the “assumptions and methodologies employed by the Special Master in the Explanation of Process are contrary to law”<sup>153</sup> because applying them to Cantor Fitzgerald claimants would be arbitrary. These include the components of presumed consumption rates<sup>154</sup> and the use of assumed compensation growth rates rather than Cantor Fitzgerald’s actual compensation growth rates.<sup>155</sup> Although Feinberg has the discretion to adjust the presumptive award methodology according to

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<sup>149</sup> Interim Final Rule, September 11th Victim Compensation Fund, 66 Fed. Reg. 66,274, 66,278 (Dec. 21, 2002) (codified at 28 C.F.R. pt. 104) (emphasis added).

<sup>150</sup> See September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. at 11,237.

<sup>151</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>152</sup> See also *City of Los Angeles v. U.S. Dep’t of Commerce*, 307 F.3d 859, 876-77 (9th Cir. 2002) (upholding Census Bureau’s decision not to use statistically adjusted population data because it was “sufficient that the Bureau’s panel of experts decided, based on their consideration of the relevant factors, that the data carried too high a risk of a fundamental flaw and could not be certain within the time frame allotted that the adjusted data would improve the accuracy of the census” and that therefore “we cannot say that the Secretary’s [decision] not to use the adjusted data was ‘arbitrary or capricious’”).

<sup>153</sup> Submission, *supra* note 4, at 30.

<sup>154</sup> See *id.* at 33.

<sup>155</sup> See *id.* at 39. Cantor Fitzgerald also urges the Special Master to allow claimants to decide how many years of past income data should count when calculating economic loss but does not deny that the Special Master has the statutory discretion to make a decision to the contrary. See *id.* at 47.

Cantor Fitzgerald's wishes, he also has the discretion not to—as long as he explains his decision.

It is possible that a court would remand these issues to the DOJ for a more detailed explanation of its choices, but this is unlikely. Consider what a federal district court said about reviewing the Census Bureau's use of statistics:

The accuracy of various statistics is often the focus of biased, heated and complex argument. Those who challenge them attack both the method of collecting raw data and the method of adjustment used to achieve the final result. In the execution of the census, these disputes are best resolved not by the courts but by the Bureau itself, whose experience with prior censuses and expertise in the collection and analysis of statistical information render it especially qualified to make the appropriate decisions.<sup>156</sup>

The expertise of the Special Master and the consultants working with him is beyond reproach. Feinberg has spent the better part of his career negotiating, resolving, and overseeing mass tort settlements.<sup>157</sup> The DOJ contracted with statisticians at PricewaterhouseCoopers as well as other expert consultants in developing its award-calculation methodology.<sup>158</sup> Feinberg and the team of experts he assembled deserve the same degree of deference as other agency decisions based on statistical expertise.

### 1. Consumption Rates

The presumed award methodology reduces the calculation of economic loss by an estimated consumption rate—the amount of money a person would have spent on herself—since that money would not have gone to her family even if she had survived. Cantor Fitzgerald calls the presumed consumption rates “arbitrary consumption rates *with no basis in economic reality*.”<sup>159</sup>

To call this accusation hyperbole would be an understatement. The DOJ used data from the 1999 Consumer Expenditure Survey by the Bureau of Labor Statistics,<sup>160</sup> which measured average annual ex-

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<sup>156</sup> *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 676 (E.D. Pa. 1980); see also *City of Los Angeles*, 307 F.3d at 876 (approving of *Klutznick*).

<sup>157</sup> See Belkin, *supra* note 2, at 92 (“[Feinberg] negotiated a settlement in the seemingly intractable Agent Orange case, served as special master in the DES case and negotiated for Dow Corning when it was sued by 450,000 women over breast implants.”); *supra* note 27 and accompanying text.

<sup>158</sup> Interview with Deborah E. Greenspan, Esq., The Feinberg Group (Jan. 10, 2003) (transcript on file with the *New York University Law Review*).

<sup>159</sup> Submission, *supra* note 4, at 33 (emphasis added).

<sup>160</sup> See U.S. Dep't of Labor, Bureau of Labor Statistics, *Consumer Expenditures in 1999* (2001), <http://www.bls.gov/cex/csxann99.pdf>.

penditures (that is, household consumption as a percentage of income) by U.S. households.<sup>161</sup> The DOJ calculated individual consumption rates as shares of the following standard expenditure categories, based on household size: food, apparel and services, transportation, entertainment, personal care products and services, miscellaneous, and, for single individuals with no dependents, housing, education, and health.<sup>162</sup> The DOJ omitted several categories “sometimes included in litigation”: reading, cash contributions, alcoholic beverages, and tobacco products.<sup>163</sup>

Cantor Fitzgerald alleges three specific instances of arbitrariness with respect to the presumed consumption rates. First, the expenditure categories do not distinguish among age groups, while some economic analyses do consider age.<sup>164</sup> Second, the consumption rate for single individuals drops steadily from 76.4%, at \$10,000 annual income, to 48%, at \$90,000 income, after which it remains at 48% through \$225,000 income.<sup>165</sup> Third, the DOJ includes education as a factor in single-individual consumption rates, even though “an individual with a \$135,000 annual income would likely satisfy his or her educational debts at a relatively young age.”<sup>166</sup>

Revisiting the “arbitrary and capricious” test, none of these choices is an example of the DOJ relying on “factors which Congress has not intended it to consider.”<sup>167</sup> Therefore, a court should remand only for reconsideration of the three issues above if it decided the DOJ had either “entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”<sup>168</sup>

The first two allegations of arbitrariness—the fact that the expenditure categories do not distinguish among age groups and the fact that consumption rates for single individuals remain constant above \$90,000 annual income—are both aspects of the same choice: to use the Bureau of Labor Statistics Consumer Expenditure Survey in the first place. But the DOJ considered “alternative techniques” for calculating consumption rates and decided not to use them because they

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<sup>161</sup> See Explanation, *supra* note 37, at 3.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 3 n.7.

<sup>164</sup> See Submission, *supra* note 4, at 34 & n.11 (citing examples).

<sup>165</sup> See *id.* at 34 (referencing Explanation, *supra* note 37, tbl.4).

<sup>166</sup> *Id.* at 36.

<sup>167</sup> *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>168</sup> *Id.*

resulted in higher offsets.<sup>169</sup> Given the potential cost of gathering new data and the enormous time pressure under which the DOJ had to finalize award methodologies, no court should condemn this choice as arbitrary and capricious unless there were readily available, commonly used data that better reflected consumption rates because they took age into account and were more accurate above \$90,000 annual income.

Cantor Fitzgerald insists that even if the only reliable data come from the Bureau of Labor Statistics, “it would be reasonable to at least extrapolate” declining consumption rates above the \$90,000 income level.<sup>170</sup> Whether this would indeed be reasonable is a question for statisticians; the question for the courts is whether the decision *not* to extrapolate was *unreasonable*. It is not enough to show that there were reasonable alternatives available because courts defer to agency choices among reasonable alternatives. In light of the fact that the DOJ developed its methodology in consultation with PricewaterhouseCoopers, a court should defer to the presumption of constant consumption rates above \$90,000 unless the DOJ cannot provide any record whatsoever of the statistical grounds for that presumption.

The same holds for including education as a factor of single-individual consumption rates. It is quite unlikely that the DOJ “entirely failed” to consider the effects of such an assumption when the DOJ *excludes* education from consumption rates for individuals with dependents.<sup>171</sup> The question, then, is whether the DOJ can offer an explanation for its decision. Given the degree of deference courts grant agencies in the realm of statistics<sup>172</sup> and the willingness of the Supreme Court to “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned,”<sup>173</sup> the DOJ should have little problem defending itself on this point.

## 2. *Compensation Growth Rates*

An important factor in calculating future lost income is the income growth rate, in turn calculated from “an annual inflationary or cost-of-living component, an annual real overall productivity or scale adjustment in excess of inflation, and an annual real life-cycle or age-specific increase.”<sup>174</sup> Cantor Fitzgerald has calculations of growth rates for its employees based on actual data over the last three years

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<sup>169</sup> Explanation, *supra* note 37, at 3 & n.8.

<sup>170</sup> Submission, *supra* note 4, at 34-35.

<sup>171</sup> See Explanation, *supra* note 37, at 3.

<sup>172</sup> See *supra* note 156 and accompanying text.

<sup>173</sup> *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974).

<sup>174</sup> Explanation, *supra* note 37, at 2.

and argues that it would be arbitrary to use presumed compensation growth rates when actual data are available.<sup>175</sup> Once again Cantor Fitzgerald criticizes what is ultimately a choice left to the DOJ, namely whether and how to depart from generalized data in administering awards to individuals.<sup>176</sup>

As Cantor Fitzgerald apparently realizes, the presumed growth rates cannot be faulted as arbitrary generalizations. The DOJ based its growth rate calculations on average-annual-income data, by age, in the March 2001 Current Population Survey, conducted under the auspices of the Bureau of Labor Statistics.<sup>177</sup> The DOJ verified that its assumption of one percent real overall productivity increase comported with the "assumed ultimate long-term annual average covered real-wage differentials used by the Board of Trustees of the Social Security Trust Funds"<sup>178</sup> and that both the productivity increase and inflation assumptions "are consistent with the long-term relationship between wage growth and risk-free interest rates."<sup>179</sup> The resulting growth rates ranged from 9.7% for eighteen-year-olds to 3.0% for individuals above the age of fifty-one.<sup>180</sup>

Rather than challenge the soundness of these data or the validity of the presumed growth rates with respect to other victims, Cantor Fitzgerald protests the application of presumed growth rates to its employees in light of actual data demonstrating significantly higher growth rates among the majority of Cantor Fitzgerald employees between 1998 and 2001.<sup>181</sup> In 1998–1999, growth rates ranged from below 0% in four age brackets to over 130% in one age bracket, with most age brackets falling between 10% and 40%.<sup>182</sup> In 1999–2000, most age brackets showed growth rates between 20% and 60%; one age bracket topped out at 160%.<sup>183</sup> In 2000–2001, the range for the majority of age brackets jumped to 50–175%, with one age bracket showing around 475%.<sup>184</sup>

Cantor Fitzgerald has every right to demand that the DOJ consider this data on an individualized basis, but determining how the data should be used rests squarely within the delegated authority of

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<sup>175</sup> See Submission, *supra* note 4, at 39–41.

<sup>176</sup> See *supra* Part II.B.

<sup>177</sup> Explanation, *supra* note 37, at 2.

<sup>178</sup> *Id.* at 2 n.4.

<sup>179</sup> September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,233, 11,238 (Mar. 13, 2002) (codified at 28 C.F.R. pt. 104).

<sup>180</sup> See Explanation, *supra* note 37, at tbl.3.

<sup>181</sup> See Submission, *supra* note 4, at 40–42.

<sup>182</sup> *Id.* at 40.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 41.



the DOJ. The Special Master will take into account evidence, on a case-by-case basis, that any aspect of the presumed methodology does not apply to a claimant's situation,<sup>185</sup> which the DOJ emphasized explicitly with respect to individuals earning above the ninety-eighth percentile.<sup>186</sup> Of course, the fact that a claimant experienced a particular growth rate in a particular year does not, by itself, accurately predict a lifetime growth rate. The Special Master therefore will have to evaluate how single-year growth rate data should affect growth rate assumptions for specific individuals. As I argue in Part II.B.2, the decision to depart from the presumed methodology should be left up to the DOJ.

### CONCLUSION

All of Cantor Fitzgerald's arguments ultimately charge that in establishing the rules for the Victim Compensation Fund, the Department of Justice did something the Air Transportation Safety and System Stabilization Act does not allow. That is why they all ultimately fail for the same reason: Congress delegated enormous discretion to the DOJ when it passed the ATSSSA—including the discretion to make the very decisions Cantor Fitzgerald protests. Given the level of judicial deference to agency action prescribed in the Administrative Procedure Act and reinforced by *Chevron*, challenging the Fund regulations in court would be an uphill battle to say the least.

This is not the place to speculate about Cantor Fitzgerald's reasons for publicly asserting what can only be characterized as weak legal arguments. One at least can understand why Cantor Fitzgerald believes that its families are not getting a fair shake, whether or not one agrees. But given the seriousness with which Cantor Fitzgerald made its allegations, the publicity they have attracted,<sup>187</sup> and the possibility that they will not be litigated in court on the merits,<sup>188</sup> it is important to set the record straight. Perhaps Cantor Fitzgerald has good policy reasons for criticizing the Victim Compensation Fund. But it does not have good legal ones.

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<sup>185</sup> See 28 C.F.R. §§ 104.31(b)(2), 104.33(f) (2002).

<sup>186</sup> September 11th Victim Compensation Fund of 2001; 67 Fed. Reg. 11,233, 11,244 (Mar. 13, 2002) (codified at 28 C.F.R. pt. 104).

<sup>187</sup> See, e.g., *The Perils of Valuing Lives*, N.Y. Times, Sept. 19, 2002, at A34 (criticizing Submission).

<sup>188</sup> See text accompanying *supra* note 45.