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Using the "Private Individual Under Like Circumstances" to Your Advantage: The Analogous Private Liability Requirement Under the Federal Tort Claims Act

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I. Although underutilized, the FTCA's analogous private liability requirement is a key limitation on the FTCA's waiver of sovereign immunity.

Those who litigate claims under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680, are likely aware that the FTCA requires analogous tort liability against a "private individual under like circumstances." *See* 28 U.S.C. §§ 2674, 1346(b) (2010). The Supreme Court identified this requirement as one of the six elements a claim must possess to fall within the FTCA's limited waiver of sovereign immunity. *See F.D.I.C. v. Meyer*, 510 U.S. 471, 477 (1994) (citing 28 U.S.C. § 1346(b)). The FTCA provides that courts may only exercise jurisdiction over:

> claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by their negligent or wrongful act or omission . . . *under circumstances where the United States, if a private person, would be liable to the claimant* in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1) (2010) (emphasis added). The statute also provides that:

> [t]he United States shall be liable, respecting the provisions of this title relating to tort claims, *in the same manner and to the same extent as a private individual under like circumstances*.

28 U.S.C. § 2674 (2010) (emphasis added). Thus, if a private person under similar circumstances would not be liable to the plaintiff for the alleged conduct, a court does not have jurisdiction to adjudicate the FTCA claim. The only claims that fall within the purview of the FTCA are those where a private person in like circumstances would be subject to liability. *See United States v. Olson*, 546 U.S. 43, 44 (2005).

Despite the fact that this requirement is mentioned on two separate occasions in the text of the FTCA as an explicit limit on the Act's waiver of sovereign immunity, it remains one of the statute's most misunderstood and underutilized jurisdictional conditions. One major difficulty with the proper application and use of the analogous private liability requirement rests in the language of the statute itself. The language in 28 U.S.C. § 1346(b) and § 2674 that sets forth the requirement is not a model of clarity and may even be described as cryptic. The FTCA mentions the "law of the place" without defining what place it is referring to – whether it is referring to a federal, state, or local jurisdiction – and proceeds to rely on a "like circumstances" test, a vague standard devoid of any concrete meaning. Another difficulty arises from the requirement's ultimate outcome. The FTCA mandates that an analogy be drawn between the United States and a private person – two seemingly incongruent and incomparable things. Finally, the case law interpreting the requirement has taken a number of twists and turns since Congress first passed the FTCA in the 1940s. In the end, the FTCA's analogous private liability requirement could be described as an awkward and counterintuitive jurisdictional prerequisite, but one that leaves ample room for both sides to make compelling arguments in FTCA cases. Fortunately for the FTCA litigator, the analogous private liability requirement can prove to be a powerful defensive weapon when attempting to secure the dismissal of tort claims brought against the United States.

II. Early Supreme Court cases that analyzed the FTCA's analogous private liability requirement struggled to consistently address inherently governmental acts and omissions.

How can the United States be compared with a private person for the purpose of measuring liability? Is it possible to find such an analogy where the government activity at issue is far removed from the kind of conduct contemplated by private persons? Early FTCA cases struggled with these fundamental questions in their interpretation of the FTCA's analogous private liability requirement. Nonetheless, one thing was made clear from the start – the FTCA must be treated as a *limited* waiver of sovereign immunity.

Shortly after the enactment of the FTCA, the Supreme Court disabused any notions that the FTCA would assure damages for all injuries caused by government employees. *See Feres v. United States*, 340 U.S. 135 (1950) (holding the government not liable under the FTCA for injuries to servicemen arising out of or in the course of activity incident to military service). In the seminal *Feres* case, the Supreme Court considered whether the United States could be held liable under the FTCA for the death of a serviceman caused by a fire in his barracks while he was on active duty military service. *Id*. at 136, 145-46 (considering the *Jefferson* and *Griggs* cases where plaintiffs alleged they were entitled to damages under the FTCA due to negligent medical treatment in connection with active duty military service). The Court stressed that the FTCA's own language prescribes the test of allowable claims, stating that the United States can only be held liable "in the same manner and to the same extent as a private individual under like circumstances." *Id*. at 141 (quoting 28 U.S.C. § 2674). The FTCA cannot be read to create new causes of action; it merely accepts liability under circumstances that would bring private liability into existence. *Id.*

In *Feres*, the Supreme Court concluded that plaintiffs could not identify private individual liability that was even "remotely analogous" to the claims asserted against the United States, stating it knew of no American law that ever allowed a soldier to recover for negligence against either his superior officers or the government he was serving. "Nor is there any liability 'under like circumstances,' for no private individual has power to conscript or mobilize a private army with such authorities over persons as the government vests in echelons of command." *Id.* at 141-42. Thus, the Court found no parallel liability and stressed that the FTCA created no new causes of action. *Id*. at 142 (holding that the FTCA's effect is to "waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities"). It also considered the notion that, although the FTCA's "law of the place" provision, 28 U.S.C. § 1346(b), "recognizes and assimilates into federal law the rules of substantive law of the several states," the relationship between the government and persons in service are fundamentally derived from federal sources and governed by federal authority. *Id.* at 144-46 (citations omitted)

("Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law. We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence.") With this landmark decision, the Supreme Court suggested that claims against the government arising from uniquely governmental activity (maintaining and commanding armed forces) would fall victim to the FTCA's analogous private liability requirement.

Three years later, the Supreme Court again considered the boundaries of the FTCA's limited waiver of sovereign immunity and affirmed the reasoning underlying its decision in *Feres*. *See Dalehite v. United States*, 346 U.S. 15 (1953) (affirming judgment in favor of the United States in an action consolidating over 300 suits under the FTCA for death, injuries, and damages resulting from an explosion of ammonium nitrate fertilizer in Texas City, Texas). In *Dalehite*, the plaintiffs claimed that the United States was negligent in a wide range of activity conducted by numerous government actors at various levels, from the government's adoption of the overarching fertilizer export plan to its manufacture and shipboard loading of the fertilizer. *Id*. at 23-24. The Supreme Court stressed:

> [t]he legislative history indicates that while Congress [through the FTCA] desired to waive the Government's immunity from actions for injuries to person and property occasioned by the tortuous conduct of its agents acting within their scope of business, it was not contemplated that the Government should be subject to liability arising from acts of a governmental nature or function.

Id. at 27-28. The Court explained that the FTCA's discretionary function exception, 28 U.S.C. § 2680(a), shields the government from claims involving "acts of a governmental nature." 346 U.S. at 27-29 (stating that "ordinary common-law torts" and "run-of-the-mine accidents" were "uppermost in the collective mind of Congress" in the passage of the FTCA). The FTCA was not intended to permit "suit[s] for damages to test the validity of or provide a remedy on account of discretionary acts," even if negligently performed. *Id*. at 30. Jurisdiction does not exist under the FTCA "[w]here there is room for policy judgment and decision." *Id.* at 36.

Although the Court focused primarily on the FTCA's discretionary function exception, it also considered the analogous private liability requirement in the context of the Coast Guard's alleged negligent failure in fighting the fire. Addressing the fire fighting claims, the Court found no "parallel liability" and noted that the FTCA's effect is only to waive immunity for recognized causes of action, not to present the government with novel and unprecedented liabilities. *Id*. at 43. Specifically, the Court held that there was no analogous liability for these claims and reasoned that "if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire." *Id*. at 44 (analogizing that "cities, by maintaining fire-fighting organizations, assume no liability for personal injuries resulting from their lapses"). The fact that the Court looked to the immunity of municipalities and public bodies is noteworthy when you consider the "private individual" language of the FTCA's analogous private liability requirement. In a way, *Dalehite* also eroded the distinction between the FTCA's discretionary function exception and its analogous private liability requirement. The Court's discussion on how the exception shields "acts of a governmental nature" from liability is eerily similar to its discussion regarding the Coast Guard fire fighting claims and its discussion in *Feres*, explaining that no analogous private liability exists where uniquely governmental conduct is involved. *Dalehite*, 346 U.S. at 28, 44; *Feres*, 340 U.S. at 135. Although somewhat unavoidable, the conflation of these two concepts – the discretionary function exception and the analogous private liability requirement – only furthered the lack of clarity surrounding each respective provision.

Only 2 years after *Dalehite*, the Court took a dramatic turn in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), where it revisited the FTCA and its analogous private liability requirement. In that case, a barge charterer brought an action under the FTCA for damages sustained when a tug went aground, allegedly due to the Coast Guard's negligent operation of a lighthouse. *Id*. at 61. The Court held that the Coast Guard, having undertaken to provide lighthouse service, had a duty to use due care to make certain that the lighthouse was kept in good working order, to discover any failure of the light, and to repair the light or give a warning that it was not functioning. *Id*. at 69. Ultimately, the Court held that the FTCA's provision imposing liability "in the same manner and to the same extent as a private individual under like circumstances" does not exclude liability in the performance of activities which private persons do not perform. 28 U.S.C. § 2674 (2010); 350 U.S. at 72. It also eradicated any distinction between governmental and non-governmental functions in terms of assessing FTCA liability. This analysis stood in stark contrast to *Dalehite*'*s* treatment of the Coast Guard fire fighting claims as well as *Feres*' treatment of active duty military personnel. With its holding in *Indian Towing*, the Court presaged the future treatment of the FTCA's analogous private liability requirement.

As the Court explained in *Indian Towing*, the government in *Dalehite* contended that the private analogous liability requirement must be "read as excluding liability in the performance of activities which private persons do not perform." *Indian Towing*, 350 U.S. at 64. Thus, no FTCA liability for the negligent performance of "uniquely governmental functions" should exist. *Id*. The Court continued to explain that

> [t]he Government reads [the FTCA] as if it imposed liability to the same extent as would be imposed on a private individual "under the same circumstances." But the statutory language is "under like circumstances . . . ."

Id. Although the Court did not squarely decide this issue, it noted the fact that the government's reading of the FTCA would impose liability "in the same manner as if it were a municipal corporation and not as if it were a private person." *Id*. at 65. The Court further stated that all governmental activity is inescapably "uniquely governmental" in that it is performed by the government. However, the Court conceded that some liability in this perceived arena is circumscribed by the exceptions to the FTCA contained in 28 U.S.C. § 2680, including the discretionary function exception. The Court found that neither *Feres* nor *Dalehite* could be considered applicable to the facts in *Indian Towing*. *Id*. at 69. *Indian Towing* suggested that uniquely governmental conduct must fall within the discretionary function exception to be expressly shielded from liability, otherwise, such activity may be analogized to the most comparable private person conduct and subjected to suit in tort. *Id*. 64-65, 68. In only half a decade, the notion advanced in *Feres* and *Dalehite*, which held that uniquely governmental functions fall outside the FTCA's analogous private liability requirement, had collapsed.

In his dissent, Justice Reed discussed the obvious discord between the holding in *Indian Towing* and the Court's prior holdings in *Feres* and *Dalehite*. *Indian Towing*, 350 U.S. at 75 ("In *Feres* we talked of private liability and came to a conclusion which is contrary to that reached by the Court today.") He stressed that the FTCA's analogous private liability requirement shaped the Court's holding in *Feres* that the plaintiffs' claims fell outside the FTCA's jurisdictional bounds. *Id*. at 72. Justice Reed likened the lighthouse keeping duties in *Indian Towing* to the responsibilities of the active duty service members in *Feres* and the Coast Guard's fire-fighting duties in *Dalehite*. *Id*. at 74-75. He argued that all were devoid of any private analogue and that lighthouse keeping is as unique a governmental function as fire-fighting and thus falls outside the scope of the FTCA's limited waiver of sovereign immunity. *Id.* at 75. He further noted that

> [t]here is at least some uncertainty and ambiguity as to what Congress meant by making the United States liable in circumstances where it would be liable "if [it was] a private person." That uncertainty should not lead us to accept liability for the United States in this case. In dealing with this enlarged concept of federal liability for torts, wisdom should dictate a cautious approach along the lines of *Feres* and *Dalehite*.

Id. The dissent also considered the fact that a municipal corporation would not be responsible under similar facts pursuant to Louisiana tort law. *Id.* at 75-76 ("We can see no reason to doubt that under Louisiana law the maintenance of navigation lights, if permissible, by municipalities would likewise be free of liability."). Ultimately, Justice Reed's dissent fell on deaf ears.

Just 2 years after *Indian Towing*, the Court revisited one of *Dalehite*'s core issues, whether the United States could be held liable under the FTCA for its alleged negligence in fighting a fire. In *Rayonier Inc. v. United States*, 352 U.S. 315 (1957), the Court squarely dealt with whether this presumably governmental function could subject the United States to liability, notwithstanding the Court's holding in *Dalehite*. *Id*. In *Rayonier*, plaintiffs sued the United States for the alleged negligence of government employees in allowing a forest fire to be started on government land in Washington state and in failing to exercise due care in putting out the fire. *Id*. at 315-16 (describing how the United States Forest Service took exclusive direction and control of all fire suppression activities). The Court held that the United States may be liable under the FTCA for its alleged negligence in fighting the forest fire, provided that state law imposes liability on private persons or corporations under similar circumstances. *Id*. at 318 (explaining that the FTCA's analogous private liability provisions, "given their plain natural meaning, make the United States liable to [plaintiffs] for the Forest Service's negligence in fighting the forest fire if, as alleged in the complaints, Washington law would impose liability on private persons or corporations under similar circumstances."). Relying on its recent holding in *Indian Towing*, the Court stressed that the FTCA's test for determining the government's liability is specifically grounded in whether a *private person* would be responsible for similar negligence under the laws of the state where the act or omission occurred. *Id*. at 319. Despite the government's argument to the contrary, the Court clarified that liability under the FTCA is not restricted to the liability of a municipal corporation or other public entity and that any alleged distinction between government actions in a proprietary capacity versus a uniquely governmental capacity is not germane to the analysis. *Id.* at 318-19 (stating that if "there was anything to the contrary in the *Dalehite* case it was necessarily rejected by *Indian Towing*"). This analysis refocused the analogous private liability requirement on the "private individual" language of the FTCA.

As the Supreme Court continued to refine the doctrine, it became clear that the FTCA will render the government liable in tort if a private individual would be liable under similar circumstances, assuming the plaintiff's claim does not fall within one of the FTCA's specific exceptions. *See Richards v. United States*, 369 U.S. 1, 6 (1962). In *Richards*, FTCA wrongful death claims were brought by personal representatives of passengers killed when an airplane, operated under federal regulation, took off in Oklahoma but crashed in Missouri. *Id.* The analogous private liability requirement demonstrates that the FTCA "was not intended to operate with complete independence of principles of law [that were] developed by common law and refined by [state] statute and judicial decisions." *Id*. at 6. The Court further explained that the FTCA was designed to build upon legal relationships formulated and characterized by the states. *Id*. at 5-6, 11 (holding that a court in an FTCA action must refer to the whole law of the state in which the act or omission occurred). Thus, it characterized the FTCA's "law of the place" language as requiring courts to apply the whole law of the state. By applying Oklahoma's conflict-of-laws doctrine, the Court turned to Missouri law and concluded that a Missouri limitation on compensation barred plaintiffs' wrongful death claims. *Id*. at 15-16. Gradually, the analogous private liability requirement became more about applying the law of the state where the act or omission occurred and less about assessing whether the governmental conduct at issue was uniquely governmental in nature.

Later, in 1963, the Court further elucidated the analogous liability requirement. In *United States v. Muniz*, 374 U.S. 150, 151 (1963), the Court considered whether the government may be liable in an FTCA action brought by federal prisoners to recover for personal injuries that were sustained during confinement and allegedly caused by the negligence of federal prison employees. The Court held that the FTCA does not shield the government from suit in this case even though maintaining a prison is inherently a governmental function. *Id*. at 153-54. The Court placed great emphasis on the legislative history of the Act and the nature of the relationship between the government and the plaintiffs to conclude that "Congress intended to permit such suits." *Id.* This case may represent the last major stand for the prospect that a governmental activity falls outside the purview of the FTCA solely based on the analogous private liability requirement. The last stand failed. By allowing this suit, the Court rejected the government's argument that *Feres* precluded such suits. *Id.* at 159-60 (stating an analogous form of liability exists in *Muniz*, where "[a] number of States have allowed prisoners to recover from their jailers for negligently caused injuries and several States have allowed such recovery against themselves"). *Feres* was now the last vestige of an antiquated view of the requirement. The Court distinguished *Feres* by emphasizing the difference between the central relationships in each case. *Id*. at 162. Unlike the government's role as an overseer in *Muniz*, the "peculiar and special relationship of the soldier to his superiors" in *Feres* warranted different treatment due to the "effects of the maintenance of such suits on discipline . . . and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty . . . ." *Id.* (quoting *United States v. Brown*, 348 U.S. 110, 112 (1954)).

In explaining its decision, the Court noted that one important consideration in allowing such suits under the FTCA is that the government is still afforded the protections announced in the FTCA's discretionary function and intentional torts exceptions. *Id*. at 163 (citing 28 U.S.C. § 2680(a) and § 2680(h)). The FTCA's exceptions were to provide the teeth once attributed to the analogous private liability requirement. The Court also clarified that state rules governing municipal immunity from prison suits are of no moment in the FTCA's private analogous liability analysis. *Id*. at 164 ("Just as we refused to import the 'casuistries of municipal liability for torts' in *Indian Towing*, so we think it improper to limit suits by federal prisoners because of restrictive state rules of immunity."). The private person analogue was here to stay.

As the Court later explained, the FTCA relies upon its discretionary function exception to mark "the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit . . . ." *United States v. Varig Airlines*, 467 U.S. 797, 808, 809-10 (1984) (citation omitted) ("It is neither desirable nor intended that the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act should be tested through the medium of a damage suit for tort."). The days of relying on a distinction between governmental or non-governmental activity were at an end, regardless of whether the distinction was premised upon the analogous private liability requirement or otherwise. Nonetheless, even in *Varig*, the government had pressed the argument that the conduct of the FAA in certificating aircraft was "a core governmental activity that is not actionable under the Act, because no private individual engages in analogous activity." *Id*. at 816. Although respondents maintained this argument was precluded by the Court's ruling in *Indian Towing*, the Court ultimately found it unnecessary to address this issue, instead basing its ruling upon the discretionary function exception. Judicial intervention in such decisionmaking through private tort suits would require the courts to "second-guess" the political, social, and economic judgments of an agency exercising its regulatory function. It was precisely this sort of judicial intervention in policymaking that the discretionary function exception was designed to prevent. *See Id.* at 820. The perceived role attributed to the analogous private liability requirement in *Feres* and *Dalehite* was destined to be carried by the discretionary function exception.

III. In *Olson*, the Supreme Court made clear that the "private person" standard governs whether or not there is analogous private liability.

In *Olson*, the Supreme Court considered the FTCA claims of injured miners who alleged negligence on the part of inspectors from the Mine Safety and Health Administration. *United States v. Olson*, 546 U.S. 43 (2005). The Court extinguished any doubt regarding the nature of the analogous private liability requirement and held that the FTCA waives sovereign immunity only where local law would make a *private person*, not a state or municipal entity, liable – even where uniquely governmental functions are at issue. *Id*. This holding abrogated a number of Ninth Circuit cases based on two premises: (1) where uniquely governmental functions are at issue, the FTCA waives sovereign immunity if a state or municipal entity would be held liable under the law where the activity occurred; and (2) certain conduct amounts to uniquely governmental functions because no private-sector analogue exists. *Id.* at 44-45 (citing *Hines v. United States*, 60 F.3d 1442 (9th Cir. 1995); *Cimo v. INS*, 16 F.3d 1039 (9th Cir. 1994); *Cameron v. Janssen Bros. Nurseries, Ltd.*, 7 F.3d 821 (9th Cir. 1993); *Aguilar v. United States*, 920 F.2d 1475 (9th Cir. 1990); and *Doggett v. United States*, 875 F.2d 684 (9th Cir. 1989)).

The Court clarified that the FTCA's imposition of liability on the government in the same manner and to the same extent as on a private individual under "like circumstances" does not restrict a court's inquiry to the same circumstances; rather, it is required to look further afield. *Olson*, 546 U.S. at 44, 46 (citing *Indian Towing*). A court must look for an appropriate analogy but the required private person analogue cannot be informed by whether municipal or governmental liability for the alleged negligent conduct exists. *Id.* at 45-46 ("Our cases have consistently adhered to this 'private person' standard."). Such reasoning is consistent with the "like circumstances" language of the Act. 28 U.S.C. § 2674 (2010). The Court interpreted the words of the FTCA "to mean what they say, namely, that the United States waives sovereign immunity 'under circumstances' where local law would make a '*private person*' liable in tort." *Id.* at 44 (emphasis in *Olson*) (quoting 28 U.S.C. § 1346(b)).

A court must look to the state-law liability of private persons even when it assesses the government's FTCA liability in the performance of activities which private persons do not perform – there is no exception for what may be considered "uniquely governmental functions." *Id*. at 46 (citing *Indian Towing* and stating the FTCA "requires a court to look to the state-law liability of private entities, not to that of public entities, when assessing the [g]overnment's liability under the FTCA"). The Court went on to list a number of instances where courts of appeals were able to find private person analogies for a variety of governmental tasks implicated in FTCA cases. *Id*. at 47 (citing *Florida Auto Auction of Orlando, Inc. v. United States*, 74 F.3d 498 (4th Cir. 1996) (inspection of automobile titles); *Dorking Genetics v. United States*, 76 F.3d 1261 (2d Cir. 1996) (inspection of cattle); *Ayala v. United States*, 49 F.3d 607 (10th Cir. 1995) (mine inspections); *Myers v. United States*, 17 F.3d 890 (6th Cir. 1994) (same); *Howell v. United States*, 932 F.2d 915 (11th Cir. 1991) (inspection of airplanes)). Referring to the facts in *Indian Towing*, the Court stated that "[p]rivate individuals, who do not operate lighthouses, nonetheless may create a relationship with third parties that is similar to the relationship between a lighthouse operator and a ship dependent on the lighthouse's beacon." *Olsen*, 546 U.S. at 47. Based on the Court's holding in *Olson*, the FTCA litigator must presume that a court will find a reasonable private person analogue for the governmental activity at issue. It is incumbent upon the litigator to identify the most advantageous analogue considering the content of substantive state law.

IV. Although a court will likely find that a reasonable private person analogue exists regardless of the nature of the government conduct at issue, no analogous private liability arguments remain readily available.

A. Whether there is analogous private liability is a question of subject-matter jurisdiction.

Following *Olson*, it became clear that any attempt to characterize alleged governmental acts or omissions as outside the purview of the FTCA's waiver of sovereign immunity solely because they relate to uniquely governmental functions will not succeed. Similarly, it is clear that the FTCA waives the United States' sovereign immunity and provides subject-matter jurisdiction where a private person, not a municipal or governmental entity, would be subject to liability. This principle must be read to cut both ways. Consequently, where a private person in like circumstances would be shielded from liability under state law, there can be no analogous private liability and the plaintiff's FTCA claims must be dismissed. Importantly, this means that any and all state law provisions that substantively shape the bounds of a private person's liability in tort can be raised in connection with a "no analogous private liability" argument in an FTCA action. *See* 28 U.S.C. § 1346(b) (2010); *Cleveland ex rel. Cleveland v. United States*, 457 F.3d 397, 403 (5th Cir. 2006) (discussing the principle that the FTCA requires the United States' liability to be measured in accordance with the law of the state where the alleged act or omission occurred); *Alexander v. United States*, 605 F.2d 828, 832 (5th Cir. 1979) ("[L]iability under the FTCA is governed by state law."). For example, the United States may always challenge the existence of a duty under state tort law. *See, e.g.*, *Barnes v. United States*, 448 F.3d 1065 (8th Cir. 2006) (finding no analogous private liability because private persons do not have an independent duty under Missouri state law to inspect poultry processors). Additionally, if a state provision immunizes certain types of private person conduct from tort liability, the government is equally entitled to these protections when it acts in like circumstances. Where a plaintiff fails to meet the analogous tort liability requirement of the FTCA, *see* 28 U.S.C. §§ 2674, 1346(b) (2010), the plaintiff cannot carry his or her burden of establishing subject-matter jurisdiction.

Ultimately, the FTCA's limited waiver of sovereign immunity, and thus its limited grant of subject-matter jurisdiction, hinges on whether a private person could be subject to state law liability under *similar circumstances*. *See Olson*, 546 U.S. at 45 (holding that "the words 'like circumstances' do not restrict a court's inquiry to the *same circumstances*, but require it to look further afield") (emphasis in *Olson*). As the Ninth Circuit recognized in *LaBarge v. County of Mariposa*, 798 F.2d 364 (9th Cir. 1986), "the federal government could never be exactly like a private actor . . . [thus] a court's job in applying the standard is to find the most reasonable analogy." *Id.* at 367. This statement means that the government must be afforded protection even where the governmental conduct at issue presents "similar," but not identical, circumstances to the type of private person conduct shielded from liability under state law. The FTCA litigator must ask, "Had a private person acted *similarly* to the actions complained of in the plaintiff's suit, would state law allow for liability?" If the answer is no, a motion should be brought pursuant to Federal Rules of Civil Procedure 12 or 56, depending on the circumstances.

Because a challenge to analogous private liability is inherently a challenge to jurisdiction, it is important to remember that the law starts with the presumption that a cause lies outside the limited jurisdiction of the federal courts. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Moreover, a court must consider jurisdiction as a threshold issue. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) (stating that the separation of powers doctrine requires a federal court to first determine whether it has jurisdiction before reaching the merits of a case). As the party averring jurisdiction, the FTCA plaintiff bears the burden of proof and must establish that the court possesses subject-matter jurisdiction based upon analogous private liability. *See Kokkonen*, 511 U.S. at 377 ("It is to be presumed that a cause lies outside this limited jurisdiction . . . and the burden of establishing the contrary rests upon the party asserting jurisdiction."); *see also McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 182-83, 189 (1936) (holding that the party asserting jurisdiction may not be relieved of the burden of showing that he is properly in court).

Although the FTCA's analogous private liability provisions rely upon the framework established by state tort law for guidance, *see* 28 U.S.C. §§ 2674, 1346(b) (2010), whether a private person in "like circumstances" would be subject to liability is a question of sovereign immunity and is therefore ultimately a question of federal law. *See United States v. Olson*, 546 U.S. 43, 44 (2005); *see also United States v. Mottaz*, 476 U.S. 834, 841 (1986) (stating the scope of the United States' waiver of sovereign immunity defines the extent of a court's jurisdiction); *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) (affirming a Fed. R. Civ. P. 12 (b)(1) dismissal based on the lack of analogous private liability). Judicial restraint requires federal courts to avoid liberal interpretation of any federal or state law which might expand the government's waiver of sovereign immunity without congressional approval. *See U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992) (holding that waivers of sovereign immunity and any conditions on such waivers must be "construed strictly in favor of the sovereign") (quoting *McMahon v. United States*, 342 U.S. 25, 27 (1951)); *Linkous v. United States*, 142 F.3d 271, 275 (5th Cir. 1998) (in assessing jurisdiction, a court "must resolve all ambiguities in favor of the sovereign"). Thus, in assessing whether a private person under "like circumstances" would be shielded from liability under state law, a court must construe all relevant federal and state statutes in favor of the government.

The analogous private liability requirement embedded in the FTCA ensures that the Act does not create novel causes of action against the United States, but rather serves only to accept government liability under "like circumstances" that are functionally equivalent to those where a private person would be liable. As described by the Seventh Circuit, the FTCA's "like circumstances" requirement is designed to prevent state legislatures from using the United States' limited waiver of sovereign immunity as an occasion to "enrich their own citizens at the expense of the deepest pocket." *See Carter v. United States*, 982 F.2d 1141, 1143 (7th Cir. 1992). This protection is consistent with the FTCA's intent to limit the waiver of sovereign immunity to "run-of-the-mine" torts where clear, private analogues exist under state tort law. *See United States v. Gaubert*, 499 U.S. 315, 325 (1991); *Dalehite v. United States*, 346 U.S. 15, 28 (1953).

Equally important is the notion that the "law of the place where the act or omission occurred," referenced in 28 U.S.C. § 1346(b)(1), "refers exclusively to state law." *Brown v. United States*, 653 F.2d 196, 201 (5th Cir. 1981). *See also Fed. Deposit Ins. Corp.v. Meyer*, 510 U.S. 471, 479 (1994) ("[W]e have consistently held that § 1346(b)'s reference to the 'law of the place' means [the] law of the State – the source of substantive liability under the FTCA."). Hence, the FTCA measures the government's liability by referencing the law of the state where the act or omission at issue occurred. *See Brown*, 653 F.2d at 201 ("[T]he liability of the United States under the [FTCA] arises only when the law of the state would impose it [on a private person]."). This notion includes a state's choice of law rules. *See Smith v. United States*, 507 U.S. 197, 202 (1993); *Richards v. United States*, 369 U.S. 1, 11 (1962). It follows that the FTCA simply cannot be read to create or enlarge substantive causes of action that do not already exist under state law. *See Richards*, 369 U.S. at 7, 13-14; *see also Winchell v. U.S. Dep't of Agriculture*, 961 F.2d 1442, 1443 (9th Cir. 1992) (under the FTCA, a plaintiff must show that the wrongs allegedly committed "would be actionable in tort if committed by a private party under analogous circumstances, under the law of the state where the act or omission occurred") (quoting *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1990)); *Goldstar (Panama) v. United States*, 967 F.2d 965, 969-70 (4th Cir. 1992).

Despite plaintiffs' arguments to the contrary, the FTCA's limited waiver of sovereign immunity "cannot apply where the claimed negligence arises from the failure of the United States to carry out a statutory duty in the conduct of its own affairs." *See Hornbeck Offshore Transp. v. United States*, 569 F.3d 506, 509 (D.C. Cir. 2009). No analogous private liability exists unless a private person in like circumstances would have a corresponding duty under the appropriate state tort law. Internal policies, procedures, or statutes governing federal action, while potentially relevant to discretionary function analysis, cannot serve to create a substantive cause of action under the FTCA unless the conduct at issue is "independently tortuous under applicable state law." *Dalrymple v. United States*, 460 F.3d 1318, 1327 (11th Cir. 2006); *see also Johnson v. Sawyer*, 47 F.3d 716, 727-29 (5th Cir. 1995) (explaining that "the violation of a federal statute or regulation does not give rise to FTCA liability unless the relationship between the [government actor] and the [plaintiff] is such that the former, if a private person or entity, would owe a duty to the latter in a *nonfederal* context.") (emphasis in *Dalrymple*). A federal statute or regulation that speaks only to the government's conduct simply cannot be read to impose state tort law duties upon private persons. *See Tindall v. United States*, 901 F.2d 53, 56 (5th Cir. 1990) ("[A] federal regulation cannot establish a duty owed to the plaintiff under state law."). To hold otherwise would effectively "discriminate against the United States." *Johnson*, 47 F.3d at 729. An FTCA litigator must consider the state tort law, assess whether a private person in like circumstances would have a duty, and consider the prospects of an appropriate motion to dismiss.

Post *Olson*, it also became clear that state law provisions that apply exclusively to state or municipal employees will not prove helpful in measuring the scope of FTCA liability. *See United States v. Olson*, 546 U.S. 43, 45-46 (2005); *see, e.g.*, *Hyatt v. United States*, 968 F. Supp. 96, 108 (E.D.N.Y. 1997). Such provisions have no bearing on Congress's required analogy to "private person" liability. *See, e.g.*, *United States v. Muniz*, 374 U.S. 150, 164 (1963). For example, a state statute is irrelevant to the required private person inquiry under the FTCA if the statute only deals with governmental agencies that perform the activities at issue in a case. In addition, whether or how a state legislature has addressed the conduct of the United States is irrelevant. Aside from obvious federalism concerns, such laws would have no bearing on the required inquiry into the analogous liability of a private person under similar circumstances. *See* 28 U.S.C. § 2674 (2010).

B. Aside from a state law no duty argument, any and all defenses and statutory protections available to private persons under state law are available to the United States and can successfully be raised.

Courts have consistently held that the government is entitled to raise any and all defenses that would potentially be available to a private citizen or private entity under state law. Thus, for the FTCA litigator, having an in-depth knowledge of the appropriate state law is invaluable. Numerous examples of successful analogous private liability arguments based on state provisions are found throughout the case law. Ultimately, "a state may not protect private citizens from liability without also protecting the federal government." *See McClain v. United States*, 445 F. Supp. 770 (D. Or. 1978). Invariably, this statement also means that state law defenses, exceptions to liability, immunity provisions, and limitations on recovery coextensively limit the government's FTCA liability as they would limit a private person's liability under similar circumstances. *See Owen v. United States*, 935 F.2d 734, 737 (5th Cir. 1991); *Banks v. United States*, 623 F. Supp. 2d 751, 752 (S.D. Miss. 2009) ("Where the FTCA applies, the United States can assert the same defenses available to private citizens . . . ."). Thus, if a state law provision is applicable to a private person under some set of circumstances, the provision must always be considered equally applicable to the United States when it is in like circumstances. *See Palmer v. Flaggman*, 93 F.3d 196, 199 (5th Cir. 1996); *Ewell v. United States*, 776 F.2d 246, 249 (10th Cir. 1985)

("[I]mmunities created by state law which are available to private persons will immunize the federal government . . . .").

In defending an FTCA action, the litigator is limited only by his or her willingness to engage the provisions of state law. Recently, the United States successfully raised the analogous private liability requirement to secure the dismissal of thousands of claims seeking potentially billions of dollars in damages. *See In re: FEMA Trailer Formaldehyde Products Liability Litig.*, MDL No. 07-1873, 2010 WL 3168116 (E.D. La. Aug. 9, 2010); *In re: FEMA Trailer Formaldehyde Products Liability Litig.*, MDL No. 07-1873, 2010 WL 2559082 (E.D. La. June 23, 2010); *In re: FEMA Trailer Formaldehyde Products Liability Litig*., MDL No. 07-1873, 2010 WL 2010487 (E.D. La. May 18, 2010). These three, separate rulings focused on the state law of three separate states – Alabama, Mississippi, and Louisiana, respectively – where FEMA emergency housing units were provided after Hurricanes Katrina and Rita in 2005. The court ruled that no analogous, private liability existed because a private person under similar circumstances would have been shielded from liability. The reason for this protection is based on various state emergency preparedness statutes that encourage the provision of emergency assistance by immunizing private persons who voluntarily provide shelter in response to an emergency.

State workers' compensation statutes that address the statutory employer doctrine are also fertile sources of potential analogous private liability arguments. *See, e.g.*, *Pendley v. United States*, 856 F.2d 699 (4th Cir. 1988) (applying Virginia's workers' compensation exclusivity provision in the context of an FTCA action); *Thomas v. Calavar Corp.*, 679 F.2d 416, 418-19 (5th Cir. 1982) (applying state workers' compensation immunity in the context of an FTCA action). No analogous private liability exists if a private person or entity in like circumstances would be protected from tort liability by the exclusive remedy provision of the applicable workers' compensation statute. *See Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) (affirming dismissal of an FTCA action where, under state law, plaintiff's exclusive remedy was under the workers' compensation statute); *see also LaBarge v. County of Mariposa,* 798 F.2d 364, 366, 369 (9th Cir. 1986) (stating the United States was "immune from suit" and the court "lacked jurisdiction" over third party claims where a private party in like circumstances would not be liable in contribution under the exclusive liability provision of the state workers' compensation statute).

Under some state workers' compensation acts, employees' common law claims against "statutory employers" may be barred. *See Hose v. United States*, 604 F. Supp. 2d 147 (D.D.C. 2009) (dismissing FTCA claims brought by an independent contractor who alleged he was exposed to anthrax spores while working in a state department facility). In certain circumstances, the United States may be able to invoke statutory employer protection from suit as part of an analogous private liability argument. *See Pendley v. United States*, 856 F.2d 699, 702 (4th Cir. 1988) (holding the Air Force was the statutory employer of a private worker killed in a rocket fuel explosion and was therefore entitled to protection from tort liability under the state's workers' compensation act); *Nelson v. U.S. Postal Serv.*, 189 F. Supp. 2d 450, 454-59 (W.D. Va. 2002) (finding that the private truck driver plaintiff was the statutory employee of the Postal Service). A statutory employer is someone who subcontracts to have some or all of the work that is part of his or her trade, business, or occupation performed by others. *Hose*, 604 F. Supp. 2d. at 150 (citations omitted) ("This 'statutory employer' provision [contained in state workers' compensation acts] is designed to ensure that owners do not escape liability for workers' compensation benefits by having their work performed by others."). Where the United States, if a private person, would be considered the plaintiff's "statutory employer," state law may dictate that no analogous private liability exists. *See, e.g.*, *Hyman v. United States*, 796 F. Supp. 905, 906 (E.D. Va. 1992). A similar argument can be made based on state provisions that allow a private person or private entity to raise the borrowed servant defense. *See*

Starnes v. United States, 139 F.3d 540, 542 (5th Cir. 1998) (applying the state law borrowed servant defense in the context of an FTCA action).

Another popular source for potential analogous private liability arguments is state recreational land use statutes that immunize private persons or entities from liability. *See, e.g.*, *Palmer v. United States*, 945 F.2d 1134 (9th Cir. 1991) (holding that Hawaii's recreational land use statute immunized the United States from liability, just as it would protect a private person due to the FTCA's analogous private liability requirement); *Woods v. United States*, 909 F. Supp. 437, 442 (W.D. La. 1995) (dismissing an FTCA action based on private landowner immunity afforded by Louisiana's recreational use statute); *Hannon v. United States*, 801 F.Supp. 323 (E.D. Cal. 1992) (holding that the United States was entitled to the protection of California's recreational land use statute based on the FTCA's analogous private liability provision, even though the statute only applied to private, not governmental, landowners). As stated in *Hannon*, if "[the land use statute] applies to private persons, so it must also apply to the United States in [an FTCA] case."). *Id.*at 326.

Some state law provisions even provide for damages caps (particularly in the medical malpractice context) that can be successfully raised as part of an analogous private liability argument. *See, e.g.*, *Starns v. United States*, 923 F.2d 34, 37 (4th Cir. 1991). Other state provisions may only allow for liability upon a showing of gross negligence or willful and wanton misconduct, depending upon the type of activity at issue. *See, e.g.*, *Bunting v. United States*, 884 F.2d 1143 (9th Cir. 1989) (holding that for purposes of the FTCA action, the Coast Guard had to be afforded the same protections that a private person would be afforded under similar circumstances where there is no preexisting duty, namely, the protections set forth in Alaska's Good Samaritan statute, which limited liability to only those circumstances where a plaintiff can establish gross negligence); *Ortiz v. U.S. Border Patrol*, 39 F. Supp. 2d 1321, 1322-23 (D.N.M. 1999) (applying a state statute limiting private person liability to only those circumstances where a plaintiff can establish gross negligence); *Priah v. United States*, 590 F. Supp. 2d 920, 930 (N.D. Ohio 2008) (holding that the discretionary function exception barred the negligence claim and finding government actor's conduct not wanton or reckless).

Although state statutes of limitation are not applicable in FTCA cases, *see, e.g.*, *Benge v. United States*, 17 F.3d 1286, 1288 (10th Cir. 1994), a number of states have statutes of repose that are considered substantive, rather than procedural, in nature and are thus sufficiently ripe to be raised as part of a private analogous liability argument. *See Resolution Trust Corp. v. Olson*, 768 F. Supp. 283, 285 (D. Ariz. 1991); *Goad v. Celotex Corp*., 831 F.2d 508 (4th Cir. 1987). *See, e.g.*, *Simmons v. United States*, 421 F.3d 1199, 1199-1200 (11th Cir. 2005) (per curiam) (dismissing an FTCA claim for medical malpractice based on Georgia's statute of repose); *Vega v. United States*, 512 F. Supp. 2d 853 (W.D. Tex. 2007) (applying Texas' state statute of repose and dismissing negligent design claims in the context of an FTCA action relating to a drainage canal); *Brown v. United States*, 514 F. Supp. 2d 146, 155-58 (D. Mass. 2007) (dismissing an FTCA action based upon the Massachusetts statute of repose); *Manion v. United States*, No. CV-06-739-HU, 2006 WL 2990381 (D. Or. Oct. 18, 2006) (applying Oregon's ultimate statute of repose in the context of an FTCA action). A statute of repose serves as an absolute bar to all suits that are brought beyond a fixed period of time after the defendant acted, regardless of whether this period ends before the plaintiff suffered the alleged injury. Some statutes are specific to latent disease claims, while others deal specifically with medical malpractice actions. *See, e.g.*, *Anderson v. United States*, CCB-08-3, 2010 WL 1346409, at *4 (D. Md. Mar. 30, 2010) (applying Maryland's 5-year statute of response for the filing of medical malpractice claims in the context of an FTCA action).

These are but a few examples of the types of state law protections and immunity provisions available to private persons and, thus, available to the United States in FTCA actions. Even where the governmental activity at issue does not squarely meet the terms of a state law provision that shields a private person from liability, the government may still have a meritorious argument based on the argument that no analogous private liability exists.

C. The FTCA's "like circumstances" language does not mean the "same circumstances," for the government is entitled to raise state defenses and protections with which it has only functionally, rather than literally, complied.

The FTCA's "like circumstances" test must be read to cut both ways because the United States is seldom identically situated to private parties. As discussed above, if a reasonable analogue exists, then the United States may be liable under the FTCA for activities that could be considered uniquely governmental in nature; but, in turn, the United States must be afforded the benefit of state immunity statutes and non-liability provisions with which the government has only functionally, rather than literally, complied. *See Hill v. SmithKline Beecham Corp.*, 393 F.3d 1111, 1118 (10th Cir. 2004) ("In light of the 'similarly situated' requirement, we . . . have allowed the United States the benefits of certain state-law defenses in FTCA actions, even when the United States did not meet the technical requirements of state law."); *C.P. Chemical Co. v. United States*, 810 F.2d 34, 37 (2d Cir. 1987) (focusing on whether private liability would exist under "comparable" circumstances); *LaBarge v. County of Mariposa*, 798 F.2d 364, 367 (9th Cir. 1986) ("Because the federal government could never be exactly like a private actor, a court's job in applying the standard is to find the most reasonable analogy.").

To determine whether a state immunity or non-liability provision is implicated in the context of an FTCA action, the focus must remain on "like circumstances" because the "FTCA assures the federal government of that treatment accorded private parties." *Starns v. United States*, 923 F.2d 34, 37 (4th Cir. 1991). This understanding also holds true when the government cannot meet certain prerequisites to raising a state provision due to unique, governmental attributes that stem from the inherent difference between the government and a private person. *See Hill*, 393 F.3d at 1118 ("[T]o hold that the United States is not entitled to the protection of [the state law provision] would place it in a differently situated position than private parties . . . thereby undermining the conditions precedent to the United States' waiver of sovereign immunity in the FTCA."). The FTCA's "like circumstances" language is necessarily flexible. It only requires that the government activity at issue be the functional equivalent of the kind of private conduct shielded from state tort liability, ensuring that the government is placed on equal footing with private persons (as required by the FTCA) despite their inherent differences. While the analogous private liability inquiry considers the framework of state law for guidance, it is not answered through a rote application of state law to the facts of a particular case. *Id*.

Thus, even where the government fails to meet the exact terms of a state statutory provision limiting or precluding liability, the United States is considered in "like circumstances" to a private party that has actually met the requirements "where the [government] has satisfied the *objectives of a statutory scheme*. *See Nationwide Mut. Ins. Co. v. United States*, 3 F.3d 1392, 1396-97, 1398 (10th Cir. 1993) (emphasis added). In *Nationwide*, the Tenth Circuit examined a case involving an automobile and held that the government's functional, though not literal, compliance with the statutory requirements of Colorado state law placed the United States in "like circumstances" to those private persons who are literally protected by a Colorado automobile insurance statute. *Id*. at 1396-97.

Additional examples applying this principle exist in a number of jurisdictions. In *Starns v. United States*, 923 F.2d 34 (4th Cir. 1991), the Fourth Circuit considered whether the government should be afforded the benefit of a Virginia state law cap on medical malpractice liability. The Fourth Circuit held that under the FTCA's "like circumstances" provision, the statutory cap on medical malpractice liability applied to the federally-operated hospital at issue. The court reasoned that the government was in like circumstances to a private provider that would be entitled to benefit from the cap, even though it was not licensed by the state in accordance with the statutory cap's requirements. *Id*. at 37. Similarly, the Tenth Circuit applied a state law statutory cap in the context of an FTCA action even though the United States had not specifically complied with a number of requirements set forth in the statute. *Haceesa v. United States*, 309 F.3d 722, 725-27 (10th Cir. 2002). In *Estate of Boone v. United States*, 591 F. Supp. 2d 800, 802 (D. Md. 2008), the district court applied a Maryland statutory immunity provision to a claim against the United States in an FTCA action despite the fact that the provision was intended for private fire companies. The district court found that the government was in like circumstances to a non-profit, private, self-insured, fire company. The court reasoned that the United States was thus afforded the same state law immunity protections that would apply to a private fire company under Maryland law, even though the government had not specifically complied with all of the requirements that a private fire company must meet under state law to gain immunity. *Id*. at 802-04 (explaining that "the specific requirements of the Maryland statute do not dictate the government's liability in this action . . . [r]ather, the 'FTCA assures the federal government of that treatment accorded private parties.' ") (quoting *Starns v. United States*, 923 F.2d 34, 37 (4th Cir. 1991)).

In yet another case, a district court analogized the United States to a private person who was not required to carry insurance pursuant to New Jersey state law by concluding that the United States had functionally, though not literally, complied with the state insurance requirements. *Cont'l Ins. v. United States*, 335 F. Supp. 2d 532, 543 (D.N.J. 2004). Finally, in *U.S. Fidelity & Guaranty Co. v. United States*, 728 F. Supp. 651, 654 (D. Utah 1989), the district court found that the United States shared similar circumstances with a secured owner or operator of a vehicle under state law despite the fact that the government had not strictly complied with some of the prerequisites set forth by state law.

V. In conclusion, an FTCA litigator is only limited by his or her understanding of the substantive state law in raising arguments under the FTCA's analogous private liability requirement.

The number and type of state statutes that can be raised as part of a no analogous private liability argument in an FTCA action are countless. Looking through the lens of private analogous liability, the United States may not be exposed to greater liability than a private person under similar circumstances. Any state law provision that shields (in whole or in part) private persons from tort liability can be raised by the United States under similar factual circumstances. This option gives litigants flexibility to argue that the challenged governmental activity is the functional equivalent of an activity that is protected or addressed by state law. In the end, it is the plaintiff's burden to show how the government conduct at issue in the case was functionally different from the kind of private person conduct shielded from tort liability under state law.

From the earliest FTCA cases, plaintiffs have stressed that a reasonable analogue can always be found for the governmental activity at issue, even in cases where the activity amounts to a uniquely governmental function. As the Supreme Court adopted this trend, it opened an opportunity for government counsel defending FTCA cases to seek reasonable private person analogues that would likewise be shielded from liability. In adjudicating FTCA cases, courts are called upon to remove the governmental cloak, strip away the inherent differences between the government and a private person, find the most reasonable private person analogy, and assess whether a private person could be subject to state law liability under "similar circumstances." Only through a complete command of the underlying state tort law can an FTCA litigator identify all potential analogous private liability arguments and successfully preserve the FTCA's explicit restrictions on its waiver of sovereign immunity.❖

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The Federal Tort Claims Act is a *Very Limited* Waiver of Sovereign Immunity – So Long as Agencies Follow Their Own Rules and Do Not Simply Ignore Problems

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I. Introduction

The waiver of sovereign immunity found in the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-80, appears, at first blush, to be quite sweeping. Generally, it provides that the "United States shall be liable [in tort] in the same manner and to the same extent as a private individual under like circumstances." *Id.* § 2674. But, as the late Harvard Law Professor Phillip Areeda always told his students, it is important to "read on." The last section of the FTCA provides that the provisions of the FTCA "shall not apply to [*inter alia*]

> (a) Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680 (2010). This section contains a number of exceptions to the FTCA's waiver of sovereign immunity, but, as the Fourth Circuit noted in *McMellon v. United States*, 387 F.3d 329, 335 (4th Cir. 2004) (en banc), the "most important of these exceptions . . . is the discretionary function exception." The statutory language above is also part of the Stafford Act, 42 U.S.C. § 5148, which covers federal actions in the case of emergencies; consequently, the analysis provided in this article is equally applicable to suits brought pursuant to the Stafford Act. *See, e.g.*, *Freeman v. United States*, 556 F.3d 326, 336 (5th Cir. 2009).

Litigants are often unaware of the extent to which the FTCA waiver of sovereign immunity is limited. In fact, the scope of the waiver is quite narrow, due largely to the discretionary function exception. Prior to 1946, there was *no* waiver at all for non-maritime torts because, prior to the expansion of the federal government during the New Deal and the enormous growth of the public sector during World War II, Congress did not perceive a need for such a waiver. Before then, all complaints against the government for tortuously injuring its citizens were resolved (if at all) through private legislation. As the government grew, the "opportunities" for negligent actions increased and Congress deemed the private legislation approach to be inadequate. On the other hand, Congress did not want individual district court judges to second-guess policy judgments of the elected branches of government. *See United States v.*

Gaubert, 499 U.S. 315, 323 (1991) (the purpose of the discretionary function exception is to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy") (quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense* (*Varig Airlines*), 467 U.S. 797, 814 (1984)). Indeed, such second-guessing would have created constitutional problems regarding the separation of powers doctrine. *See Varig Airlines*, 467 U.S. at 809-10. When the FTCA was enacted in 1946, its discretionary function exception was included as part of the limited waiver of sovereign immunity to address these concerns. For a more detailed discussion of this history, see David S. Fishback & Gail Killefer, *The Discretionary Function Exception to the Federal Tort Claims Act: From Dalehite to Varig to Berkovitz*, 25 IDAHO L. REV. 291 (1989).

The fundamental purpose of the discretionary function exception is to "mark[] the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *Berkovitz v. United States*, 486 U.S. 531, 536 (1988) (quoting *Varig Airlines*, 467 U.S. at 808).

In order to explain the scope of the discretionary function exception to potential opposing counsel or to judges who may not be familiar with the exception, it is useful to note at the outset that the issue posed by the exception is *not* whether a claimant ought to receive compensation from the federal government. Rather, the question is whether the claimant is seeking redress in the appropriate forum: the courts or, as it was for all non-maritime cases before 1946, Congress. (The Suits in Admiralty Act (SAA), 46 U.S.C. §§ 30901-30918 (2009), enacted in 1920, provides a waiver of federal sovereign immunity for admiralty cases. While the SAA does not, by its own terms, include a discretionary function exception, the courts have uniformly held that a discretionary function exception must be implied under the separation of powers doctrine. *See McMellon*, 387 F.3d at 335-38 (collecting cases)).

Indeed, the first discretionary function exception case to come before the Supreme Court, *Dalehite v. United States*, 346 U.S. 15 (1953), involved just the sort of circumstance that Congress deemed to remain within its purview for compensation. In that case, fertilizer bound for post-World War II Europe under the Marshall Plan exploded in the harbor of Texas City, Texas, killing more than 500 people, wounding many others, and causing immense property damage. *See In re Texas City Disaster Litig.*, 197 F.2d 771, 772 (5th Cir. 1952) (en banc). In *Dalehite*, the Supreme Court affirmed the discretionary function exception dismissals, and Congress subsequently enacted legislation providing compensation to those hurt. *See In re "Agent Orange" Product Liability Litigation*, 304 F.Supp.2d 404 (E.D.N.Y. 2004) (citing Texas City Disaster Relief Act, Pub. L. No. 84-378, 69 Stat. 707 (1955)), *aff'd* 517 F.3d 76 (2d Cir. 2008), *cert. denied*, 129 S.Ct. 1523 (2009). Congress took similar steps following the discretionary function exception dismissals of suits brought by the "downwinders" – people who alleged that their cancers were caused by radiation from the government's above-ground nuclear testing in the 1950s and 1960s. *See Allen v. United States*, 816 F.2d 1417 (10th Cir. 1987). *See also* Radiation Exposure Compensation Act, 42 U.S.C. § 2210 (note) (2009).

In its most recent discussion of the exception, *United States v. Gaubert*, 499 U.S. 315 (1991), the Supreme Court set forth fairly clear standards for when the exception applies. An allegedly negligent act or omission falls within the discretionary function exception (and thus bars jurisdiction over the case) if: (1) it did not violate a pertinent self-imposed statute, regulation, or policy that prescribed a specific course of action (the function was "discretionary"); and (2) it was "susceptible to policy analysis" involving "social, economic, or political" policy considerations. *Id.* at 322-23, 325. These two parts of the analysis are popularly known as Prong One and Prong Two. Thus, the title of this article, *The Federal Tort Claims Act is a* Very Limited *Waiver of Sovereign Immunity — So Long as Agencies Follow Their Own Rules and Do Not Simply Ignore Problems*, conveys the essence of what government counsel needs to know. To paraphrase the great sage Hillel, "All the rest is commentary." However, understanding the commentary is necessary for an effective defense in FTCA cases. (The two prong test was first set forth in *Berkovitz*, *supra*. *Berkovitz* left some loose ends, *see* Fishback & Killefer, at 321-27, which were tied up in *Gaubert*, 499 U.S. at 326, 333 (regarding the relevance of *Indian Towing Co., Inc. v. United States*, 350 U.S. 61 (1955) and "technical decisions," respectively). Thus, it is usually best to first cite *Gaubert* in explaining the scope of the discretionary function exception.)

II. Two preliminary matters

A. Negligence is irrelevant to the analysis

It is useful to clarify at the outset that, in deciding the discretionary function exception question, issues of negligence are "simply irrelevant to the discretionary function inquiry." *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1029 (9th Cir. 1989). *Accord, e.g.*, *Hix v. U.S. Army Corps of Engineers*, 155 Fed. Appx. 121, 128 (5th Cir. 2005); *Lopez v. United States*, 376 F.3d 1055, 1056 (10th Cir. 2004). Consequently, issues of analogous private liability (discussed in Adam M. Dinnell's article in this edition of the *U.S. Attorneys' Bulletin*) are not germane to the threshold analysis of whether a case is actually within the limited waiver of sovereign immunity.

B. Interaction with the contractor exception

Another matter that should be clarified at the outset is that the discretionary function exception threshold issue is important in cases involving allegations that a government contractor was negligent. In such cases, the contractor exception to liability under the FTCA – *see* 28 U.S.C. § 2671 (the negligence of a federal agency potentially the subject of an FTCA action "does not include [the negligence of] any contractor with the United States") – may not itself bar a suit alleging governmental negligence in selecting or supervising a contractor. Indeed, particularly where states have non-delegable duty regimes (*i.e.*, where private persons or entities may not, under state tort law, avoid responsibility for supervising their contractors), analogous private liability may exist. However, the discretionary function exception bars such suits under the FTCA because decisions about selecting contractors and the degree to which the government will oversee the work of its contractors are typically not constrained by specific and mandatory self-imposed obligations, and are thus susceptible to policy considerations. *See In re Consol. U.S. Atmospheric Testing Litig*., 820 F.2d 982, 996-97 (9th Cir. 1987) (holding that claims against federal contractors for radiation injuries resulting from nuclear weapons testing are barred by the FTCA's discretionary function exception), distinguishing *Gardner v. United States*, 780 F.2d 835 (9th Cir. 1986) (where the United States was liable under a non-delegable duty theory). *Accord Iron Partners v. Mar. Admin.*, No. C08-5217 RBL, 2009 WL 577539 (W.D. Wash. Mar. 5, 2009) (contracting with a private company for the operation of a shipyard); *Heinrich v. Sweet*, 308 F.3d 48, 59 (1st Cir. 2002) (contracting involved medical radiation experimentation); *Andrews v. United States*, 121 F.3d 1430, 1440-41 (11th Cir. 1997) (contracting with a private company for waste disposal from military bases); *Williams v. United States*, 50 F.3d 299, 303-05 (4th Cir. 1995) (contractor responsibility for maintenance at a federal building); *Kirchmann v. United States*, 8 F.3d 1273, 1275-78 (8th Cir. 1993) (contracting with a private company regarding a missile base); *Shuman v. United States*, 765 F.2d 283, 290-94 (1st Cir. 1985) (claims of negligent exposure to asbestos that involved contracting with a private shipyard).

Only where the government fails to carry out mandatory and specific oversight responsibilities that it imposes upon itself will the discretionary function exception not bar a suit based on an alleged failure to supervise a contractor. *See, e.g.*, *McMichael v. United States*, 856 F.2d 1026, 1033 (8th Cir. 1988) (where acts of government inspectors of an Army contractor munitions plant were not discretionary as the inspectors failed to follow a 51-part checklist for safety compliance).

III. Prong One

A. In general

As a general proposition, a determination as to whether a particular case should be dismissed due to the discretionary function exception will likely be straightforward. If the act or omission did not involve a specific and mandatory self-imposed obligation, the first prong of the analysis is satisfied in favor of the United States. *See, e.g.*, *Garcia v. U.S. Air Force*, 533 F.3d 1170, 1178 (10th Cir. 2008). Moreover, even if there was a specific and mandatory obligation, the first prong is satisfied if the United States did not violate it. *See, e.g.*, *Abreu v. United States*, 468 F.3d 20, 26-27 (1st Cir. 2006); *Elder v. United States*, 312 F.3d 1172, 1177 (10th Cir. 2002) (plaintiffs must, to prevail on the first prong, "show that [federal] employees violated a federal statute, regulation, or policy that is both 'specific and mandatory.' ").

Even if there was a violation of a specific and mandatory obligation, the first prong does not yield a determination against the United States if the violation made no difference with respect to the alleged negligence. *See, e.g.*, *Andrews v. United States*, 121 F.3d 1430, 1439, 1441 (11th Cir. 1997) (noting that the discretionary function exception bars the case where the evidence "showed that there was no causal link between the Navy's failure to segregate [waste materials, in violation of a self-imposed, specific, and mandatory obligation] and the contamination of plaintiffs' wells[]" (*id*. at 1439 n.5) and explaining that "to cancel discretionary function immunity, a directive must not only be specific and mandatory, it must also be *relevant* to the claims underlying the suit" (*id*. at 1441, emphasis in original). In *Andrews*, the violation that took place on a naval base did not matter because all of the material was then given to a contractor who took the material to a landfill in which there was no requirement or expectation of segregation. *Accord Montijo-Reyes v. United States*, 436 F.3d 19, 25 (1st Cir. 2006) (discretionary function exception application not vitiated where the alleged violation of a specific and mandatory obligation "did not proximately cause [the] harm."), and *Loughlin v. United States*, 286 F. Supp. 2d 1, 18 (D. D.C. 2003), *aff'd* 393 F.3d 155 (D.C. Cir. 2004) (to defeat the discretionary function exception, "a directive must not only be specific and mandatory, it must also be *relevant* to the claims underlying the suit." (emphasis in the original).

For this reason, as noted earlier, the appropriate formulation of the standard for the first prong is whether the United States violated a *pertinent self-imposed*, specific, and mandatory obligation. In addition, there is recent authority for the proposition that a violation of a federal statute requiring certain actions by the United States may not be germane to the Prong One analysis if the statute itself does not provide for a private cause of action. *See Abreu*, 468 F.3d at 30-32. *But see In re Katrina Canal Breaches Consolidated Litig.*, 647 F. Supp. 644, 717-18 (E.D. La. 2009), Notice of Appeal filed Feb. 25, 2010.

B. State law specific and mandatory obligations generally *not* relevant

It is important to remember that state law regimes imposing specific and mandatory obligations on private parties are *not* relevant unless the United States has made a specific decision to impose those rules upon itself. *See, e.g.*, *Sydnes v. United States*, 523 F.3d 1179, 1184 (10th Cir. 2008); *Kirchmann,* 8 F.3d at 1275-76. Efforts by plaintiffs to use such state law doctrines confuse the analogous private liability analysis with the discretionary function analysis.

C. Is the rule mandatory?

Sometimes there may be a dispute over whether a pertinent, self-imposed rule is mandatory. For example, in *Aragon v. United States*, 146 F.3d 819 (10th Cir. 1998), the plaintiff was unsuccessful in contending that language in an Air Force manual setting forth objectives to be reached constituted a mandatory, self-imposed obligation because "an agency manual, in contrast to a regulation, is not necessarily entitled to the force and effect of law . . . . This is particularly true if the agency did not intend the manual to be mandatory, but rather intended it as a guidance or advisory document." *Id.* at 824. Further, when, as in *Aragon*, the manual at issue states that actions should be taken "as practicable," they are not mandatory. *Id.* at 826. Thus, any written policies that cover the actions at issue in a given case should be examined closely to see if the government maintains discretion, notwithstanding language that might suggest that taking certain actions is required.

The thing to remember is that a rule or policy takes a case out of the discretionary function exception only if there is absolutely no other option for the government than to do a particular thing. As the Supreme Court explained in *Berkovitz*,

> the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive.

486 U.S. at 536.

Finally, the fact that a particular *objective* may be stated does not mean that the discretionary function exception does not apply if the objective is not reached. Rather, the issue is whether there was, as *Berkovitz* pointed out in the above-quoted language, a specific and mandatory "course of conduct" that was violated. *Berkovitz*, 486 U.S. at 539; *Aragon*, 146 F.3d at 823-24. *Accord Montez ex rel. Estate of Hearlson v. United States*, 359 F.3d 392, 395, 399 (6th Cir. 2004); *Cestonaro v. United States*, 211 F.3d 749, 755-56 (3d Cir. 2000). Thus, it is important to look very closely to determine whether an agency rule or policy is in fact mandatory within the ambit of the discretionary function exception analysis.

D. What about professional standards?

As the Ninth Circuit explained in *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1026-27 (9th Cir. 1989), applying *Berkovitz* and anticipating the analysis in *Gaubert*, "a safety or engineering standard operates to remove discretion under the FTCA when it is embodied in a *specific* and *mandatory* regulation or statute which creates clear duties incumbent upon the government actors" (emphasis in the original), but such standards do not remove discretion when they are not so embodied. The *Kennewick* court explained that "[o]nce the government, having balanced economic, social and political policy considerations, adopts safety standards in the form of specific and mandatory regulations or policy, employees do not have any discretion to violate these standards." *Id*. at 1026-27. However, those safety standards themselves must be sufficiently specific to deprive the government of the ability to satisfy Prong One.

E. Is the rule specific enough?

Sometimes there may be a dispute as to whether a pertinent, self-imposed, mandatory rule is sufficiently specific for the discretionary function exception not to apply. In this regard, it is important to recognize that the courts consistently require a significant degree of specificity to conclude that discretion has been removed. Moreover, this specificity relates to what the government actor must do with respect to the specific course of action the actor must take – not the result that must be achieved. *See, e.g.*, *Freeman*, 556 F.3d at 337-38 (explaining that "provisions [containing] generalized, precatory, or aspirational language that is too general to prescribe a specific course of action for an agency or employee to follow" do not remove discretion within the discretionary function exception); *OSI, Inc. v.*

United States, 285 F.3d 947, 952 (11th Cir. 2002) ("[A]n agency manual which provides only objectives and principles for a government agent to follow does not create a mandatory directive which overcomes the discretionary function exception."); *Elder*, 312 F.3d at 1177-78 (explaining that the National Park Service manual does not remove discretion because even though it "conveys the message that safety must be a priority, and it assists park management by focusing on a number of elements that should be encompassed by a safety program . . . it does not dictate what actions park employees must take in response to particular problems."); *Blackburn v. United States*, 100 F.3d 1426, 1431 (9th Cir. 1996), *cited with approval in Elder*, 312 F.3d 1172 (10th Cir. 2002) (involving the same analysis of the same National Park Service manual); *Snyder v. United States*, 504 F. Supp. 2d 136, 140-41 (S.D. Miss. 2007), *aff'd* 296 Fed. Appx. 399 (5th Cir. 2008) (where a requirement that "refuse, in any form, should not be disposed of where it may pollute surface or underground waters which are eventually to be used as drinking water" did not remove discretion because the requirement was not sufficiently specific).

IV. Prong Two

A. In general

By way of review, an allegedly negligent act or omission falls within the discretionary function exception if: (1) the function was discretionary; and (2) it was "susceptible to policy analysis" involving "social, economic, or political" policy considerations. *United States v. Gaubert*, 499 U.S. 315, 322-23, 325 (1991). The analysis of Prong Two issues is often less mechanical than Prong One.

No matter how obvious a policy may seem, it is always a good idea to lay out each policy, whether through evidence of factors explicitly considered or through an explanation why the alleged negligence implicates policy considerations, whether or not they were actually considered. Although, as shown below, actual consideration need not be demonstrated, it is always useful to discuss the actual considerations, if only to give the court a comfort level. When direct evidence of policy considerations is not available – a common problem in situations where the alleged negligence occurred many years or even decades before – it may be useful to secure witnesses qualified to discuss what those considerations would have been.

At the outset, it is important to remember that when Congress enacted the FTCA, its "thought was centered on granting relief for the run-of-the-mine accidents," namely, the "ordinary common-law torts," as distinguished from injuries resulting from discretionary government activities. *Dalehite*, 346 U.S. at 28, 30. The most frequently cited example in the legislative history was "negligence in the operation of vehicles." *Id.* at 28. As the Supreme Court noted in *Gaubert*, the negligent operation of an automobile generally would not be within the discretionary function exception because decisions in driving "can hardly be said to be grounded" in policy. *Gaubert*, 499 U.S. at 325.

B. Key *Gaubert* holdings

In *Gaubert*, the Court explained that if the government had discretion under Prong One, the discretionary function exception applies if the government's conduct is "susceptible to policy analysis," involving "social, economic, or political" policy considerations. 499 U.S. at 323-31. The details of the Court's analysis are worth repeating:

1. "Because the purpose of the exception is to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort . . . the exception protects only governmental actions and decisions based on considerations of public policy." *Id.* at 323 (quotations from *Varig* and *Berkovitz* omitted).

2. In addition to planning-level decisions, which are plainly within the exception, "the actions of Government agents involving the necessary element of choice and grounded in the social, economic, or political goals of the statute and regulations are protected." *Id*. Thus, the operational/planning distinction set forth by the Fifth Circuit in ruling against the United States in the underlying action (whereby the planning decisions were deemed to be within the exception, but operational decisions were not) was rejected by the Supreme Court. *See id.* at 326 (noting that *Dalehite* contained "no suggestion that decisions made at an operational level could not also be based on policy," and referring to the "nonexistent dichotomy between discretionary functions and operational activities").

3. The argument that "challenged actions fall outside the discretionary function exception because they involve the mere application of technical skills" fails because that "is just another way of saying that the considerations involving the day-to-day management . . . are so precisely formulated that decisions at the operational level never involve the exercise of discretion within the meaning of § 2680(a), a notion that we have already rejected." *Id.* at 331. The Court then went on to address the question of when "technical" decisions might be outside the scope of the exception, explaining that while it "may be that certain decisions resting on mathematical calculations, for example, involve no choice or judgment in carrying out the calculations," the exception applies when the "challenged actions involv[e] the exercise of choice or judgment." *Id.*

4. "[I]f the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy. On the other hand, if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations." *Id.* at 324.

5. "The focus of the inquiry is not on the agent's subjective intent in exercising [discretion], but on the nature of the actions taken and on whether they are susceptible to policy analysis." *Id.* at 325. Thus, as the courts largely held before and have uniformly held after the *Gaubert* decision, there need not be a demonstration of a conscious decision to carry out or not to carry out a particular action for a matter to be within Prong Two. *See, e.g.*, *Shansky v. United States*, 164 F.3d 689, 692 (1st Cir. 1999) (noting that in light of *Gaubert*, the "critical question is whether the acts or omissions that form the basis of the suit are susceptible to a policy-driven analysis, not whether they were the end product of a policy-driven analysis"); *Miller v. United States*, 163 F.3d 591, 593 (9th Cir. 1998) (the challenged conduct "need not be actually grounded in policy considerations, but must be, by its nature, susceptible to a policy analysis"); *In re Consol. U.S. Atmospheric Testing Litig*., 820 F.2d 982, 998-99 (9th Cir. 1987) (a pre-*Gaubert* decision citing cases in several circuits affirming that the focus of the inquiry should be on the nature of the government's action and whether that action was susceptible to policy analysis).

C. Application of the *Gaubert* criteria

Where does all this leave us in determining whether a case should be dismissed on discretionary function exception grounds, when there are no violations of self-imposed, specific, and mandatory obligations? Some case law stands for the proposition that cost alone cannot be a basis for a failure to act. However, that proposition does not pass muster because situations certainly exist where the cost of acting may be so high that the government is willing, as a policy matter, to take the chance that a bad thing will not happen. *See Nat'l Union Fire Ins. v. United States*, 115 F.3d 1415, 1422 (9th Cir. 1997) (reconciling conflicting statements about cost in *ARA Leisure Services v. United States*, 831 F.2d 193, 195 (9th Cir. 1987) and *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018,1028 (9th Cir. 1989)). In the *National Union* case, the court stated that "where a statute or policy plainly requires the government to balance expense against other desiderata, then considering the cost of greater safety is a discretionary function." As the First Circuit explained in *Shuman v. United States*, 765 F.2d 283, 290 (1st Cir. 1985), "lack of due care in promulgating a policy, or in having no policy or program at all on an issue, however imprudent it might seem, is encompassed within the discretionary function exception." In *Allen v. United States*, 816 F.2d 1417, 1424 (10th Cir. 1987) (involving nuclear testing), the Tenth Circuit echoed this point, observing that "[h]owever erroneous or misguided [the government's decisions] may seem today, it is not the place of the judicial branch [through the FTCA] to now questions them."

D. Cases where Prong Two applies

In *Elder*, 312 F.3d at 1181-84, the Tenth Circuit set forth a comprehensive discussion of how to distinguish between cases that implicate policy concerns and those that do not. In that case, the court explained that "the very existence of the regulation creates a strong presumption" that the federal employees' decisions were grounded in agency policies. The court, however, noted that "the facts of the specific case may overcome the presumption to which the government is entitled under *Gaubert*" and that "[i]n certain circumstances, it may be obvious that a decision implicates none of the public policies that ordinarily inform an agency's decisionmaking." *Id.* at 1182. Essentially, the test is whether the alleged negligence involved a violation of a policy consideration or was simply an ordinary instance of someone "dropping the ball." Notwithstanding the Ninth Circuit's observation in *Terbush v. United States*, 516 F.3d 1125, 1129 (9th Cir. 2008) that "[c]ourts have been reluctant to create formulaic categories or to demarcate flashpoints on [the spectrum between decisions that obviously implicate policy and those that obviously do not] to illuminate which governmental decisions fall within the discretionary function exception," examination of the post-*Berkovitz* and post-*Gaubert* case law does provide some guidance.

Claims that complain of negligent design of facilities are typically found to be grounded in policy and are thus insulated from tort suit by the discretionary function exception. *See, e.g.*, *Fothergill v. United States*, 566 F.3d 248, 254 (1st Cir. 2009) (court upheld dismissal of Postal Service customers' suits for injuries they received when another customer drove her car through the front entrance of the post office building); *Riley v. United States*, 486 F.3d 1030, 1034 (8th Cir. 2007) (court upheld dismissal of motorist's suit alleging United States Postal Service negligently placed, maintained, and failed to relocate mailboxes along highway); *Shansky v. United States*, 164 F.3d 688, 692-96 (1st Cir. 1999) (court upheld summary judgment for government where visitor to a national historic site sustained injuries after falling down a flight of steps); *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1027 (9th Cir. 1989) (claims against governmental decisions on the design of the irrigation canal barred because such decisions were rooted in policy). Likewise, claims that complain of negligent governmental plans for safety in national parks are typically found to be grounded in policy, and thus insulated from tort suit by the discretionary function exception. *See, e.g.*, *Merando v. United States*, 517 F.3d 160, 165 (3d Cir. 2008); *Baum v. United States*, 986 F.2d 716, 721-24 (4th Cir. 1993); *Autery v. United States*, 992 F.2d 1523, 1524-25 (11th Cir. 1993). In short, alleged governmental negligence in the operation of government facilities will be insulated from tort suit by Prong Two if the policy implications of the alleged negligent acts or omissions can be demonstrated or at least articulated.

Cases that involve injuries allegedly due to governmental failures to warn of dangers illustrate how courts treat the question of whether the asserted negligence involves policy considerations. In *Wells v. United States*, 851 F.2d 1471, 1476-77 (D.C. Cir. 1988), the court reviewed the Environmental Protection Agency's decisions made during an investigation of an area around three lead smelters. The court held that the agency's decisions regarding the dissemination of information concerning lead risks to a nearby neighborhood involved social, economic, and political policy considerations and were thereby protected by the discretionary function exception. Similarly, the same circuit in *Loughlin v. United States*, 393 F.3d 155, 164 (D.C. Cir. 2004), *affirming* 286 F. Supp. 2d 1, 23 (D.D.C. 2003), concluded that the government's "decision to bury . . . munitions without disclosing their burial during World War I or its immediate aftermath" was "fraught with . . . policy considerations," including "competing concerns of secrecy and safety, national security and public health." *Loughlin*, 393 F.3d at 164. *Loughlin* also rejected the argument that the exception did not apply to claims that the government has an ongoing duty to warn and explained that a "judicially constructed requirement to rethink particular decisions not to warn on a regular basis for over 80 years would constitute precisely the 'judicial second-guessing' that the discretionary function exception was intended to" prevent. *Id*. Additionally, with respect to another kind of failure to warn – warnings of possible terrorist threats – the D.C. Circuit explained that such claims implicated the weighing of public policy concerns. *See Macharia v. United States*, 334 F.3d 61, 66-67 (D.C. Cir. 2003).

This approach in dismissing failure to warn claims has been repeatedly taken by the courts. *See, e.g.*, *Hawes v. United States*, 409 F.3d 213, 218-22 (4th Cir. 2005) (maintenance and warnings regarding an obstacle course on a military base); *Demery v. U.S. Dep't of Interior*, 357 F.3d 830, 834 (8th Cir. 2004) (warning of thin ice on a frozen lake); *Theriot v. United States,* 245 F.3d 388, 399-400 (5th Cir. 1998) (failure to place a warning sign by an underwater sill in a lake created by the Army Corps of Engineers); *Maas v. United States*, 94 F.3d 291, 297 (7th Cir. 1996) (exception applied to failure to warn former service members of radiation exposure, explaining that "[d]eciding whether health risks justify the cost of a notification program, and balancing the cost and the effectiveness of a type of warning, are discretionary decisions covered by § 2680(a)"); *Kiehn v. United States*, 984 F.2d 1100, 1105 (10th Cir. 1993) ("decision not to post warning signs in remote areas of a national monument inherently required a balancing of public policy objectives, such as resource allocation, visitor safety and scenic preservation" and was within the exception); *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1542-43 (10th Cir. 1992) (dismissing failure to warn claim against the Army because the dissemination of information "was infused with policy implications including prompt and cost-effective yet safe cleanup of hazardous wastes"); *Lockett v. United States*, 938 F.2d 630, 638-39 (6th Cir. 1991) (dismissing failure to warn claim against the EPA because regulators' decisions involved the sufficiency of evidence, allocation of resources, and priorities regarding health risks); *In re Joint E. & S. Districts Asbestos Litig.*, 891 F.2d 31, 37 (2d Cir. 1989) (discretionary function exception applied in suit against government for wrongful death of person who died by exposure to asbestos on merchant ships operated by the United States during World War II); *U.S. Fidelity & Guaranty Co. v. United States*, 837 F.2d 116, 122 (3d Cir. 1988) (noting the EPA's decisions in conducting remedial activities "necessarily require the setting of priorities in light of the risks presented at various sites and the finite resources available to address the problem"); *Bowman v. United States*, 820 F.2d 1393, 1395 (4th Cir. 1987) (government not liable for failure to post a guardrail along the Blue Ridge Parkway because the decision may have implicated policy considerations such as protecting the scenic vista); *In re Consolidated U.S. Atmospheric Testing Litig.*, 820 F.2d at 996-98 (9th Cir. 1987) (exposure to nuclear radiation); *Smith v. Johns-Manville Corp.*, 795 F.2d 301, 307-08 (3d Cir. 1986) (exception applied to failure to warn about hazards of stockpiled asbestos); *Cisco v. United States*, 768 F.2d 788, 789-90 (7th Cir. 1985) (finding exception applied "[i]n deciding not to warn [the plaintiff] about the contaminated landfill . . . [where] the EPA made political, social and economic judgments pursuant to its grant of authority").

Sometimes litigants mistakenly state that the Supreme Court's decision in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), provides a basis for asserting that the discretionary function exception cannot apply to activities in furtherance of a decision that has already been made, regardless of whether a specific, mandatory, and self-imposed obligation has been violated. In *Indian Towing*, the U.S. Coast Guard failed to keep a lighthouse's light lit, causing a shipping accident. The Court rejected the government's argument that "uniquely governmental functions" were not within the FTCA's waiver of sovereign immunity. *Id*. at 67. In the ensuing years, some courts relied on this case to support the proposition that once the government decides to achieve a goal, its negligent failure to fulfill that goal is, *a fortiori*, outside the discretionary function exception. *But see Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1023-25 (9th Cir. 1989) (disagreeing with such a proposition). Finally, in *Gaubert*, 499 U.S. at 326, the Supreme Court put this misconception to rest, explaining that the government "did not even claim the benefit of the exception" in *Indian Towing*. *See Harrell v. United States*, 443 F.3d 1231, 1237 (10th Cir. 2006) (since *Gaubert*, a number of circuits have explicitly recognized that *Indian Towing* "is simply not persuasive authority in the context of the discretionary function exception") (collecting cases). If the *Indian Towing* case were litigated today, it would avoid dismissal based on the discretionary function exception if: (1) government employees violated a specific and mandatory instruction with respect to *how* to keep the light lit (but that would be a Prong One, not a Prong Two, analysis); or (2) the failure at issue was the result of run-of-the-mill (or according to the Court in *Dalehite*, 346 U.S. at 30, "run of the mine") negligence that did not implicate possible policy considerations.

E. Cases where Prong Two does not apply

Cases where government failures were deemed *not* to be susceptible to policy determinations involve various circumstances. One type is an acute danger situation in which no policy could be articulated for failing to intervene. *See Andrulonis v. United States*, 952 F.2d 652, 655 (2d Cir. 1991) (involving a federal scientist who observed the plaintiff conducting an experiment and was fully cognizant of the immediate danger posed by the experiment, but failed to warn plaintiff of an imminent and clear danger). In that case, no policy for essentially failing to say, "Hey, look out!" could be articulated. *Id*. at 664-65.

Another type of situation is where the government made a policy decision to warn, and the failure to do so – while not a violation of a specific and mandatory requirement – could not be said to implicate a contrary policy. *See, e.g.*, *Oberson v. U.S. Dep't of Agric., Forest Serv.*, 514 F.3d 989, 998 (9th Cir. 2008) (failure to deal with a known serious hazard prior to the accident in question was deemed not to be policy-based, in the absence of evidence to the contrary); *Cope v. Scott*, 45 F.3d 445 (D.C. Cir. 1995) (where government assertion that its failure to place a hazard sign on a park road could have been for aesthetic reasons was rejected because it was shown that a parkway-wide decision for that stretch of road was to only use safety as a criteria) (distinguished in *Loughlin*, 393 F.3d at 165-66); *Faber v. United States*, 56 F.3d 1122, 1125-27 (9th Cir. 1995) (government liable for failure to post adequate warning signs to protect divers in a national park, where the failure to post at the location did not have any conceivable policy basis and a specific policy to post such warnings existed); *Summers v. United States*, 905 F.2d 1212, 1215 (9th Cir. 1990) (government liable where failure to warn about the dangers of stepping on hot coals did not involve policy considerations and was a departure from established policies). These cases are distinguishable from the failure to warn cases cited above, where the discretionary function exception was found applicable, because the policy implications in the earlier cited cases were not contradicted by more specific policy choices.

Also outside the discretionary function exception are cases in which the government's failure to act was the result of simply ignoring an obvious problem, namely, where only the government was in a realistic position to address the problem and no policy implications could be explicated. *See, e.g.*, *Bolt v. United States*, 509 F.3d 1028, 1033-35 (9th Cir. 2007) (failure to maintain a parking lot on a military base where plaintiff was injured due to unplowed ice was found not to have policy implications); *Whisnant v. United States*, 400 F.3d 1177, 1185 (9th Cir. 2005) (disregard of "reports and complaints describing the unsafe [mold] condition of the meat department" in a naval commissary had no conceivable policy implications and therefore was not insulated from tort suit by the exception); *O'Toole v. United States*, 295 F.3d 1029 (9th Cir. 2002) (where the government ignored routine maintenance of an irrigation system, causing a river to back up and seriously damage plaintiffs' land, where the government delegated that responsibility to an Indian tribe and was aware that the tribe was not fulfilling its obligations); *Marlys Bear Medicine v. United States*, 241 F.3d 1208, 1216-17 (9th Cir. 2001) (no articulable policy considerations involved in government's breach of a contractual duty to supervise the safety of workers at a logging site); *Cestonaro v. United States*, 211 F.3d 749, 756-57 (3d Cir. 2000) (inadequate lighting in a parking lot next to a national historic site where no warnings of dangers were given fell outside the exception because such warnings would not have been inconsistent with "returning the area to its historic appearance"); *Gotha v. United States*, 115 F.3d 176, 181 (3d Cir. 1997) (holding that the exception is no shield to a claim of negligence in failing to provide handrails or adequate lighting on a footpath); *In re Glacier Bay*, 71 F.3d 1447, 1453 (9th Cir. 1995) (spacing of sounding lines in charting of inlet was simply a matter of "scientific hydrographic judgment" with no policy implications). The reader may have observed the number of Ninth Circuit cases in which the government's Prong Two arguments have been rejected. However, it is noteworthy that these cases are distinguishable from situations in which policy implications can be articulated.

F. Problems with *Gaubert* analysis in some Ninth Circuit opinions

Panels in the Ninth Circuit sometimes veer away from the teachings of *Gaubert*. As noted earlier, there is no such thing as an "operational/planning" distinction in the Prong Two analysis. *See supra* Part IV.B.2. While the facts as understood by the panels in cases like *Whisnant*, *O'Toole*, and *Bear Medicine*, *supra*, may have warranted the results reached, the panels' discussion of the legal standards is questionable. In *Bear Medicine*, a panel held that the "decision to adopt safety precautions may be based in policy considerations, but the implementation of those precautions is not . . . . [S]afety measures, once undertaken, cannot be short changed in the name of policy." *Bear Medicine*, 241 F.3d at 1215, 1216-17. This statement was, in effect, an attempted resurrection of the *Gaubert*-discredited operational/planning distinction. A later panel, in *Whisnant*, sought to refine the *Bear Medicine* statement by adding that "[o]ur case law reveals one exception . . . to the design/implementation distinction: The implementation of a government policy *is* shielded where the implementation itself implicates policy concerns . . . ." 400 F.3d at 1182 (emphasis in the original). That refinement hews closer to *Gaubert*, although it comes perilously close to reversing the *Gaubert* presumption that government actions that are part of an authorized program and have not violated a specific, mandatory, and self-imposed obligation are within the discretionary function exception. *See supra* Part IV.B.4. *See generally Irving v. United States*, 162 F.3d 154, 182 (1st Cir. 1998) (en banc) (where the majority determined that the activity in question was insulated from tort suit by Prong Two, but the dissent took the view that the majority had erroneously treated the presumption as irrefutable).

While the Ninth Circuit panel in *Terbush v. United States*, 516 F.3d 1125 (9th Cir. 2008), appeared to recognize this tension between some Ninth Circuit cases and *Gaubert* on this point, it ruled that "there still must be some support in the record that the decisions taken are 'susceptible' to policy analysis for the discretionary function exception to apply." *Id.* at 1134. The tension between this Ninth

Circuit precedent and the Supreme Court's admonitions in *Gaubert* may be quite limited because the context of this statement in *Terbush* seems to limit the exception to what a court may view as matters of routine maintenance. *See also Bailey v. United States*, 623 F.3d 855, 861-63 (9th Cir. 2010) (finding that *Whisnant* did not require reversal of a district court discretionary function exception dismissal, over a dissent by *Whisnant*'s author).

G. A framework that is consistent with the results

The D.C. Circuit's discussion in *Loughlin v. United States*, 286 F.Supp.2d 1, 18 (D.D.C. 2003), *aff'd* 393 F.3d 155, 165-66 (D.C. Cir. 2004)*,* about its earlier decision in *Cope* provides a useful framework that reconciles the facts of the various decisions. In *Cope v. Scott*, 45 F.3d 445 (D.C. Cir. 1995), the dispute was whether the absence of a warning sign on a winding road, which was also a commuter route, in a national park was actionable negligence under the FTCA or whether the failure to post the warning sign was protected under Prong Two. The government argued that aesthetic considerations were implicated in the failure to post the warning sign and therefore the exception applied. Plaintiff, however, was able to show that the Park Service had already made a decision that safety would trump aesthetics because the commuter route was replete with similar signs. The *Loughlin* court explained that in *Cope* "the presence of no less than 23 signs on the same strip of road was probative of the nature of the decision to place an additional warning sign, because it demonstrated that the Government was not concerned with preserving a pristine view on the particular stretch of road." *Loughlin*, 393 F.3d at 166. The plaintiff rebutted the presumption that policy was implicated and could thus proceed with the suit because the government was unable to show anything to the contrary *i.e.*, that, notwithstanding the policy choice suggested by the Park Service's actions, another policy choice could have been implicated with respect to the location at issue. So, the following framework ought to govern any dispute on Prong Two where there is no actual evidence of a conscious policy decision:

1. As a general matter, actions are presumed to be susceptible to policy analysis *if policy considerations can be articulated*, regardless of whether it can be shown that they were actually considered. The burden is on the plaintiff to demonstrate otherwise. (Where no policy consideration can be articulated, as in *Andrulonis v. United States*, 952 F.2d 652, 655 (2d Cir. 1991), the exception does not apply.)
2. However, if it can be shown that a policy decision contrary to that articulated by government counsel had, in fact, been made and that the allegedly negligent acts or omissions were counter to that policy, then the burden shifts to the government to affirmatively show that the other policies were part of the mix.
3. If the government is unable to meet the burden that has been shifted to it, then the exception does not bar the suit.

In any event, as a matter of sound litigation strategy, when a determination has been made by government counsel that the discretionary function exception should be raised, every effort should be made to identify particular facts which support the proposition that the negligence at issue was susceptible to policy judgments.

H. "Technical" decisions

A related question arises when plaintiffs argue that the alleged negligence only involved technical or scientific judgments, which inherently have no policy implications. *Gaubert* rejected that notion. *See supra* Part IV.B.3. The mere fact that a judgment is characterized as technical or scientific does not, *a fortiori*, remove it from the discretionary function exception's umbrella because these judgments may still implicate policy concerns. As *Gaubert* explained, while it "may be that certain decisions resting on mathematical calculations, for example, involve no choice or judgment in carrying out the calculations," a "technical" decision can still have policy implications. 499 U.S. at 331. The question in any given case is whether such implications can be articulated; if so, then the matter falls within the discretionary function exception. *See Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1031 (1989) (where most of the allegations were rejected on discretionary function exception grounds but one claim was deemed to be outside the exception because it was based solely on technical considerations). In other instances, however, technical decisions may have policy implications that bring them within Prong Two.

V. If the discretionary function exception applies, then the district court does not have jurisdiction over the case.

The district court does not have jurisdiction over an FTCA case if the alleged negligence comes within the ambit of the discretionary function exception. *See, e.g.*, *Freeman v. United States*, 556 F.3d 326, 334-35 (5th Cir. 2009); *CNA v. United States*, 535 F.3d 132, 144 (3d Cir. 2008); *Hinsley v. Standing Rock Child Protective Services*, 516 F.3d 668, 672 (8th Cir. 2008); *Garcia v. U.S. Air Force*, 533 F.3d 1170, 1175-76 (10th Cir. 2008); *Abreu v. United States*, 468 F.3d 20, 23 (1st Cir. 2006); *Sharp v. United States*, 401 F.3d 440, 443 (6th Cir. 2005); *Loughlin v. United States*, 393 F.3d 155, 158 (D.C. Cir. 2004); *Wang v. United States*, 61 Fed. Appx. 757, 759 (2d Cir. 2003); *GATX/Airlog Co. v. United States*, 286 F.3d 1168, 1173 (9th Cir. 2002); *OSI, Inc. v. United States*, 285 F.3d 947, 951 (11th Cir. 2002); *Medina v. United States*, 259 F.3d 220, 223-24 (4th Cir. 2001). *But see Williams v. Fleming*, 597 F.3d 820, 823-24 (7th Cir. 2010) (treating the exception as a defense, rather than a question of jurisdiction).

Jurisdiction is a threshold issue and the separation of powers doctrine requires a federal court to determine whether it has jurisdiction at the outset. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). Therefore, rather than deferring the issue to trial, the district court must resolve the discretionary function exception issue first. In *Steel Co.*, the Court explained the fundamental importance in determining jurisdiction, stating that "[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Id.* at 94 (quoting *Ex parte McCardle*, 74 U.S. 506, 514 (1868)).

Consequently, dispositive motions may be brought under FED. R. CIV. P. 12(b)(1) even if there are facts in dispute. Where facts are in dispute, the district court may make its own factual determinations without converting the motion into one for summary judgment. On a Rule 12(b)(1) motion to dismiss, a court is not limited to the allegations of the complaint, but may consider materials outside of the pleadings. *See Land v. Dollar*, 330 U.S. 731, 735 (1947) (stating that on a motion to dismiss for lack of jurisdiction, a court "may inquire by affidavits or otherwise, into the facts as they exist"); *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995) (on a 12(b)(1) motion, the court is "free to weigh the evidence and satisfy itself as to the existence of its power to hear the case") (citing *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)). In a motion to dismiss under Rule 12(b(1), the moving party may submit

> affidavits or any other evidence properly before the court . . . . It then becomes necessary for the party opposing the motion to present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction. The district court obviously does not abuse its discretion by looking into this extra-pleading material in deciding the issue, even if it becomes necessary to resolve factual disputes.

St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir. 1989). *Accord, e.g.*, *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005); *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995); *ALX El Dorado v. Sw. Sav. & Loan Ass'n*, 36 F.3d 409, 410 (5th Cir. 1994).

Some courts have concluded that they should convert such a 12(b)(1) motion into a motion to dismiss under Rule 56. *See e.g.*, *Garcia*, 533 F.3d at 1174-75. Other courts, however, hold that this view is inappropriate if they believe that the jurisdictional issues are intertwined with the merits issues. *See, e.g.*, *Williams*, 50 F.3d at 304; *ALX El Dorado*, 36 F.3d at 410. As a practical matter, however, it may not make a difference in many cases. *See Baum v. United States*, 986 F.2d 716, 719 (4th Cir. 1993). On the other hand, it is wise to style the dispositive motion as one for dismissal under Rule 12(b)(1) and (h)(3) because, on a Rule 12(b)(1) motion, a court is free to make factual findings in the face of conflicting evidence – something it may not do on a motion for summary judgment. It may be prudent, however, to style such a motion as a motion to dismiss or, in the alternative, for summary judgment. If you are able to marshal your evidence early in the litigation, it may be wise to file a motion to dismiss in lieu of an answer. At that point, if a plaintiff seeks discovery, you may seek an agreement to limit discovery to the jurisdictional motion, a sound practice. Such an approach saves the resources of the parties and the court. Nevertheless, under certain conditions, it may be wiser to wait to file a discretionary function exception motion until all discovery is closed.

VI. Burden of proof

Because application of the discretionary function exception is generally deemed to be a jurisdictional question, most circuits have concluded that the burden of proof for establishing that the discretionary function exception does not apply is on the plaintiff. *See, e.g.*, *Freeman v. United States*, 556 F.3d 326, 334 (5th Cir. 2009); *Hawes v. United States*, 409 F.3d 213, 216 (4th Cir. 2005); *Wang v. United States*, 61 Fed. Appx. 757, 758-59 (2d Cir. 2003); *OSI, Inc. v. United States*, 285 F.3d 947, 951-52 (11th Cir. 2002); *Irving v. United States*, 162 F.3d 154, 168 (1st Cir. 1998); *Kiehn v. United States*, 984 F.2d 1100, 1105 (10th Cir. 1993). The Ninth Circuit, however, takes the view that the burden of proof is on the government. *See, e.g.*, *Prescott v. United States*, 973 F.2d 696, 701-02 (9th Cir. 1992). Other courts, however, have deemed that approach to be suspect in light of the Supreme Court's decision in *Gaubert*. *See, e.g.*, *Sharp v. United States*, 401 F.3d 440, 443-44 n.1 (6th Cir. 2005). In *Hart v. United States*, No. 10-1604, 2011 WL 69067 (8th Cir. Jan. 11, 2011), the Eighth Circuit, recognizing the division in the circuits, noted that it had "not yet taken a formal position on this precise issue," but set forth a series of circuit precedent suggesting that it would agree with the majority view. The Seventh Circuit, which recently concluded that the discretionary function exception is not jurisdictional, *see Williams v. Fleming*, 597 F.3d 820, 823-24 (7th Cir. 2010), has not reached the burden of proof issue. *See Rothrock v. United States*, 62 F.3d 196, 198 (7th Cir. 1995). In any event, this split may not be as significant in practice as it may appear in the abstract. What the *Prescott* rule does, in effect, is simply place on the government the burden of coming forward with presenting a *prima facie* case as to the application of the discretionary function exception. Once that burden has been met, the responsibility for rebutting it then lies with the plaintiff.

VII. Closing notes

It is important to remember that the Torts Branch must authorize the assertion of the discretionary function exception in any given case. Typically, this authorization will be obtained from the Torts Branch's Federal Tort Claims Act Section unless the case comes within the jurisdiction of one of the other Torts Branch Sections (Environmental Torts, Aviation/Admiralty, Constitutional and

Specialized Torts). The reason for this policy is to assure that the United States takes coherent and consistent positions on discretionary function exception issues.

Not every case will be defensible based on the discretionary function exception. A case may involve a violation of a pertinent self-imposed specific and mandatory obligation or a simple mistake that has no policy implications, but each case should be investigated closely to see if the exception applies.

Early discussions with agency counsel about the possibility of raising the discretionary function exception are always wise. Presentation of a discretionary function exception argument will often require considerable investigation and the earlier this is done, the better. If possible, consideration should be given to filing an early motion to dismiss in lieu of an answer. Particularly when an early motion is filed, it may be possible to convince opposing counsel and the court to stay all proceedings (except for discovery relating to the discretionary function exception) pending resolution of the dispositive motion.

Sometimes early presentation of the discretionary function exception argument, along with the supporting facts, may persuade opposing counsel to voluntarily dismiss. It does no one any favor to expend litigant and judicial resources on a case that the plaintiff cannot win.❖

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Jurisdiction Limits on Damages in FTCA Cases

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Generally, state law determines allowable damages in Federal Tort Claims Act (FTCA) suits. The FTCA provides that the United States shall be liable for money damages "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674 (2010). The FTCA also provides that liability is determined "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1) (2010); *see also Richards v. United States*, 369 U.S. 1, 9-10 (1962) (applying choice-of-law principles of the state where the negligence occurred to determine which state's substantive law on damages would govern in a multistate tort action). Although state law generally determines the type of damages allowed in FTCA suits, the FTCA imposes certain jurisdictional limitations on damages. Because these limitations define the scope of the government's waiver of sovereign immunity, they cannot be waived.

I. Only money damages are permitted under the FTCA.

A significant limitation of the FTCA is that only "money damages" are permitted. Federal district courts lack subject-matter jurisdiction under the FTCA to award equitable relief and declaratory judgments. *See* 2 Lester S. Jayson & Robert C. Longstreth, Handling Federal Tort Claims, § 9.02 (1996). Courts have interpreted "money damages" to mean the payment of lump-sum judgments. *See, e.g.*, *Frankel v. Heym*, 466 F.2d 1226, 1229 (3d Cir. 1972) ("The relaxation of sovereign immunity is peculiarly a matter of legislative concern, responsibility and policy. If novel types of awards are to be permitted against the government, Congress should affirmatively authorize them."). Accordingly, district courts lack jurisdiction to order the United States to pay future periodic payments, to purchase annuity contracts to pay future periodic payments, or to establish a trust for the benefit of the plaintiff. *See, e.g.*, *Hill v. United States*, 81 F.3d 118, 120 (10th Cir. 1996); *Hull v. United States*, 971 F.2d 1499, 1505 (10th Cir. 1992); *Reilly v. United States*, 863 F.2d 149, 169 (1st Cir. 1988); *Muenstermann v. United States*, 787 F. Supp. 499, 527 (D. Md. 1992).

It is clear that district courts cannot apply state statutes mandating periodic payment of judgments by the United States. *See Hill*, 81 F.3d at 120. It is also clear that district courts cannot enter a judgment that would obligate the United States to make future periodic payments or purchase an annuity for that purpose. *See Reilly*, 863 F.2d at 169. Nevertheless, the United States may rely on periodic-payment-of-judgment statutes in some states to argue that all or part of a lump-sum judgment must be paid into an account that will make periodic payments to the injured party with any balance reverting to the United States upon the death of the party. This argument is based on 28 U.S.C. § 1346(b), which provides that the United States is liable if a private person, under similar circumstances, "would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

In *Hill*, the Tenth Circuit held that the United States was entitled to the private-party equivalent of Colorado's periodic-payment-of-judgment statute, which provided that the tortfeasor's obligation to make certain future periodic payments terminates upon the death of the plaintiff. *Hill*, 81 F.3d 118. The

United States was entitled to similar treatment because a private defendant's obligation would have terminated upon the death of the injured party. Thus, the Tenth Circuit ordered the district court to establish a reversionary trust for those portions of the judgment that would otherwise have been subject to the periodic-payment-of-judgment statute. *Id*. at 121. This argument would probably apply only to periodic-payment-of-judgment statutes that terminate the tortfeasor's obligation upon the death of the plaintiff. *See, e.g.*, CAL. CIV. CODE § 667.7 (2010); Colo. Rev. Stat. §§ 13-64-201–64-206 (2010); N.Y. C.P.L.R. §§ 5031- 5039 (2010); WASH. REV. CODE § 4.56.260 (2009); WIS. STAT. § 655.015 (2009); *see also Cibula v. United States*, 551 F.3d 316, 320-22 (4th Cir. 2009) (holding that the United States was entitled to the private-party equivalent of California's periodic-payment-of-judgment statute); *Dutra v. United States*, 478 F.3d 1090 (9th Cir. 2007) (holding that the United States could properly invoke Washington's periodic-payment-of-judgment statute) ("The FTCA authorizes courts to craft remedies that approximate the results contemplated by state statutes, and nothing in the FTCA prevents district courts from ordering the United States to provide periodic payments in the form of a reversionary trust."). *Id*. at 1092.

Likewise, although a district court cannot order the United States to establish a trust, *Hull v. United States*, 971 F.2d 1499, 1505 (10th Cir. 1992), a district court has the inherent power to require a plaintiff to use a lump-sum payment from the United States to establish a trust, including a trust with a reversionary interest to the United States. In *Hull*, the Tenth Circuit ruled that, "provided . . . the government satisfies its *obligation* up front in one lump sum, nothing in the FTCA prohibits courts from exercising their inherent authority to structure awards or to impose trusts or reverter conditions to ensure that the damage recovery is in the best interest of the victim." *Id.* (emphasis in original).

The Tenth Circuit's opinion in *Hull* and its subsequent opinion in *Hill*, appear to establish a district court's inherent power to create a trust – with or without a reversionary interest – in situations where it is in the best interests of the plaintiff. The Tenth Circuit in *Hull* noted that other courts have allowed reversionary trusts to be established where the injured party has an uncertain or shortened life expectancy. *See Hull*, 971 F.2d at 1506 (citing *Robak v. United States*, 503 F. Supp. 982, 983 (N.D. Ill. 1980), *aff'd in part and rev'd in part on other grounds*, 658 F.2d 471 (7th Cir. 1981), and *Nemmers v. United States*, 795 F.2d 628 (7th Cir. 1986)).

In *Deasy v. United States*, 99 F.3d 354, 360 (10th Cir. 1996), the Tenth Circuit affirmed the district court's award of future medical expenses in the form of a trust with any sums remaining at plaintiff's death reverting to the United States. This decision is important because it was not based on the "best interests" test established in *Hull* or on the "private-party equivalent" test used in *Hill*. Instead, although not explicitly announced by the court, the decision appears to rest on the rationales discussed in *Nemmers* and *Robak*: the uncertainty of the victim's life expectancy. It is important to note that in each of these cases, the United States was not ordered or required to establish a reversionary trust or to be the grantor of a reversionary trust; rather, the United States was simply required to pay the lump-sum judgment into a trust which provided that any money remaining in the trust would revert to the United States upon the death of the plaintiff.

More flexibility exists with respect to settlements. When the United States settles an FTCA claim or suit it can agree to establish a reversionary trust for the benefit of the injured party, to purchase annuities to make future periodic payments, or both, provided the terms of the settlement do not otherwise violate 28 U.S.C. § 1346(b). In other words, the United States may agree as part of a settlement to establish and fund a trust or to purchase annuities, provided its obligation is fully satisfied at the time of the settlement. However, the United States cannot agree to make future periodic payments directly from the judgment fund nor can the United States guarantee future periodic payments from annuities because that would violate the FTCA's requirement of lump sum "money damages" only. The difference between settlements and judgments is that 28 U.S.C. § 1346(b) places a jurisdictional limit on federal district courts' authority in FTCA suits.

II. Damages are limited by the plaintiff's administrative claim.

The basic rule, set forth in 28 U.S.C. § 2675(b), provides that an action may not be instituted

> for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

In short, a plaintiff generally may not recover for more than the amount claimed. *See, e.g.*, *Lebron v. United States*, 279 F.3d 321, 329-31 (5th Cir. 2002).

Additionally, plaintiffs may not recover more than the amount claimed for each particular type of damage. For example, if a plaintiff claimed $100,000 in property damage and $100,000 for personal injuries, and the court finds $50,000 in property damages and $500,000 in personal injuries, the judgment would be limited to $150,000, even though the total amount claimed was $200,000. *See Kokaras v. United States*, 980 F.2d 20, 23 (1st Cir. 1992) (holding that property damage is severable from personal injury and that failure to put a sum certain on administrative claim for personal injury does not prevent plaintiffs from seeking property damage where sum certain requirement was satisfied for such damage); *Allen v. United States*, 517 F.2d 1328, 1330 (6th Cir. 1975) (holding that the case was properly dismissed where plaintiffs filed an administrative claim for property loss but not personal injury or loss of consortium, yet filed a complaint alleging only personal injury and loss of consortium); *Schwartzman v. Carmen*, 995 F.Supp. 574, 576 (E.D. Pa. 1998) (where sum certain was listed as to property but not to personal injury, plaintiff could pursue property damages but not personal injury claims in district court).

III. Punitive damages are prohibited.

Section 2674 of Title 28 provides that the United States "shall not be liable . . . for punitive damages." In 1992, the Supreme Court clarified the punitive damages provision of the FTCA. *See Molzof v. United States*, 502 U.S. 301 (1992). In *Molzof*, the Court ruled that punitive damages under the FTCA should be interpreted according to federal common law. *See id.* at 312. Under the common law, awards exceeding actual losses are not *per se* punitive and may be recovered when state law regards these damages as compensatory. Where, however, the award of damages depends upon "proof that the defendant has engaged in intentional or egregious misconduct," the intent of the damages is to punish the tortfeasor, rendering them unrecoverable under the FTCA. *See id.* In short, courts may not award damages against the United States based on the degree of culpability of the tortfeasor.

Two situations merit separate discussion. First, in wrongful death cases where the state statute provides (or has been construed to provide) only punitive damages, section 2674 limits the award to the "actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof." *See, e.g.*, *D'Ambra v. United States*, 481 F.2d 14 (1st Cir. 1973) (finding award of damages to be punitive because it included the ultimate value of the estate, an amount the surviving parents would never have actually received). Second, with respect to damages for loss of enjoyment of life, the Court in *Molzof* held that an award for such damages to a comatose patient is not punitive, *per se*, and may be recoverable under the FTCA, provided it is allowed under state law.

IV. The FTCA limits awards of prejudgment and postjudgment interest.

In most jurisdictions, tort damages include prejudgment and postjudgment interest. In FTCA cases, these issues are controlled by federal law. The FTCA specifically precludes awards of prejudgment interest. *See* 28 U.S.C. § 2674 (2010). Accordingly, regardless of state law, the injured party is not entitled to an award of prejudgment interest against the United States.

Postjudgment interest is available on FTCA judgments. The availability of postjudgment interest, the period of entitlement, and the rate of interest are prescribed by federal statutes. *See* 28 U.S.C. § 1961 (2010) (rate of interest); 31 U.S.C. § 1304 (2010) (entitlement). Section 1304 provides that postjudgment interest accrues only when the United States unsuccessfully appeals an adverse monetary judgment and only if the plaintiff has presented a copy of the judgment to the United States Treasury. The period of entitlement for postjudgment interest runs from the day the plaintiff files the judgment with the Department of the Treasury to the day preceding the mandate of affirmance by the court of appeals or Supreme Court. If a plaintiff fails to file the judgment with this department, then he or she is not entitled to recover postjudgment interest.

The rate of interest available on a judgment is determined by a formula set forth in 28 U.S.C. § 1961. If a district court enters judgment that includes an award for postjudgment interest in violation of 31 U.S.C. § 1304 or 28 U.S.C. § 1961, the award *must* be appealed unless the court amends the judgment to comply with these statutory provisions.

V. Attorneys' fees are not allowed under the FTCA.

Attorneys' fees are not allowed under the FTCA. Instead, the FTCA imposes a statutory limit on attorneys' fees: attorneys cannot "charge, demand, receive, or collect for services rendered" more than 20 percent of the amount of an administrative settlement or more than 25 percent of a judgment or a settlement of suit in litigation. *See* 28 U.S.C. § 2678 (2010). This limitation on fees applies to all fee arrangements. In addition, the Equal Access To Justice Act precludes an award of attorneys' fees in cases sounding in tort. *See* 28 U.S.C. § 2412(d)(1)(A) (2010).

Attorneys' fees in structured settlements are based on the final, actual cost of the settlement and not on the future expected payout, future guaranteed payout, or the present value of the settlement, if that is different from the actual cost to the United States. *See Wyatt v. United States*, 783 F.2d 45 (6th Cir. 1986). Section 2678 provides a penalty of not more than $2,000 or 1 year imprisonment, or both, for any attorney who charges, demands, receives, or collects fees in excess of the statutory maximum.

Notwithstanding these limits on attorneys' fees, some courts have awarded "costs" to attorneys who serve as guardians *ad litem* for minors and incapacitated plaintiffs. *See, e.g.*, *Gaddis v. United States*, 381 F.3d 444, 476-77 (5th Cir. 2004) (affirming award of "guardian *ad litem* fees" to attorney who represented minor's interests in litigation where parents were also plaintiffs); *Hull v. United States*, 53 F.3d 1125, 1128-29 (10th Cir. 1995) (affirming award of "costs" to attorney who served as guardian because minor had another attorney of record and guardian served only as "officer of the court"). These decisions are in tension with 28 U.S.C. § 2412(a)(1), which allows costs under 28 U.S.C. § 1920, but specifically excludes as costs "the fees and expenses of attorneys." 28 U.S.C. § 1920 does not specifically allow costs for guardians *ad litem*.❖

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The Benefit of Proving Benefits – Avoiding Paying Twice For the Same Injury Under the FTCA

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Tort litigation that involves the United States as a party presents many unique challenges, the inherent and unavoidable consequence of the nature of the Federal Tort Claims Act's (FTCA) limited waiver of sovereign immunity. In passing the FTCA, Congress sought, with some exceptions, to impose liability on the United States to the same extent as a private party under state law. Private party defendants, however, are rarely, if ever, confronted with the problem of paying special and economic damages arising from the same injuries for which they have already paid or provided benefits or will pay or provide benefits in the future. In contrast, the United States, due to its governmental role, frequently finds itself in a unique position as both an alleged tortfeasor and a federal benefit provider.

Plaintiffs who are injured by employees of the United States often are beneficiaries of, or eligible for, one or more of the many federally-funded programs that pay for or provide services related to, among other things, health care or disability. Provision of these benefits by the United States to plaintiffs who enjoy the availability of these programs is unique among tort defendants because private defendants do not often find themselves in the position of providing financial or other assistance to tort victims. The United States, on the other hand, is routinely asked to pay tort damages to plaintiffs who are entitled to, have received, or will continue receiving Medicare, Medicaid, Social Security, TRICARE/CHAMPUS, Veterans' benefits, or some other federally-funded benefit that compensates them for the same injuries claimed under the FTCA. The purpose of this article is to explore how the United States, in its capacity as a tort defendant, can obtain an appropriate credit for these federal benefits when calculating damages in FTCA actions.

I. Collateral source rule and federal benefits

The Supreme Court recognized that "the extent of the United States' liability under the FTCA is generally determined by reference to state law." *Molzof v. United States*, 502 U.S. 301, 305 (1992). *See also Wilkinson v. United States*, 564 F.3d 927, 934 (8th Cir. 2009) (FTCA damages are determined according to state law); *Wakefield v. United States*, 765 F.2d 55, 58 (5th Cir. 1985) (components and damages in FTCA cases are taken from the law of the state where the tort occurred). Thus, a plaintiff generally may recover the same amount of damages from the United States as he would recover from a private defendant, so long as the applicable state law recognizes the availability of those damages and the damages are compensatory in nature. *Molzof*, 502 U.S. at 312 (remanding for a determination as to whether the damages plaintiff sought were properly characterized as compensatory under state law); *Fort Vancouver Plywood Co. v. United States*, 747 F.2d 547, 553 (9th Cir. 1984) (FTCA permits recovery of compensatory damages under state law).

A critical issue when calculating damages rests on reconciling the federal government's limited waiver of immunity with its unique role in funding the entitlement programs to which plaintiffs are already (or will become) beneficiaries. Plaintiffs and some courts cite state "collateral source rules" as the primary device to prevent the United States from deducting or offsetting damages awards by amounts that plaintiffs receive or will receive in the future from the United States under a variety of entitlement programs. *See, e.g.*, *Manko v. United States*, 830 F.2d 831, 836-37 (8th Cir. 1987) (finding Social Security benefits were a collateral source and not deductible); *Berg v. United States*, 806 F.2d 978, 985 (10th Cir. 1986) (finding that Medicare benefits were a collateral source and not deductible); *Siverson v. United States*, 710 F.2d 557, 559-60 (9th Cir. 1983) (declining to deduct Medicare benefits).

In its most basic iteration, the collateral source rule permits an injured party to recover medical and other expenses from a tortfeasor, notwithstanding reimbursement or payment of such expenses from a third party or from a source "collateral" to the tortfeasor himself. Application of the rule depends on identifying the source of reimbursement as separate and distinct from the tortfeasor or, in the case of the United States, as separate from the source used to pay an FTCA judgment. The philosophy behind application of the rule has been described as follows:

> [E]ither the injured party or the tortfeasor is going to receive a windfall, if a part of the pecuniary loss is paid for by an outside source and . . . it is more just that the windfall should inure to the benefit of the injured party than that it should accrue to the tortfeasor. This conclusion seems to be based on substantial justice. This reasoning, however, does not apply in a situation where the collateral source is the defendant himself. Under those circumstances no one gets a windfall and if a recovery were allowed under those circumstances the result would be that the plaintiff would receive a double recovery and that the defendant would be mulcted twice for the same item of damages.

Olivas v. United States, 506 F.2d 1158, 1163-64 (9th Cir. 1974), quoting *Adams v. Turner*, 238 F.Supp. 643, 644-45 (D.D.C. 1965). While some states have abolished or reformed the collateral source rule, many jurisdictions still recognize it. Thus, state law should always be consulted to determine whether the rule applies to a particular source, if at all.

Courts determining the rule's applicability to federal benefit programs administered by the United States have attempted to differentiate between benefits that come from "general" revenues of the United States – the same source from which FTCA judgments are paid – and those that come from "special" funds that are supplied in part by the beneficiary or a relative upon whom the beneficiary depends. *See Siverson v. United States*, 710 F.2d 557, 560 (9th Cir. 1983) (distinguishing between benefits paid from general revenues, which are non-collateral and deductible from FTCA awards, and benefits paid from "special" funds, which are considered collateral and non-deductible); *Overton v. United States*, 619 F.2d 1299, 1307-09 (8th Cir. 1980) (explaining the distinction in treating certain benefits as "collateral" and other benefits as "non-collateral" in FTCA cases). A related distinction in "special" fund situations occurs when the plaintiff has made a contribution, whether through payroll deductions for a specific purpose or through premiums, and such funds are "in the nature of insurance" that may be likened to proceeds from an historically "collateral source." *Overton*, 619 F.2d at 1308.

Applying this distinction, benefits paid from general revenues with no special contribution by the plaintiff have been considered "non-collateral" and hence deductible from an FTCA award. *See Carter v. United States*, 982 F.2d 1141, 1145 (7th Cir. 1992) (deducting Veterans' disability benefits appropriate where the Veterans' Administration is both the injurer and the source of incremental benefits); *Mays v. United States*, 806 F.2d 976, 976-77 (10th Cir. 1986) (holding that CHAMPUS benefits are deductible where plaintiff did not directly contribute to the fund used to pay those benefits).

So-called "special" funds, however, to which a plaintiff makes a contribution through payroll taxes or programs that are otherwise likened to insurance proceeds, have typically been found to be collateral and non-deductible. These programs include Medicare, Social Security, and civil service retirement benefits. *See Manko v. United States*, 830 F.2d 831, 836 (8th Cir. 1987) (Medicare and Social Security); *Smith v. United States*, 587 F.2d 1013, 1016 (3d Cir. 1978) (Social Security); *United States v. Price*, 288 F.2d 448, 451 (4th Cir. 1961) (civil service retirement benefits).

The decisions declining to offset FTCA awards suggest that the foundation of their holdings rests in the legal application of the collateral source rule under state law. However, for reasons discussed below, a better read is that the United States, as a matter of federal law, may be entitled to a deduction of, at minimum, the *pro rata* federal contributions to such benefits otherwise considered "collateral" upon a proper evidentiary showing.

II. Using federal law and a properly developed evidentiary record to avoid collateral source issues

Although state law, including state collateral source rules, applies to damages in FTCA actions, the government's waiver of sovereign immunity should still be the starting point when determining whether a plaintiff's damages claim seeks to recover more than what the United States' waiver of immunity permits. To this end, the Supreme Court, writing only 3 years after the passage of the FTCA, declared that it now "sees no indication that Congress meant the United States to pay twice for the same injury." *Brooks v. United States*, 337 U.S. 49, 53 (1949).

Thus, notwithstanding the distinction that courts have made between "general" and "special" federal benefit funds, the above principle is embodied in the FTCA itself and, combined with a properly developed record, may provide the foundation for, at minimum, a partial *pro rata* set-off even where a plaintiff has contributed in some way to the "special" fund. The basic principle is as follows: If the United States can prove the amount of benefits that it directly contributed, then the "source" of the paid benefits can no longer be considered "collateral," even if the plaintiff has contributed to that source. Moreover, the FTCA's waiver of immunity would also preclude making the United States pay twice for the same injury under these circumstances.

Consistent with this principle, the failure to obtain any set-off for federal benefits frequently has had less to do with the application of the collateral source rule and more to do with a simple failure of proof. For example, in *Reilly v. United States*, 863 F.2d 149, 163 (1st Cir. 1988), the First Circuit affirmed the district court's decision not to award a set-off for benefits under CHAMPUS, Medicaid, or the Education for All Handicapped Children Act because the United States simply failed to develop any meaningful evidence regarding plaintiffs' eligibility for the benefits or the amounts to which they were entitled or had received. *Id.* The court noted that such programs seemed "strangely far afield" from conventional "collateral sources" but declined to further consider the issue in the absence of a properly developed factual record. *Id.* at 163.

Similarly, in *Siverson*, the Ninth Circuit affirmed the district court's decision not to award a set-off of Medicare benefits received by the plaintiff where the United States had not sustained its burden of proof on the issue. *Siverson v. United States*, 710 F.2d 557, 560 (9th Cir. 1983). Despite its analysis distinguishing general and special revenues when evaluating whether Medicare and other programs should be considered collateral sources, the court concluded that:

> The record here shows that the United States failed to sustain [its] burden as to either its contributions or the amount of benefits that [the plaintiff] would be expected to receive in the future. Under these circumstances, the district court did not err in refusing to deduct Medicare expenses from the damage award.

Id. Like *Reilly*, a proper evidentiary showing may have yielded a different result.

In contrast, the Eighth Circuit's decision in *Overton v. United States*, 619 F.2d 1299 (8th Cir. 1988), which held that a plaintiff's FTCA damages award must be reduced by any amounts received through Medicare, was reached in large part because of the absence of proof that the plaintiff had contributed to the Medicare program. Therefore, the court required that the medical expenses that the plaintiff received from Medicare be fully deducted to avoid the United States having to pay twice for the same injury. *Id.* at 1308-09. The *Overton* court expressly noted that even where a plaintiff contributes to the fund, "[t]here may be cases in which the government is entitled to a partial set-off, to the extent that governmental benefits primarily attributable to special levies or premiums are in fact attributable to general taxation." *Id.* at 1309. The court, however, relieved the government of making such a showing where the plaintiff failed to show that she either made such a contribution or a contribution should be presumed. *Id.* (discussing the possibility of deducting Social Security benefits to the extent the government meets its burden of proving the amounts that the government itself contributes to the payment of such benefits). *See also Dempsey v. United States*, 32 F.3d 1490, 1495-96 (11th Cir. 1994) (affirming set-off for CHAMPUS benefits based on sufficiency of the government's evidence).

The principle to take away from decisions such as *Reilly*, *Siverson*, and *Overton* is that a properly developed record that proves the amount the United States has already paid or will pay in the form of benefits (or the value of the services furnished, as the case may be) for plaintiff's injury increases the likelihood of a set-off because it demonstrates that the United States is paying twice for the same injury. Whether that set-off is in full or *pro rata* depends on the evidence itself. However, the principle that the United States should not pay twice for the same injury, enunciated by the Supreme Court in *Brooks v. United States*, 337 U.S. 49 (1949), clearly requires a court to deduct from an FTCA award those amounts that the United States can *prove* have already been paid or will be paid to the plaintiff under an applicable benefits program.

Consider, for example, the Education for All Handicapped Children Act (EAHCA) – now codified as the Individuals with Disabilities Education Act (IDEA) – that provides federal assistance to disabled and handicapped children. *See* 20 U.S.C. §§ 1400-1487 (2010). In *Scott v. United States*, 884 F.2d 1280, 1284 (9th Cir. 1989), the Ninth Circuit declined to reduce an FTCA damages award by benefits available to plaintiff under the EAHCA because the United States had failed to provide any evidence of the value of the services available under the program. *Id.* In *Anderson v. United States*, 731 F. Supp. 391, 402 (D. N.D. 1990), the United States again claimed the right to offset damages under the FTCA by the amount of funding plaintiffs were entitled to receive under the EACHA. *Id.* The court there, rather than rejecting the argument under the collateral source rule, noted that the United States had not provided any data as to the percentage of EACHA benefits funded by the federal government. *Id.* The court noted that the United States was legally protected from making double payments to the extent that it could show what portion of the funding under the EACHA came directly from the United States. *Id.* The court summarized as follows:

> If a portion of the funding for South Dakota benefits [under the EAHCA] comes from the federal government the United States should be allowed to offset this amount from [the plaintiff's] damage award. For example, if South Dakota provides a benefit worth one dollar, the United States cannot offset this dollar from the amount owed [plaintiff]. If, however, the United States can prove that thirty cents of that dollar is provided by federal money, it can offset [the plaintiff's] damages by thirty cents.

Id. The court, therefore, offered an opportunity to the government to make an accounting of the sums that should be deducted from the plaintiff's FTCA damages. *Id.* at 403.

A similar holding resulted where the percentage of federal assistance provided to a state for purposes of Medicaid payments was established by an evidentiary record. *See Lucius v. United States*, No. 4:04CV1127-SNL, 2006 WL 3257915, at *8 (E.D. Mo. Nov. 9, 2006). In that case, the United States proved that the federal contribution under the Medicaid program was 61.06 percent. Consequently, the court found that the government was entitled to that percentage credit on the medical bills that had been covered under the Medicaid program. Accordingly, upon a properly developed record, the United States can successfully invoke the principle that it should not pay twice for the same injury.

III. The problem of future damages

Three oft-cited cases have rejected the government's attempt to deduct future medical expenses on grounds that such expenses will be paid by the government as a result of the plaintiff's eligibility for government benefits in the future. *See Molzof v. United States*, 6 F.3d 461, 467-68 (7th Cir. 1993) (on appeal after remand from the Supreme Court); *Ulrich v. Veterans Admin. Hosp.*, 853 F.2d 1078, 1083-84 (2d Cir. 1988); *Feeley v. United States*, 337 F.2d 924, 934-35 (3d Cir. 1964).

In *Molzof*, the plaintiff was eligible for Veterans' benefits, meaning that his future care would be paid entirely by the United States at no expense to him or his guardian while he was cared for in a VA clinic. The Seventh Circuit, despite evidence showing that the plaintiff would in fact receive future care at a VA clinic, held that future medical expenses are recoverable and will not offset the amount the government must pay in damages. *Molzof*, 6 F.3d at 467-68. The court denied an offset for future care because "[forcing] a plaintiff to choose between accepting public aid or bearing the expense of rehabilitation himself is an unreasonable choice." *Id.* at 467 (citing *Feeley*, 337 F.2d at 934); *see also Ulrich*, 853 F.2d at 1083-84. The court's rationale was that prohibiting the plaintiff from receiving future care would essentially restrict his treatment to public facilities, with which he may feel dissatisfied or which he may view as inferior to a private physician. *Molzof,* 6 F.3d at 468. This dilemma would "deny the plaintiff the freedom to choose his medical provider." *Id.* Additionally, the *Molzof* court alternatively held that "the speculative nature of the prospective benefits prohibits [the court] from offsetting the award." *Id.* (citations omitted).

These cases, however, addressed situations where the benefits to be conferred and received presumed that treatment would be received by veterans at VA hospitals. In situations where benefits will be furnished regardless of where the care is provided or by whom, the plaintiff does not suffer the risk that his freedom to choose future medical care will be preempted. To the extent that the value of these benefits may be proven, the United States should argue for an offset to avoid the potential of paying twice for the same injury. *See, e.g.*, *Dempsey v. United States*, 32 F.3d 1490, 1495-96 (affirming set-off for CHAMPUS benefits to cover future costs of medication where evidence was sufficient).

The other cited argument for denying an offset of future benefits is that they are too speculative to permit an offset. *Molzof*, 6 F.3d at 467-68. Both future benefits and future damages, however, carry with them an inherent amount of uncertainty. As the Fourth Circuit stated on remand from the Supreme Court in *United States v. Brooks*, 176 F.2d 482 (4th Cir. 1949):

> We recognize that prospective disability payments are uncertain in that the government may withdraw or decrease them at any time, but the uncertainty here is no greater than that involved in many other matters affecting damages in personal injury cases; and the trial court must deal with it as it deals with other uncertainties by using its best judgment after all the facts and circumstances of the case have been taken into consideration.

Id. at 484.

Indeed, the future availability of federal programs established by existing law is, in reality, no more speculative than a plaintiff's case-in-chief on future damages, which is frequently dependent on uncertain future health care needs, unknowable inflation rates, speculative mortality and life expectancy projections, and/or hypotheses about future education and employment. In many respects, the continued viability of congressionally-established federal benefit programs is *more* certain than a plaintiff's claim for future damages and any argument to the contrary should be countered accordingly.

IV. Practice tips

The United States bears the burden of proof and persuasion with respect to set-offs. Therefore, it is crucial to identify how to meet that burden of proof early in case preparation. The plaintiff's damages case should be examined closely to identify what federal entitlements, both direct and indirect, are available as to each component of the plaintiff's past and future damages. Once identified, counsel should then determine whether federal law, as referenced in *Brooks*, can be invoked to demonstrate each instance where the United States has paid or will pay twice for the same injuries and damages claimed in the FTCA action. Next, state collateral source rules should be examined to identify whether, as a matter of state law, an alternative argument for a set-off of federal benefits exists. Lastly, some state laws permit a set-off for damages paid by non-federal sources. Such laws apply to the United States in an FTCA action and should not be overlooked.

As to evidence, past benefits are frequently ascertainable through sources like the program itself, billing records, and agency contacts or experts. It may be necessary with some programs, such as the IDEA, to ascertain the services provided locally through the Individualized Education Program. With future benefits, close coordination with agency experts is necessary to determine what services and needs claimed in a plaintiff's life-care plan will be covered by the federal government and how much those services will cost. Experts may also assist with understanding how coverage may change depending on eligibility factors that alter with time, such as age, and in valuation of such services where the benefits do not expressly take the form of monetary assistance.

Lastly, it is important to remember to preserve the record for appeal. If an attorney is precluded from presenting evidence due to an adverse ruling, make an offer of proof so that further review may be sought in the court of appeals.

V. Conclusion

It is incumbent upon counsel for the United States to identify the federal benefit programs that have supplied or will supply benefits to plaintiffs for the injuries alleged in an FTCA action. Once identified, counsel is in a position to develop evidence and meet the burden of proof. Counsel may meet this burden through statutes, experts, and other witnesses by demonstrating the amount of money or the value of services provided by the United States to the plaintiff through such programs, both in the past and in the future. Development of proper evidence may help the United States avoid state "collateral source" rules by establishing that the government's own direct contributions, whatever the percentage, are not collateral. The United States may also avoid these rules by citing the Supreme Court's decision in *United States v. Brooks* that held that regardless of state law, the United States cannot be made to pay twice for the same injury under the FTCA.❖

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Defending Wrongful Death and Survival Claims Brought Under the Federal Tort Claims Act

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I. Introduction

The purpose of this article is to provide a general overview of how to defend wrongful death and survival actions brought under the Federal Tort Claims Act (FTCA). Each state's statutory scheme varies significantly, so familiarity with the relevant state's framework is an essential starting point to any wrongful death or survival defense. Because the nuances of each state's statutes cannot be fully addressed herein, this article is intended to provide a general framework, rather than a state-by-state analysis, for approaching wrongful death and survival claims specifically under the FTCA.

II. Overview

At common law, a cause of action for personal injury "died" with the decedent and his family members had no recourse for their own pecuniary and non-pecuniary losses that resulted from the decedent's death. Today, however, each state typically has a survival statute that allows a decedent's personal-injury claims to survive his death and a wrongful death statute that allows statutory beneficiaries to recover for their own loss as a result of the decedent's death. Because there was no common law action for wrongful death, recoverable damages are strictly limited to what is provided by statute and the interpreting case law. *See, e.g.*, *Turon v. J & L Const. Co.*, 86 A.2d 192 (N.J. 1952) (noting that New Jersey's wrongful death statute creates a cause of action for loss suffered by the statutory beneficiaries and if none of the statutory beneficiaries have suffered a compensable loss, no action lies). Wrongful death and survival claims cannot be litigated in a vacuum and often require reference to estate law and personal injury law. *See, e.g.*, *Jenkins v. Patel*, 684 N.W.2d 346 (Mich. 2004) (applying Michigan's medical malpractice non-economic damages cap to wrongful death actions).

Wrongful death and survival claims are typically framed as either derivative or independent of any claims the decedent could have brought at the time of his death. Many, but not all, wrongful death statutes enumerate beneficiaries, who are usually family members. These claims are generally independent of the decedent and usually allow the statutory beneficiaries to recover damages for their loss stemming from the decedent's death.

By contrast, survival actions are generally thought to be derivative of the decedent's personal injury claim. Generally, survival actions must be brought by a personal representative acting on behalf of the decedent's estate. These claims usually allow for recovery by the estate of damages that stem from wrongs the decedent suffered before he died. Since survival actions are typically not independent causes of action, any defense that would have barred the decedent's claim had he not died will usually bar a survival action, as well.

While wrongful death actions are typically deemed independent and survival actions are deemed derivative, this is not always the case. *See Miller v. Philadelphia Geriatric Ctr*., 463 F.3d 266, 271 (3d Cir. 2006) (noting that Pennsylvania's wrongful death statute is part independent and part derivative of decedent's claim); *Chomic v. United States*, 377 F.3d 607 (6th Cir. 2004) (characterizing Michigan's wrongful death statute as a derivative, not independent, cause of action). Some states have only one death statute that encompasses both derivative and independent characteristics. *See, e.g.*, *Stern v. Internal Med. Consultants, II, LLC*, 452 F.3d 1015, 1019 (8th Cir. 2006) (discussing independent and derivative characteristics of Missouri's death statute). Additionally, while most jurisdictions view survival actions and wrongful death actions as complementary to each other, other jurisdictions do not allow a claimant to bring both actions. *See Hendrix v. Daugherty*, 457 S.E.2d 71 (Va. 1995) (noting that Virginia law requires a person to elect between pursuing either a wrongful death or survival action).

III. Accrual of an action

While state law determines *whether* an underlying cause of action exists, federal law governs the statute of limitations, including the accrual of the cause of action. *See* 28 U.S.C. § 2401(b) (2010); *Miller v. United States*, 932 F.2d 301, 302 (4th Cir. 1991). Not surprisingly, most circuits hold that a wrongful death action brought under the FTCA cannot accrue before the decedent's death. *See Miller*, 463 F.3d at 272; *Warrum v. United States*, 427 F.3d 1048 (7th Cir. 2005); *Johnston v. United States*, 85 F.3d 217 (5th Cir. 1996). In some jurisdictions, courts have applied the discovery rule to wrongful death claims and have held that the action does not accrue until the plaintiff (the beneficiary, not the decedent) knew or reasonably should have known of both the decedent's death and its causal connection with the government. *See*, e.g., *Skwira v. United States*, 344 F.3d 64 (1st Cir. 2003); *Diaz v. United States*, 165 F.3d 1337 (11th Cir. 1999). In certain jurisdictions, where wrongful death actions are considered derivative rather than independent, courts have held that a wrongful death action can accrue prior to death if the injury and the cause of the injury are known prior to the decedent's death. *See Chomic*, 377 F.3d at 616 (2-year period to file administrative claim accrued at time of decedent's injury, not his death, as the injury and its cause were both known prior to his death); *see also Miller*, 932 F.2d at 301.

A survival action usually becomes a legally enforceable claim when the decedent's underlying personal injury action accrues because most survival actions are derivative of the decedent's causes of action available at the time of death. Traditionally, a personal injury action accrues at the time of the claimant's injury. *See United States v. Kubrick*, 444 U.S. 111, 120 (1979); *Attallah v. United States*, 955 F.2d 776, 779 (1st Cir. 1992). In some situations, then, a survival action will accrue before the decedent's death. If the discovery rule applies to the survival action, the action accrues when the decedent (not the personal representative plaintiff) knew or reasonably should have known of the injury and its causal connection. *See Miller*, 463 F.3d at 273.

IV. Administrative claim requirements

Making sure that the administrative claim requirements are satisfied for both wrongful death and survival actions is an important aspect of any wrongful death/survival action defense. While the FTCA and accompanying regulations (28 C.F.R. Part 14) require that a claim be presented by one entitled to assert the claim under state law, most courts require only that a beneficiary under the statute or a person who eventually becomes the personal administrator of the estate file an administrative claim. *See, e.g.*, *Free v. United States*, 885 F.2d 840, 843 (11th Cir. 1989); *Knapp v. United States*, 844 F.2d 376 (6th Cir. 1988); *Booten v. United States*, 95 F. Supp. 2d 37, 42 (D. Mass. 2000); *Byrne v. United States*, 804 F. Supp. 577 (S.D.N.Y. 1992); *Van Fossen v. United States*, 430 F. Supp. 1017, 1021 (N.D. Cal. 1977). *But see Johnson v. United States*, 287 Fed. Appx. 328, 330 (5th Cir. 2008) (dismissing FTCA action because, under Texas estate law, sister failed to show that she had capacity to bring a claim on behalf of decedent); *Del Valle v. Veterans Admin.*, 571 F. Supp. 676 (S.D.N.Y. 1983).

Generally, under the FTCA, each claimant must satisfy the jurisdictional prerequisite of filing a proper administrative claim. *See, e.g.*, *Muth v. United States*, 1 F.3d 246 (4th Cir. 1993). Whether a beneficiary may file an administrative claim for the benefit of other beneficiaries varies depending on the jurisdiction, but some courts base the decision on the legal authority of the beneficiary to act on the other beneficiaries' behalf. *See, e.g.*, *Estate of Sullivan v. United States*, 777 F. Supp. 695 (N.D. Ind. 1991) (widow's administrative claim form filed with VA satisfied FTCA jurisdictional requirement with respect to children, even though they were not named in the administrative claim, as the agency was given sufficient notice to commence an investigation). *But see Frantz v. United States*, 791 F. Supp. 445 (D. Del. 1992) (dismissing adult sons' wrongful death claims because they did not submit individual administrative claims to the agency and produced no evidence at the administrative level that the wife or attorney who both signed the administrative claim had legal authority to act on the sons' behalf); *Estate of Santos v. United States*, 525 F.Supp. 982 (D.P.R. 1981). The approach set forth in *Santos* and *Frantz* with respect to the administrative claim requirements of multiple beneficiaries is the more appropriate interpretation of the FTCA's jurisdictional requirements.

Where both survival and wrongful death actions are asserted in a complaint, the administrative claim should be examined to determine whether the claimant asserted enough information to bring both claims at the administrative level. The level of notice required to bring both claims varies among the courts. *Compare Starr v. United States*, 262 F. Supp. 2d 605 (D. Md. 2003) (finding adequate notice of wrongful death claim where plaintiffs asked for wrongful death damages and where the cover letter identified both parents, rather than estate alone, as claimants), *with Barrett v. United States*, 845 F. Supp. 774, 783 (D. Kan. 1994) *and Frantz*, 791 F. Supp. at 450 (declining to find sufficient notice of a wrongful death claim where family members were not identified as claimants and each family member did not state a sum certain for his/her wrongful death claim), *and First Commercial Bank, N.A., Little Rock, Ark. v. United States*, 727 F. Supp. 1300, 1303 (W.D. Ark. 1990) (right to pursue survivorship claims was waived by failure to present those claims during administrative review under FTCA). Obviously, where either a wrongful death claim or a survival claim has not been asserted at the administrative stage, the claim must be dismissed.

V. The status of the plaintiff

It is important to understand (and keep in mind throughout the pendency of the case) which individuals are authorized under state law to bring each cause of action. While most courts are less particular about the legal status of the administrative claimant, the plaintiff bringing the wrongful death or survival action must be the proper plaintiff as required by the applicable state law. When an improper plaintiff brings suit, the court should dismiss the case for failure to state a claim under state law. Some courts, however, have addressed this situation by allowing the addition of proper parties to relate back to the filing date of the original complaint. *See Goodman v. United States*, 298 F.3d 1048, 1054 (9th Cir. 2002). If, however, the proper party has not timely filed an administrative claim (or, after relating back, filed the claim before exhausting the administrative requirement), the argument should be made that the proper party is jurisdictionally barred from bringing her claim. *See Haceesa v. United States*, 309 F.3d 722, 735 (10th Cir. 2002) (finding estate to be jurisdictionally barred from bringing an action because the claim either was not filed within 6 months or, if related back, the action was filed prematurely before the administrative claim requirement was satisfied).

In some jurisdictions, defenses unique to a specific plaintiff that would not have been available against the decedent can still bar a death action. *See Eagan v. Calhoun*, 698 A.2d 1097, 1103 (Md. 1997) (noting that in a wrongful death action, the plaintiff is subject to any defense applicable to her, whether or not the defense applies to the decedent).

The status of each plaintiff also may be important in determining whether that particular plaintiff can recover damages. *See, e.g.*, *In re Greenwood Air Crash*, 161 F.R.D. 387, 395 (S.D. Ind. 1995) (noting that children of decedent must have been dependent on decedent to qualify as beneficiaries under Indiana law). Where a plaintiff or other beneficiary is involved with the underlying act that gave rise to the decedent's death, the applicable state's law may bar the plaintiff or beneficiary from bringing suit or recovering damages. *See, e.g.*, 740 ILL. COMP. STAT. 180/2 (2007) (reducing and barring contributory negligent beneficiaries from wrongful death recovery); *Holloway v. Holloway*, No. 2007-CA-1386-MR, 2008 WL 4754872 (Ky. App. Oct. 31, 2008); *Carver v. Carver*, 314 S.E.2d 739, 743 (N.C. 1984).

VI. The status of the decedent

In many jurisdictions, wrongful death and survival statutes include language to the effect that, if the decedent would have been barred from bringing a personal injury action at the time of his death, derivative claims and, in some instances, the beneficiaries' independent wrongful death claims, are barred. Where a decedent's claim would have been barred by the applicable statute of limitations, states vary as to whether the derivative claim is also barred. *Compare Miller v. Philadelphia Geriatric Ctr.*, 463 F.3d 266, 271 (3d Cir. 2006) (Pennsylvania law bars wrongful death action where statute of limitations has run on decedent's personal injury claim), *and Miller v. United States*, 932 F.2d 301, 303 (4th Cir. 1991) (finding a derivative death claim barred if, at the time of decedent's death, her personal injury action based on conduct alleged to have caused the death would have been time-barred), *and Nelson v. Am. Nat'l Red Cross*, 26 F.3d 193 (D.C. Cir. 1994) (wrongful death action barred if survival action is time-barred), *with Miller v. Estate of Sperling*, 766 A.2d 738 (N.J. 2001) (holding that jurisdictional or procedural matters that would have prevented decedent from bringing suit during his lifetime do not also bar a wrongful death claim, requiring only that decedent's injury would have warranted a personal injury action prior to his death).

Jurisdictions are also split on whether a decedent's personal injury settlement or exculpatory release can bar a subsequent death claim. *Compare Stern v. Internal Med. Consultants, II, LLC*, 452 F.3d 1015, 1019-20 (8th Cir. 2006) (holding that beneficiaries were barred from bringing wrongful death action under Missouri law by decedent's personal injury settlement), *and Grbac v. Reading Fair Co.*, 688 F.2d 215 (3d Cir. 1982) (beneficiaries barred from bringing derivative wrongful death action under Pennsylvania law because decedent signed a personal injury release), *with Schwarder v. United States*, 974 F.2d 1118, 1123 (9th Cir. 1992) (decedent's previous personal injury settlement did not bar children's independent wrongful death claims), *and Gershon v. Regency Driving Ctr., Inc.*, 845 A.2d 720 (N.J. Super. Ct. App. Div. 2004) (decedent's release of personal injury liability did not bar family's wrongful death claim). Generally, where a decedent has entered into a personal injury settlement with the United States, all derivative claims should be barred as a matter of federal law. *See generally* 28 U.S.C. § 2672 (2010) ("The acceptance of any . . . award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States, and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter."). Notwithstanding the plain language of 28 U.S.C. § 2672, courts typically look to the applicable state law to determine whether a decedent's settlement bars the beneficiaries' independent wrongful death actions. 28 U.S.C. § 1346(b) (2010). *See, e.g.*, *Montellier v. United States*, 315 F.2d 180 (2d Cir. 1963).

Defenses that are personal to the decedent can also be raised in defense of a death claim. *See, e.g.*, *Sowinski v. Walker*, 198 P.3d 1134 (Ala. 2008) (allowing non-pecuniary damages to the beneficiaries only for the period of time decedent would have been a minor); *Smith v. Gross*, 571 A.2d 1219 (Md. 1990) (mother's wrongful death and survival claims for death of child against child's father were barred by the parent-child immunity doctrine, which would have barred the child's personal injury action against the father). Additionally, courts are varied as to whether a claim exists for the death of an unborn child. *Compare Pino v. United States*, 273 Fed. Appx. 732 (10th Cir. 2008) (allowing wrongful death claim for non-viable fetus under Oklahoma law), *with Marie v. McGreevey*, 314 F.3d 136 (3d Cir. 2002) (no claim for wrongful death of fetus where fetus died before birth).

VII. Death during the pendency of a tort case

Death during the pendency of a tort action can raise additional issues. When a personal injury plaintiff dies during the pendency of a personal injury action, a state's abatement doctrine may void the entire cause of action and damages award. *See Bravo v. United States*, 532 F.3d 1154, 1170 (11th Cir. 2008) (abating child's $10 million personal injury award because child died during pendency of appeal). *But see Reed by Reed v. United States*, 891 F.2d 878 (11th Cir. 1990) (refusing to abate award where plaintiff died after settlement was fully authorized but before enforcement of settlement was sought). In some jurisdictions, the death of a wrongful death claimant during the pendency of the lawsuit may preclude recovery by the claimant's estate. *See, e.g.*, *Wackenhut Corrs. Corp. v. de la Rosa*, 305 S.W.3d 594 (Tex. Ct. App. 2009) (barring a beneficiary's estate from wrongful death recovery on behalf of the beneficiary who had died during pendency of action); *Lornson v. Siddiqui*, 735 N.W.2d 55 (Wis. 2007) (claimant's wrongful death action does not survive claimant's death under Wisconsin law). *But see Bemenderfer v. Williams*, 745 N.E.2d 212 (Ind. 2001) (holding that beneficiary's wrongful death claim survived beneficiary's death).

Once a personal injury plaintiff has died, no new administrative claim is required if the beneficiaries of the estate or other proper parties want to convert the pending personal injury action into a purely derivative survival action that is merely a continuation of the decedent's personal injury claim. However, if a beneficiary attempts to bring an independent wrongful death claim, the beneficiary must bring a separate administrative claim before filing suit, even if the decedent brought a personal injury claim for the same alleged negligence during his lifetime. *See Warrum v. United States*, 427 F.3d 1048, 1052 (7th Cir. 2005) (holding that a separate administrative claim for a wrongful death action was required to maintain the action following the decedent's death); *Raymond v. United States*, 445 F. Supp. 740 (E.D. Mich. 1978). *But see Brown v. United States*, 838 F.2d 1157, 1161 (11th Cir. 1988) (finding a new administrative claim for wrongful death action unnecessary).

VIII. Conclusion

The defense of wrongful death and survival claims under the FTCA requires a keen understanding of the applicable state's statutory framework. Each state will have its own particular requirements and nuances that apply to its wrongful death and survival actions. Any questions regarding how these state law requirements interplay with the requirements of the FTCA should be directed to the Torts Branch, FTCA Staff.❖

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The United States' Waivers of Sovereign Immunity in Admiralty

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I. Introduction

The United States, as a sovereign, cannot be sued except strictly as Congress has statutorily consented. *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. King*, 395 U.S. 1, 4 (1969); *United States v. Sherwood*, 312 U.S. 584, 586 (1941); *Neirbo Co. v. Bethlehem Shipbuilding Corp*., 308 U.S. 165 (1939); *Hillier v. S. Towing Co.*, 714 F.2d 714, 723 (7th Cir. 1983); *Stanley v. Cent. Intelligence Agency*, 639 F.2d 1146 (5th Cir. 1981). One of the instances in which the United States can be sued involves admiralty suits. This article will address when and on what terms Congress has allowed admiralty suits against the United States.

There are four statutes that allow and circumscribe the United States' liability in admiralty cases: the Contract Disputes Act (CDA), 41 U.S.C. §§ 601- 613 (2010); the Admiralty Extension Act (AEA), 46 U.S.C. § 30101 (2009); the Suits in Admiralty Act (SAA), 46 U.S.C. §§ 30901-30918 (2009); and the Public Vessels Act (PVA), 46 U.S.C. §§ 31101-31113 (2009). The SAA and the PVA provide limited waivers of sovereign immunity. The AEA slightly broadens the applicability of these waivers as it extends admiralty jurisdiction generally. The CDA requires that suits concerning maritime contracts will be subject to the SAA where it is not in conflict with the CDA. 41 U.S.C. § 603 (2010). A fifth statute, the Clarification Act, 50 U.S.C. App. § 1291 (2010), modifies the applicability of the SAA and PVA for a small class of seamen as explained below.

II. Exclusivity of the admiralty waivers

Where admiralty jurisdiction exists, either the SAA or the PVA is the exclusive waiver of sovereign immunity. The land-based and more commonly applicable waiver of sovereign immunity is the Federal Tort Claims Act (FTCA), §§ 28 U.S.C. 1346(b), 2680 (2010), which says that "section 1346(b) of this title shall not apply to . . . any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States." 28 U. S. C. § 2680 (2010). This exclusivity is mirrored in complementary provisions in the admiralty statutes. The SAA states that "if a remedy is provided by this chapter, it shall be exclusive of any other action arising out of the same subject matter against the officer, employee, or agent of the United States or the federally-owned corporation whose act or omission gave rise to the claim." 46 U.S.C. § 30904 (2009).

The PVA adopts the SAA's exclusivity clause, providing that "[a] civil action under this chapter is subject to the provisions of chapter 309 of this title except to the extent inconsistent with this chapter." 46 U.S.C. § 31103 (2009). The CDA adopts the exclusivity element of the above statutes and thus becomes the exclusive waiver of sovereign immunity for maritime contract actions. The provision states, "[a]ppeals under paragraph (g) of section 607 of this title and suits under section 609 of this title, arising out of maritime contracts, shall be governed by chapter 20 or 22 of Title 46 . . . to the extent that those chapters are not inconsistent with this chapter." 41 U.S.C.A. § 603 (2010).

The AEA stipulates that "in a civil action against the United States for injury or damage done or consummated on land by a vessel on navigable waters, chapter 309 or 311 of this title, as appropriate, provides the exclusive remedy." 46 U.S.C. § 30101 (2009).

III. Admiralty jurisdiction

Because these waivers apply to admiralty cases, a brief review of the criteria for such a characterization may be helpful. The breadth of the courts' admiralty jurisdiction is subject to constant analysis and change, but the basic criteria give a good indication of the rough scope of admiralty jurisdiction.

Admiralty jurisdiction is defined differently in tort and contract cases. The criteria for admiralty tort jurisdiction were announced by the Supreme Court in *Exec. Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249, 260 (1972) and clarified in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995); *see also Sisson v. Ruby*, 497 U.S. 358 (1990); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982). In order for a court to have admiralty jurisdiction in a tort case, the tort must have a maritime "locus" and "nexus" for recognition as an admiralty tort.

Admiralty locus is generally limited to "the navigable waters of the United States," which are those which "form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870). The commercial highways of our rivers, canals, lakes bordering multiple states, intracoastal waterways, bays, harbors, and the territorial waters we claim offshore are our navigable waters.

The AEA extends the locus of admiralty tort jurisdiction to cases of damage or injury on land, including "cases of injury or damage, to person or property, caused by a vessel on navigable waters, even though the injury or damage is done or consummated on land." 46 U.S.C. § 30101(a) (2009). Further, admiralty tort jurisdiction can extend inland through the application of a line of cases that liberally grant admiralty jurisdiction over the claims of seamen injured ashore when they are acting "in the service of the ship." *Hopson v. Texaco, Inc.*, 383 U.S. 262, 263 (1966).

Admiralty nexus is judged by two criteria: whether the general features of the type of incident involved have a potentially disruptive impact on maritime commerce and whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity. *Grubart*, 513 U.S. at 534. As the holdings in *Grubart*, *Sisson*, and *Foremost* demonstrate, these criteria may be applied quite liberally.

For contract actions, if the "fundamental nature of the contract" is maritime, then it is a maritime contract. *N. Pac. Steamship Co. v. Hall Bros. Marine Ry. and Shipbuilding Co.*, 249 U. S. 119 (1919). The character of the agreement determines the question of admiralty jurisdiction. *American President Lines, Ltd. v. Green Transfer and Storage, Inc*., 568 F. Supp. 58 (D. Or. 1983). Contracts for routine ship repairs are maritime contracts, *North Pacific*, 249 U.S. at 128, but those for ship construction are not, *The Jefferson*, 61 U.S. 393, 399 (1857). Mortgages for ship construction are usually undertaken with guarantees under The Commercial Instruments and Maritime Liens Act, 46 U.S.C. §§ 31301-31343 (2009), but the mortgages only become maritime contracts when the hull becomes a vessel. *United States v. Trident Crusader*, 366 F.3d 391, 393-94 (5th Cir. 2004). Contracts for the carriage of passengers, *The*

Moses Taylor, 71 U.S. 411 (1866), or goods, *The Belfast*, 74 U.S. 624 (1868), on navigable waters are maritime contracts. The use of "through bills of lading" can extend the maritime character of a contract inland in the proper circumstances, *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14 (2004), but a contract for the storage of goods before or after ocean shipment is generally not maritime in nature. *St. Louis Cold Drawn, Inc. v. Beelman River Terminals, Inc*., 863 F. Supp. 1013, 1018 (E.D. Mo. 1994) (stating that a transaction loses its maritime nature as soon as navigation ceases to be central to the parties' relationship); *Colgate Palmolive Co. v. S.S. DART CANADA*, 724 F.2d (1983).

There are also statutes that create affirmative admiralty claims for the federal government. The Rivers and Harbors Act, 33 U.S.C. §§ 401-426 (2010); The Oil Pollution Act of 1990 (OPA), 33 U.S.C. §§ 2701-2761 (2010); The Park System Resources Protection Act (PSRPA), 16 U.S.C. § 19jj (2010); The Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§ 30701-30707 (2005) and others may require lawsuits in admiralty on behalf of the United States.

IV. Practice under the SAA

The SAA subjects the United States to lawsuits through these broad terms:

> Waiver of immunity: (a) In a case in which, if a vessel were privately owned or operated, or if cargo were privately owned or possessed, or if a private person or property were involved, a civil action in admiralty could be maintained, a civil action in admiralty in personam may be brought against the United States or a federally-owned corporation. In a civil action in admiralty brought by the United States or a federally-owned corporation, an admiralty claim in personam may be filed or a setoff claimed against the United States or corporation.

46 U.S.C. § 30903(a) (2009).

Like the FTCA, the SAA does not grant any substantive rights, but rather waives the United States' immunity from suits cognizable under the general maritime law of the United States. The language of section 30903 arguably exposes the United States to any legal claim that is properly brought in admiralty, but the waiver is limited in several ways.

Suits under the SAA are required to "be tried without a jury," 46 U.S.C. § 30903(b) (2009), and "must be brought within 2 years after the cause of action arose." 46 U.S.C. § 30905 (2009). An action under the SAA must be brought in federal court. 46 U. S. C. § 30906(a) (2009). Under the SAA, suits may be brought against the United States but not against a federal agency. *Williams v. United States*, 711 F.2d 893, 897 (9th Cir. 1983); *Smith v. United States*, 346 F.2d 449, 454 (4th Cir. 1965); *Dillingham Corp. v. Hawk*, 97 F.R.D. 450, 451 (D. Haw. 1983). Venue is proper under the SAA in any United States district court in which any plaintiff resides or has its principal place of business. Where a vessel or cargo is involved, venue is proper where either is found. 46 U.S.C. § 30906(a) (2009). Additionally, the court in which original venue is proper may transfer venue to any other district. *Id.* § 30906(b). If adjudged liable under the SAA, the United States may be liable for costs and prejudgment interest at the specified rate of 4 percent per year. 46 U.S.C. § 30911(a) (2009). No administrative claim requirement exists in the SAA when the provision applies *ex proprio vigore* to an admiralty tort for which a court would find maritime locus and nexus.

The SAA recognizes that an action may be brought in rem if the analogous suit against a private party would be brought in rem, but any lawsuit arising from allegations against a public vessel of the United States would implicate the PVA. 46 U.S.C. § 30907(b) (2009). Thus, in rem suits under the SAA are somewhat anomalous. Actions under the SAA are generally in personam lawsuits.

V. Practice under the PVA

The PVA's waiver of immunity is less broadly drawn, allowing:

> [a] civil action in personam in admiralty [to] be brought, or an impleader filed, against the United States for: (1) damages caused by a public vessel of the United States; or (2) compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States.

46 U.S.C. § 31102(a) (2009).

The PVA provides that "a civil action under this chapter is subject to the provisions of [the SAA] except to the extent inconsistent with this chapter." 46 U.S.C. § 31103 (2009). A lawsuit under the PVA generally proceeds just like an SAA suit, but exceptions exist in the PVA's varying provisions concerning venue and interest.

Venue under the PVA is dependent on the location of the public vessel giving rise to the controversy on the day suit is filed. If the public vessel is present in the United States or its territorial waters, then venue under the PVA is proper only in the United States district court for the district where the ship is found. 46 U.S.C. § 31104(a) (2009). If, however, the public vessel subject to the suit is outside the territorial waters of the United States, venue under the PVA is proper in any district in which any plaintiff resides or has an office for the transaction of business. *Id.* If no plaintiff resides or has an office for the transaction of business in the United States, then venue is proper in any United States district court. *Id.* § 31104(b). A judgment under the PVA may not include prejudgment interest unless the claim is based on a contract providing for interest. 46 U.S.C. § 31107 (2009). As with the SAA, no administrative claim requirement exists in the PVA.

VI. Practice in maritime contract cases under the CDA

The CDA provides that contract actions "arising out of maritime contracts are governed by" the SAA or PVA "to the extent that those chapters are not inconsistent with this chapter." 41 U.S.C. § 603 (2010). The Court of Claims' analysis of the legislative history of this provision led to the conclusion that Congress intended to retain subject matter jurisdiction and venue for claims on maritime contracts in the various United States district courts. *Whitey's Welding and Fabrication, Inc. v. United States*, 5 Cl.Ct. 284 (Cl. Ct. 1984).

The CDA's jurisdictional prerequisite that a certified claim to the Contracting Officer be decided by the issuance of a Contracting Officer's Final Decision prior to the filing of any lawsuit applies to suits on maritime contracts in the United States district courts. 41 U.S.C. § 605 (2010); *Bethlehem Steel Corp. v. Avondale Shipyards, Inc.*, 951 F.2d 92 (5th Cir. 1992). Therefore, administrative exhaustion is required in lawsuits arising from maritime contracts with the United States.

VII. Administrative claim requirements in particular circumstances

While the SAA and PVA require no administrative claim as a jurisdictional prerequisite, preliminary administrative claims are required in two specific applications of these waivers. When applicable, the AEA and the Clarification Act, 50 U.S.C. App.§ 1291 (2010), require an administrative claim.

In a case for which it provides admiralty jurisdiction, the AEA requires that a suit "may not be brought until the expiration of the 6-month period after the claim has been presented in writing to the agency owning or operating the vessel causing the injury or damage." 46 U.S.C. § 30101(c)(2) (2009).

Where no public vessel is involved, ambiguity arises as to the identity of the agency to which the claim should be addressed and possibly to the applicability of the AEA's administrative claim requirement, altogether. While the requirement has been enforced in such cases as a prerequisite to subject matter jurisdiction, no published precedent for that proposition exists.

The Clarification Act applies very narrowly to merchant seamen employed by the Maritime Administration of the Department of Transportation (MARAD), the current incarnation of the War Shipping Administration and the United States Maritime Commission, and requires a waiver of sovereign immunity to be brought under the SAA. Prior to such a suit, the Clarification Act requires that the plaintiff secure "a denial of a written claim" under regulations promulgated by MARAD. 50 U.S.C. App. § 1291(a) (2010). MARAD's regulations concerning administrative claims of the sort required by the Clarification Act are found at 46 C.F.R. § 327 (2010).

Unlike that found in the FTCA, the administrative claim requirements of the AEA and the Clarification Act do not allow agency inaction to toll the statute of limitations. Under the administrative claim requirements of the AEA and the Clarification Act, the statute of limitations continues to run as the administrative claim is submitted and considered by the agency. While the agency's inaction brings a presumption of denial after a specified period (6 months under the AEA and 60 days under MARAD's regulations for Clarification Act seamen), denial must be shown and suit filed prior to the expiration of the limitations period. Because the administrative claim requirements in the AEA and the Clarification Act are jurisdictional prerequisites, *McNeil v. United States*, 508 U.S. 106 (1993), the administrative exhaustion requirement effectively shortens the statute of limitations for those cases to which the AEA and the Clarification Act apply. *Rashidi v. American President Lines*, 96 F.3d 124 (5th Cir. 1996); *Loeber v. Bay Tankers, Inc*., 924 F.2d 1340 (5th Cir. 1991).

VIII. The discretionary function exception

The SAA and PVA are subject to the discretionary function exception of the Federal Tort Claims Act. 28 U.S.C. §2680(a) (2010). *McMellon v. United States*, 387 F.3d 329 (4th Cir. 2004); *Theriot v. United States*, 245 F.3d 388 (5th Cir. 1998); *Baldassaro v. United States*, 64 F.3d 206 (5th Cir. 1995); *Sea-Land Serv. Inc. v. United States*, 919 F.2d 888, 891 (3d Cir. 1990); *Wiggins v. United States,* 799 F.2d 962, 966 (5th Cir. 1986).

The discretionary function exception limits the United States' waiver of sovereign immunity by providing that the waiver will not apply to:

> [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a) (2010).

The discretionary function exception "covers acts involving an element of judgment or choice if they are based on considerations of public policy." *United States v. Gaubert*, 499 U.S. 315, 316 (1991); *Berkovitz v. United States*, 486 U.S. 531 (1988); *United States v. S.A. Empresa de Viacao Aerea Rio Grandense* (*Varig Airlines*), 467 U.S. 797 (1984). Sovereign immunity has not been waived where the challenged governmental action is a discretionary function.

The discretionary function analysis is a two-part test. First, the court must determine whether the challenged conduct involves an element of judgment or choice. The relevant inquiry here is whether a controlling statute or regulation mandates that a government agent perform his or her function in a specific manner. *Powers v. United States*, 996 F.2d 1121, 1124-25 (11th Cir. 1993). The government employee's conduct will fall outside of the discretionary function exception only if a federal statute, regulation, or policy "specifically prescribes a course of action embodying a fixed or readily ascertainable standard." *Autery v. United States*, 992 F.2d 1523, 1526 (11th Cir. 1993); *see also Gaubert*, 499 U.S. at 322-23. If the conduct is deemed discretionary under the first prong of the analysis, the court must then determine whether that judgment is of the kind that the discretionary function exception was designed to shield. The focus is on whether the challenged actions are "susceptible to policy analysis." *Hughes v. United States*, 110 F.3d 765 (11th Cir. 1997) (citing *Powers v. United States*, 996 U.S. 1121, 1125 (11th Cir. 1993)).

Protected discretionary conduct is not confined to the policy or planning level. *Hughes v. United States*, 110 F.3d 765, 768 (11th Cir. 1997). Moreover, the United States is not required to prove that particular policy factors were in fact balanced during the course of making the challenged decision because policy decisions fall under the discretionary function exception "whether traceable to a conscious decision or not." *Sea-Land Service, Inc. v. United States*, 919 F.2d 888, 892 (3d Cir. 1990); *see also United States Fidelity & Guaranty Co. v. United States*, 837 F.2d 116, 120-21 (3d Cir. 1988).

IX. Conclusion

The Suits in Admiralty Act and Public Vessels Act, as extended by the Admiralty Extension Act and Contract Disputes Act, are broad waivers of sovereign immunity allowing a wide range of substantive claims against the sovereign. They are, however, limited waivers, subject to their own procedural restrictions and the discretionary function analysis required by the FTCA's language. The general maritime law of the United States supplies the substantive precedents under which lawsuits properly brought under these waivers of sovereign immunity are decided. The Aviation and Admiralty Litigation staff is charged with responsibility to litigate these suits and can advise on the procedures for referring them.❖

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Researching the Legislative History of the Federal Tort Claims Act

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I. Introduction

Legislative history is consulted when attorneys and judges need to determine why Congress enacted a particular law or to aid in the interpretation of that law or one of its provisions. Courts first strive for a "plain reading" of the statute. However, if the language is ambiguous, then the bills, hearings, reports, debate, and other documents that are part of the legislative record may be used to yield important clues regarding the state's intent. Researching legislative history can be a time-consuming and frequently fruitless endeavor. Congressional documents often provide an answer for why Congress enacted a particular law but are ordinarily less helpful when determining what Congress meant by a specific word or phrase. The legislative history of the Federal Tort Claims Act (FTCA) is even more difficult to research than most laws due to the long history of failed legislation prior to its enactment. This article will outline the history of the FTCA and provide guidance on searching relevant documents for it and other laws. Note that the history below is only a summary. For a more complete discourse, see Chapter 2 of Lester S. Jayson and Robert C. Longstreth's, Handling Federal Tort Claims: Administrative and Judicial Remedies (2005).

II. Tort claims bills prior to 1946

For over 150 years, the U.S. Government could not be sued without its consent due to the doctrine of sovereign immunity. With the passage of the Tucker Act in 1887, Congress waived immunity from suit in contract cases. However, for tort claims involving injury or damages inflicted by the government through an agent or employee, a judicial remedy was available in very limited circumstances. During the second half of the 1800s and the early 1900s, Congress enacted a series of statutes that provided remedies in isolated situations. They included certain claims in areas such as patent infringement, military and maritime activities, injuries sustained by federal employees in the performance of their duties, and property damage in limited situations. For other tort claims, federal agencies were authorized in the 1920s to settle claims for relatively small sums of money ($500 – $1,000). Prior to 1946, apart from these rather limited exceptions, those who suffered damage due to the negligence of a federal employee had only two options; they could sue the employee personally, or they could seek relief from Congress through private legislation.

Thousands of claims were introduced in each session of Congress and almost all of the private laws enacted during those sessions were related to tort claims. Once enacted, a private bill would provide either compensation or permission to adjudicate the claim in court. However, few of the private bills were enacted. The time and expense of these claims, which required hours of witness interviews, document retrieval, and in-person testimony, was considered disproportionate to the importance of the matters involved. Acting essentially as a court of law placed an undue burden on Congress and was also an inefficient means of obtaining justice for the claimants. As far back as 1832, John Quincy Adams complained that Congress was spending half of its time on private legislation for which it was ill-equipped. During the 1920s and later, as the size and scope of the federal government expanded, the number of claimants seeking relief from personal injury and property damage inflicted by government employees increased exponentially.

Attempting to remedy this situation, more than 30 bills were introduced between 1925 and 1946. With the exception of the 75th Congress, a tort claims bill was introduced in every Congress from the 68th to the 79th. Many of the early bills had similar characteristics, vesting, in varying degree, the power of settling the claim in the Comptroller General, usually with the assistance of the United States Employees' Compensation Commission when personal injury and death claims were involved. A number of these earlier bills provided for the prosecution and defense of tort claims in the courts by the Comptroller General. One such bill (H.R. 9285, 70th Congress) passed both houses of Congress, but resulted in a pocket veto by President Coolidge on March 4, 1929. The veto was recommended by Attorney General Sargent due to the provision that authorized the Comptroller General to defend tort cases on behalf of the government. Later versions of the bill were introduced without that provision, but none passed both Houses.

In addition to the question regarding which office would represent the government, other areas where the proposed bills varied included jurisdiction, limitations on damages, proportionate liability, reimbursement from the government employee, and statutes of limitations. There were also at least 25 types of exclusions that were proposed for various categories of government employees and different types of activities. Despite the differences in the proposals, most had a number of elements in common. Portions of many of the introduced bills were ultimately incorporated in some form in the act that finally passed in 1946. Given all the points of agreement, it is difficult to fathom why it took 20 years to get the legislation enacted. However, not everyone in Congress supported tort claims legislation. Some feared that it would make the government vulnerable to fraudulent and frivolous claims and felt that the power to decide these matters should stay with the Congress.

In 1939, the Claims Divisions of the Department of Justice, in collaboration with other governmental agencies, drafted a bill which was introduced and reported favorably in both Houses, but the Senate failed to act on it before the close of the session. In January 1942, President Roosevelt sent a special message to Congress advocating legislation for administrative determination of tort claims up to a maximum of $1000 and by court action to a maximum of $7,500. This message gave the House reason to once again consider the bill that had been drafted by the Justice Department. Renewed consideration led to several significant changes by the Judiciary Committee. The Senate passed S.2221 (77th Congress) and it was reported favorably to the House, but it failed to come to a vote due to the urgency of wartime business. Similar measures were introduced in the subsequent two Congresses, but no final action was taken until the proposed legislation was slightly modified and finally enacted as Title IV of the Legislative Reorganization Act of 1946. For a contemporaneous description of the legislative history of the FTCA leading up to its enactment, *see* Irvin M. Gottlieb, *The Federal Tort Claims Act – A Statutory Interpretation*, 35 GEO. L. J. 1, 1-9 (1946).

III. FTCA amendments

A series of amendments to the FTCA were passed starting in 1947, some of which are listed below.

- The Federal Tort Claims Act (Part 3 Sec. 410 (a)) specified that the federal government, in awarding damages, shall follow "the law of the place where the act or omission occurred," yet shall not be liable for punitive damages. H.R. 3690 (enacted as Public Law 80-324 on August 1, 1947) removed that restriction.
- In 1949, Congress lengthened the statute of limitations from 1 year to 2 years. Public Law 81-55 was enacted April 25, 1949.
- In 1959, Congress increased the authority of heads of federal agencies to settle claims administratively, raising the ceiling from $1,000 to $2,500. Pub. L. No. 86-238, § 1(1), 73 Stat. 471 (1959).
- In 1966, Congress again amended the FTCA's statute of limitations, imposing a mandatory requirement that claimants exhaust all administrative remedies as a prerequisite to suit and giving heads of federal agencies authority to settle claims, regardless of their amount. In modifying the statute of limitations, it provided that a suit on a claim that has been denied must be filed within 6 months. The amendment also made certain other changes. Pub. L. No. 89-506, § 7, 80 Stat. 307 (1966); Pub. L. No. 89-507, § 1, 80 Stat. 308 (1966); and Pub. L. No. 89-508, § 3, 80 Stat. 308 (1966).
- In 1970, Congress passed the Emergency Health Personnel Act of 1970 "to amend, the Public Health Service Act to authorize the assignment of commissioned officers of the Public Health Service to areas with critical medical manpower shortages, to encourage health personnel to practice in areas where shortages of such personnel exist, and for other purposes." The law also made the FTCA's assault and battery exception inapplicable to claims arising out of negligence of an employee in the performance of such functions. Pub. L. No. 91-623, § 4, 84 Stat. 1870 (1970).
- In 1974, the exclusionary provisions dealing with "intentional torts" were amended, permitting suit on claims against federal investigative or law enforcement officers for assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. Pub. L. No. 93-253, § 1, 88 Stat. 50 (1974).
- Congress enacted the National Swine Flu Immunization Program of 1976, making the FTCA the exclusive remedy for claims arising from this program. Pub. L. No. 94-380, § 2, 90 Stat. 1113 (1976).
- In 1988, Congress passed the Federal Employees Liability Reform and Tort Compensation Act of 1988 ("The Westfall Act"). It amended the FTCA to provide absolute immunity for federal employees from personal liability for common law torts by substituting the United States as the defendant in any action against federal employees acting within the scope of their employment. It also extended coverage to employees of the legislative and judicial branches and the Tennessee Valley Authority. Pub. L. No. 100-694, § 9, 102 Stat. 4566 (1988).
- The Administrative Dispute Resolution Act, enacted in 1990, gave the Attorney General the authority to empower agency heads to settle administrative claims for an amount equal to that authorized for United States Attorneys. The Act also authorizes federal

agencies to use alternative dispute resolutions methods in resolving claims. Pub. L. No. 101-552, § 4, 104 Stat 2737 (1990).

- The Civil Asset Forfeiture Reform Act of 2000 was enacted to provide a fairer and more uniform procedure for federal civil forfeitures. It provided that suit may be brought for the damage of property detained by the government: if the property was seized in a forfeiture proceeding; the interest of the claimant was not forfeited, remitted or mitigated; and the claimant was not convicted of a crime in the related criminal proceeding. Pub. L. No. 106-185, § 18, 114 Stat. 222 (2000).
- Also in 2000, Congress amended the definition of "employee of the government" with relation to National Guard members performing funeral honors duties and public defenders representing criminal defendants. Pub. L. No. 106-398, § 1, 114 Stat. 1654 (2000); Pub. L. No. 106-518, 114 Stat. 2410 (2000).

IV. Finding legislative history of the FTCA

The DOJ's Virtual Library is a rich source for finding the legislative history of the FTCA, as well as other federal laws. The Virtual Library offers a specialized FTCA research guide prepared by DOJ librarians that links to a chronology of its original enactment, the amendments, early attempts to pass tort claims legislation, federal case law, and secondary sources. To get to the FTCA guide from the Virtual Library home page, click on "Research Guides" at the top of the Shortcut list. Search for FTCA in the search box or just scroll down to the letter "F" and choose "FTCA Legislative History." This page links to all the resources on the FTCA available through the Virtual Library. The first link, called "Federal Tort Claims Act," presents a chronology of the 1946 Legislative Reorganization Act, of which the FTCA was a part. Below that, the link takes you to debate and committee reports on unenacted tort claims bills introduced between 1925 and 1946, a rich source for legislative intent. The next link covers the extensive amendments to the FTCA and includes short descriptions of each amendment. When available, the links go to debates and reports, the two best sources of legislative intent, as well as to other documents. The list of amendments includes changes made starting with the 80th Congress in 1947 up to the 106th Congress' enactment of the Federal Courts Improvement Act of 2000 that exempted public defenders from the FTCA for claims related to their legal services.

The final two links on the guide page go beyond legislative documents to list federal court decisions on the FTCA and secondary sources such as CRS and GAO reports, law review articles, and treatises. The list of Supreme Court cases is intended to be a comprehensive list of all important decisions related to the FTCA. The citations on the page of secondary sources were selected to provide the researcher with an overview of the FTCA, as well as specific resources that cover the various FTCA exceptions and amendments. The treatise section includes links to library catalog records (or full-text when available) for the most fundamental texts dealing with the FTCA, including Lester S. Jayson and Robert C. Longstreth's, Handling Federal Tort Claims: Administrative and Judicial Remedies (available in full-text on Lexis.com). Overall, the guide is a true one-stop shop for the FTCA.

V. Finding legislative history of other federal laws

The Virtual Library's general "Legislative History Research Guide" can save researchers time with links to a complete or summary history of most public laws. If you are looking for a specific congressional document, the guide also links to the best databases and sources for committee reports, floor debates, and hearings. The guide also points to resources for tracking bills and issues in Congress and legislative history research training. To access the guide from the homepage of the Virtual Library, click on “Legislative History Resources” that is located just below the Shortcuts list. The guide opens to several options.

Click on “Find a legislative history” to view sources for compiled histories or find summaries of the legislative history of most federal laws. The Virtual Library has eight different sources for compiled legislative histories. With a compiled history, all the congressional documents are assembled in one place; the work has been done for you. To highlight some of those resources, a good place to start looking for a compiled history is the library catalog, where you can search for a legislative history by the public law number. You can also search “Listing by Popular Name” or “Listing by Public Law Number” as another quick way to locate a compiled legislative history. These lists indicate where to find the history. It may be in print or in an online database. DOJ librarians have also completed a number of e-histories of federal laws and those are listed chronologically by Congress under “Online Histories.” Like other legislative histories prepared by DOJ librarians, the e-histories are thoroughly researched and comprehensive; they can be relied on to include all of the key documents.

If you do not find a compiled history, search for a summary or abstract of the legislative history of a federal law. The two sources for summaries, LexisNexis Congressional (available from DOJ networked computers; no password required) and Thomas (http://thomas.loc.gov) both provide chronologies of bills as they go through the legislative process to become law. The summaries include committee report numbers and dates of floor debates. Sometimes the summaries link to the actual documents, but if not, the user can go to online databases or print resources to locate the documents. LexisNexis Congressional includes lists of hearings on a particular bill and miscellaneous congressional documents such as committee prints. This information is harder to find on Thomas. Also, note that these two sources for summaries of legislative history cover different time periods. For example, Thomas' coverage begins in 1989 while Lexis Congressional has full-text material and indexing dating back to the beginning of Congress. Lexis Congressional also provides a full-text search of all documents in the database that might help you find where a specific provision was discussed more easily.

Another way to use the Virtual Library's Legislative History Research Guide is to locate a specific congressional document. Return to the guide's main page and select “Find a Congressional Document.” The opened page lists all the sources for congressional documents from bills introduced in Congress to committee action, floor debates, enactment as public law, presidential signing statements and, finally, sources for the official *United States Code* as prepared by the House of Representative's Office of Law Revision Counsel. For example, eight listings for locating congressional committee reports are available and each one covers a time period unique to that resource. LexisNexis Congressional is an excellent place to find committee reports, especially historical reports. FDsys (http://www.gpo.gov/fdsys/) is useful to find reports from 1995 to the present. Similar considerations apply to the resources for locating other types of congressional documents; keep an eye on the coverage periods indicated on the guide.

VI. Tracking legislation and learning more about legislative history research

The Legislative History Research Guide also provides information on how to “Track Current Events in Congress.” Here the researcher can locate CRS reports and congressional and committee calendars and set up alerts to track specific issues or bills in the current Congress. Set up your own alerts using Westlaw or Lexis or ask a librarian to forward alerts from the extensive information available from CQ.com.

The main page of the Legislative History Research Guide provides links for the novice and experienced researcher. Click on “Learn How to Do Legislative History” for how-to instructions on legislative history research or, if you already know which database you want (Thomas, FDsys, Westlaw, HeinOnline, etc.), you can link to it directly from the guide's list of "Legislative History Online Resources."

Finally, the DOJ librarians offer in-person training classes on legislative history research throughout the year. On the main page of the legislative history research guide, click on "legislative history training" or simply select "Training Programs" from the left menu to view all classes offered by DOJ's Washington, DC, librarians. You can also arrange for a special training class on legislative history for your office via videoconferencing. E-mail Diane L. Smith of the JMD Library Staff, or call (202) 616-0986 for more information.

VII. Conclusion

When researching a federal statute, the first step is usually to look for the public law that enacted it. In the case of the FTCA, it tends to be a bit more complicated. If the USCA section you are researching was added as part of the 1946 act, you will most likely need to look at the legislative history of the tort claims bills (especially those introduced in the 77th-79th Congresses) to find the most useful documents for that provision. If the code section was added as one of the amendments, you will need to look at the legislative history to try to determine intent. Section III of this article highlights some of the most important FTCA amendments. For a complete list, see the online FTCA Legislative History described in section IV. For amendments proposed but not enacted, use the resources described in section V to search by keyword in bills, hearings, the *Congressional Record*, and reports to find discussion on a particular issue. CRS Reports might also discuss proposed amendments. A number of those are cited in the FTCA Legislative History guide with links to the full-text.

Another essential source for background information on the FTCA (particularly the exceptions to it) is the series of Monographs produced by the Civil Division Torts Branch. Most are available online and can be accessed from the Civil Monographs page on the Virtual Library (listed under "C" on the Research Guides page). If the resources described here do not lead you to the information you need, please consult a librarian. From the homepage of the Virtual Library, click on "Ask a Librarian" and send your request via e-mail. You will get a response within 1 to 2 business days. Contact information for libraries and librarians is also provided for more urgent requests. The librarians on staff have extensive experience researching legislative history and can help make this difficult process less cumbersome.❖

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