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## ARTICLE

# ETHICAL INTERSECTIONS & THE FEDERAL TORT CLAIMS ACT: AN APPROACH FOR GOVERNMENT ATTORNEYS

BY PAUL FIGLEY\*

John Quincy Adams,<sup>1</sup> Abraham Lincoln,<sup>2</sup> and Millard Fillmore<sup>3</sup> agreed on one key public administration concern—Congress should not decide private claims against the government. This truism eventually led Congress to enact the Federal Tort Claims Act (“FTCA” or “the Act”). The Act allows recovery on a broad range of cases to persons injured by government negligence, but its exceptions and exclusions can bar other claims entirely. It successfully transfers responsibility for deciding disputed tort claims from Congress to the courts.

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1. See *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the H. Comm. on the Judiciary*, 77th Cong. 49 (1942) [hereinafter *Hearings on H.R. 5373 and H.R. 6463*] (quoting John Quincy Adams) (“There is a great defect in our institutions by the want of a court of Exchequer or Chamber of Accounts. [Deciding private claims] is judicial business, and legislative assemblies ought to have nothing to do with it. One-half of the time of Congress is consumed by it, and there is no common rule of justice for any two of the cases decided . . . . A deliberative assembly is the worst of all tribunals for the administration of justice.”).

2. See *id.* at 46 (quoting Abraham Lincoln) (citing *First Annual Message to Congress*, CONG. GLOBE, 37th CONG., 2D SESS. PT. III, APP. (1861)) (“The investigation and adjudication of claims in their nature belong to the judicial department.”).

3. See 6 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 2627 (1908). President Fillmore reasoned that:

Congress has so much business of a public character that it is impossible it should give much attention to mere private claims, and their accumulation is now so great that many claimants must despair of ever being able to obtain a hearing. It may well be doubted whether Congress, from the nature of its organization, is properly constituted to decide upon such cases.

*Id.* (citing *First Annual Message* (Dec. 2, 1850)).

A swirl of competing interests results from the structure of the FTCA, the deep pocket it grants successful claimants, the complete immunity it provides some tortfeasors,<sup>4</sup> and the methods Congress chose for paying settlements and judgments awarded under its auspices. Government attorneys, responsible for administering the FTCA and defending litigation brought pursuant to its procedures, must balance these competing interests. These attorneys regularly confront issues that involve tensions among plaintiffs, individual defendants, and federal agencies. The manner in which they resolve those problems can have dramatic consequences for the individuals and entities involved.

This article suggests an ethical approach for government attorneys to follow when making decisions in the special context of the FTCA. Part I reviews the history and purpose of the FTCA, the Judgment Fund,<sup>5</sup> and the Westfall Act.<sup>6</sup> Part II touches on the ethical obligations of government attorneys. Part III discusses how the FTCA functions in practice, the various considerations at play in applying its rules to plaintiffs, federal employee defendants, and federal agencies, and the ethical issues that arise in the FTCA context. Part IV suggests that government attorneys responsible for administering the FTCA affirmatively help claims enter the FTCA's adjudicatory system and then treat each claim equally by raising every reasonable defense in every case.

## I. THE STATUTORY BACKDROP

### A. *The History & Purpose of the FTCA*

For a century and a half, the only practical recourse for citizens injured by the torts of federal employees was to ask Congress to enact private legislation affording them relief.<sup>7</sup> This was necessary because the United States' sovereign immunity, grounded in the Appropriations Clause of the Consti-

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4. The Act provides complete immunity to government employees for common law torts they commit within the scope of their employment. 28 U.S.C. § 2679(d) (2006). It has been used to grant immunity to non-governmental entities. *See, e.g.*, 31 U.S.C. § 1304 (2006); Pub. L. No. 101-512, § 314, 104 Stat. 1915, 1959 (1990) (codified at 25 U.S.C. § 450) (tribal employees and contractors).

5. The Judgment Fund is the funding source for FTCA judgments and most FTCA settlements. *See* 31 U.S.C. § 1304; discussion *infra* Part I.B.

6. The Westfall Act substitutes the United States as defendant in the place of federal employees sued for common law torts within the scope of their employment and provides them immunity. *See* Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), 100 Pub. L. No. 694, § 2, 102 Stat. 4563; discussion *infra* Part I.C.

7. *See Hearings on H.R. 5373 and H.R. 6463, supra* note 1, at 24–25 (statement of Assistant Att'y Gen. Francis M. Shea); James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1888–92 (2010); LESTER S. JAYSON & ROBERT C. LONGSTRETH, *HANDLING FEDERAL TORT CLAIMS* § 2.01 (2009) (noting alternative of personally suing government employee “of doubtful financial resources”).

tution, protected it from suit.<sup>8</sup> The clause states: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .”<sup>9</sup>

The doctrine of sovereign immunity provides that a sovereign state can be sued only to the extent that it has consented and that only its legislative branch can give such consent.<sup>10</sup> Consequently, the United States cannot be sued for damages unless Congress has enacted an applicable waiver of sovereign immunity.<sup>11</sup> Such a waiver must be express; it may not be implied.<sup>12</sup> Accordingly, the United States could not be sued in tort until Congress passed a statute waiving the government’s sovereign immunity for such suits.<sup>13</sup>

8. While the origins, validity, and value of the doctrine of sovereign immunity are beyond the scope of this essay, the United States’ sovereign immunity for suits seeking money damages is grounded in the Appropriations Clause of the Constitution. *See* U.S. CONST. art. I, § 9, cl. 7; *see also* Paul F. Figley & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 MICH. L. REV. 1207, 1248–58 (2009) (chronicling the history of the Appropriations Clause in the United States); John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 437 n.192 (2010) (“The most plausible textual source for federal sovereign immunity [from money damages] is the Appropriations Clause.”).

9. U.S. CONST. art. I, § 9, cl. 7. The first half of the clause is the Appropriations Clause. The second half is the Statement and Accounts Clause that states, “and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.” *Id.*

10. *See, e.g.*, *United States v. Dalm*, 494 U.S. 596, 610 (1990) (stating that the principle that power to consent is reserved to Congress is central to our understanding of sovereign immunity); *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 514 (1940) (“Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void . . . . Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body.”).

11. *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. Sherwood*, 312 U.S. 584, 587–88 (1941)) (“Thus, except as Congress has consented to a cause of action against the United States, ‘there is no jurisdiction . . . in any . . . court to entertain suits against the United States.’”); *United States v. McLemore*, 45 U.S. 286, 288 (1846) (“[T]he government is not liable to be sued, except with its own consent, given by law.”); *see also* *Cohens v. Virginia*, 19 U.S. 264, 411–12 (1821) (“The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits.”).

12. *Lane v. Pena*, 518 U.S. 187, 192 (1996) (citing *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33–34, 37 (1992), and *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95 (1990)); *U.S. Fid. & Guar. Co.*, 309 U.S. at 514 (“Consent alone gives jurisdiction to adjudge against a sovereign.”).

13. *See Lane*, 518 U.S. at 192. Prior to enacting the FTCA, Congress did pass measures waiving sovereign immunity for various non-tort claims against the government. *See, e.g.*, Court of Claims Act, ch. 122, 10 Stat. 612 (1855) (repealed 1982); Tucker Act, ch. 359, 24 Stat. 505 (1887) (current version at 28 U.S.C. §§ 1346(a), 1491 (2006)). Congress also passed waivers of sovereign immunity pertaining to governmental torts in specific settings or circumstances. *See, e.g.*, Act of June 16, 1921, ch. 23, 42 Stat. 29, 63 (providing remedy to persons injured by Post Office operations); Railroad Control Act of 1918, ch. 25, § 10, 40 Stat. 451, 456 (creating remedy against the United States for claims arising from the government’s operation of railroads and utilities under its wartime authority); Act of March 4, 1913, 37 Stat. 828, 843 (current version at 16 U.S.C. § 502(d) (2006)) (granting Forest Service authority “to reimburse owners of horses, vehicles, and other equipment lost, damaged, or destroyed while being used for necessary firefighting, trail, or official business”).

Members of Congress had long recognized that legislation was a poor way to resolve private claims against the government.<sup>14</sup> By the twentieth century, congressional procedures for addressing private claims were well established but remarkably inefficient.<sup>15</sup> The process was subject to interminable delays and arbitrary actions.<sup>16</sup> Congress could not promptly and effectively decide tort claims on their merits.<sup>17</sup> In 1926, Congressman Celler explained that the “Committee on Claims ha[d] no facilities nor ha[d] the members time or inclination to pass upon questions of negligence and contributory negligence, to sift evidence, and determine a host of matters.”<sup>18</sup> The committee considered claims in *ex parte* proceedings without cross-examination of witnesses.<sup>19</sup>

The process of considering and processing claims was also a substantial burden on the time and attention of Congress.<sup>20</sup> Typically a Congress would consider thousands of private claims bills but enact relatively few.<sup>21</sup> Appointment to the Committee on Claims was burdensome “not only because of the number of claims submitted but because of the realization that careful judicial consideration of the claims [was] for the most part impossi-

14. See *Hearings on H.R. 5373 and H.R. 6463, supra* note 1, at 49–55 (including comments dating from 1832 to 1941 by congressmen criticizing the private claims bills system).

15. In 1926, the House of Representatives procedure for enacting such a private bill called for the claim to be referred to the Committee on Claims. See *Hearings on H.R. 5373 and H.R. 6463, supra* note 1, at 51 (citing H.R. REP. NO. 69-667, at 13–14 (1926) (Supplementary Report of Congressman Emanuel Celler)). If the committee took favorable action, the claim would be forwarded to the House where it would be placed on the Private Calendar. *Id.* Any member could strike it from that calendar for any reason. *Id.*

16. *Hearings on H.R. 5373 and H.R. 6463, supra* note 1, at 54 (statement of Congressman Luce) (noting waste of time and inequity of procedures and stating that “nothing is so disgraceful in the conduct of the Congress . . . as its treatment of claims”).

17. See *id.* at 51–52. The House Report also quotes the 1926 statement of Massachusetts Congressman Charles L. Underhill, which reads:

The power vested in the chairman of the Committee on Claims is tremendous and absolutely wrong. I can either refuse arbitrarily to consider your claim or I can take up each and every one of your claims to suit my convenience.

. . .

I have one case that has passed five different Congresses, one branch or the other, and has failed of passage in both branches the same year, not because it did not have justification but because it was too late; it got caught in the jam; it could not get through; and these claimants have been waiting all of these years for relief for the payment of a debt which the United States owes them.

*Id.* (citing 67 CONG. REC. 7526 (1926)).

18. *Id.* at 51 (citing H.R. REP. NO. 69-667, at 14 (Supplementary Report of Congressman Emanuel Celler)). Congressman Ross Collins of Mississippi commented that the consideration given to private bills “by the individual membership was trifling.” *Id.* at 53 (citing *Hearing General Tort Bill Before a Subcomm. of the H. Comm. on Claims*, 72d Cong. 6–8 (1932)).

19. See *id.* at 54 (statement of Congressman Robison).

20. See, e.g., S. REP. NO. 79-1400, at 30–31 (1946); H.R. REP. NO. 79-1287, at 2 (1945); *Hearings on H.R. 5373 and H.R. 6463, supra* note 1, at app. II, 49–55.

21. *Hearings on H.R. 5373 and H.R. 6463, supra* note 1, app. III, at 56 (“Private Claim Bills before several Recent Congresses”).

ble.”<sup>22</sup> Members of the committee simply could not know the details of each of the thousands of claims considered in every Congress.<sup>23</sup>

Congress debated proposals for a general tort claims act for decades.<sup>24</sup> In 1929, both houses of Congress passed such a bill, but it was pocket-vetoed by President Coolidge, apparently because it would have authorized an agent of Congress, the Comptroller General, to represent the United States in the Court of Claims.<sup>25</sup> In 1940, the House passed a bill similar to the FTCA, but more “urgent matters” relating to World War II kept the Senate from considering it.<sup>26</sup> On January 14, 1942, President Roosevelt urged Congress to enact a general tort claims act so that Congress and the executive branch would no longer be diverted from larger issues.<sup>27</sup> He noted that in the three previous Congresses, less than twenty percent of the proposed 6300 private claim bills became law and that they accounted for a third of the bills he had vetoed.<sup>28</sup>

Congress affirmatively wanted to compensate persons injured by a broad range of common law government torts.<sup>29</sup> The private bill system and various limited waivers of sovereign immunity had tacitly recognized an obligation to compensate.<sup>30</sup> Congress sought to replace the private bill system with a “well-defined, continually operating machinery to redress wrongs arising out of Government activity.”<sup>31</sup> Congress intended for the new system to provide an “effective and readily available remedy” that included “judicial consideration of tort claims against the Government.”<sup>32</sup> It also intended that the new system protect certain government activities from tort litigation<sup>33</sup> and limit the damages paid.<sup>34</sup> Congress met these

22. *Id.* app. II, at 50 (citing H.R. REP. NO. 69-667, at 1–3 (1926)).

23. *Id.* at 54 (quoting Debates on H.R. 7236, 86 CONG. REC. 12016 (1940)).

24. *See generally id.*; JAYSON & LONGSTRETH, *supra* note 7, §§ 2.09–.10.

25. *Hearings on H.R. 5373 and H.R. 6463*, *supra* note 1, at 25 (statement of Assistant Att’y Gen. Francis M. Shea); *id.* at 41 (citing 70 CONG. REC. 4836 (1929)). The memorandum following the committee recounted: “The Attorney General objected to the act because it placed the Comptroller General in charge of appeals to the Court of Claims from his own decisions, and the act received a pocket veto by President Coolidge.” *Id.*; *see also* O.R. McGuire, *Tort Claims Against the United States*, 19 GEO. L.J. 133, 134–35 (1931) (discussing the history of President Coolidge’s pocket veto).

26. H.R. REP. NO. 79-1287, at 2 (1945). *See also* H.R. REP. NO. 76-2428, at 4–6 (1940).

27. H.R. DOC. NO. 77-562, at 1–2 (1942). The Roosevelt Administration, through the Department of Justice, was actively involved in drafting proposals for a general tort claims act. *See, e.g., Hearings on H.R. 5373 and H.R. 6463*, *supra* note 1, at 6–36 (statement of Assistant Att’y Gen. Francis M. Shea); *Hearings on H.R. 7236 Before Subcomm. 1 of the H. Comm. on the Judiciary*, 76th Cong. at 15–31 (1940) (statement of Alexander Holtzoff, Special Assistant to the Att’y Gen.); JAYSON & LONGSTRETH, *supra* note 7, § 2.10.

28. H.R. DOC. NO. 77-562, at 1.

29. *See, e.g., Hearings on H.R. 5373 and H.R. 6463*, *supra* note 1, at 37.

30. *Id.* at 39, 40, 45.

31. *Id.* at 45.

32. *Id.* at 40.

33. *Id.* at 44–45.

34. *See id.* at 43; 28 U.S.C. § 2674 (2006) (barring recovery for “interest prior to judgment or for punitive damages”).

goals when it enacted the FTCA as Title IV of the Legislative Reorganization Act of 1946,<sup>35</sup> and President Truman signed it into law on August 2, 1946.<sup>36</sup>

### B. *The Judgment Fund*

While the basic structure of the FTCA has remained largely unchanged, Congress has altered the procedures for paying FTCA judgments and settlements. The Appropriations Clause of the United States Constitution<sup>37</sup> requires a specific funding source for any government payment, including settlements and court-ordered judgments.<sup>38</sup> The long-established rule is that agency appropriations cannot be used to pay judgments against the United States or its agencies, absent specific authorizing legislation.<sup>39</sup> Such legislation could be an appropriation for particular settlements or judgments, a general appropriation for categories of settlements or judgments, or a statute that authorizes payments from a pre-existing appropriation.<sup>40</sup>

As initially enacted in 1946, the FTCA authorized the use of agency appropriations to pay settlements of up to \$1000<sup>41</sup>—later amended to

35. Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812 (current version found within 28 U.S.C.). The Legislative Reorganization Act also established the organization of congressional committees, *id.* at tit. I, II; regulated lobbying, *id.* at tit. III; eliminated the need for congressional approval of each new bridge, *id.* at tit. V; and altered congressional pay, *id.* at tit. VI.

36. 92 CONG. REC. 10,675 (1946). The Legislative Reorganization Act drastically reduced the burden that private claim bills would have on Congress because Title I of that act prohibited such bills in circumstances where the FTCA might provide a remedy. Pub. L. No. 79-601, 60 Stat. 812. The pertinent section reads:

SEC. 131. No private bill or resolution (including so-called omnibus claims or pension bills), and no amendment to any bill or resolution, authorizing or directing (1) the payment of money for property damages, for personal injuries or death for which suit may be instituted under the [FTCA] . . . shall be received or considered in either the Senate or the House of Representatives.

*Id.* at 831.

37. U.S. CONST. art. I, § 9, cl. 7.

38. 3 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-978SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW § 14-31 to -32 (3d ed. 2008) [hereinafter GAO-08-978SP] (citing Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 424–26 (1990)), available at <http://www.gao.gov/special.pubs/d08978sp.pdf>.

39. *Id.* §§ 14-30 to -44. *But see* 28 U.S.C. § 2672 (2006) (settlements for less than \$2500). The rare exceptions include non-appropriated fund instrumentalities, GAO-08-978SP at § 15-266, and the U.S. Postal Service. 2 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/OGC-94-33, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW §§ 14-34 to -37 (2d ed. 1994), available at <http://www.gao.gov/special.pubs/og94033.pdf>.

40. *See* GAO-08-978SP, *supra* note 38, §§ 14-31 to -32.

41. The Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812, 843, provides in part:

SEC. 4.03 CLAIMS OF \$1,000 OR LESS

...

(c) Any award made to any claimant pursuant to this section, and any award, compromise, or settlement of any claim cognizable under this title made by the Attorney General pursuant to section 413, shall be paid by the head of the Federal agency concerned

\$2500.<sup>42</sup> Judgments and settlements in excess of that amount could not be paid until Congress specifically appropriated money to pay them.<sup>43</sup> The recurrent need to make appropriations for judgments entered under a number of statutes caused an administrative burden on Congress and unnecessary delays in the payment of valid judgments. To solve these problems, in 1956 Congress created the Judgment Fund—a permanent, indefinite appropriation for the payment of judgments of up to \$100,000.<sup>44</sup> Under the new procedure, any FTCA judgment for that amount or less was paid automatically.<sup>45</sup> The legislation successfully reduced the administrative burdens of the old regime, the delays in payments, and the irritations associated with the delays.<sup>46</sup> In 1961, Congress amended the law to allow similar use of the Judgment Fund to pay settlements of up to \$100,000.<sup>47</sup> Settlements and judgments in excess of \$100,000 continued to require a specific appropriation authorizing payment until 1977, when Congress opened the Judgment Fund to pay, *inter alia*, any FTCA judgment regardless of amount and any FTCA settlement for more than \$2500.<sup>48</sup>

The Judgment Fund is an open-ended appropriation available to pay “final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when—(1) payment is not otherwise provided for; (2) payment is certified by the Secretary of the Treasury; and (3) the judgment, award, or settlement is payable under” the specified authorities, one of which is the FTCA.<sup>49</sup> It was created and is used primarily to pay judgments and settlements negotiated by the Department of Justice.<sup>50</sup> The Judgment Fund is not “an all-purpose fund for

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out of appropriations that may be made therefor, which appropriations are hereby authorized.

42. An Act to amend title 28 of the United States Code to increase the limit for administrative settlement of claims against the United States under the tort claims procedure to \$2500 is found at 86 Pub. L. No. 238, 73 Stat. 471 (1959).

43. See GAO-08-978SP, *supra* note 38, § 14-31.

44. Supplemental Appropriation Act of 1957, Pub. L. No. 84-814, § 1302, 70 Stat. 678, 694–95 (July 27, 1956) (now codified at 31 U.S.C. § 1304 (2006)). The statute provided, *inter alia*:

There are appropriated, out of any money in the Treasury not otherwise appropriated, and out of the postal revenues, respectively, such sums as may hereafter be necessary for the payment, not otherwise provide for, as certified by the Comptroller General, of judgments (not in excess of \$100,000 in any one case) rendered by the district courts and the Court of Claims against the United States which have become final together with such interest and costs as may be specified in such judgments or otherwise authorized by law. . . .

*Id.*

45. *Id.*

46. H.R. REP. NO. 87-733, at 2, 4 (1961); see also H. REP. NO. 87-428, at 2 (1961).

47. Act of Aug. 30, 1961, Pub. L. No. 87-187, § 2, 75 Stat. 415, 416 (1961).

48. Supplemental Appropriations Act of 1977, Pub. L. No. 95-26, ch. 14, 91 Stat. 61, 96–97 (1977).

49. 31 U.S.C. § 1304 (2006).

50. See GAO-08-978SP, *supra* note 38, § 14-34.

judicial disbursement.”<sup>51</sup> Rather, it can be used “only on the basis of . . . a substantive right to compensation based on the express terms of a specific statute.”<sup>52</sup> The Judgment Fund is not available to pay a settlement that exceeds the authority of the government attorney who purportedly agreed to it.<sup>53</sup>

### C. *The Westfall Act*

One other amendment to the FTCA is pertinent to this discussion. Prior to 1988, as a general rule federal employees “were absolutely immune from personal liability in State common law tort actions for harm that resulted from activities within the scope of their employment.”<sup>54</sup> Federal employees also had statutory immunity for suits arising from their operation of motor vehicles under the Federal Driver’s Act, which provided that the United States be substituted as defendant in such cases.<sup>55</sup> In 1988 the Supreme Court held in *Westfall v. Erwin* that federal employees are absolutely immune from suit for common law torts only if they were acting within the scope of employment and exercising discretionary functions.<sup>56</sup> The Court invited Congress to give more direction, stating: “Congress is in the best position to provide guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context. Legislated standards governing the immunity of federal employees involved in state-law tort actions would be useful.”<sup>57</sup>

In response,<sup>58</sup> Congress promptly enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the Westfall Act), which amended the FTCA to provide complete statutory immunity to federal employees from liability for common law torts arising from acts or omissions within the scope of their federal employment.<sup>59</sup> The Westfall Act

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51. Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 432 (1990).

52. *Id.*

53. See GAO-08-978SP, *supra* note 38, § 14-34 (citing White v. U.S. Dep’t of Interior, 639 F. Supp. 82 (M.D. Pa. 1986), *aff’d mem.*, 815 F.2d 697 (3d Cir. 1987)).

54. H.R. REP. NO. 100-700, at 2 (1988). See also Federal Employees Liability Reform and Tort Compensation Act of 1988 (the Westfall Act), Pub. L. No. 100-694 § 2(a)(3), 102 Stat. 4563 (1988); Poolman v. Nelson, 802 F.2d 304, 307 (8th Cir. 1986) (recognizing absolute immunity for federal employees acting “within the outer perimeter of their line of duty”); Gen. Elec. Co. v. United States, 813 F.2d 1273, 1276-77 (4th Cir. 1987). *But see* Johns v. Pettibone Corp., 769 F.2d 724, 728 (11th Cir. 1985) (holding federal officials have absolute immunity only for discretionary conduct within scope of employment).

55. Federal Drivers Act, Pub. L. No. 87-258, 75 Stat. 539 (1961) (providing for substitution of the United States as a defendant under the FTCA in cases “resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment”).

56. 484 U.S. 292, 300 (1988).

57. *Id.*

58. H.R. REP. NO. 100-700, at 2-4 (1988); Westfall Act, 100 Pub. L. No. 694 § 2, 102 Stat. 4563 (1988).

59. The Westfall Act provides, in part:

does not apply to claims based on a violation of the Constitution or of a federal statute that creates a cause of action against individuals.<sup>60</sup> Using the Federal Drivers Act as a model,<sup>61</sup> it provides that if a federal employee is sued for a covered tort for actions taken within the scope of employment, the United States will be substituted as defendant,<sup>62</sup> the case will proceed under the FTCA,<sup>63</sup> and the individual will be dismissed from the action.<sup>64</sup>

The statute's procedures give the Department of Justice the initial responsibility for deciding whether the defendant was a federal employee acting within the scope of employment at the time of the event that led to the suit.<sup>65</sup> If the Department of Justice concludes the employee was acting within the scope of employment it will certify that conclusion.<sup>66</sup> If the case is in state court it will be removed to the federal district court where the action was pending.<sup>67</sup> The United States will then be substituted as defendant and the employee will be dismissed from the suit.<sup>68</sup> If the Department of Justice refuses to certify that the employee was acting within the scope of employment, the employee may petition the court to issue such a certification.<sup>69</sup> If the Department of Justice does certify that the employee was acting within the scope of employment, another party may challenge that decision in federal district court.<sup>70</sup> In evaluating the scope of the employ-

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The remedy against the United States provided by [the FTCA] for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

100 Pub. L. No. 694 § 5, 102 Stat. 4563 (codified at 28 U.S.C. § 2679(b)(1) (2006)).

60. 28 U.S.C. § 2679(b)(2) (2006) states:

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—(A) which is brought for a violation of the Constitution of the United States, or (B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

61. See H.R. REP. NO. 100-700, at 4 (1988).

62. See 28 U.S.C. § 2679(d)(1), (5).

63. See 28 U.S.C. § 2679(d)(4).

64. 28 U.S.C. § 2679(b)(1).

65. See 28 U.S.C. § 2679(d); 28 C.F.R. § 15.4(a), (b) (2010).

66. See 28 U.S.C. § 2679(d); 28 C.F.R. § 15.4(a), (b).

67. See 28 U.S.C. § 2679(d)(2). The case cannot be remanded to state court even if the certification of scope of employment is reversed. See *Osborn v. Haley*, 549 U.S. 225, 231–32 (2007) (holding “once certification and removal are effected, exclusive competence to adjudicate the case resides in the federal court”).

68. See 28 U.S.C. § 2679(d)(1).

69. See 28 U.S.C. § 2679(d)(3).

70. See *Gutierrez De Martinez v. Lamagno*, 515 U.S. 417, 436–37 (1995). The Department also has authority to withdraw a certification. See 28 C.F.R. § 15.4(c).

ment issue, the district court is not limited to the allegations of the complaint<sup>71</sup> and has discretion to allow discovery.<sup>72</sup>

## II. ETHICAL OBLIGATIONS OF CIVIL GOVERNMENT ATTORNEYS

There is a surprising amount of debate about whether government attorneys in civil litigation should temper their advocacy because they represent the government.<sup>73</sup> On the criminal side, federal prosecutors clearly have such a duty. As the Supreme Court explained seventy-five years ago:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.<sup>74</sup>

Some scholars suggest that government lawyers in civil cases have a similar obligation to “do justice,”<sup>75</sup> “serve the public interest,”<sup>76</sup> or “seek justice.”<sup>77</sup> This obligation purportedly arises because the lawyer represents a government that has its own obligation to serve the public interest, to treat its citizens equally, and to seek justice for all, and is himself an officer of

71. See *Osborn v. Haley*, 549 U.S. 225, 231 (2007) (holding that the United States would remain as the substituted defendant “unless and until the District Court determines that the employee, in fact, and not simply as alleged by the plaintiff, engaged in conduct beyond the scope of his employment”) (emphasis removed). The scope of employment determination applies the respondeat superior law of the state in which the negligent or wrongful act occurred. See *Williams v. United States*, 350 U.S. 857, 857 (1955) (per curiam).

72. See, e.g., *Borneman v. United States*, 213 F.3d 819, 827 (4th Cir. 2000) (“[W]e recognized that this burden-shifting proof scheme would sometimes make it advisable for the trial court to permit limited discovery or conduct an evidentiary hearing to resolve competing factual claims concerning the scope-of-employment issue.”); see also JAYSON & LONGSTRETH, *supra* note 7, § 6.01(c) (providing a detailed discussion of the procedural nuances of challenges to certification decisions).

73. The scholarship on this topic is extensive. Compare Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789 (2000) [hereinafter Berenson, *Public Lawyers, Private Values*] (arguing that civil government attorneys have greater ethical obligations than private attorneys), and Bruce A. Green, *Must Government Lawyers “Seek Justice” in Civil Litigation?*, 9 WIDENER J. PUB. L. 235 (2000) (same), with Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 985 (1991) (arguing that civil government attorneys have the same ethical obligations as private attorneys).

The broader questions regarding ethical obligations of civil government attorneys are beyond the scope of this paper which addresses one simple problem: how government attorneys might approach decisions under the FTCA.

74. *Berger v. United States*, 295 U.S. 78, 88 (1935), *overruled on other grounds by* *Stirone v. United States*, 361 U.S. 212 (1960).

75. See, e.g., James W. Diehm, *The Government’s Duty to “Seek Justice” in Civil Cases*, 9 WIDENER J. PUB. L. 289 (2000).

76. See Berenson, *Public Lawyers, Private Values*, *supra* note 73, at 813–16.

77. See Green, *supra* note 73, at 279–80.

that government.<sup>78</sup> Others respond that the idea that government attorneys should guide their decisions by an unspecified “public interest” is “incoherent,”<sup>79</sup> or too “abstract” to have meaning.<sup>80</sup>

The ABA Model Rules of Professional Conduct (“Model Rules”) impose obligations on all attorneys, including the duty to “zealously assert[ ] the client’s position under the rules of the adversary system.”<sup>81</sup> But the rules say very little about the particular obligations of government attorneys in civil litigation. The Preamble to the Model Rules recognizes that government attorneys may have authority over legal matters that would normally belong to non-governmental clients.<sup>82</sup> Comment 9 to Model Rule 1.13, “Organization as Client,” notes the complexity of precisely identifying the client that government attorneys represent.<sup>83</sup> Indeed, defining the government client has become something of a parlor game.<sup>84</sup> Comment 9 suggests that the client might be an agency, a branch of government, or “the government as a whole.”<sup>85</sup> Other possibilities include “the people,”<sup>86</sup> “the public,”<sup>87</sup> the institutions of government,<sup>88</sup> and that “sovereignty” which seeks justice.<sup>89</sup>

Advocates on both sides of the debate have used hypothetical questions involving statutes of limitations for illustrative purposes. Professor Bruce Green discusses whether a government attorney should warn opposing counsel that she is about to miss a required filing date so that the oppo-

78. See e.g., Steven K. Berenson, *Hard Bargaining on Behalf of the Government Tortfeasor: A Study in Governmental Lawyer Ethics*, 56 CASE W. RES. L. REV. 345, 379 (2005) [hereinafter Berenson, *Hard Bargaining*]; Diehm, *supra* note 75, at 290; Green, *supra* note 73, at 265–66.

79. See Geoffrey P. Miller, *Government Lawyers’ Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1294 (1987).

80. See Robert P. Lawry, *Confidences and the Government Lawyer*, 57 N.C. L. REV. 625, 637 (1979).

81. MODEL RULES OF PROF’L CONDUCT pmb. & scope § 2 (2002).

82. *Id.* § 18.

83. *Id.* at R. 1.13 cmt. 9 (“Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules.”). Comment 9 on Rule 1.13 also notes that that the rule pertaining to representing organizations applies to governmental organizations and that a government lawyer may have more authority to question conduct than would a private attorney dealing with a private organization. *Id.*

84. See Berenson, *Public Lawyers, Private Values*, *supra* note 73, at 797–800 (collecting formulations of client of government attorneys).

85. *Id.* at 797.

86. Diehm, *supra* note 75, at 291.

87. See Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291, 296 (1991) (listing the possibilities for the government lawyer’s client as: “(1) the public (2) the government as a whole (3) the branch of government in which the lawyer is employed (4) the particular agency or department in which the lawyer works and (5) the responsible officers who make decisions for the agency”).

88. See Douglas Letter, *Lawyering and Judging on Behalf of the United States: All I Ask for is a Little Respect*, 61 GEO. WASH. L. REV. 1295, 1297 (1993) (“In theory, federal public servants have a single master: the people of the United States . . . [whom] they sometimes serve . . . through loyalty not to the people directly but to institutions created by them, such as the Presidency, Congress, their agency employers, or the federal courts.”).

89. Green, *supra* note 73, at 277.

ment's claim will not be lost.<sup>90</sup> Professor Catherine Lanctot considers whether a government attorney may ethically raise a statute of limitations defense to bar the otherwise valid claim of a needy widow.<sup>91</sup> The one ABA ethics opinion dealing with such issues holds that a government attorney has no greater obligation than does a private attorney to inform the opposing party that a claim asserted by her client is barred by limitations.<sup>92</sup> The opinion concludes that it would violate ethical obligations to make such a disclosure without the client's consent.<sup>93</sup> At the moment of decision, the question for a government lawyer faced with such a situation is not hypothetical, abstract, or a matter of defining the "client." Rather, it is the simple but hard to answer question: How will I act in the face of this legal problem?<sup>94</sup>

In her seminal work on the ethical obligations of federal attorneys, Professor Catherine Lanctot argues persuasively that there is one set of rules for all attorneys, including those who represent the government in civil litigation.<sup>95</sup> In the FTCA context, it is difficult to see how any other standard would work.<sup>96</sup> Congress has determined the circumstances for liability and the extent to which the public fisc will be put at risk, and no money can be paid from the public treasury without its express consent.<sup>97</sup> Congress's decisions should not be circumvented or undermined by government lawyers.<sup>98</sup> It is in the public interest to protect that treasury<sup>99</sup> and to follow the orderly processes<sup>100</sup> for resolving claims against the government.

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90. *Id.* at 250–56.

91. Lanctot, *supra* note 73, at 951–52, 975–86. Professor Lanctot also discusses a related limitations question: May a government attorney ethically not inform the court that its *sua sponte* dismissal of an action on limitations grounds was improper for reasons that may not be perceived by the plaintiff? *Id.* at 951–52, 986–94.

92. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-387, at 253 (1994) ("There is no basis in the ethics rules for holding a lawyer representing a government client to a different standard [when disclosing to an opposing party and court that the statute of limitations has run] than that applicable to a lawyer representing a private client.").

93. *Id.* at 253–54 (citing MODEL RULES OF PROF'L CONDUCT R. 1.3, R. 1.6 (1983) (amended 2002)).

94. See Berenson, *Hard Bargaining*, *supra* note 78, at 364.

95. Lanctot, *supra* note 73, at 1016–17. *But see* Freeport-McMoRan Oil & Gas Co. v. FERC, 962 F.2d 45, 46–47 (D.C. Cir. 1992).

96. See generally Diehm, *supra* note 75, at 293.

97. See *supra* text accompanying notes 10–15.

98. See generally Lanctot, *supra* note 73, at 986 (noting that elected officials rather than government lawyers have the responsibility to decide public policy); Miller, *supra* note 79, at 1295 (noting that "[i]f attorneys could freely sabotage the actions of their agencies out of a subjective sense of the public interest, the result would be a disorganized, inefficient bureaucracy, and a public distrustful of its own government.").

99. See Diehm, *supra* note 75, at 293.

100. See Lanctot, *supra* note 73, at 984–86.

### III. THE INTERSECTION OF THE FTCA & LEGAL ETHICS

#### A. *The FTCA & Plaintiffs*

In the typical FTCA case, a person who believes she was injured by government negligence will comply with the FTCA's mandatory administrative claim requirement by filing with the agency involved a written claim that states what happened and a sum certain.<sup>101</sup> The agency can then settle the claim or deny it.<sup>102</sup> In assessing the claim, the agency will consider its factual and legal merits, including any applicable defenses. If a proposed settlement is for an amount larger than the agency's authority, the agency must secure approval from the Department of Justice.<sup>103</sup> The majority of FTCA administrative claims are resolved on the administrative level and do not go to litigation.<sup>104</sup>

The claimant can file suit if the claim is denied or if a settlement is not reached and six months have passed since the claim was filed.<sup>105</sup> If the claimant files a complaint, the case will proceed like any other lawsuit. If the case is not settled or dismissed, it will go to trial before a United States district judge acting as the fact-finder.<sup>106</sup> The role and ethical obligations of the Justice Department attorney responsible for defending the case would be like that of any defense attorney in a similar suit.

Many defenses could keep a case from being decided on its factual merits. First, the FTCA contains two statutes of limitations. A written administrative claim must be presented to the responsible agency within two years of the claim's accrual.<sup>107</sup> If the agency denies that claim, suit must be filed in federal district court within six months of the date of that denial.<sup>108</sup> A suit must comply with both limitations periods or it will be barred.<sup>109</sup>

Second, Congress wrote into the text of the FTCA explicit exceptions to the waiver of sovereign immunity.<sup>110</sup> If any of them apply, the suit is barred, and the case will not be decided on its factual merits. For example, suppose the child of U.S. diplomats alleges that while visiting her parents

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101. 28 U.S.C. § 2675(a) (2006).

102. *Id.* § 2672.

103. *Id.*

104. See 3 JAYSON & LONGSTRETH, *supra* note 7, § 17.01; Jeffrey Axelrad, *Federal Tort Claims Act Administrative Claims: Better Than Third-Party ADR for Resolving Federal Tort Claims*, 52 ADMIN. L. REV. 1331, 1342–45 (2000) (arguing that the administrative claim system is efficient because it enables many claims to be settled before reaching court).

105. 28 U.S.C. § 2675(a).

106. *Id.* § 2402.

107. *Id.* § 2401(b).

108. *Id.*

109. *Willis v. United States*, 719 F.2d 608, 608 (2d Cir. 1983) (holding that a suit is barred by six month limitations period even though suit was filed less than two years after the auto accident). See generally *McNeil v. United States*, 508 U.S. 106 (1993). State statutes of limitation have no application under the FTCA. See, e.g., *Young v. United States*, 184 F.2d 587, 588–89 (D.C. Cir. 1950).

110. 28 U.S.C. § 2680.

she contracted a horrible disease because a negligent State Department doctor placed her entire family in the quarantine wing of the American Embassy with people who had the disease. Regardless of the truth of her allegations, at least three exceptions to the FTCA—the quarantine exception,<sup>111</sup> the false imprisonment exception,<sup>112</sup> and the foreign tort exception<sup>113</sup>—would bar her suit, and her allegations would not be the subject of a trial.

Third, any suit must also fall within the jurisdictional limits of the FTCA that are set forth in 28 U.S.C. § 1346(b).<sup>114</sup> As the Supreme Court explained in *FDIC v. Meyer*<sup>115</sup>:

Section 1346(b) grants the federal district courts jurisdiction over a certain category of claims for which the United States has waived its sovereign immunity and “render[ed]” itself liable. This category includes claims that are:

“[1] against the United States, [2] for money damages, . . . [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] 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.”

A claim comes within this jurisdictional grant—and thus is “cognizable” under §1346(b)—if it is actionable under § 1346(b). And a claim is actionable under § 1346(b) if it alleges the six elements outlined above.<sup>116</sup>

Because the FTCA applies the substantive tort law of the place of the allegedly wrongful act or omission, any state law defenses available to private defendants would be available to the government.<sup>117</sup> These include, *inter alia*, contributory negligence,<sup>118</sup> comparative negligence,<sup>119</sup> assumption of

111. *Id.* § 2680(f).

112. *Id.* § 2680(h).

113. *Id.* § 2680(k).

114. 28 U.S.C. § 1346(b)(1) states:

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, 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.

115. 510 U.S. 471 (1994).

116. *Id.* at 477 (citations omitted).

117. 28 U.S.C. § 1346(b)(1).

118. *See, e.g., Kahn v. United States*, 795 F. Supp. 473, 476 (D.D.C. 1992) (finding contributory negligence where plaintiff stepped into Kennedy Center elevator car that was two feet lower than the floor).

risk,<sup>120</sup> superseding cause,<sup>121</sup> the absence of an actionable duty,<sup>122</sup> recreational use statutes,<sup>123</sup> and the statutory employer doctrine.<sup>124</sup>

Additional defenses may apply. If Congress did not intend for a suit to fall within the FTCA's waiver of sovereign immunity, it is barred. For example, in *Jefferson v. United States*,<sup>125</sup> a military surgeon left a towel measuring thirty inches by eighteen inches in the body cavity of an active duty soldier.<sup>126</sup> Because the Supreme Court determined that Congress had not waived sovereign immunity for claims that arise incident to military service, it held in *Feres v. United States*<sup>127</sup> that the suit was barred.<sup>128</sup> Likewise, some statutes bar tort liability for certain kinds of claims. For example, the Federal Employees Compensation Act bars suit when its workers compensation type remedy may be available,<sup>129</sup> and the Flood Control Act of 1928 bars suits arising from "floods or flood waters . . . ."<sup>130</sup>

From the perspective of a plaintiff who successfully avoids these barriers and for whom the FTCA provides a remedy, the government is the very best sort of deep pocket defendant. The United States will pay all compensatory damages awarded against it.<sup>131</sup> For an unsuccessful plaintiff whose

119. See, e.g., *Murff v. United States*, 785 F.2d 552, 555 (5th Cir. 1986) (barring suit where airplane pilot's negligence exceeded that of air traffic controllers; "The Texas form of comparative negligence permits no recovery against one who is less negligent than the plaintiff.").

120. See, e.g., *Clem v. United States*, 601 F. Supp. 835, 845 (N.D. Ind. 1985) (applying Indiana "incurred risk doctrine" where swimmer entered unfamiliar waters after being informed no lifeguard was present and the waters were hazardous).

121. See, e.g., *Ins. Co. of N. Am. v. United States*, 527 F. Supp. 962, 971 (E.D. Ark. 1981) (allowing no recovery because superseding negligence of airplane pilot caused crash).

122. See, e.g., *Walters v. United States*, 474 F.3d 1137, 1141 (8th Cir. 2007) (finding no FTCA liability for accident caused by loose gravel on roadway because a private party would have no duty to prevent such a condition).

123. See, e.g., *Matheny v. United States*, 469 F.3d 1093 (7th Cir. 2006) (finding that Indiana Recreational Use Statute foreclosed recovery where woman was injured by a protruding pipe while sledding in a national park).

124. See, e.g., *Leigh v. Nat'l Aeronautics & Space Admin.*, 860 F.2d 652, 653 (5th Cir. 1988) (holding that the Louisiana statutory employer doctrine protected the United States from liability for injuries employee of a subcontractor sustained while testing the external tank of the space shuttle).

125. 178 F.2d 518 (4th Cir. 1949), *aff'd*, *Feres v. United States*, 340 U.S. 135 (1950).

126. *Id.* at 519.

127. 340 U.S. at 146.

128. *Id.* See generally Paul F. Figley, *In Defense of Feres: An Unfairly Maligned Opinion*, 60 AM. U. L. REV. 393 (2010) (examining the early influences on the FTCA and arguing that the Supreme Court correctly held that Congress did not intend for the FTCA to encompass injuries to service members).

129. 5 U.S.C. § 8116(c) (2006).

130. 33 U.S.C. § 702c (2006).

131. See 28 U.S.C. § 2674 (2006), which provides, in part, "The 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, but shall not be liable for interest prior to judgment or for punitive damages."

otherwise meritorious claim is barred, a private relief bill is the only remedy.<sup>132</sup>

### B. *The FTCA & Government Employees*

The FTCA is particularly important to a federal employee accused of a tort because, if the employee was acting within the scope of employment, the Act grants her complete immunity from common law tort liability regardless of whether it allows any recovery to the plaintiff.<sup>133</sup> Under the FTCA's procedures, the Department of Justice, with input from the employee's agency, will decide whether the employee was acting within the scope of employment.<sup>134</sup> If so, the Department of Justice will certify that conclusion.<sup>135</sup> The United States will be substituted as defendant, and the employee will be dismissed from the suit.<sup>136</sup>

This decision about scope of employment obviously has serious consequences for the individuals involved. If the United States is substituted as defendant and FTCA defenses apply, the plaintiff will have no recovery.<sup>137</sup> If the defendant-employee is not certified, she may be left to defend the litigation and pay any judgment on her own.

Scope of employment determinations for FTCA purposes turn on state respondeat superior law.<sup>138</sup> If a federal employee has a motor vehicle accident under circumstances where a private person would be outside the scope of employment under state law, the FTCA and its immunity for federal employees would not apply.<sup>139</sup> For instance, state law on the going-and-coming rule will determine whether commuting federal employees were acting within the scope of employment and protected by the FTCA.<sup>140</sup>

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132. See *United States v. Smith*, 499 U.S. 160, 165 (1991) (holding that the FTCA renders federal employee tortfeasors immune from suit even when the FTCA defenses bar recovery).

133. See generally *id.* See also 28 U.S.C. § 2679(d) (2006) (providing that employees acting within the scope of employment shall be substituted by the United States as the defendant).

134. 28 U.S.C. § 2679(c); 28 C.F.R. §§ 15.1–4 (2011).

135. 28 U.S.C. § 2679(c); 28 C.F.R. §§ 15.1–4.

136. 28 U.S.C. § 2679(d).

137. See *Smith*, 499 U.S. at 166–67.

138. *Williams v. United States*, 350 U.S. 857, 857 (1955) (per curiam) (“This case is controlled by the California doctrine of respondeat superior.”), *vacating* 215 F.2d 800, 808 (9th Cir. 1954) (affirming dismissal because negligent acts of a soldier while off duty and off base were outside military line of duty).

139. See, e.g., *Mider v. United States*, 322 F.2d 193, 197–98 (6th Cir. 1963) (holding two soldiers were outside the scope of their employment when “[t]hey took the government vehicle to go to Abner’s home for an entirely personal weekend frolic, and became intoxicated on the way, and, before the collision which occurred fifty-five miles from the Base”).

140. Compare *Clamor v. United States*, 240 F.3d 1215, 1217 (9th Cir. 2001) (holding that Navy civilian employee who had auto accident in government rented vehicle while leaving work for the day was not acting within the scope of his employment under Hawaii law), with *Healy ex rel. Healy v. United States*, 435 F. Supp. 2d 157, 163–64 (D.D.C. 2006) (holding that FBI agent driving from home to work was within scope of employment under D.C. law because his use of FBI car served the agency’s needs).

Programs that allow law enforcement officers to drive agency vehicles during non-work hours are a prime breeding ground for disputes about scope of employment.<sup>141</sup> Interesting problems arise when male law enforcement officers have female guests in their cars. If the officer is posing as a gangster and has an accident after leaving a tavern at two o'clock a.m., he may well be within the scope of employment if the lady accompanying him has gang connections. If the same officer has an accident during regular business hours in an airport parking lot, he is likely outside the scope of employment if the lady is his mother who just flew in from Chicago.<sup>142</sup>

Questions regarding scope of employment determinations can lead to tension among the accused tortfeasor-employee who wants immunity, the employee's agency, which may want to protect him, and the Department of Justice, which is responsible for independently administering this aspect of the FTCA. A federal employee facing substantial personal liability has a strong interest in receiving a favorable scope of employment determination. If the employee is not a lawyer he may not understand the nuances of state respondeat superior law or why those nuances control such an important decision in his life. He or his union may press his agency to advocate for his position. The agency has an interest in its employees' morale and their perception of its willingness to protect them. If the employee is high-ranking, the agency may have political reasons to support his position. The Department of Justice is largely immune from such pressures. It is charged with applying the law to the facts.

Similar problems can arise in deciding whether an accused tortfeasor is a federal employee for FTCA purposes. The Act defines "[e]mployee of the government" to include:

officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty . . . , and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.<sup>143</sup>

Determining employee status is critical because the FTCA does not apply if the tortfeasor is not a federal employee.<sup>144</sup> The answer in any particular case may be complicated, but generally turns on whether a common law master-servant relationship exists with the federal government.<sup>145</sup> State or

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141. See, e.g., *W. Nat'l Mut. Ins. Corp. v. United States*, 964 F. Supp. 295, 297-98 (D. Minn. 1997) (holding that a Minneapolis police officer, a Special Deputy U.S. Marshall on sick leave, was not within scope of employment while using an FBI car to pick up daughter from day care).

142. See *id.* at 297.

143. 28 U.S.C. § 2671 (2006).

144. See *United States v. Orleans*, 425 U.S. 807, 813 (1976); *Logue v. United States*, 412 U.S. 521, 526 (1973) (citing 28 U.S.C. § 2671).

145. See *JAYSON & LONGSTRETH*, *supra* note 7, § 8.04 n.14 ("A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the

local law enforcement officers deputized as federal officers may be federal employees for FTCA purposes and entitled to its statutory immunity for common law torts.<sup>146</sup> Other defendant-tortfeasors who do not squarely fit the “[e]mployee of the government” definition, including informants,<sup>147</sup> inspectors,<sup>148</sup> jurors,<sup>149</sup> and private agencies,<sup>150</sup> have also sought to be treated as federal employees for FTCA purposes.<sup>151</sup>

Because the FTCA grants federal employees immunity and provides plaintiffs a deep-pocket defendant, tortfeasors and plaintiffs may have a common interest in having a defendant deemed a federal employee. This may have been the case in *Brandes v. United States*,<sup>152</sup> where the fiancé of a Veterans’ Administration doctor had a traffic accident while driving a government vehicle on a house-hunting trip with the doctor in a new city.<sup>153</sup> The district court held the fiancé to be a federal employee, although the Ninth Circuit subsequently vacated that decision.<sup>154</sup>

performance of the services is subject to the other’s control or right of control.”) (quoting RESTATEMENT OF AGENCY 2d § 220(1) (1958)).

146. See, e.g., *Provancial v. United States*, 454 F.2d 72, 75 (8th Cir. 1972) (holding that city police officers with special commission to arrest Indians within Indian Reservation were federal employees for FTCA purposes); *Chin v. Wilhelm*, 291 F. Supp. 2d 400, 403 (D. Md. 2003) (holding Baltimore City Police officers assigned to DEA Task Force were federal employees for FTCA purposes), *aff’d*, No. 06-1428, 2006 U.S. App. LEXIS 32075, at \*2 (4th Cir. Dec. 29, 2006).

147. *Wang v. United States*, 947 F.2d 1400, 1401 (9th Cir. 1991) (remanding case for determination whether Internal Revenue Service informant should be certified as a federal employee for FTCA purposes). Compare *Leaf v. United States*, 661 F.2d 740, 741 (9th Cir. 1981) (holding DEA informant who rented an airplane for use in an undercover operation was a FTCA federal employee), with *Slagle v. United States*, 612 F.2d 1157, 1160 (9th Cir. 1980) (holding DEA informant involved in shooting was not a FTCA federal employee).

148. Compare *Haddix v. Yetter Mfg. Co.*, 209 F. Supp. 2d 915, 916 (N.D. Ill. 2002) (holding Occupational Safety and Health Administration inspector was not a federal employee), with *In re Air Crash Disaster near Silver Plume*, 445 F. Supp. 384, 400 (D. Kan. 1977) (holding FAA inspector was a federal employee).

149. *Sellers v. United States*, 672 F. Supp. 446, 449 (D. Idaho 1987) (holding prospective juror driving to courthouse was not a federal employee).

150. *Daniels v. Liberty Mut. Ins. Co.*, 484 F.3d 884, 885 (7th Cir. 2007) (describing an industry anti-fraud organization, the National Insurance Crime Bureau, which sought to be certified as federal employee for FTCA purposes).

151. There is a significant question whether a corporation can be deemed to be a federal employee for FTCA purposes. Compare *Adams v. United States*, 420 F.3d 1049, 1050 (9th Cir. 2005) (holding that helicopter company retained to spread herbicide could not be certified as a federal employee because “the word ‘persons’ as used in this portion of the FTCA does not include corporations”), and *Vallier v. Jet Propulsion Lab.*, 120 F. Supp. 2d 887, 893 (C.D. Cal. 2000) (rejecting request by university engaged in rocket research that it be certified as federal employee for FTCA purposes), *aff’d*, 23 F. App’x 803 (9th Cir. 2001), with *B&A Marine Co. v. Am. Foreign Shipping Co.*, 23 F.3d 709, 714–15 (2d Cir. 1994) (holding that the American Foreign Shipping Company (AFS) was a federal employee because, inter alia, its contract with the Maritime Administration “expressly provided that AFS would serve ‘as [the Maritime Administration’s] agent, and not as an independent contractor’”).

152. 783 F.2d 895 (9th Cir. 1986), *rev’g* 569 F. Supp. 538 (N.D. Cal. 1983).

153. *Id.* at 895–96.

154. *Id.* at 897.

Disputes about “employee” status can be very important to accused tortfeasors, the agencies to which they are connected, and injured plaintiffs. For example, in the 1980s, Department of Energy contractors involved in the nation’s nuclear weapons program were sued in over fifty cases by thousands of plaintiffs allegedly injured by radiation,<sup>155</sup> including test site workers, members of the military, and downwinders.<sup>156</sup> The contractors were not at financial risk because their contracts included valid indemnity agreements that made the United States an indemnitor for all tort liability and costs of litigation.<sup>157</sup> Nonetheless, for several years they sought to be considered part of the government for actions they took to assist in the nuclear weapons program.<sup>158</sup>

Having failed to convince the Department of Justice to support that position in court, the contractors argued to Congress that, despite indemnification, pending litigation interfered with their research and unfairly opened them to blame.<sup>159</sup> They threatened to end their participation in nuclear research and expressed concern that the litigation might undermine the nuclear weapons program.<sup>160</sup> Consequently, in 1984 Congress enacted a statute that made the FTCA the exclusive remedy for injuries “due to exposure to radiation based on acts or omissions by a contractor in carrying out an atomic weapons testing program under a contract with the United States”<sup>161</sup> and required the United States to substitute itself in place of the contractors under FTCA-like procedures.<sup>162</sup> Because FTCA defenses applied to the allegations made against the nuclear weapons contractors, the legislation effectively ended the plaintiffs’ hope for recovery.<sup>163</sup>

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155. See H.R. REP. NO. 98-124, pt. 4, at 2 (1983).

156. See *id.* at 2–3; see, e.g., *In re Consol. U.S. Atmospheric Testing Litig.*, 820 F.2d 982 (9th Cir. 1987) (military personnel); *Hammond v. United States*, 786 F.2d 8 (1st Cir. 1986) (test site worker).

157. See H.R. REP. NO. 98-124, pt. 4, at 11, app. 2 (Modification No. M203 Contract No. W-7405-ENG-36, *Clause 16—Contingencies—litigation and claims*); S. REP. NO. 98-500, at 375–77 (1984); see, e.g., *In re Consol. U.S.*, 820 F.2d at 987; *Hammond*, 786 F.2d at 13–14.

158. See generally H.R. REP. NO. 98-124, pt. 4, at 1–4.

159. See *id.* at 2.

160. See *id.* at 3.

161. 50 U.S.C. § 2783(b)(1) (2006) (formerly 42 U.S.C. § 2212(b)(1) (2000 & Supp. 2003)).

162. Compare 50 U.S.C. § 2783(c), with 28 U.S.C. § 2679(d)(2).

163. See, e.g., *In re Consol. U.S. Atmospheric Testing Litig.*, 820 F.2d 982, 986–92 (9th Cir. 1987) (approving substitution, upholding constitutionality of the substitution, and dismissing claims under affirmative FTCA defenses); *Hammond v. United States*, 786 F.2d at 8, 10–16 (1st Cir. 1986) (same).

Legislation that extends FTCA coverage to contractors is troublesome because it blurs the distinction between contractors on the one hand, and federal agencies or instrumentalities on the other, a distinction that protects the United States from liability for the acts of its contractors. See H.R. REP. NO. 98-124, pt. 4, at 4.

### C. *The FTCA & Federal Agencies*

The government is not a monolith,<sup>164</sup> and federal agencies may have interests that conflict with a strict adherence to the limits of the FTCA. These interests may be political, budgetary, or programmatic. They may put the agency at odds with the Department of Justice regarding how the FTCA should apply in particular circumstances. The Judgment Fund and its procedures are important to any discussion of such disputes and the ethical issues they raise.

It is easy to be generous, or less careful, with other people's money.<sup>165</sup> This truism has consequences in the FTCA context. Because any FTCA judgment or any FTCA settlement in excess of \$2500 will be paid from the Judgment Fund rather than agency appropriations, agencies have little financial interest in the outcome of an FTCA claim or suit.<sup>166</sup> Because agency funds are not at risk under the FTCA, agencies lack a key incentive to oppose claims, especially when the agency has some reason to prefer that the FTCA apply. Thus, agency officials may urge against the weight of evidence that an employee was acting within the scope of employment out of concern for the employee or for political reasons internal to the agency. Agencies or agency officials may also have cause to seek a disproportionately generous financial award in favor of a claimant, either because that claimant seems particularly sympathetic or because such an award would further the agency's policy interests. On occasion, agencies have proposed non-meritorious FTCA settlements in order to avoid disclosure of malfeasance, ineptness, or embarrassing facts.

An agency contractually obligated to use its appropriations to indemnify its contractor can save those appropriated funds if the contractor is treated as a government employee under the FTCA because any payment will come from the Judgment Fund if the suit is settled or lost.<sup>167</sup> Accordingly, an agency may perceive that its ability to conduct its programs will be enhanced if the FTCA can be used to shield the agency's contractors from liability. This is so although, generally speaking, the government is not liable under the FTCA for the torts of government contractors,<sup>168</sup> and

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164. See, e.g., *Hughes v. United States*, 701 F.2d 56, 58 (7th Cir. 1982).

165. Cf. *In re Erewon, Inc.*, 21 B.R. 79, 81 (Bankr. D. Mass. 1982) ("When dealing with other people's money, there is apt to be less regard for exercising the same scrutiny of charges that one might render when dealing purely with one's own expenses.")

166. Federal agencies do bear the cost of providing litigation support, witnesses, and in-house counsel to assist the Department of Justice attorneys that represent the government in court. See Edwin F. Hornbrook & Eugene J. Kirschbaum, *The Feres Doctrine: Here Today—Gone Tomorrow?*, 33 A.F. L. REV. 1, 15 (1990).

167. See discussions of nuclear weapons contractors, *supra* notes 155–63 and accompanying text, and tribal contractors, *infra* note 172.

168. The FTCA defines the term "Federal agency" as including "the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States." 28 U.S.C. § 2671 (2006)

the Antideficiency Act<sup>169</sup> bars government officers from agreeing to indemnify contractors unless the agency has funds available for that purpose or special statutory authority to indemnify.<sup>170</sup>

The freedom from direct financial consequences to the agency may lead agency officials to provide only minimal support to the defense of a case or to ignore it entirely. This problem arises most frequently when the plaintiff has a prior relationship with the officials, when all the agency personnel with knowledge of an event have left the concerned facility, or when the entity involved does not perceive itself to be part of the federal government, such as when the tortfeasor is a nuclear weapons contractor<sup>171</sup> or tribal employee or tribal contractor<sup>172</sup> for whose torts Congress has ac-

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(emphasis added). In *Logue v. United States*, the Court recognized “the Act’s exclusion of employees of a ‘contractor with the United States.’” 412 U.S. 521, 523, 532 (1973) (citing 28 U.S.C. § 2671). The Court held, where a federal prisoner committed suicide while housed in a county jail, that the United States is not liable under the FTCA for torts of a contractor when the government does not control the detailed physical aspects of the contractor’s operation. *Id.* at 531–32; *see also* *United States v. Orleans*, 425 U.S. 807, 819 (1976) (holding community service agency was not a federal agency even though it received federal funding and complied with federal regulations).

169. 31 U.S.C. § 1341 (2006). The Antideficiency Act prohibits any government officer from entering a “contract or obligation for the payment of money before an appropriation is made unless authorized by law.” *Id.*

170. One consequence of the Antideficiency Act is that, absent available funds or special statutory authority, agencies cannot agree to indemnify government contractors and contractors cannot recover on indemnification agreements that violate the statute. *See, e.g.,* *Cal.-Pac. Utils. Co. v. United States*, 194 Ct. Cl. 703, 715 (1971) (holding power company could not recover indemnity for money paid to soldier injured by its electrical line because the Antideficiency Act “proscribes indemnification on the grounds that it would constitute the obligation of funds not yet appropriated”) (citations omitted); *see Hercules, Inc. v. United States*, 516 U.S. 417, 427–28 (1996); *see also* 2 U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-382SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 6-60 (3d ed. 2004) [hereinafter GAO-06-382SP], available at <http://www.gao.gov/special.pubs/d06382sp.pdf>.

The Department of Energy and its predecessors had statutory authority to enter indemnity contracts under 50 U.S.C. § 1431. This statutory authority originated in the First War Powers Act. Act of Dec. 17, 1941, Pub. L. No. 77-354, § 201, 55 Stat. 838, 839 (1941). Indeed, in 1943, the General Accounting Office (now Government Accountability Office) approved an indemnity agreement that protected contractors involved in the Manhattan Project. *See* GAO-06-382SP, *supra*, at 6-78 n.82 (citing U.S. GOV’T ACCOUNTABILITY OFFICE, B-33801, REQUEST FOR RULING ON PROPRIETY OF CONTRACT MODIFICATIONS (1943), available at <http://archive.gao.gov/lglp2pdf/23/087300.pdf>).

171. *See* discussions of nuclear weapons contractors, *supra* notes 155–63.

172. Congress made the FTCA the exclusive remedy for torts of tribal employees and contractors acting under certain contracts or agreements, giving them the FTCA’s “full protection and coverage.” Act of Nov. 5, 1990, Pub. L. No. 101-512, Title III, § 314, 104 Stat. 1915, 1959 (1990) (current version at 25 U.S.C. § 450(f) (2006)). The pertinent contracts and agreements are those authorized “by the Indian Self-Determination and Education Assistance Act of 1975, as amended, and . . . [the] Tribally Controlled School Grants of the Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1988, as amended.” *Id.* (citations omitted). Accordingly, any settlements or judgments arising from the covered torts of those tribal employees and contractors are paid from the Judgment Fund. *Id.* at 1960. The statute does require the Secretary of Interior to request funds with which to reimburse the Treasury for the prior year’s payments. *Id.* *But see* *Mentz v. United States*, 359 F. Supp. 2d 856, 861–62 (D.N.D. 2005) (holding that tribal school superintendent and agency education administrator provided evidence refuting claim of auto mechanics teacher that he was authorized to work on private vehicles on school grounds).

cepted FTCA liability. The lack of agency financial consequences may also embolden individuals within the agency to become advocates for the plaintiffs. This advocacy may be grounded in guilt feelings of an employee who caused an injury, anger at the agency for old grievances or actions related to the injury, or strong disagreement with the government's failure to provide compensation to the plaintiffs.

A prime example is the course followed by Secretary of Energy Hazel O'Leary immediately before and during the *Prescott* trial. The *Prescott* litigation<sup>173</sup> was a massive radiation case, consolidating fifteen lawsuits involving 216 former Nevada Test Site workers or their families.<sup>174</sup> The plaintiffs alleged in eight counts that, between January 1951 and February 1981, the negligence of the Department of Energy (and its predecessor organizations<sup>175</sup>), the Department of Defense, and their nuclear weapons contractors led to the occupational exposure of the workers to ionizing radiation, causing them to contract various diseases.<sup>176</sup> The trial of six representative cancer cases, Mr. Prescott's, and five wrongful death actions, took place in Las Vegas from December 13, 1993, until February 1, 1994.<sup>177</sup>

Less than a week before the trial began, Secretary O'Leary gave a speech in which she announced a new Department of Energy (DOE) policy of openness, noted her concern for victims of previously disclosed human experimentation, and expressed hope that, with disclosures about radiation at DOE's work sites, "we can improve the work conditions and the safety of our employees who work there, and that we already know is one of our major vulnerabilities."<sup>178</sup> The speech and the related press materials<sup>179</sup> received broad coverage under headlines such as "U.S. Reveals 204 Nuclear Tests, Plutonium Exposure, Weapons: Energy Department Declassifies Cold War Data. Radioactive Matter Was Injected into 18 People,"<sup>180</sup> and

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173. *Prescott v. United States*, 858 F. Supp. 1461 (D. Nev. 1994).

174. *Id.* at 1464.

175. *Id.* at 1467 (noting that the Department of Energy's predecessor organizations in the nuclear weapons program included the Atomic Energy Commission and the Energy Research and Development Administration).

176. *Id.* at 1464-65.

177. *Id.* at 1464.

178. Hazel O'Leary, U.S. Sec'y of Energy, Openness (Dec. 7, 1993) (transcript available at <http://gos.sbc.edu/o/oleary.html>). Her next sentence stated, "So the more we know, the more we share, the better we are in a position to do that." *Id.*

179. See Press Release, U.S. Dep't of Energy, Energy Secretary Unveils Openness Initiative (Dec. 7, 1993), available at <https://www.osti.gov/opennet/forms.jsp?formurl=reports/pc931207.html>; Press Release, U.S. Dep't of Energy, Openness Press Conference Fact Sheets (Dec. 7, 1993), available at <https://www.osti.gov/opennet/forms.jsp?formurl=reports/pc931207.html>.

180. Issa Healy, *U.S. Reveals 204 Nuclear Tests, Plutonium Exposure, Weapons: Energy Department Declassifies Cold War Data. Radioactive Matter Was Injected into 18 People*, L.A. TIMES, Dec. 8, 1993, at A1 ("We've got to expose the impact of the Cold War, both in terms of its environmental health and safety impacts and also impacts on . . . the psyche of the nation," O'Leary told reporters. "One of the benefits to openness will be to build public trust.").

“204 Secret Nuclear Tests by U.S. Are Made Public.”<sup>181</sup> On December 28, 1993, Secretary O’Leary gave an interview on CNN and held another press conference in which she called for the government to compensate people who had been exposed to radiation as subjects of medical testing or from fallout downwind from the Nevada Test Site.<sup>182</sup> The flurry of publicity obviously was of interest to the participants in *Prescott*. In a news story published the next day, Stuart Udall, one of the attorneys representing the *Prescott* plaintiffs, interpreted the Secretary’s statements as “a very bold step” and an apology.<sup>183</sup> Secretary O’Leary acknowledged that her comments were in conflict with the views of the Department of Justice<sup>184</sup> and that they might make the government more vulnerable in litigation.<sup>185</sup>

Some of Secretary O’Leary’s remarks seem intended to undermine the government’s defense of the *Prescott* litigation. In discussing the subjects of medical testing, Secretary O’Leary pointedly identified by name as persons who had engaged in human experimentation three scientists listed by the Department of Justice as expert witnesses in *Prescott*.<sup>186</sup> The *Prescott* plaintiffs sought to capitalize on the perceived ethical vulnerability of these scientists.<sup>187</sup> Incongruously, Secretary O’Leary did not include Dr. Karl Morgan in her list of persons who had engaged in human experimentation.<sup>188</sup> Dr. Morgan had already testified as an expert for the *Prescott* plaintiffs about Nevada Test Site safety issues.<sup>189</sup> His cross-examination showed

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181. John H. Cushman, Jr., *204 Secret Nuclear Tests by U.S. Are Made Public*, N.Y. TIMES, Dec. 8, 1993, at A20 (“We were shrouded and clouded in an atmosphere of secrecy,” Energy Secretary Hazel R. O’Leary said at a news conference, where the new details were disclosed. “And I would take it a step further: I would call it repression.”); accord Tom Squitieri, *U.S. Hid 200 Nuclear Tests Since ‘40s*, USA TODAY, Dec. 8, 1993, at A4 (“The Cold War is over,” O’Leary said. “We’re coming clean.”).

182. See Keith Schneider, *Energy Official Seeks to Assist Victims of Tests*, N.Y. TIMES, Dec. 29, 1993, at A1.

183. *Id.* (quoting Stuart Udall, and identifying him as a former Secretary of the Interior). Ten days later, Mr. Udall, encouraged by Secretary O’Leary’s comments, expressed plans to travel to Washington to engage in settlement discussions. See Michael Janofsky, *Radiation Victim Hopes for Redress: Revelation of Atom Experiments on Humans*, DAILY NEWS (L.A.), Jan. 1, 1994, at U1.

184. See Schneider, *supra* note 182, at A1 (“I cannot imagine there would be any other posture that I could take on this . . . I am also clear on the fact that the Justice Department may come from another position and point of view.”) (quoting Energy Sec’y Hazel R. O’Leary).

185. *Id.* (recognizing potential for lawsuits).

186. *Id.*

187. The *Prescott* plaintiffs successfully moved for an order requiring government attorneys to give two days notice before calling any expert witness who had participated in human experimentation. See Warren Bates, *Judge: U.S. Must Report Radiation Witnesses*, LAS VEGAS REV.-J., Jan. 12, 1994, at 3a.

188. See *id.*

189. See Warren Bates, *Doctor Aiding Radiation Victims Admits Advocating Past Testing*, LAS VEGAS REV.-J., Dec. 16, 1993, at 6b.

that he previously advocated for and engaged in exposing humans to radiation for scientific purposes.<sup>190</sup>

Regardless of O'Leary's comments, the *Prescott* trial ended in a complete victory for the government. The court held that plaintiffs' claims lacked legal and factual merit. First, the FTCA's discretionary function exception barred the claims because they arose from policy choices grounded in social, economic, or political policy, made by responsible officials acting under the authority of the Atomic Energy Act.<sup>191</sup> Second, the plaintiffs had not shown a breach of the standard of care.<sup>192</sup> Third, the plaintiffs had not shown causation, that their exposures to ionizing radiation at the test site were "a substantially contributing factor in causing" their cancers.<sup>193</sup> The plaintiffs did not appeal.

#### IV. A SUGGESTED ETHICAL APPROACH FOR GOVERNMENT ATTORNEYS HANDLING FTCA MATTERS

The debate about whether civil government attorneys have enhanced ethical obligations raises questions for those who administer the FTCA:

Should a government attorney defeat an otherwise valid claim through the use of the exclusions or exceptions of the FTCA, statutes of limitations, *Feres*, or state law defenses?

Should a government attorney put a finger on the scale of a scope of employment determination to give an injured plaintiff a chance at recovery or to protect a well-regarded federal employee?

Should the handling of litigation or the consideration of settlement be altered because of agency policies, preferences, or programs; adverse publicity about the facts giving rise to a claim; or embarrassment about the manner in which the claim was processed?

How should attorneys responsible for administering and defending FTCA cases approach specific ethical problems? The search for an identifiable governmental client, difficult in general, is virtually impossible here.

190. See *id.* On cross-examination Dr. Morgan acknowledged that in 1955 he had suggested prisoners might agree to be used in radiation tests as restitution for their crimes, and that in 1943 he had taped radioactive discs to the arms and breasts of women. *Id.*; see Karl Z. Morgan, *Problems Associated with the Application of External and Internal Radiation Exposure Limits*, 16 AM. INDUS. HYGIENE ASS'N Q. 307, 314 (1955) (urging that "every effort should be made to obtain autopsy data" when cooperating prisoners expire).

191. *Prescott v. United States*, 858 F. Supp. 1461, 1466-71 (D. Nev. 1994).

192. *Id.* at 1472-73. Judge Pro concluded that it was inappropriate to judge radiological safety decisions made forty years earlier by present day scientific and medical standards, but that under the standards of the 1950s, 1960s, or 1970s the result would be the same. *Id.* at 1472. He did not address the side issue of experts conducting human experimentation. Indeed, the only such expert mentioned in the opinion was plaintiff's Dr. Morgan who "stated that his evaluation of NTS safety practices was based upon the standards adhered to today, and that his own conduct with regard to radiation experimentation in the early 1940s, should not be judged by today's standards." *Id.*

193. *Id.* at 1473-79.

The interests of plaintiffs, government employee-tortfeasors, and federal agencies are all in play, often against one another.

Any approach to ethical decision-making in the FTCA context must be consistent with the Constitution and Congress's intent for the Act. Two constitutional principles apply: First, the Constitution provides that no money can be paid from the public fisc except as Congress has directed.<sup>194</sup> Second, our system of justice requires the uniform application of the law to all persons.<sup>195</sup>

Congress enacted the FTCA to provide injured parties an "effective and readily available remedy"<sup>196</sup> for those claims that fall within the Act's waiver of sovereign immunity. It sought to end the inefficient, burdensome, and unjust system of resolving tort claims through legislative private relief bills, and to create a system that provided compensation to individuals injured by government negligence without damaging the efficient operation of government or unduly taxing the public treasury.<sup>197</sup> Unlike the typical defendant, Congress affirmatively wanted tort claims against the government to be adjudicated and paid, so long as they fell within the authorized categories.<sup>198</sup>

The ethical course for government attorneys handling FTCA matters, I suggest, is to affirmatively assist every claim to successfully make its way into the FTCA's adjudicatory system and, then, in every case to vigorously raise each defense that is reasonably supported by the facts and the law. Both steps are necessary to fulfill Congress's purposes.

Government attorneys should affirmatively reach out to help any claimant having difficulty complying with the Act's administrative or procedural requirements. In practice, this means government attorneys negotiating with claimants should advise them of approaching deadlines that, if missed, would bar their claims. For example, government attorneys should inform such claimants if they have not yet filed a written claim and the two year limitations period is about to run, if they have not included a sum

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194. See discussion *supra* notes 7–13 and accompanying text.

195. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985) (emphasizing that refusal to recognize a class as quasi-suspect for constitutional review does not leave the class unprotected because it still retains the right to equal treatment under the laws); *Berger v. United States*, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all."), *overruled on other grounds*, *Stirone v. United States*, 361 U.S. 212 (1960); see also *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 669 (2006) (Kennedy, J., dissenting) (interpreting the bankruptcy code priorities in accord with the principle of "equal treatment of like claims"); *Truax v. Corrigan*, 257 U.S. 312, 351 (1921) (Pitney, J., dissenting) ("The guaranty of 'equal protection' entitles plaintiffs to treatment not less favorable than that given to others similarly circumstanced."); cf. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

196. See *Hearings on H.R. 5373 and H.R. 6463*, *supra* note 1, at 40.

197. See *supra* Part I.A.

198. See discussion *supra* notes 31–36 and accompanying text.

certain in that claim, or if the six month limitations period is approaching. While these actions may result in judgments against the government that might otherwise have been avoided, they plainly meet Congress's goal of having claims decided under the FTCA regime.<sup>199</sup> For many years, such steps were the practice in the Civil Division's Torts Branch. The alternative, for government attorneys to mislead or watch in silence as a claimant's inaction defeats its claim, is contrary to the underlying purposes of the FTCA.<sup>200</sup>

Every claim or suit should be treated in the same manner.<sup>201</sup> The only approach that can consistently be applied to all claims is to raise every reasonable defense every time, including statutes of limitations and all the FTCA's exceptions and exclusions. Pulling punches for favored claimants or pulling out more stops against the politically unpopular is inconsistent with the rule of law.<sup>202</sup> Government lawyers would usurp Congress's prerogative over the government's purse if they ignored the limits Congress placed on the FTCA's waiver of sovereign immunity.<sup>203</sup>

In practice, this means that government attorneys should simply apply the law to the facts at hand. If the law bars the claim of a particularly sympathetic plaintiff, so be it. Decisions on scope of employment and federal employee status should be made without regard to agency preferences or the financial consequences for plaintiffs, government-employee defendants, or the federal treasury.<sup>204</sup> While the views of an agency about the law, the facts, and the litigative risk should be carefully considered, decisions about whether to settle or defend litigation should not be altered by political

199. See generally *Van Fossen v. United States*, 430 F. Supp. 1017, 1022 (N.D. Cal. 1977) (noting "the intent behind the [administrative claim requirement] is to ease court congestion and speed the decision-making process through the settlement of meritorious claims prior to trial. This 'more expeditious procedure' is meant to benefit claimants and in no way is designed to preclude them from their day in court.").

200. See discussion *supra* notes 97–100 and accompanying text.

201. See generally Patricia M. Wald, "*For the United States*": *Government Lawyers in Court*, 61 LAW & CONTEMP. PROBS. 107, 124–27 (1998).

202. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985) (emphasizing that refusal to recognize a class as quasi-suspect for constitutional review does not leave the class unprotected because it still retains the right to equal treatment under the laws). See also *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 669 (2006) (Kennedy, J., dissenting) (interpreting the bankruptcy code priorities in accord with the principle of "equal treatment of like claims"); *Truax v. Corrigan*, 257 U.S. 312, 351 (1921) (Pitney, J., dissenting) ("The guaranty of 'equal protection' entitles plaintiffs to treatment not less favorable than that given to others similarly circumstanced."); cf. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

203. See *Lanctot*, *supra* note 73, at 984 ("To do otherwise would be to expend funds that Congress has already determined should not be spent.").

204. See *Miller*, *supra* note 79, at 1296 (noting that government attorneys act in the context of their role in one branch of the government).

considerations,<sup>205</sup> agency policy concerns, or the risk of bad publicity.<sup>206</sup> Certainly, lobbying in favor of particular plaintiffs by agency employees or officials should not alter litigation decisions.

A brief review of the alternative demonstrates its fallacy. Department of Justice attorneys cannot in good conscience ignore the FTCA's foreign tort exception because they like the plaintiff.<sup>207</sup> Nor can government attorneys properly use Judgment Fund money to settle a readily defensible, multi-million dollar case because agency officials think it would be good policy, good politics, or simply wise to do so.<sup>208</sup> When Congress enacted the FTCA, it limited the Act's scope by including legal defenses to protect government operations and the public fisc.<sup>209</sup> When it created the Judgment Fund's shortcut around the appropriations process, it trusted government attorneys to apply the laws scrupulously.<sup>210</sup> Congress, not government attorneys or agency officials, has the authority and responsibility to decide when FTCA defenses should be waived and when politics, policy, or wisdom justifies the payment of taxpayer money to plaintiffs who could not recover under the FTCA.<sup>211</sup>

The proposed two-step ethical approach for FTCA issues arguably meets the standards set by both sides of the debate on the ethical obligations of civil government attorneys. Government attorneys who help claimants enter the FTCA's adjudicatory system follow the path urged by those who believe government attorneys in civil cases take on the government's own obligation to serve the public interest.<sup>212</sup> If the ethical obligations of civil government attorneys are identical to those of private attorneys, the same course of action is mandated. Any attorney who represents a client that wants to establish an administrative system to organize numerous claims raised against it and to resolve administratively those claims that can be settled without litigation would help claimants file claims in that system.<sup>213</sup>

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205. Congress has the authority and responsibility to make such decisions, as it did in passing the Westfall Act and in providing FTCA protection to nuclear weapons contractors and tribal contractors. *See, e.g.*, discussion *supra* notes 59, 159–63, 171–72.

206. *See generally* Diehm, *supra* note 75, at 290 (noting tension between representing government in litigation and simultaneously furthering a political agenda).

207. *See* Miller, *supra* note 79, at 1295 (noting that government attorneys lack authority to substitute their views for judgments made by governmental processes).

208. *See* Green, *supra* note 73, at 278 (noting that government lawyers abdicate their responsibility if they defer to agency officials who lack authority over litigation).

209. *See* discussion *supra* Part III.A.

210. *See* discussion *supra* notes 49–53.

211. *See* Lanctot, *supra* note 73, at 984 (noting that the executive branch has a constitutional duty to enforce limits established by Congress). If a claimant cannot recover under the FTCA she may seek enactment of a private relief bill. *See supra* note 132 and accompanying text.

212. *See generally* Green, *supra* note 73, at 250–55.

213. British Petroleum created such a system to deal with claims arising from the 2010 oil spill. *See In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, MDL No. 2179, 2011 WL 323866* (E.D. La. Feb. 2, 2011); *Gulf Coast Claims Facility*,

The second part of the proposed approach, calling on government attorneys to raise every reasonably supported defense to every FTCA claim, also seems to be in harmony with both sides of the ethical debate. If civil government attorneys have the same ethical obligation to provide zealous representation as private attorneys, they have a duty to raise every reasonable defense in every case.<sup>214</sup> Such vigorous advocacy is also appropriate if government attorneys have a different ethical standard, that of serving justice or the public interest. Supporters of the public interest ethical standard disavow that “public interest” is to be subjectively defined by the government lawyer’s personal preferences or world-view.<sup>215</sup> Rather, the public interest standard means that government attorneys have the same public interest obligations as the government they serve.<sup>216</sup> In the FTCA context, where Congress has weighed the need for compensation and placed specific limits on its waiver of sovereign immunity, the public interest is served when government attorneys vigorously raise the defenses Congress established to protect the public treasury and the processes of government.<sup>217</sup>

## V. CONCLUSION

Congress enacted the FTCA to create an effective and equitable system to decide and pay certain claims arising from torts of federal employees,<sup>218</sup> but limited the Act’s general waiver of sovereign immunity with a broad range of defenses. To serve Congress’s purposes and their own ethical obligations, government attorneys should affirmatively foster the FTCA’s administrative process by helping plaintiffs comply with the Act’s procedural requirements, and then treat each claim equally by vigorously raising every reasonable defense in every case.

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*Protocol for Interim and Final Claims* (2011), available at [http://www.gulfcoastclaimsfacility.com/proto\\_4.php](http://www.gulfcoastclaimsfacility.com/proto_4.php).

214. See Lanctot, *supra* note 73, at 985.

215. See, e.g., Berenson, *Hard Bargaining*, *supra* note 78, at 364; see Miller, *supra* note 79, at 1296 (noting that government attorneys act in the context of their role in one branch of the government).

216. See, e.g., Berenson, *Hard Bargaining*, *supra* note 78, at 379; Diehm, *supra* note 75, at 290; Green, *supra* note 73, at 265–66.

217. See Diehm, *supra* note 75, at 293 (noting in the context of defending personal injury actions against the government that public interest considerations countenance “assertion of defenses and advocacy appropriate to our adversary system”). But see Green, *supra* note 73, at 274 (suggesting that “it is wrong for the government to assert every plausible claim or defense” in every case).

218. See *Hearings on H.R. 5373 and H.R. 6463*, *supra* note 1, at 37.



