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ARTICLE

INTENTIONAL TORTS AND OTHER EXCEPTIONS TO THE FEDERAL TORT CLAIMS ACT

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The Federal Tort Claims Act (FTCA) creates a broad waiver of sovereign immunity for tort claims against the United States but also provides for a number of exceptions. Beyond the much-discussed "discretionary function" exception found at 28 U.S.C. § 2680(a), additional exceptions—such as the so-called "intentional tort" exception—are located throughout the statutory text and vary widely in subject matter and wording. Most of them appear in a list found at 28 U.S.C. § 2680,[2] but other important exceptions

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1. Assistant United States Attorney, District of Minnesota. The views expressed in this article are solely my own and do not necessarily represent the positions of the United States Department of Justice.

2. In relevant part, the exceptions under 28 U.S.C. § 2680 (2006), read as follows:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
> (a) Any claim based upon an act or omission of an employee of the [g]overnment, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the [g]overnment, whether or not the discretion involved be abused.
> (b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.
> (c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer. . . .
> . . . .
> (d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.
> (e) Any claim arising out of an act or omission of any employee of the [g]overnment in administering the provisions of sections 1-31 of [t]itle 50, Appendix.
> (f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.
> [(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.]
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, [t]hat, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is em-

are found elsewhere in the FTCA or are products of the definitions and general scope of the statute.[3] Still more exceptions have been implied by the courts[4] or arise from other federal statutes.[5]

As with the discretionary-function exception, applicability of these exceptions frequently becomes the central issue in a lawsuit brought under the FTCA. Notwithstanding the FTCA's general reference to and incorporation of state law, the interpretation and applicability of any of the statute's exceptions are matters of federal law.[6] The exceptions are generally jurisdictional and the government may raise them at any point in an FTCA lawsuit.[7]

This article provides an overview of these carve-outs to the FTCA's establishment of governmental tort liability with an emphasis on the often-complex interplay between exceptions or between an exception and another part of the FTCA. The article begins by setting forth a description of the FTCA and its many exceptions, including consideration of Congress's rationales for enacting (and subsequently modifying) some of them. The article also reviews ways in which courts have applied certain of the exceptions—especially the "intentional tort" exception—over the years. Particular attention is given to the tort of intentional infliction of emotional distress (IIED). IIED was not widely recognized when the FTCA was originally passed, and some early decisions considered IIED claims to be barred by the statute's exclusion of claims for assault and battery. More recently, courts have recognized that an IIED claim may be brought under the FTCA so long as it is not really a clever substitute for other claims that would fall within one of the statutory exceptions—a line that is often quite difficult to draw.

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powered by law to execute searches, to seize evidence, or to make arrests for violations of [f]ederal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a [f]ederal land bank, a [f]ederal intermediate credit bank, or a bank for cooperatives.

Id.

3. *See, e.g.*, 28 U.S.C. § 2671 (2006) (defining "employee" and "agency" in a way that excludes liability on the part of government contractors).

4. *See, e.g.*, Feres v. United States, 340 U.S. 135, 146 (1950) (barring all FTCA claims by military personnel arising out of activity incident to military service).

5. *See, e.g.*, 5 U.S.C. § 8116(c) (2006) (barring federal employees from suing the United States for on-the-job injuries).

6. *See, e.g.*, United States v. Orleans, 425 U.S. 807, 814 (1976); Logue v. United States, 412 U.S. 521, 528 (1973); United States v. Neustadt, 366 U.S. 696, 705–06 (1961).

7. Jablonski v. United States, 712 F.2d 391, 395 (9th Cir. 1983).

I. The Federal Tort Claim Act and its Exceptions

A. *The FTCA*

Originally passed in 1946, the FTCA exposes the United States to potential civil liability in federal court

> 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.[8]

In enacting the FTCA, Congress was principally concerned with addressing what might be considered "garden variety" negligence torts—the most prominent example cited at the time being accidents involving government vehicles.[9] By its terms, however, the statute reaches further than garden variety negligence torts and applies to a broad array of factual situations.[10] On the other hand, there are also substantial categories of tort liability—such as strict liability for ultra-hazardous governmental activity—that the FTCA's waiver of sovereign immunity does not reach.[11]

Whatever one might think of them, the FTCA's exceptions underscore the principle that the law does not provide a remedy for every wrong—particularly where the government is concerned.[12] Indeed, Congress never intended the FTCA as a comprehensive waiver of governmental immunity from tort liability. While a concern for fairness and equity in favor of aggrieved plaintiffs certainly motivated legislators, that concern had to be balanced against others and was not the only impetus behind the FTCA.

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8. 28 U.S.C. § 1346(b)(1) (2006).

9. *See, e.g.*, H.R. Rep. No. 76-2428, at 5 (1940); *Hearings Before the Comm. on the Judiciary on H.R. 5373 and H.R. 6463*, 77th Cong. 66 (1942); *see also* Dalehite v. United States, 346 U.S. 15, 28 (1953) (noting car accident cases as "uppermost" in Congress's mind at time of FTCA passage); Sosa v. Alvarez-Machain, 542 U.S. 692, 707 n.4 (2004).

10. *See* Kent Sinclair & Charles A. Szypszak, *Limitations of Action Under the FTCA: A Synthesis and Proposal*, 28 Harv. J. on Legis. 1, 2 (1991) (noting that the FTCA encompasses a variety of "complex, attenuated, and unperceived conduct"). This raises the interesting question of whether the FTCA rightly applies to newly-created torts that may not have existed when this waiver of sovereign immunity was enacted. *See generally* Susan M. Mathews, *Title VII and Sexual Harassment: Beyond Damages Control*, 3 Yale J.L. & Feminism 299 (1991) (proposing a new "tort of sexual harassment"); *see also infra* pp. 390–97 (discussing development of case law addressing applicability to tort of intentional infliction of emotional distress).

11. *See, e.g.*, Laird v. Nelms, 406 U.S. 797, 802 (1972) (rejecting claim for damages to home in connection with sonic booms; "Liability of this type under the [FTCA] is not to be broadened beyond the intent of Congress by dressing up the substance of strict liability for ultrahazardous activities in the garments of common-law trespass."); *see also id.* (citing 1954–55 legislative history and private relief bill passed in connection with the decision rejecting liability in the Texas City disaster case, Dalehite v. United States, 346 U.S. 15 (1953)).

12. *See* Thompson v. Deal, 92 F.2d 478, 491 (D.C. Cir. 1937) (Stephens, J., dissenting) ("[T]he maxim 'equity will not suffer a wrong to be without a remedy' is not safely to be followed in respect of a wrong asserted to have been imposed by the Government.").

The FTCA was enacted as one part of a broader legislative "housekeeping" measure—the Legislative Reorganization Act of 1946[13]—whereby Congress removed from itself (or at least greatly reduced) certain time-consuming administrative responsibilities. As a result of the dramatic change in the size and scope of government in connection with the Great Depression, World War II, and Roosevelt-era reforms generally, it had become necessary to modernize the national legislature to cope with its vastly increased workload. One long-standing Congressional duty alleviated by the Reorganization Act was the consideration of "private bills," which until that point had been essentially the only way for injured citizens to recover from the United States for tortious conduct by government employees acting within the scope of employment.[14] A private bill deals with one or more named individuals or entities, often providing benefits in response to a specific request in an area such as immigration or private claims. The Supreme Court has referred to Congress's pre-FTCA handling of private bills as a "notoriously clumsy" process.[15]

The number of private bills has greatly declined over the past half-century, at least partly as a result of the FTCA's passage.[16] Despite this decline, however, private bills today are far from dead.[17] In *Bailor v. Salvation Army and United States*,[18] for example, the Seventh Circuit in 1995 upheld the denial of relief under existing law to a plaintiff who was raped by an escapee from a halfway house and alleged, among other claims, that the United States Bureau of Prisons had negligently placed the escapee at the halfway house. In denying the FTCA claim, the court also observed that "private legislation . . . would not, in appropriate cases, be an inappropriate response" to certain unfair situations.[19] More recently, in 2005, Congress

13. Ch. 753, 60 Stat. 812 (1946).

14. *See The Federal Tort Claims Act*, 56 YALE L.J. 534, 535 (1947) (noting that passage of the FTCA was in part motivated by the fact that Congress was "burdened by thousands of claim bills at every session"); Walter Gellhorn & Louis Lauer, *Congressional Settlement of Tort Claims Against the United States*, 55 COLUM. L. REV. 1, 31 (1955) (noting the "seeming success of the Federal Tort Claims Act in reducing the volume of tort claims submitted to Congress for settlement," though also observing that the "legislative docket remains jammed").

15. *Dalehite*, 346 U.S. at 24–25 (1953).

16. *See* JENNIFER E. MANNING, CONG. RESEARCH SERV., 96-727-C, CONGRESSIONAL STATISTICS: BILLS INTRODUCED AND LAWS ENACTED, 1947–2003, at CRS-2 to -3 (2004) (noting the decline in private bills; listing enactment of 1103 such bills by the 81st Congress in 1949–50, 492 by the 86th in 1959–60, 246 by the 91st in 1969–70, 123 by the 96th in 1979–80, 16 by the 101st in 1989–90, and 24 by the 106th in 1999–2000); Matthew Mantel, *Private Bills and Private Laws*, 99 LAW LIBR. J. 87, 91–94 (2007) (noting same trend and offering explanations).

17. *See, e.g.*, *Legislation, Laws, and Acts*, U.S. SENATE, www.senate.gov/legislative/common/briefing/leg_laws_acts.htm (last visited Dec. 21, 2011) ("A private bill provides benefits to specified individuals (including corporate bodies). Individuals sometimes request relief through private legislation when administrative or legal remedies are exhausted.").

18. 51 F.3d 678 (7th Cir. 1995).

19. *Id.* at 686; *see also* H.R. 1328, 109th Cong. (2005); H.R. Res. 201, 109th Cong. (2005) (introducing private bill and resolution to address *Bailor* situation subsequent to Seventh Circuit ruling).

passed a quasi-private law enabling the parents of Terry Schiavo to bring suit in Florida federal court challenging the withholding of food, water, and medical attention from their daughter.[20] These examples illustrate that, while by no means easy or commonplace, it remains possible to obtain private legislative relief today—a possibility that should not be forgotten in discussions of the FTCA and its scope.

B. Exceptions to FTCA Liability

As noted, there are several sources of exceptions from the FTCA's waiver of sovereign immunity for tort claims against the United States. This section of the article begins by looking at the exceptions expressly listed in 28 U.S.C. § 2680. Consideration is then given to other exceptions built into the definitions and textual scope of the FTCA, as well as some of the exceptions that arise not directly from the FTCA but from other federal laws that preclude FTCA recovery by creating their own exclusive remedies.

1. Exceptions Listed in 28 U.S.C. § 2680

The FTCA contains a number of "carefully worded exceptions"[21] set forth in a list found at 28 U.S.C. § 2680. One of the more fascinating—and controversial[22]—of these is the so-called "intentional tort exception." At 28 U.S.C. § 2680(h), the FTCA expressly excludes from its scope any claim "arising out of" eleven categories of torts: assault or battery; false imprisonment or false arrest; malicious prosecution or abuse of process; libel or slander; misrepresentation or deceit; and interference with contract rights.[23] Notably, at least four intentional torts are not included in this list: trespass, conversion, invasion of privacy, and intentional infliction of emotional distress. Accordingly, Congress made clear its intent to exclude only a subset of intentional torts from the scope of the FTCA as the statute (a) does not contain the term "intentional torts"; (b) fails to include all intentional torts in the list of excluded causes of action at § 2680(h); and (c) excludes some torts that courts have held need not always be intentional.[24] For these reasons, although the term has persisted (and this article will use it), it is

20. *See* Act of Mar. 21, 2005, Pub. L. No. 109-3, 119 Stat. 15 (enacting a law "For the relief of the parents of Theresa ["Terry"] Marie Schiavo").

21. *The Federal Tort Claims Act*, *supra* note 14, at 542.

22. *See, e.g.*, *id.* at 547 (noting that this "sweeping exception imposes a hardship upon claimants and leaves open one fruitful source of private claim bills," and expressing the view that Congress's stated reasons for including the exception seem "insufficient"); *Developments in the Law: Remedies Against the United States and its Officials*, 70 HARV. L. REV. 827, 891–92 (1957) (suggesting that the exception of certain intentional torts from FTCA liability "should be reassessed by Congress").

23. *See* 28 U.S.C. § 2680(h) (2006).

24. Staheli v. Smith, 548 So.2d 1299, 1305 (Miss. 1989) ("Under Mississippi defamation law, libel is not necessarily an intentional tort."); Malvo v. J.C. Penney Co., 512 P.2d 575, 583 n.13 (Alaska 1973) (noting that "slander is not necessarily an intentional tort").

widely acknowledged that the label "intentional tort exception" is something of a misnomer.[25]

Other exceptions in 28 U.S.C. § 2680 include the prohibition against using the FTCA to challenge the validity of a statute or regulation and the discretionary-function exception, both found in § 2680(a).[26] The FTCA also prohibits claims "arising out of the loss, miscarriage, or negligent transmission of letters or postal matter";[27] claims "arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property" by any customs or other law enforcement officer;[28] claims alleging damages caused by a quarantine;[29] claims for "damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system";[30] and claims "arising out of the combatant activities of the military . . . during time of war."[31] In 1950, this latter exception was significantly expanded when the Supreme Court decided *Feres v. United States*,[32] creating the *Feres* doctrine, which bars all FTCA claims by military personnel arising out of activity incident to military service—regardless of whether the activity occurred during a time of war. Section 2680 also bars claims arising from the activities of the Tennessee Valley Authority;[33] the Panama Canal Company;[34] or any federal land bank, federal intermediate credit bank, or bank for cooperatives.[35]

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25. *See, e.g.*, Limone v. United States, 579 F.3d 79, 92 (1st Cir. 2009) (noting that courts "sometimes have referred loosely to section 2680(h) as an 'intentional torts' exception" even though "the provision only preserves the federal government's immunity with respect to claims arising out of certain enumerated torts" (citations omitted)).

26. *See* 28 U.S.C. § 2680(a) (prohibiting claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty" and claims "based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation").

27. *Id.* § 2680(b); *see The Federal Tort Claims Act*, *supra* note 14, at 546 & n.81 (stating that this exception is "based on the number of cases which might arise were it not included," as well as "the ease with which postal matter may be insured").

28. *Id.* § 2680(c). This provision contains an exception to the exception for claims based on "injury or loss of goods, merchandise, or other property" while in government possession under specified circumstances. *See id.*; *see also* Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 220 (2008) (reading "any other law enforcement officer" expansively to include "law enforcement officers of whatever kind").

29. 28 U.S.C. § 2680(f); *see The Federal Tort Claims Act*, *supra* note 14, at 546 ("No satisfactory explanation for the quarantine provision has been given," although it was "once described as 'dangerous'" (quoting FTCA legislative history)).

30. 28 U.S.C. § 2680(i); *see The Federal Tort Claims Act*, *supra* note 14, at 546 & n.80 (noting that Congress "presumably felt that the liability would be too immense and the damages too widespread to justify any allowance of claims" pertaining to the monetary system, although the "explanations given for these provisions are often ambiguous or inconclusive").

31. 28 U.S.C. § 2680(j).

32. 340 U.S. 135 (1950).

33. 28 U.S.C. § 2680(l).

34. *Id.* § 2680(m).

35. *Id.* § 2680(n).

2. *Exceptions Based on Statutory Definitions and Scope*

Additional exceptions are inherent in the structure and scope of the waiver of sovereign immunity, including the statute's definitional portions. The Supreme Court has repeatedly held, for example, that the FTCA's jurisdictional grant[36] does not extend to strict-liability torts, notwithstanding the fact that the statute nowhere expressly excludes or otherwise mentions strict-liability concepts.[37] Another provision in the jurisdictional grant expressly precludes convicted prisoners from suing the United States "for mental or emotional injury suffered while in custody without a prior showing of physical injury."[38]

Courts have likewise found FTCA claims to be barred on the ground that the alleged tortfeasor was not an "employee of the Government." For example, the Eighth Circuit in 1977 held that the FTCA cannot apply to a private attorney appointed by the court to represent a defendant in a federal criminal prosecution[39] and later found no liability for the negligence of a private person who was acting as a federally designated "Airworthiness Representative."[40]

The "contractor exception" arises from the FTCA's definitions of "employee" and "agency."[41] Simply put, the FTCA imposes damages liability only for torts committed by "officers or employees of any federal agency" and expressly defines "federal agency" to "not include any contractor with the United States."[42] Thus, courts have found that wherever the term "federal agency" appears in the FTCA, Congress meant it to refer solely to official components of the Federal Government.[43]

3. *Federal Exclusivity Statutes*

Yet another category of exceptions from FTCA liability involves federal exclusivity statutes. For example, the language of the FTCA itself excludes claims cognizable under the Suits in Admiralty Act or Public Vessels Act[44] and claims arising from administration of the Trading with the Enemy Act.[45] Relatedly, numerous other federal statutes either prohibit or provide their own single mechanism for potential recovery against the government and thus indirectly prevent claims that would otherwise be cognizable under

36. *See* 28 U.S.C. § 1346(b) (2006).

37. *See* Laird v. Nelms, 406 U.S. 797, 803 (1972); Dalehite v. United States, 346 U.S. 15, 44–45 (1953).

38. 28 U.S.C. § 1346(b)(2); *see also* Mitchell v. Horn, 318 F.3d 523, 533 (3d Cir. 2003).

39. Jones v. Hadican, 552 F.2d 249, 251 n.4 (8th Cir. 1977).

40. Charlima, Inc. v. United States, 873 F.2d 1078, 1081–82 (8th Cir. 1989).

41. *See* 28 U.S.C. § 2671 (2006).

42. *Id.*

43. *See* United States v. Orleans, 425 U.S. 807, 814–15 (1976); Carroll v. United States, 661 F.3d 87, 92, 105 (1st Cir. 2011).

44. *See* 28 U.S.C. § 2680(d) (2006) (referencing 46 U.S.C. § 745 ch. 309, 311).

45. *See id.* § 2680(e) (referencing 50 U.S.C. Appendix, sections 1–31).

the FTCA. A small sampling of such statutes includes the Social Security and Medicare Acts, which provide the exclusive remedies for wrongs pertaining to the administration of these programs;[46] the Federal Employees' Compensation Act (FECA), which bars federal employees from suing the United States for on-the-job injuries;[47] the Federal Water Pollution Control Act, providing the exclusive remedy for expenses incurred in cleaning up oil spills;[48] and the Flood Act, which immunizes the government from any liability arising from flood control.[49]

Beyond the many statutes that expressly preclude FTCA liability, certain comprehensive remedial schemes have been found to embody implied restrictions preempting FTCA liability. One such scheme is the remedies already available to federal employees through the civil service system, which the Eighth Circuit in 1984 held preempted claims of negligent termination or failure to promote.[50]

4. The Foreign Country Exception

The FTCA's "foreign country" exception bars "[a]ny claim arising in a foreign country."[51] This provision was enacted primarily to protect against the specter of Americans being subjected to foreign law.[52] While this may seem straightforward, the statute contains no definition of "foreign country," and over the years, the provision has given rise to such questions as whether FTCA claims may arise from conduct occurring at American embassies,[53] wartime acquisitions,[54] military bases,[55] and foreign airspace.[56]

In *Smith v. United States*,[57] the Supreme Court directly addressed whether an FTCA claim can arise from a tort occurring on the sovereignless continent of Antarctica—where there is no foreign law. *Smith* was a wrongful death case in which the plaintiff alleged that the government negligently failed to warn her late husband of the dangerous conditions present in Antarctica. The eight-Justice majority opinion considered multiple factors—including the dictionary definition of "country" as "a region or tract of land";[58] the difficulties of choice of law and venue that would arise if

46. *See* 42 U.S.C. § 405(h) (2006).
47. *See* 5 U.S.C. § 8116(c) 200.
48. *See* 33 U.S.C. § 1321(i) (2006).
49. *See* 33 U.S.C. § 702c (2006).
50. *See* Premachandra v. United States, 739 F.2d 392, 394 (8th Cir. 1984).
51. 28 U.S.C. § 2680(k).
52. *See The Federal Tort Claims Act*, *supra* note 14, at 548 & n.95 (citing FTCA legislative history).
53. *See* Meredith v. United States, 330 F.2d 9, 11 (9th Cir. 1964).
54. *See* Straneri v. United States, 77 F. Supp. 240 (E.D. Pa. 1948).
55. *See* United States v. Spelar, 338 U.S. 217, 221 (1949).
56. *See* Pignataro v. United States, 172 F. Supp. 151, 152 (E.D. N.Y. 1959).
57. 507 U.S. 197 (1993).
58. *Id.* at 201.

FTCA claims could arise in "no-man's land";[59] and the general presumptions against both waivers of sovereign immunity and the extraterritorial reach of Congressional statutes—and concluded that the "foreign country" exception does indeed apply to Antarctica, and thus, the United States generally may not be sued in tort for claims arising on that continent.[60]

While the *Smith* decision left open the question of whether the FTCA applies to tort claims arising in outer space, Justice Stevens in dissent warned that the ruling would lead inevitably to denial of such claims.[61] Most commentators seem to agree,[62] and lower court rulings to date seem to bear out Justice Stevens's prediction.[63]

The Supreme Court in *Sosa v. Alvarez-Machain*[64] unanimously rejected the "headquarters doctrine," whereby several courts of appeals had found the federal government liable for torts occurring in foreign countries if the wrongdoing was planned or directed by government employees within the United States. The Court found that this theory opened the door too far to the very sort of claims from which Congress intended to protect the federal government.[65] Accordingly, the Court held that the foreign country exception applies to "all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred."[66]

C. Rationale Behind the "Intentional Tort" Exception

Turning specifically to the "intentional tort" exception, many have asked why Congress would choose to allow recovery based on negligence while barring recovery for most intentional torts—which presumably represent more egregious conduct by government employees and can certainly lead to similar harms.[67] Understanding Congress's rationale here presents particular challenges because the FTCA's 28-year legislative his-

59. *Id.* at 202–03.

60. *See id.* at 204–05.

61. *See id.* at 205–06 (Stevens, J., dissenting) (providing that denial of claims in the "sovereignless region" of Antarctica parallels the denial of claims arising in outer space).

62. *See, e.g.*, Marcy Darsey, *"To the Stars, Despite Adversity": Liability for the Columbia Space Shuttle Tragedy*, 42 HOUS. L. REV. 457, 482 (2005) (noting that "the fact that the Columbia may have disintegrated while in the sovereignless region of outer space appears to bar an FTCA suit against the government for NASA's negligence."); Lauren S.B. Bornemann, *This is Ground Control to Major Tom . . . Your Wife Would Like to Sue but There's Nothing We Can Do . . . The Unlikelihood that the FTCA Waives Sovereign Immunity for Torts Committed by United States Employees in Outer Space: A Call for Preemptive Legislation*, 63 J. AIR LAW & COMMERCE 517, 535 (1998) (observing that the *Smith* decision "appears to exclude outer space from consideration for FTCA coverage").

63. *See, e.g.*, Hughes Aircraft Co. v. United States, 29 Fed. Cl. 197, 231 (1993).

64. 542 U.S. 692 (2004).

65. *Id.* at 710.

66. *Id.* at 712.

67. *See Developments in the Law: Remedies Against the United States and its Officials*, *supra* note 22; *see also* Sheridan v. United States, 487 U.S. 392, 403 (1988) (observing that it

tory contains scant commentary on the intentional-tort exception. Nonetheless, it is clear that the exception first appeared in the bill in 1931,[68] and several interrelated reasons for the exception were offered during a Senate Judiciary subcommittee hearing in March of 1940.

A 1939 Department of Justice memorandum included in the committee report stated that, "for the time being at least, it may be dangerous for the Government to subject itself to suit" from these torts, "until in any event considerable experience has been had under the proposed legislation."[69] Elaborating on this concept, the committee report observed that claims arising out of assault, battery, and the like constitute

> a type of torts which would be difficult to make a defense against, and which are easily exaggerated. For that reason it seemed to those who framed this bill that it would be safe to exclude those types of torts, and those should be settled on the basis of private acts.[70]

Before the House Judiciary Subcommittee later in 1940, Special Assistant to the Attorney General Mr. Holtzoff further explained that

> [t]he theory of these exemptions is that, since this bill is a radical innovation, perhaps we had better take it step by step and exempt certain torts and certain actions which might give rise to tort claims that would be difficult to defend, or in respect to which it would be unjust to make the Government liable.[71]

A few themes emerge from these passages. First, there was a sentiment that exposing the public fisc to potential liability for assault, battery, and other listed torts would be "dangerous," based on the notion that these torts are both easy for plaintiffs to exaggerate and difficult to defend against. Indeed, this reasoning was expressed by stating that it would be "unjust" to make the government liable for these torts.

Second, excluding these intentional torts from the FTCA was viewed as "safe"—at least "for the time being" or until "considerable experience" could be had under the FTCA generally *without* these torts being included. Thus, in passing the "intentional tort" exception, Congress took a "wait and see" or "step by step" approach to the scope of liability under the FTCA.

"would be odd to assume that Congress intended" to create liability for a breach of duty when a person causing harm "was merely negligent but not when he or she was malicious").

68. S. 211, 72d Cong. § 206 (1931); *see also General Tort Bill: Hearing on H.R. 5065 Before a Subcomm. of the H. Comm. on Claims*, 72d Cong. 4 (1932).

69. *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Comm. on the Judiciary*, 76th Cong. 13 (3d Sess. 1940) (Memorandum by the Dept. of Justice for the Att'y Gen. (June 7, 1939)).

70. *Id.* at 39 (statement of Alexander Holtzoff, special assistant to the Att'y. Gen. of the United States).

71. *Tort Claims Against the United States: Hearings on H.R. 7236 Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 76th Cong. 22 (3d Sess. 1940) (quoted in Sheridan v. United States, 487 U.S. at 410 (O'Connor, J., dissenting)).

The final theme that emerges is the assumption that claims arising under any of the excluded torts could and would be "settled on the basis of private acts." This is a reminder of what Congress intended to do in 1946 by enacting the FTCA—transfer decision-making authority concerning the payment of certain "[d]ebts of the United States"[72] from the legislature to the federal courts.[73] By indicating an ongoing willingness to entertain private bills for excepted torts, Congress made clear that this transfer was not meant to be complete.

D. The "Law Enforcement Proviso": An Exception to (Some of) the Exceptions

To some extent the proposed "step by step" approach came to fruition, insofar as Congress has expanded the scope of the waiver of sovereign immunity since the FTCA's original passage. Today, for example, the "intentional tort" exception contains a "law enforcement proviso" that constitutes an "exception to the exceptions"—at least as to some of the otherwise excepted torts. In response to a national outcry over certain widely publicized law enforcement excesses in the early 1970s, Congress amended § 2680(h) in 1974 to expand the scope of FTCA liability by effectively contracting the scope of the intentional tort exception—although only as to torts committed by a defined subcategory of government employees. As a result of the law enforcement proviso, the FTCA now permits suits based on tortious conduct by federal law enforcement officers for six of the eleven otherwise-excluded torts: assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution.[74]

According to this proviso, tort claims in these categories may be brought based on "acts or omissions of investigative or law enforcement officers of the United States Government," defined as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law."[75] The provision is thus doubly limited insofar as claims pursuant to only a limited subset of otherwise-excluded intentional torts may be brought based only on conduct by a limited subset of federal officials. Nonetheless, claims arising under this "exception to the exception," sometimes referred to as "proviso torts," have greatly shifted the FTCA litigation landscape.

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72. U.S. CONST. art. I, § 8.

73. *See The Federal Tort Claims Act*, *supra* note 14, at 554 (articulating view that, in deciding FTCA claims, courts are acting as an "arm of the legislative department of the Government").

74. *Id.* Another example of the "step by step approach" is reflected in the Emergency Health Personnel Act of 1970, which made the FTCA's assault and battery exception inapplicable to claims arising out of negligence of a commissioned officer of the Public Health Service in the performance of medical functions. *See* Pub. L. No. 91-623, § 4, 84 Stat. 1868, 1870–71 (1970).

75. 28 U.S.C. § 2680(h) (2006).

E. Some Court Decisions Applying the Exceptions

Considerable judicial energy has been devoted to discerning the boundary between excepted and non-excepted torts—as well as to the question of how to proceed when interrelated claims of both sorts are present in a single case. In general, courts begin the inquiry by looking to the "traditional legal definition" of alleged torts "as [they] would have been understood by Congress when the Tort Claims Act was enacted."[76] In characterizing tort claim allegations, the Supreme Court has cautioned against "assuming that Congress was unaware of established tort definitions when it enacted the Tort Claims Act in 1946"[77] and observed that "[t]here is nothing in the Tort Claims Act which shows that Congress intended to draw distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation."[78] A brief look at some of the cases addressing proviso torts and the misrepresentation exception follows.

1. Proviso Torts

Courts have frequently faced the question whether, when an assault and battery (or any other excluded intentional tort) has occurred in a non-proviso context, plaintiffs may nonetheless raise an FTCA claim based on an indirect theory of liability. Such claims against the government have involved negligent hiring or supervision of the tortfeasor, or some other "independent" negligence-based tort that is *not* listed as barred by 2680(h), even though factually related to the underlying intentional tort that *is* listed as barred.

In *Sheridan v. United States*,[79] the Supreme Court held that such claims may be viable in some circumstances. The facts there involved an intentional tort committed outside the scope of a federal employee's official duty (specifically, rifle shots fired down a public street by an intoxicated, off-duty serviceman), and the Court left open the question of whether negligent hiring, training, or supervision claims can ever arise under the FTCA "for a foreseeable assault or battery by a Government employee."[80]

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76. Block v. Neal, 460 U.S. 289, 296 (1983); *see also* Sheehan v. United States, 896 F.2d 1168, 1170 (9th Cir. 1990).

77. United States v. Neustadt, 366 U.S. 696, 707 (1961).

78. *Id.* at 708 (quoting Indian Towing Co. v. United States, 350 U.S. 61, 68 (1955)).

79. 487 U.S. 392 (1988).

80. *Id.* at 403 n.8. Both the district court and the court of appeals in *Sheridan* had "assumed" that the complaint stated a claim of some sort under Maryland law based on negligence by government employees at a Naval base who allowed the allegedly foreseeable shooting to occur. *Id.* at 401–02. The Supreme Court, not wanting to second-guess this assumption, remanded the case for further consideration of liability. Given the nature of the plaintiff's legal theory, the *Sheridan* Court observed that the shooter's employment status had "nothing to do with the basis for imposing liability on the Government." *Id.* at 402–03 & nn. 6–8.

The majority of post-*Sheridan* lower courts answer this question in the negative. For example, in *Billingsley v. United States*,[81] the plaintiff alleged negligent failure to supervise by the United States Job Corps of an enrollee who "struck [plaintiff] over the head with a glass bottle and kicked him repeatedly."[82] In remanding for factual findings, the Eighth Circuit joined every other circuit but the Ninth[83] to have addressed the issue in holding that, if the tortfeasor was found to have been acting within the scope of employment, no FTCA claim would lie based on negligent supervision of the tortfeasor by another government actor.[84] Quoting the 1940 legislative history, the Eighth Circuit concluded that holding the government vicariously liable based solely on the employment relationship "would frustrate the purpose" of the intentional-tort exception, "which is to bar suits resulting from 'deliberate attacks by Government employees.'"[85]

2. *Misrepresentation*

In addition to the proviso torts, questions have repeatedly been raised about which claims properly fall within the misrepresentation exception. Some courts have referred to this as the "fraud and misrepresentation" exception[86] and have also found that it encompasses negligent as well as intentional misrepresentation.[87] Two key Supreme Court decisions relevant to various FTCA exceptions—*United States v. Neustadt*[88] and *Block v. Neal*[89]—arose in the misrepresentation context. Among other important points, these decisions together stand for the proposition that plaintiffs cannot circumvent the exceptions by artful pleading. In *Neustadt*, the Court stated that it is important to look beyond the language of plaintiffs' claims "to ascertain the real cause of the complaint."[90] Thus, at least when misrepresentation is at issue, a claim will be barred if the essence of the complaint involves the government's failure to use due care in obtaining or communicating information, regardless of how a plaintiff may try to characterize his or her claim.[91]

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81. 251 F.3d 696 (8th Cir. 2001) (per curium).

82. *Id.* at 697.

83. *See* Brock v. United States, 64 F.3d 1421, 1425 (9th Cir. 1995) (holding that the assault and battery exception does not preclude liability for negligent supervision of an employee); Bennett v. United States, 803 F.2d 1502, 1504 (9th Cir. 1986).

84. *See Billingsley,* 251 F.3d at 698.

85. *Id.* (quoting *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Comm. of the Judiciary*, 76th Cong. 39 (1940)).

86. *See, e.g.*, McNeily v. United States, 6 F.3d 343, 349 (5th Cir. 1993).

87. United States v. Neustadt, 366 U.S. 696, 704 (1961).

88. *Id.*

89. 460 U.S. 289 (1983).

90. *Neustadt*, 366 U.S. at 703 (quoting Hall v. United States, 274 F.2d 69, 71 (10th Cir. 1959)).

91. *See id.* at 706; *Neal*, 460 U.S. at 297.

As the Court made clear in *Neal*, however, the bar against misrepresentation claims (like the other exceptions) does not preclude other independent claims merely because they may involve some common questions of law or fact.[92] The United States, for example, cannot shield itself from liability simply by adding a misrepresentation to an otherwise actionable tort.[93] The recent case of *Najbar v. United States*[94] illustrates some of these points. Although the plaintiff's complaint alleged only claims of intentional infliction of emotional distress, negligence, negligence per se, and negligent infliction of emotional distress, the district court dismissed them all based on the conclusion that they actually sounded in misrepresentation.[95] On the undisputed facts of the case, a letter intended for a soldier serving in Iraq was erroneously returned to the plaintiff mother bearing a postal stamp marked "deceased."[96] The mother confirmed later that day that her son was in fact alive and well but alleged that she was harmed by the incident and entitled to damages as a result.[97]

The question for District Judge Patrick Schiltz[98] was whether the plaintiff's claim based on this unfortunate mistake was actionable under the FTCA or barred by one or more of the intentional-tort exclusions. The court held that, regardless of how the claims may be styled, the but-for cause of any injury to the plaintiff—telling the mother her son was dead when he was not—was the communication of information, which is central to the tort of misrepresentation.[99] While acknowledging that most misrepresentation claims arise in the commercial context, the court concluded that nothing in § 2680(h) suggests any limitation to that subset of claims for misrepresentation.[100]

The district court in *Najbar* also considered whether the "postal matters" exception of § 2680(b) could provide an additional basis for dismissal. Relying on the Supreme Court's decision in *Dolan v. Postal Service*,[101] which reads that FTCA exception narrowly, the court rejected the government's argument, concluding that the complaint did not allege that the letter was lost, miscarried, or negligently transmitted.[102]

The Eighth Circuit affirmed, but on different grounds.[103] The court of appeals did not reach the applicability of the misrepresentation exception

92. *See, e.g.*, *Neal*, 460 U.S. at 298.
93. *See id.*
94. No. 10-3015, 649 F.3d 868 (8th Cir. Aug. 12, 2011) (reh'g and reh'g en banc denied Nov. 8, 2011 (Bye, J., dissenting)), *aff'g* 723 F. Supp. 2d 1132 (D. Minn. 2010).
95. *Najbar*, 723 F. Supp. 2d at 1137–38.
96. *Id.* at 1133.
97. *Id.*
98. Former Associate Dean and professor at the University of St. Thomas School of Law.
99. *Najbar*, 723 F. Supp. 2d at 1136–37.
100. *Id.* at 1137.
101. 546 U.S. 481 (2006).
102. *Najbar*, 723 F. Supp. 2d at 1135.
103. *See Najbar*, 649 F.3d at 869.

because it concluded that the plaintiff's claim was barred under the postal matters exception.[104] Although the letter was not lost and the court agreed with the district court that the envelope also was not "damaged" by virtue of having been erroneously stamped,[105] the Eighth Circuit concluded that returning it to the soldier's mother constituted a "miscarriage" of mail.[106] As the court put it, the plaintiff's alleged harm—while of an "uncommon" and "idiosyncratic" variety—plainly resulted from the fact of the letter being mistakenly returned to her with an injurious explanation as to the reason.[107]

II. Claims of Intentional Infliction of Emotional Distress ("IIED") Under the FTCA

Given the numerous exceptions discussed above, and Congress's rationale for enacting the so-called "intentional tort" exception, it may seem surprising that the tort of intentional infliction of emotional distress (otherwise known as "IIED" or "outrage") is actionable under the FTCA. The remainder of this article will briefly review the development and general contours of the IIED cause of action and then consider ways in which courts have approached various species of IIED claims brought under FTCA auspices.

A. The Development of IIED as a Separate Cause of Action

Although certainly not unheard of, IIED was by no means uniformly or even widely recognized at the time the FTCA was originally enacted in 1946.[108] The Restatement of Torts first acknowledged the possibility that a plaintiff might recover in tort despite a lack of demonstrable physical injury in 1948, two years after the FTCA's passage, and (while some had done so previously) courts in disparate jurisdictions adopted variations of this theory at different times over the subsequent decades.[109]

To succeed on a claim of IIED a plaintiff generally must show the following elements: (1) the defendant acted intentionally or with reckless disregard of the consequences; (2) the defendant's conduct was extreme or outrageous; (3) the plaintiff suffered severe emotional distress; and (4) the defendant's conduct caused that distress.[110] In general, IIED is a "very nar-

104. *Id.* at 872–73.

105. *Id.* at 871–72.

106. *Id.* at 872.

107. *Id.* at 872–73.

108. *See, e.g.*, United States v. Hambleton, 185 F.2d 564, 566 (9th Cir. 1950) (noting that section 46 of the Restatement of Torts was not "revamped" to include IIED under the "Assault and Battery" chapter until 1948, two years after the FTCA was enacted).

109. *See, e.g.*, Culbert v. Sampson's Supermarkets, Inc., 444 A.2d 433, 436–38 (Me. 1982) (discussing various tests for recovery and holding that only serious mental injury that was foreseeable as a result of witnessing another's harm from a tortfeasor's negligent act is compensable); Payton v. Abbott Labs, 437 N.E.2d 171, 174–75 (Mass. 1982).

110. *See* Restatement (Second) of Torts § 46 (1965).

row" tort.[111] It has been referred to as a "gap-filler" tort, insofar as it should never replace or duplicate another tort already available to the claimant.[112] By definition, therefore, cases arising under the rubric of IIED—or its close cousin, negligent infliction of emotional distress—often involve theories not otherwise legally cognizable, such as claims of mind-control[113] or the "fear of cancer" (a.k.a. "cancerphobia").[114] IIED has also sometimes served as the vehicle of choice for proponents of novel liability theories, such as a cause of action for slavery reparations.[115]

B. IIED and the FTCA's "Intentional Torts" Exception: A History

As previously noted, today a consensus exists that—so long as they do not simply amount to artful attempts to "plead around" excluded torts—IIED claims are not barred by the FTCA.[116] But it was not always so. In 1950, four years after the FTCA was enacted and two years after IIED first appeared in the Restatement, the Ninth Circuit held that the FTCA categorically excluded claims for IIED in *United States v. Hambleton.*[117] *Hambleton* involved an IIED claim based on an excessive interrogation that caused the plaintiff to become psychotic, requiring the patient to undergo "shock treatments."[118] The court observed that mental suffering was the only form of injury alleged and noted that the existence of such a cause of action reflected a "comparatively recent growth in the law."[119] The court framed

111. Snyder v. Phelps, 131 S. Ct. 1207, 1222 (2011) (Alito, J., dissenting) (discussing comment in PROSSER & KEETON ON LAW OF TORTS § 12, at 61 (5th ed. 1984), that IIED requirements "are rigorous, and difficult to satisfy").

112. *See, e.g.*, Moser v. Roberts, 185 S.W.3d 912, 915 (Tex. Ct. App. 2006) ("IIED is first and foremost a 'gap-filler' tort which was created for the 'limited purpose of allowing recovery in those rare instances where a defendant inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress.'" (quoting Hoffmann-La Roche, Inc. v. Zeltwanger, 144 S.W.3d 438, 447 (Tex. 2004))).

113. *See* Kronisch v. United States, 150 F.3d 112, 120 (2d Cir. 1998) (alleging IIED based on unwitting involvement in CIA drug-testing program); Glickman v. United States, 626 F. Supp. 171, 173 (S.D.N.Y. 1985).

114. *See, e.g.*, *In re* Moorenovich, 634 F. Supp. 634, 636 (D. Me. 1986); Ayers v. Township of Jackson, 461 A.2d 184, 188–89 (N.J. 1983); W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 54, at 363 n. 34 (5th ed. 1984) (providing a list of cases and similar "fears"); *see also* Plummer v. United States, 580 F.2d 72, 76 (3d Cir. 1978) (fear of tuberculosis); *see also generally* Keith J. Klein, *Fear of Cancer – A Legitimate Claim in Tort Cases?*, 33 A.F. L. REV. 193 (1990); Robert L. Willmore, *In Fear of Cancerphobia*, 3 TOXICS L. REP. (BNA) 559 (Sept. 28, 1988).

115. *See* Cato v. United States, 70 F.3d 1103, 1107 (9th Cir. 1995) (rejecting IIED slavery-reparations claim brought under the FTCA based on two-year statute of limitations and fact that injuries arose before January 1, 1945); Donald Aquinas Lancaster, Jr., *The Alchemy and Legacy of the United States of America's Sanction of Slavery and Segregation: A Property Law and Equitable Remedy Analysis of African American Reparations*, 43 HOWARD L.J. 171, 172, 205 (2000) (asserting a "demand for reparations to all African American families," and suggesting that IIED under the FTCA is a "dignitary tort that could be utilized as the basis" for such a claim).

116. *See, e.g.*, Limone v. United States, 579 F.3d 79, 92–93 (1st Cir. 2009).

117. 185 F.2d 564 (9th Cir. 1950).

118. *Id.* at 565.

119. *Id.* at 566.

the legal question as "whether this new development is in substance, and in reality, an extension of the law of assault," and extensively quoted from the "Assault and Battery" chapter of the Restatement of Torts, which is where the IIED provision was first inserted in the 1948 revision.[120] Characterizing IIED as "but a new type of assault," the court concluded that Congress "must have intended" the FTCA's "assault" exclusion to encompass IIED cases.[121] "The absurdity of any other view," the court stated, "would be manifest, if we were to hold that if when he used his frightening words [plaintiff's interrogator] had pointed a pistol at the plaintiff, then the United States would not be liable, but that if he had displayed no pistol, the United States could be held."[122]

Forty years later, in *Sheehan v. United States*,[123] the Ninth Circuit recognized that *Hambleton* was "no longer controlling."[124] The plaintiff in *Sheehan* alleged that her military supervisor caused humiliation and emotional distress by sexually harassing and slandering her. The district court—relying on *Hambleton*—concluded that the IIED claim fell within the FTCA's intentional-tort exclusion because it actually sounded in assault.[125] In reversing, the court of appeals held that *Hambleton*'s view of IIED as nothing more than a species of assault had been overtaken by events and specifically discussed the intervening Supreme Court decisions in *Rayonier Inc. v. United States*,[126] *United States v. Neustadt*,[127] and *Block v. Neal*,[128] all of which the court viewed as undermining *Hambleton*'s conclusion that IIED is necessarily barred by the FTCA's exclusion of assault claims.[129]

The Ninth Circuit in *Sheehan* stated that, in determining that Congress must have meant for the FTCA's exclusions to encompass IIED, *Hambleton* ran afoul of the Supreme Court's subsequent caution against "read[ing] exemptions into the Act beyond those provided by Congress."[130] The court noted the requirement, based on *Neustadt* and *Neal*, to look beyond a plaintiff's "characterization of the cause of action" to the "conduct upon which plaintiff's claim is based."[131] If that conduct "constitutes an assault as that tort is traditionally defined," the IIED claim based on it will be "barred even though the conduct may also constitute a tort other than assault."[132]

120. *Id.* at 566–67.
121. *Id.* at 567.
122. *Id.*
123. 896 F.2d 1168 (1990).
124. *Id.* at 1172.
125. *See id.* (referencing 28 U.S.C. § 2680(h) (2006)).
126. 352 U.S. 315 (1957).
127. 366 U.S. 696 (1961).
128. 460 U.S. 289 (1983).
129. *See* Sheehan v. United States, 896 F.2d 1168, 1170–71 (1990); *see also* the discussion of *Neustadt* and *Neal* at pp. 387–88, *supra*.
130. *Id.* at 1170 (quoting *Rayonier*, 352 U.S. at 320).
131. *Id.* at 1171.
132. *Id.*

On the other hand, if any "aspect of the conduct upon which plaintiff relies did not constitute an assault, suit is not barred *even though another aspect of that conduct may have been assaultive.*"[133]

Today courts considering IIED claims brought under the FTCA widely recognize and apply this rule, which is taken directly from the Supreme Court's analysis in *Neal*.[134] The Supreme Court in *Neal* faced a situation in which the plaintiff had both a barred misrepresentation claim and a non-barred claim based in part on common factual and legal issues. According to the Court in *Neal*,

> the partial overlap between these two tort actions does not support the conclusion that if one is excepted under the Tort Claims Act, the other must be as well. Neither the language nor history of the Act suggests that when one aspect of the Government's conduct is not actionable under the "misrepresentation" exception, a claimant is barred from pursuing a distinct claim arising out of other aspects of the Government's conduct.[135]

Ultimately in *Sheehan*, the Ninth Circuit remanded to the district court because it could not determine whether any of the plaintiff's allegations would "permit proof of conduct that is not within the definition of any of the excluded torts"—and, consequently, whether those allegations would "support Sheehan's claim she suffered injury from the [IIED] independently of injury suffered from excluded conduct."[136]

Sheehan relied in part for its analysis on the 1982 Eighth Circuit decision in *Gross v. United States.*[137] *Gross* is one of many examples of the challenges courts face when attempting to "look beyond" a plaintiff's allegations to the underlying acts complained of in order to determine the applicability of an FTCA exception.[138] The plaintiff in *Gross* complained of fraud and falsification by government officials, including wrongfully denying him participation in an agricultural subsidy program and causing him financial harm and attendant emotional distress.[139]

Criticizing the Ninth Circuit's *Hambleton* decision, and considering the "wrongs" alleged in the complaint, the majority in *Gross* concluded that the plaintiff's claim was not barred by § 2680(h).[140] The dissent, however, concluded that the claim should be excluded because the "wrongful acts underlying the action" all amounted to torts falling within § 2680(h)—specifically, interference with contract, misrepresentation, libel, slander, mali-

133. *Id.* (emphasis added).

134. *See, e.g.*, *Limone*, 579 F.3d at 92–93 (relying on *Neal*'s analysis in IIED context).

135. *Neal*, 460 U.S. at 298 (quoted by *Sheehan*, 896 F.2d at 1170–71).

136. *Sheehan*, 896 F.2d at 1173.

137. 676 F.2d 295 (8th Cir. 1982).

138. *See id.*; *Neal*, 460 U.S. at 296 (focusing on the "gravamen of the action against the Government").

139. 676 F.2d at 297.

140. *Id.* at 304.

cious prosecution, and abuse of process.[141] According to the dissenting opinion, the majority "err[ed] in allowing the drafting of Gross's complaint to determine whether his action falls within the exceptions."[142] Additionally, the dissent concluded, as defined by the relevant "law of the place," the IIED tort would be "implicitly included in [§] 2680(h)" because "South Dakota law requires Gross to show an invasion of rights closely analogous to those invasions of rights listed in [§] 2680(h) . . . ."[143]

The issues dividing the majority and the dissent in *Gross* are inherently perplexing. Particularly without seeing either the complaint or (as applicable) any subsequent record evidence, it is often exceedingly difficult to understand the basis for characterizing FTCA tort claims in cases of this sort. This may help explain why courts have seemingly reached widely divergent conclusions on whether IIED claims fall within one of the many FTCA exclusions. A brief survey of some of these cases follows.

C. FTCA Cases Finding IIED Claims Excluded

Courts have found IIED claims barred under the FTCA for a variety of reasons. Some IIED claims are considered excluded because the conduct at issue is determined to fall within the discretionary function exception.[144] Other IIED claims have been characterized as essentially claims for assault and thus barred by § 2680(h).[145] Another basis on which IIED claims have been excluded is the *Feres* doctrine, which—as previously mentioned—generally bars any FTCA claim arising out of military service.[146] Still other courts have concluded that an action for IIED based on sexual harassment is unavailable under the FTCA because Title VII or other statutory schemes provide the exclusive remedy for such claims.[147] One case concluded that

141. *Id.* at 305 (Floyd Gibson, J., dissenting).

142. *Id.*

143. *Id.*

144. *See, e.g.*, Spotts v. United States, 613 F.3d 559, 574 (5th Cir. 2010) (affirming dismissal of IIED and other claims based on failure to evacuate prisoners in aftermath of hurricane); Sydnes v. United States, 523 F.3d 1179, 1187 (10th Cir. 2008) (affirming summary judgment for government on "outrageous conduct" and other claims arising from alleged wrongful termination and retaliation); Hart v. United States, 894 F.2d 1539, 1549 (11th Cir. 1990) (reversing grant of summary judgment for plaintiff in IIED case based on mistaken identification by military of remains of soldier shot down over Laos during Vietnam conflict).

145. *See, e.g.*, Vallo v. United States, 298 F. Supp. 2d 1231, 1235 (D. N.M. 2003) (summary judgment for government where assault and battery claim of former inmate who was allegedly sexually assaulted "encompasses the claim of the proposed IIED, and the allegations that support those claims cannot be separated"); Koch v. United States, 209 F. Supp. 2d 89, 94 (D. D.C. 2002) (granting motion to dismiss IIED claim based on alleged conduct that "could only be fairly characterized as an assault").

146. *See, e.g.*, Lovely v. United States, 570 F.3d 778, 785 (6th Cir. 2009) (affirming dismissal of IIED claim brought by ROTC cadet against commanding officer in connection with actions taken in response to allegations of sexual assault).

147. *See, e.g.*, Pfau v. Reed, 125 F.3d 927, 933 (5th Cir. 1997), *vacated on other grounds*, 521 U.S. 801 (1998); Gergick v. Austin, 997 F.2d 1237, 1239 (8th Cir. 1993).

an IIED claim brought by a defecting Iraqi, who alleged that the U.S. government failed to fulfill promises it made to him, was barred because it actually sounded in contract and must be adjudicated under the Tucker Act.[148]

In the face of a concurring opinion sharply differing with the majority's legal analysis, a 2009 Eleventh Circuit decision found that the Supremacy Clause barred the FTCA claims at issue and, in particular, summarily dismissed an IIED claim on the ground that IIED "is not one of the torts enumerated within § 2680(h)."[149] While this decision appears to be anomalous, one commentator has observed that the "FTCA case law shows a consistent refusal by courts to permit damage awards for . . . intentional infliction of emotional distress."[150]

The Supreme Court has not squarely faced the issue of whether an IIED claim falls within one of the FTCA exceptions, but it has come close. In *Christopher v. Harbury*,[151] the Court unanimously held that a complaint failed to state a *Bivens* claim against certain CIA and other federal government officials for denial of access to the courts. The gravamen of the plaintiff's underlying allegations in *Harbury* was that U.S. government officials bore responsibility for the fact that her late husband—a Guatemalan rebel leader—was detained, tortured, and summarily executed by Guatemalan military officers, including officers trained, paid, and used as informants by the CIA.[152]

In analyzing the constitutional denial-of-access claim (the only count directly at issue before the Supreme Court in *Harbury*), Justice Souter's opinion for eight of the Justices[153] reiterated the rule from prior decisions that the right to access the courts is "ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court."[154] Accordingly, the denial-of-access plaintiff must identify a "nonfrivolous" *underlying* claim that the plaintiff was somehow prevented from bringing and must also "identify a remedy that may be awarded as recompense but not otherwise available in some suit that may yet be brought."[155] The Supreme Court concluded that the plaintiff's complaint "did not even come close" to meeting this standard and—most relevant here—also went on to address the attempt by plaintiff's counsel to "supply the missing alle-

148. *See* Awad v. United States, No. 1: 93CV376-D-D, 2001 U.S. Dist. LEXIS 8989, at *11–12 (N.D. Miss. Apr. 27, 2001), *aff'd*, 301 F.3d 1367 (Fed. Cir. 2002).

149. Denson v. United States, 574 F.3d 1318, 1345 & n.67 (11th Cir. 2009).

150. James O'Reilly, *Libels on Government Websites: Exploring Remedies for Federal Internet Defamation*, 55 ADMIN. L. REV. 507, 522 (2003).

151. 536 U.S. 403 (2002).

152. *Id.* at 406–08.

153. Justice Thomas concurred in the judgment on the sole ground that he found no basis in the Constitution for the sort of "right of access to courts" at issue. *Id.* at 422–23.

154. *Id.* at 415.

155. *Id.*

gations" during oral argument before the court of appeals.[156] The response the attorney provided at that time was that the plaintiff "would have brought an action for intentional infliction of emotional distress."[157] In reversing the district court's dismissal of the denial-of-access claim, the D.C. Circuit had "accepted this amendment as a sufficient statement of an underlying cause of action."[158]

The Supreme Court found this to be error and offered some telling comments on the proposed underlying IIED claim. In an extended footnote, the Court stated that the absence of any identifiable remedy made it "unnecessary to resolve any of the [denial-of-access] claim's other difficulties in satisfying the need for nonfrivolous and arguable underlying causes of action."[159] Among several such difficulties, the Court noted that it would be questionable whether any IIED claim "could be maintained under the Federal Tort Claims Act," citing both the FTCA's exclusion of "certain intentional torts including assault, battery, false imprisonment, and misrepresentation," and its exclusion of claims arising in a foreign country.[160] This skeptical footnote, while not binding, seems to recognize that other FTCA exceptions may often bar IIED claims even though IIED is not listed as an excluded cause of action.

D. FTCA Cases Finding IIED Claims Not Excluded

Notwithstanding some of the hurdles to having an IIED claim recognized under the FTCA, many courts have found such claims not to fall within any of the statutory exclusions. Thus, a Mexican national was allowed to bring an FTCA claim for IIED based on his allegedly wrongful extraterritorial arrest by DEA agents.[161] A recent case involving barred claims of assault and molestation held that related "emotional distress suffered as a result of the demand for sexual favors is an injury distinct from the battery" and thus not subject to any FTCA exclusion.[162] Another IIED claim brought by the parents of a serviceman shot to death by a fellow soldier, alleging that the Army mistreated them by suppressing information about the incident, was held not to be barred by the *Feres* doctrine.[163] Other cases have allowed IIED claims based on forms of alleged harassment to proceed under the FTCA.[164] In one case, an FTCA damages award to a

156. *Id.* at 418.
157. Christopher v. Harbury, 536 U.S. 403, 419 (2002).
158. *Id.* at 420.
159. *Id.* at 420 n.19.
160. *Id.*
161. *See* Alvarez-Machain v. United States, 331 F.3d 604, 641 (9th Cir. 2003).
162. Lu v. Powell, 621 F.3d 944, 950 (9th Cir. 2010).
163. *See* Kohn v. United States, 680 F.2d 922, 924 (2d Cir. 1982) (reversing dismissal of cause of action sounding in IIED).
164. *See, e.g.*, Santiago–Ramirez v. Sec'y of Dep't of Def., 984 F.2d 16, 20 (1st Cir. 1993) (allegedly wrongful theft accusation, interrogation, threatened FBI investigation, and termination);

deceased prisoner's estate under an IIED theory was affirmed based on a prison guard's delay in entering a cell to cut down the inmate once he was discovered to have hanged himself.[165] IIED claims involving allegations of mind control experiments[166] and other purported misconduct[167] have also been allowed to proceed under the FTCA.

In *Limone v. United States*,[168] the First Circuit recently affirmed an intentional-infliction FTCA judgment and damage award of more than 100 million dollars. The facts, as recounted by the court, were particularly egregious.[169] Four men were convicted in 1968 on state indictments for a "gang-land slaying" that took place in 1965.[170] In late 2000—more than 30 years later and after certain "scapegoats" had spent much of their lives wrongfully incarcerated—the FBI "for the first time disclosed that all along it had possessed reliable intelligence undercutting" the story of a key witness and that the FBI had "suppressed this intelligence" in order to "secure the convictions."[171] Based on this belated revelation, the convictions were vacated and the sole surviving defendant was released from prison.[172] Various plaintiffs (including the scapegoats' family members) filed suit over the incident, including multiple FTCA claims against the United States.[173] Following a 22-day bench trial, the district court found for the plaintiffs on a number of claims, including claims for IIED.[174]

On appeal, after concluding that the plaintiffs failed to prove malicious prosecution (because the FBI had never instituted criminal proceedings),[175] the First Circuit considered the IIED claim. The court noted that the government had waived any argument that the "seminal Massachusetts case" recognizing a cause of action for IIED had not yet been decided at the time of the convictions at issue.[176] The court stated that the question whether plaintiffs' IIED claim actually "arises out of" malicious prosecution "necessitates a fact-sensitive, case-specific inquiry" in which "substance trumps form" and the court must "look past the nomenclature employed by the

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Truman v. United States, 26 F.3d 592, 596–97 (5th Cir. 1994) (sexual harassment); Jense v. Runyon, 990 F. Supp. 1320, 1324 (D. Utah 1998) (sexual harassment).

165. *See* Trentadue v. United States, 397 F.3d 840, 867 (10th Cir. 2005).

166. *See* Ritchie v. United States, 210 F. Supp. 2d 1120, 1125 (N.D. Cal. 2002).

167. *See* Raz v. United States, 343 F.3d 945 (8th Cir. 2003); Sabow v. United States, 93 F.3d 1445 (9th Cir. 1996); Gasho v. United States, 39 F.3d 1420 (9th Cir. 1994).

168. 579 F.3d 79 (1st Cir. 2009).

169. *See* Bravo v. United States, 583 F.3d 1297, 1299 n.2 (11th Cir. 2009) (Carnes, J., concurring in the denial of rehearing en banc) ("The facts in the *Limone* case grew out of one of the darkest chapters in the history of the FBI.").

170. *Limone*, 579 F.3d at 83.

171. *Id.*

172. *Id.*

173. *Id.* at 86.

174. *Id.* at 87.

175. *See id.* at 91.

176. *Id.* at 91 n.6 (discussing Agis v. Howard Johnson Co., 355 N.E.2d 315 (Mass. 1976)).

plaintiff and focus on the actual nature of the plaintiff's grievance."[177] The court then listed two types of cases: those in which IIED was barred because the grievances were found to have rested on proof of excluded conduct[178] and those in which IIED claims were not barred because there was "merely a loose connection, a family resemblance, or even a partial overlap between the conduct on which the asserted claim rests and that comprising an excepted tort."[179] The court concluded that § 2680(h) did not exclude IIED in this instance because the plaintiffs' claim involved substantively different proof of conduct "broader than that traditionally associated with the tort of malicious prosecution"—specifically, proof of certain conduct that post-dated the wrongful convictions and proof of extreme and outrageous FBI conduct.[180] The First Circuit in *Limone* went on to affirm the district court's conclusion that the plaintiffs proved the elements of IIED,[181] and—despite some misgivings—upheld the very large damages award as not outside the range of the district court's discretion.[182]

Conclusion

The basic waiver of sovereign immunity set forth in the FTCA is riddled with exceptions, provisos, and exceptions to the exceptions. These provisions often intersect, overlap, or even collide in complex ways in the context of a single case, creating mind-bending challenges for litigants and courts alike. While the rationale behind various exceptions has frequently been questioned—often justifiably so—it must be borne in mind that Congress never intended the FTCA to be a blanket waiver of sovereign immunity as to any and all tort liability. The exceptions have been modified more than once since the law's original enactment, and further changes are no doubt to be expected. Nevertheless, at this time the FTCA's exceptions constitute a core feature of the statutory scheme, and litigants are well-advised to pay careful heed to their applicability in any case arising under the law.

177. *Id.* at 92–93.

178. *See id.* at 92 (citing Snow-Erlin v. United States, 470 F.3d 804, 808–09 (9th Cir. 2006); Truman v. United States, 26 F.3d 592, 595 (5th Cir. 1994); and Thomas-Lazear v. FBI, 851 F.2d 1202, 1207 (9th Cir. 1988)).

179. *Id.* at 92–93 (citing Estate of Trentadue *ex rel.* Aguilar v. United States, 397 F.3d 840, 855 (10th Cir. 2005) (holding IIED claim not barred by misrepresentation exception because elements of misrepresentation, including reliance and pecuniary loss, were not present); *Truman*, 26 F.3d at 596 (IIED claim not barred by assault or battery exceptions because elements of latter torts were not alleged); and Jimenez-Nieves v. United States, 682 F.2d 1, 4–5 (1st Cir. 1982) (negligence claim not barred by misrepresentation exception because reliance not present)).

180. *Limone*, 579 F.3d at 93.

181. *See id.* at 100 (noting that the government did not challenge this finding by the district court and observing that "[o]n this record, it is unarguable that the wrongful indictment, prosecution, conviction, and incarceration caused the victims severe emotional distress").

182. *See id.* at 103–07.