

# Federal Tort Claims Act

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# Personal Liability Tort Litigation Against Federal Employees

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Every year, thousands of current or former federal employees are named as defendants in civil suits asserting claims against them in their individual capacity and seeking to recover money damages from their personal assets. Usually, these claims sound in tort and are defended by attorneys in the Department of Justice.

## **I. Basics of individual capacity representation**

The Department of Justice (DOJ) has long recognized that personal liability tort claims against federal employees implicate the interests of the United States. Accordingly, 28 U.S.C. § 517 authorizes DOJ attorneys to defend these claims in accordance with guidelines found at 28 C.F.R. §§ 50.15 and 50.16. *See also* USAM § 4-5.412.

Individual capacity representation is available for current or former federal employees who have been “sued, subpoenaed, or charged in their individual capacities.” 28 C.F.R. § 50.15 (2010). The guideline, however, does not define those terms. In some cases, a complaint is so poorly drafted that it is difficult to ascertain if a personal liability claim has been asserted. DOJ attorneys should look for three things when evaluating a case: (1) whether the employee is named in the caption as required by Fed. R. Civ. P. 10(a); (2) whether there is an allegation that the employee acted wrongfully; and (3) whether the prayer for relief seeks monetary damages. If all three of these things are present in the complaint, the employee can and should request individual capacity representation.

Individual capacity representation by a DOJ attorney is not mandatory. A federal employee may retain counsel at his own expense, but this is rarely done. Most employees prefer representation by a DOJ attorney because there is no cost to the employee. The guidelines require that employees seeking individual capacity representation make a request through their employing agency. 28 C.F.R. § 50.15(a)(1) (2010). Unless the request is “clearly unwarranted,” the agency is obligated to forward it to the appropriate litigating division, along with the court papers served on the employee and an “agency statement.” *Id.*

Usually, requests for individual capacity representation go to the Civil Division. The overwhelming majority of these requests are handled by the Constitutional Torts Staff in the Torts Branch. The Tax Division, however, often handles requests from employees at the Internal Revenue Service in suits arising from their efforts to collect income taxes. Requests made in suits challenging the adequacy of medical care for incarcerated persons, however, should be directed to the Federal Tort Claims Act Staff in the Torts Branch.

Individual capacity representation involves a two-part test. First, the conduct giving rise to the claim must have occurred while the employee was working within the scope of federal employment. Second, it must be in the interest of the United States to assign a DOJ attorney to provide a defense for

the employee. 28 C.F.R. § 50.15(a)(2) (2010); USAM § 4-5.412(B). The litigating division reviews the complaint, the agency statement, and any supporting documentation to determine whether these two conditions are met. In the overwhelming majority of cases, this review is routine and the employee's request is approved as a matter of course. However, in difficult or novel cases, and in cases where initial review suggests the request should be denied, the matter is sent to a higher office for a decision. In the Civil Division, these cases are forwarded to the Deputy Assistant Attorney General, who oversees the Torts Branch. The Deputy may, at her option, convene the Civil Division Representation Committee to provide additional analysis and guidance.

If individual capacity representation is approved, the DOJ attorney assigned to defend the employee enters into a "full and traditional attorney client relationship," and all communication between the employee and the department attorney is privileged. 28 C.F.R. § 50.15(a)(3) (2010). Accordingly, care should be taken to ensure that privileged material is clearly identified and segregated in the case file. Agency counsel employed by any DOJ component are also bound by the privilege and should take the same precautions. *Id.*

Counsel employed by other agencies, however, have the option of being bound by the privilege. *Id.* DOJ attorneys representing employees of agencies other than the DOJ should ascertain early in the litigation whether agency counsel agree to be bound by the privilege and must then carefully memorialize counsels' decision in the case file. If agency counsel opt out of the privilege, department attorneys should take care to avoid any communications with agency counsel that might waive the privilege.

The guidelines on individual capacity representation include a number of terms and conditions. *See* 28 C.F.R. § 50.15(a)(8)-(12) (2010). These terms and conditions are set forth in the DOJ-399 form, which can be obtained from the Constitutional Torts Staff. DOJ attorneys representing current or former federal employees in their individual capacities should ensure that the client completes this form and that it is made part of the case file.

Some federal employees have purchased professional liability insurance. To date, there are three companies selling this coverage: Federal Employees Defense Services, Mass Benefits Consultants, and Wright USA (formerly Wright & Company). Any federal employee who serves as a "law enforcement officer," "supervisor or management official," or a "temporary fire line manager" is eligible for reimbursement "not to exceed one-half" of the premium paid for professional liability insurance. 5 U.S.C.A. Pt. III, Subpt. D, Ch. 59, Subch. IV. (Refs & Annos) (2010). DOJ attorneys are eligible for reimbursement as well. FINANCIAL MANAGEMENT POLICIES & PROCEDURES BULLETIN, No. 05-17 (Apr. 27, 2005). The DOJ counsel assigned to represent federal employees in their individual capacities should inquire at the outset as to whether the employee carries professional liability insurance. If so, the carrier should be promptly notified of the pending suit and kept informed as the litigation progresses.

## **II. Types of personal liability claims sounding in tort against federal employees**

Three types of personal liability claims sounding in tort are typically asserted against federal employees in their individual capacity. First, there are personal liability claims premised upon an alleged violation of the Constitution. *See, e.g., Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (Fourth Amendment). Second, there are personal liability claims premised upon a violation of a federal statute. *See, e.g., Brown v. Nationsbank Corp.*, 188 F.3d 579 (5th Cir. 1999) (Racketeer Influenced and Corrupt Organizations Act (RICO)). Finally, there are personal liability claims premised upon a violation of state tort law. *See, e.g., United States v. Smith*, 499 U.S. 163 (1991) (medical malpractice). The most common defense strategies for each type of claim will be

covered below. For additional coverage of this topic, refer to the U.S. ATTORNEYS' BULLETIN, No. 50, Vol. 4 (July 2002).

### **III. Common issues that arise when defending federal employees against personal liability constitutional tort claims**

#### **A. Whether a *Bivens* remedy should be inferred at all**

In *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court allowed the district courts to infer a personal liability remedy for money damages against federal employees who violate the Fourth Amendment. *Id.* at 388. The Supreme Court cautioned, however, that where there are "special factors counsel[ing] hesitation," it may not be appropriate to infer a *Bivens* remedy. *Id.* at 396. The Court later explained that a *Bivens* remedy does not lie in two situations: (1) where Congress has provided an equally effective alternative remedy and declared it to be a substitute for recovery under the Constitution; and (2) where, in the absence of affirmative action by Congress, special factors counsel hesitation. *Carlson v. Green*, 446 U.S. 14 (1980).

Later Supreme Court decisions show a great reticence to infer the *Bivens* remedy. In 1983, the Court declined to infer a *Bivens* remedy for a federal employee seeking to litigate a constitutional claim arising in the context of his employment because the comprehensive remedial scheme established by the Civil Service Reform Act (CSRA) constituted a special factor. *Bush v. Lucas*, 462 U.S. 367 (1983). In 1988, the Court declined to infer a *Bivens* remedy for a plaintiff trying to litigate a Fifth Amendment procedural due process claim after being denied Social Security payments because the Social Security Act's review process was a special factor. *Schweiker v. Chilicky*, 487 U.S. 412 (1988). In 2001, the Court declined to infer a *Bivens* remedy for an inmate seeking to assert an Eighth Amendment claim against a private prison contractor because the inmate had an alternative remedy in the form of a respondeat superior negligence claim against the corporation. *Correctional Services. Corp. v. Malesko*, 534 U.S. 61 (2001).

In 30 years of *Bivens* jurisprudence we have extended its holding only twice, to provide an otherwise nonexistent cause of action against *individual officers* alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked *any alternative remedy* for harms caused by an individual officer's unconstitutional conduct. Where such circumstances are not present, we have consistently rejected invitations to extend *Bivens* . . . .

*Id.* at 70.

In 2007, the Court stressed that a *Bivens* remedy for a claimed constitutional violation "has to represent a judgment about the best way to implement a constitutional guarantee; *it is not an automatic entitlement no matter what other means there may be to vindicate a protected interest* . . . ." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007) (emphasis added).

The courts of appeals have been similarly disinclined to infer a *Bivens* remedy. In *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009), the Second Circuit, sitting en banc, declined to infer a *Bivens* remedy for an alien seeking to assert a constitutional tort claim against the Attorney General and other high-ranking executive branch employees arising out of his extraordinary extradition from the United States to a foreign country.

In *Wilson v. Libby*, 535 F.3d 697 (D.C. Cir. 2008), the D.C. Circuit considered a personal liability constitutional tort claim brought by a Central Intelligence Agency employee and her husband against the Vice President and other senior administration officials. These officials were alleged to have improperly disclosed the employee's covert status in retaliation for her husband's protected First Amendment activity. The D.C. Circuit declined to infer a *Bivens* remedy because the Privacy Act afforded plaintiffs an alternative remedy where the challenged conduct involved wrongful dissemination of private information from government records. *Id.* at 704.

In *Benzman v. Whitman*, 523 F.3d 119 (2d Cir. 2008), the Second Circuit decided a case in which residents of Manhattan sought to assert a Fifth Amendment substantive due process claim against the head of the Environmental Protection Agency for allegedly misrepresenting the dangers posed by airborne contaminants following the terrorist attack on September 11, 2001. The Second Circuit declined to infer a *Bivens* remedy because plaintiffs had an alternative remedy in the form of a claim against a government fund set up to compensate those injured. *Id.* at 126. The Court explained that "[a] *Bivens* action is a blunt and powerful instrument for correcting constitutional violations and not an 'automatic entitlement' associated with every governmental infraction." *Id.* at 125.

In light of this decisional authority, DOJ attorneys that defend federal employees against personal liability, constitutional tort claims should consider at the outset whether it is proper for the district court to infer the *Bivens* remedy. Where the plaintiff has another way to litigate the propriety of the challenged conduct, a motion to dismiss should be filed urging the district court to eschew inferring a *Bivens* remedy. This type of motion will be especially well-taken if the plaintiff's claim is analogous to the claims at issue in *Malesko*, *Wilkie*, *Arar*, *Wilson*, or *Benzman*. Moreover, although the decisional authority is less clear, it is also possible to argue that district courts should decline to infer a *Bivens* remedy when the plaintiff can seek relief under the Administrative Procedures Act, the Freedom of Information Act, the Tucker Act, or the Immigration and Nationality Act. DOJ attorneys encountering these issues should contact the Constitutional Torts Staff for guidance.

## **B. Whether qualified immunity protects the employee from suit on a *Bivens* claim**

If the district court infers a *Bivens* remedy, the defense of choice is qualified immunity. Although some decisions still refer to "good faith" immunity, this reference is a misnomer. The qualified immunity defense is wholly objective and no inquiry into a defendant's subjective good faith is appropriate. *See Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985) (observing that *Harlow* "purged qualified immunity doctrine of its subjective components"); *Davis v. Scherer*, 468 U.S. 183, 191 (1984) (observing that *Harlow* "rejected the inquiry into state of mind in favor of a wholly objective standard"). The qualified immunity inquiry remains wholly objective even when the official's subjective intent is an essential part of plaintiff's affirmative case. *See Crawford-El v. Britton*, 523 U.S. 574, 588 (1998) (explaining that qualified immunity "may not be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly motivated," because "[e]vidence concerning the defendant's subjective intent is simply irrelevant to that defense.").

### **1. Qualified immunity basics**

Qualified immunity shields government officials performing discretionary functions from liability so long as their conduct does not violate clearly established statutory or constitutional rights, of which a reasonable person would have known. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Even employees who violate the Constitution may nevertheless be protected from suit by the doctrine of qualified immunity. *See Wilson v. Layne*, 526 U.S.

603, 614, 618 (1999) (holding that presence of media during execution of a warrant violated the Fourth Amendment, but granting qualified immunity because the right not clearly established).

## 2. The concept of "clearly established law"

Qualified immunity gives public officials the benefit of the doubt if the law at the time of their conduct did not clearly prohibit their actions. *See Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (describing qualified immunity as "accommodation for reasonable error"). Qualified immunity provides "ample room for mistaken judgments" and protects all government officials except "the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Thus, officials are immune from claims for damages "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson*, 483 U.S. at 638.

The inquiry is whether reasonable officials, not judges or constitutional scholars, could have thought the defendant's conduct permissible under the Constitution. *See Wilson*, 526 U.S. at 618. "If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

When grappling with what is "clearly established," the most critical step is properly defining the right at issue. The inquiry must be "fact-specific," *Anderson*, 483 U.S. at 641, and "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 201. To overcome qualified immunity, "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. This rule takes into account one of the fundamental purposes of qualified immunity, which is to bar liability when it would be "difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts." *Saucier*, 533 U.S. at 205.

The Supreme Court, therefore, has consistently begun its qualified immunity analysis by defining the claimed right with relevant specificity. *See, e.g., Brosseau v. Haugen*, 543 U.S. 194, 199, 200 (2004) (per curiam) (defining "the situation [the defendant] confronted" as "whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight"); *Wilson*, 526 U.S. at 615 (defining the appropriate question as whether a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful, in light of clearly established law and the information the officers possessed."); *Conn v. Gabbert*, 526 U.S. 286, 291 (1999) (defining the relevant question as whether "use of a search warrant by government actors violates an attorney's right to practice his profession"). Thus, although plaintiffs will often attempt to bypass the second step of qualified immunity by asserting some hoary and overly-general constitutional precept, such as "due process," "free speech," or "reasonableness," courts must look to whether, on the particular facts of the case, the right was clearly established.

## 3. What sort of authority makes a right clearly established?

Once the court has defined the specific right at issue, the next step is to determine whether that right is "clearly established." *Anderson*, 483 U.S. at 635-36. It is too extreme to say that qualified immunity applies unless the very action in question has previously been held unlawful. But, in light of pre-existing law, the unlawfulness must be apparent. *Id.* at 640. The "salient question" is whether the officer had "fair warning" or "fair notice" that his or her actions would violate the law. *Hope v. Peltzer*, 536 U.S. 730, 739-41 (2002).

What constitutes fair warning varies from situation to situation. *Hope*, 536 U.S. at 740-41. Where the Constitution itself is specific, the right may be clearly established by the plain text. *See Groh v. Ramirez*, 540 U.S. 551, 563 (2004) (holding no reasonable officer could believe that warrant that did not particularly describe objects subject to seizure could be valid given Fourth Amendment's textual requirement of particularity). Most often, however, the Constitution's text is "cast at a high level of generality" such that its application to particular facts will clearly establish a governing rule only in "obvious" cases. *Brosseau*, 543 U.S. at 199.

Therefore, review of decisional authority interpreting the constitutional provision at issue is usually needed. *See, e.g., Saucier*, 533 U.S. at 209 ("[N]either respondent nor the Court of Appeals has identified any *case* demonstrating a clearly established rule prohibiting the officer from acting as he did[.]") (emphasis added). The decisions need not be "fundamentally" or "materially similar" on the facts, especially when egregious violations are at issue and "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope*, 536 U.S. at 741.

It is not necessary for the Supreme Court to have considered the issue being litigated. Decisions from the courts of appeals can clearly establish a constitutional rule. *Hope*, 536 U.S. at 741-43 (examining Eleventh Circuit precedent). However, when the issue is "one in which the result depends very much on the facts of each case," an officer cannot have fair notice unless the cases "squarely govern." *Brosseau*, 543 U.S. at 201; *see also Conn*, 526 U.S. at 291 (holding that law was not clearly established where cases all dealt with a complete prohibition of the right to engage in a certain calling, not the brief interruption that affected plaintiff).

The Supreme Court has identified at least two situations in which caselaw is unlikely to have clearly established a constitutional rule. First, a circuit split on an issue indicates that the law is not clearly established. *See Wilson*, 526 U.S. at 618 ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.") Second, "when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue," the law on that conduct will not be clearly established unless a later case addresses the question with "a very high degree of prior factual particularity . . ." *Hope*, 536 U.S. at 741 (quoting *United States v. Lanier*, 520 U.S. 259, 270-71 (1997)).

An official remains immune even if his conduct violated other, non-constitutional standards such as internal guidelines, ethical principles, or regulations. *See Davis v. Scherer*, 468 U.S. 183, 194-96 (1984). For example, in *Magluta v. Samples*, 375 F.3d 1269 (11th Cir. 2004) (*Magluta III*) a pretrial detainee brought a Fifth Amendment, procedural due process claim against prison managers after they transferred him to administrative detention and failed to provide the periodic review mandated by a Bureau of Prisons regulation. The Eleventh Circuit rejected the detainee's argument that violating the regulation was the same as violating the Constitution. *Id.* at 1279. The court of appeals held the rule of decision was properly drawn from controlling decisional authority interpreting the constitutional provision at issue rather than the Code of Federal Regulations. *Id.*

While agency policy does not by itself control the immunity analysis, courts sometimes examine it to see if the law is clearly established. *See, e.g., Groh v. Ramirez*, 540 U.S. 551, 564 (2004). A policy proscribing the challenged conduct certainly undermines any argument that the employee was unaware the conduct was unlawful. *See id.* On the other hand, a policy expressly allowing or requiring certain conduct may support an officer's contention that he reasonably believed his conduct to be constitutional. *See Wilson v. Layne*, 526 U.S. 603, 617 (1999). It is important to note, however, that the agency policy must be read against the decisional authority. *See Hope v. Peltzer*, 536 U.S. 730, 744 (2002) (opining that

regulation appeared to be sham in light of mandates in caselaw); *Wilson*, 526 U.S. at 617-18 (holding that officers could rely on policy only where caselaw "was at best undeveloped").

#### **4. Qualified immunity is more than a defense to liability**

Qualified immunity protects not only against liability but also from trial and even from discovery. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991) (explaining that qualified immunity protects officials from "expensive and time consuming preparation to defend the suit on its merits" and from "not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit"). Litigation diverts energy and resources from pressing public problems, the threat of personal liability discourages capable people from assuming public positions, and the fear of suit may deter officials from exercising judgment with the decisiveness critical to their offices. *See Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). Because litigation imposes these costs whether or not liability is imposed, qualified immunity "is an *immunity from suit* rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Also, because these costs begin to accrue as soon as a case has been filed, the Supreme Court "repeatedly ha[s] stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991); *see also Saucier v. Katz*, 533 U.S. 194, 200 (2001) ("Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive.") If a defendant raises qualified immunity in a motion to dismiss or a pre-discovery motion for summary judgment, then "[u]ntil this threshold immunity question is resolved, discovery should not be allowed." *Harlow*, 457 U.S. at 818; *see also Crawford-El v. Britton*, 523 U.S. 574, 598 (1988) (explaining that "if the defendant does plead the immunity defense, the district court should resolve that threshold question before permitting discovery").

#### **5. The analytical framework for qualified immunity**

As noted above, the qualified immunity test contains two steps. For many years, the Supreme Court mandated that the "initial inquiry" must be whether the officer's conduct violated a constitutional right. *Saucier*, 533 U.S. at 201. If no constitutional right was violated, then "there is no necessity for further inquiries concerning qualified immunity." *Id.* But, "if a violation could be made out on a favorable view of the parties' submissions," then "the next, sequential step is to ask whether the right was clearly established." *Id.*

During the 1990s, the Supreme Court warned against skipping ahead to the second step and insisted lower courts begin with the initial inquiry into whether the challenged conduct was constitutional. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991) (criticizing the court of appeals for assuming, without deciding, the "preliminary issue" of whether the plaintiff had alleged a constitutional violation); *see also County of Sacramento v. Lewis*, 523 U.S. 833, 841 (1998) (explaining that "[t]he first step is to identify the exact contours of the underlying right said to have been violated"). The Court explained that addressing the steps in order advanced "the law's elaboration from case to case" by ensuring courts will "set forth principles which will become the basis for a holding that the right is clearly established." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Otherwise, the Court reasoned, "standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals." *Lewis*, 523 U.S. at 842.

In recent years, however, the Court expressed increasing skepticism over rigid application of the *Saucier* test. In fact, in some cases the Court failed to follow its own instruction altogether. *See, e.g., Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (expressing "no view" on the constitutional question itself

and instead concluding that "however that question is decided, the Court of Appeals was wrong on the issue of qualified immunity"); *Saucier*, 533 U.S. at 207-08 (assuming violation could have occurred on facts alleged and proceeding directly to assessment of clearly established law).

By 2008, at least four sitting Justices had signaled support for a more flexible approach. *See Morse v. Frederick*, 551 U.S. 393, 432 (2007) (Breyer, J., dissenting) ("*always* requiring lower courts first to answer constitutional questions is misguided . . . I would end the failed *Saucier* experiment now"); *Los Angeles Cnty. v. Rettele*, 550 U.S. 609, 617 (2007) (Stevens, J., concurring) (joined by Justice Ginsburg and urging disavowal of "the unwise practice of deciding constitutional questions in advance of the necessity for doing so"); *Scott v. Harris*, 550 U.S. 372 (2007) (Breyer, J., concurring) (Court should overrule requirement announced in *Saucier v. Katz*); *Scott v. Harris*, 550 U.S. at 386-87 (Ginsburg, J., concurring) (agreeing Court should confront *Saucier*, but in a factually different case); *Brosseau*, 543 U.S. at 201-02 (Breyer, J., concurring) (joined by Justices Scalia and Ginsburg and criticizing "current rule" as "rigidly requir[ing] courts unnecessarily to decide difficult constitutional questions"); *Lewis*, 523 U.S. at 859 (Stevens, J., concurring) (opining that courts should have discretion to consider whether a particular right is clearly established first, before determining whether the defendant's conduct violated that right).

Criticism of what Justice Breyer called a "rigid order of battle" was building in the courts of appeals, as well. *See, e.g., Egolf v. Witmer*, 526 F.3d 104, 109-10 (3d Cir. 2008) ("We find in this case an exception to [*Saucier's*] generally mandated analytic framework."); *see also id.* at 112 (Smith, J., concurring) (identifying cases where other circuits expressed doubts about or declined to follow *Saucier*); *Clement v. City of Glendale*, 518 F.3d 1090, 1093 (9th Cir. 2008) (while "we are bound to follow [*Saucier's*] rule] until further notice . . . [w]e are free to muse . . . that [it] may lead to the publication of a lot of bad constitutional law that is, effectively, cert-proof."); *Robinette v. Jones*, 476 F.3d 585, 593 (8th Cir. 2007) (assuming without deciding that a constitutional violation occurred and declaring that posited objective of *Saucier* "would be ill served by a ruling here" on the constitutional question); *Ehrlich v. Town of Glastonbury*, 348 F.3d 48, 57-58 (2d Cir. 2003) (listing circumstances under which strict adherence to *Saucier* would not be appropriate); *Santana v. Calderón*, 342 F.3d 18, 29-30 (1st Cir. 2003) (rejecting prescribed order where analysis of whether right exists would have required federal courts to construe Puerto Rico law); *Delaney v. DeTella*, 256 F.3d 679, 682 (7th Cir. 2001) ("Whether the first prong of a qualified immunity defense . . . is a mandatory step or merely a recommendation remains, to some extent, a bit of an open question.") *But see, e.g., Moore v. Andreno*, 505 F.3d 203, 208 (2d Cir. 2007) ("[d]espite continued criticism" of *Saucier*, "unless and until the Supreme Court heeds the plea to overrule [it], we will continue to ask first whether a constitutional violation has occurred and only then ask whether defendants are nevertheless entitled to qualified immunity.").

In March of 2008, the Supreme Court granted *certiorari* in *Pearson v. Callahan*, 128 S. Ct. 1702 (2008) with specific instructions that clearly signaled its intention to revisit the analytical framework. In addition to the questions presented by the petition, the parties were directed to brief and argue whether *Saucier* should be overruled.

On January 23, 2009, the *Pearson* Court held that *Saucier* should be overruled. *Pearson v. Callahan*, 129 S. Ct. 808 (2009). Writing for a unanimous Court, Justice Alito began the opinion by recognizing that the two-step analysis mandated by *Siegert* and *Saucier* "is often beneficial" to help develop constitutional law. *Id.* at 818. He noted, however, that requiring a threshold determination regarding the constitutionality of the challenged conduct comes at a price. It may require "substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the

case." *Id.* Constitutional tort defendants are also adversely affected when they are required to litigate a constitutional question in an area where the law is obviously not clearly established. *Id.*

Justice Alito also reasoned that mandating the first step in the qualified immunity analysis did little to develop the jurisprudence. *Id.* at 819. Some issues were so fact-bound that a decision provided little guidance in future cases. *Id.* Others required lower courts to decide an issue pending in a higher court with the possibility of conflicting holdings. *Id.* Moreover, in those cases where qualified immunity is decided in a ruling on a motion to dismiss, resolving the constitutional issue is difficult in the absence of a fully-developed factual record. *Id.* at 819-20. This problem sometimes leads to "woefully inadequate" advocacy by the parties and the risk that a court "may not devote as much care as it would in other circumstances to the decision of the constitutional issue." *Id.* at 820.

*Pearson* also notes that mandating both steps of the qualified immunity analysis sometimes creates problems at the circuit for defendants who prevail in district court.

Where a court holds that a defendant committed a constitutional violation but that the violation was not clearly established, the defendant may face a difficult situation. As the winning party, the defendant's right to appeal the adverse holding on the constitutional question may be contested.

*Id.* at 820.

Finally, adherence to *Saucier's* two step protocol departs from the general rule of constitutional avoidance and runs counter to the general rule against passing on questions of constitutionality unless such adjudication is unavoidable. *Id.*

On reconsidering the procedure required in *Saucier*, we conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.

*Id.* at 818.

In our view, *Pearson* is a positive development for department attorneys defending federal employees in their individual capacities against personal liability, constitutional tort (*Bivens*) claims. Nothing in the decision prevents the traditional "belt and suspenders" argument that the challenged conduct did not violate the constitution, and even if it did, the law was not clearly established. In cases presenting a close question, however, department attorneys will be able to bypass *Saucier's* thicket and argue entitlement to qualified immunity on the ground that the law is not clearly established.

## **6. Qualified immunity and the elusive "extraordinary circumstances"**

In *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), the Supreme Court suggested that even if the challenged conduct violated a constitutional right, and even if that right was clearly established, qualified immunity might still bar suit "if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard." *Id.* at 819. The Supreme Court has never explained precisely what circumstances are "extraordinary" enough to warrant qualified immunity, and the courts of appeals have not often grappled with this question. Nevertheless, the decisions show that some circumstances might be extraordinary enough to warrant qualified immunity.

Several circuits agree, for instance, that an officer acting on the advice of counsel may be able to demonstrate that extraordinary circumstances prevented her from recognizing clearly established law. *See, e.g., Lawrence v. Reed*, 406 F.3d 1224, 1230-31 (10th Cir. 2005); *Davis v. Zirkelbach*, 149 F.3d 614, 620-21 (7th Cir. 1998); *Buonocore v. Harris*, 134 F.3d 245, 252-53 (4th Cir. 1998). *Cf. Silberstein v. City of Dayton*, 440 F.3d 306, 318 (6th Cir. 2006) (recognizing potential for advice of counsel to create extraordinary circumstances, but noting Sixth Circuit has never granted qualified immunity on that ground). Other decisions seem to go the other way, holding that reliance on advice of counsel "is not inherently extraordinary, for few things in government are more common than the receipt of legal advice." *V-1 Oil Co. v. State of Wyo., Dep't of Env'tl. Quality*, 902 F.2d 1482, 1488 (10th Cir. 1990). The court in that case explained that determining whether advice of counsel is an extraordinary circumstance may depend on the following factors: (1) how unequivocal and specifically tailored the advice was to the particular facts giving rise to the controversy; (2) whether complete information had been provided to the advising attorney(s); (3) the prominence and competence of the attorney(s); and (4) how soon after the advice was received the disputed action was taken. *Id.* at 1489 (internal citations omitted); *accord Davis v. Zirkelbach*, 149 F.3d at 620.

Aside from advice of counsel, there is little consensus on what circumstances might rise to the level of "extraordinary." Some courts have suggested that circumstances might be extraordinary when an officer relies on a state or local statute. *See Roska ex rel. Roska v. Sneddon*, 437 F.3d 964, 971 (10th Cir. 2006); *Mimics, Inc. v. Vill. of Angel Fire*, 394 F.3d 836, 846 (10th Cir. 2005). Other decisions consider reliance on the advice of superior officer, *see, e.g., Liu v. Phillips*, 234 F.3d 55, 58 (1st Cir. 2000); on acts directly at the behest of a judge, *see Lowe v. Letsinger*, 772 F.2d 308, 314 (7th Cir. 1985); on budgetary constraints precluding a certain course of action, *McCord v. Maggio*, 927 F.2d 844, 848 (5th Cir. 1991); or an emergency precluding further factual investigation, *Rykers v. Alford*, 832 F.2d 895, 899 (5th Cir. 1987).

## **7. Qualified immunity and the burden of pleading and persuasion**

Qualified immunity is an affirmative defense that must be pled. *Crawford-El v. Britton*, 523 U.S. 574, 586 (1988); *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982); *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). The Supreme Court, however, has never explained which party must prove what, once the defense has been asserted. *See Gomez*, 446 U.S. at 642 (noting that Justice Rehnquist joined the Court's opinion based on his understanding that the opinion "le[ft] open the issue of the burden of persuasion, as opposed to the burden of pleading").

Of course, to the extent that qualified immunity is properly raised and the facts are undisputed (as in a motion to dismiss), the defense presents a question of law to which burden allocation is, in a sense, irrelevant. *See Elder v. Holloway*, 510 U.S. 510, 515-16 (1994). The leading decision in respect of what constitutes a well-pleaded *Bivens* claim is *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). DOJ attorneys considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6) should also consult *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (abrogating *Conley v. Gibson* rule for when a complaint states a claim).

Finally, we note the courts of appeals have developed widely divergent (and sometimes elaborate) approaches to allocating the burden of demonstrating various aspects of the qualified immunity inquiry. Constraints of space preclude a circuit-by-circuit analysis. Department attorneys are advised to consult the Constitutional Torts Staff for guidance.

#### **IV. Defending federal employees against personal liability tort claims premised upon an alleged violation of federal statutory law**

Occasionally, department lawyers will encounter a claim that seeks to recover money damages from an employee's personal assets, premised upon an allegation the employee violated a federal statute.

The first inquiry is whether the statute in question provides a private right of action. This is controlled by a four-part test: (1) whether the statute was enacted for the benefit of the plaintiff; (2) indication of legislative intent to create a private remedy; (3) consistency with the purposes of the legislative scheme; and (4) whether the cause of action would traditionally come under state law. *Cort v. Ash*, 422 U.S. 66, 78 (1975). The central inquiry is whether Congress intended to create, either expressly or by implication, a private cause of action. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979). See also *Gonzaga Univ. v. Doe*, 536 U.S. 273, 286 (2002) (focusing on congressional intent as evidenced by statutory text); *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001) (same). Cf. *Thompson v. Thompson*, 484 U.S. 174, 179-80 (1988) (focusing on congressional intent, but looking more broadly to legislative history and allowing that private rights of action could be implied rather than explicit).

In the years since *Cort* was decided, courts have been reluctant to find that a federal statute provides a private right of action against an individual employee. See, e.g., *Martinez v. Bureau of Prisons*, 444 F.3d 620 (D.C. Cir. 2006) (holding that no claim may be asserted against individual federal officials for violation of the Freedom of Information Act); *Foley v. Univ. of Houston Sys.*, 355 F.3d 333, 340 (5th Cir. 2003) (explaining that "relief under Title VII is available only against an employer, not an individual supervisor or fellow employee"); *Garcia v. S.U.N.Y Health Sciences. Ctr. of Brooklyn*, 280 F.3d 98, 107 (2d Cir. 2001) (holding that Title II of the ADA does not provide for suit against a public official acting in his individual capacity); *Romain v. Shear*, 799 F.2d 1416, 1418 (9th Cir. 1986) (the only proper defendant in a federal employee's suit under the Age Discrimination in Employment Act is the agency head); *Wheeler v. Gilmore*, 998 F.Supp. 666, 668 (E.D. Va. 1998) (Privacy Act allows a private cause of action against a federal agency, not individuals).

There are, however, some statutes that create a private right of action which may be asserted against a federal employee in his individual capacity. See, e.g., *Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2138 (2008) (permitting suit against individual for alleged violation of RICO Act); *Duncan v. Belcher*, 813 F.2d 1335 (4th Cir. 1987) (permitting suit against individual for alleged violation of the Right to Financial Privacy Act); *Quon v. Arch Wireless Operating Co., Inc.*, 445 F.Supp.2d 1116, 1128 (C.D. Cal. 2006) (permitting suit against individual for alleged violation of the Electronic Communications Privacy Act).

If no private right of action exists for the statute upon which the plaintiff relies, it should be a simple matter to seek dismissal of the personal liability federal statutory claim under FED. R. CIV. P. 12(b)(6). If, however, the statute in question is one where the courts have found a private right of action, then the defense of choice is qualified immunity.

The Supreme Court has long recognized that qualified immunity is available to counter not only constitutional claims but also statutory claims. See *Harlow*, 457 U.S. 800, 818 ("We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established *statutory* or constitutional rights of which a reasonable person would have known.") (emphasis added). The courts of appeals are in accord. See, e.g., *Tapley v. Collins*, 211 F.3d 1210, 1214-15 (11th Cir. 2000) (holding qualified immunity is available against statutory claim unless Congress intended to abrogate the defense of qualified immunity).

to claims under that act); *Berry v. Funk*, 146 F.3d 1003, 1014 (D.C. Cir.1998) (holding that qualified immunity may be raised as a defense to a plaintiff's statutory claims under the Federal Wiretap Act).

## **V. Defending federal employees against personal liability tort claims premised upon an alleged violation of state law**

The general rule is that federal employees enjoy absolute immunity from tort claims that challenge negligent or wrongful acts performed while acting within the scope of government employment. *See Osborn v. Haley*, 549 U.S. 225, 229-30 (2007). The source of this absolute immunity is the Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the Westfall Act. 28 U.S.C. § 2679 (2010).

Under the Westfall Act, the exclusive remedy for anyone injured by the negligent or wrongful act of a federal employee acting in the scope of employment is a suit against the United States under the Federal Tort Claims Act. 28 U.S.C. § 2679(b)(1) (2010). Despite this clear statutory command, department attorneys often encounter plaintiffs who seek to recover money damages from the personal assets of federal employees for an alleged violation of state tort law. Fortunately, this pleading mistake is easily remedied. The Westfall Act permits the Attorney General to certify that the employee "was acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. § 2679(d)(1) (2010). If the case is pending in state court, the certification permits the case to be removed any time prior to trial. 28 U.S.C. § 2679(d)(2) (2010). The certification also causes the employee to be dismissed from the action and the United States substituted in his place as the only defendant on the state law tort claim. *Id.* From that point the case proceeds like any other claim under the Federal Tort Claims Act and all the usual FTCA defenses apply. 28 U.S.C. § 2679(d)(4) (2010).

Of course, the FTCA is a limited waiver of sovereign immunity and expressly excludes certain claims. *See, e.g.*, 28 U.S.C. § 2680(a) (2010) (claims challenging discretionary decisions); 28 U.S.C. § 2680(h) (2010) (intentional torts). Moreover, as noted elsewhere in this issue, compliance with the FTCA's statute of limitations is a jurisdictional prerequisite. *See* 28 U.S.C. §§ 1346(b), 2401(b) (2010). Accordingly, in some cases following the substitution of the United States as sole party defendant under the Westfall Act, it is clear the plaintiff is not entitled to relief. Some plaintiffs respond by arguing that the substitution was improper, apparently preferring to sue the employee individually instead of pursuing a claim against the United States that is doomed to fail. Usually this argument is couched in terms of a challenge to the certification of scope of employment.

The Supreme Court held in *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995), that the Attorney General's certifications under the Act are judicially reviewable. *See id.* at 434. *Gutierrez* did not flesh out the kind of review allowed, but the lower courts have agreed that de novo review is appropriate. *See, e.g.*, *Singleton v. United States*, No. 00-4152, 2002 WL 75663, at \*3 (6th Cir. Jan. 22, 2002); *Maron v. United States*, 126 F.3d 317, 322 (4th Cir. 1997); *Rogers v. Mgmt. Tech., Inc.*, 123 F.3d 34, 36 (1st Cir. 1997); *Lawson v. United States*, 103 F.3d 59, 60 (8th Cir. 1996); *Palmer v. United States*, 93 F.3d 196, 198-99 (5th Cir. 1996); *Wilson v. Drake*, 87 F.3d 1073, 1076 (9th Cir. 1996); *Haddon v. United States*, 68 F.3d 1420, 1422 (D.C. Cir. 1995); *Richman v. Straley*, 48 F.3d 1139, 1145 (10th Cir. 1995); *Sullivan v. United States*, 21 F.3d 198, 201 (7th Cir. 1994); *Schrob v. Catterson*, 967 F.2d 929, 936 (3d Cir. 1992); *McHugh v. Univ. of Vt.*, 966 F.2d 67, 74 (2d Cir. 1992); *Nadler v. Mann*, 951 F.2d 301, 304 (11th Cir. 1992).

Although certification review is de novo, the plaintiff bears the burden of proof. *See, e.g.*, *Larson v. Frederiksen*, No. 01-1301, 2002 WL 91569, at \*1 (8th Cir. Jan. 25, 2002); *Borneman v. United States*, 213 F.3d 819, 827 (4th Cir. 2000); *Day v. Mass. Air Nat'l Guard*, 167 F.3d 678, 685 (1st Cir. 1999);

*Taboas v. Mlynczak*, 149 F.3d 576, 581 (7th Cir. 1998); *Palmer v. Newton*, 93 F.3d 196, 199 (5th Cir. 1996); *Flohr v. Mackovjak*, 84 F.3d 386, 390 (11th Cir. 1996); *Billings v. United States*, 57 F.3d 797, 800 (9th Cir. 1995); *Richman v. Straley*, 48 F.3d 1139, 1145 (10th Cir. 1995); *Kimbrow v. Velten*, 30 F.3d 1501, 1505 (D.C. Cir. 1994); *Melo v. Hafer*, 13 F.3d 736, 747 (3d Cir. 1994) (en banc). As in civil cases generally, the evidentiary standard is a preponderance of the evidence. See, e.g., *Borneman*, 213 F.3d at 827; *Billings*, 57 F.3d at 800; *Raisig v. United States*, 34 F.Supp. 2d 1053, 1055 (W.D. Mich. 1998); *Barry v. Stevenson*, 965 F.Supp. 1220, 1222 (E.D. Wis. 1997). Unless challenged, a certification is conclusive evidence that the employee was acting in the scope of employment and trial courts may not insist on affidavits or evidentiary support for it. See *Rogers v. Mgmt. Tech., Inc.*, 123 F.3d 34 (1st Cir. 1997). Once the plaintiff asserts a challenge, however, the certification has no evidentiary weight.

Defending against a challenge to a Westfall Act certification implicates procedural and ethical issues that can be complex. Department attorneys encountering litigation of this nature are encouraged to consult with the Constitutional Torts Staff.❖

#### ABOUT THE AUTHOR

❑ Paul Michael Brown joined the Department of Justice in 1988, via the Attorney General's Honors Program. In 2009, the Attorney General presented him with the John Marshall Award for Outstanding Legal Achievement in Providing Legal Advice. He gratefully acknowledges his Constitutional Torts Staff colleagues, whose diligent scholarship and clear writing provided the foundation for this article.✽

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# The Statute of Limitations of the Federal Tort Claims Act as a Jurisdictional Prerequisite to Suit and the Implications for Equitable Tolling

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## I. Introduction

When a tort plaintiff seeking to sue the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680 (2010), fails to submit an administrative claim to the appropriate agency within 2 years of the accrual of her cause of action *or* fails to file suit within 6 months of an agency denial of the administrative claim, she will likely argue that the statute of limitations should be “tolled” for equitable reasons. Federal courts, however, are increasingly finding that this argument is not available to

FTCA plaintiffs because the FTCA's statute of limitations is jurisdictional and, as such, is not subject to tolling, waiver, or estoppel. These courts have relied on the reasoning of the Supreme Court's decision in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), which held that the statute of limitations for claims against the government in the United States Court of Federal Claims was jurisdictional and could not be waived. This article will examine whether the FTCA's statute of limitations, like the statute of limitations for court of claims actions, is jurisdictional. The article will consider recent caselaw addressing this issue, including a split in the circuit courts of appeals. Additionally, the article will explain why, irrespective of the jurisdictional nature of the FTCA's statute of limitations, it is important to show that Congress did not intend for equitable tolling to apply to the statute. The article concludes with suggestions for federal government attorneys who argue that equitable tolling should not apply to the FTCA's statute of limitations.

## II. The FTCA's statute of limitations and caselaw before *John R. Sand & Gravel*

As one court stated, the FTCA's statute of limitations "represents a deliberate balance struck by Congress whereby a limited waiver of sovereign immunity is conditioned upon the prompt presentation of tort claims against the government." *Gould v. U.S. Dep't of Health and Human Services*, 905 F.2d 738, 742 (4th Cir. 1990) (en banc). The statute imposes two filing deadlines on claimants:

A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401(b) (2010). Thus, a plaintiff must file an administrative claim with the appropriate federal agency within 2 years of the time the claim accrues *and* begin an action within 6 months of the mailing of the notice of final denial of the claim. *Id.* If a plaintiff fails to meet either deadline, the claim "shall be forever barred." *Id.* Also, if the agency does not take action on a claim within 6 months of the time the claim is presented, the claimant can deem the claim denied. 28 U.S.C. § 2675(a) (2010).

The Supreme Court has never explicitly ruled that the FTCA's statute of limitations is jurisdictional and therefore not subject to tolling, waiver, or estoppel. However, the only Supreme Court case interpreting the FTCA's statute of limitations contains language that would lead to this conclusion. In *United States v. Kubrick*, 444 U.S. 111, 119-22 (1979), the Court held that the accrual of a cause of action under the FTCA's statute of limitations was not delayed until a plaintiff had reason to believe that the United States was negligent. In reaching this conclusion, the Court stated, "[T]he [FTCA] waives the immunity of the United States and . . . in construing the statute of limitations, which is a condition of that waiver, we should not take it upon ourselves to extend the waiver beyond that which Congress intended." *Id.* at 117-18. By virtue of Article III of the United States Constitution, compliance with a condition on the waiver of the United States' sovereign immunity is a prerequisite to a federal court's exercise of jurisdiction. See *Block v. N.D. ex rel. Bd. of Univ. and Sch. Lands*, 461 U.S. 273, 287 (1983) [hereinafter *Block*]; *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

However, even after the Supreme Court's decision in *Kubrick*, federal courts reached different conclusions on whether the FTCA's statute of limitations was jurisdictional. The issue sometimes arose in the context of whether the United States had to plead the statute as an affirmative defense and consequently had to carry the burden of proving non-compliance; other times, it arose in the context of whether the statute of limitations was subject to equitable tolling. See e.g., *Hughes v. United States*, 263 F.3d 272, 278 (3d Cir. 2001) (not jurisdictional); *Johnson v. Smithsonian Inst.*, 189 F.3d 180, 189 (2d Cir.

1999) (jurisdictional); *Perez v. United States*, 167 F.3d 913, 915-17 (5th Cir. 1999) (not jurisdictional); *Coska v. United States*, 114 F.3d 319, 322 (1st Cir. 1997) (jurisdictional); *Glarner v. U.S. Dep't of Veterans Admin.*, 30 F.3d 697, 701 (6th Cir. 1994) (not jurisdictional). Ironically, a decision which led many courts to find that the FTCA's statute of limitations was not jurisdictional, and therefore could be tolled, did not specifically address the FTCA or whether a limitations period in a waiver-of-immunity statute was jurisdictional. In *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 93-96 (1990), the Supreme Court found that the 30-day limitations period in Title VII of the Civil Rights Act of 1964 could be equitably tolled. In so doing, the Court adopted a generally applicable "presumption" to replace its prior ad hoc determinations regarding when a statute of limitations for actions against the United States was subject to equitable tolling. *Id.* at 95-96. The Court stated "that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Congress, of course may provide otherwise if it wishes to do so." *Id.*

Subsequently, many courts reflexively held that *Irwin* compelled the conclusion that the FTCA's statute of limitations could be equitably tolled and was therefore not jurisdictional. The leading case for this proposition was *Schmidt v. United States*, 933 F.2d 639 (8th Cir. 1991). In *Schmidt*, the Eighth Circuit reversed an earlier ruling in the same case that the FTCA's 6-month limitations period for filing suit was jurisdictional and that the plaintiff carried the burden of proving compliance. *Id.* at 639-40. The Supreme Court had remanded the earlier ruling for reconsideration in light of *Irwin*. See *Schmidt v. United States*, 901 F.3d 680 (8th Cir. 1990), *cert. granted and judgment vacated*, 498 U.S. 1077 (1991). On remand, the Eighth Circuit found that the "implicit holding" of *Irwin* was that "strict compliance with the statute of limitations is not a jurisdictional prerequisite to suing the government." *Schmidt*, 933 F.2d at 640. Therefore, the FTCA's 6-month limitations period could be equitably tolled, and was not jurisdictional. *Id.* Based on this conclusion, the court found that the United States had the burden of pleading and proving the FTCA's limitations bar. *Id.*

What *Schmidt* and many of the cases following *Schmidt* failed to recognize was that *Irwin* had merely held that Title VII's statute of limitations for claims against the government was subject to equitable tolling. The *Irwin* Court did not conclude that the provision was *not* jurisdictional. Doing so would have been contrary to a long-standing principle that the Court reaffirmed the same year it decided *Irwin*: namely, that a limitations period in a waiver-of-immunity statute is a jurisdictional prerequisite to suit if it is a condition of the United States' consent to suit. See *United States v. Dalm*, 494 U.S. 596, 608-10 (1990). Indeed, Title VII, the statute at issue in *Irwin*, is a waiver of sovereign immunity in its application to the United States, and the limitations period is a condition of that waiver. *Irwin*, 498 U.S. at 93-94. One could argue that *Irwin* established that limitations periods in waiver-of-immunity statutes can be both jurisdictional and subject to equitable tolling.

In *T.L. ex rel. Ingram v. United States*, 443 F.3d 956, 959-61 (8th Cir. 2006), the Eighth Circuit, which in *Schmidt* had reasoned that the FTCA's statute of limitations was not jurisdictional because it was subject to equitable tolling, decided, upon further reflection and development in the caselaw, that the FTCA's statute of limitations could be *both* jurisdictional and subject to equitable tolling. The court reasoned that where Congress intended equitable tolling to apply, "there is no inconsistency between viewing compliance with the statute of limitations as a jurisdictional prerequisite and applying the rule of equitable tolling." *Id.* at 961. The court concluded that "considerations of equitable tolling simply make up part of the . . . determination [as to] whether an action falls within the scope of the waiver of sovereign immunity granted by Congress, and thus within the jurisdiction of the federal courts." *Id.* The Supreme Court has also recognized that courts, not Congress, lack the authority to provide for equitable exceptions to statutes of limitations. See *Bowles v. Russell*, 551 U.S. 205, 214 (2007) ("[T]his Court has no authority to create equitable exceptions to jurisdictional requirements . . .") (emphasis added).

Nevertheless, whether a statute of limitations is jurisdictional is still an important consideration in determining congressional intent. In *Holland v. Florida*, 130 S.Ct. 2549 (2010), the Supreme Court implied that *Irwin's* rebuttable presumption in favor of equitable tolling was confined to non-jurisdictional statutes, stating “[w]e have previously made clear that a *nonjurisdictional* federal statute of limitations is normally subject to a ‘rebuttable presumption’ in favor of ‘equitable tolling.’” *Id.* at 2560 (citing *Irwin*, 498 U.S. at 95-96) (emphasis added). This limitation, of course, is inconsistent with *Irwin's* holding, which provided for equitable tolling in a waiver-of-immunity statute.

While a determination that a condition is “jurisdictional” commonly means that a court may not expand or contract the provision through equitable doctrines like tolling and waiver, the determination may not be conclusive, at least with respect to equitable tolling. Because the grant of Article III jurisdiction for suits against the United States is ultimately a matter of congressional intent to waive the government's sovereign immunity, there is no reason that the intent may not include, under certain circumstances, equitable exceptions. Those circumstances, however, must be closely tied to congressional intent. As described below, the Supreme Court and other courts have considered whether the *Irwin* presumption of equitable tolling has been rebutted, even after finding that a statute of limitations was jurisdictional. See *John R. Sand & Gravel Co.*, 552 U.S. 130, 137-38 (2008); *Marley v. United States*, 567 F.3d 1030, 1036-37 (9th Cir. 2009). Finally, while applying specific equitable exceptions to a jurisdictional condition as a matter of congressional intent is one thing, finding that a jurisdictional condition can be waived is quite another. To allow an agency of the executive branch of the United States to waive a jurisdictional condition established in a congressional waiver-of-immunity statute would violate the separation of powers doctrine. See *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004) (stating “[o]nly Congress may determine a lower federal court’s subject matter jurisdiction”) (citing U.S. Const. art. III, § 1).

Significantly, courts that have reflexively followed *Irwin* to find that the FTCA’s statute of limitations was subject to equitable tolling have generally failed to recognize that *Irwin's* presumption in favor of equitable tolling was rebuttable. Few courts have closely analyzed the FTCA’s language, purpose, and legislative history to determine whether Congress intended for equitable tolling of the FTCA’s statute of limitations. The Supreme Court's 2008 *John R. Sand & Gravel* decision provided additional insight regarding how a court should analyze congressional intent with respect to the FTCA’s statute of limitations. Understanding that case and subsequent decisions, a federal government attorney defending the United States in an FTCA action can set forth the best argument that the FTCA’s statute of limitations should not be equitably tolled.

### **III. The impact of *John R. Sand & Gravel* on the determination of whether the FTCA's statute of limitations is jurisdictional**

The significance of characterizing a statute of limitations as a “jurisdictional” prerequisite for bringing an action against the United States became more clear with the Supreme Court's decision in the *John R. Sand & Gravel* case. The plaintiff mining company had filed an action in the United States Court of Federal Claims alleging that certain actions of the Environmental Protection Agency, in building and moving various fences as part of environmental remediation efforts, were unconstitutional takings of its leasehold rights. 552 U.S. at 132. While the United States had initially asserted that several of the claims were untimely under the statute of limitations for actions in the United States Court of Federal Claims, 25 U.S.C. § 2501, the government later effectively conceded that certain claims were timely. 552 U.S. at 132. The United States won the case on the merits and the plaintiff appealed. *Id.* at 132-33. The Court of Appeals for the Federal Circuit considered itself obliged to address the application of the statute of limitations which had been raised in an amicus brief, though not by the government. See *John R. Sand &*

*Gravel Co. v. United States*, 457 F.3d 1345, 1352 (Fed. Cir. 2006). The appellate court found that the United States could not waive the statute of limitations because it was jurisdictional and concluded that the action was untimely. *Id.* at 1353-60. Thus, the Supreme Court was asked to determine whether a court must consider the timeliness of a suit brought in the court of claims, despite the government's apparent waiver of the issue. 552 U.S. at 133.

The Supreme Court found that two types of statutes of limitations exist. On one hand, the typical garden variety statute of limitations seeks to protect defendants from "stale or unduly delayed claims." *Id.* This common statute of limitations must be raised as an affirmative defense, is subject to waiver, and may be tolled "in light of special equitable considerations." *Id.* (citing cases). On the other hand, some statutes of limitations do not merely "protect a defendant's case-specific interest in timeliness," but seek "to achieve a broader system-related goal, such as facilitating the administration of claims . . . limiting the scope of a governmental waiver of sovereign immunity . . . or promoting judicial efficiency." *Id.* (citing cases). The Court noted that it had often determined these latter statutes to be "more absolute, say as requiring a court to decide a timeliness question despite a waiver, or as forbidding a court to consider whether certain equitable considerations warrant extending a limitations period." *Id.* at 133-34 (citing cases). The Court explained that "[a]s convenient shorthand, [it] has sometimes referred to the time limits in such statutes as 'jurisdictional.'" *Id.* at 134 (citing *Bowles v. Russell*, 551 U.S. 205, 210 (2007)).

Based upon this dichotomy alone, one would conclude that the FTCA's statute of limitations falls in the latter category of absolute statutes. Like the common statutes of limitations, the FTCA's statute certainly protects the United States from having to defend against "stale or unduly delayed claims." *Id.* at 133. Indeed, to support this purpose for common statutes of limitations, the *John R. Sand & Gravel* Court cited *Kubrick*, the seminal FTCA statute of limitations case. *Id.* at 133 (citing *Kubrick*, 444 U.S. at 117). But the FTCA's statute of limitations also seeks to achieve at least two of the broader "system-related goal[s]" that the Court mentioned. *Id.* at 133. First, the FTCA's statute of limitations facilitates "the administration of claims;" it is part and parcel of the FTCA's administrative exhaustion requirement. See *Marley v. United States*, 567 F.3d 1030, 1036 (9th Cir. 2009). Under the statute, a tort claimant must first present the claim to the appropriate federal agency within 2 years of accrual; the agency then has 6 months to attempt to resolve the claim before the claimant can file suit in federal court. 28 U.S.C.

§§ 2401(b), 2675(a) (2010). Second, the FTCA's statute of limitations limits the scope of the government's waiver of its sovereign immunity. The *Kubrick* Court called the FTCA's statute of limitations a "condition of [the] waiver" of immunity. 444 U.S. at 117-18. Similarly, in *United States v. Dalm*, 494 U.S. 596 (1990), the Supreme Court found that a limitations period for seeking a tax refund was jurisdictional because it was a condition on the authority Congress had given to courts "in permitting suits against the [g]overnment." *Id.* at 609-10. The Court emphasized, that "[i]f any principle is central to our understanding of sovereign immunity, it is that the power to consent to such suits is reserved to Congress." *Id.* at 610.

The analysis that the Supreme Court employed in *John R. Sand & Gravel* to determine that the statute of limitations at issue, 28 U.S.C. § 2501, was the "second, more absolute, kind of limitations period," is instructive. *John R. Sand & Gravel*, 552 U.S. at 134. The Court primarily considered how it had historically interpreted this statute of limitations and its predecessor statutes. For example, the Court noted that as early as 1883, it had denied equitable tolling for a prior version of the statute, stating that the statute was "jurisdiction[al]," and "not susceptible to judicial 'engraft[ing]' of unlisted disabilities." *Id.* The Court found that it had a duty to consider the timeliness of the action whether it was raised "by plea or not." *Id.* (quoting *Kendall v. United States*, 107 U.S. 123, 125-26 (1883)). Subsequently, the Court reiterated views about "the more absolute nature of the court of claims limitations statute." *Id.* at 134-35 (citing cases).

The Court found that the change of language of the court of claims statute of limitations in the 1948 recodification of Title 28 was not significant, even though the current statute, unlike the prior version, states that it is applicable to claims of which the Court of Federal Claims “*has jurisdiction.*” 552 U.S. at 135 (quoting 28 U.S.C. § 2501) (emphasis in *John R. Sand & Gravel*). The petitioner argued that this language showed that the statute of limitations could not be “jurisdictional” because it only applied to claims over which the court already had jurisdiction. The Court rejected this argument, noting that the 1948 recodification did not work a change in the underlying substantive law, “unless an intent to make such a change is clearly expressed.” 552 U.S. at 136 (quoting *Keene Corp. v. United States*, 508 U.S. 200, 209 (1993)). The new language did not reflect an intent to change the application of the statute and the Court noted that subsequent to the 1948 recodification, in *Soriano v. United States*, 352 U.S. 270 (1957), it had found that the statute was “‘jurisdiction[al]’ and not susceptible to equitable tolling.” *John R. Sand & Gravel*, 552 U.S. at 136 (quoting *Soriano*, 352 U.S. at 273-74).

The petitioner also argued that, in *Irwin*, the Court overturned its earlier precedents regarding the jurisdictional nature of the court of claims limitations period because the statute of limitations at issue in Title VII was “linguistically similar” to the court of claims statute. *Id.* at 137. While admitting that the statute was linguistically similar to the statute at issue in *Irwin*, the Court noted a key distinction: the Supreme Court had previously provided a definitive interpretation of the court of claims limitations period as “jurisdictional,” whereas the civil rights statute had no such pedigree. *Id.* Moreover, the Court noted that the *Irwin* Court would not have implicitly overruled the *Soriano* Court’s precedential interpretation of the court of claims statute of limitations as “jurisdictional.” *Id.* Most significantly, however, the Court recognized that the *Irwin* Court held that a presumption of equitable tolling for suits against the government was *rebuttable*; in other words, the presumption was not conclusive. *Id.* That presumption could be rebutted not only by specific statutory language – for example, indicating a contrary congressional intent – but also through “a definitive earlier interpretation of the statute, finding a similar congressional intent.” *Id.* at 137-38. The Court concluded that prior Supreme Court decisions interpreting the court of claims statute of limitations in absolute terms as “jurisdictional” and “not susceptible” to tolling or waiver, were sufficient to rebut any contrary presumption allowing equitable exceptions. *Id.* at 138. Thus, the Court at least implied that the *Irwin* analysis could apply to a jurisdictional statute of limitations.

The Court stated that *Irwin* and the prior cases interpreting the court of claims statute of limitations did not create a “critical anomaly,” but rather reflected “a different judicial assumption about the comparative weight Congress would likely to have attached to competing legitimate interests.” *Id.* at 139. On one hand, there is the interest in treating the government similarly to a private litigant as reflected in *Irwin*. On the other hand, there is the interest in strictly interpreting the conditions of a statute that waives the government’s sovereign immunity, as reflected in *Soriano* and other cases interpreting the court of claims statute. Resolution of these competing interests requires a determination of the congressional intent at the time of a statute’s enactment.

While there were many Supreme Court cases interpreting the current court of claims statute of limitations and its predecessors, the same is not the case for the FTCA. The only Supreme Court case interpreting the FTCA’s statute of limitations is *Kubrick*, and the *Kubrick* Court did not directly address whether the FTCA’s statute of limitations is jurisdictional, let alone whether it is subject to tolling, waiver, or estoppel. *Kubrick*’s statements that the FTCA’s statute of limitations is a “condition of [the] waiver” of sovereign immunity, and that the Court “should not take it upon [itself] to extend the waiver beyond that which Congress intended,” 444 U.S. at 117-18, would lead one to conclude that the FTCA’s statute of limitations is jurisdictional or at least subject to a strict construction. Yet, the statements are, in

a sense, dicta and thus do not carry the weight of the long line of court of claims cases that the Supreme Court cited in *John R. Sand & Gravel*.

Therefore, the dichotomy between common and “more absolute” statutes of limitations that begins the Supreme Court’s analysis in *John R. Sand & Gravel* is helpful, but not sufficient, in answering the question of whether the FTCA’s statute of limitations is subject to equitable tolling. *Irwin* shows that a statute of limitations in a waiver-of-immunity statute may still be tolled. So, determining whether a statute of limitations is jurisdictional may not necessarily answer the question of whether it can be tolled. The jurisdictional nature of the statute may be just one consideration among others in determining whether Congress intended for equitable exceptions to the limitations period.

#### **IV. Caselaw analyzing the FTCA's statute of limitations after *John R. Sand & Gravel***

Since the *John R. Sand & Gravel* decision, courts, with one significant exception, have found that the FTCA’s statute of limitations was jurisdictional and not subject to equitable tolling or waiver. The first major case, *Marley v. United States*, 567 F.3d 1030 (9th Cir. 2009), involved application of the FTCA’s 6-month statute of limitations for filing suit after agency denial of a claim. *Id.* at 1032-34. The plaintiff initially filed a timely complaint, but then dismissed the complaint pursuant to a stipulation that had been sent by the Assistant United States Attorney. *Id.* at 1032-33. The plaintiff subsequently filed another action outside of the 6-month period but argued that the period should be tolled because in a cover letter accompanying the stipulation he had been misled to believe that he could file a subsequent suit on the same claim if the action were dismissed “without prejudice.” *Id.* at 1033-34.

The Ninth Circuit Court of Appeals found that the FTCA’s statute of limitations was jurisdictional and could not be equitably tolled. *Id.* at 1034-38. In reaching this conclusion, the court applied the recent *John R. Sand & Gravel* analysis. *Id.* at 1034-35. Initially, the court noted that the FTCA’s statute of limitations was a condition of the federal government’s waiver of sovereign immunity that must be strictly construed. *Id.* at 1034 (citing *Block*, 461 U.S. at 287 and *Kubrick*, 444 U.S. at 117-18). The court found that the FTCA’s statute of limitations was a “more absolute” and “jurisdictional” statute of limitations, but not merely because it was contained within a waiver-of-immunity statute. *Id.* at 1035. As the Supreme Court had looked to its past precedents in interpreting the court of claims statute of limitations in *John R. Sand & Gravel*, the Ninth Circuit also looked to its past precedents in interpreting the FTCA’s statute of limitations. *Marley*, 567 F.3d at 1035-36. The court found that it had long held that the FTCA’s statute of limitations was jurisdictional and not subject to tolling in light of equitable considerations. *Id.* (citing among other cases *Berti v. V.A. Hosp.*, 860 F.2d 338, 340 (9th Cir. 1988); *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983); *Blain v. United States*, 552 F.2d 289, 291 (9th Cir. 1977) (per curiam); *Mann v. United States*, 399 F.2d 672, 673 (9th Cir. 1968)).

The court held, however, that it would reach the same conclusion in the absence of its past precedent regarding the FTCA’s statute of limitations. *Marley*, 567 F.3d at 1036. First, the court found that the purpose of the 6-month limitations period fell “squarely” within the “more absolute” category of statutes of limitations described in *John R. Sand & Gravel* because it sought to “achieve a broader system-related goal, such as facilitating the administration of claims.” *Id.* (quoting *John R. Sand & Gravel*, 552 U.S. at 133). The court also noted that the legislative history of the FTCA’s statute of limitations suggested “that Congress did not intend for equitable tolling to apply.” 567 F.3d at 1036-37 (citing Ugo Colella & Adam Bain, *Revisiting Equitable Tolling and the Federal Tort Claims Act: Putting the Legislative History in Proper Perspective*, 31 SETON HALL L. REV. 174 (2000)). Finally, the court found that the statutory “context” for the FTCA’s limitations period showed that Congress did not intend for equitable exceptions to apply. 567 F.3d at 1037. The court noted that Congress had explicitly included

some equitable exceptions in a general statute of limitations for civil actions against the United States, 28 U.S.C. § 2401(a), including “legal disability or beyond the seas,” *id.*, but had included no such exceptions in 28 U.S.C. § 2401(b). 567 F.3d at 1037. The court concluded that “[i]f Congress had intended to grant exceptions to the § 2401(b) limitations period, it would have done so expressly, as it did in § 2401(a).” 567 F.3d at 1037 (citing *United States v. Fiorillo*, 186 F.3d 1136, 1153 (9th Cir. 1999) (*per curiam*)).

In sum, the Ninth Circuit in *Marley* not only considered its prior precedent, finding that the FTCA’s statute of limitations was jurisdictional, but also considered the function of the statute, its legislative history, and its statutory context. These considerations provided persuasive evidence of congressional intent that would have sufficiently rebutted the *Irwin* presumption of equitable tolling had the court found it necessary to apply the presumption. Since *Marley*, several courts have cited it and *John R. Sand & Gravel* with little additional analysis to find that the FTCA’s statute of limitations is jurisdictional and not subject to equitable tolling. *See, e.g., Waltz v. United States*, No. 1:07-cv-01691-SMS, 2010 WL 1286777, at \*3-5 (E.D. Cal. Mar. 29, 2010); *Jones v. United States*, 691 F.Supp. 2d 639, 641 (E.D.N.C. 2010); *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, MDL No. 07-1873, 2010 WL 323898, at \*4 (E.D. La. Jan. 21, 2010).

The significant exception to this trend is *Santos v. United States*, 559 F.3d 189, 194-97 (3d Cir. 2009), in which the Third Circuit Court of Appeals found that the 2-year period in the FTCA’s statute of limitations could be equitably tolled. In *Santos*, the plaintiff in a medical malpractice action claimed that the statute of limitations should be equitably tolled because she “did not know that the allegedly negligent healthcare providers had been deemed federal employees.” *Id.* at 192. The court recognized that *John R. Sand & Gravel*, and other Supreme Court cases “might call into question whether equitable tolling is available in FTCA claims.” *Id.* at 196 (citing *John R. Sand & Gravel*, 552 U.S. at 137; *United States v. Beggerly*, 524 U.S. 38, 48-49 (1998); *United States v. Brockamp*, 519 U.S. 347, 350-54 (1997); and *Kubrick*, 444 U.S. at 117-18). Nevertheless, the court noted that its prior precedent, relying upon *Irwin*, had found that “the FTCA’s statute of limitations is not jurisdictional, and thus in appropriate circumstances the equitable tolling doctrine can apply in actions under it.” 559 F.3d at 194-95 (citing *Hughes v. United States*, 263 F.3d 272, 278 (3d Cir. 2001)). The court explained that “*Irwin* remains good law” and that *John R. Sand & Gravel* “applied but did not overrule *Irwin* in holding that its presumption that equitable tolling applied had been rebutted.” *Santos*, 559 F.3d at 197 (citing *John R. Sand & Gravel*, 552 U.S. at 137).

However, the only evidence of congressional intent that the *Santos* Court considered to determine whether the *Irwin* presumption in favor of equitable tolling was rebutted was the FTCA’s savings clause for actions filed in the wrong forum. This section states that claims brought erroneously in state court against a federal employee are timely notwithstanding the 2-year limitation of 28 U.S.C. § 2401(b), if the claim would have been timely had it been filed on the date the state court action was commenced and the claim is presented to the appropriate federal agency with 60 days of the dismissal of the state court action. *See* 28 U.S.C. § 2679(d)(5) (2010). The United States had argued that the court should not recognize additional non-statutory exceptions because Congress had explicitly provided for this statutory exception and, indeed the plaintiff in *Santos* had initially filed her action in the wrong court. This argument is the standard canon of statutory construction, *expressio unius est exclusio alterius*, which means the expression of one is the exclusion of another. The Ninth Circuit in *Marley* had, in essence, applied this canon in comparing sections 2401(a) and 2401(b) and inferring congressional intent to exclude any equitable exceptions for the FTCA’s statute of limitations. *Marley*, 567 F.3d at 1037. *See also TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (applying the canon to a discovery rule for a federal statute of limitations). The *Santos* court rejected the government’s argument, concluding that the savings clause was distinct from the FTCA’s limitations provision and thus not relevant to congressional intent with respect

to equitable tolling of the FTCA's statute of limitations. *Santos*, 559 F.3d at 196. The court also found that the FTCA's general waiver of sovereign immunity, subjecting the United States to liability "to the same extent as a private individual under like circumstances," 28 U.S.C. § 2674 (2010), justified applying equitable tolling. *Santos*, 559 F.3d at 197. The court did not consider whether the FTCA's statute of limitations was of the "more absolute" variety under the *John R. Sand & Gravel* dichotomy or analyze other evidence of legislative intent, such as the surrounding language in the statute, the statute's purposes, and its legislative history.

## **V. Indications of congressional intent regarding equitable tolling of the FTCA's statute of limitations in its text, purpose, and legislative history**

Recent Supreme Court cases show that it is important to consider the text of the statute, its purposes, and its legislative history in order to determine whether Congress intended for the statute of limitation at issue to be subject to equitable tolling. These cases demonstrate that *Irwin's* presumption in favor of equitable tolling can indeed be rebutted. The cases also illustrate the types of evidence of congressional intent that the Court has found persuasive. For example, in *United States v. Brockamp*, 519 U.S. 347 (1997), the Court reasoned that Congress did not intend for courts to incorporate "other unmentioned, open ended 'equitable' exceptions" because it included specific tolling provisions within the language of a tax refund statute. *Id.* at 351-52. The Court also noted the "unusually emphatic" form of the time limitations which "cannot easily be read as containing implicit exceptions." *Id.* at 350. Finally, the Court discussed the purpose of the statute, its administrative implications, and its legislative history, all of which evidenced a congressional objective of "strong statutory 'protection against stale demands,' " which would preclude tolling. *Id.* at 352-54.

Similarly, in *United States v. Beggerly*, 524 U.S. 38 (1998), the Court found that Congress did not intend to allow equitable tolling for the Quiet Title Act because the Act "already effectively allowed for equitable tolling" given that a cause of action did not accrue until the plaintiff "knew or should have known of the claim of the United States." *Id.* at 48. Additionally, the Court noted that the 12-year limitations period was already "unusually generous" and any "additional equitable tolling" would be contrary to a central purpose of the Act, which was to create certainty with respect to property rights and when those rights can be challenged. *Id.* at 48-49. *See also TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (finding that the existence of a limited discovery rule for a statute of limitations reflected a congressional intent to preclude a more general discovery rule).

The Court has also described the type of evidence that is not sufficient to show that Congress intended to preclude equitable tolling of a statute of limitations. Most recently, in *Holland v. Florida*, 130 S.Ct. 2549 (2010), the Court held that equitable tolling applied to the 1-year statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which governs petitions for federal habeas relief by state prisoners. 28 U.S.C. § 2244(d) (2010). The Court initially noted that this statute of limitations was not "jurisdictional." *Holland*, 130 S.Ct. at 2560. Next, the Court found that the strength of *Irwin's* presumption in favor of equitable tolling was "reinforced," because equitable principles had traditionally governed the substantive law of habeas corpus and because the AEDPA had been passed after the Court's *Irwin* decision. Thus, Congress was likely aware that courts would apply the presumption. *Id.* at 2560-61.

In contrasting the AEDPA's statute of limitations to those at issue in *Brockamp* and *Beggerly*, the Court found that the statute was neither "unusually emphatic," nor "particularly long." *Id.* at 2561. Moreover, in contrast to law governing tax refund and land claims, which were at issue in those cases, "equity finds a comfortable home" in habeas corpus law. *Id.* Further, the Court discounted the argument

that the statute already set forth equitable exceptions that would raise an inference that Congress intended to exclude open-ended equitable tolling. *Id.* at 2561-62. The Court explained that several exceptions related to events that *triggered*, rather than tolled, the statute and that the only tolling provision during state collateral review was explained simply by the necessity of an exhaustion of state remedies. Thus, the provisions would not rightly raise an inference of congressional intent to preclude other tolling. *Id.* Finally, the Court found that allowing equitable tolling would not undermine the purposes of the AEDPA because the statute sought to eliminate delays in the federal habeas review process “without undermining basic habeas corpus principles,” including the “vital role” of habeas corpus in protecting constitutional rights. *Id.* at 2562 (citing *Slack v. McDaniel*, 529 U.S. 473, 483 (2000)). *See also Young v. United States*, 535 U.S. 43, 50-53 (2002) (finding that equitable tolling applied to a limitations period in bankruptcy law because bankruptcy courts are traditionally equitable, and the tolling provision that was included was distinct from traditional equitable tolling and therefore did not reflect congressional intent to preclude traditional equitable tolling).

Applying the reasoning of these cases to the FTCA reveals that there are several arguments that the FTCA’s statute of limitations should not be equitably tolled. First, Congress passed the FTCA long before the Court decided *Irwin*. In contrast to the situation in *Holland*, Congress would have no reason to believe that a presumption in favor of equitable tolling would apply to the FTCA statute of limitations. *See Holland*, 130 S.Ct. at 2561. If anything, when Congress passed the FTCA in 1946, it was operating against a common law background that recognized few equitable exceptions to statutes of limitations as a matter of common law. *See Adam Bain & Ugo Colella, Interpreting Federal Statutes of Limitations*, 37 CREIGHTON L. REV. 493, 501-22 (2004) (discussing equitable exceptions recognized at common law). Second, claims under the FTCA are possible only through an act of Congress waiving the United States’ sovereign immunity. Thus, the law governing federal tort claims is purely statutory and not an area, such as habeas corpus or bankruptcy, in which equitable doctrines have traditionally applied, making the *Irwin* presumption particularly apt. *See Holland*, 130 S.Ct. at 2561-62 (habeas corpus); *Young*, 535 U.S. at 50 (bankruptcy). In fact, courts have held that equitable remedies are not available under the FTCA. *See Westbay Steel, Inc. v. United States*, 970 F.2d 648, 651 (9th Cir.1992) (barring equitable claim for unjust enrichment against United States under the FTCA).

Additionally, the language of the FTCA’s statute of limitations, like the time limitations at issue in *Brockamp*, is emphatic. The statute of limitations provides that a failure to meet either prescriptive period means that the claim is “forever barred.” 28 U.S.C. § 2401(b) (2010). While the 2-year period for filing a claim, by itself, is not as generous as the 12-year period in *Beggerly*, the application of a discovery rule of accrual means that many cases can be filed many years after the allegedly negligent conduct occurred. In fact, the *Beggerly* Court found that the existence of such a discovery rule in the Quiet Title Act was a good reason to preclude other equitable tolling. *Beggerly*, 524 U.S. at 48-49.

There are also good arguments for application of the canon *expressio unius est exclusio alterius* to support the conclusion that Congress did not intend equitable tolling for the FTCA. Initially, as the Ninth Circuit noted in *Marley*, the general 6-year statute of limitations for civil actions against the government allows for particular types of traditional equitable tolling, namely “legal disability” and “beyond the seas,” 28 U.S.C. § 2401(a) (2010), whereas the FTCA’s statute of limitations does not provide for any disabilities. *Marley*, 567 F.3d at 1037. The general 6-year statute of limitations for civil actions, 28 U.S.C. § 2401(a), is right next to the FTCA’s statute of limitations for tort actions, 28 U.S.C. § 2401(b). However, the proximity of the two provisions does not necessarily lead to an inference of congressional intent. The two subsections had distinct origins. The 6-year statute of limitations, now in 28 U.S.C. § 2401(a), originally included the following traditional equitable tolling exception:

*Provided*, That the claims of married women, first accrued during marriage, of persons under age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively.

Judicial Code, Act of Mar. 3, 1911, § 34, ¶ 20, 36 Stat. 1093. This provision was in effect at the time Congress passed the FTCA in 1946, *see* 28 U.S.C., 1940 ed. § 41(20), yet Congress did not provide for any such disabilities or other equitable exceptions in the FTCA's statute of limitations. Federal Tort Claims Act § 420, 60 Stat. 842, 845 (1946). Thus, one could argue that Congress intentionally placed traditional equitable exceptions into a statute of limitations for civil actions against the United States government prior to 1946 and intentionally chose not to do so for the FTCA.

When Title 28 of the United States Code was revised in 1948, the two statutes of limitations were placed next to each other. *See* H.R. Rep. No. 80-308, at A185 (1948) (noting that revised section 2401 of title 28 “consolidates provision in section 41(20) of Title 28 U.S.C. 1940 ed., as to time limitation for bringing actions against the United States under section 1346(a) of this title, with section 942 of said title 28 [statute of limitations for tort claims]”). Significantly, the equitable exception for the 6-year statute of limitations was amended at that time so that the only disabilities recognized were “legal disability” and “beyond the seas.” *See* H.R. Rep. No. 80-308, at A185. While the focus of the 1948 revision of the Judicial Code was to codify without substantively modifying existing law for statutes of limitations for actions against the United States, *see John R. Sand & Gravel v. United States*, 552 U.S. 130, 136 (2008), Congress changed the circumstances under which limitations could be equitably tolled in 28 U.S.C. § 2401. It narrowed the type of disabilities that could toll the limitations period in 28 U.S.C. § 2401(a), yet left the FTCA's statute of limitations in Section 2401(b) without any explicit equitable tolling at all. Thus, the inference that Congress did not intend for equitable tolling to be offered with regard to the FTCA is fully justified through *expressio unius est exclusio alterius* as applied to the two subsections in 28 U.S.C. § 2401. Further, if not otherwise clear, the Reviser's Note shows that no equitable exceptions other than those expressed in the section were intended. The Note states that a provision in the predecessor to 28 U.S.C. § 2401(a), which provided that “disabilities other than those specifically mentioned should not prevent any action from being[,] barred was omitted *as superfluous*.” H.R. Rep. No. 80-308 (emphasis added). Thus, Congress did not need to explicitly state that equitable tolling that was not included within the statutes of limitations in section 2401 was prohibited, because that was already assumed.

The other argument for application of *expressio unius est exclusio alterius* is the one the Third Circuit rejected in *Santos*, namely that Congress's inclusion of a savings provision for circumstances in which a plaintiff sued a federal employee in an improper forum reflected congressional understanding that other equitable tolling was unavailable. *Santos*, 559 F.3d at 196. The *Santos* court reasoned that the savings clause was placed in a distinct provision from the FTCA's statute of limitations. *Id.* Coupled however, with the history of 28 U.S.C. § 2401(a) and its consolidation with the FTCA's statute of limitations in 1948, Congress's action in adopting this particular savings provision in 1988 indicates an understanding that other traditional equitable tolling was not intended. An equitable exception for circumstances in which a plaintiff had filed an action in an improper forum had been recognized in the common law before the 1988 amendment to the FTCA. *See Bain & Colella, supra*, 37 CREIGHTON L. REV. at 517-19 (discussing equitable exception for defective pleading, wrong forum, and constructive notice). Thus, Congress' action in specifically adding this exception to the statute shows that it had not intended for this or any other open-ended equitable tolling for the FTCA's limitations period when it enacted the statute.

The purpose and design of the FTCA also indicate that Congress did not intend for open-ended equitable tolling. First, unlike some other “remedial statutes,” the FTCA is a waiver-of-immunity statute that is subject to strict construction. *See Block v. N.D. ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983) (stating that conditions on the waiver of sovereign immunity “must be strictly observed”). Second, as the *Marley* court recognized, the FTCA’s statute of limitations is a “key part” of the administrative claim process, which is required before a plaintiff can bring an action in federal court. *Marley*, 567 F.3d at 1036. Indeed, as the Senate Judiciary Committee noted when the administrative claim process was made part of the FTCA in 1966, the process was designed to “ease court congestion” and make it possible to “expedite the fair settlement of tort claims asserted against the United States.” S. Rep. No. 89-1327, at 2 (1966) (quoted in *Marley*, 567 F.3d at 1036). Allowing open-ended equitable tolling would subvert this purpose by allowing cases that would otherwise be barred and by delaying the settlement and adjudication of timely claims.

Finally, the FTCA’s particular legislative history further supports the view that Congress did not intend to incorporate equitable tolling into the FTCA’s statute of limitations. A complete analysis of the FTCA’s legislative history with respect to congressional intent on equitable tolling is beyond the scope of this article, but this subject has been exhaustively covered in a law review article. *See Ugo Colella & Adam Bain, supra*, 31 SETON HALL L. REV. at 191-205. A few highlights of the legislative history are worth noting to show that Congress did not intend for open-ended equitable tolling. First, prior to the FTCA’s enactment, many equitable exceptions were proposed and considered for the legislation – including those for disability, for infancy, and even for “reasonable cause shown” in certain categories of cases – but none of these exceptions were adopted in the final statute. *See id.* at 190-97. Additionally, subsequent to the FTCA’s enactment, Congress amended the FTCA several times to correct perceived injustices resulting from the application of the statute of limitations. In 1949, Congress lengthened the limitations period. In 1966, it provided for an administrative claim process. And, as referenced above, in 1988, it adopted a savings provision for circumstances in which a plaintiff sued a federal employee in state court when the plaintiff’s action should have been brought against the United States in federal court. *Id.* at 200-05. These amendments all reflected congressional understanding that equitable exceptions were unavailable to plaintiffs under the FTCA. *Id.* at 197-205. Congress also repeatedly rejected amendments which would have allowed tolling for certain conditions, including infancy and insanity. *Id.* at 198-99; H.R. 1023, 99th Cong. (1985) (A Bill to amend 2401 of title 28, United States Code, to extend the time for presenting tort claims to persons under legal disability). *See also McCall v. United States*, 310 F.3d 984, 988 (7th Cir. 2002) (noting that in 1989 Congress considered a proposed amendment to the FTCA, which would have tolled the statute of limitations for minors but the amendment never made it out of committee). Thus, the legislative history clearly reflects congressional intent to preclude tolling. *See Marley*, 567 F.3d at 1036-37 (“[T]he legislative history of § 2401(b) of the FTCA suggests that Congress did not intend for equitable tolling to apply.”); *Wukawitz v. United States*, 170 F.Supp2d 1165, 1169 (D. Utah 2001) (stating “it is clear from the legislative history of the FTCA that Congress did not intend for equitable tolling to apply to the limitations period.”).

Thus, irrespective of whether the FTCA’s statute of limitations is jurisdictional, good reasons in the text, purposes, and legislative history of the statute exist to overcome *Irwin*’s presumption in favor of equitable tolling and to demonstrate that Congress did not intend such tolling for the FTCA’s statute of limitations.

## **VI. Arguing that the FTCA’s statute of limitations is not subject to equitable tolling**

The Supreme Court’s *John R. Sand & Gravel* opinion, coupled with an analysis of the subsequent federal caselaw, the text of the FTCA, its purposes, and its legislative history, provide the federal

government attorney with a strong arsenal of weapons to argue that the FTCA's statute of limitations is not subject to equitable tolling. Assuming that there is no controlling precedent since the Supreme Court's *John R. Sand & Gravel* decision in the federal jurisdiction where the matter is at issue, the attorney should consider the following arguments:

- Between the two types of statutes of limitations described in *John R. Sand & Gravel*, the FTCA's statute of limitations is a "more absolute" statute of limitations because it seeks to "facilitat[e] the administration of claims . . . [and] limit[s] the scope of the governmental waiver of sovereign immunity." The Ninth Circuit's decision in *Marley* and the Supreme Court's decision in *Kubrick* support these points, respectively.
- If there is any history of the controlling jurisdiction treating the FTCA's statute of limitations as jurisdictional and/or not subject to equitable exceptions – going back to the passage of the statute – that history will support continued treatment of the FTCA's statute of limitations as jurisdictional and will support rebutting any presumption in favor of equitable tolling. The history of the jurisdiction's treatment of the statute was relied upon in *John R. Sand & Gravel* and *Marley* to show that the statute at issue was jurisdictional and not subject to waiver or tolling.
- If the controlling jurisdiction has ever held that the FTCA's statute of limitations was subject to equitable tolling, the attorney should determine whether any decision did so based on *Irwin* and if so, whether it analyzed whether the *Irwin* presumption of equitable tolling was rebutted. If no decision analyzed whether the presumption was rebutted, recent Supreme Court decisions show that courts should perform this analysis to determine congressional intent.
- If a decision in the controlling jurisdiction finds that equitable tolling is appropriate and claims to analyze whether the *Irwin* presumption was rebutted, the analysis is incomplete. A complete analysis of the language, purposes, and legislative history of the FTCA's statute of limitations, consistent with similar analyses of the Supreme Court for other statutes of limitations, will show that Congress did not intend for equitable tolling, thereby rebutting the *Irwin* presumption. This will include:
  - That the FTCA was enacted long before the *Irwin* decision that established a rebuttable presumption in favor of equitable tolling, but, as a relatively recent waiver of sovereign immunity, is purely statutory and not an area in which equitable doctrines have traditionally applied, like in habeas corpus or bankruptcy;
  - That the FTCA's statute of limitations is emphatic, providing that claims failing to meet its prescriptive periods are "forever barred;"
  - That the 2-year period for filing a claim after accrual, coupled with the FTCA's discovery rule of accrual, provides ample time to file an administrative claim without any necessity for equitable tolling;
  - That Congress' inclusion of some types of traditional equitable tolling in another statute of limitations for actions against the government, and its 1988 amendment of the FTCA to include a specific equitable exception, show that it did not intend to include other equitable tolling;

- That the FTCA, as a waiver-of-immunity statute with a statute of limitations that is an integral part of its mandatory administrative exhaustion requirement, was not designed for equitable tolling; and
- That the legislative history of the FTCA shows that Congress considered and rejected equitable tolling for the statute until it decided to provide a specific type of equitable tolling in a 1988 amendment.

The extent to which the government attorney should develop these arguments will depend upon how important the equitable tolling issue is to the case. In many instances, such as where the court has traditionally treated the FTCA's statute of limitations as jurisdictional, a brief argument with citation to *John R. Sand & Gravel* and *Marley* may be sufficient. In other cases, such as where adverse prior precedent exists, full development of the argument may be necessary.

## VII. Conclusion

When a plaintiff raises equitable tolling as a reason for excusing compliance with either of the prescriptive periods of the FTCA's statute of limitations, there is a very persuasive legal argument that FTCA's statute of limitations cannot be equitably tolled. That argument was strengthened considerably by the Supreme Court in *John R. Sand & Gravel* decision, where it considered the jurisdictional nature of a statute of limitations for claims against the government. Because the FTCA's statute, like the statute at issue in *John R. Sand & Gravel*, is correctly considered jurisdictional, any equitable tolling could only be justified based upon strong evidence of congressional intent for tolling. Here, not only is such evidence lacking, but indicators of congressional intent provide sufficient evidence to overcome any presumption of equitable tolling that a court might entertain. ❖

### ABOUT THE AUTHOR

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*The views expressed in this article are solely those of the author and not of the Department of Justice.*

# An Underutilized Defense: State Statutes of Repose as a Bar to FTCA Medical Malpractice Actions

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## I. Introduction

This article discusses an often overlooked state law defense in Federal Tort Claims Act (FTCA) cases where the tort claim has languished with an agency for a number of years before suit is ultimately brought. A case in point is *Anderson v. United States*, No. 1:08CV3, 2010 WL 1346409 (D. Md. Mar. 30, 2010), *appeal docketed*, No. 10-1597 (4th Cir. June 1, 2010). The plaintiff, who had undergone surgery in 2002, filed an administrative tort claim in 2003 alleging medical malpractice. Over the course of several years, the agency negotiated with Ms. Anderson and eventually reached a tentative resolution. The Assistant Attorney General, however, refused to approve the proposed settlement. Ms. Anderson then filed suit in January 2008, over 5 years after her injury occurred.

Maryland law, however, has an absolute 5-year period of repose on the filing of medical malpractice actions, calculated from the date the injury was committed. MD. CODE ANN., CTS. & JUD. PROC. § 5-109(a) (West, Westlaw through 2010 Legis. Sess.). A statute of repose comprises a substantive right, in favor of a defendant, to be free from liability. A repose period is fixed and not subject to tolling or estoppel except in very limited circumstances. The United States filed a motion to dismiss, arguing that, as substantive state law, Maryland's statute of repose barred the action. The district court granted the motion to dismiss. *Anderson*, 2010 WL 1346409, at \*4.

Statutes of repose are considered substantive state law. Thus, they may be raised as a bar to FTCA suits because the FTCA looks to "the law of the place where the act or omission occurred" to determine whether, under the circumstances, "the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b) (2010). Stated another way, the FTCA mandates that the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances. . . ." *Id.* § 2674 (2010). Based on these conditions to the waiver of sovereign immunity, it is well-settled that state substantive law applies in actions filed pursuant to the FTCA. *FDIC v. Meyer*, 510 U.S. 471, 478 (1994).

It therefore follows that statutes of repose, as substantive state law that defines when a cause of action no longer exists, are applicable in FTCA actions. To hold otherwise would place the United States in a dramatically different position than private parties, because a suit filed outside of the repose period could proceed against the United States while a similar suit filed against a private person would be dismissed. Section 2674 of the FTCA – also known as the private person analog – was intended to prevent such disparate results. 28 U.S.C. § 2674 (2010); *cf. Hill v. SmithKline Beecham Corp.*, 393 F.3d 1111, 1117 (10th Cir. 2004).

## II. Defining statutes of repose

While the terms "statute of repose" and "statute of limitations" are often used interchangeably, the two legal concepts are not identical. Indeed, the two concepts are separate and distinct legal theories:

It is important to distinguish statutes of limitations from statutes of repose at the outset of this discussion. Although the commencement date for the applicable statute of limitations may be deferred and hinge upon the injured party's discovery of the existence of the cause of action, the point of commencement for the applicable statute of repose is commonly the date of the last act or omission that caused the plaintiff's injury. Moreover, a critical distinction is that a repose period is fixed and its expiration will not be delayed by estoppel or tolling.

4 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1056 (3d ed. 2002). Critically, courts have noted that "[a] statute of limitations is procedural in nature while a statute of repose is substantive in that it defines a right rather than merely limits its enforcement." *Resolution Trust Corp. v. Olson*, 768 F.Supp. 283, 285 (D. Ariz. 1991); see *Alexander v. Beech Aircraft Corp.*, 952 F.2d 1215, 1223 (10th Cir. 1991); *Goad v. Celotex Corp.*, 831 F.2d 508, 511 (4th Cir. 1987) ("Statutes of repose are meant to be 'a substantive definition of rights as distinguished from a procedural limitation on the remedy used to enforce rights.'")

## III. Analytical framework

Given the frequent misinterpretation of statutes of repose as statutes of limitations, government counsel must carefully analyze an apparent statute of repose before raising it in an FTCA suit. Statutes of repose are principally characterized by at least three factors. First and foremost, a statute of repose bars the right to bring a cause of action after a statutorily-defined period of time has passed. These statutes are typically tied to the occurrence of an event, such as the date of a medical injury, and are unrelated to the date the claim accrues or the injury is discovered. In other words, unlike statutes of limitations, statutes of repose do not incorporate the discovery rule and the clock measuring the period of repose begins running regardless of whether and when the injury is discoverable. *Alexander*, 952 F.2d at 1218; *Edmonds v. Cytology Servs. of Md., Inc.*, 681 A.2d 546, 552 (Md. Ct. Spec. App. 1996).

Second, statutes of repose are notoriously strict bars and are not subject to tolling or estoppel unless specifically provided for by statute. *Hill v. Fitzgerald*, 501 A.2d 27, 32 (Md. 1985). This strict interpretation of statutes of repose arises from the primary purpose behind these statutes: to curtail the "long-tail" effect of the discovery rule. *Id.* at 32-33; *Abend v. Klauert*, 531 S.E.2d 722, 726-27 (Ga. Ct. App. 2000). Therefore, a statute of repose aims to prevent indefinite exposure to liability for a particular injury and to afford defendants greater certainty in predicting potential liability. Some common statutory exceptions that permit a statute of repose to be tolled include fraudulent concealment of a claim, claims involving minors, and injuries involving foreign objects left in the body. *E.g.*, GA. CODE ANN. § 9-3-71(b) (West, Westlaw through 2010 Legis. Sess.); MD. CODE ANN., CTS. & JUD. PROC. § 5-109(b) (2010); MONT. CODE ANN. § 27-2-205 (West, Westlaw through 2009 Legis. Sess.). But courts are generally not permitted to engraft exceptions onto a statute of repose because doing so would defeat the principal purpose behind the enactment.

Third, unlike a statute of limitations, which serves as a procedural bar, a statute of repose is considered substantive in nature. Statutes of repose completely eliminate a cause of action for medical malpractice after a certain time period. While a statute of limitations bars enforcement of a cause of action, a statute of repose actually defines when a cause of action no longer exists. See *Simmons v.*

*Sonyika*, 614 S.E.2d 27, 29 (Ga. 2005) ("The statute of repose destroys the previously existing rights so that, on the expiration of the statutory period, the cause of action no longer exists.") (quotations omitted); *Resolution Trust Corp. v. Olson*, 768 F.Supp. 283, 285 (D. Ariz. 1991).

Opposing counsel may argue that an administrative tort claim filed within the statutorily-prescribed period satisfies a state statute of repose. Most statutes of repose, however, require that a plaintiff file a civil action, not a claim, within a certain time period. Moreover, the administrative tort claim operates like an insurance claim in a private context in that when a medical provider causes an injury, a patient submits a claim to that medical provider's malpractice insurance carrier before filing suit. After filing such a claim, the injured party and the insurance company may engage in settlement discussions. During this time, a patient must take care to satisfy all applicable state law requirements, including the filing of a civil action within a statute of repose, in order to maintain a cause of action. *Cf. Henry Prods. Co. v. United States*, 180 Ct. Cl. 928, 930 (1967) ("[V]oluntary settlement negotiations [sic] have no effect on the running of the statute of limitations once it has begun."). Likewise, just as in a private context, plaintiffs' counsel in FTCA actions must pay close attention to a statute of repose in order to properly preserve a cause of action.

An argument that the submission of an administrative tort claim satisfies a state statute of repose also fails to appreciate that "there is nothing to prevent a plaintiff from complying with both requirements." *Stanley v. United States*, 321 F.Supp. 2d 805, 809 (N.D. W. Va. 2004). A judicial finding that the filing of an administrative tort claim satisfies a statute of repose would create an implied exception to the bar, something that is strictly prohibited. In *Anderson*, for example, settlement negotiations lasted for years, and the plaintiff filed her suit outside of the period of repose. Similar litigation against a private defendant would be dismissed in state court, as well as in a federal court presiding over a diversity action. Consequently, a ruling that the submission of an administrative tort claim stops the repose clock from ticking would cause a result that the private person analogue was intended to prevent.

Agency counsel may be concerned that the statute of repose argument may prompt claimants to file suit earlier, although the parties' settlement talks are progressing well. It is well-known that, once a complaint is filed, the U.S. Attorney's Office takes primary responsibility for a case. But agency counsel may raise a statute of repose as leverage during negotiations with a claimant. This defense has the practical effect of preventing prolonged negotiations. In addition to bringing settlement talks to a quicker resolution in many instances, statutes of repose may also be used to obtain a more reasonable resolution.

#### **IV. Conclusion**

To date, nearly two-thirds of the states have established statutes of repose for medical malpractice actions. Yet, aside from *Anderson*, only a couple of decisions discuss statutes of repose in any type of FTCA suit. *See, e.g., Vega v. United States*, 512 F.Supp. 2d 853 (W.D. Tex. 2007) (dismissing FTCA claim for negligent design as barred by Texas's real property statute of repose); *Manion v. United States*, No. CV-06-739, 2006 WL 2990381 (D. Or. Oct. 18, 2006) (dismissing FTCA suit as filed outside of Oregon's statute of ultimate repose). Since *Anderson*, this defense has been raised in a number of FTCA actions, and the development of a solid body of caselaw is underway. ❖

## ABOUT THE AUTHOR

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# Litigating Venue in Federal Tort Cases

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## I. Introduction

In federal tort actions, the United States, as a defendant or an individual federal defendant, may challenge the venue in which the plaintiff has filed the action if the venue is either not proper under a federal venue statute or not the most suitable venue for the case. A defendant in a federal tort case may wish to challenge the plaintiff's choice of venue for several reasons. For example, the plaintiff may have chosen a venue in which the controlling law is more favorable to the plaintiff than in other appropriate venues, the plaintiff may have chosen a venue that is less convenient for the defense of the action than other appropriate venues, or the plaintiff may have chosen a legally improper venue that would subject the action to dismissal or transfer to a legally proper venue.

Where a federal venue provision is part of a statute that waives the government's sovereign immunity, the question arises whether the defendant can waive a venue objection. Generally, the government cannot waive jurisdictional conditions on the waiver of sovereign immunity. Congress, however, may have intended a statutory venue provision not to be a condition on a sovereign immunity waiver but rather a privilege that the defendant can choose to invoke or waive. For example, while the Supreme Court has not determined whether the venue provision for the Federal Tort Claims Act (FTCA) is a condition on the Act's waiver of sovereign immunity, the legislative history of the Act supports the view that the FTCA's venue provision is not a jurisdictional condition but a privilege that the United States can either invoke or waive.

Venue may be significant to the outcome of a case. A recent case illustrates a situation in which challenging an improper venue ultimately assisted in the dismissal of a multi-billion dollar federal tort suit against the United States. In *Sanchez v. United States*, 600 F.Supp. 2d 19, 20-21 (D.D.C. 2009), 7,125 plaintiffs brought an FTCA lawsuit against the United States in which they asserted that the United States had engaged in negligent and wrongful acts and omissions with respect to its operation of a military training facility on the Island of Vieques in Puerto Rico. The plaintiffs filed the suit in the district court for the District of Columbia. A factor in the plaintiffs' choice of venue may have been rulings from the First Circuit Court of Appeals and the District of Puerto Rico, which found that the FTCA's discretionary function exception, 28 U.S.C. § 2680(a), barred a similar suit. See *Abreu v. United States*, 468 F.3d 20 (1st Cir. 2006), *aff'g Rivera-Acevedo v. United States*, Nos. 04-1232, 04-1372, 2005 WL 5610230 (D.P.R. Apr.

25, 2005). The United States moved to dismiss or, in the alternative, transfer the case for improper venue. *Sanchez*, 600 F.Supp. 2d at 20. The court found that venue in the District of Columbia was improper under the FTCA because (1) none of the plaintiffs resided there, (2) the “gravamen of the acts or omissions complained of” occurred in Puerto Rico, and (3) any relevant conduct in the District of Columbia produced consequences only in Puerto Rico. *Id.* at 22-23. The court exercised its discretion under 28 U.S.C. § 1406(a) to transfer the case to Puerto Rico. *Id.* at 23-25. A year later, the district court in the District of Puerto Rico, relying in large part on the First Circuit’s holding in *Abreu*, dismissed the case based upon the FTCA’s discretionary function exception. *Sanchez v. United States*, 2010 WL 1626118, at \*1 (D.P.R. Mar. 31, 2010). Thus, challenging venue in the District of Columbia ultimately facilitated the dismissal of the case based upon controlling precedent in the transferee district.

This article will cover the main topics with which a government lawyer needs to be familiar in addressing venue for federal tort actions: (1) the statutory provisions that determine venue, (2) the procedures for challenging venue, (3) issues that often arise when venue is challenged, and (4) whether the government can waive an objection to an inappropriate venue.

## II. Provisions governing venue for federal tort actions

Most federal tort actions arise under the FTCA, 28 U.S.C. §§ 1346(b), 2671-2680. With respect to venue for an FTCA action, federal law states, “[a]ny civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.” 28 U.S.C. § 1402(b) (2010).

In addition to the FTCA, two statutes provide for admiralty suits, including tort actions, against the United States. These two statutes, which predate the FTCA, are the Public Vessels Act (PVA), 46 U.S.C. §§ 31101-31113 (2009) and the Suits in Admiralty Act (SAA), 46 U.S.C. §§ 30901-30918 (2009). The PVA authorizes “[a] civil action in personam in admiralty . . . against the United States . . . for damages caused by a public vessel of the United States.” 46 U.S.C. § 31102 (2009). The SAA is somewhat broader since it renders the United States liable in admiralty in any case “in which, if a vessel were privately owned or operated, or if cargo were privately owned or possessed, or if a private person or property were involved, a civil action in admiralty could be maintained . . . .” 46 U.S.C. § 30903(a) (2009). *See also Taghadomi v. United States*, 401 F.3d 1080, 1083 (9th Cir. 2005) (discussing applicability of PVA and SAA). Together, the two acts provide the exclusive cause of action for damages suffered aboard a public vessel due to negligence committed by the United States or its agents. *See Doyle v. Bethlehem Steel Corp.*, 504 F.2d 911, 912 (5th Cir. 1974) (holding that action against government under PVA and SAA was the exclusive remedy for worker injured while working aboard tanker owned by the United States). Only the SAA, however, would apply in an admiralty action against the United States not involving a public vessel. *See Peter Myer's article entitled The United States' Waivers of Sovereign Immunity in Admiralty*, found in the next issue of the United States Attorneys’ Bulletin.

The two admiralty statutes contain similar, but somewhat distinct, venue provisions. The PVA’s venue provision states:

(a) **In general.** A civil action under this chapter shall be brought in the district court of the United States for the district in which the vessel or cargo is found within the United States.

(b) **Vessel or cargo outside territorial waters.** If the vessel or cargo is outside the territorial waters of the United States-

(1) the action shall be brought in the district court of the United States for any district in which any plaintiff resides or has an office for the transaction of business; or

(2) if no plaintiff resides or has an office for the transaction of business in the United States, the action may be brought in the district court of the United States for any district.

46 U.S.C. § 31104 (2009).

The SAA's venue provision states:

(a) **In general.** A civil action under this chapter shall be brought in the district court of the United States for the district in which –

(1) any plaintiff resides or has its principal place of business; or

(2) the vessel or cargo is found.

(b) **Transfer.** On a motion by a party, the court may transfer the action to any other district court of the United States.

46 U.S.C. § 30906 (2009).

Finally, a federal tort action may take the form of a personal liability claim asserted against a federal employee in that employee's individual capacity. The most common type of personal liability claims are premised upon an alleged violation of the Constitution as recognized by the Supreme Court in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). *See generally*, Paul Michael Brown, *Personal Liability Tort Litigation Against Federal Employees*, in this issue of the United States Attorneys' Bulletin. These claims are known as *Bivens* actions or Constitutional torts, and venue is controlled by 28 U.S.C. § 1391(b), which provides:

A civil action wherein jurisdiction is not found solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

Significantly, the Supreme Court has held the federal officer venue provision, 28 U.S.C. § 1391(e), does not apply to these actions because that provision only applies to suits brought against government officials *in their official capacities*; venue for constitutional torts, which are brought against government officials *in their individual capacities*, is controlled exclusively by § 1391(b). *Stafford v. Briggs*, 444 U.S. 527, 544-45 (1980). Additionally, because tort suits brought against individual government employees for conduct within the scope of their employment can only be brought against the United States under the FTCA, *see* 28 U.S.C. § 2679, the FTCA venue statute establishes venue for those actions.

### III. Procedures for challenging venue in federal tort cases

#### A. Challenging venue when the case is filed in a district lacking venue

When a plaintiff has filed a case in a district lacking venue over the action, the defendant may move to dismiss the action and/or transfer the action to a court with proper venue. The venue statute specifically provides for a remedy when venue is improper. It states that “[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.” 28 U.S.C. § 1406(a) (2010). As originally enacted in 1948, this provision “provided flatly that the district court ‘shall transfer’ a case filed in an improper venue;” there was no alternative remedy of dismissal. *See* 14D CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3827, at 565 (3d ed. 2007) (citing Act of May 24, 1949, c. 139, § 81, 63 Stat. 101). In 1949, shortly after enactment, however, Congress changed Section 1406(a) to provide that where venue was improper, the district court “shall dismiss” the case; the district court could only transfer the case to a court with proper venue “if it be in the interest of justice.” *See* 14D WRIGHT, MILLER & COOPER, *supra* at 565. Congress revised the statute because it became clear that a provision requiring transfer was unacceptable. As a Senate Report on the amendment explained:

It is thought that this provision may be subject to abuse in that a plaintiff might deliberately bring a suit in the wrong division or district where he could get service on the defendant, and when the question of venue is raised the court is required to transfer the case to the court where it “could have been brought.” However, in the meantime, service has been perfected on a defendant in the wrong venue, and it will carry over into the new (and proper) venue. Rather than promote justice, it can be seen that this section may be subject to abuse.

S. REP. No. 81-303, at 1253 (1949). The Supreme Court subsequently elaborated that the purpose of allowing transfer in some circumstances, rather than dismissal, was to avoid “the injustice which had often resulted to plaintiffs from dismissal of their actions merely because they had made an erroneous guess with regard to the existence of some elusive fact of the kind upon which venue provisions often turn.” *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 466 (1962).

Under Rule 12(b)(3) of the Federal Rules of Civil Procedure, a defendant may move to dismiss a plaintiff’s complaint for improper venue in lieu of filing an answer. When a defendant challenges venue, the plaintiff bears the burden of establishing that venue is proper, “[b]ecause it is the plaintiff’s obligation to institute the action in a permissible forum.” *Freeman v. Fallin*, 254 F.Supp. 2d 52, 56 (D.D.C. 2003). As a general matter, however, courts favor the transfer of a case for improper venue over dismissal. *See Goldlawr*, 369 U.S. at 466-67; *Sanchez v. United States*, 600 F.Supp. 2d 19, 22 (D. D.C. 2009). Yet, courts have properly exercised their discretion to dismiss a case rather than transfer it in situations in which a plaintiff had not simply made a good faith error regarding venue.

For example, where it appeared that a plaintiff’s choice of a district without proper venue was motivated by the desire to shop for a more favorable forum, rather than a good faith mistake as to venue, courts have exercised their discretion to dismiss a case. In *Mikkilineni v. Pennsylvania*, No. 02-1205, 2003 WL 21854754, at \*8 (D.D.C. Aug. 5, 2003) *aff’d*, No. 03-5329 (D.C. Cir. Nov. 22, 2004) (per curiam), a court exercised its discretion to dismiss a case under Section 1406(a), noting that the plaintiff, “hoping to find a more sympathetic judge,” did not seek to have his case transferred to a district court with proper venue in Pennsylvania and filed his case in the District of Columbia. *Id.* Accordingly, the court found that transferring the case to Pennsylvania would not be in the interest of justice. *Id.* *See also Vanskiver v.*

*Rosotti*, No. 00-2455, 2001 WL 361470, at \*2 (D.D.C. Jan. 31, 2001) (dismissing a case for improper venue and noting that the reason the plaintiffs filed in the District of Columbia rather than in the District of Kansas, where venue was proper, may have been that the District of Kansas had enjoined the plaintiffs from filing any suit against the United States in that district without leave of the court).

It may also be a proper exercise of discretion to dismiss a case, rather than transfer it to another court, when there is a substantial question regarding the substantive merits of a claim. For example, in *Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 789 (D.C. Cir. 1983), the District of Columbia Circuit Court held that a district court did not abuse its discretion in dismissing an action where there were substantive problems with the plaintiff's claims such that the plaintiff could not show that those claims could properly be heard in any federal court. *See also Bartel v. Fed. Aviation Admin.*, 617 F.Supp. 190, 199 (D.D.C. 1985) (finding that dismissal was an appropriate remedy rather than transfer where there was a significant question regarding whether the plaintiff stated a valid FTCA claim). *Compare* 14D WRIGHT, MILLER & COOPER, *supra* at 567 (stating that a district court may not order transfer if it does not have subject matter jurisdiction unless transfer would cure the jurisdictional defect), *with Bartel, supra*.

On the other hand, courts will usually transfer a case, rather than dismiss it, when the plaintiff could not refile the action because the applicable statute of limitations had expired. *See Sinclair v. Kleindienst*, 711 F.2d 291, 293-94 (D.C. Cir. 1983) (stating that transfer may be appropriate when a procedural obstacle such as the statute of limitations impedes an adjudication on the merits); *Simpson v. Fed. Bureau of Prisons*, 496 F.Supp. 2d 187, 194 (D.D.C. 2007) (same). The dismissal of an action for improper venue when the statute of limitations has expired, however, is not itself an abuse of discretion. *Cont'l Ins. Co. v. M/V Orsula*, 354 F.3d 603, 608 (7th Cir. 2003) (“[D]ismissal of a cause of action for improper venue under 28 U.S.C. § 1406(a) after the statute of limitations has run does not, on its own, constitute an abuse of discretion.”). Indeed, some courts have found that filing a case in a court of improper venue shortly before the statute of limitations expires may justify dismissal. *See, e.g., Pedzewick v. Foe*, 963 F.Supp. 48, 51-52 (D. Mass. 1997) (dismissing a case for improper venue, rather than transferring it, even though the statute of limitations had expired on any subsequent action, because plaintiff had failed to exercise proper diligence and act in good faith in deciding where to file suit). *See also In re Complaint of Mike's, Inc.*, 317 F.3d 894, 898 (8th Cir. 2003) (finding under an identical admiralty transfer statute that it was not an abuse of discretion to dismiss a case for improper venue, where the plaintiff had not filed the claim until the last week before the limitations period had run); *Dubin v. United States*, 380 F.2d 813, 816 (5th Cir. 1967) (stating that it is not “in the interest of justice” to aid a non-diligent plaintiff who knowingly files a case in the wrong district by transferring the case under 28 U.S.C. § 1406(a) rather than dismissing it).

If a court decides to transfer a case rather than dismiss it, the court will need to determine the most appropriate transferee court. 28 U.S.C. § 1406(a) provides that the case may be transferred to “any district or division in which it could have been brought.” The district court has wide discretion, provided that the court to which the case is transferred is one in which venue would have been proper and in which service of process could have been made had the action been commenced there. *See* 14D WRIGHT, MILLER & COOPER, *supra* at 606.

## **B. Challenging venue when the case is filed in a district possessing venue**

Even where venue is legally proper, a defendant may still seek to transfer a case to another district where venue is appropriate. In venue statutes for federal torts, venue may appropriately lie in more than one district. For example, under the FTCA, venue properly lies where any of the plaintiffs resides and where the act or omission complained of occurred. 28 U.S.C. § 1402(b) (2010). Under the SAA, venue is

appropriate where the plaintiff resides, where the plaintiff has its principal place of business, or where the vessel or cargo is found. 46 U.S.C. § 30906(a) (2009).

Congress enacted 28 U.S.C. § 1404(a) to permit change of venue between federal courts with proper venue. The statute was drafted in accordance with the common law doctrine of *forum non conveniens*, which allowed for dismissal of cases that were filed in completely inappropriate or inconvenient venues, *see Piper Aircraft Co. v Reyno*, 454 U.S. 235, 253 (1981) (citing Reviser's Note, H.R. Rep. No. 80-308, at A132 (1947); *see* H.R. Rep. No. 79-2646, at A127 (1946)); but it was intended as "a revision rather than a codification of the common law." *Piper Aircraft*, 454 U.S. at 253 (citing *Norwood v. Kirkpatrick*, 349 U.S. 29 (1955)). District courts have more discretion to transfer a case for reasons of inconvenience under Section 1404(a) than they had to dismiss a case on those grounds under the doctrine of *forum non conveniens*. *See Norwood*, 349 U.S. at 31-32. Section 1404(a) states that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (2010).

Typically, if the plaintiff has chosen an appropriate forum under the applicable venue statute, there is a strong presumption in favor of the plaintiff's choice of venue. *See Piper Aircraft*, 454 U.S. at 255-56; *Mathis v. Geo Group, Inc.*, 535 F.Supp. 2d 83, 86-87 (D.D.C. 2008). Therefore, the burden of proof rests on the defendant to show that transfer is appropriate. *See Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986) ("The defendant must make a strong showing of inconvenience to warrant upsetting the plaintiff's choice of forum.") First, the defendant must establish that venue is proper in the proposed transferee district. *See Hoffman v. Blaski*, 363 U.S. 335, 343-44 (1960); *Sierra Club v. Flowers*, 276 F.Supp. 2d 62, 65 (D.D.C. 2003). Second, the defendant must demonstrate that interests of justice and considerations of convenience weigh in favor of transfer to that court. In making this latter determination, courts will weigh case-specific private and public interest factors. *See Piper Aircraft*, 454 U.S. at 241.

The private interest factors may include:

- (1) the plaintiff's choice of forum, unless the balance of convenience is strongly in favor of the defendants;
- (2) the defendants' choice of forum;
- (3) whether the claim arose elsewhere;
- (4) the convenience of the parties;
- (5) the convenience of the witnesses of the plaintiff and defendant, but only to the extent that the witnesses may actually be unavailable for trial in one of the fora; and
- (6) the ease of access to sources of proof.

*Trout Unlimited v. U.S. Dept. of Agric.*, 944 F.Supp. 13, 16 (D.D.C. 1996) (footnotes omitted).

The public interest factors may include:

- (1) the transferee's familiarity with the governing laws;
- (2) the relative congestion of the calendars of the potential transferee and transferor courts; and
- (3) the local interest in deciding local controversies at home.

*Id.* (footnotes omitted).

In a federal tort case, a federal defendant most typically will consider seeking a change of venue based upon the ease to access of sources of proof, including the ability to use compulsory process for the attendance of unwilling witnesses at trial. *See* 1 LESTER S. JAYSON & ROBERT C. LONGSTRETH, *HANDLING FEDERAL TORT CLAIMS* § 7.03[2], at 7-26 (2009). There may also be cases in which it is important for the fact finder to view locations that are central to the issues in the case. *See id.* Finally, it is not uncommon to seek transfer of a case involving common issues of fact with a case in another district for purposes of consolidation to avoid duplication of trial efforts. *See id.*

#### **IV. Recurring venue issues in federal tort cases**

##### **A. Can there be more than one venue for an FTCA case based upon the phrase "wherein the act or omission complained of occurred"?**

Venue may lie in more than one district under the FTCA. Initially, by virtue of the first clause of the FTCA's venue statute, venue would be proper in more than one district if the plaintiff lives in a different district from the place where the act or omission occurred. In a multi-plaintiff action, venue would be proper in more than one district based solely on the different districts of the plaintiffs' residences. Under the second clause of the FTCA's venue statute, however, "it has so far been held that the act or omission complained of can occur in only one district." 14D WRIGHT, MILLER & COOPER, *supra* § 3814, at 365. *See Andrade v. Chojnacki*, 934 F.Supp. 817, 829 (S.D. Tex. 1996) (stating that the operative language in Section 1402(b) suggests that venue in FTCA actions premised on "wherein the act or omission complained of occurred" is "proper in only one district"). This interpretation is supported by the plain meaning of the statute which confines venue to "*the judicial district . . . wherein the act or omission complained of occurred.*" 28 U.S.C. § 1402(b) (2010) (emphasis added). Generally, the plain meaning of the statute "should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *United States v. Ron Pair Enterprises Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

In *Franz v. United States*, 591 F.Supp. 374, 377-78 (D.D.C. 1984), a District of Columbia district court implied that venue for a case may be appropriate in more than one district based upon the second clause of 28 U.S.C. § 1402(b). Finding that venue was appropriate in the District of Columbia, the court reasoned that 28 U.S.C. § 1402(b) should be given a "liberal construction" like the general venue statute, 28 U.S.C. § 1391(b), so that venue would lie "in a district where a *substantial portion* of the acts or omissions giving rise to the [court] actions occurred, notwithstanding that venue might also lie in other districts." 591 F.Supp. at 378 (quoting *Lamont v. Haig*, 590 F.2d 1124, 1134 (D.C. Cir. 1978) (emphasis added in *Franz*)). The problem with the *Franz* court's analysis is that, unlike 28 U.S.C. § 1391(b) (the provision at issue in the quoted *Lamont* case), the terms of the FTCA, including its venue provision, must be *strictly* construed. In *Reuber v. United States*, the District of Columbia Circuit noted that the FTCA's venue provision should be strictly construed and stated that "Congress has specified the district in which the act occurred as the '*only*' district, other than that where the plaintiff resides, where a claim may be brought." *Reuber*, 750 F.2d 1039, 1048 (D.C. Cir. 1984) (emphasis added), *overruled on other grounds by Kauffman v. Anglo-American Sch. of Sofia*, 28 F.3d 1223 (D.C. Cir. 1994).

##### **B. Under the FTCA, where is the district where "the act or omission complained of occurred" for multi-district torts?**

If there can only be one appropriate venue where the alleged "act or omission complained of occurred" under the FTCA's venue statute, one must sometimes determine the appropriate venue where the wrongful conduct allegedly occurred in multiple districts and/or where the alleged harmful effect took place in a different district from the allegedly wrongful conduct.

In *Andrade v. Chojnacki*, 934 F.Supp. 817, 823 (S.D. Tex. 1996), plaintiffs sought to establish venue in the Southern District of Texas for the FTCA claims arising out of the federal assault on the Branch Davidian compound outside of Waco, Texas. *Id.* at 829. Even though Waco was in the Western District of Texas, the plaintiffs argued that venue for the FTCA claims was also appropriate in the Southern District because "a substantial part of the acts or omissions complained of occurred in Houston."

*Id.* at 829. The court determined that a “preponderance of the contacts test” governed the application of the statute’s language that states, “wherein the act or omission complained of occurred.” *Id.* at 829 (citing *Johns-Manville Corp. v. United States*, 601 F.Supp. 170, 173 (D. Colo.1985), *rev’d on other grounds*, 796 F.2d 372 (10th Cir.1986)). Under this test, the court found the Western District of Texas was “where the acts and omissions complained of by [p]laintiffs took place” under the statute. *Id.*

If more than one venue is appropriate under the second clause of Section 1402(a), then the plaintiff’s choice of venue will usually be honored as long as the conduct that transpired in the venue was “not insubstantial in relation to the totality of events giving rise to plaintiff’s grievance.” *Franz*, 591 F.Supp. at 378 (quoting *Lamont v. Haig*, 590 F.2d 1124, 1134 (D.C. Cir. 1978)). Additionally, there must be “sufficient activities giving rise to the plaintiff’s cause of action” that took place in the venue. *Id.* at 378. *See also Sanchez v. United States*, 600 F.Supp. 2d 19, 23 (D. D.C. 2009) (finding venue lacking where plaintiffs failed to offer more than “rank speculation” that wrongful conduct occurred in the district, and the “gravamen of the acts or omissions complained of” occurred in another district); *Williams v. United States*, 932 F.Supp. 357, 363 (D.D.C. 1996) (finding venue not appropriate where plaintiff’s claims centered “exclusively around activities that occurred outside this district.”).

With respect to cases involving conduct that occurred in one district and had an effect in another, the analysis usually involves a determination of where the tort materialized, including the first effects of the allegedly wrongful conduct. One court found that when conduct “occurs in one district but has intended effects elsewhere, the act ‘occurs’ in the jurisdiction where its effects are directed.” *Reuber v. United States*, 750 F.2d 1039, 1047(D.C. Cir. 1984). In *Reuber*, a plaintiff alleged federal torts based upon dissemination of a letter that was written and received in Maryland, but was then leaked to, and published by, a newspaper in Washington, D.C. *Id.* at 1043-46. The court found that even though some damaging effects occurred in the District of Columbia, the plaintiff could not point to “tortious conduct of any government employee aimed at the District;” therefore, venue was not appropriate in the District of Columbia. *Id.* at 1047-48. In *Forest v. United States*, 539 F.Supp. 171, 175 (D. Mont. 1982), plaintiffs alleged that a plane crash in Montana occurred because Federal Aviation Administration employees in Utah were negligent in transmitting incorrect information to the pilot. The court found that venue in Montana was appropriate because the tort did not occur until the pilot in Montana received the alleged misinformation. *Id.* at 175-76.

### **C. When is venue for federal tort actions proper in the District of Columbia?**

Plaintiffs will often bring federal tort actions against the United States government or federal officials in the District of Columbia, which is perceived to be the location of the federal government. Venue, however, may or may not be appropriate in the District of Columbia, depending upon the applicable venue statute. Because of the possibility that venue for federal tort actions may be improper in the District of Columbia, federal courts in the District “must examine challenges to venue particularly carefully ‘to guard against the danger that a plaintiff might manufacture venue in the District of Columbia.’ “ *Sierra Club v. Flowers*, 276 F.Supp. 2d 62, 65 (D.D.C. 2003) (quoting *Cameron v. Thornburg*, 983 F.2d 253, 256 (D.C. Cir. 1993)). Failing to carefully examine such considerations, a plaintiff, “[b]y naming high government officials as defendants . . . could bring a suit [in the District of Columbia] that properly should be pursued elsewhere.” *Sierra Club*, 276 F.Supp. 2d at 65 (quoting *Cameron*, 983 F.2d at 256).

Under the FTCA’s venue statute, if none of the plaintiffs reside in the District of Columbia and the allegedly negligent conduct giving rise to the cause of action did not occur there, then the mere location of the headquarters office for a government agency in the District of Columbia cannot establish venue in the district. *See Esogbue v. Dep’t of Homeland Sec.*, No. 06-1895, 2007 WL 2601932, at \*1

(D.D.C. Sept. 6, 2007) (finding, under Section 1402(b), that the presence of the Bureau of Immigration and Customs Enforcement headquarters in the District of Columbia did not establish venue there, where the plaintiff did not reside in the District of Columbia and no event related to the action occurred in the district); *Bartel v. Fed. Aviation Admin.*, 617 F.Supp. 190, 199 (D. D.C.) (finding, under Section 1402(b), that the District of Columbia headquarters for the Federal Aviation Administration was “entirely irrelevant” to the statutory test for venue and “obviously cannot constitute a basis for concluding that venue is appropriate” in the District of Columbia).

Additionally, to the extent that tort plaintiffs allege that they were injured as a result of policies or practices that were formulated or initiated at federal agency headquarters in the District of Columbia, such allegations cannot be a basis for finding that venue is proper in the District of Columbia when the focus of plaintiffs’ allegations is actually the implementation of these decisions and policies that took place in another district. For example, in *Zakiya v. United States*, 267 F.Supp. 2d 47 (D.D.C. 2003), a federal prisoner brought an FTCA action that challenged a Bureau of Prisons (BOP) policy of detaining inmates beyond their judicially-imposed sentences when there was a failure to meet court-imposed financial obligations. *Id.* at 49, 58. The court found that the plaintiff’s allegations could not establish venue in the District of Columbia under the FTCA’s venue statute, even if the policy upon which the BOP agents based their decision to detain the plaintiff was formulated in the district. *Id.* at 58-59. The court noted that the plaintiff was not injured in the District of Columbia and “[n]one of the events central to plaintiff’s lawsuit occurred in this district.” *Id.* at 58. The court concluded that the “plaintiff’s challenge of the BOP policy is a specific attack on the implementation of that policy to his particular situation, and as the actual implementation by the BOP officials occurred at the facilities where he was incarcerated and not in this district, venue is not appropriate here.” *Id.* at 59. *See also Huskey v. Quinlan*, 785 F.Supp. 4, 7 (D.D.C. 1990) (holding that a challenge to policies at a headquarters office in the District of Columbia would not be determinative in deciding where venue was appropriate under the venue transfer statute, 28 U.S.C. § 1404(a), because plaintiff “principally takes issue with the conduct of individuals” and “the implementation of policy,” so venue properly lies where the implementation took place).

In analogous circumstances, the U.S. Supreme Court has ruled that a plaintiff could not circumvent a specific jurisdictional provision in the FTCA by repackaging allegations of negligence as “headquarters claims.” In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the plaintiff claimed that agents of the Drug Enforcement Administration (DEA) had instigated his arrest in Mexico by Mexican nationals and his transport to the United States for a criminal trial. *Id.* at 697. After he was acquitted, plaintiff brought an FTCA action for false arrest. *Id.* at 698. The Ninth Circuit, applying the “headquarters doctrine,” found that the plaintiff’s suit was not barred by the FTCA’s foreign country exception for a “claim arising in a foreign country,” 28 U.S.C. § 2680(k), because the plaintiff’s arrest resulted from “wrongful acts of planning and direction” by DEA officials in the United States. *See* 542 U.S. at 702. The Supreme Court reversed the Ninth Circuit, noting that many tort claims can be “repackaged as headquarters claims based on a failure to train, a failure to warn, the offering of bad advice, or the adoption of a negligent policy.” *Id.* at 702-03. The Court reasoned that allowing headquarters claims would make the claim a standard part of FTCA pleading for any action potentially implicating the foreign country exception. *Id.* at 703. Moreover, in its rejection of the headquarters doctrine, the Court found that Congress likely intended the foreign country exception to reserve sovereign immunity for any claim for injury or harm occurring in a foreign country. *Id.* at 704-05. Similarly, with respect to the FTCA’s venue provision, Congress likely intended to limit venue under the FTCA to a district in which a plaintiff resides or the district most closely associated with the occurrence of the alleged negligent act or omission. If “headquarters claims” were sufficient to establish venue in the District of Columbia, plaintiffs would routinely assert a “headquarters claim” in FTCA cases any time they wanted to establish venue in that district.

Further, a plaintiff cannot establish venue in the District of Columbia for a common law tort claim based upon the “residence” of a federal officer or employee under Section 1391(e) of the federal venue statute for torts that were committed within the scope of the federal employment. Even though “residence” for this venue provision is considered the place where the person’s official duties are performed (which will often be the District of Columbia for high-level federal employees), rather than the employee’s personal residence, *see Reuben H. Donnelley Corp. v. Fed. Trade Comm’n*, 580 F.2d 264, 267 (7th Cir. 1978), Section 1391(e) does not apply to such actions. Under the FTCA’s exclusive remedy provision, a common law tort claim committed within the scope of federal employment “is an action against the United States rather than against the individuals or the particular government agencies.” *Cox v. Sec’y of Labor*, 739 F.Supp. 2d 28, 29 (D.D.C. 1990) (citing cases). *See also* 28 U.S.C. § 2679 (b)(1) (2010) (providing that an FTCA action against the United States is the exclusive remedy for alleged torts of federal employees committed within the scope of federal employment); *Zakiya v. United States*, 267 F.Supp. 2d 47, 57 (D. D.C. 2003) (dismissing FTCA claims brought against the Attorney General and the United States Attorney for the District of Columbia). Therefore, Section 1402(b), not Section 1391(e), determines the appropriate venue for such claims.

Neither does Section 1391(e) apply to constitutional tort claims against federal employees. A constitutional tort claim against a federal officer is an individual capacity suit, and venue is controlled by 28 U.S.C. § 1391(b). *Stafford v. Briggs*, 444 U.S. 527, 544 (1980). Therefore, a plaintiff could only bring a constitutional tort suit in the District of Columbia when venue is appropriate under that provision. Unless all of the individual defendants reside in the District of Columbia, *see* 28 U.S.C. § 1391(b)(1) (2010), venue is likely only proper there when a “substantial part of the events or omissions giving rise to the claim occurred” there. *See id.* § 1391(b)(2) (2010). As with claims under the FTCA, mere government policy-making in the District of Columbia, without more, is unlikely to provide a basis for venue in the District of Columbia under this provision. For example, in *Ciralsky v. Central Intelligence Agency*, 689 F.Supp. 2d 141, 145-47 (D.D.C. 2010), a plaintiff brought a constitutional tort action in the District of Columbia based upon the Central Intelligence Agency’s (CIA) reinvestigation and revocation of the plaintiff’s security clearance and his subsequent termination. The court found that venue was not proper in the District of Columbia, but rather in the Eastern District of Virginia, because “[t]he overwhelming bulk of events and omissions giving rise to [p]laintiff’s claims occurred at CIA Headquarters in Langley, Virginia.” *Id.* at 161. The plaintiff and seven of the eight *Bivens* defendants worked at the CIA headquarters; the headquarters was where the reinvestigation of the plaintiff’s security clearance took place; it was also the location of the decision to revoke his security clearance and terminate his employment. *Id.* The court found that the plaintiff’s claims relating to conduct in the District of Columbia were “more tangentially than substantially related to the claims in [the] case.” *Id.* at 161. The plaintiff argued that venue in the District of Columbia was proper because: (1) certain meetings between the CIA, White House officials, National Security Council (NSC) officials, and congressmen to discuss the plaintiff’s situation took place there; (2) the employment position that the plaintiff allegedly lost with the NSC would have been in the District of Columbia; and (3) and other briefings regarding the plaintiff’s situation occurred there. *Id.* The court concluded that these events represented “only peripheral meetings and consequences,” and were not “the gravamen” of the plaintiff’s *Bivens* claims. *Id.* *See also Simpson*, 496 F.Supp. 2d at 193 (finding venue improper in the District of Columbia under 28 U.S.C. § 1391(b) for an inmate’s *Bivens* claims against federal corrections officials because “[a]ll of the defendants do not reside in the District of Columbia, none of the events relevant to [the] case occurred in [the] district” and the events described in the complaint, including the underlying disciplinary proceedings, occurred principally in a Pennsylvania facility).

#### **D. When must a vessel or cargo be “found” in the district for purposes of venue for admiralty suits against the United States?**

In admiralty actions against the United States, under either the PVA or the SAA, a venue question may arise regarding when a cargo or vessel is “found” or located within a district. Each statute provides that venue may lie in the district where the cargo or vessel is found. *See* 46 U.S.C. § 31104(a) (2009) (PVA); 46 U.S.C. § 30906(a)(2) (2009) (SAA). The provision allowing venue where the cargo or vessel is found rested on the concern that testimony of witnesses on a ship may be lost by reason of the nature of their employment, in particular the “roving manner of life of the ship’s crew.” *See The Henry S. Grove*, 287 F. 247, 250 (W.D. Wash. 1923). Under a provision placing venue in the district where the vessel or cargo is “found,” it is generally necessary that the ship or cargo be in the district at the time the suit is filed. *See Chilean Line Inc. v. Main Ship Repair Corp.*, 232 F.Supp. 907, 908 (S.D.N.Y. 1964), *aff’g*, 344 F.2d 757 (2d Cir. 1965) (finding venue under PVA not proper where ships were in Rhode Island and Virginia at the time of the suit, not in New York). *See also Simonowycz v. United States*, 125 F.Supp. 847, 847-48 (N.D. Ohio 1954) (finding that venue was not proper in the district where the vessel was in New York harbor and would continue to be there for an indefinite period of time). However, if the ship or cargo enters, *or is likely to enter* the district subsequent to filing and during the pendency of the action, the court will probably consider this to have cured the venue defect. *See Gill v. United States*, 184 F.2d 49, 51 (2d Cir. 1950) (finding under the SAA that “the presence of the vessel within the jurisdiction during the pendency of the libel cured any original defect as to venue”). *See also Preussler v. United States*, 102 F.Supp. 274, 274-75 (S.D.N.Y. 1952) (finding that venue was improper where there was only a “possibility” that the vessel might touch port in the district during pendency of action); *Grant v. United States War Shipping Admin.*, 65 F.Supp. 507, 510 (E.D. Pa. 1945) (finding that action should not be dismissed for improper venue even though the ship was not in the district at the time of filing because it was “expected to call again” in the near future during the pendency of the action).

#### **V. Whether federal tort venue provisions create a jurisdictional condition on the government’s waiver of sovereign immunity or a privilege which the United States can assert or waive**

Under the Federal Rules of Civil Procedure, venue is a defense which must be asserted in a responsive pleading or by motion. *See* FED. R. CIV. P. 12(b)(3). If the defense is not raised in one of these two ways, the Rules provide that it is waived. *See* FED. R. CIV. P. 12(h)(1). Courts, however, consider most terms of the government’s waiver of sovereign immunity as jurisdictional conditions on the waiver. *See United States v. Sherwood*, 312 U.S. 584, 586 (1941) (stating that terms of the United States’ consent to suit “define [the] court’s jurisdiction to entertain the suit”). The United States cannot assent to jurisdiction in any individual case where Congress has not specifically waived the government’s immunity through legislation; therefore, if a provision in a statute is a jurisdictional condition on the sovereign immunity waiver, the United States may not waive the condition. *See United States v. Tittjung*, 235 F.3d 330, 335 (7th Cir. 2000) (stating that “neither the parties nor their lawyers may stipulate to jurisdiction or waive arguments that the court lacks jurisdiction”); *Wooten v. United States*, 825 F.2d 1039, 1045 (6th Cir. 1987) (stating, in an FTCA case, that “federal courts are courts of limited jurisdiction, jurisdiction that is otherwise lacking cannot be conferred by consent, collusion, laches, waiver, or estoppel”). For example, with respect to the FTCA’s statute of limitations, courts have held that because the limitations provision is a condition of the United States’ consent to suit, it is part of the waiver of sovereign immunity that defines the court’s subject matter jurisdiction. *See, e.g., Ramming v. United States*, 281 F.3d 158, 165 (5th Cir. 2001) (stating, in an FTCA case, that “[l]imitations periods in statutes waiving sovereign immunity are jurisdictional”); *Johnson v. Smithsonian Inst.*, 189 F.3d 180, 189 (2d Cir. 1999) (stating

“[u]nless a plaintiff complies with [the FTCA’s statute of limitations], a district court lacks subject matter jurisdiction over a plaintiff’s FTCA claim”). Consequently, the FTCA’s statute of limitations cannot be waived by the United States, and the United States can raise the limitations bar at any time. *See Walters v. Sec’y of Def.*, 725 F.2d 107, 112 (D.C. Cir. 1983). *See generally* Adam Bain, *The Statute of Limitations of the Federal Tort Claims Act as a Jurisdictional Prerequisite to Suit and Implications for Equitable Tolling*, in this issue of the United States Attorneys’ Bulletin.

Courts, however, have not been consistent with respect to whether the FTCA’s venue provision is a condition on the waiver of sovereign immunity that the United States may not waive or a privilege that the United States is free to assert or waive. Two cases within the District of Columbia Circuit support the argument that the FTCA’s venue provision is jurisdictional. *See Reuber v. United States*, 750 F.2d 1039, 1048-49 (D.C. Cir. 1994); *Kimberlin v. Quinlan*, 774 F.Supp. 1, 10 (D.D.C. 1991). In *Reuber*, the District of Columbia Circuit stated that the FTCA’s venue statute, 28 U.S.C. § 1402(b), is one of the conditions of the United States’ waiver of sovereign immunity to tort claims. 750 F.2d at 1048-49. Ultimately, the court stated, it “is unclear whether a district court even has jurisdiction to hear an FTCA claim anywhere but in the district specified by 28 U.S.C. § 1402(b)” and concluded that it “need not decide this question” because the dismissal of the plaintiff’s FTCA claim was “properly within the district court’s discretion.” *Id.* at 1049. In *Kimberlin*, a District of Columbia district court stated that 28 U.S.C. § 1402(b), as a part of the FTCA’s waiver of sovereign immunity, “specifies precisely in which courts venue is proper,” and the “venue provision must therefore be strictly construed.” 774 F.Supp. at 10.

On the other hand, some courts have held that the FTCA’s specification of the appropriate venues in 28 U.S.C. § 1402(b) can be waived. *See Upchurch v. Piper Aircraft Corp.*, 736 F.2d 439, 440 (8th Cir. 1984); *Bartlett v. United States*, 835 F.Supp. 1246, 1262 (E.D. Wash. 1993); *Nowotny v. Turner*, 203 F.Supp. 802, 805 (M.D.N.C. 1962). In the only detailed analysis of the issue, the *Upchurch* court found that the United States had waived any objection to venue because it had failed to assert an objection to venue in its answer. 736 F.2d at 440. The court explained that the FTCA’s current venue provision, 28 U.S.C. § 1402(b), was formerly the venue provision of 28 U.S.C. § 931(a) (1946 ed.), relating to federal tort claims. *Id.* The court reasoned that when Title 28 of the United States Code was revised in 1948, the jurisdictional provisions of Section 931(a) were incorporated in 28 U.S.C. § 1346(b) in a Chapter entitled “District Courts: Jurisdiction” and the venue provisions of Section 931(a) were incorporated in Section 1402(b), in a Chapter entitled “District Courts: Venue.” *See id.* (citing Act of June 25, 1948, ch. 646, 62 Stat. 869, 933, 937). Based upon this statutory reformulation, the court concluded that Congress must not have intended the FTCA’s venue provision to be a jurisdictional condition on the United States’ waiver of sovereign immunity. *Id.* The court also noted that other courts had construed the FTCA’s venue provision as a traditional “venue statute,” through which venue could be waived, rather than as a jurisdictional condition. *Id.* (citing *United States Lines, Inc. v. United States*, 470 F.2d 487, 489 (5th Cir. 1972) (per curiam); *United States v. Acord*, 209 F.2d 709, 711-14 (10th Cir. 1954); *Nowotny*, 203 F.Supp. at 805).

The *Upchurch* decision, however, does not provide much support for its conclusion because the reasoning does not withstand closer scrutiny. Initially, the court’s reasoning runs counter to the purpose of the 1948 revision of the Judicial Code, as reflected in the legislative history of that revision. The 1948 Act that revised the Judicial Code expressly stated that “[n]o inference of a legislative construction is to be drawn by reason of the chapter in Title 28, Judiciary and Judicial Procedure, as set out in section 1 of this Act, in which any section is placed, nor by reason of the catch-lines used in such title.” Act of June 25, 1948, ch. 646, § 33, 62 Stat. 991. Thus, the text of the statute that effected a recodification of Title 28, forbids the very inference that the *Upchurch* court drew.

Indeed, the Supreme Court has recently stated that it would not presume that the 1948 revision in the Judicial Code worked any change in underlying substantive law unless Congress had clearly expressed

an intent to make such a change. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 136 (2008) (citing *Keene Corp. v. United States*, 508 U.S. 200, 209 (1993)). Moreover, as the Supreme Court noted, the legislative history of the Act and the comments of the Chief Reviser both recognized that the 1948 revision sought to codify, rather than substantively revise, existing law. *Id.* at 136 (citing H.R. Rep. No. 80-308, at 1-8 (1947)); WILLIAM W. BARRON, *THE JUDICIAL CODE: 1948 REVISION*, 8 F.R.D. 439, 441 (1948) (stating “[t]here was no purpose on the part of the Revision staff to effect any change in existing law”). Finally, following the analysis of the *Upchurch* court to its logical conclusion, the FTCA’s statute of limitations would not be jurisdictional either. The FTCA’s limitations provision is not in the “Jurisdiction” section of the Code, but in the “United States As A Party Generally” section. *See* 28 U.S.C. § 2401(b) (2010).

Neither does the caselaw that the *Upchurch* court cited provide much support for its conclusion. Of the three cases on which *Upchurch* relied, only the *Nowotny* decision supports the conclusion that the FTCA’s venue provision is not jurisdictional and venue can be waived, and that case contains no analysis of the issue. *Nowotny*, 203 F.Supp. at 805. In *United States Lines, Inc. v. United States*, 470 F.2d 487, 489 (5th Cir. 1972), the court merely struck the United States’ venue defense, finding that it was improper because the alleged negligent conduct had occurred within a city in the district. The court did not discuss whether venue was a jurisdictional condition or a defense that could be waived. 470 F.2d at 489. *Acord*, the other cited case, involved the question of whether a contribution action could be brought against the United States in a venue other than those venues appropriate under 28 U.S.C. § 1402(b). 209 F.2d at 711. The court recognized that the contribution claim against the United States was an ancillary proceeding and that “no separate ground of jurisdiction is required.” *Id.* at 712. The court merely supported its holding by noting that venue provisions were “for the convenience of the parties.” *Id.* at 714.

Nevertheless, an analysis of what Congress intended through the original venue provision that became 28 U.S.C. § 1402(b) shows that it must have meant venue to be a privilege in FTCA actions rather than a jurisdictional condition. If one were to decide the issue by the *original* placement of the venue provision alone, one would have to conclude that venue was intended to be jurisdictional. The venue provision, as enacted under the original version of the FTCA, was contained in a section marked “Jurisdiction.” The venue provision of the tort claims act, enacted in the 79th Congress, was contained within Section 410(a) [28 U.S.C. § 931(a) (1946 ed.)], which contemporary commentator and Department of Justice “Claims Division” attorney, Irvin Gottlieb, described as the “heart of the bill.” *See* Irvin M. Gottlieb, *The Federal Tort Claims Act - A Statutory Interpretation*, 35 GEO. L.J. 1, 16 (1946). In pertinent part, this section stated as follows:

### **Part 3 – Suits on Tort Claims Against The United States**

#### *Jurisdiction*

Sec. 410. (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on or after January 1, 1945, on account of damage or loss of property . . . .

Federal Tort Claims Act § 410, 60 Stat. 842, 843-44 (1946).

Other limitations and conditions of the FTCA that courts have construed as “jurisdictional,” such as the Act’s statute of limitations and discretionary function exception, were included in separate parts of

the Act, Sections 420 and 421, respectively. *Id.* §§ 420, 421, 60 Stat. at 845. Of course, if the venue provision is “jurisdictional” merely by virtue of its placement in the “jurisdiction” section of the statute, then any change in the location of the venue provision, by reason of the 1948 Act, should not be given any interpretive weight for the reasons articulated above, including the very terms of that Act itself. *See* Act of June 25, 1948, ch. 646, § 33, 62 Stat. 991.

The Department of Justice attorney, Irvin Gottlieb, who wrote an in-depth interpretation of the Act upon its passage, noted with respect to venue for tort actions under the Act that “[a]n objection to venue may be raised by a motion to dismiss, or improper venue may be pleaded in an answer.” Gottlieb, *supra* at 17 n.51 (citing *Duval v. Bathrick*, 31 F.Supp. 510 (D. Minn. 1940); *Kaufman v. United States*, 35 F.Supp. 900 (D.D.C. 1940)). Gottlieb’s statement mirrors the traditional notion of venue: venue must be asserted by motion to dismiss or as a defense in the answer; otherwise, any objection to venue will be waived. Indeed, the *Duval* decision, which Gottlieb cited, stated that “the rule is well settled that such provisions governing the venue of actions confer a personal privilege upon the defendant which may be waived.” 31 F.Supp. at 511. Gottlieb also cited an Explanatory Note to the Federal Rules of Civil Procedure, stating that improper venue was an “affirmative dilatory defense.” Gottlieb, *supra* at 17 n.51 (citing Explanatory Note No. 3 to Form 2, Allegation of Jurisdiction, in Fed. R. Civ. Pro.). Gottlieb did not discuss whether venue for an FTCA action was a jurisdictional condition, nor did he state or imply that the FTCA’s venue provision was different from most other federal venue statutes under which courts considered venue to be a privilege subject to waiver. Further, there is no indication in the statute itself or in its legislative history that Congress, by placing the venue provision in the “jurisdiction” section of the statute, intended to change the commonly understood nature of venue and give it jurisdictional status.

To the contrary, all reliable indications of legislative intent show that Congress meant the FTCA’s venue provision to perform the traditional function of venue provisions in federal statutes, namely, to provide a privilege for the defense to assert, if appropriate, or waive. Indeed, federal venue law shows that Congress historically understood that the FTCA’s venue statute did not impact subject matter jurisdiction. The 1948 revisions of the Judicial Code included, within its provisions on federal venue, a statement at 28 U.S.C. § 1406(b), that “[n]othing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue.” This provision, enacted after the FTCA and as part of the same Act which placed the FTCA’s venue provision in 28 U.S.C. § 1402(b), reflects congressional understanding at the time that the venue provisions in that chapter, including the FTCA’s venue provision, could not impact district court jurisdiction, absent a “timely and sufficient objection to the venue.” *See id.* In other words, venue was not a matter of federal subject matter jurisdiction that could be raised at any time. In fact, the House Report notes that the codifications with respect to venue in the 1948 Act, such as 28 U.S.C. § 1406(b), were intended “to clarify ambiguities or to reconcile conflicts.” H.R.Rep. No. 80-308, at 6 (1947).

Further, the Historical Notes for this section state that this provision is “declaratory of existing caselaw” – including presumably the FTCA’s venue provision in Section 1402(b) – that “makes clear the intent of Congress that venue provisions are not jurisdictional but may be waived.” *See* 28 U.S.C.A.

§ 1406(b) (Historical Notes) (citing *Panama R.R. Co. v. Johnson*, 264 U.S. 375 (1924)). *See also* H.R. Rep. No. 80-308, at A131 (noting that Section 1402(b) contains venue provisions of Section 931(a), “relating to tort claims cases,” whereas the “jurisdictional provisions” of Section 931(a) are incorporated in 28 U.S.C. § 1346(b)); *id.* at A132-33 (citing *Panama Railroad* and stating that Section 1406(b) “makes clear the intent of Congress that venue provisions are not jurisdictional but may be waived”). The Supreme Court’s *Panama Railroad* decision, cited in the Historical Notes and House Report, is instructive. Like the venue provision in the FTCA, the venue provision at issue in the *Panama Railroad* case originated within a “jurisdictional” provision of a seaman’s compensation statute, commonly known

as the Jones Act. Jones Act § 20, 38 Stat. 1185, as amended, 41 Stat. 1007. The provision stated that “[j]urisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.” *Panama Railroad*, 264 U.S. at 384. Notwithstanding this language, the Supreme Court found that the use of the word “jurisdiction” was “inapt and therefore not of any special significance.” *Id.* at 385. Instead, the Court recognized that the most important consideration in interpreting the provision was the background congressional policy regarding venue:

Beginning with [the] Judiciary Act of 1789 (1 Stat. 73), Congress has pursued the policy of investing the federal courts – at first the Circuit Courts, and later the District Courts – with a general jurisdiction expressed in terms applicable alike to all of them and of regulating the venue by separate provisions designating the particular district in which a defendant shall be sued, such as the district of which he is an inhabitant or in which he has a place of business – the purpose of the venue provisions being to prevent defendants from being compelled to answer and defend in remote districts against their will.

*Id.* at 384. The Court explained that a long line of caselaw showed that venue provisions merely conferred “on the defendant a personal privilege, which he may assert, or may waive, at his election, and does waive if, when sued in some other district, he enters a general appearance before or without claiming his privilege.” *Id.* at 385 (citing cases). Stating that “[a]n intention to depart from a course or policy thus deliberately settled is not lightly to be assumed,” the Court concluded that the provision at issue was not intended to affect jurisdiction “but only to prescribe the venue for the actions brought.” *Id.* at 384-85.

Thus, despite its original inclusion with a section of the Act labeled “Jurisdiction,” there is no indication that Congress intended to give the FTCA’s venue a special “jurisdictional” status. In enacting the FTCA, Congress was operating against the background of the *Panama Railroad* decision, with no evidence of an intent to supplant the rule of that case. A common canon of statutory construction is that Congress enacts legislation in light of the underlying common law existing at the time and that Congress does not supplant that law absent strong evidence of an intent to do so. *See, e.g., United States v. Bestfoods*, 524 U.S. 51, 63 (1998); *Molzof v. United States*, 502 U.S. 301, 307-08 (1992). *See generally* 2B NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION, § 50.01, at 133-44 (6th ed. 2000). Here, Congress enacted the FTCA at a time when venue was interpreted as a privilege that the defendant could waive, even when the venue provision was within the jurisdictional provision of a statute. *See Panama Railroad*, 264 U.S. at 384-85. Moreover, the enactment of 28 U.S.C. § 1406(b) just a few years later shows congressional understanding that venue was subject to waiver (without any special exception for waiver of sovereign immunity statutes).

Finally, since the enactment of the FTCA, courts that have interpreted venue provisions for other statutes, including statutes creating federal tort actions, have concluded that the provisions are not jurisdictional, even when the statute waives the government’s sovereign immunity. In 1948, in an action brought under the SAA, the Supreme Court found that a provision directing where suits should be brought for an action of “libel *in personam*” was a matter of venue and not jurisdiction. *Hoiness v. United States*, 335 U.S. 297, 301 (1948). Citing *Panama Railroad*, the Court stated:

Congress, by describing the district where the suit was to be brought, was not investing the federal courts “with a general jurisdiction expressed in terms applicable alike to all of them.” *See Panama R. Co. v. Johnson*, [264 U.S. at 384]. It was dealing with the convenience of the parties in suing or being sued at the designated places. The purpose of the Act was to grant seamen relief against the United States in its own courts. The concepts of residence and principal place of

business obviously can have no relevance when applied to the United States. It is ubiquitous throughout the land and, unlike private parties, is not centered at one particular place. The residence or principal place of business of the libelant and the place where the vessel or cargo is found may be the best measure of the convenience of the parties. But if the United States is willing to defend in a different place, we find nothing in the Act to prevent it.

*Id.* at 302.

Likewise, in *Transcapital Leasing Assocs. v. United States*, 398 F.3d 1317, 1319-22 (Fed. Cir. 2005), the Federal Circuit found that the venue provision was not jurisdictional in a statute that allowed challenges to certain determinations of the Internal Revenue Service. The court stated that “[v]enue relates to the *locale* in which a suit may be properly instituted and is not related to the power of the court to hear the case or reach the parties.” *Id.* at 1320 (quoting *Minn. Mining & Mfg. v. Eco Chem, Inc.*, 757 F.2d 1256, 1264 (Fed. Cir. 1985) (emphasis added in *Transcapital*)). Citing the Supreme Court’s decision in *Panama Railroad*, the court found it significant that courts commonly found that venue provisions were not jurisdictional. *Transcapital*, 398 F.3d at 1321-22. *See also Nat’l Wildlife Fed’n v. Browner*, 237 F.3d 670, 672-75 (D.C. Cir. 2001) (finding a provision in the Clean Water Act allowing review of the Environmental Protection Agency Administrator’s decisions in a particular circuit court of appeals was merely a venue provision, and not jurisdictional).

In sum, statutory analysis supports the conclusion that Congress intended to incorporate traditional concepts of venue into the FTCA. There are no reliable indications of congressional intent to treat the FTCA’s venue statute as one of the jurisdictional conditions of the government’s waiver of sovereign immunity that the United States may invoke at any time. Instead, the congressional signposts show that the FTCA’s venue provision is just like most other venue provisions in federal law; it creates a privilege that the United States may invoke in a timely manner or waive. Therefore, if one perceives venue to be a potential issue in a case, it is crucial to raise venue as a defense in the answer or assert improper venue in a motion to dismiss and/or transfer the case prior to filing an answer.

## VI. Conclusion

Federal government lawyers must carefully assess venue at the outset of any lawsuit alleging a federal tort. There can be great benefits to challenging an inappropriate venue, including, potentially, the dismissal of the case. More commonly, a case can be transferred to a district in which litigation is more convenient or the controlling law is more favorable. In any event, the assessment must be made early because a failure to preserve a venue objection through an affirmative defense or a motion to dismiss will likely be deemed a waiver. ❖

### ABOUT THE AUTHOR

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*The views expressed in this article are solely those of the author and not of the Department of Justice.*

# Affirmative Contribution, Indemnification, and Subrogation Claims Arising in FTCA Cases

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## **I. Introduction**

This article provides an introduction to affirmative claims that the United States may have against third parties in Federal Tort Claims Act (FTCA) suits. Because state law determines the substance of these affirmative claims, the law of the appropriate jurisdiction must be analyzed before determining whether a colorable affirmative claim exists. This article highlights basic issues that may arise if a private insurance policy or contract covers conduct subject to an FTCA claim.

## **II. Definitions**

When two or more people are liable for the same harm and one discharges the liability by either a settlement or judgment, the discharging individual may recover contribution from the other. In a majority of states, the individual seeking contribution may recover only the amount which exceeds that individual's share of responsibility.

Indemnity comes in two forms — contractual and common law. In contractual indemnity, two parties agree that one party will reimburse the second party, in full or in part, for damages the second party incurs in certain actions. The content of the contract governs how the actions are indemnified. Common-law indemnity allows a defendant who has been found liable to shift the full extent of liability to a third person who was the real-party-at-fault. Common-law indemnity has eroded significantly as the doctrines of comparative fault and contribution have developed. Thus, many states have limited common-law indemnity to situations in which an entirely blameless defendant is vicariously liable, or technically responsible, for the real-party-at-fault's actions.

Subrogation usually arises in the insurance context. When proceeding in subrogation, the subrogee (insurer) “stands in the shoes” of one whose claim he has paid (insured). The subrogee has all the rights of the person whose claim he has assumed.

## **III. Affirmative claims in the FTCA context**

### **A. Indemnification**

The circumstances under which a contractual indemnification claim may arise in FTCA claims are as broad as the number of risks insured against, but two types of cases are typical. First, perhaps the most frequent application of indemnification in the FTCA context, is when an employee causes damages when operating a privately-owned vehicle within the scope of his employment. A review of the driver's insurance policy must be made to determine whether the United States is an additional insured under the

terms of the policy. Such a determination is based on the language of the policy and state contract and insurance law. If the United States is covered under the policy, it may then tender the defense to the insurance company. The United States, however, must maintain at least some control of the defense. *See* 28 U.S.C. §§ 516-17 (2010). Further, the United States may turn to the insurance company to pay a claim within the policy's limit. *See, e.g., Way v. United States*, No. 7:00CV819-24, 2001 WL 1854501 at \*3 (D.S.C. Apr. 16, 2001); *United States v. Gov't Employees Ins. Co.*, 612 F.2d 705 (2d Cir. 1980); *Gov't Employees Ins. Co. v. United States*, 349 F.2d 83 (10th Cir. 1965), *cert denied*, 382 U.S. 1026 (1966), *reh. denied*, 383 U.S. 939 (1966); *United States v. Gov't Employees Ins. Co.*, 409 F.Supp. 986 (E.D. Va. 1976); *Eastman v. United States*, 257 F.Supp. 315 (S.D. Ind. 1966).

Second, contractual indemnification frequently involves contracts between the United States and an independent contractor. Usually, these contracts are interpreted under federal common law because the contract is executed under "authority conferred by federal statute and, ultimately, by the Constitution." *United States v. Seckinger*, 397 U.S. 203, 209-10 (1970). A contract need not include a specific "indemnify and hold harmless" clause or explicitly state that indemnity is granted for the indemnitee's (in this case the United States') negligent acts to establish indemnity. *Id.* at 213. Accordingly, each contract must be analyzed individually, and the language of the contract and "other indicia of the parties' intention" will determine if the United States is indemnified. *Seckinger*, 397 U.S. at 209-10; *Butler v. United States*, 726 F.2d 1057, 1064-65 (5th Cir. 1984).

Even if a contract between the United States and a contractor does not expressly provide for indemnification, indemnity may nonetheless be implied. In *Ritchie v. United States*, a patient treated by a contract physician at a U.S. Air Force base sued the United States for medical malpractice. 732 F.Supp. 1125, 1126 (W.D. Okla. 1990). The United States then brought in the contract doctor's insurance company as a third-party defendant. *Id.* The court determined that although the contract between the physician and the United States "did not explicitly require" the doctor to indemnify the United States, the contract implied indemnity between the doctor and the United States. *Id.* at 1127. Because of this implied indemnity, the United States could seek indemnity from the physician's insurance company. *Id.* According to the court, this was fair because the insurance company insured the physician knowing that he was under contract at the Air Force base but failed to explicitly exclude his work there from coverage. *Id.* Another court has adopted this approach. *See United States v. CNA Fin. Corp.*, 168 F.Supp. 2d 1109, 1122 (D. Alaska 2001) (noting that even if the United States were found not to be an implied insured, "the court would be inclined to grant the United States summary judgment on its theory that it is entitled to implied immunity"). It is worth noting that while federal common law governs a claim for contractual indemnity based on a contract between the United States and a contractor, state law will govern whether implied indemnity exists between the parties. *See U.S. Lines, Inc. v. United States*, 470 F.2d 487, 490 (5th Cir. 1972).

## **B. Contribution**

State law also governs contribution claims. *See United States v. Yellow Cab Co.*, 340 U.S. 543, 546 (1951); *Warner v. United States*, 669 F.Supp. 2d 234, 236 (N.D. Ill. 1987) (collecting cases).

Contribution law varies significantly from state to state. *See* RESTATEMENT 3d TORTS § 23 cmt a (1999). Examples show this variety: Indiana law does not allow for contribution, IND. CODE § 34-51-2-12 (2010); states following the Uniform Contribution Among Tortfeasors Act do not allow contribution for any intentional tortfeasor, UNF. CONTRIBUTION AMONG TORTFEASORS ACT § 1(c) (1955); other states do, *see Raquet v. Braun*, 381 N.E.2d 404, 407 (N.Y. 1997); in Florida, the law surrounding contribution against a previously-exonerated or dismissed defendant is such a "morass" that it is advisable to join all potentially-

liable defendants through third-party practice, FLORIDA CIVIL PRACTICE DAMAGES, CPD FL-CLE § 4.18 (2005). Thus, a close inspection of state contribution law is necessary to determine if, and how, an affirmative contribution claim can be made.

Even if there is no joint tortfeasor, the United States may have a contribution claim against an insurer to cover defense costs. For example, in a case where a health-care center's physician is allegedly negligent both before and after he was "deemed" a federal employee, the physician's insurer would be liable for acts prior to his becoming a federal employee and the United States would be liable for his acts after he is named an employee. Both the insurer and the United States have obligations to defend and contribution rights for defense costs. *See, e.g., Avondale Ins. Inc. v. Travelers Ind. Co.*, 774 F.Supp. 1416, 1436 (S.D.N.Y. 1991).

### C. Subrogation

For private parties, subrogation is usually limited to the insurance context. In FTCA cases, however, the United States may have a statutory right to subrogation. Under 42 U.S.C. § 233(g)(2), the United States may subrogate any claim for benefits under a physician's or Federally Supported Health Center's insurance in a medical-malpractice action against the United States. The subrogation right rests with the United States if the physician is "deemed" an employee of the Public Health Service under 42 U.S.C. § 233, which confers immunity to the physician and waives the United States' immunity under the FTCA.

### D. Affirmative claims in practice

The first step in determining whether the United States has a right to indemnity, contribution, or statutory subrogation is to closely examine the applicable contract or insurance policy to find the contract or policy language that will govern.

The section defining the effective date of an insurance policy merits particular attention. The policy may establish an effective date in two ways. First, in an "occurrence policy," the policy holder is protected from acts that *occur* within the policy's effective dates. Second, under a "claims-made policy," the holder is covered for acts, whenever they occurred, as long as the claim is *made* within the policy's period. The exclusion section also deserves attention. That section may bar any claim for indemnification from the United States. Finally, a wrap-around policy may specifically exclude coverage for claims that fall within the FTCA. This may occur in physicians' policies if they work at Federally Supported Health Centers. For a reduced premium, the policy may exclude coverage for acts covered by the FTCA.

If an insurance company fails to perform its duty to indemnify the United States under the terms of its policy, the United States has a variety of remedies. It may sue the insurance company under state law for breaching the terms of the agreement. Depending on the state, this action may include claims of breach of the duty to defend, breach of a duty of good faith and fair dealing, and punitive damages. *See, e.g., New Hampshire Ins. Co. v. United States*, No. 95-55245, 55246, 1996 WL 436509 at \*1 (9th Cir. Aug. 2, 1996); *see also, United States v. CNA Fin. Corp.*, 381 F. Supp. 2d 1088, 1090 (D. Alaska 2005).

The law surrounding which statute of limitations - state or federal - applies to contribution claims is muddled. When the United States possesses a *federal* statutory right to a claim, such as the Medical Care Recovery Act, 42 U.S.C. § 2651, the federal statute of limitations applies. *See United States v. Summerlin*, 310 U.S. 414, 416 (1940) ("It is well settled that the United States is not bound by state statutes of limitations or subject to the defense of laches in enforcing its rights.") If the specific statute does not set a limitations period, the limitations periods of 28 U.S.C. § 2415 apply.

If the United States seeks contribution based solely on state law, the state statute of limitations may apply. Courts are divided on this issue. In *United States v. Saint Louis University*, the court found that the United States' contribution claim was subject to the *federal* statute of limitations. No. 07-cv-0156, 2007 WL 4115807 (S.D. Ill. Nov. 16, 2007). The court found that *Summerlin* controlled and the United States' right under state law could not be nullified. *Id.* Two district courts have rejected this analysis. In *Estate of Nobile v. United States*, Nobile's estate sued the United States under the FTCA for medical malpractice at a VA hospital. 193 F.R.D. 58, 59 (D. Conn. 2000). After years of discovery, the United States filed a third-party apportionment complaint against a private hospital alleging that it, not the VA, caused the decedent's death. *Id.* The hospital moved to dismiss, contending that the United States failed to follow Connecticut's requirement for contribution claims. *Id.* Under that requirement, an apportionment complaint must be filed 120 days after the original complaint in order to bring an action for contribution or indemnity. *Id.* at 60. The United States argued it was not subject to the state-law limitation. *Id.* The court held that the state statute created a new cause of action that did not exist in common law and therefore "the remedy exists only during the prescribed period and the time limitation is not to be treated as an ordinary statute of limitations, but rather as a limitation on the liability itself." *Id.* Finding the limitation applicable to the United States, the court dismissed its claim for contribution. *Id.* at 62.

Similarly, in *Santiago v. United States*, the court found that Puerto Rico's statute of limitations applied to the United States' claim for contribution. The court distinguished situations where the United States "enforc[ed] its rights as sovereign pursuant to a federal statute" from circumstances where the United States' contribution action was based solely on substantive state law. 884 F. Supp. 2d 45, 50-51 (D.P.R. 1995). Noting that it was an "open question" of whether state or federal statutes of limitations applied in that limited circumstance, the court decided that a notice requirement was a prerequisite to any action against a Puerto Rico municipality, and failure to comply with it barred the United States' contribution claim against a municipality. *Id.* at 51.

These cases applying the state statute of limitations to counterclaims asserted by the United States add emphasis to the general instruction that the contribution law of the appropriate jurisdiction must be exhaustively examined. State law also governs when a claim for contribution accrues. *See, e.g., United States v. Saint Louis Univ.*, 2007 WL 4115807, at \*5 (Nov. 16, 2007) ("Because the parties agree that the United States' right to contribution in the instant case is created by the law of Illinois, the Court looks to Illinois law to determine when this right first existed.") Thus, state law will always govern when the right to contribution accrues. It may also govern when the right to contribution expires. With the entire time to assert a contribution claim potentially determined solely by state law, it is crucial to understand that law when a potential claim is identified.

In subrogation claims, because the subrogee "steps into the shoes" of the person whose claim he has assumed, the statute of limitations applicable to the claim remains with the subrogee. As a general principle, the Supreme Court has firmly established that the United States as a subrogee is bound by the statute of limitations of the claim it assumes. *See Guar. Trust Co. of New York v. United States*, 304 U.S. 126, 142 (1938).

Courts have long held that a claim for indemnification or contribution is not compulsory under Federal Rule of Civil Procedure 13, because it does not arise at the time of service of the complaint but matures only after resolution of the underlying suit. *See Hall v. General Motors*, 647 F.2d 175, 176 (1980). But if one party pleads a substantive initial cross-claim against the other party, the parties may be "opposing" parties under Rule 13 and therefore required to initially plead all claims, including those for contribution and indemnity. *See, e.g., Rainbow Mgmt. Group, LTD v. Atlantis Submarines Hawaii*, 158 F.R.D. 656, 659-60 (D. Haw. 1994). Thus, if the United States has both a substantive counterclaim and

contribution (or indemnity) claim it must either plead both initially or wait until resolution of the suit to pursue either the substantive claim, the contribution claim, or both.❖

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# Raising State Pre-Litigation Screening or Certificate of Merit Statutes in FTCA Medical Malpractice Actions

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## I. Introduction

A number of states have enacted statutes that establish requirements that must be satisfied before a plaintiff may file an action for medical malpractice. Although they vary widely, the statutes frequently require a party to attest to the merit of a suit before an action is filed in court or shortly thereafter. For example, some state statutes require an injured party to consult with a medical professional who, after conducting an investigation, will vouch for the merit of an action alleging medical malpractice. Some of the statutes require that the medical professional complete an expert's certificate of merit that plaintiff's counsel must file with the initial pleading. Other states have enacted statutes that require both parties to appear before a panel which considers the merit of a medical malpractice claim before suit may be initiated. To the extent that these statutes require a plaintiff to make a showing of merit as a condition to suit, the United States is entitled to this benefit in suits under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b) (2010).

## II. Background

In the 1970s, the United States experienced what has been termed a "medical malpractice crisis." Various authorities have offered opinions regarding the cause of the crisis. Some argue that there was a breakdown in the patient-doctor relationship. Others point to the increased complexity of medical services and technology. Regardless of the underlying cause or causes, the crisis significantly impacted the medical landscape in the United States. Between 1960 and 1970, medical malpractice insurance rates rose significantly for surgeons, physicians, and hospitals. See Elizabeth Urban Karzon, *Medical Malpractice Statutes: A Retrospective Analysis*, 1984 ANN. SURV. AM. L. 693, 693 n.1. Certain insurers even stopped providing coverage in states such as New York and Maryland. *Id.* at 693 n.2; *Att'y Gen. v. Johnson*, 385 A.2d 57, 61 (Md. 1978); *St. Paul Fire & Marine Ins. Co. v. Ins. Comm'r*, 339 A.2d 291 (Md. 1975).

Indeed, nearly every state enacted measures in an attempt to control skyrocketing insurance rates and insurers' refusals to provide coverage. Karzon, *supra*. at 693. State legislation came in various forms, including limits on the amount of damages recoverable for non-economic harm, periodic payment of future damage awards, and, as is relevant here, certification of merit as a precondition to filing suit. Because these tort reforms are applicable to private party defendants, the United States is entitled to assert them as liability is imposed by the FTCA "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b) (2010).

### III. Statutes imposing unilateral requirements on plaintiffs to establish merit

A number of states have passed statutes that require a plaintiff to verify the merit of a suit during the case's infancy. Such statutes do not require the defendant to take any sort of action. Oftentimes, these unilateral statutes require the submission of a certificate or affidavit of merit along with the plaintiff's initial pleading, *see, e.g.*, MINN. STAT. ANN. § 145.682 (2002), or shortly thereafter, *see, e.g.*, COLO. REV. STAT. ANN. § 13-20-602(1)(a) (1995). Some states require that the certificate of merit be completed by a health care professional, *see, e.g.*, W. VA. CODE ANN. § 55-7B-6 (2003), while others require that the plaintiff's attorney attest to undertaking a good faith investigation of the claim before initiating suit. *See, e.g.*, MISS. CODE ANN. § 11-1-58 (2002).

Several courts throughout the United States have held that plaintiffs must comply with these unilateral requirements in suits brought pursuant to the FTCA. These decisions are based on the FTCA's waiver of sovereign immunity, which provides that the United States may only be held liable "in the same manner and to the same extent as a private individual under like circumstances []. . . ." 28 U.S.C. § 2674 (2010). In interpreting this language, the Supreme Court has consistently found that a state's substantive, not procedural, law is applicable in actions brought under the FTCA. *See FDIC v. Meyer*, 510 U.S. 471, 478 (1994) ("[W]e have consistently held that § 1346(b)'s reference to the 'law of the place' means law of the State—the source of substantive liability under the FTCA.") Many courts have deemed state laws that require an injured party to file a certificate of merit to be substantive, and therefore applicable to suits brought pursuant to the FTCA. *E.g., Hill v. SmithKline Beecham Corp.*, 393 F.3d 1111, 1118 (10th Cir. 2004) ("In a federal action predicated upon diversity jurisdiction, we have determined that Colorado's certificate of review requirement is a substantive rule of law. Consequently, we conclude that the Colorado review statute is applicable to professional negligence claims brought against the United States under the FTCA.") (citation omitted); *Parker v. United States*, 475 F. Supp. 2d 594, 598 (E.D. Va. 2007) ("[P]laintiff's failure to obtain a certificate of merit, [as required by the Virginia Medical Malpractice Act,] is fatal to his claim."), *aff'd per curiam on other grounds*, 251 Fed. Appx. 818 (4th Cir. 2007); *Stanley v. United States*, 321 F. Supp. 2d 805, 809 (N.D. W. Va. 2004) (ruling that West Virginia's pre-litigation filing requirement in W. Va. Code § 55-7B-6 was substantive and plaintiff was required to comply with it in an FTCA action); *Oslund v. United States*, 701 F. Supp. 710, 714 (D. Minn. 1988) ("[C]ompliance with [Minn. Stat.] § 145.682 is necessary in any claim of malpractice under Minnesota law, no matter how the court obtains jurisdiction over the claim.")

Opposing counsel will frequently overlook the FTCA's "private person" language, as well as the caselaw mandating plaintiffs' compliance with substantive state pre-filing requirements. Indeed, plaintiffs' counsel often erroneously believe that compliance with the FTCA's administrative claim process is sufficient. In some jurisdictions, a plaintiff's failure to comply with a state's unilateral statute results in dismissal, typically without prejudice. The FTCA's statute of limitations, however, "forever bars" an action initiated more than 6 months after denial of an administrative claim. 28 U.S.C. § 2401(b) (2010). Thus, if a plaintiff attempts to initiate a new lawsuit with a certificate of merit, her action may be

jurisdictionally time-barred if filed more than 6 months after the federal agency's denial of her administrative claim.

Such statutes also require a plaintiff to do more preparatory work and may give defense counsel the benefit of learning earlier whether a plaintiff will be able to find an expert to support her medical malpractice allegations. In this way, counsel is better informed as to whether the case should be settled sooner, later, or not at all. In addition, state statutes requiring plaintiffs to file pre-litigation certificates of merit allow discovery of the identity of a plaintiff's probable testifying expert; this provides an opportunity to conduct background research on that individual.

Over the last several years, unilateral state pre-litigation statutes have led to favorable decisions for the United States in various districts, including Colorado, Minnesota, Virginia, and West Virginia. For example, in *Kikumura v. Osagie*, 461 F.3d 1269 (10th Cir. 2006), the Tenth Circuit stated:

Under Colorado law, litigants who bring a claim “based upon the alleged professional negligence of . . . a licensed professional” must “file with the court a certificate of review . . . within [60] days after the service of the complaint . . . unless the court determines that a longer period is necessary for good cause shown.” Colo. Rev. Stat. § 13-20-602(1)(a). This certificate of review must declare that the plaintiff's attorney, or the plaintiff himself in a pro se action, *see Yadon v. Southward*, 64 P.3d 909, 912 (Colo. Ct. App. 2002), “has consulted a person who has expertise in the area of the alleged negligent conduct,” and that “the professional who has been consulted . . . has concluded the filing of the claim . . . does not lack substantial justification.” § 13-20-602(3)(a). We have previously held that “Colorado's certificate of review requirement is a substantive rule of law,” and is therefore “applicable to professional negligence claims brought against the United States under the FTCA.”

*Id.* at 1297-99. Further, in *Stanley v. United States*, 321 F. Supp. 2d 805, 808 (N.D. W. Va. 2004), the district court dismissed the plaintiff's FTCA claim for failure to submit a medical screening certificate of merit as required by West Virginia's Medical Professional Liability Act. Additionally, in *Ross v. United States*, No. 06-cv-141, 2007 WL 5145351 (E.D. Va. Jan. 29, 2007), the court dismissed an FTCA suit as a result of plaintiff's failure to comply with Virginia's statute requiring that a party alleging medical malpractice obtain an expert certificate of merit prior to serving process upon the defendant. Other states have enacted similar statutory requirements that may be utilized in defending medical malpractice cases brought pursuant to the FTCA.

#### **IV. State statutes imposing bilateral obligations on plaintiffs and defendants to establish merit**

The scenario is complicated whenever a state statute imposes a corresponding duty on a defendant to submit to the jurisdiction of a state screening, mediation, or alternative dispute resolution panel. Sovereign immunity, however, precludes imposition of such requirements on the United States.

A statute on point is the Maryland Health Care Malpractice Claims Act, MD. CODE ANN., CTS. & JUD. PROC. §§ 3-2A-01 (2010) *et seq.*, which prescribes various prerequisites that must be satisfied before the filing of any medical malpractice cause of action seeking damages in excess of \$5,000. *Id.* §§ 3-2A-02(a); 4-402(d)(1) (2010). A person seeking to file a claim for injuries against a medical provider must first present that claim to the Director of the Maryland's Health Claims Alternative Dispute Resolution Office. *Id.* at § 3-2A-04(a) (2010). Within 90 days of filing the claim, the injured party must file a certificate from an expert “attesting to departure from standards of care, and that the departure from standards of care is the proximate cause of the alleged injury” unless the “sole issue in the claim is lack of

informed consent." *Id.* at § 3-2A-04(b)(1) (2010). A party disputing liability must then submit a similar certificate within 120 days of service of the claimant's certificate. *Id.* at § 3-2A-04(b)(2) (2010). Each party must file the certificate "with a report of the attesting expert attached." *Id.* at § 3-2A-04(b)(3)(i) (2010). Either party may unilaterally elect to waive the arbitration process before the Health Claims Alternative Dispute Resolution Office after filing the respective certificates. *Id.* at § 3-2A-06B (2010).

It does not necessarily follow that the United States must comply with the Maryland Health Care Malpractice Claims Act's condition precedent that requires a defendant to file a certificate contesting liability with the Health Care Alternative Dispute Resolution Office. Nonetheless, in *Mayo-Parks v. United States*, 384 F. Supp. 2d 818 (D. Md. 2005), the district court concluded that the United States' failure to proffer a countervailing medical expert witness certificate precluded the United States from contesting liability. The court's reasoning in that case is fundamentally flawed. In waiving the United States' sovereign immunity under the FTCA, Congress did not authorize or require the United States to appear before a state body such as Maryland's alternative dispute resolution panel as a precondition to defending itself. Indeed, Congress explicitly provided that the U.S. district courts have "exclusive jurisdiction" over FTCA actions. 28 U.S.C. § 1346(b)(1) (2010). Plaintiffs usually argue that if they must comply with a bilateral state pre-litigation statute, so, too, must the United States. This argument misconstrues the concept of sovereign immunity and the unique position of the United States. On this point, a quote from Justice Powell is appropriate:

The Federal Tort Claims Act is not a federal remedial scheme at all, but a waiver of sovereign immunity that permits an injured claimant to recover damages against the United States where a private person "would be liable to the claimant in accordance with the law of the place where the act or omission occurred." . . . *The FTCA gives the plaintiff even less than he would receive under state law in many cases, because the statute is hedged with protections for the United States.*

*Carlson v. Green*, 446 U.S. 14, 28 (1980) (Powell, J., concurring) (emphasis added).

Analogous scenarios provide support for the argument that the United States is entitled to the benefit of bilateral pre-litigation statutes. For instance, some states allow health care providers to take advantage of the state's non-economic damages cap only if the providers are licensed by the state. *See, e.g.*, VA. CODE. ANN. § 8.01-581.15 (2008). Other states limit the availability of a non-economic damages cap to providers that file proof of financial responsibility and contribute to a patient compensation fund. *See, e.g.*, NEV. REV. STAT. §§ 44-2821, 2824 (2009); LA. REV. STAT. ANN. § 40:1299.42 (2006). The United States does not satisfy such state statutory conditions. Yet federal courts have recognized that the United States is entitled to the benefit of these and other state law defenses in FTCA actions, despite its failure to comply with the statutory technical requirements. For example, in *Starns v. United States*, 923 F.2d 34 (4th Cir. 1991), the Fourth Circuit held that Virginia's statutory cap on damages in medical malpractice actions applied to federal hospitals, even though the statute applied only to "health care providers" licensed by the Commonwealth of Virginia. VA. CODE. ANN. § 8.01-581.1(1) (2008). The Fourth Circuit explained that

Virginia law, as applied to private parties in "like circumstances," determines the extent of the government's liability in this case. Since private health care providers in Virginia would in "like circumstances" be entitled to the benefit of § 8.01-581.15, so, too, is a federally operated hospital in that state.

*Starns*, 923 F.2d at 37; *see also Lozada v. United States*, 974 F.2d 986 (8th Cir. 1992) (holding United States is entitled to benefit of non-economic damages cap although government did not file proof of financial responsibility or contribute to Nebraska's excess liability fund); *Owen v. United States*, 935 F.2d

734 (5th Cir. 1991) (holding Louisiana's medical malpractice liability cap applicable in FTCA suit even though United States had not filed proof of financial responsibility or contributed to patient's compensation fund as required by state statute); *Taylor v. United States*, 821 F.2d 1428, 1431-32 (9th Cir. 1987) (holding United States is entitled to liability limitation although it did not meet definition of "health care provider" under California law); *Scheib v. Fla. Sanitarium & Benevolent Ass'n*, 759 F.2d 859, 863-64 (11th Cir. 1985) (holding United States is entitled to benefit of Florida collateral source rule, which was established by statute and applied to Florida-licensed hospitals or physicians). These cases support the position that the United States is entitled to the benefit of a bilateral certificate of merit or screening statute, notwithstanding the fact that the United States does not submit to the jurisdiction of a state board.

## V. Conclusion

State pre-litigation screening or certificate of merit statutes may be raised to gain advantageous results in suits brought pursuant to the FTCA. While several cases pertaining to unilateral state pre-litigation statutes may be found, the law involving bilateral statutes is in its infancy. The Torts Branch is available to assist U.S. Attorneys' offices interested in exploring these state law defenses in FTCA medical malpractice actions. ❖

### ABOUT THE AUTHOR

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