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# FEDERAL TORT CLAIMS AT THE AGENCY LEVEL: THE FTCA ADMINISTRATIVE PROCESS

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*Tort actions against the federal government and its agencies are currently governed by the FTCA and various other statutes, agency rules and procedures. Claims against the government are increasing rapidly, and the agencies enjoy broad settlement authority, often at the expense of coordination among the appropriate statutes. This Article examines the various procedures allowed and those that are actually practiced by the agencies. The author points out that, though claims officers are supposed to be fair-minded, the process can take on an adversarial nature, often a prel-*

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*ude to litigation rather than settlement. He proposes that the current processes be made fairer for claimants. He advocates, among other things, liberalizing the rules dealing with bringing the claim, giving notice of reasons for denying a claim and the reconsideration process as means of removing obstructions to agency-level settlements.*

## INTRODUCTION

AFTER NEARLY forty years, the Federal Tort Claims Act (FTCA) is still regarded principally as a vehicle for suing the federal government in tort. Historically, this conception of the statute is not inaccurate, for what Congress enacted in 1946 was a statutory waiver of sovereign immunity to suit. But the reality of the FTCA is quite different. Virtually every FTCA claim passes through a mandatory administrative phase in which the agency directly involved in the incident, rather than the Justice Department or United States Attorney's Office, investigates the factual and legal bases of the claim and, more importantly, exercises primary responsibility for determining whether and at what level the claim should be paid.

The administrative process for handling federal tort claims is not merely a formality. Not only does the investigative file that it yields continue to shape events even after a claim enters judicial channels, but the administrative process actually prevents litigation of the vast majority of tort claims against the government. While the litigation origins of the FTCA and the ultimate availability of a court for claims that are not settled give the FTCA administrative process much of its coloration, the scope and statistical significance of agency-level activity demand that it be studied in its own right. There is in every sense an administrative process to the FTCA, however much the FTCA literature and popular conceptions of the federal tort claim phenomenon may neglect it. In addition, as claimants and claimants' attorneys press the outer boundaries of the common law tort concept in the public law context and as Congress moves closer to assimilating constitutional and traditional torts for procedural purposes, tort initiatives increasingly become a means of obtaining not only monetary relief but also administrative and judicial review of agency action.

This Article provides a comprehensive account of the administrative handling of tort claims against the federal government. Parts I and II explore in a preliminary fashion the agencies' statutory authority to entertain such claims. In that discussion the FTCA occupies center stage, but not the whole stage. Part III outlines and critiques the regulatory framework that the Justice De-

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partment and agencies have developed to organize their statutory claims activity under the FTCA. Since the statute and the regulations give many procedural choices to individual claims officers, an inquiry into the actual practice of the agencies is also needed. This is the subject of Part IV. The Article concludes with thematic suggestions for reform.

## I. AGENCY AUTHORITY TO ENTERTAIN CLAIMS IN TORT

The prominence of the FTCA as a statutory vehicle for handling tort claims against the government has had two interesting side effects. First, it has tended to preempt the question of whether agencies might enjoy claim settlement authority apart from any such statutory mandate. It has also obscured, if not for most agency lawyers then at least for most students of government tort law, the array of narrow statutory bases that coexist with the FTCA in the agencies' claims payment arsenal. Before turning the focus upon the FTCA as such, these two neglected issues are examined.

### A. *Do Agencies Have Inherent Authority to Settle Tort Claims?*

The fact that Congress has given agencies express statutory settlement authority leads virtually all agency claims officers to assume that they would not otherwise have it. In fact, the question whether agencies have inherent authority to settle tort claims arising out of their activities has not been judicially decided; a claimant, after all, is unlikely to challenge an agency's willingness to exercise it. But the General Accounting Office (GAO) unhesitatingly and unfailingly maintains that agencies lack any inherent authority to entertain and satisfy tort claims, however fair and equitable it might be to do so under certain circumstances. The GAO describes its position as "but a corollary of the principle that no one is authorized to give away Government money or property."[1] As a practical mat-

1. GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 11-17 (1982) [hereinafter cited a GAO PRINCIPLES]. The Constitution provides that: "No money shall be drawn from the Treasury, but in consequence of appropriations made by law." U.S. CONST. art I, § 9. *E.g.*, Op. Comp. Gen. No. B-201054 (Apr. 27, 1981). *Cf.* 31 U.S.C. § 1301(a) (1982) ("Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."). *See also id.* § 1532. If an account is disallowed by the GAO, the responsible officer may be held personally liable to the United States for the amount of any improper payment already made. *Id.* § 3528(4). *See also* D. SCHWARTZ & S. JACOBY, LITIGATION WITH THE FEDERAL GOVERNMENT 162 (1970). For information on the GAO, see generally Baer, *The General Accounting Office: The Federal Government's Auditor*, 47 A.B.A. J. 359 (1961); Keller, *The Role of the General Accounting Office*, 21 BUS. LAW. 259 (1965).

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ter, all claims officers, however generally sympathetic to claimants, seem to proceed on the same assumption.

This is not to say that things could not, as a matter of law or policy, be otherwise. The doctrine of sovereign immunity, routinely invoked in this context, should not end the inquiry. It is true that the sovereign's immunity to suit without its consent[2] may be waived only by Congress, not by an officer or employee of the United States,[3] and that such waivers are strictly subject to the conditions Congress chooses to place upon them.[4] But to say that the federal government may not be sued except on the basis of a legislative waiver of sovereign immunity is not to say that the government may not pay a just claim of its own accord. As a policy matter, agencies might well consider compensation of tort victims to be a cost of doing business and, as such, an ordinary operating expense chargeable to general agency appropriations. Payment of similarly just claims by private enterprise is commonly regarded as a legitimate business expense.

A more probable rationale for the prevailing government view is the need to legitimate any agency expenditure of public money that does not directly and specifically advance the statutorily defined mission of that agency. While vague statutory mandates and the attendant risk of unaccountability permeate the life and work of the administrative agencies, and implicate far greater sums of money than the ordinary exercise of claims settlement authority, they at least correspond positively to the agencies' reason for existence.

If the agencies in fact do not assert an inherent right to compensate for government-inflicted injury to person or property, the legislative branch bears the burden of defining the authority they have. Congress has gone about this in a patchwork manner. As we shall see,[5] there exists alongside the FTCA a disparate collection of narrow authorizations, many agency-specific, all legislated on a piecemeal basis, and collectively establishing no discernible overall design.

Of course, even without monetary settlement authority,[6] an

2. United States v. Testan, 424 U.S. 392, 399 (1976).

3. United States v. Shaw, 309 U.S. 495, 500-01 (1940); Munro v. United States, 303 U.S. 36, 41 (1938).

4. Soriano v. United States, 352 U.S. 270, 276 (1957); United States v. Sherwood, 312 U.S. 584, 587 (1941).

5. *See infra* notes 20-25 and accompanying text.

6. For an exceptionally rare instance of a compensation program knowingly instituted by an agency without express statutory support, see Department of Defense Directive No. 5220.6 (Dec. 20, 1971) (reimbursement for loss of earnings from the suspension, revocation or

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agency still may remedy a claimant's legitimate grievances by exercising other authority in its possession. It can roll back the specific action that gave rise to the objection. For example, if the agency has statutory authority to condemn property, it can exercise that authority to give the claimant what an inverse condemnation suit would have achieved. Agency real estate departments sometimes negotiate with private parties after the fact over money to be paid for the unplanned use of real property and call upon general operating funds as a source of payment, a procedure the Army has formalized.[7] Contracting officers also may use funds appropriated for a contract, or seek contract modification, in order to answer claims for damage to or loss of property in connection with the performance of a contract.[8] If the full range of specific statutory authorities at the agencies' disposal is canvassed, in light of the available appropriations under each, it becomes apparent that the agencies are not as disarmed in the face of claims for monetary redress as it first appears.

But agencies do not in all circumstances have the authorization that would enable them to satisfy a deserving tort claim by other available means. They may also be unwilling, in the larger public interest, to roll back the action they have taken, assuming they can do so and that doing so would make the claimant whole. In fact, some monetary claims on which the government actually may be sued simply have no identifiable administrative settlement counterpart. Though not true of claims cognizable under the FTCA, this is true of many claims upon which suit may be brought in the United States Claims Court.[9] In these situations, recourse may be had to

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final denial of an industrial security clearance). Claims are processed and settled by the General Claims Division, United States Army Claims Service, and paid from "Claims, Department of Defense" appropriations. Dep't of Army Reg. No. 27-20, Legal Services: Claims § 13-12e (Sept. 18, 1970).

7. Dep't of Army Reg. No. 405-15 (Sept. 6, 1967), also referred to in Dep't of Army Reg. No. 27-20, *supra* note 6 § 13-11. The procedure is evidently contemplated in connection with military maneuvers, training exercises and emergency situations.

8. Dep't of Army Reg. No. 27-20, *supra* note 6 §§ 13-9f, 13-10.

9. 28 U.S.C. §§ 1346(a)(2), 1491(a)(1) (1982) (Tucker Act claims); *id.* § 1495 (unjust conviction and imprisonment); *id.* § 1497 (damage to oyster growers); *id.* § 1498 (patent infringement); *id.* § 1505 (Indian tribe claims). The Court of Claims, as established in 1855, could only find and report facts and opinions to Congress, its original purpose being to relieve congressional claims committees from the press of private relief bills. Act of Feb. 24, 1855, ch. 122, 10 Stat. 612. The same 1855 statute gave the court jurisdiction over "all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States." *Id.* § 1. Not until 1887, however, did Congress make the court's judgments final, subject to appeal to the Supreme Court. Tucker Act, ch. 359, 24 Stat. 505, § 3 (1887). It was the Tucker Act

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the Attorney General who enjoys authority to settle claims referred to him under the rubric of defense of imminent litigation.[10] Whether this amounts to an administrative rather than litigation remedy is open to question.

The statutory authority of the GAO to "settle all claims . . . against the United States Government" also must be mentioned.[11] The statute presumably makes the GAO an available forum for relief when the responsible agency lacks power to satisfy a monetary claim based on recognized legal grounds.[12] The GAO may even be available where an agency does have authority, but its determinations are not regarded as final and conclusive.[13] Such a broad GAO authority, however, does not exist for claims sounding in tort.[14] The Comptroller General also has been empowered since 1928 to "report to Congress on a claim against the government . . . that may not be adjusted by using an existing appropriation, and that [he] believes Congress should consider for legal or equitable reasons."[15] This mechanism is seldom invoked,[16] probably because the

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that added jurisdiction over claims "founded . . . upon the Constitution" and "for damages, liquidated or unliquidated, in cases not sounding in tort." *Id.* § 1.

The Court of Claims was reorganized and renamed the Claims Court as part of the Federal Court Improvements Act of 1982, Pub. L. No. 97-164, 96 Stat. 40 § 133(b)-(c), *amending* 28 U.S.C. § 1491.

10. 28 U.S.C. § 2414 (1982). Settlements made pursuant to this authority are paid, like judgments and compromise settlements, out of the Permanent Indefinite Appropriation established by the Act of Sept. 13, 1982, Pub. L. No. 97-258, §§ 1, 2(m)(2), 96 Stat. 917, 1062, *codified in* 31 U.S.C. § 1304(a) (1982). The Deputy Attorney General may exercise this authority for the Attorney General. 28 C.F.R. § 0.161(b) (1984). Furthermore, authority to accept settlement offers of up to $750,000 in compromise of claims against the United States has been delegated to the Assistant Attorneys General of the litigating divisions, except that referral to the Deputy Attorney General is required when a compromise will practically control or influence the disposition of claims totalling more than $750,000, or where the presence of a question of law or policy or opposition by the agency involved suggests that the Deputy Attorney General be consulted. *Id.* § 0.160. The authority of the Assistant Attorneys General is not limited by any monetary ceiling when it comes to rejecting compromises or administrative settlements though the exceptions for questions of law or policy or for cases of agency opposition still apply. *Id.* § 0.162. There has been further limited redelegation to subordinate division officials such as the Torts Branch Director and to United States Attorneys. *Id.* § 0.168. *See also id.* pt. O, Subpt. Y, App. (details of the delegations and the requirement of action memoranda for the closing of claims).

11. 31 U.S.C. § 3702(a) (1983). The statute requires that the Comptroller General receive the claim within six years after it accrues.

12. *See* GAO PRINCIPLES, *supra* note 1, at 11-5 to 11-11 (1982) (for a discussion of the nature of this authority and the limitations the GAO has placed on its exercise).

13. *See infra* notes 698-99.

14. *See infra* note 700.

15. 31 U.S.C. § 3702(d) (1983). The purpose of the provision was to facilitate congressional consideration of private relief bills by giving Congress the benefit of recommendations from a body with expertise in investigating and adjudicating monetary claims. S. REP. NO.

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GAO uses its recommendation authority sparingly and because the statutory framework for agency and court consideration of monetary claims is more comprehensive than it was in 1928.[17] GAO recommendation is also not needed for the enactment of a private relief bill.

The previous discussion should not suggest that tort claim payments never take place at the agency level without statutory authorization. According to claims officers at more than one agency, agency heads occasionally pay meritorious claims from contingency funds to which only they, through the agency's chief fiscal officer, have access. According to one officer, payment from contingency funds might occur in his agency as often as four or five times a year, though seldom for sums in excess of a few thousand dollars at a time. Another officer surmises that only politically well-connected claimants have any realistic chance of collecting from such a fund, and even then only under highly unusual circumstances or those constituting a source of embarrassment to the agency. Apparently, access to a contingency fund is only through political channels, and the agency's chief claims attorney and General Counsel may even be unaware of the largely undocumented transaction. An agency's contingency fund cannot properly function as a consistent source for systematic compensation of claimants. Furthermore, it is highly questionable whether agency contingency funds should be used for compensation at all, given the risk of political favoritism and the absence of any real accountability.

On the other hand, the Chief of the General Claims Division of the Army Claims Service believes that agency operating divisions tend to underestimate the extent to which program-related appropriations are legitimately available for making monetary payments to claimants. The result is too many matters coming before the

684, 70th Cong., 1st Sess. 3-4 (1928). A six-year statute of limitations applies to the Comptroller General's meritorious claims authority. For a full discussion of the standards the GAO has developed for exercising this authority and for certain statistics on its use, see GAO PRINCIPLES, *supra* note 1, at 11-137 to 11-163. *See also* Holtzoff, *The Handling of Torts Claims Against the Federal Government*, 9 LAW & CONTEMP. PROBS. 311, 321 (1942).

16. GAO PRINCIPLES, *supra* note 1, at 11-139.

17. The GAO does not view its meritorious claims authority as applicable to claims sounding in tort. *Id.* at 11-143 to 11-145, and decisions of the Comptroller General cited therein. The GAO presumes that where Congress has enacted legislation providing relief for certain kinds of claims, including tort, the limits on that relief must be respected. Similarly, the GAO will not entertain, under the meritorious claims heading, claims for which agencies possess their own meritorious claims settlement authority or might afford remedies such as veterans' benefits or payments under the Military Personnel and Civilian Employees' Claims Act. *Id.* at 11-149 to 11-150.

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Judge Advocate's Office in the form of tort claims that could and should be handled at program levels.[18] The Office of the Chief of the General Claims Division spends considerable resources trying to identify sources of authority which program officers could, but do not, legitimately draw upon to satisfy valid monetary demands that then must be treated as tort claims. Agency claims units might enlist other divisions of their offices of general counsel, and possibly the GAO, to prepare an agency-by-agency inventory of legal means apart from the FTCA for responding to monetary claims.[19]

### B. *Special Tort Claims Legislation*

If the FTCA constitutes the centerpiece of agency authority to entertain tort and tort-like claims, the rest of the arrangement is in disarray. The multitude of ancillary statutes affording agencies the opportunity to satisfy such claims defy even elementary typology. The leading authority on the FTCA reports no fewer than forty,[20] but the number far exceeds that if the term "monetary" claim is construed broadly. Most statutes are agency-specific, some covering only certain kinds of incidents and activities; but others, including some of the most significant, cut completely across agency lines. A few, like the FTCA, condition claims payment on a showing of fault; others do not. Some require a federal officer or employee to be acting within the scope of employment when causing the injury, while others require only a connection between the injury and a government program of some type, not necessarily of a particular agency. Only a few statutes deal specifically with the claimant's contributory negligence. Most place fixed monetary ceilings on the amount of recovery and, rarely, on the amount of allowable attorneys' fees. They carry varying statutes of limitations. Almost all preclude or are assumed to preclude judicial review of the disposition of a claim. In some cases, the agency may not only determine the claim, but also pay it. In others, the agency has authority only to recommend to Congress that the claim be paid. A few of these statutes purport to be the exclusive remedy for any covered claim. Most leave open the question of whether exclusiveness, or at least a requirement of prior exhaustion of remedies, should be inferred.

18. Personnel in the Claims Division of the GAO lend support to the suspicion that some payments are being processed as tort claims—and drawn from the judgment fund—when they should properly be charged to agency appropriations as a program-related or general operating expense.

19. *See, e.g.*, Dep't of Army Reg. No. 27-20, *supra* note 6 § 13.

20. 1 L. JAYSON, HANDLING FEDERAL TORT CLAIMS 1-11 (1984).

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Almost all of the statutes show virtual inattention to questions of claims procedure. Although each of these specific pieces of legislation is fundamentally idiosyncratic, most can be understood either as complementing the FTCA (for example, addressing claims categorically exempt from that act),[20A] or as true meritorious claims statutes requiring no predicate of fault on the government's part.[20B]

Even confining the inquiry to meritorious claims statutes, it is

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20A. Department of Health and Human Services, 42 U.S.C. § 247b(k) (Supp. 1983); Department of Justice, 28 U.S.C. § 2680(e) (1982); Panama Canal Commission, 22 U.S.C. § 3761(e) (Supp. 1983); Department of State, 22 U.S.C. § 2669(f) (1982); Tennessee Valley Authority, 16 U.S.C. § 831c(b) (1982); United States Information Agency, 22 U.S.C. § 1474(5) (1982); Veterans Administration, 38 U.S.C. § 236 (1982); Suits in Admiralty Act, 46 U.S.C. §§ 741-52 (Supp. 1983); Public Vessels Act, 46 U.S.C. §§ 781-90 (1982); Patent Infringement, 28 U.S.C. § 1498(a) (Supp. 1983); Copyright Infringement, 28 U.S.C. § 1498(b) (Supp. 1983)

20B. *E.g.*, Department of Agriculture, 16 U.S.C. §§ 502(d), 574 (1983) (authority to reimburse owners for the damage or destruction of private property as a result of action by federal employees in connection with national forests); Federal Bureau of Investigation, 42 U.S.C. § 233 (1983) (amending 58 Stat. 710 (1944)) (authority to settle claims for property damage or personal injury or death arising from actions of FBI personnel where not amenable to settlement under the FTCA); Department of Health and Human Services, 42 U.S.C. § 223 (1983) (authority to settle claims for damages caused by collision with or otherwise incident to the operation of Public Health Service vessels where such vessels are responsible for the damage); Department of the Interior, 16 U.S.C. § 17(f) (1983) (amending 46 Stat. 382 (1930)) (authority to reimburse owners for the loss, damage or destruction of private property while in custody of the National Park Service or the Department where the property is used for firefighting or other official purpose); 25 U.S.C. § 388 (1983) Department of Justice, 31 U.S.C. § 3722 (1983) (amending 63 Stat. 167 (1949)) (authority to settle claims for damage or loss of personal property of employees of federal penal institutions); 18 U.S.C. § 4126 (1982); National Aeronautics and Space Administration, 42 U.S.C. § 2473(c)(13) (Supp. 1983) (amending 72 Stat. 429 (1958)) (authority to settle claims for property damage or personal injury or death arising out of NASA activities); National Oceanic and Atmospheric Administration, 33 U.S.C. § 853 (Supp. 1983) (amending 41 Stat. 929 (1920)) (authority to settle claims for property damage of personal injury or death due to actions for which the National Oceanographic Survey is responsible); Nuclear Regulatory Commission, 42 U.S.C. § 2207 (1983) (amending 68 Stat. 952 (1954)) (authority to settle claims for property damage or personal injury or death resulting from explosion or radiation in connection with the detonation of explosive devices); *Id.* § 2211 Peace Corps, 22 U.S.C. § 2509(b) (1983) (amending 75 Stat. 617 (1961)) (authority to settle claims to non-residents or aliens for property damage or personal injury or death arising abroad from the act or omission of any Peace Corps employee or volunteer); Postal Service, 39 U.S.C. § 2603 (1983) (amending 48 Stat. 1207 (1934)) (authority to settle claims for property damage or personal injury or death resulting from operations of the Postal Service where "a proper charge [is made] against the United States" and where the cause of action is not recognized under the FTCA); Department of State, 22 U.S.C. § 2669(b) (1983) (authority to settle meritorious claims for property damage or personal injury or death suffered by a foreign national resulting from any U.S. government activity, where the claim is presented by the government of the foreign country and where the cause of action is not recognized under the FTCA); *Id.* § 277(e); 31 U.S.C. § 3725 (1983); Veterans Administration, 38 U.S.C. § 626 (1982); Military Claims Act, 10 U.S.C. § 2733 (1983); Foreign Claims Act, *Id.* § 2734; National Guard Claims Act, 32 U.S.C. § 715 (Supp. 1983).

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difficult to account for Congress' singling out a handful of agencies for meritorious claims settlement authority. Judging by the available examples, Congress occasionally may find such authorization to be an appropriate response to the government's conduct of especially hazardous or sensitive activities,[20C] to situations where private property is destroyed in aid of a public purpose,[20D] and to settings where fuller agency claims authority would serve America's foreign relations interests.[20E] Still, attributing an orderly rationale to the existing pattern of meritorious claims legislation is naive. Some statutes simply cannot be explained in terms of any general principle,[21] but only as responses to the prospect of litigation and liability in connection with a new government program or as the immediate reaction to a particular incident. More importantly, the government activities chosen for coverage by meritorious claims statutes cannot all be regarded as uniquely suited to that treatment. Many equally deserving activities remain outside their reach.

Without researching the legislative purpose of current meritorious claims statutes, or the actual use agencies have made of them over the years, it cannot be recommended that they be extended to a greater number of agencies, or even that their modest payment ceilings be raised. To be sure, most claims officers whose agencies enjoy meritorious claims authority would like to see that authority extended. For example, the Assistant Legal Advisor of the State Department regrets that his agency only has meritorious claims authority over foreign claims.[22] An Agriculture Department attorney finds that, under the FTCA, state recreational use statutes effectively bar him from making what would seem to be an appropriate award for injuries caused by hazards in the national parks.[23] The

20C. *E.g.*, Nuclear Regulatory Commission, 42 U.S.C. § 2207 (1983) (damage resulting from explosion or radiation connected with the detonation of an explosive device).

20D. *E.g.*, Department of the Interior, 16 U.S.C. § 17(f) (1983) (private property damaged or destroyed in firefighting or other official business of the Department or National Park Service).

20E. *E.g.*, Peace Corps, 22 U.S.C. § 2509(b) (1983) (claims of non-residents or aliens connected with activities of Peace Corps employees or volunteers).

21. *E.g.*, National Oceanic and Atmospheric Administration, 31 U.S.C. § 3701 (1982); Postal Service, 39 U.S.C. § 2603 (1982); Job Training Partnership Act, 29 U.S.C. §§ 1501-1781 (1982). The patent, 28 U.S.C. § 1498(a) (1982), and copyright infringement claims statutes, 28 U.S.C. § 1498(b) (1982), not properly speaking meritorious claims statutes, may be necessitated by the constitutional guarantee against the taking of private property for public use without just compensation.

22. Interview with Thomas T.F. Huang, Assistant Legal Advisor, Department of State, in Washington, D.C. (June 8, 1983).

23. Interview with Jeffrey L. Nesvet, Attorney, Research and Operations Division, Office of General Counsel, Department of Agriculture, in Washington, D.C. (Aug. 16, 1983).

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Chief of the FBI Civil Litigation Unit believes that the five hundred dollar ceiling on his ability to pay just claims all too often renders it an inadequate remedy.[24] On the other hand, some agency officials who currently enjoy a generous measure of such claims authority feel uncomfortable with it and use it rarely.[25]

Certainly, Congress should view sympathetically requests for a higher payment ceiling on meritorious claims coming from agencies that in the past have made principled use of their authority, for inflation has done violence to many monetary limits. But much more needs to be known about the utility of these provisions to those agencies that have them—and of the safeguards that might advantageously be put in place for their use—before suitably informed recommendations can be made.

### C. *The FTCA: An Introduction*

The FTCA[26] is singular among claims statutes due to its generality of application. Confined neither to specific agencies nor to specific categories of claimants, it contemplates virtually any situation marked by a "negligent or wrongful act or omission" on the part of a federal officer or employee, as well as an open-ended category of losses without monetary ceiling under the rubrics of personal injury, death or property damage. For these and related reasons, the FTCA is foremost among existing statutory vehicles for the disposition of tort and tort-like claims against the government.

The FTCA subjects the federal government to liability in accordance with the same principles that govern the liability of private persons under the law of the place where the alleged tort occurred,[27] except that it does not allow prejudgment interest or punitive damages.[28] The FTCA, however, limits the government's exposure through thirteen categorical exemptions.[29] A claimant

24. Interview with Thomas A. Kelley, Chief, Civil Litigation Unit, FBI, in Washington, D.C. (May 27, 1983).

25. *See infra* notes 558-64 and accompanying text.

26. The Federal Tort Claims Act was enacted as Title IV of the Legislative Reorganization Act of 1946, §§ 401-24, Pub. L. No. 79-601, 60 Stat. 812-44, and is presently codified at 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 (1982).

27. 28 U.S.C. §§ 1346(b), 2674 (1982).

28. *Id.* § 2674.

29. *Id.* § 2680.

The FTCA is subject, apart from the express statutory exceptions, to two other sets of exemptions. First, an occasional statute may recite that it constitutes the exclusive remedy for a certain category of claims or simply immunizes the government from liability altogether. *E.g.*, Federal Civil Defense Act of 1951, 50 U.S.C. app. § 2294 (1951) (terminated by own terms on June 30, 1974) (government immunity in connection with a civil defense emer-

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may bring suit in the federal district court for the district where either the alleged tort occurred or the plaintiff resides,[30] provided the claimant filed a prior administrative claim with the appropriate federal agency for its consideration within two years of the claim's accrual and instituted suit within six months of that agency's final denial.[31] The 1966 amendments that made the prior filing of a claim a prerequisite to suit also greatly expanded the agencies' statutory authority to settle and pay claims cognizable under the FTCA.

In 1946, when the FTCA was enacted, federal agencies had little opportunity to entertain and pay tort and tort-like claims against them. The then Court of Claims[32] and the Supreme Court[33] had consistently declined to read the Court of Claims Act as embracing tort claims, a view ultimately endorsed in the drafting of the Tucker Act.[34] Since the agencies were deemed to lack settlement authority even over claims falling within Tucker Act jurisdiction, unless another statute expressly gave it to them, they could hardly be expected to entertain the payment of claims sounding in tort. By way of reasonably general legislation, only the patent infringement statute of 1910,[35] the admiralty statutes of 1920[36] and 1925,[37] and the

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gency); Federal Employees' Compensation Act, 5 U.S.C. § 8116(c) (1982) (FECA is the exclusive remedy against the United States for the injury or death of a federal employee in the course of duty); Flood Control Act, 33 U.S.C. § 702(c) (1982) (no government liability for damage from or by floods or flood waters); Panama Canal Act, 22 U.S.C. § 3761(e) (1982) (FTCA inapplicable to claims arising from operation of the Canal or related facilities).

Under exceptional circumstances other exemptions have been inferred by the courts on the basis of available alternative remedies. *See infra* notes 73-76.

30. 28 U.S.C. § 1402(b) (1982).

31. *Id* at § 2401(b).

32. *E.g.*, Dykes v. United States, 16 Ct. Cl. 289 (1880); Dennis v. United States, 2 Ct. Cl. 210 (1865); Pitcher v. United States, 1 Ct. Cl. 7 (1863).

33. *E.g.*, Langford v. United States, 101 U.S. 341 (1879); Morgan v. United States, 81 U.S. (14 Wall.) 531 (1871); Gibbons v. United States, 75 U.S. (8 Wall.) 269 (1868). The Court opined in *Morgan* that "Congress has wisely reserved to itself the right to give or withhold relief where the claim is founded on the wrongful proceedings of an officer of the government." 81 U.S. (14 Wall.) at 534.

34. The original version of what was to become the Tucker Act did provide a general tort remedy. According to the report accompanying the House Judiciary Committee bill, enactment of the Court of Claims Act did not affect the "large class of cases in equity, in admiralty, and in tortious acts of the Government through its agents which are left to Congress, [but] for which a court of justice is better fitted to attain the right between the litigants." H.R. REP. NO. 1077, 49th Cong., lst Sess. 3-4 (1886), *quoted in* 1 L. JAYSON, *supra* note 20, at 2-17 to 2-18 (1984). As enacted, however, the legislation expressly excluded cases "founded upon torts." *See* Schillinger v. United States, 155 U.S. 163, 168 (1894).

35. Act of June 25, 1910, ch. 423, 36 Stat. 851 (codified at 28 U.S.C. § 1498 (1982)).

36. Act of March 9, 1920, ch. 95, 41 Stat. 525 (codified at 46 U.S.C. §§ 741-752 (1982)).

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Small Claims Act of 1922[38] offered government tort victims a monetary remedy. Furthermore, of these, only the Small Claims Act could be said to cut across different fields of tort and to afford an administrative rather than a judicial means of relief.

In reality, the Small Claims Act was a modest piece of legislation, confined to property damage claims[39] of up to $1,000 arising out of the negligent acts of government employees acting within the scope of their employment and filed within one year of accrual. It authorized the head of each executive department or other independent governmental body to consider and adjust any such claim and to certify it to Congress for payment out of appropriations to be made for that purpose. A claimant's acceptance of the amount offered was deemed to be in full settlement of the claim and judicial review was not available.[40]

Although the Small Claims Act was enacted to relieve Congress of the pressures of private claims bills and to assist those claimants unable to present their case to Congress effectively,[41] its stringent limitations made attaining those goals virtually impossible. No sooner was the Small Claims Act in place than Congress felt pressure to provide a more liberal and procedurally better defined remedy for governmental torts. The years 1925 through 1946 saw no fewer than thirty different bills introduced in Congress for the purpose of providing a more extensive measure of liability and at the same time a more uniform substantive and procedural framework for the handling of claims.[42] The formula ultimately adopted in 1946 still characterizes the FTCA to this day.[43]

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37. Public Vessels Act, ch. 428, 43 Stat. 1112 (1925) (codified at 46 U.S.C. §§ 781-790 (1982)).

38. Ch. 17, 42 Stat. 1066 (1922) (codified at 31 U.S.C. § 3723 (1982)) (repealed in part 1946).

39. Personal injury and death claims were thought to be unusually susceptible to fraud, collusion and excessive compensation. 62 CONG. REC. 2297 (1922).

40. *See generally* Gottlieb, *The Federal Tort Claims Act: A Statutory Interpretation*, 35 GEO. L.J. 1, 13 n.42 (1946) (describing the numbers of small claims brought annually against various government departments).

41. Reportedly, nearly one-third of private relief claims were for amounts under $1000 and arose out of accidents involving government vehicles. H.R. REP. No. 342, 67th Cong., 1st Sess. 1-2 (1921).

42. McGuire, *Tort Claims Against the United States*, 19 GEO. L.J. 133, 141 (1931). *See* S. REP. No. 1400, 79th Cong., 2d Sess. 29-34 (1946), accompanying S. 2177, discussing the limitations of the Small Tort Claims Act.

43. The purposes of the Federal Tort Claims Act were set forth by the Supreme Court in Feres v. United States, 340 U.S. 135, 140 (1950):

> Relief was often sought and sometimes granted through private bills in Congress, the number of which steadily increased as Government activity increased. The volume of these private bills, the inadequacy of a congressional machinery for determi-

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The Small Claims Act still exists, notwithstanding the enactment of the FTCA. It has been slightly modified, but only to facilitate the payment of claims. Rather than reporting to Congress for special appropriations, agencies now may pay administrative settlements out of the permanent indefinite appropriation (otherwise known as the judgment fund), which is also the source for judgments, litigation settlements, and most administrative settlements under the FTCA.[44] Far from repealing the Small Claims Act, the FTCA expressly saved the Act as to claims not cognizable under its own provisions.[45] Theoretically, then, agencies may authorize payment of up to $1000 on claims for property damage negligently caused by their employees acting within the scope of their employment whenever those claims fall within one of the FTCA's several exclusions. Arguably, FTCA-exempt claims are precisely those for which the Small Claims Act was saved.[46] On the other hand, the appropriateness of resort to the Small Claims Act for claims that are not cognizable under the FTCA (because they fail to state a cause of action under the law of the relevant state or because they succumb to certain state tort law defenses or to certain technical bars to recovery under state law) is doubtful. But as a practical matter, there are few occasions when an agency that is disposed to pay a claim essentially as a matter of good will under the Small Claims Act would find itself unable to do so under the FTCA.

### D. *The Relation of the FTCA to Other Settlement Authority*

Given the proliferation of ancillary claims statutes, meritorious and otherwise, the question of their relationship to one another and to the FTCA is of obvious importance. The FTCA itself provides guidance with respect to administrative claims statutes predating it, by expressly repealing all provisions of law in effect at the time of its enactment that authorize the adjustment of claims based on "the negligent or wrongful act or omission of an employee of the Government while acting within the scope of his office or employment

nation of facts, the importunities to which the claimant subjected members of Congress, and the capricious results led to a strong demand that claims for tort wrongs be submitted to adjudication. Congress already had waived immunity and made the Government answerable for breaches of its contracts and certain other types of claims. At last, in connection with the Reorganization Act, it waived immunity and transferred the burden of examining tort claims to the courts.

44. 31 U.S.C. §§ 1304(a)(3)(B), 3723(c) (1982).

45. Legislative Reorganization Act of 1946, ch. 753 § 424(b), 60 Stat. 812, 847. *See also* 31 U.S.C. § 3723(a)(2) (1982).

46. The Comptroller General has taken this view, at least with respect to tort claims falling within the FTCA exemption for claims arising abroad. *See infra* note 53.

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. . . in respect of claims cognizable under [the Act]."[47] Otherwise, they expressly remain in effect.[48] Thus, a claim that could have been settled administratively under prior existing law still may be settled under that law after the FTCA, provided the claim is not covered by the FTCA and the law in question is otherwise still in force.

Unfortunately, what constitutes a cognizable claim under the FTCA is ambiguous.[49] If a cognizable claim is one based on tortious acts of federal officers within the scope of their office, then arguably a tort claim falling within one of the FTCA exemptions remains cognizable under the Act, and is no longer amenable to settlement under some earlier statute. This interpretation—which the courts have given to the FTCA's explicit bar against tort actions under a particular agency's statutory authority to sue and be sued in its own name[50]—has the virtue of promoting a uniform government-wide framework for handling tort claims. Agencies may use their additional settlement authority to satisfy meritorious claims not sounding in tort, but not tort claims that happen to be exempt under the FTCA.[51]

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47. Legislative Reorganization Act of 1946, ch. 753 § 424(a), 60 Stat. 812, 846-47. The section gives a nonexhaustive enumeration of statutes so repealed, including the Small Claims Act and the Military Claims Act.

48. *Id.* § 424(b). *See* S. REP. NO. 1400, 79th Cong., 2d Sess. 30 (1946); S. REP. NO. 1196, 77th Cong., 2d Sess. 8 (1942); 26 Comp. Gen. 149 (1946).

49. Note, *The Federal Tort Claims Act*, 56 YALE L.J. 534, 550-51 (1947).

50. Legislative Reorganization Act of 1946, ch. 753 § 423, 28 U.S.C. § 2679(a) (Supp. 1983). *See* SHEPARD'S/MCGRAW HILL CIVIL ACTIONS AGAINST THE UNITED STATES, ITS AGENCIES, OFFICERS AND EMPLOYEES 343 (1982). By judicial interpretation, the limitation on use of agency "sue and be sued" authority has been construed to bar *any* action in tort against the agency, even on a claim exempt from coverage of the FTCA. *See* Peak v. Small Business Admin., 660 F.2d 375, 377-78 (8th Cir. 1981); *see also* FDIC v. Citizens Bank & Trust Co., 592 F.2d 364, 371 (7th Cir. 1979), *cert. denied*, 444 U.S. 829 (1979). In fact, legislative history of the FTCA strongly supports the view that the Act was meant to displace any "sue and be sued" clause in tort matters so as to "place torts of 'suable' agencies of the United States upon precisely the same footing as torts of 'nonsuable' agencies." H.R. REP. NO. 1287, 79th Cong., 1st Sess. 6 (1945); S. REP. NO. 1400, 79th Cong., 2d Sess. 33-34 (1946).

This wider interpretation of the exclusion was made explicit in the drafting of the Postal Service's "sue and be sued" clause in the Postal Reorganization Act of 1970, 39 U.S.C. §§ 401(a), 409(c) (1980). *See* Insurance Co. of North America v. United States Postal Service, 675 F.2d 756 (5th Cir. 1982) (in actions under "sue and be sued" provision sounding in tort, FTCA restrictions still apply); *see also* Sportique Fashions, Inc. v. Sullivan, 597 F.2d 664 (9th Cir. 1979) ("sue and be sued" clause does not repeal express FTCA exemption).

51. An attorney in the United States Postal Service Law Department reads the term cognizable just this way for purposes of limiting his use of the Service's meritorious claims statute. By considering any claim involving fault and scope as a cognizable claim, he has reduced the reach of that statute. It is some measure of the ambiguity of the term that the Assistant General Counsel of the Law Department is inclined to read the term cognizable

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On the other hand, a cognizable claim may be defined more narrowly as a tort claim arising out of acts within the scope of office and also not falling within any of the FTCA exemptions. Commentators commonly describe an exempt tort claim as simply not cognizable under the FTCA. The language of the FTCA's repealer clause—terminating agency settlement authority over torts committed by a federal employee acting within the scope of his office "in respect of claims cognizable under [the FTCA]"[52]—strongly implies that there are some tort claims, presumably the exempted ones, that are not cognizable under the FTCA.

Ultimately, the issue should not be decided in terms of plain meaning, because there is none. Policy considerations, however, strongly favor the second view. Congress enacted the FTCA chiefly in order to broaden the government's accountability in tort, not to force its response to tort claims into a single standardized mold. It would therefore be incorrect to deprive agencies of their preexisting settlement authority over tort claims that Congress chose to exempt from its general waiver of immunity in 1946. FTCA exemptions generally seek to avoid dangerous intervention by the courts, not action by agencies to remedy their own wrongs. Leaving pre-FTCA administrative settlement authority intact would preserve the liberalizing purposes of those earlier statutes, without ignoring the litigation-oriented concerns that form the FTCA's own exemptions.[53]

Much the same reasoning applies to the interpretation of post-1946 claims legislation. Obviously, the meaning of any such claims statute depends primarily on its own language. Some enactments—the NASA,[54] Peace Corps,[55] and Nuclear Regulatory Commission

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more narrowly to require not only fault and scope, but also the nonapplicability of any FTCA exemption. In view of the Postal Service's scant use of its meritorious claims statute under either version, the disagreement is of more theoretical than practical interest.

52. *See supra* note 47.

53. The leading authority on the FTCA, without directly addressing the problem, appears to conclude that exempt claims should not be considered cognizable under the FTCA for these purposes. 1 L. JAYSON *supra* note 20, at 2-75. The Comptroller General has ruled to the same effect, at least so far as the foreign claims exemption is concerned. Op. Comp. Gen. No. B-123479-OM (June 21, 1955) (Small Claims Act remains in effect for claims arising in a foreign country); Op. Comp. Gen. No. B-120773 (Mar. 22, 1955) (same).

My narrow interpretation of cognizability under the FTCA is easily squared with the broad interpretation given to the exclusion of tort suits under agencies' "sue and be sued" clauses. *See supra* note 50. Those clauses were the predicate for judicial determination of tort claims; the statutes discussed here mostly entail administrative settlement by the agencies themselves.

54. 42 U.S.C. § 2473(c)(13) (Supp. 1983), 72 Stat. 426 (1958).

55. 22 U.S.C. § 2509(b) (1979), 75 Stat. 612 (1961).

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statutes[56]—make no reference at all to the FTCA. In applying them, the agencies should not consider themselves bound by the FTCA exemptions, although they might allow certain policy considerations underlying the exemptions to influence the exercise of their own statutory settlement authority.[57] On the other hand, where a subsequent statute refers to the FTCA, the situation is more problematic. For the reasons advanced earlier, however, a statute allowing an agency to settle claims not cognizable under the FTCA[58] should not, without more, be read to disallow the settlement of tort claims exempt under the FTCA.

Some post-1946 claims statutes strike a still different pose in relation to the FTCA. The State Department[59] and Veterans Administration,[60] for example, are now authorized to settle tort claims arising abroad in conformity with the provisions of the FTCA. When it conferred that authority, Congress clearly meant only to allow the named agencies to disregard the FTCA foreign claims exemption;[61] their statutes do not entitle them to disregard any or all of the other exemptions. Even here, however, Congress could have made its purpose clearer.

In enacting legislation that enlarges an agency's authority to satisfy claims for loss or injury, Congress should precisely define the parameters of the new authority, particularly as it relates to the agency's existing FTCA authority. The viability and meaning of pre-1946 settlement statutes have been clouded by their own vagueness and the ambiguity of the FTCA's saving and repealer clauses. Now that each agency has a reasonably well-defined baseline settlement authority under the FTCA, Congress has every reason to use the utmost precision whenever extending it. A successful example of exact drafting in this connection is the Swine Flu Immunization

56. 42 U.S.C. § 2207 (1973), 68 Stat. 952 (1954).

57. Thus, the easy availability of postal insurance—said to explain in part the FTCA's exemption for loss of postal matter—has led the Postal Service to deny claims for loss of simple postal matter under its own claims statute as well.

58. Examples include the Job Corps statute, 29 U.S.C. §§ 1501-1781 (1982), and the State Department statute governing claims by foreign nationals, 22 U.S.C. § 2669(b) (1983), as well possibly as the Military, 10 U.S.C. § 2733 (1982), and Foreign Claims Acts, 10 U.S.C. § 2734 (1982), comprehensively revised in 1956. The meritorious claims statute of the Postal Service, however, may present a different picture 39 U.S.C. § 2603 (1983). While it speaks only of claims not cognizable under the FTCA, another statute directs the Service to apply the provisions of the FTCA to all tort claims presented to it *Id.* § 409(c). This may rule out payment of an FTCA-exempt claim.

59. 22 U.S.C. § 2669(f) (1979), 82 Stat. 1305 (1968).

60. 38 U.S.C. § 236 (1979), 79 Stat. 1110 (1965).

61. 28 U.S.C. § 2680(k) (1965).

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Act of 1976.[62] There Congress clearly expressed its intent to enlarge the bases of recovery under the FTCA by including strict liability and breach of warranty,[63] imputing vicarious liability for the acts of drug manufacturers and distributors as well as federal employees,[64] and waiving the discretionary function exemption and that exemption alone.[65]

Most discussions of the FTCA's impact upon alternative agency claim statutes conceal the underlying question of the FTCA's own reach. In fact, both claims officers and claimants need to know as a threshold inquiry whether the FTCA applies to the claim before them. In enacting the FTCA Congress acknowledged that for some claims "adequate remedies are already available."[66] Such is the rationale for a fair number of existing FTCA exemptions: claims arising out of the assessment or collection of a tax or customs duty,[67] administration of the Trading with the Enemy Act,[68] activities of the Tennessee Valley Authority[69] and the Panama Canal Company,[70] and claims cognizable under the admiralty statutes.[71] In such cases, the categorical inapplicability of the FTCA dispels any problem of competition among remedies. The same result should obtain with respect to statutes outside the FTCA that by their own terms purport to be the exclusive remedy for a designated category of claims.[72] The courts have inferred from the availability of alternative remedies still other exclusions from the FTCA[73]—notably claims for personal injury or death or property damage of servicemen incurred as an incident to service,[74] and prisoner claims for

62. 42 U.S.C. §§ 247b(j)-(l) (1976).

63. *Id.* at § 247b(k)(2)(A)(i).

64. *Id.* at §§ 247b(k)(3), (5)(A). *But cf.* § (k)(7) (U.S. has right of indemnity for damages and litigation costs resulting from breach of contract or from "any negligent conduct on the part of any program participant in carrying out any obligation or responsibility in connection with the swine flu program").

65. *Id.* at § 247b(k)(5)(C).

66. S. REP. No. 1400, 79th Cong., 2d Sess. 33 (1946).

67. 28 U.S.C. § 2680(c) (1965).

68. *Id.* § 2680(e).

69. *Id.* § 2680(l).

70. *Id.* § 2680(m).

71. *Id.* § 2680(d).

72. *See supra* note 29.

73. If Congress agrees, it should add these exclusions specifically to the FTCA's exemption section.

74. *See, e.g.*, Feres v. United States, 340 U.S. 135 (1950); Preferred Ins. Co. v. United States, 222 F.2d 942 (9th Cir.), *cert. denied*, 350 U.S. 837 (1955) (both denying right of action against government under Federal Tort Claims Act for physical injury or property damage incident to military service).

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which a fair, reasonable and comprehensive remedy exists[75]—but far more often than not they decline to do so.[76]

Claimants often have recourse to the FTCA, notwithstanding the fact that their claims may be compensable, for example, under the Court of Claims Act,[77] the Military Claims Act,[78] certain servicemen's[79] or veterans' benefits laws,[80] or the meritorious claims provision of the Atomic Energy Act.[81] These are only the few enactments whose impact on the FTCA actually has been an issue in litigation. Claimants are also not required to elect remedies.[82] Apart from the FTCA's administrative claim procedure, the law does not even require the exhaustion of other administrative remedies before filing suit.[83] This is consistent with the FTCA's policy of providing simple and direct means of access to the federal courts.[84] Moreover, the pendency of parallel remedies does not bar the FTCA claim.[85] In fact, claimants' counsel have been specifically cautioned, in order to avoid expiration of the statute of limitations on any potentially applicable remedy, to pursue all possible claims at once.[86] Finally, agency findings are not binding in a re-

75. United States v. Demko, 385 U.S. 149 (1966) (availability of remedial relief under 18 U.S.C. § 4126 (1934), a prison compensation law, bars suit under FTCA).

76. *See, e.g.*, United States v. Muniz, 374 U.S. 150 (1963) (no exclusion of prisoner claims); United States v. Brown, 348 U.S. 110 (1954) (no exclusion of veterans' claims); Brooks v. United States, 337 U.S. 49 (1949) (no exclusion of non-service-connected injuries of servicemen).

77. *E.g.*, Aleutco Corp. v. United States, 244 F.2d 674, 678-79 (3d Cir. 1957).

78. *E.g.*, United States v. Gaidys, 194 F.2d 762, 763-64 (10th Cir. 1952); United States v. Wade, 170 F.2d 298, 301 (1st Cir. 1948); Arkwright Mut. Ins. Co. v. Bargain City, U.S.A., Inc., 251 F. Supp. 221, 227-28 (E.D. Pa. 1966).

79. *E.g.*, Brooks v. United States, 337 U.S. 49, 53 (1949).

80. *E.g.*, United States v. Brown, 348 U.S. 110, 113 (1954).

81. *E.g.*, Bulloch v. United States, 133 F. Supp. 885, 893 (D. Utah 1955). The question of FTCA preclusion was not raised by the parties, but by the court sua sponte.

82. *Arkwright Mut. Ins. Co.*, 251 F. Supp. at 227. *See also* United States v. Huff, 165 F.2d 720, 725-26 (5th Cir. 1948) (31 U.S.C. § 273b remedy neither conclusive nor required); Bird & Sons, Inc. v. United States, 420 F.2d 1051, 1057 (Ct. Cl. 1970) ("Foreign Claims Act provides an *ex gratia* remedy which does not preclude later relief."). The result is different if acceptance of payment is deemed by statute to be in full and final satisfaction of the claim or a release is actually entered into.

83. Beins v. United States, 695 F.2d 591, 597 (D.C. Cir. 1982).

84. 2 L. JAYSON, HANDLING FEDERAL TORT CLAIMS 11-18 (1984).

85. 1 L. JAYSON, *supra* note 20, at 5-255.

86. *Id.* at 5-258. The FTCA statute of limitations is unaffected by the filing of any other claim or suit. *E.g.*, *Beins*, 695 F.2d at 599 (appeals under Federal Aviation Act); Mendiola v. United States, 401 F.2d 695, 697 (5th Cir. 1968) (state workmen's compensation); Winston Bros. Co. v. United States, 371 F. Supp. 130, 134-35 (D. Minn. 1973) (contract claim in Court of Claims); Dancy v. United States, 668 F.2d 1224, 1228 (Ct. Cl. 1982) (appeal of separation from service before Merit Systems Protection Board).

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lated FTCA proceeding,[87] although any recovery under the Act is reduced by a prior award for the same loss.[88]

The question whether Congress or the courts, as a policy matter, should oust the FTCA remedy where a narrower statutory remedy exists has no single answer. Both ousting and not ousting have their inconveniences. In any event, individual claims officers should make it a practice of apprising claimants of other available remedies and where permissible administer them.[89] Unfortunately, this suggestion presupposes a familiarity with an agency's overall inventory of claims authority that any given tort claims officer may or may not possess. Interests are best served when all agency channels for satisfaction of a monetary claim are explored in the most expeditious and practical way possible. And since claims officers situated within the legal department of the agency out of whose activities such claims arise can best accomplish this, those officers should become familiar with the full range of channels and explore them as the circumstances logically suggest.[90] The notion that one administrative remedy necessarily excludes all others, or must be exhausted before any other is entertained, tends to interfere with flexibility of this sort. The situation is different where Congress establishes a comprehensive framework for administrative relief. An exclusive remedy designed to take advantage of agency expertise and to promote uniform and orderly disposition of claims must be respected. But, as a general rule, limitations on access to the FTCA should not be easily inferred.

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87. Joseph v. United States, 505 F.2d 525, 527 (7th Cir. 1974) (Veterans Administration findings not *res judicata* in later FTCA action). *Accord* Bryson v. United States, 463 F. Supp. 908, 910 (E.D. Pa. 1978) (Military Claims Act).

88. United States v. Brown, 348 U.S. 110, 113 (1954); *accord* Brooks v. United States, 337 U.S. 49, 53-54 (1949). When the claimant executes a release of the United States either voluntarily or implicitly by statute, no FTCA recovery is available. 2 L. JAYSON *supra* note 84, at 11-18 n.20.

89. *See, e.g.*, 32 C.F.R. § 536.6(h)(1) (1984) ("Prior to the disapproval of a claim under a particular statute, a careful review should be made to insure that the claim is not properly payable under a different statute or on another basis."). In addition, when it comes to notifying the claimant of his or her appeal rights, the Army suggests calling attention to all the alternatives. *Id.* § 563.11(e). The Army Claims Service provides its officers with a list of all military and non-military authority to pay claimants. Dep't of Army Reg. No. 27-20, Legal Services: Claims, *supra* note 6, § 13.11e.

90. A claims officer should be careful that the statutes of limitations on some remedies do not expire while other remedies are explored.

"Each agency General Counsel's office should compile and publish in the CFR a list briefly describing statutes under which the agency is authorized to entertain monetary claims and the name and telephone number of the agency personnel in charge of each program. In appropriate circumstances, claims officers should make a copy of the list available to claimants." ACUS Recommendations, 1 C.F.R. § 305.84-7(A)(1)(b) (1984).

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## II. THE STATUTORY FRAMEWORK

The notion of administrative settlement of tort claims substantially predates the enactment of the Federal Tort Claims Act in 1946.[91] Through the haphazard collection of statutes alluded to earlier, Congress had authorized certain agencies to settle and sometimes pay particular types of claims. The Small Claims Act of 1922 gave severely limited settlement authority to all agencies.[92] In fact, the earlier federal tort claims bills of the 1920's and 1930's contemplated a predominantly administrative model for implementing the general tort liability that Congress by then was prepared to have the federal government bear.[93]

The bills that eventually produced the FTCA took a different approach, adopting a judicial model for the disposition of tort claims. They vested basic decisional authority in the federal courts, empowering the agencies only to dispose of judicially cognizable tort claims within the strictest monetary limits.[94] This litigation-oriented model was the eventual shape of the FTCA.

The FTCA, as enacted, permitted the United States to be sued, with no amount limitation, for the negligent or wrongful acts of its employees who were acting within the scope of their employment. It authorized the Attorney General to compromise and settle such suits. Heads of federal agencies could administratively settle only claims not exceeding $1000,[95] a figure later raised to $2500 to allow for inflation.[96] More importantly, the Act made the decision to submit an administrative claim entirely optional, and even allowed the

91. *See supra* note 26.

92. *See supra* notes 39-46 and accompanying text.

93. *See* Gottlieb, *supra* note 39, at 2. One proposal provided that the General Accounting Office, the Employees' Compensation Commission and the agencies share responsibility for handling tort claims. Recourse to the Court of Claims was limited to property damage claims and was available on a review not a de novo basis. H.R. 9285, 70th Cong., 1st Sess. (1927). For greater detail on this and similar bills, see Borchard, *The Federal Tort Claims Bill*, 1 U. CHI. L. REV. 1 (1933).

94. *See* Gottlieb, *supra* note 39, at 3.

95. Legislative Reorganization Act of 1946, ch. 753 § 403(a). The $1000 figure referred to the amount of the claim, not to the size of any proposed settlement. The claimant's acceptance of an administrative settlement constituted a complete release of both the United States and the employee. *Id.* § 403(d).

96. Act of Sept. 8, 1959, Pub. L. No. 86-238, § 2, 73 Stat. 471, 472 (codified at 28 U.S.C. § 2672 (1983)). The Senate Report urged increasing the limit to $3000 while recognizing that most claims were in excess even of that amount. S. REP. NO. 797, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. CODE CONG. & AD. NEWS 2272, 2273. The House Committee on the Judiciary thought $2000 adequate. *Id.* The figure of $2500 was a compromise. *See generally* Williams, *The $2,500 Limitation on Administrative Settlements Under the Federal Tort Claims Act*, 1960 INS. L.J. 669, 673 (1960).

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claimant, on fifteen days' written notice, to withdraw the claim from agency consideration and bring suit.[97] The sole effect of filing an administrative claim was to create a ceiling on the sum that could be sought in court—a restriction that only discouraged prudent claimants from turning to the agency first. The easy access to court shows that the FTCA's architects contemplated a modest role for administrative settlement.

Agency settlement authority under the FTCA was expanded greatly in 1966, one of the few times the statute has been altered in a basic way. The 1966 reform gave agency heads settlement authority without regard to amount[98] and made submission of claims to the agencies an absolute prerequisite to suit.[99] The previous $2500 ceiling had made administrative settlement all but impossible except in modest property damage claims and exceptionally small personal injury claims; for larger claims, claimants had no choice but to bring suit, with the later possibility of negotiated settlement. The decision to require agency submission before filing suit was based on evidence that claimants bypassed the agencies when the administrative settlement process was optional.[100] Under the amended FTCA, claims initially brought to court, rather than to the responsible

97. A claim rejected by the agency or withdrawn from its consideration, could still be sued upon within the two-year limitations period. If the two-year period expired before an administrative decision, a six-month filing extension became available, starting from the date the agency mailed the denial or from the date the claim was withdrawn from the agency, as appropriate. Legislative Reorganization Act of 1946, ch. 753 § 420. *See* Williams, *supra* note 96, at 670-71.

98. Settlements in excess of $25,000, however, must receive prior written approval from the Attorney General or his designee. Act of July 18, 1966, Pub. L. No. 89-506 §§ 1(a), 9(a), 80 Stat. 306 (1966) (amending 28 U.S.C. § 2672).

99. *Id.* § 2 (amending 28 U.S.C. § 2675(a)). Note that the 1966 amendments only govern claims accruing on or after January 18, 1967.

Considerations of judicial economy create the only exception to the agency submission requirement—assertion of tort claims by way of third party complaint, cross-claim or counterclaim. *Id.* But the courts have limited the counterclaim exception to compulsory counterclaims, Northridge Bank v. Community Eye Care Center, Inc., 665 F.2d 832, 836 (7th Cir. 1981); United States v. Chatham, 415 F. Supp. 1214, 1216 (N.D. Ga. 1976), and the third party claim exception to claims by the principal defendant. Rosario v. American Export-Isbrandtsen Lines, Inc., 531 F.2d 1227 (3d Cir.), *cert. denied*, 429 U.S. 857 (1976).

The constitutionality of the prior claim requirement was upheld in Montalvo v. Graham, 390 F. Supp. 533, 534 (E.D. Wis. 1975). A few state courts have invalidated notice of claim requirements in state tort claims legislation as violative of equal protection or lacking a rational relation to a valid public purpose. *See generally* Note, *Notice of Claim Provisions: An Equal Protection Perspective*, 60 CORNELL L. REV. 417 (1975).

100. *Hearings on Improvement of Procedures in Claims Settlement and Government Litigation Before Subcomm. No. 2 of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. 12-14 (1966) (statement of John W. Douglas, Assistant Attorney General) [hereinafter cited as *Hearings*].

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agency, should be dismissed as premature.[101]

Congress clearly intended by the 1966 amendments to encourage and facilitate administrative disposition of tort claims. Thus, if the original Act was designed to ease the burdens on Congress by shifting primary responsibility for government tort claims to the courts,[102] the 1966 amendments sought in turn to transfer the burden to the agencies. Legislative history also suggests that the benefits of avoiding unnecessary litigation were expected to flow to claimants, the Department of Justice, and the agencies alike.[103]

The 1966 changes required an adjustment in the statute of limitations. Under the original Act, claims had to be brought to court within one year of accrual. If a claimant chose first to present a claim to the agency, that also had to be done within one year, but a new statute of limitations on suit began with the mailing of the denial or withdrawal of the claim and ran for six months or until the end of the original one-year limit, whichever was longer.[104] The 1966 amendments applied the basic statute of limitations, which by then had been extended to two years,[105] to the mandatory administrative claim, and attached a further six-month limitation on suit to run from the agency's mailing of a written notice of final denial of the claim.[106] As before, failure to meet the FTCA's time limits eliminated federal jurisdiction over the matter.[107]

To help enforce the jurisdictional prerequisite, Congress retained the provision requiring agency action before an administra-

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101. Blain v. United States, 552 F.2d 289, 291 (9th Cir. 1977); Cummins v. Ciccone, 317 F. Supp. 342, 343 (W.D. Mo. 1970). Moreover, the premature filing of a complaint does not toll the statute of limitations on filing an administrative claim. *E.g.*, Morano v. United States Naval Hosp., 437 F.2d 1009, 1011 (3d Cir. 1971); Gutelius v. United States, 312 F. Supp. 51, 53 (E.D. Va. 1970).

102. United States v. Yellow Cab Co., 340 U.S. 543, 549 (1951) (the FTCA "merely substitutes the District Courts for Congress as the agency to determine the validity and amount of the claims"); Feres v. United States, 340 U.S. 135, 140 (1950) (the Act "waived immunity and transferred the burden of examining tort claims to the courts").

103. S. REP. NO. 1327, 89th Cong., 2d Sess. 2-5 (1966), *quoting from* H.R. REP. NO. 1532, 89th Cong., 2d Sess. 6-10, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2515-20; *Hearings, supra* note 100, at 12-15 (Statement of John W. Douglas, Assistant Attorney General).

104. *See supra* note 97.

105. Act of Apr. 25, 1949, ch. 92, § 1, 63 Stat. 62 (1949) (amending 28 U.S.C. § 2401(b)). The extension was meant to bring the limitations period into conformity with analogous state statutes. H.R. REP. NO. 276, 81st Cong., 1st Sess. 2, *reprinted in* 1949 U.S. CODE CONG. & AD. NEWS 1226, 1227.

106. Act of July 18, 1966, § 7 (1966) (amending 28 U.S.C. § 2401(b)).

107. *Id. E.g.*, Stewart v. United States, 655 F.2d 741, 742 (7th Cir. 1981); Best Bearings Co. v. United States, 463 F.2d 1177, 1179 (7th Cir. 1972) (the requirement, being jurisdictional, is not waivable).

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tive claim could be sued upon,[108] and dropped the provision enabling a claimant to withdraw a pending claim from agency consideration and sue.[109] Congress also addressed the case of failure by an agency to dispose of a claim within six months. If that occurs, a claimant may either treat the inaction as a final denial and proceed to litigation, or allow the agency to consider the claim further, without giving up the right to sue any time thereafter.[110]

The amendment package contained additional provisions designed to facilitate tort claim settlements. It eliminated the original requirement of court approval of litigation settlements by the Attorney General,[111] and more importantly increased the allowable attorneys' fees. The amendments raised the statutory ceiling on fees from ten percent to twenty percent of the amount recovered in agency settlements, and from twenty percent to twenty-five percent of judgments and litigation settlements.[112] These increases not only resulted in fees more commensurate with those in private tort litigation,[113] but also narrowed the difference between fees recovered in agency settlements compared to litigation. Because of the much

108. 28 U.S.C. § 2675(a) (1982). The bar to suit during this period has been consistently enforced. *E.g.*, Gregory v. Mitchell, 634 F.2d 199, 204 (5th Cir. 1981); Caton v. United States, 495 F.2d 635, 638 (9th Cir. 1974); Insurance Co. of N. Am. v. United States, 561 F. Supp. 106, 117-18 (E.D. Pa. 1983); Nixon v. NLRB, 559 F. Supp. 1265, 1268 (W.D. Mo. 1983); Cooper v. United States, 498 F. Supp. 116, 118-19 (W.D.N.Y. 1980); Walley v. United States, 366 F. Supp. 268, 269 (E.D. Pa. 1973).

109. Act of July 18, 1966, § 3.

110. 28 U.S.C. § 2675 (a) (1982). *See* Mack v. USPS, 414 F. Supp. 504, 507-08 (E.D. Mich. 1976); Corboy, *Shielding the Plaintiff's Achilles' Heel: Tort Claim Notices to Governmental Entities*, 28 DE PAUL L. REV. 609, 638 (1979); Silverman, *The Ins and Outs of Filing a Claim Under the Federal Tort Claims Act*, 45 J. AIR L. & COM. 41, 42 (1980).

A final denial, even if issued beyond the six-month period allotted the agency, presumably triggers a fixed six-month limitations period on suit. *See* Silverman, *supra*.

111. Act of July 18, 1966, Pub. L. No. 89-506 § 3, 80 Stat. 306, 307 (amending 28 U.S.C. § 2677). Justice Department determinations to settle were evidently rarely overruled. S. REP. NO. 1327, *supra* note 103, at 8, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2520; Jayson, *Federal Tort Claims Act Amendments: Trial Counsel Warns Problems Ahead*, 2 TRIAL 19 (1966).

112. Act of July 18, 1966, Pub. L. No. 89-506, § 4, 80 Stat. 306, 307 (amending 28 U.S.C. § 2678). The increase had a dual purpose: to help afford claimants competent representation and to provide their attorneys reasonable compensation. The percentages stated merely place a limit on the allowable amount. The actual fee is determined between the litigant and attorney; agency or court approval of the agreed amount is no longer required. S. REP. NO. 1327, *supra* note 103, at 6, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2520. A remaining question pertains to the allowable fee in cases of no recovery. *See infra* notes 693-95 and accompanying text.

113. S. REP. NO. 1327, *supra* note 103, at 6, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2520.

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greater time and effort generally required in litigation, the change gave attorneys an obvious incentive to settle before suit.

No less important in encouraging agency settlements was the change in the source of payment for tort claim settlements. The FTCA originally provided that administrative settlements be paid out of agency appropriations.[114] Under the amended act, agency-level settlements not exceeding $2500 continue to be so paid,[115] but larger agency settlements, as well as all litigation settlements, come out of the judgment fund.[116] The combination of independent settlement authority (subject to Attorney General approval only for settlements above $25,000) and a very limited exposure of agency appropriations for the payment of settlements clearly was calculated to strengthen agency disposition to settle.[117]

Finally, the amendments provided that the agencies' new and largely independent settlement authority should be exercised "in accordance with regulations prescribed by the Attorney General."[118] A concern that the government would not have legal representation during all settlement proceedings prompted this provision for substantive legal guidance on the part of the Attorney General.[119] In fact, the regulations promulgated provide little such guidance. Instead, they direct the agencies to submit proposed settlements greater than $5000 for review by a legal officer.[120] A second concern was that agency settlement policies and procedures might vary widely. However, the Justice Department has not used its rulemaking authority under the amended FTCA to provide the agencies with guidance on substantive issues, but rather has confined itself to

114. Legislative Reorganization Act of 1946, ch. 753, § 403(c), 60 Stat. 812, 843. Since litigation settlements were also paid out of agency appropriations, the agencies in effect paid all but actual judgments.

115. Act of July 18, 1966, Pub. L. No. 89-506 § 1(c), 80 Stat. 306 (amending 28 U.S.C. § 2672). However, the $2500 cutoff now refers to the size of the settlement rather than the amount of the claim. *Id.*

116. *Id. See also* 31 U.S.C. § 1304(a) (1983).

117. A possible repercussion of this fiscal irresponsibility is the heightened potential for collusion between the agency and claimant. Neither Congress nor the General Accounting Office has explored whether this potential has been exploited.

118. Act of July 18, 1966, Pub. L. No. 89-506 §§ 1, 9(a), 80 Stat. 306, 308 (amending 28 U.S.C. § 2672).

119. *Hearings, supra* note 100, at 17.

120. 28 C.F.R. § 14.5 (1984). Another regulation provides for prior consultation with the Justice Department even with respect to settlements not in excess of $25,000, where some other named element is present. These include a novel legal issue or policy question, a potential government claim for indemnity or contribution from a third party, the pendency of a related claim against the United States on which the amount to be paid might exceed $25,000, and the pendency of any litigation arising out of the same incident. *Id.* § 14.6(b), (c).

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procedural matters.[121]

Even before the vast new settlement opportunities created by the 1966 amendments, the agencies played a crucial role in the investigation and initial evaluation of claims. They prepared detailed litigation reports on both the factual and legal dimensions of a claim, and consulted with the Justice Department on substantive aspects of the litigation and on the advisability of settlement at every stage.[122] Nevertheless, the amendments brought the agencies new autonomy in claims evaluation, prompting some critics seriously to question whether agency legal staffs were equipped to handle their new responsibilities.[123] The amendments brought a similarly dramatic change for claimants and private practitioners handling federal tort claims. A claims officer attached to the agency, often far from the events, now supplanted the local Assistant U.S. Attorney as their primary negotiating partner.

The FTCA administrative claims process betrays in many ways its origins as a fundamentally judicial remedy in tort. The general consensus is that agencies have no broader substantive authority under the FTCA to issue an award than Congress conferred on the courts.[124] Although a decent argument could be made that agencies may administratively settle claims falling within an FTCA exemption,[125] Congress almost certainly did not intend that the agencies

121. *Cf.* Jacoby, *The 89th Congress and Government Litigation*, 67 COLUM. L. REV. 1212, 1214 (1967).

122. S. REP. NO. 1327, *supra* note 103, at 5, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2519. Agencies also prepare routine accident reports in the event of known mishaps.

123. I. GOTTLIEB, A NEW APPROACH TO THE HANDLING OF TORT CLAIMS AGAINST THE SOVEREIGN 28-29 (1967).

124. As a practical matter, agency claims officers uniformly view their settlement authority as no broader than the government's exposure to legal liability. Williams, *supra* note 96, at 672. Except to acknowledge that even doubtful claims legitimately command a certain, albeit reduced, settlement value, they disavow any authority to settle a claim that is truly exempt, time-barred or otherwise infirm under the FTCA.

125. The argument is best made by reference to the discretionary function exemption. The legislative history of that provision suggests an intent to keep the courts from second-guessing the agencies on matters of policy or judgment. Gottlieb, *supra* note 39, at 44. But that concern recedes when an agency chooses of its own accord to compensate a tort victim. The same may be said of the so-called intentional torts exemption, whose purpose is to spare the government from having to defend against such categories of claims in litigation or having to bear the large and speculative judgments that a court might render. *See* Note, *supra* note 49, at 547.

A parallel argument may be made with respect to the statute of limitations. Clearly, no claim may be sued upon unless first presented to the agency within two years of accrual. 28 U.S.C. § 2401 (b) (Supp. 1983). But the government, like a private party, might conceivably want to pay a claim that, though no longer timely for purposes of suit, remains just and meritorious.

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do so. It meant to enable agencies to entertain and pay litigable claims without awaiting litigation. By the same token, Congress did not apparently design for these purposes any particular administrative process. Nevertheless, agency handling of tort claims has taken on a substantial life of its own. It has become one of the conventional responsibilities of an agency's office of general counsel, as well as a highly standardized operation, especially in agencies with a high claims volume. In both its conduct and its results, the administrative claims process has proven to be, as the Torts Branch Director within the Justice Department's Civil Division has remarked, "more than a perfunctory exercise that serves merely as the necessary springboard for a judicial claim."[126]

Although the 1966 amendments have been credited with success in shifting disposition of government tort claims from court to agency,[127] any precise assessment of the gains is difficult to make. A proper evaluation requires a clear sense of the drafters' purposes and expectations. Statistics provided by the Justice Department at the 1966 hearings suggested that roughly eighty percent of all meritorious FTCA claims in litigation were settled prior to trial.[128] The Department did not offer statistics on the incidence of prelitigation settlements, but considering the then $2500 ceiling on agency settlement authority, it is likely that all substantial settlements were reached only after suit had been filed.[129] In recommending passage of the 1966 amendments, the Department clearly anticipated that many settlements reached after litigation began might be settled sooner.[130] The availability of administrative settlement was expected to rid congested court dockets of many claims that, in the

126. Axelrad, *Litigation Under the Federal Tort Claims Act*, 8 LITIGATION 22, 24 (Fall 1981).

127. *Id.* at 24, 55.

128. S. REP. NO. 1327, *supra* note 103, at 3, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2516. *Accord* Laughlin, *Federal Tort Claims Act Amendments: A New Charter for Injured Citizens*, 2 TRIAL 18 (1966).

129. However, in some agencies the volume and settlement rate of claims amenable to administrative settlement were impressive. In 1965, the Post Office processed over 5000 claims ranging from $100 to $2500, and allowed 3800 of them. Field officers allowed an additional 5200 claims of less than $100. S. REP. NO. 1327, *supra* note 103, at 5, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2519.

130. The stated prediction was not undisputed. One insider, writing just after passage of the amendments, described the expected shift to agency-level settlement as "the most fallacious of all sorcery since the volume of claims which will descend upon the agencies and their limited staffs will make effective settlement a literal or practical impossibility." I. GOTTLIEB, *supra* note 123, at 29. Nevertheless, the Justice Department cited statistics showing that only 40% private tort claimants filed suit for personal injury in New York City. S. REP. NO. 1327, *supra* note 103, at 3, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2516-17.

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private tort claim sector, would not have proceeded that far. The Department's immediate purpose may have been to husband its litigation resources,[131] but the advantages to deserving claimants in time and money saved are no less compelling. The benefits are not to be measured only in terms of expedited settlement. An adequate agency claims process may also effectively demonstrate either the weakness of a claimant's case or the strength of the government's defense, thus preventing futile litigation.[132] The availability of agency-level settlement may also encourage the filing of additional meritorious claims which would not be pressed if litigation were the only avenue. Still, despite the enthusiasm over administrative settlement, neither the Justice Department nor Congress anticipated that a substantial majority of claims could ever be disposed of without litigation.[133]

To what extent have expectations been met? Currently, the tort claim filing and settlement figures necessary to justify a precise appraisal are simply not maintained. The agencies should develop more complete and refined statistics than are now available.[134] For any given fiscal year, each agency should be able to tell the volume and dollar value of administrative tort claims filed, broken down by type of claim and by the agency program or activity involved. They should know the percentage, both in numbers and dollar values, of claims that were eventually settled, denied or abandoned. Apparently no agency has this kind of information on its own claims operations; nor is it information that the Justice Department or the General Accounting Office can develop on a government-wide basis if the agencies do not furnish them with the underlying data. Without this information—which would also have important risk-management value to the bodies that generate it[135]—the agencies cannot

131. The Justice Department thought its resources in the tort area might better be devoted to cases involving difficult legal or technical questions in such areas as medical malpractice, products liability and aviation accidents. S. REP. NO. 1327, *supra* note 103, at 6, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2520. Of course, the Department fully expected to perform important advisory services to the agencies as they assumed their more substantial claims evaluation functions. Laughlin, *supra* note 128, at 38.

132. *Hearings*, *supra* note 100, at 15 (Statement of John W. Douglas, Assistant Attorney General).

133. One reason for this prediction was that very large personal injury claims, involving difficult questions of fact and dubious assertions of damages, could not realistically be settled without use of the discovery devices provided by the Federal Rules of Civil Procedure. Laughlin, *supra* note 128, at 38. Also, some claimants will simply demand their day in court even if they have an agency offer in hand, whether in hopes of a more generous judgment or litigation settlement, or out of a litigious spirit.

134. *See also infra* notes 610-23 and accompanying text.

135. *See infra* note 616 and accompanying text.

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know the efficacy of their claims processes. It would also be helpful for agencies to correlate administrative with judicial outcomes for any given body of claims. Data should be collected to show the percentage of administrative claims denied or deemed denied that went on to litigation and of those the percentage that ended in compromise settlement or judgment. The inferences to be drawn from the resulting correlations may not be obvious or unambiguous, but without correlations, no inferences can be drawn at all.

Even agencies with the best documentation now maintain data that are segregated by fiscal year or other fixed time period.[136] Unfortunately, fiscal year data do not detail the disposition of a single set of original claims; they instead reflect action taken on claims filed during the previous four or five fiscal years, while ignoring claims not acted on in the fiscal year in question. The difference is between a static and a dynamic picture of tort claims events. Since all agencies have somewhat erratic yearly claim patterns, distortions inevitably result.

Keeping in mind the relatively unscientific character of the claims data available, consider one example. The Air Force in fiscal year 1982 received 1,727 administrative filings under the FTCA, totalling $741,319,922 in claims.[137] In the same period it settled 1,143 claims, totalling $17,544,161.[138] Because the claims it settled in fiscal year 1982 were not all filed that year, and because not all claims filed in fiscal year 1982 could possibly have been settled that year, a fiscal year 1982 Air Force settlement rate cannot sensibly be determined. Assuming it could, the figures would be impressive: sixty-six percent of the total claims filed were disposed of by payments representing a tiny fraction—barely two percent—of the amounts initially sought.[139] Compared with litigation settlements and judgments reached in fiscal year 1982, the impression is still very favorable. Payment was made on a mere eighty-nine claims at that stage, though the dollar value admittedly was very high: $13,178,587.[140] The evidence suggests that the administrative pro-

136. For example, *Central Office Annual Administrative Tort Claim Report FY 1982*, Oct. 1, 1981 - Sept. 30, 1982 (Office of General Counsel, Veterans Administration).

137. *Statistical Review, AF Claims and Tort Litigation Activity, Fiscal Year 1982*, at 7.

138. *Id.* at 3.

139. By way of additional example, the Veterans Administration settled 156 medical malpractice claims in fiscal year 1982, paying out some $6.2 million. In the same period, it received claims totalling $775 million. *See Central Office Annual Administrative Tort Claim Report FY 1982, supra* note 136; *Field Office Annual Administrative Tort Claim Report FY 1982*, Oct. 1, 1981 - Sept. 30, 1982.

140. Comparable Air Force claims data for the first six months of fiscal year 1983 reflect

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cess resolves an extremely high proportion of claims worth paying.[141] The fact that the per claim dollar value of postlitigation settlements and judgments greatly exceeds the per claim dollar value of prelitigation settlements[142] is hardly surprising, since the larger the claim the more likely claimant and government alike will view it as worth litigating. The more relevant figure is probably the number rather than the dollar value of claims. In this respect the administrative process appears to be handsomely vindicating itself.[143]

The agency-level claims process also helps expose the meritless character of many claims that are filed administratively, denied or deemed denied, and taken no further. Figures furnished by a few

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a similar pattern: Claims filed—899, totalling $445,801,800; claims paid administratively—531, totalling $4,893,101; claims paid after litigation—21, totalling $2,169,188. *Statistical Review, AF Claims and Tort Litigation Activity, March FY 1983*, at 7-10.

Similar results are found in other agencies. In calendar year 1982, the Postal Service received 9323 tort claims, while in the same period 435 FTCA lawsuits were filed arising out of Postal Service activities. That year, $7,878,444 was paid out in administrative settlement of tort claims, compared to $2,122,210 in litigation settlements (206 in number) and $873,201 in judgments (32 in number). The Postal Service successfully defended to judgment 188 tort suits. Information supplied by Paul M. Levin, Supervising Attorney, Claims Division, Law Dep't, U.S. Postal Service.

141. The figure is more impressive when one considers that constraints on litigation resources compel the Justice Department to settle a certain number of tort suits based on claims that were simply not strong enough to justify settlement at the agency level. *See infra* notes 370-71 and accompanying text.

In any event, the results compare very favorably with the New York City settlement statistics that the Justice Department cited with approval in 1966. *See supra* note 130. The Chief of the General Claims Division of the Army Claims Service guesses that of the 5000 to 6000 tort claims filed annually with the Army, only ten percent have gone to court in recent years and many fewer to an actual judgment. Interview with Joseph H. Rouse, Chief, General Claims Division, U.S. Army Claims Service, at Fort George G. Meade, Md. (Aug. 29, 1983).

142. Government-wide statistics compiled by the General Accounting Office on tort payments from the judgment fund suggest that the dollar value of postlitigation tort payments far outstrips that of prelitigation payments. Thus, for fiscal year 1983, the GAO reported administrative settlements in tort totalling $32,416,118, but litigation settlements and judgments totalling $104,423,334. The disparity would be reduced by an uncertain figure if the total government-wide value of agency-level settlements not in excess of $2500 (none of which is reported by the agencies to the GAO) was added to the administrative settlement total. (An additional $4 million was paid out of the judgment fund in fiscal year 1983 for that portion of individual agency-level settlements under the Military, Foreign and National Guard Claims Acts in excess of $25,000.) Telephone interview with Sharon Green, Chief, Claims Adjudication, Claims Group, Accounting and Financial Management Division, General Accounting Office, (Feb. 21, 1984).

143. Adding agency level-settlements not in excess of $2500 to the numbers compiled by GAO would further vindicate the administrative process. Even without them, GAO records show a government-wide total of 1114 administrative settlements under the FTCA in fiscal year 1983 (not including 40 for amounts in excess of $25,000 under the Military, Foreign and National Guard Claims Acts), compared to 997 for litigation settlements and judgments. *Id.*

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agencies suggest that such claims represent a considerable percentage of all claims filed.[144] To what extent such claims might have fruitlessly clogged the courts if not for their ventilation at the agency level, one can only guess. A good deal stands to be learned from gathering and analyzing data on what claimants do when they receive an agency-level denial.[145] Arguably, disappointed claimants who accept denial of a claim have greater confidence in the fairness and accuracy of the administrative process.

Quite apart from the utility of the administrative process in diverting tort claims from litigation,[146] the distribution of agency-level outcomes seems to vary widely with the agency. At the high end, a Department of Interior attorney supposes that seventy-five percent of all claimants achieve an agency-level settlement, which may or may not approximate the amount initially claimed.[147] The

144. For example, data gathered from each of NASA's field installations for the last three fiscal years show very little evidence of litigation in any year despite a considerable percentage of denials throughout the period. Letter from Richard J. Wieland, Assistant General Counsel for Litigation, NASA, to George A. Bermann (Aug. 8, 1983). The Chief of General Claims at the Army Claims Service supposes that disappointed claimants are on the whole as likely to accept defeat as to litigate. *See* Rouse Interview, *supra* note 141.

Yet, other agency claims attorneys insist that upwards of ninety percent of claimants receiving agency-level denials proceed to court. *See* Interview with Aleta Bodolay, Torts Branch, Civil Div., Dep't of Justice, in Washington, D.C. (May 26, 1983). The assertion is not entirely credible. Most agencies report making payments in the case of no more than sixty or seventy percent of the claims filed, at the outside. *See* Nesvet Interview, *supra* note 23. If the overwhelming majority of disappointed agency-level claimants sued, we would find a much larger ratio of FTCA lawsuits to FTCA administrative claims than we seem to have. No accurate ratio can be posited given the absence of reliable filing figures on an agency-by-agency basis. However, informal estimates both in the literature and in the author's conversations would put the ratio at no more than one to ten and more likely at one to fifteen or twenty. *See* Interview with Jeffrey Axelrad, Director, Torts Branch, Civil Div., Dep't of Justice, in Washington, D.C. (May 18, 1983).

In 1977, the leading authority on the FTCA estimated new lawsuits filed under the Act to be in excess of 1500 yearly and new administrative claims to number "some 10 to 20 times that amount." 1 L. JAYSON, *supra* note 20, § 1-8 (1985). Annual reports of the Administrative Office of the United States Courts reflect a doubling since then in tort actions commenced against the United States in the district courts: 2973 in the year ending June 30, 1982, 3084 in the year ending June 30, 1983. But there is no reason to doubt that the number of new administrative claims has kept fully apace. No one has gathered the figures on a government-wide basis, but a figure of 60,000 to 70,000 would probably not be an exaggeration.

145. Denials due entirely to a failure to agree on a settlement sum presumably trigger litigation.

146. *See supra* notes 141-44, and figures cited therein. If administrative claims estimates are correct, the agencies are disposing of as high a percentage of claims as ever, notwithstanding the rise over time in the number of FTCA suits. (Incredibly, the Justice Department had expected the 1966 amendments to reduce in absolute terms the volume of FTCA litigation. *See* Laughlin, *supra* note 128, at 38.)

147. Interview with Robert A. Feeley, Attorney-Advisor, General Law Division, Office of the Solicitor, Department of the Interior, in Washington, D.C. (Aug. 15, 1983).

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Postal Service estimates that it enters into monetary settlements at least as often, though the amounts involved tend to be lower and the differences between recovery and initial demand greater, than the Interior Department reports.[148] At the other extreme, Veterans Administration attorneys estimate that only twenty-five percent of total yearly tort claims result in final settlements at the agency level.[149] This figure reflects the relatively high incidence of large and often speculative medical malpractice claims against that agency.[150] Most agencies put settlement rates somewhere in between.[151]

Claims officers also point out that the settlement rate of a single agency fluctuates widely according to the dollar value or type of claim. In the National Aeronautics and Space Administration (NASA), a crudely estimated settlement rate of as high as eighty percent on small claims drops to a fraction of that for claims in excess of $25,000.[152] The Department of Agriculture shows a wide

148. Interview with Clinton I. Newman, Assistant General Counsel, Law Department, U.S. Postal Service, in Washington, D.C. (June 7, 1983). Nevertheless, the total is impressive. The Law Department estimates aggregate administrative tort payments in the vicinity of ten to thirteen million dollars a year, a figure, however, that must be put in the perspective of a $25 billion annual agency operating budget.

Settlement rates may vary within a given agency depending on the locus of authority. Thus, postal service claims adjudicated at Law Department headquarters show a somewhat lower settlement rate than those adjudicated in the field, but this may be due to the generally greater amounts or greater legal or factual complexity of the claims involved. *Id.*

149. Interview with James P. Kane, Assistant General Counsel, Irving Schmetterling, Deputy Assistant General Counsel, and E. Douglas Bradshaw, Staff Attorney, all of the Office of General Counsel, Veterans Administration, in Washington, D.C. (July 26, 1983). No guess was hazarded as to the percentage of denials that go into litigation, but Veterans Administration attorneys estimate that no more than forty percent of claims that do go into litigation are compromised, and that among those going to judgment the agency prevails at least nine times out of ten. *Id.*

150. *See infra* note 391.

151. Interviews with Ray Semeta, Chief, Air Force Claims and Tort Litigation, Office of the Judge Advocate General, Headquarters, United States Air Force, in Washington, D.C. (July 27, 1983); Rouse Interview, *supra* note 141; Kelley Interview, *supra* note 24; Nesvet Interview, *supra* note 23; Huang Interview, *supra* note 22. The Chief of General Claims at the Army Claims Service imagines that the number of administrative claims producing an agency-level settlement of some sort and the number resulting in a denial come out about evenly, though the dollar values not surprisingly do not. Rouse Interview, *supra* note 141. A table of general claims which may include non-FTCA matters, suggests that the percentage of claims paid administratively in recent fiscal years has ranged between thirty and forty, although this is another example of the use of a noncomparable claims data base. Table provided to author by Joseph H. Rouse on Aug. 29, 1983 (on file with Case Western Reserve University Law Review).

152. Interview with Richard J. Wieland, Assistant General Counsel for Litigation, Office of General Counsel, National Aeronautics and Space Administration, in Washington, D.C. (June 29, 1983). Other claims officials agree that larger claims are not as well suited for administrative adjustment. *See* Letter from Jeffrey Axelrad, Director, Torts Branch, Civil

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disparity in the percentage of claims honored as between the rising number of regulatory and program-related torts, on the one hand, and the more conventional vehicular accident claims, on the other.[153] But, if these data and impressions show that we do not know as much as we might about tort claim outcomes in agency-level and judicial channels, they at least do not suggest that the administrative claims process fails to achieve its intended purpose or that Congress' faith in the agencies was misplaced.

## III. Basic Legal Issues

The administrative claim process under the FTCA looks deceptively simple. The Act simply requires that a claimant, prior to commencing a tort suit against the United States, present the claim to the appropriate federal agency and give that agency six months in which to consider it.[154] If the agency denies the claim, the claimant has six months from the date the letter of denial was mailed to commence an FTCA suit.[155] The failure of an agency to make a final disposition of the claim within six months after it is filed may be taken by the claimant as a denial.[156] Within this apparently simple and straightforward statutory framework,[157] however, lurks a host of legal issues.

### A. *The Prior Claim*

Although the statutory prior administrative claim requirement has been the source of confusion and occasional injustice to claimants,[158] the fact of the matter is that the government usually asserts

Division, Dep't of Justice, to Charles Pou, Jr., Administrative Conference of the United States (May 18, 1984) (available at Case Western Reserve University Law Review); Letter from Frederic L. Conway, III, Special Assistant to the General Counsel, Veterans Administration, to Charles Pou, Jr., Administrative Conference of the United States (May 25, 1984) (available at Case Western Reserve University Law Review).

153. Nesvet Interview, *supra* note 23. The theme is echoed by others, including the chief claims attorney at the Federal Bureau of Investigation. Kelley Interview, *supra* note 24. The Assistant Legal Advisor for claims of the State Department distinguishes sharply between vehicular incidents, which yield settlements somewhere in the sixty percent range, from what he describes as the "esoteric" claims, in which even a ten percent rate of administrative settlement might be an exaggeration. Huang Interview, *supra* note 22.

154. 28 U.S.C. § 2675(a) (1983).

155. *Id.*

156. *Id.*

157. For an excellent review of the statutory framework, see Silverman, *supra* note 110, at 60.

158. One commentator found 267 reported cases between 1966 and 1982 on the administrative procedures of the FTCA alone. The vast majority dealt with the sufficiency of the administrative claim as a prerequisite to suit. Zillman, *Presenting a Claim Under the Federal*

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a jurisdictional defense based on the failure to file an administrative claim only when the claimant did not purport at the time of the alleged prior claim to have filed one. The plaintiff may learn of the requirement only after having filed suit and then attempt to characterize some previous action or communication as satisfying it. These purported prior claims take a multitude of forms: verbal requests to the alleged wrongdoer for restitution or other relief,[159] communications with the United States Attorney,[160] notice of intent to file a claim,[161] a letter of complaint,[162] the initiation of state court,[163] workmen's compensation[164] or other state agency proceedings,[165] and assorted other forms of actual or constructive notice to the agency.[166] This panoply of forms shows the wisdom of retaining the present statutory requirement of a claim "in writing to the

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*Tort Claims Act*, 43 LA. L. REV. 961, 962 n.7 (1983). Undoubtedly, many disputes over the sufficiency of a claim never reached the courts and have passed unrecorded. Critics of the 1966 amendments had predicted substantial litigation over procedural issues. *E.g.*, Corboy, *The Revised Federal Tort Claims Act: A Practitioner's View*, 2 FORUM 67, 73-74 (1967).

For a useful compilation of case law on certain aspects of the prior claim requirement, along with substantive aspects of the Act, see U.S. ARMY CLAIMS SERVICE, FEDERAL TORT CLAIMS ACT HANDBOOK 1-19 (rev. ed. Apr. 1983).

159. *See, e.g.*, Best Bearings Co. v. United States, 463 F.2d 1177, 1179 (7th Cir. 1972); Shubert Constr. Co., Inc. v. Seminole Tribal Hous. Auth., 490 F. Supp. 1008, 1011 (S.D. Fla. 1980); Mayo v. United States, 425 F. Supp. 119, 123 (E.D. Ill. 1977); Franklin State Bank v. United States, 423 F. Supp. 1, 3 (S.D.N.Y. 1975); Mims v. United States, 349 F. Supp. 839, 844 (W.D. Va. 1972).

160. *See, e.g.*, *Best Bearings Co.*, 463 F.2d at 1179; Grasso v. USPS, 438 F. Supp. 1231, 1237 (D. Conn. 1977); Turtzo v. United States, 347 F. Supp. 336, 337 (E.D Pa. 1972).

161. *See, e.g.*, Wright v. Gregg, 685 F.2d 340, 341 (9th Cir. 1982); Bailey v. United States, 642 F.2d 344, 346 (9th Cir. 1981); Smith v. United States, 588 F.2d 1209, 1211 (8th Cir. 1978).

162. *See, e.g.*, Di Lorenzo v. United States, 496 F. Supp. 79, 84 (S.D.N.Y. 1980); Shubert Constr. Co. v. Seminole Tribal Hous. Auth., 490 F. Supp. 1008, 1011 (S.D. Fla. 1980); Mayo v. United States, 407 F. Supp. 1352, 1353 (E.D. Va. 1976). A widely cited example of an alleged prior claim which was held to be insufficient involved the service of a "Notice to Pay Rent or Quit Premises" upon the Postal Manager of the post office in the plaintiff's building. Three-M Enterprises, Inc. v. United States, 548 F.2d 293, 295 (10th Cir. 1977). The court noted that by state statute, the tort of unlawful detainer did not arise unless possession continued three days beyond service of the Notice. Thus, to treat the Notice as a tort claim for FTCA purposes would be to allow notification of a tort before it even occurs.

163. *See, e.g.*, Flickinger v. United States, 523 F. Supp. 1372, 1377 (W.D. Pa. 1981); Gush v. Bunker, 344 F. Supp. 247, 249 (W.D. Tenn. 1972). Likewise, filing pleadings in federal court will not relieve a plaintiff from the prior claim requirement set forth in the FTCA. *See, e.g.*, McWhirter Dist. Co. v. Texaco, Inc., 668 F.2d 511, 526 n.24 (Temp. Emer. Ct. App. 1981); Ryan v. Cleland, 531 F. Supp. 724, 728-29 (E.D.N.Y. 1982).

164. *E.g.*, Mendiola v. United States, 401 F.2d 695, 698 (5th Cir. 1968).

165. *E.g.*, Hejl v. United States, 449 F.2d 124, 126 (5th Cir. 1971).

166. *See, e.g.*, Green v. United States, 385 F. Supp. 641, 644 (S.D. Cal. 1974) (administrative claim filed on behalf of another); Dancy v. United States, 668 F.2d 1224, 1228 (Ct. Cl. 1982) (appeal to the Merit Systems Protection Board for a hearing on an alleged wrongful separation from a civil service position).

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appropriate Federal agency."[167] Claimants can reasonably be required to present agencies with tort claims that are recognizable as such, especially as the requirement is well-publicized and coupled with a generous statute of limitations.

On the other hand, while the statutory requirement of a prior written claim is sound in itself, the agencies should not be rigid in enforcing it. Neither the FTCA[168] nor the Justice Department regulations[169] require that the prior claim take any particular form. The agencies should be no less flexible in their requirements, provided they do not thereby prejudice the government's interest in sound claims adjudication. One situation calling for flexibility is when the claimant applies to an agency for a statutory benefit, or responsibly pursues some other administrative channel, and learns, after the statute of limitations for filing an administrative tort claim has run, that the FTCA was the only appropriate remedy under the circumstances.[170]

The case of *Gordon H. Ball, Inc. v. United States*[171] illustrates the difficulty of establishing a general rule for such situations. In *Gordon H. Ball*, the plaintiff was contractually obligated to the United States to construct a new dam on the Snake River in Idaho. As work was about to commence, the river rose to flood level due to the failure of the Teton Dam. As a result, the plaintiff incurred standby labor and equipment costs.[172] Within two years of the occurrence, the plaintiff filed a claim under the Teton Dam Disaster Assistance Act with the designated officer of the Department of Interior. The Department denied relief on the ground that it could only entertain claims arising in a location declared by the regulations to be a "major disaster area."[173] Rather than appeal that determination, the plaintiff brought suit under the FTCA, arguing that the Teton Dam Disaster benefits application should be considered the equivalent of an administrative claim under the FTCA.

167. 28 U.S.C. § 2401(b) (1983). To help reduce misunderstanding, Congress should also clarify 28 U.S.C. § 2675(a), the prior claim requirement, by explicitly requiring that the prior administrative claim be in writing.

168. 28 U.S.C. § 2675(a) (1983).

169. 28 C.F.R. § 14.4 (1985).

170. 28 U.S.C. § 2401(b) provides that a claim must be presented "within two years after such claim accrues." Flexibility is not as imperative when the limitations period has not yet run, since the claimant usually suffers no substantial prejudice in being asked to start over again.

171. 461 F. Supp. 311 (D. Nev. 1978).

172. *Id.* at 312.

173. *Id.*

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Only under this view would the action still be timely.[174]

The court in *Gordon H. Ball* assumed that an application for benefits could fairly and reasonably be treated as a claim for FTCA purposes if the government was afforded the same opportunities to review and settle the claim as it would have enjoyed if plaintiff had filed under the FTCA.[175] Prejudice to the agency may in turn depend on the similarity of factual and legal issues between the tort remedy and the other remedy. Applying this standard to the facts in *Gordon H. Ball*, the court noted that liability under the Teton Dam Disaster Assistance Act was without regard to fault or proximate cause, and that the plaintiff's claim under that Act understandably made no allegation of negligence. As a result, the application for benefits under the Teton Dam Disaster Assistance Act did not afford the agency the same practical opportunity to review and settle the claim as if the plaintiff had initially proceeded under the FTCA.

As a general rule, unless an agency is presented with a claim and a claims context that fairly alert it to the presence of a tort, and otherwise satisfy the bare essentials of an administrative filing under the FTCA, it should not be required by the courts to accept it as such.[176] At the same time, however, what an agency is required to

174. *Id.* at 311-12. In *Gordon H. Ball*, the timing of the denial still permitted plaintiff to file a tort claim with the Department of the Interior within the statute of limitations period. *Id.* at 312.

175. *Id.* at 315.

176. For cases in which courts appear to have been guided by this proposition, see Latz v. Gallagher, 562 F. Supp. 690, 692 (W.D. Mich. 1983) (flood insurance claim filed with the Federal Emergency Management Agency); Kelly v. United States, 554 F. Supp. 1001, 1004 (E.D.N.Y. 1983) (claims for veterans benefits); Vanderberg v. Carter, 523 F. Supp. 279, 282-83 (N.D. Ga. 1981) (request for benefits under CHAMPUS (Civilian Health and Medical Program of the Uniformed Services)); Knight v. United States, 442 F. Supp. 1069, 1070 (D.S.C. 1977) (claim for Veterans Administration service-related compensation benefits); Dancy v. United States, 668 F.2d 1224, 1228 (Ct. Cl. 1982) (appeal to the Merit Systems Protection Board).

A related issue is whether an administrative claim should be construed for settlement or for jurisidictional purposes as covering a theory of liability other than those specifically stated in the claim. When faced with the issue, the courts properly tend to view an additional theory as covered if the agency's investigation of the claim should fairly have revealed the basis of that theory. *See, e.g.*, Bush v. United States, 703 F.2d 491, 494-95 (11th Cir. 1983) (wrongful death claim sufficient to put government on notice of negligence claim); Rooney v. United States, 634 F.2d 1238, 1243 (9th Cir. 1980) ("administrative claim was sufficient to apprise the government of the nature and extent of the claim based both upon the fall and the alleged medical malpractice."); Rise v. United States, 630 F.2d 1068, 1071 (5th Cir. 1980); Dundon v. United States, 559 F. Supp. 469, 476-77 (E.D.N.Y. 1983); Dillon v. United States, 480 F. Supp. 862, 863 (D.S.D. 1979) (negligence claim sufficient to permit suit on a theory of lack of informed consent). In fact, most courts have not required that claimants spell out a particular theory of liability in order to perfect a valid administrative claim. *E.g.*, Barnson v.

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do as a matter of law and what it should do as a matter of sound and enlightened administrative practice do not necessarily coincide. An agency should not decline to consider a claim under the FTCA simply because it determines that a court would not require it to do so. Thus, even if a claim fails on its face to designate that it has been filed pursuant to the FTCA,[177] or is cast in terms of some other remedy, an agency may consider it sufficient for tort claim purposes. In other words, agencies have and should exercise discretion to decide whether a claim properly filed with them under some other rubric sufficiently enables them to investigate and evaluate the circumstances from a tort perspective.

Applications for statutory benefits are only a single variant of the much more general problem of deciding when communications should be treated by agencies as claims for FTCA purposes. Assuming that most oral requests, informal inquiries, and applications for different statutory benefits do not satisfy the jurisdictional prerequisite to a tort suit, agency personnel still might undertake as a matter of administrative practice to inform the private party, when feasible, of the existence of a tort remedy. Inquirers should be advised of the written claim requirement and referred to Standard Form 95 as a vehicle for compliance.[178] That would also provide agency personnel an opportunity to bring the statute of limitations and sum certain requirement to the party's attention.[179] In short,

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United States, 531 F. Supp. 614, 623 (D. Utah 1982) ("claim need not elaborate all possible causes of action or theories of liability"); Mellor v. United States, 484 F. Supp. 641, 642 (D. Utah 1978) (" 'claim' which must be presented . . . is not equivalent to a 'legal cause of action' that may eventually be articulated by counsel in the course of a subsequent lawsuit").

177. For an example of such a case, see Boyd v. United States, 482 F. Supp. 1126, 1128-29 (W.D. Pa. 1980) (filing of Treasury Department form, "Report/Application for Relief on Account of Loss, Theft or Destruction of United States Bearer Securities (individuals)," deemed a valid FTCA administrative claim). *But cf.* Santiago Rivera v. United States, 405 F. Supp. 330, 331 (D.P.R. 1975) (letter to VA inquiring whether compensation being paid to relatives in the form of VA benefits included compensation for veteran's death resulting from food poisoning at VA hospital is not a valid FTCA claim).

178. For cases in which agency personnel followed the suggested practices, see Benitez v. Presbyterian Hosp., 539 F. Supp. 470, 472 (D.P.R. 1982) (district counsel acknowledges receipt of letter claiming damages by sending Standard Form 95 and requesting completion so further investigation can take place); Shelton v. United States, 615 F.2d 713, 714 (6th Cir. 1980); Muldez v. United States, 326 F. Supp. 692, 694 (E.D. Va. 1971).

179. Claims officers should also apprise the claimant of any other potentially applicable remedy of which they may be aware and actually entertain the claim under those rubrics if authorized and otherwise in a postion to do so. *See, e.g.*, 32 C.F.R. § 536.6(h) (1983) (Army) ("Prior to the disapproval of a claim under a particular statute, a careful review should be made to insure that the claim is not properly payable under a different statute or on another basis"). *See supra* notes 89-90 and accompanying text. *See also* ACUS Recommendations, 1 C.F.R. § 305.84-7 (A)(1)(b) (1984).

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nothing in the FTCA suggests that agencies act improperly when they prevent a potentially deserving claimant from innocently failing to perfect a valid FTCA claim. Only the assumption that the relationship between claimant and agency is from the beginning strictly adversarial[180] would preclude such assistance. Certainly, agencies do not thereby solicit claims in violation of law or agency regulation[181] or assume responsibility for giving detailed assistance in the filing of claims.

One distinctive and recurring pattern of hardship related to the administrative claim requirement is that of the deserving claimant who innocently fails to recognize that the tortfeasor was a federal officer acting within the scope of employment. The most common scenario involves the government driver, for whom the federal government, pursuant to the Drivers Act,[182] typically substitutes itself as sole defendant in automobile accident cases. The case is then removed, if need be, from state to federal court and in any event

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180. Courts have expressed such an assumption in passing upon the sufficiency of a prior administrative claim. In Green v. United States, 385 F. Supp. 641 (S.D. Cal. 1974), the court declined to take a child's duly filed administrative claim for personal injury as fairly embracing her mother's claim for medical expenses in connection with that same injury. The court denied that the government was already on notice of the possibility of a related claim by the mother, and stated *inter alia*:

> [I]nherent in plaintiffs' argument is a suggestion that if the United States has received some sort of constructive or actual notice of a possible claim it then has a duty to go out and solicit an administrative claim to ensure that the jurisdictional prerequisite to suit by the claimant is properly laid. *Such a proposition is not only alien to the adversary concept of American jurisprudence*, but is also unsupported as a matter of law.

*Id.* at 644 (emphasis added).

For a clear statement of the Justice Department's belief in "the true adversarial nature of the tort claim administrative process," see Letter to Loren A. Smith, Chairman, Administrative Conference of the United States, from Richard K. Willard, Acting Assistant Attorney General, Civil Division [herinafter cited as Willard Letter].

181. It generally is a criminal offense for a federal officer or employee to act as agent or attorney for anyone prosecuting a claim against the United States. 18 U.S.C. § 205 (1983). Significantly, it is no offense where doing so is "in the proper discharge of [the officer's or employee's] official duties." *Id.* A number of agencies essentially restate the prohibition in their regulations or internal manuals, but then provide that agency personnel may and even must on request assist a claimant in preparing the claim and assembling evidence.

Standard Form 95, as revised in July 1985, following the Administrative Conference's recommendations, *supra* note 179, advises claimants that they may obtain from the agency upon request instructions and information on preparation of their claim and directs them to the Justice Department regulations.

182. 28 U.S.C. § 2679(b) (1983). Doctors and other medical personnel of various agencies have likewise been immunized from suit on claims arising out of action within the scope of their employment. 38 U.S.C. § 4116 (1983) (Veterans Administration); 42 U.S.C. § 233 (1983) (Public Health Service); 10 U.S.C. § 1089 (1983) (armed forces, National Guard, Department of Defense and Central Intelligence Agency); 22 U.S.C. § 2702 (1983) (Department of State).

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treated as if it had been originally filed under the FTCA. Normally, a claim will not yet have been filed with the agency. Courts grappling with the inevitable government motion to dismiss for failure to exhaust administrative remedies usually do so without prejudice in order to allow the filing of an administrative claim when still possible. However, the FTCA's two-year statute of limitations by then may have already expired.

Most courts have not been sympathetic to plaintiffs in this situation. Generally, they do not consider the filing of a claim in state court as the equivalent of an FTCA administrative claim,[183] though it may have occurred within two years of the accrual of the cause of action.[184] Timely personal communications with the government employee also have been held not to satisfy the requirement,[185] even when the employee almost certainly brought the matter to the agency's attention or plaintiff sent copies of the correspondence directly to the agency.[186] Although some recent decisions question whether the prior claim requirement should apply at all to removals under federal officer immunization statutes such as the Drivers Act,[187] there are more balanced ways to accommodate the relevant concerns.

One effective solution is to give the plaintiff who mistakenly brings suit against the driver individually a short additional period

183. Wilkinson v. United States, 677 F.2d 998 (4th Cir. 1982); Rogers v. United States, 675 F.2d 123, 124 (6th Cir. 1982); Wollman v. Gross, 637 F.2d 544 (8th Cir. 1980), *reh'g en banc denied*, 646 F.2d 1306 (8th Cir.), *cert. denied*, 454 U.S. 893 (1981); Melo v. United States, 505 F.2d 1026 (8th Cir. 1974); Meeker v. United States, 435 F.2d 1219 (8th Cir. 1970); Flickinger v. United States, 523 F. Supp. 1372 (W.D. Pa. 1981); Lien v. Beehner, 453 F. Supp. 604 (N.D.N.Y. 1978); Fuller v. Daniel, 438 F. Supp. 928 (N.D. Ala. 1977); Miller v. United States, 418 F. Supp. 373 (D. Minn. 1976); Driggers v. United States, 309 F. Supp. 1377 (D.S.C. 1970). *But cf.* Henderson v. United States, 429 F.2d 588, 590 (10th Cir. 1970) (government as a matter of law became a party to the action as soon as it was filed in state court).

184. *Wilkinson*, 677 F.2d at 999; *Melo*, 505 F.2d at 1027; *Meeker*, 435 F.2d at 1220; *Flickinger*, 523 F. Supp. at 1373.

185. Binn v. United States, 389 F. Supp. 988, 991 (E.D. Wis. 1975).

186. *Driggers*, 309 F. Supp. at 1378-79.

187. Kelley v. United States, 568 F.2d 259, 261 (2d Cir.), *cert denied*, 439 U.S. 830 (1978) (suit brought within two years of accrual); Van Lieu v. United States, 542 F. Supp. 862, 864, 868 (N.D.N.Y. 1982) (suit brought after two years from accrual but within state statute of limitations). *See also* Comment, *Administrative Claims and the Substitution of the United States as Defendant Under the Federal Drivers Act: The Catch 22 of the Federal Tort Claims Act*, 29 EMORY L.J. 755, 786-87 (1980) (discussing whether Congress intended to create exception to administrative exhaustion requirement for removal to federal court in Drivers Act cases). Other courts would waive the requirement only where the government can be said to have lulled the claimant into a false sense of security. *Wilkinson*, 677 F.2d. at 999; *Melo*, 505 F.2d at 1027; *Meeker*, 435 F.2d at 1220; *Flickinger*, 523 F. Supp. at 1373.

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of time in which to file an administrative claim,[188] thereby rescuing the claim with minimal prejudice to the government. The Swine Flu Immunization Act, a statute which, like the Drivers Act, makes the United States an exclusive defendant in cases that otherwise would be heard against a private defendant in state court,[189] in effect adopts this approach. A minor disadvantage of the automatic extension is that it confers a windfall on those claimants who are aware of the defendant's capacity as a government employee acting within the scope of employment. One court confronted this dilemma by distinguishing between those claimants who are excusably unaware of the tortfeasor's status and those who are either aware or inexcusably unaware of it.[190] Claimants of the latter sort may not avoid the prior claim requirement, even though the opportunity to satisfy it has passed. Claimants of the former sort, on the other hand, are relieved of the requirement altogether.[191] This approach suffers from having to categorize claimants as of the time the state court suit began, without regard to what a claimant may or should have learned thereafter. More importantly, this policy too quickly surrenders the advantages of the administrative process as a means of dispute resolution. In sum, a simple fixed extension of the statute of limitations is probably preferable. An acceptable alternative would be a rule that postpones accrual of the claim for statute of limitations purposes until the claimant first knows or should reasonably have known of the government connection.[192] Such a rule places due responsibility on the claimant and at the same time allows agency consideration of tort claims before they reach the courts; but it has the drawback of requiring findings on the claimant's actual and constructive state of mind.

### B. *Presentation of the Claim*

The FTCA provides that a tort claim must be presented to the

188. Comment, *supra* note 187, at 790. *See* ACUS Recommendations, 1 C.F.R. § 305.84-7(B)(3) (1984).

189. The statute expressly provides that where a civil action is brought within two years of the administration of the vaccine and dismissed for failure to file a prior administrative claim, "the plaintiff . . . shall have 30 days from the date of such dismissal or two years from the date the claim arose, *whichever is later*, in which to file such administrative claim." 42 U.S.C. § 247b(k)(2)(A)(iii) (1976) (emphasis added).

190. Harris v. Burris Chem., Inc., 490 F. Supp. 968, 971 (N.D. Ga. 1980).

191. *Id.*

192. *Cf.* United States v. LePatourel, 593 F.2d 827, 830 (8th Cir. 1979) (claim against federal judge accrued when court determined that federal judges were covered by the Act, as plaintiffs should not have reasonably foreseen this decision).

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appropriate federal agency within two years of its accrual.[193] In the absence of any formal guidance either from Congress or the Justice Department, the courts approach the issue of when a tort claim accrues in substantially the same manner as they approach the accrual issue for virtually every claim to which a statute of limitations attaches. Though the Supreme Court has recently sought to clarify the FTCA ground rules, at least on the vexing problem of accrual in medical malpractice claims,[194] little of its analysis is unique to the tort claim context or to governmental liability in general.[195]

The Attorney General, however, has addressed the question of when a claim is "presented" within the meaning of the statute. According to the regulations, this occurs when a written notification of the incident, accompanied by a claim for damages, is received by the agency.[196] Although this rule probably simplifies matters for the agencies, it has on occasion served to extinguish an otherwise valid claim mailed to the appropriate agency in the waning days of the two-year limitations period.[197] One means of averting hardship to the occasional claimant who has not been alerted by the wording of the statute to the risks of an eleventh hour filing would be to consider the date of postmark of the administrative claim or other evidence of due delivery as the moment of presentation.[198] A dispatch rule also would avoid an ungenerous asymmetry in the operation of the statute of limitations, for both the FTCA and the regulations provide that the six-month period within which suit must be brought following a final agency denial begins to run from the date the denial is mailed.[199] Such a rule would not necessarily

193. 28 U.S.C. §§ 2401(b), 2675(a) (Supp. 1983).

194. United States v. Kubrick, 444 U.S. 111, 123-24 (1979) (claim accrues at the time plaintiff knows both the existence and cause of his injury, but not necessarily the fact of malpractice). *See* Zillman, *supra* note 158, at 983-84. *Kubrick* establishes that federal rather than state law governs the question of accrual under the FTCA. *Kubrick*, 444 U.S. at 121 n.8.

195. In *Kubrick*, the Court relied on the FTCA for little more than the observation that Congress intended "the reasonably diligent presentation of tort claims." *Kubrick*, 444 U.S. at 123.

196. 28 C.F.R. § 14.2(a) (1983). *See infra* note 198.

197. Steele v. United States, 390 F. Supp. 1109, 1111-12 (S.D. Cal. 1975) (claim forever barred when mailed on the final day of the limitations period and received two days thereafter).

198. *See* ACUS Recommendations, 1 C.F.R. § 305.84-7(A)(2)(a) (1984). However, in revising Standard Form 95 in July 1985 following the Administrative Conference's recommendations, *id.*, the Justice Department chose to reaffirm the receipt rule categorically: "A claim is presented when it is received by the appropriate agency, not when it is mailed." At least the revision constitutes a warning to claimants who use Standard Form 95. It also specifically mentions, as prior versions did not, the two-year statute of limitations period.

199. 28 U.S.C. § 2401(b) (Supp. 1983). Even one of the most cynical recorded critics of

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disadvantage the agencies by shortening the time in which they may act on a claim. The six-month period that the statute gives them for that purpose could easily be made to commence upon their receipt of the claim.

The current regulation, strictly applied by the agencies, also places on the claimaint the entire risk of loss in the transmission of a claim, even when the claim can be shown to have been dispatched in a timely manner. In *Bailey v. United States*,[200] attorneys representing the estate of a man killed in an explosion at an Air Force gunnery range delayed filing a claim pending appointment of a personal representative under state law.[201] A proper claim was mailed sixteen months after the accident, thus within the statute of limitations.[202] Nine months thereafter—and just over two years from the incident—the attorneys learned that the agency had denied a companion claim which they had filed on behalf of one of the decedent's colleagues injured in the same explosion, and which had been under agency consideration for twenty-two months.[203] A prompt inquiry about the estate's claim revealed that the Air Force had no record of any such claim and, because two years and one month had elapsed since the incident, was unwilling to give it belated consideration, even on the basis of the original submission.[204] Though technically justified under the receipt rule, the result was harsh. The attorneys waited less than three months from the time of the accident to file related claims not requiring appointment of a personal representative.[205] Moreover, the Air Force, which was already familiar with the incident from these other claims, knew that a claim for the estate was imminent. Correspondence over the estate's

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the 1966 amendments assumed that the Attorney General, for reasons of parallelism and ease of application, would fix the moment of presentation at the date of mailing. Corboy, *supra* note 158, at 75.

200. 642 F.2d 344 (9th Cir. 1981). *See also* Barlow v. Avco Corp., 527 F. Supp. 269, 273 (E.D. Va. 1981) (administrative claim mailed but not received).

201. *Bailey*, 642 F.2d at 345.

202. *Id.* at 346.

203. The fact that the Air Force had the companion claim under consideration for that length of time before issuing a notice of denial suggests that it was not unreasonable for counsel not to be alarmed by the passage of eight months without action on the estate's claim. In fact, as the dissenting judge points out, it is curious that the Air Force took so long in denying the companion claim in the first place.

> For unknown reasons the Air Force withheld its decision on the [companion] claim until the statute of limitations had run on the [estate's] claims. If the [companion] claim had been denied but a few weeks earlier, it is obvious that duplicates of the missing . . . papers would have been remailed in time.

*Id.* at 348-49 (Jameson, J., dissenting).

204. *Id.*

205. *Id.*

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claim, which included an autopsy report, a wage statement, and a funeral bill, had been exchanged by the attorneys and the Air Force within ten months following the incident.[206] During that period, the claims officer requested and received information regarding the decedent's dependents, earnings and length of employment.[207] At one point, he wrote that the Air Force had not yet received a claim, but understood that one would be filed as soon as a personal representative was appointed, and undertook to "keep counsel advised of the status of [all] the claims."[208]

In fact, the Air Force had already investigated the same incident in order to deny the companion claims which had been filed earlier, and had received ample information regarding the decedent's own losses.[209] The only information which was not at the Air Force's disposal was the total amount claimed, and this the claimant promptly resupplied.[210] In short, entertaining the duplicate claim one month beyond the limitations period would not have meant rescuing an irresponsible claimant or prejudicing the government in its consideration of the claim. Nevertheless, both agency and court sidestepped the question of whether the claim under the circumstances should have been deemed timely, asserting simply that the claimant had failed to comply with a "jurisdictional prerequisite."

A related problem is whether a claim has been presented to the "appropriate" agency, as required by the FTCA.[211] Since most incidents which give rise to government tort claims involve a single readily identifiable federal agency, the issue rarely arises. However, one practitioner suggests that claimants, in order to avert a potential problem, file a complete claim "against each and every Federal agency which might be involved."[212]

The Justice Department has framed regulations that apparently ease matters for the claimant in such a situation, without prejudicing the government or working a result at variance with the underlying legislative purpose. The regulations provide that should the wrong agency receive a claim, it "shall transfer it forthwith to the appropriate agency, if the proper agency can be identified from the

206. *Id.* at 345.
207. *Id.* at 346.
208. *Id.*
209. *Id.* at 348.
210. *Id.*
211. 28 U.S.C. § 2675(a) (Supp. 1983).
212. McCabe, *Observations on the Federal Tort Claims Act*, 3 FORUM 66, 78-79 (1967). The July 1985 revision of Standard Form 95 advises claimants, where more then one agency is involved, to state each agency.

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claim, and [shall] advise the claimant of the transfer. If transfer is not feasible, the claim shall be returned to the claimant."[213] This has provided the courts a basis for deeming a claim transferred to the proper agency when in fact it was not,[214] and even for tolling the statute of limitations at the time of the initial filing where necessary to render the claim timely.[215] In an apparent response to such gestures, the Attorney General recently amended the regulations to specify that a claim shall be deemed "presented as required by 28 U.S.C. § 2401(b) as of the date it is received by the appropriate agency."[216] Assuming the Attorney General has authority to determine the operation of a statute of limitations, this particular exercise of that authority is regrettable. A regulation that directs the transfer where practicable of a wrongly filed but otherwise valid claim from one agency to another, and also provides that that original date of filing governs its timeliness,[217] would be entirely consistent with legislative purpose and substantially fairer to claimants.

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213. 28 C.F.R. § 14.2(b)(1) (1984).

214. *See, e.g.*, Barnson v. United States, 531 F. Supp. 614, 623-24 (D. Utah 1982) (failure to file with correct agency did not result in dismissal for lack of exhausting administrative remedies). A claim as originally filed should rarely be so devoid of information as to free the receiving agency of any obligation to transfer it. *See* Slagle v. United States, 612 F.2d 1157, 1159 n.5 (9th Cir. 1980). Case law under the FTCA prior to its amendment did not mandate the transfer of claims. *See* Johnson v. United States, 404 F.2d 22, 24 (5th Cir. 1968).

215. Kirby v. United States, 479 F. Supp. 863, 867 (D.S.C. 1979) (claim valid where United States Attorney received it on the last permissible day, and the agency on the next day thereafter); Stewart v. United States, 458 F. Supp. 871, 872 (S.D. Ohio 1978) (claim deemed valid where filed with the wrong agency one week prior to tolling of limitations period and reaches the proper agency several months later). *But see* Lotrionte v. United States, 560 F. Supp. 41, 43 (S.D.N.Y. 1983).

216. 28 C.F.R. § 14.2(b)(l) (1984). The amendment originates from a version of the Attorney General's original regulations of 1966, which was abandoned under criticism. *See* I. GOTTLIEB, *supra* note 123, at 11.

217. *See* ACUS Recommendations, 1 C.F.R. § 305.84-7(B)(2) (1984); *cf.* 32 C.F.R. § 536.150 (1984) (Army) (statute of limitations on filing claims under National Guard Claims Act deemed tolled when claim filed with another agency, provided it is forwarded to the Army within six months or claimant otherwise contacts the Army within that time).

A related problem arises when the claimant alleges tortious conduct by employees of more than one agency. The prudent claimant will file a separate timely claim with each agency and cross-reference the claim to all others that have been filed. The failure to so act has adverse consequences. A claimant who files a claim for the entire amount of loss with just one agency may be charged with failing to file the required prior claim with the other agency or agencies with respect to that portion of the loss attributable to them. Even a claimant who duly files a claim with each appropriate agency runs a risk if he fails to cross-reference them. The regulations stipulate that if the claimant fails to cross-reference and one of the agencies takes final action on the claim submitted to it, the statute of limitations will be triggered with respect to the claims submitted to the other agencies, unless the others choose to treat the matter before them as a request for reconsideration of a final denial. 28 C.F.R. § 14.2(b)(3) (1984).

Similarly, where a claim is filed with only one agency, the Attorney General's transfer

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### C. *Contents of a Valid Claim*

The FTCA is virtually silent about what an administrative claim must contain in order to be considered by the agency or to satisfy the jurisdictional prerequisite to suit. The regulations promulgated by the Attorney General fill that breach.[218]

Section 14.2(a) of the regulations identifies the essential elements of a claim as "an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident."[219] Originally, the regulation linked this description of a claim to the agencies' exercise of settlement authority under section 2672 of the FTCA.[220] By recent amendment, the regulation makes it equally applicable to section 2401(b), the jurisdictional prerequisite to suit.[221]

Standard Form 95 requires claimants to state their identity, provide minimal personal information, indicate the place and time of the incident, and describe all known facts and circumstances surrounding their loss. This includes identifying the cause of the incident and the persons and property involved, reporting the nature and extent of the damage or injury and any insurance coverage, providing the names and addresses of witnesses, and stating a separate amount of damages for property damage, personal injury and

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directive should apply and cause the original filing date to govern all claims fairly encompassed in the original claim. The regulations provide that:

> when more than one Federal agency is or may be involved in the events giving rise to the claim, an agency with which the claim is filed shall contact all other affected agencies in order to designate the single agency which will thereafter investigate and decide the merits of the claim.

*Id.* § 14.2(b)(2) (1984). Such a case has not yet arisen. In the only similar decided case, the administrative claim actually filed addressed the conduct of the sole agency to which the claim was presented (wrongful detention by Interior Department officers). The claim was properly held inadequate for purposes of the claimant's charges of subsequent and distinct tortious conduct by a second agency (medical malpractice by Public Health Service). Provancial v. United States, 454 F.2d 72, 74 (8th Cir. 1972).

218. *See generally* Note, *Federal Tort Claims Act: Notice of Claim Requirement*, 67 MINN. L. REV. 513 (1982) (examination of what constitutes sufficient notice).

219. Prior to this regulation, some agencies refused to entertain tort claims which were not filed on a Standard Form 95. This practice was occasionally supported by the courts. *See, e.g.*, Johnson v. United States, 404 F.2d 22, 24 (5th Cir. 1968). The rule is otherwise today. *See* Crow v. United States, 631 F.2d 28, 30 (5th Cir. 1980) (neither Form 95 nor other particular form of claim required).

220. Comment, *The Act of Claimsmanship: What Constitutes Sufficient Notice of a Claim Under the Federal Tort Claims Act?*, 52 U. CIN. L. REV. 149, 164 nn.111-12 and accompanying text (1983).

221. For the significance of this amendment, see *infra* note 274 and accompanying text.

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wrongful death. Substantiation of the claim is also required.[222] The form, which must be dated and signed, recites that the claimant "agree[s] to accept said amount in full satisfaction and final settlement of this claim."

Apart from their apparent incorporation by reference of the elements of Standard Form 95, the regulations set forth for each basic category of claim the evidence or information that the claimant "may be required to submit."[223] For death claims, this includes evidence of death, past employment and earnings, survivors, dependents' support, health at the time of death, medical and burial expenses, and the decedent's condition in the interval between injury and death.[224] Personal injury claimants may be required to provide doctors' reports, itemized bills, and evidence of anticipated medical expenses and lost income. In addition, they may have to submit to a physical or mental examination by a government physician.[225] For property damage claims, the agency may request proof of ownership, itemized repair bills or estimates, purchase price and date, and salvage value.[226] Although the regulations invite the agencies to supplement these requirements,[227] most agencies have not significantly expanded upon the Justice Department's definition of a claim or on the categories of evidence or information that a claims officer may request. Their greatest problem has been dealing with the claimant who refuses to comply with their specific informational demands.[228]

### D. *The Sum Certain Requirement*

The regulatory requirement that claimants state a claim for damages in a sum certain has generated little controversy as a matter of principle, but a good deal of litigation over its application. Although the terms of the FTCA do not impose the requirement, virtually every court called upon to address the question agrees that

222. Standard Form 95 requests, in the case of claims for personal injury or death, a full written report by the attending physician and itemized bills for medical, hospital and burial expenses. In cases concerning property damage claims, Standard Form 95 requires either signed receipted bills, two estimates of repair, or detailed information on value when repair is not feasible.

223. 28 C.F.R. § 14.4.

224. *Id.* § 14.4(a).

225. *Id.* § 14.4(b).

226. *Id.* § 14.4(c).

227. The agencies are authorized to "issue regulations and establish procedures consistent with" the Justice Department regulations. *Id.* § 14.11.

228. *See infra* notes 250-305 and accompanying text.

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the Attorney General has a sound statutory basis for doing so.[229] The sum certain requirement has been justified on three grounds. First, it serves as a reference point to the Attorney General, whose office must approve any award against the United States in excess of $25,000.[230] It also enables courts to police the statutory provision barring FTCA suits for sums in excess of the amount claimed from the agency.[231] Finally, it facilitates internal agency delegations of settlement authority. The requirement seems consistent with legislative history and commonsense notions of the term "claim,"[232] and also probably helps expedite the settlement process. Few claims officers seriously consider making settlement offers without a specific statement of loss on the table.

There is little to be said for abolishing the sum certain requirement. Though some would criticize it as encouraging claim inflation,[233] this charge is more appropriately leveled at the underlying statutory rule barring a litigant, absent newly discovered evidence or intervening facts, from seeking higher damages in court than at the agency level. Once that rule is accepted, the sum certain requirement all but follows.

A study of the cases suggests that most claimants are aware of the requirement and that the courts are reasonably able to distinguish between claims that state a sum certain[234] and those that do

229. *See, e.g.*, Erxleben v. United States, 668 F.2d 268, 271 (7th Cir. 1981); Molinar v. United States, 515 F.2d 246, 248-49 (5th Cir. 1975); Caton v. United States, 495 F.2d 635, 637-38 (9th Cir. 1974); Avril v. United States, 461 F.2d 1090, 1091 (9th Cir. 1972); *see also* Bialowas v. United States, 443 F.2d 1047, 1050 (3d Cir. 1971) (initial purpose for requiring specific sum claimed is to enable federal agency to determine if claim falls within jurisdictional authority to adjudicate).

230. 28 U.S.C. § 2672 (1982).

231. *Id.* § 2675(b).

232. *Avril*, 461 F.2d at 1091.

233. Zillman, *supra* note 158, at 973. Certain agency claims attorneys voiced this complaint. Letter from Sarah Hertz to Charles Pou, Jr. (May 21, 1984) (available from *Case Western Reserve Law Review*) [hereinafter cited as Hertz Letter]; Rouse Interview, *supra* note 141.

234. *E.g.*, Erxleben v. United States, 668 F.2d 268, 270 (7th Cir. 1981) (personal injury claim for "$149.42 presently"); Insurance Co. of N. Am. v. United States, 561 F. Supp. 106, 117 (E.D. Pa. 1983) ("approximately $170,000 in face amount" of bearer bonds); Industrial Indem. Co. v. United States, 504 F. Supp. 394, 396-97 (E.D. Cal. 1980) (qualified reference to a $560 claim); Fallon v. United States, 405 F. Supp. 1320, 1322 (D. Mont. 1976) ("approximately $15,000.00"); Walley v. United States, 366 F. Supp. 268, 268-69 (E.D. Pa. 1973) ("approximate[ly] $100,000.00"), *aff'd mem.*, 546 F.2d 421 (3d Cir. 1976). A fair number of courts have deemed the requirement met by bills, repair costs or other statements of value found in supporting documents. Crow v. United States, 631 F.2d 28, 30 (5th Cir. 1980); Molinar v. United States, 515 F.2d 246, 249 (5th Cir. 1975); Lester v. United States, 487 F. Supp. 1033, 1038 (N.D. Tex. 1980); Boyd v. United States, 482 F. Supp. 1126, 1128-29 (W.D.

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not.[235] If a claim does lack a sum certain, claims officers usually notify the claimant of the deficiency.[236] Some also relate the amended claim back to the original filing date where necessary to avoid a time bar,[237] even though neither Justice Department nor agency regulations indicate that it is proper to do so. Thus, only claimants who genuinely cannot quantify their loss will find it difficult to meet the sum certain requirement, and they may file an inflated claim as a result. Still, a claims officer is normally able to tell, from the frequent and open exchanges that characterize the administrative settlement process in most agencies, whether a claim has been inflated because of honest uncertainty on the part of a claimant or as a result of tactical considerations.

Concededly, the lack of a sum certain seldom prevents an agency from conducting an investigation or assessing damages, provided the claimant has otherwise furnished sufficient factual information. But, absent a showing of general prejudice to claimants,

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Pa. 1980); Mack v. USPS, 414 F. Supp. 504, 506 (E.D. Mich. 1976). *Contra* Hlavac v. United States, 356 F. Supp. 1274, 1276 (N.D. Ill. 1972).

235. *E.g.*, Keene Corp. v. United States, 700 F.2d 836, 841-42 (2d Cir.) ("$1,088,135 and . . . an additional amount yet to be ascertained"), *cert. denied*, 464 U.S. 864 (1983); Caton v. United States, 495 F.2d 635, 638 (9th Cir. 1974) ("[u]nknown at this time"); Bialowas v. United States, 443 F.2d 1047, 1049-50 (3d Cir. 1971) ("neck, chest and right arm"); Robinson v. United States, 563 F. Supp. 312, 313 (W.D. Pa. 1983) ("amount undetermined"); Cooper v. United States, 498 F. Supp. 116, 118 (W.D.N.Y. 1980) ("Pending No Fault Benefits"); Raymond v. United States, 445 F. Supp. 740, 741 (E.D. Mich. 1978) ("in excess of $50,000.00"); DeGerena v. United States, 398 F. Supp. 93, 94 (D.P.R. 1975) ("on treatment"); Robinson v. United States Navy, 342 F. Supp. 381, 383 (E.D. Pa. 1972) ("$2,135.45 plus personal injury"). Some claims do not recite even the semblance of a sum certain. Benitez v. Presbyterian Hosp., 539 F. Supp. 470, 472 (D.P.R. 1982).

236. *See, e.g.*, Melo v. United States, 505 F.2d 1026, 1027 (8th Cir. 1974); Bialowas v. United States, 443 F.2d 1047, 1048 (3d Cir. 1971); Robinson v. United States Navy, 342 F. Supp. 381, 383 (E.D. Pa. 1972); Interview with Aleta Bodolay, Torts Branch, Civ. Div., Dep't of Justice, in Washington, D.C. (May 26, 1983); Interview with Lt. Col. Richard L. Purdon, Chief, Torts Branch, Air Force Claims and Tort Litigation Staff, Office of the Judge Advocate General, Headquarters, United States Air Force, in Washington, D.C. (July 29, 1983). *See also* Hertz Letter, *supra* note 233; Letter from Col. Nolan Sklute to Charles Pou, Jr. (May 21, 1984) (available from *Case Western Reserve Law Review*) [hereinafter cited as Sklute Letter].

237. For a case requiring the agency to relate the delayed furnishing of a sum certain back to the original claim lacking it, see Apollo v. United States, 451 F. Supp. 137, 139 (M.D. Pa. 1978). Most courts have refused to do so. Allen v. United States, 517 F.2d 1328, 1329 (6th Cir. 1975); Cooper v. United States, 498 F. Supp. 116, 118 (W.D.N.Y. 1980); Jordan v. United States, 333 F. Supp. 987, 990 (E.D. Pa. 1971), *aff'd mem.*, 474 F.2d 1340 (3d Cir. 1973).

In Williams v. United States, 693 F.2d 555, 558 (5th Cir. 1982), the court of appeals required that the sum certain relate back to the original filing. However, the court's position was eased somewhat because the claimant had brought suit in state court against the driver individually with a full description and itemization of damages. *Contra* Gonzales v. USPS, 543 F. Supp. 838 (N.D. Cal. 1982).

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the requirement offers sufficient advantages for the agencies and the settlement process to justify its retention by the Justice Department and its enforcement by the courts. Three limited reforms of agency practice would suffice to eliminate most of the misunderstanding.

First, because of the importance attached to the statement of a sum certain, both the regulations and Standard Form 95 should be amended to advise claimants that a precise damages figure for all categories of claims is essential to the validity of a claim for all purposes, including the jurisdictional prerequisite to suit.[238] Since claimants do not invariably consult the regulations or use Standard Form 95, agencies should also advise individual claimants promptly if their claim lacks a sum certain, and warn them that failure to provide one by a given date will disqualify the claim from agency and possibly court consideration.[239] At present, the regulations require no such measures and the courts for the most part have not presumed to do so either.

Second, the Justice Department should adopt a uniform policy on whether the subsequent furnishing of a sum certain relates back in time to the initial filing. Both the agencies[240] and the courts[241] appear to be divided on this point. If, as the Justice Department appears to prefer, no relation back may take place, then the regulations and Standard Form 95 should so specify.[242] And claims of-

238. Several courts have expressed muted displeasure at the silence, particularly of Standard Form 95, on these points. Molinar v. United States, 515 F.2d 246, 249 (5th Cir. 1975). The Standard Form 95 put into use in 1978 calls attention to this issue by reciting that: "[f]ailure to completely execute this form or to supply the requested material within two years from the date the allegations accrued may render your claim 'invalid.' " Nonetheless, this language fails to communicate the particular rigors of the sum certain requirement and, more importantly, the consequences of an "invalid" claim. A July 1985 revision of the form, prompted by the Administrative Conference recommendations, *infra* note 239, now conspicuously adds the following: "Failure to specify a sum certain will result in invalid presentation of your claim and may result in forfeiture of your rights."

239. *See* ACUS Recommendations, 1 C.F.R. § 305.84-7(A)(2)(b) (1984).

240. For example, the Assistant Legal Adviser at the State Department reports relating back the late statement of a sum certain. Huang Interview, *supra* note 22. However, Veterans Administration attorneys report not doing so, though they will use the telephone rather than the mails for communications with the claimant in order to meet a fast-approaching deadline and also may relax the rules on place of filing. Interview with James P. Kane, Assistant General Counsel, Irving Schmetterling, Deputy Assistant General Counsel, E. Douglas Bradshaw, Jr., Staff Attorney, all of Office of General Counsel, Veterans Administration, in Washington, D.C. (July 26, 1983).

241. *See supra* note 237.

242. The instruction on the reverse side of Standard Form 95 fairly warns that an agency might choose not to relate back the delayed submission of a sum certain. Until recently, the form did not indicate the consequences of an "invalid" claim. As revised in July 1985, it warns that forfeiture of rights may result. *See supra* note 238.

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ficers, when corresponding with claimants and their attorneys over the sufficiency of a claim, should emphasize the point. However, a better policy, with respect to claims lacking a sum certain, would be to give the claimant a reasonable length of time without prejudice in which to supply one.

Third, agencies should discontinue the practice of refusing to entertain satisfactory property damage claims simply because the personal injury or death claim arising out of the same incident, and filed on the same form, lacks a sum certain. Problems usually can be avoided by discussing with claimants the nature and significance of the sum certain requirement. However, if for some reason the death or personal injury claim remains unquantified, the agencies should sever the death or personal injury claim and proceed with the property damage claim as stated. The Attorney General should require claims officers to proceed in this fashion, even if the courts do not.[243]

As observed, a claimant may not sue for damages in excess of the amount sought from the agency unless the increase is based on "newly discovered evidence not reasonably discoverable at the time of presenting the claim . . . or upon allegation and proof of intervening facts, relating to the amount of the claim."[244] Although the courts have the ultimate responsibility for defining the scope and applicability of these two exceptions, the agencies should see to it that claimants, particularly those who are unrepresented, learn early in the administrative process of the existence of a claim ceil-

243. Allen v. United States, 517 F.2d 1328, 1329 (6th Cir. 1975); Robinson v. United States Navy, 342 F. Supp. 381, 383 (E.D. Pa. 1972).

244. 28 U.S.C. § 2675(b) (1983). The stated ceiling on damages dates back to the original Act in which filing an administrative claim was optional. Legislative Reorganization Act of 1946, Pub. L. No. 601, § 410(g), 60 Stat. 812, 842 (1946). The rationale, to gauge by the scant legislative history, was that "otherwise a claimant would stand only to gain by pursuing both the administrative and judicial remedies." *Hearings on S. 2221 Before the Senate Judiciary Comm.*, 77th Cong., 2d Sess. (1972) (unpublished statement of Assistant Attorney General Francis M. Shea), quoted in Gottlieb, *supra* note 39, at 24 n.71.

For general observations regarding this provision, see Zillman, *supra* note 158, at 991. A claimant seeking to increase his damage claim has the burden of establishing the required statutory preconditions. *See* Husovsky v. United States, 590 F.2d 944, 954-55 (D.C. Cir. 1978); Molinar v. United States, 515 F.2d 246, 249 (5th Cir. 1975); Campbell v. United States, 534 F. Supp. 762, 766 (D. Hawaii 1982); Joyce v. United States, 329 F. Supp. 1242, 1247-48 (W.D. Pa. 1971), *vacated on other grounds*, 474 F.2d 215 (3d Cir. 1973). In Kielwien v. United States, 540 F.2d 676, 680 (4th Cir.), *cert. denied*, 429 U.S. 979 (1976), however, a district court judgment substantially in excess of the administrative claim was reduced to the amount of that claim on the ground that plaintiff was in fact sufficiently apprised of the nature and extent of her injuries at the time she filed it. *Accord* Schwartz v. United States, 446 F.2d 1380, 1382 (3d Cir. 1971); Nichols v. United States, 147 F. Supp. 6, 10 (E.D. Va. 1957).

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ing.[245] Not only should the Attorney General's regulations and Standard Form 95 be amended to provide a conspicuous alert, but claims officers should also caution claimants on an individual basis,[246] for some claimants genuinely believe they can freely reserve the right to present additional bills to the agencies as they are received.[247]

Aside from invoking the exceptions for newly-discovered evidence or intervening facts, claimants may avoid the statutory ceiling on damages by amending a claim while it is still in administrative channels. Although the FTCA does not address the question, the Attorney General's regulations provide that a claim "may be amended by the claimant at any time prior to final agency action or prior to the exercise of the claimant's option [to sue after six months]."[248] The sum certain is presumably no less freely amendable than any other element of the claim. The sole disadvantage a claimant suffers upon amending a claim is the automatic renewal of the six-month period during which the agency may evaluate the claim and the claimant may not sue.[249] In fact, some amendments may be so minor as not to warrant a six-month extension. But, to prescribe a set of different extensions according to the substantiality of the amendment is impractical, and to leave the extension period indeterminate would be still worse. A fixed six-month rule is therefore optimal.

### E. *Substantiation*

#### 1. *The Requirement*

The FTCA does not as a formal matter require a claim to be documented or substantiated. Regulations of the Justice Department and of specific agencies, however, specify a long list of evi-

245. Even some attorneys who are not versed in the FTCA may wrongly assume that the liberal provisions for the amendment of pleadings in the Federal Rules of Civil Procedure apply with full force. FED. R. CIV. P. 15(b) (1981). *See* Corboy, *supra* note 158, at 69.

246. *See* ACUS Recommendations, 1 C.F.R. § 305.84-7(A)(2)(b) (1984). When the Justice Department revised Standard Form 95 in July 1985 to emphasize the importance of a sum certain, *supra* note 238, it declined to call attention to the ceiling feature.

247. As an example, see Odin v. United States, 656 F.2d 798 (D.C. Cir. 1981), discussed at *infra* notes 329-40 and accompanying text.

248. 28 C.F.R. § 14.2(c) (1984). The regulation further requires that the amendment be in writing and signed by the claimant or his or her representative.

249. *Id.* A claimant, for this reason, may disregard the opportunity to amend the claim and simply seek a higher sum in subsequent litigation on a showing of newly discovered evidence. A court has recently held that claimants are not obligated to amend a pending administrative claim to reflect evidence discovered after its initial presentation. McCormick v. United States, 539 F. Supp. 1179, 1184 n.2 (D. Colo. 1982).

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dence or information that a claimant "may be required to submit."[250] They also contain the catchall provision that claimants "may be required to submit . . . [a]ny other evidence or information which may have a bearing on either the responsibility of the United States for death [or personal injury, or injury to or loss of property] or the damages claimed."[251] The agencies do in fact "require" substantiation and, in its absence, often regard a claim as invalid for all purposes. Furthermore, Standard Form 95, the recommended form of claim, directs claimants to attach specified kinds of information and advises them that failure to do so within two years of the incident may render a claim "invalid."[252]

Unfortunately, the substantiation requirement is uncertain in its meaning and in its effect. For this reason, it has generated substantial litigation[253] and left the courts and commentators divided. Since the mandatory prior claim was intended to reduce litigation, it is proving to that extent counterproductive. Responsibility for the situation is shared, on the one hand, by claimants and attorneys who are needlessly unresponsive to agency demands for information and, on the other, by government attorneys who view compliance with their demands as just another litigable issue under the FTCA.

To begin with, the substantiation requirements present certain problems on their face. Though the regulations clearly set out the information that an agency is authorized to demand,[254] they do not indicate what is meant by "the claimant may be required."[255] More specifically, the regulations may mean either that failure to furnish the information requested renders the claim insufficient to satisfy the prerequisite to suit, or merely that the agency is unlikely to settle the claim. One court, emphasizing the term "required," favored a strict interpretation;[256] another, stressing the "may" language, favored a looser meaning.[257] Conceivably, the Attorney General intended only to give the agencies authority to make documentary demands in aid of their settlement efforts, a view that comports with the regulatory definition of a claim as merely a "written notification of an incident, accompanied by a claim for damages in a sum cer-

250. *See supra* notes 223-26 and accompanying text.

251. 28 C.F.R. §§ 14.4(a)(8), (b)(6), (c)(5) (1984).

252. *See supra* note 222 and accompanying text.

253. *See infra* notes 261-91 and accompanying text.

254. For a different view, see Note, *Claim Requirements of the Federal Tort Claims Act: Minimal Notice or Substantial Documentation?*, 81 MICH. L. REV. 1641 (1983).

255. 28 C.F.R. § 14.4 (1984).

256. Kornbluth v. Savannah, 398 F. Supp. 1266, 1268 (E.D.N.Y. 1975).

257. Tucker v. USPS, 676 F.2d 954, 957 (3d Cir. 1982).

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tain."[258] However, the instructions for completing Standard Form 95 clearly state that failure to supply requested material on a timely basis may compromise the claim's validity.[259]

If this latter interpretation of government policy is correct, the question remains whether it has been communicated effectively to the public. The instruction and warning on Standard Form 95 do not in fact convey the force of the government's demands. They state only that the amounts claimed "should" be substantiated, and that nondocumentation "may render [a] claim 'invalid'," without telling a layman what that means. More importantly, since Standard Form 95 is not the only vehicle for submitting claims under the FTCA,[260] neither its requests for information nor its instructions to substantiate constitute effective notice of what a "valid" claim requires. If the claimant has not used Standard Form 95, claims officers should bring its apparent demands specifically to the claimant's attention before attempting to enforce them. The need to do so is all the greater because neither the regulations nor the statute clearly connects the validity of a claim to its documentation.

### 2. *Judicial Response and Interpretation*

Substantiation requirement problems generally arise when a claimant refuses or otherwise fails to provide some or all of the information requested by the claims officer, who then denies the claim either on the merits or for the more specific reason that no valid claim was filed. The issue invariably resurfaces when the claimant subsequently brings suit. At this juncture, the government usually moves to dismiss the complaint for lack of subject matter jurisdiction on the ground that no prior claim was presented to the agency[261] or, if two years have elapsed since the claim accrued,

258. 28 C.F.R. § 14.2(a) (1984).

259. *See supra* notes 238, 242 and accompanying text. For a discussion of the tension between Standard Form 95 and the regulations taken as a whole, see Note, *supra* note 254, at 1654 n.68. The regulations of specific agencies may echo the theme that compliance with informational requests is essential to the claim's validity. Postal Service regulations state: "In order to exhaust the administrative remedy provided, a claimant shall submit substantial evidence to prove the extent of any losses incurred and any injury sustained so as to provide the Postal Service with sufficient evidence of it to properly evaluate the claim." 39 C.F.R. § 912.8 (1983).

260. The regulations provide that "a claim shall be deemed to have been presented when a [f]ederal agency receives . . . an executed Standard Form 95 *or other written notification of an incident*." 28 C.F.R. § 14.2(a) (1984) (emphasis added).

261. *E.g.*, Erxleben v. United States, 668 F.2d 268, 270 (7th Cir. 1981). Alternately, the objection may be framed in terms of a failure to exhaust administrative remedies. Crow v. United States, 631 F.2d 28, 30 (5th Cir. 1980).

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seeks dismissal with prejudice.[262] In doing so, the government will remind the court that satisfaction of the prior claim requirement is a condition of the sovereign's consent to be sued and cannot be waived.[263] Because it is jurisdictional, the defect also may be raised by the government at any time and by the court *sua sponte*.[264] Although the issue of whether an FTCA complaint should be dismissed because of the claimant's failure to substantiate the claim at the agency level has arisen in a wide variety of factual settings, it has elicited essentially two different judicial responses.

*Swift v. United States*[265] is illustrative of the judicial view that claimants must provide the requesting agency with sufficient information so that it may evaluate and settle their claims, and that noncompliance subjects a subsequent FTCA suit to dismissal for failure of a valid administrative claim.[266] In *Swift*, the claimant filed a two million dollar personal injury, wrongful death, and loss of consortium claim with the United States Forest Service on a Standard Form 95.[267] The claimant ignored the agency's repeated requests for documentation, eventually arguing that because six months had passed since the original filing, the claim should be deemed denied and ripe for suit.[268] The district court dismissed the complaint[269] because the six-month review period was never triggered due to the claimant's failure to satisfy the agency's request.[270] In effect, the claimant's failure to exhaust administrative remedies deprived the court of jurisdiction. The First Circuit affirmed the decision on ap-

262. Cooper v. United States, 498 F. Supp. 116, 117-18 (W.D.N.Y. 1980); Robinson v. United States Navy, 342 F. Supp. 381, 383 (E.D. Pa. 1972).

263. Bialowas v. United States, 443 F.2d 1047, 1048-49 (3d Cir. 1971).

264. FED. R. CIV. P. 12(h)(3). The cases have so held. Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir. 1983); Lien v. Beehner, 453 F. Supp. 604, 605 (N.D.N.Y. 1978); Perkins v. United States, 76 F.R.D. 593, 595 (W.D. Okla. 1976); United Missouri Bank South v. United States, 423 F. Supp. 571, 575 (W.D. Mo. 1976).

265. 614 F.2d 812 (lst Cir. 1980).

266. Manis v. United States, 467 F. Supp. 828, 829-30 (E.D. Tenn. 1979); Founding Church of Scientology v. Director, FBI, 459 F. Supp. 748, 757-58 (D.D.C. 1978); Cummings v. United States, 449 F. Supp. 40, 42 (D. Mont. 1978); State Farm Mut. Auto. Ins. Co. v. United States, 446 F. Supp. 191, 192 (C.D. Cal. 1978); Rothman v. United States, 434 F. Supp. 13, 16-17 (C.D. Cal. 1977); Mudlo v. United States, 423 F. Supp. 1373, 1377 (W.D. Pa. 1976); Kornbluth v. Savannah, 398 F. Supp. 1266, 1267-68 (E.D.N.Y. 1975); Robinson v. United States Navy, 342 F. Supp. 381, 383 (E.D. Pa. 1972).

267. 614 F.2d at 813.

268. *Id.* at 813-14.

269. The district court dismissed the complaint without prejudice, however, because it interpreted the agency warning as suspending the statute of limitations. *Id.* at 815 n.3. If the court had not done so, the statute of limitations would have run and the claim would have been barred.

270. *Id.* at 814.

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peal. The court emphasized that Justice Department and agency regulations authorize the agencies to require the documentation they need in order to settle a claim.[271] As long as a claimant fails to provide that information, both agency and court may properly consider the claim as not having been filed.[272] *Swift* properly draws a close connection between the agency's having adequate information about a claim and its ability to evaluate and possibly settle that claim.[273] Not surprisingly, agency claims officers welcomed the *Swift* decision, less for its doctrinal correctness than for its practical contribution to their capacity to settle claims.

A widely-recognized difficulty with the court's logic in *Swift* is that the Justice Department promulgated the pertinent regulations under section 2672 of the Act, the provision that confers substantive settlement authority on the agencies, rather than section 2675(a), which actually makes the filing of an administrative claim a prerequisite to suit.[274] The substantiation provisions thus assist agencies in deciding whether to settle a claim administratively, but do not necessarily determine whether the claim meets the exhaustion requirement. In fact, Congress probably gave the Attorney General rulemaking authority to begin with only for the purpose of organizing agency settlement activity, and not for controlling access to the courts. To put the matter differently, claimants who fail to document their claims may not win an agency-level settlement, but do not necessarily lose their right to sue.[275]

The other main response of the courts to the substantiation problem requires the claimant for jurisdictional prerequisite purposes to provide the agency only with sufficient information to en-

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271. *Id.*

272. *Id.*

273. *Id.* The same considerations have led courts to require that administrative claims be reasonably intelligible and precise. Keene Corp. v. United States, 700 F.2d 836, 842 (2d Cir.), *cert. denied*, 464 U.S. 864 (1983).

274. *See* Note, *Federal Tort Claims Act Administrative Claim Prerequisite*, 1983 ARIZ. ST. L.J. 173, 188 (1983); Note, *supra* note 218, at 520; Comment, *supra* note 220, at 164. *But see* Note, *supra* note 254, at 1642. The Justice Department probably meant to address the difficulty referred to in the text when it amended its regulations to tie the definition of a claim to the existence of judicial as well as agency authority to satisfy a demand in tort. *See supra* note 221 and accompanying text. However, the regulation that has been amended (§ 14.2) deals with the definition of a claim, not substantiation of a claim, a matter dealt with in a separate regulation (§ 14.4).

275. Many agencies simply would have denied the claim on the merits rather than question its legal sufficiency. Even so, the government might be expected in subsequent litigation to deny that a valid claim had ever been filed. As an example, see Rothman v. United States, 434 F. Supp. 13, 15 (C.D. Cal. 1977). *See also infra* note 319 and accompanying text (discussing Justice Department strategy on this issue).

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able it to investigate the claim.[276] This approach is known as the minimal notice standard.[277] In the case of *Adams v. United States*,[278] the parents of a brain-damaged child filed an administrative claim based on the alleged medical malpractice of an Air Force physician in prenatal care and delivery.[279] After partial compliance with an Air Force request for medical reports and expense records,[280] and after the lapse of more than six months, the claimants brought suit. The district court dismissed the action on jurisdictional grounds because of the claimants' failure to comply with all of the government's requests for substantiation.[281]

The Fifth Circuit reversed and remanded. The court held that Congress intended the section 2675(a) notice requirement "to be construed in light of the notice traditionally given to a municipality by a plaintiff who was allegedly injured by a municipality's negligence,"[282] that is, notice of the approximate nature and circumstances of the injury, plus a statement of damages.[283] As a result, the court held that section 2675(a) imposes only two requirements upon claimants. They must first provide written notice of the claim so that the agency can investigate. They must also give the claim a

276. Bush v. United States, 703 F.2d 491, 494 (11th Cir. 1983); Avery v. United States, 680 F.2d 608, 611 (9th Cir. 1982) (calling only for "notice of the manner and general circumstances of injury and the harm suffered, and a sum certain representing damages"); Tucker v. USPS, 676 F.2d 954, 959 (3d Cir. 1982); Adams v. United States, 615 F.2d 284, 289, *aff'd on reh'g*, 622 F.2d 197 (5th Cir. 1980); Reynoso v. United States, 537 F. Supp. 978, 979 (N.D. Cal. 1982); Hoaglan v. United States, 510 F. Supp. 1058, 1061 (N.D. Iowa 1981); *see also* Erxleben v. United States, 668 F.2d 268, 273 (7th Cir. 1981) (finding 28 C.F.R. § 14.2(a) applicable to defining claim under section 2675, but rejecting any "regulatory checklist" of jurisdictional prerequisites).

277. Note, *supra* note 274, 1983 ARIZ. ST. L.J., at 180.

278. 615 F.2d 284, *aff'd on reh'g*, 622 F.2d 197 (5th Cir. 1980).

279. *Id.* at 285.

280. The exchange between claimants and agency was more complex than in the *Swift* case. Claimants had filed a Standard Form 95 with a sum certain, but did not furnish some of the requested supporting documentation and failed to provide information regarding future expenses. The claimants apparently felt that the Air Force already possessed or had access to much of the information demanded. There also appeared to be some misunderstanding as to what the claims officer actually wanted by way of substantiation. The district court considered these nuances irrelevant, and ruled that claimants, in order to perfect their claim, were bound to inform the agency that they had no unreported medical expenses and were required to provide an estimate of future medical expenses. However, claimants in other circuits adopting the *Adams* view have not contended that the agency already had the information sought.

281. 615 F.2d at 286.

282. *Id.* at 289.

283. The District of Columbia Code provision, cited with favor by the House Committee on the Judiciary, requires a document containing a claim for money damages and stating "the approximate time, place, cause, and circumstances of the injury or damage." D.C. CODE ENCYCLOPEDIA §§ 1-923, 12-309 (West 1966).

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specific dollar value.[284] Having done this, but still not having achieved a settlement, a claimant is entitled to bring an action under the FTCA in district court.[285]

A variation of *Adams* has surfaced more recently in the Sixth Circuit opinion in *Douglas v. United States*.[286] In *Douglas*, the claimant failed to satisfy the agency's request for medical reports and insurance records, and for that reason had his claim denied at the agency level. The appellate court ultimately held that a claimant satisfies section 2675 by placing a value on the claim and giving the agency sufficient written notice of the circumstances so that it may conduct an investigation. However, it emphasized that the claimant in fact had provided sufficient information to permit calculation of a reasonable settlement figure.[287] The issue of whether *Douglas* adds an additional step to the *Adams* standard is not clear.[288] But it would be an unfortunate development if *Douglas* does modify the *Adams* standard in this way. Although no standard for gauging the adequacy of a claim can be perfectly objective, a standard geared to the agency's ability to arrive at a settlement value will unnecessarily lead to differences of opinion as to its appli-

284. 615 F.2d at 289-90. The *Adams* court noted that the substantiation requirements apply to section 2672, but not section 2675, emphasizing the independence of the two sections. Thus a claimant who satisfies the requirements of section 2675 may maintain a subsequent action, even though the agency lacked sufficient information to settle the claim under section 2672. "Equating these two very different sets of requirements leads to the erroneous conclusion that claimants *must* settle with the relevant federal agency, if the agency so desires, and *must* provide that agency with any and all information requested in order to preserve their right to sue." *Id.* at 290 (emphasis in original). *See also* Avery v. United States, 680 F.2d 608, 611 (9th Cir. 1982) (section 2675(c) not intended to allow agency to insist on proof of claim to its satisfaction before claimant becomes entitled to bring court action); Tucker v. USPS, 676 F.2d 954, 959 (3d Cir. 1982) (compliance with section 2675 alone sufficient to allow maintenance of subsequent court action).

285. A major problem with *Adams* is that the court may have placed undue reliance on the references in legislative history to the simple notice of claim provisions in existing state and municipal claims statutes. Those references were not made for the purpose of defining the contours of a valid claim, but instead to justify introducing the prior claim requirement into the FTCA. S. REP. NO. 1327, *supra* note 103, at 3-4 (quoting H.R. REP. NO. 1532, 89th Cong. 2d Sess. (1966), *reprinted in* Note, *supra* note 254, at 1648-49).

286. 658 F.2d 445, 447-49 (6th Cir. 1981).

287. The court also based its decision on estoppel, and argued that the agency's earlier indication that the claim contained enough information barred it from thereafter contesting its sufficiency. *Id.* at 449.

288. 658 F.2d at 448-49. In reaching its decision, the court attempted to reconcile *Adams* with *Swift* on the grounds that *Swift* and two earlier cases, Kornbluth v. Savannah, 398 F. Supp. 1266 (E.D.N.Y. 1975), and Rothman v. United States, 434 F. Supp. 13 (C.D. Cal. 1977), involved allegations so conclusory that investigation and disposition of the claim was actually impossible.

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cation.[289] The *Adams* standard by comparison offers greater certainty. Once a claimant provides a complete Standard Form 95 or its equivalent, with a description of the incident and of the injury sustained, the agency presumably can conduct an investigation.

All in all, *Adams* corresponds best with the probable intent of the FTCA. Neither the text nor the legislative history of the Act implies that Congress meant to grant agencies the power to compel information from unwilling claimants that *Swift* allows. More likely, Congress thought that the inherent advantages of agency-level settlement—namely, immediate payment and avoidance of the expenses and inconvenience of litigation[290]—provided sufficient incentives to cooperate. As before the 1966 reform, less cooperative claimants presumably will litigate, provided, however, they have previously filed with the agency a claim meeting the minimal notice standard.[291]

### 3. *Policy Considerations*

Most discussions of the substantiation problem properly assume that any sound solution will treat claimants fairly and at the same time promote administrative settlement of tort claims. Congress has never clearly stated what procedural fairness to government tort claimants requires. In fact, the allusions to fairness in the legislative history of the FTCA amendments do not relate to those amendments as such, but to the overall 1966 legislative package on government litigation. The four bills in the package were reported to "have the common purpose of providing for more fair and equitable treatment of private individuals and claimants when they deal with the Government or are involved in litigation with their Government."[292] The other three bills in the package[293] manifest an intent to place citizens on a more equal footing with the government in the litigation and prelitigation context. This concern is less pronounced in the FTCA amendments where claimants and government alike

289. *See* Comment, *supra* note 220, at 168-69.

290. *See generally* 2 L. JAYSON, *supra* note 84, § 285 (discussing advantages of administrative settlement of government tort claims).

291. *See, e.g.*, Reynoso v. United States, 537 F. Supp. 978, 979 (N.D. Cal. 1982).

292. S. REP. NO. 1327, *supra* note 103, at 2, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2515-16.

293. Act of July 18, 1966, Pub. L. No. 89-505, 80 Stat. 304 (1966) (providing agencies with increased authority to compromise claims against private persons); Act of July 18, 1966, Pub. L. No. 89-507, 80 Stat. 308 (1966) (imposing statute of limitation on the government's contract and tort claims); Act of July 19, 1966, Pub. L. No. 89-508, 80 Stat. 308 (1966) (allowing costs to private persons who successfully sue the government).

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were thought to benefit from the opportunity to dispose of claims without the delay, expense and inconvenience of litigation.[294] Still, if agencies may unilaterally determine what is needed to settle a claim, and thereby effectively decide whether or not a claimant may proceed to court, they gain a clear upper hand in the administrative process. To the extent that they learn the factual and legal details of the claimant's case they also gain advantage in subsequent litigation.

A second policy consideration which bears on the substantiation problem is of course the desirability of settling tort claims at the agency level. As several courts have found,[295] agencies need adequate supporting material before they can evaluate a claim for settlement purposes and guard against claim inflation.[296] Experience with settlement of private tort claims supports this view.[297] The more evidence and information an agency has, the surer it can be that settlement at a given level is the correct course of action. Furthermore, an agency may not be able to act at all within the six-month period unless it receives the material it needs fairly soon. In any event, the agencies should not alone bear the burdens of investigating tort claims;[298] they should at least be able to call on claimants to produce the essential information already in their hands or

294. *See* S. REP. NO. 1327, *supra* note 103, at 2, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2517 ("[M]eritorious [claims] can be settled more quickly without the need for filing suit and possible expensive and time-consuming litigation."); *see also Hearings on Improvement of Procedures in Claims Settlement and Government Litigation Before Subcomm. No. 2 of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. 15 (1966). ("[A claimant] could [settle] without the bother and cost of litigation."). In urging passage of the bill, the Justice Department opined that simple administrative claims might be settled early without the claimant requiring counsel. *Id.* at 13. *See, e.g.*, Locke v. United States, 351 F. Supp. 185, 187 (D. Hawaii 1972) (husband acting on own behalf and that of decedent's estate).

295. Rothman v. United States, 434 F. Supp. 13, 16 (C.D. Cal. 1977); Kornbluth v. Savannah, 398 F. Supp. 1266, 1267-68 (E.D.N.Y. 1975). *Accord* Trail, *Federal Tort Claims Act: Filing an Administrative Claim: A Two-Step Approach: Presentation and Substantiation*, 27 JAG 421, 426 (1973).

296. Note, *supra* note 254, at 1656.

297. *Id.* at 1650 n.48, and authorities cited therein. *See generally* H. BAER & A. BRODER, HOW TO PREPARE AND NEGOTIATE CLAIMS FOR SETTLEMENT 83 (1967) (open exchange of information creates mutual confidence and atmosphere for successful settlements); P. HERMANN, BETTER SETTLEMENTS THROUGH LEVERAGE 160 (1965) (greatest roadblock to settlement is failure of opponents to exchange information).

Virtually all agency claims attorneys agree. One specifically would like to see Standard Form 95 amended to require the claimant to also spell out his or her theory of liability. Nesvet Interview, *supra* note 23. At least one claims attorney urges that the regulations and preferably the statute be amended to clarify the obligations of claimants to supply relevant information and to negotiate in good faith. Rouse Interview, *supra* note 141.

298. *See* Adams v. United States, 615 F.2d 284, 289 (5th Cir. 1980) (claimant must provide minimal notice of circumstances of accident so agency may investigate claim). However,

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readily available to them. The claimant who defies these considerations and prefers to wait six months before divulging in court the nature and extent of injury does not evoke a great deal of sympathy.

Finally, the dimensions of the problem need to be kept in perspective. In a case that is truly susceptible to administrative settlement, the rational claimant normally complies with reasonable agency requests for substantiation. Even partial disclosure may provide an adequate basis for settlement. More importantly, many cases of noncompliance are not realistic candidates for agency-level resolution anyway. In those cases, noncompliance does not actually frustrate settlement.

### 4. *Proposed Solutions*

There are essentially two solutions that would produce fair and sound results.[299] Under the first solution, based on *Adams*, agencies may request any information they consider useful, but they may only regard a claim as invalid if it lacks a sum certain or sufficient content to enable them to conduct an investigation. While relying on the benefits of early settlement as an incentive to claimants to be forthcoming in substantiation of their claims, the minimal notice standard will admittedly deprive the agencies on occasion of useful information and even cause some claims to go unsettled at the administrative level. The prospect of the recalcitrant claimant does not, however, warrant giving agencies routine authority to decide whether claimants have been sufficiently forthcoming to have earned their day in court. Beyond a certain point, the appropriate sanction for a claimant's lack of cooperation is simply the enhanced likelihood of an agency denial on the merits,[300] the cost and incon-

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neither did Congress intend for claimants to bear wholly the burden of investigation. *Id.* at 290 n.9.

299. The First Circuit's decision in Swift v. United States, 614 F.2d 812 (1st Cir. 1980), represents yet a third possible approach. *See supra* notes 265-75 and accompanying text. However, such a solution is not desirable, for it allows the agencies, at least initially, to prevent tort litigation by finding unilaterally that claimants have not provided the documentation necessary to settle the case. The judicial supervision required to ensure that agencies do not abuse this power would itself frustrate the purpose of lessening judicial involvement in the resolution of government tort claims. *See* Avery v. United States, 680 F.2d 608, 611 (9th Cir. 1982). Moreover, anticipation of eventual judicial mediation might induce agencies to pose informational demands that are exaggerated and cause claimants to resist even those that are not.

300. Writing shortly after enactment of the 1966 amendments, the Chief of the Justice Department Torts Branch predicted that claimants who were not forthcoming with information necessary for the sound evaluation of their claim would be met with a denial. Laughlin, *supra* note 128, at 38.

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venience of litigation, and the risk of adverse inferences in the judicial forum.

The *Adams* approach does not require claims officers to alter radically the way in which they deal with claimants. For them to distinguish at an early stage between information necessary to establish a sufficient claim and additional information useful in investigating and evaluating the claim is neither practical nor productive. Certainly, nothing should be done that would convey the suspicion that claimants may be less than fully forthcoming in substantiating their claim. Only if and when the exchange reveals a pattern of serious noncooperation should the claims officer make it clear that continued nonproduction of designated information will compromise the validity of the claim under the minimal notice standard.[301] The courts tend to be supportive where agencies diligently request specific information and clearly communicate the consequences of nonproduction.[302]

A second solution to the substantiation problem would entail a reconceptualization of the tort claim process. As the process exists now, claimants do not always fully disclose all available information to agencies because of the perception that disclosure may prejudice them in any ensuing FTCA litigation. As a result of the prior administrative claim, the government commonly enters litigation with

301. Several agencies, including NASA and the VA, have developed a series of form letters to be sent at given successive intervals to claimants who fail to supply requested information which is deemed essential to the sufficiency of the claim. 4 NASA-AMES UNIVERSITY CONSORTIUM FOR ASTROLAW RESEARCH, FEDERAL MANAGEMENT LAW PRACTICE MANUAL (TORT MATTERS) pt. 1 (Aug. 1, 1982). In the VA, these letters may culminate in a form claim denial letter that recites non-production as the reason for denial, that cites *Swift* or its local progeny, and that scrupulously avoids addressing the merits of the claim. Vet. Admin. Reg. No. M-02-1 pt. 18, § 18.06(a) (1981).

Not all agencies proceed in similar fashion. The Department of Agriculture reports no standardized follow-up procedure and does not even issue a denial letter of any sort where a claimant has failed to cooperate.

*See* ACUS Recommendations, 1 C.F.R. § 305.84-7(A)(3) (1984) ("Where exchanges with a claimant reveal an insufficiency of information submitted in support of the claim, agency claims officers should promptly and clearly advise the claimant whether the continued nonproduction of designated information will, in the officer's view, warrant dismissal of the claim as invalid because of incomplete documentation.").

302. *See, e.g.*, Avril v. United States, 461 F.2d 1090, 1091 (9th Cir. 1972) (lack of sum certain uncorrected by the claimant though called to his attention by the agency); Bialowas v. United States, 443 F.2d 1047, 1048-50 (3d Cir. 1971) (failure of claimant to provide specific damage amounts even though requested to do so); Cummings v. United States, 449 F. Supp. 40, 41 (D. Mont. 1978) (no evidence of injury furnished in response to Air Force requests); Robinson v. United States Navy, 342 F. Supp. 381, 382-83 (E.D. Pa. 1972) (requested property damage estimates and medical bills not supplied).

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an unusually complete sense of the claim's legal and factual weaknesses. Frequently, it has revealed little about its own defense.

This observation raises the question whether agency claims handling should be made less an adversarial prelude to litigation and more an autonomous dispute resolution process in the hands of impartial claims officers.[303] The more claimants accept administrative settlement as the proper vehicle for resolving their claims against the government, rather than a procedural barrier to litigation, the less they will view prior disclosure as unfairly prejudicial to their case. At present, the true character of the FTCA remains unclear, notwithstanding the 1966 reforms. Administrative settlement may be the principal dispute resolution mechanism, but the prospect of FTCA litigation is never very far away.[304] The pervasive ambiguity of the process, and of the agency claims officer who manages it, explains why the substantiation problem has been so difficult to resolve.

The second option therefore presupposes that claim and defense alike will be made primarily in administrative channels, with parity in access to information, suitable sanctions for noncooperation by either side,[305] and the promise of impartiality on the claims officer's part. In this setting, the agency clearly can demand full disclosure of all pertinent information as a condition of validity of the claim, though it would be bound to make equally broad disclosure to the claimant. Establishing parity of this sort would blunt the unfairness argument and probably contribute to more informed settlement negotiations at an early stage. In doing so, it would also fundamentally reconstruct the administrative tort claim process.

### 5. *Limits on Agency Access to Information*

As long as litigation remains an alternative means of resolving

303. *Compare* ACUS Recommendations, 1 C.F.R. § 305.84-7 (1984) (preamble), *with* Willard Letter, *supra* note 180 (describing the agency-level process as "an annex of and preliminary to litigation").

304. Willard Letter, *supra* note 80. For a persuasive argument that Congress would not have wanted documentation requests to prejudice a claimant's interests in court, see Note, *supra* note 254, at 1653 n.66. Congress recognized that not all tort claims could be resolved administratively and deliberately preserved claimant's option to file suit after six months. S. REP. NO. 1327, *supra* note 103, at 5-6, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2519.

305. One commentator suggests that if, subsequent to filing a timely Standard Form 95, a claimant fails within a reasonable time to honor an agency's unambiguous requests for information discoverable under the Federal Rules of Civil Procedure, the running of the statute of limitations should resume. Note, *supra* note 254, at 1656-57. The sanction for unexcused nondisclosure would then be a time bar to suit.

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government tort claims, certain limits on agency access to information may be appropriate. According to one critic, the Attorney General's regulations are unfair because they "permit an agency to demand information that it could not obtain if the parties were conducting discovery."[306] Certainly, any solution to the substantiation problem would allow the agencies to demand some information as a condition of validity of the claim—information that may be of the sort privileged in discovery. Moreover, the catch-all language of the regulations[307] reads broadly enough to encompass privileged material.

In principle, the agencies should be free to request privileged material in their investigation of claims. The situation becomes problematic only if a claimant's failure to furnish information requested, even if privileged, renders the claim invalid as an administrative claim. This issue is unlikely to arise under the *Adams* minimal notice standard, because agencies will rarely find that they are unable to investigate a claim due to the absence of privileged information. Moreover, under the *Adams* view, the Attorney General's regulations indicate only what the agencies may request, not what they may demand on pain of deeming a claim invalid. Finally, since discovery privileges are generally waivable, agencies should not be barred or discouraged from seeking any relevant information that the claimant may be willing to produce and whose production may bring a swifter and better informed settlement.[308]

Ultimately, agencies engaged in the administrative claim process should respect the privileges from discovery under the Federal Rules of Civil Procedure. Though Congress did not address the issue in enacting the 1966 amendments, it recognized that some tort claims would defy administrative settlement and it preserved the claimant's option to sue. Congress even chose not to extend the six-month waiting period, a move that might have increased marginally the rate of prelitigation settlement.[309] Against that background, it seems unlikely that Congress would have required claimants in the mandatory administrative process to disclose privileged information. Besides prejudicing the claimant at trial, such a policy would

306. *Id.* at 1654.

307. "Any . . . evidence or information which may have a bearing on either the responsibility of the United States . . . or the damages claimed." *Id.*

308. The agencies should also promote open and mutual exchange by releasing information they have in their possession which relates to the pending claim. *See infra* notes 484-90 and accompanying text.

309. S. REP. NO. 1327, *supra* note 103, at 8, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2515, 2519.

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give the agencies an unfair advantage in settlement, for, even armed with the Freedom of Information Act, a claimant is in no position to exact privileged information from the agency.

Application of privilege standards in a settlement scenario may prove problematic, particularly in the case of privileges that are qualified rather than absolute. Moreover, the agencies are not authorized to resolve the ensuing disputes, and chronic resort to the courts for their resolution would be damaging to the autonomy of the administrative process. On the other hand, claimants and claimants' attorneys do not appear to invoke privileges in refusing agency requests for information or in justifying their refusal in court. Those disputes that do arise can probably be resolved without specific machinery for that purpose. Either settlement will be reached notwithstanding the disagreement, or the claim will be denied or deemed insufficient. In the latter two circumstances, a claimant intent on pursuing matters will soon be in court, where any specific question of privilege in administrative settlement proceedings most likely will be overtaken by a parallel question of discovery in litigation.

### F. *Eligibility for Relief*

The sum certain and substantiation requirements do not fully account for the disputes over the validity of federal tort claims. Although the FTCA leaves the term "claimant" undefined, the Justice Department has promulgated regulations controlling who may file administrative claims. Those regulations identify the proper claimants for claims of injury to or loss of property,[310] personal injury,[311] death,[312] and losses wholly compensated by a subrogated insurer.[313] The agencies, however, do not agree on the extent to which compliance with these regulations is necessary before a claim may be heard. Even the courts are divided. Some waive what they take to be "technical defects" and allow the claim to be heard on its merits,[314] but others do not.[315] According to the leading study of

310. 28 C.F.R. § 14.3(a) (1983). *See also id.* § 14.3(e).

311. *Id.* § 14.3(b). *See also id.* § 14.3(e).

312. *Id.* § 14.3(c).

313. *Id.* § 14.3(d).

314. Locke v. United States, 351 F. Supp. 185, 187 (D. Hawaii 1972) (government should not be allowed to stand on technicalities on evidence of representative capacity where the rights of children are involved and inequities would otherwise result). *E.g.*, Forest v. United States, 539 F. Supp. 171, 174 (D. Mont. 1982); Young v. United States, 372 F. Supp. 736, 741 (S.D. Ga. 1974).

315. Triplett v. United States, 501 F. Supp. 118, 119 (D. Nev. 1980) (claim invalid, in the

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litigation under the administrative claim provisions of the FTCA, a number of otherwise meritorious claims have run permanently afoul of the statute of limitations because a technically ineligible person presented them.[316]

When faced with a "technical defect," the agencies should not ignore the Attorney General's requirements, but neither should they respond to violations with undue harshness. The appropriate response in most cases would be to treat an otherwise valid and timely claim as having been duly filed, on condition that the claimant correct the deficiency within a specified reasonable length of time.[317] Since the proper benchmark is fair and sound administrative practice, the Justice Department regulations also should be amended to adopt a principle of substantial compliance with the formal requirements of a valid claim. In other words, the Attorney General should direct the agencies not to rely on sheer technical deficiencies in otherwise valid, intelligible, and responsibly filed administrative claims, where they are not prejudiced as a result.[318]

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absence of any unusual or extenuating circumstances, for lack of evidence of attorney authority); Gunstream v. United States, 307 F. Supp. 366, 368 (C.D. Cal. 1969) (claim filed by plaintiff's parents held defective for failure to show parents' representative capacity).

316. Zillman, *supra* note 158, at 977.

317. *See* ACUS Recommendations, 1 C.F.R. § 305.84-7 (A)(1)(a) (1984). For example, most claims officers who implement the Attorney General's requirement of a written power of attorney are content with delayed submission, which usually occurs sometime before the onset of negotiations. Bodolay Interview, *supra* note 144. Some claims officers never call for a written power of attorney at all. Rouse Interview, *supra* note 141. If a power of attorney is not furnished and later becomes an issue in litigation, the courts may be willing to inquire whether there was actual authority to represent another. House v. Mine Safety Appliances Co., 573 F.2d 609, 617-18 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978). The Ninth Circuit, reaffirming its basic approach to the FTCA administrative claim requirement in Avery v. United States, 680 F.2d 608 (1982), recently held that the issue of whether a valid power of attorney is supplied has nothing to do with satisfaction of the jurisdictional prerequisite to suit. Warren v. Department of Interior, 724 F.2d 776 (9th Cir. 1984) (en banc). *Accord* Graves v. United States Coast Guard, 692 F.2d 71, 74-75 (9th Cir. 1982). The prudent attorney will append a power to the initial Standard Form 95 since the courts are not always forgiving, even when the government can show no prejudice. *See* Triplett v. United States, 501 F. Supp. 118 (D. Nev. 1980).

318. For example, when a person files a claim for personal injuries without mentioning a spousal claim for loss of consortium, the agencies and courts properly regard the latter as outside the ambit of the claim. *E.g.*, Johnson v. United States, 704 F.2d 1431, 1442 (9th Cir. 1983); Heaton v. United States, 383 F. Supp. 589, 590-91 (S.D.N.Y. 1974). *See generally* Silverman, *supra* note 110, at 50. However, where a loss of consortium claim was filed, but as part of the physically injured party's claim rather than the spouse's, the prejudice to the agency and the disrespect for the administrative claim mechanism under the FTCA are minimal. Unfortunately, the agencies and courts have not always acknowledged the difference. Walker v. United States, 471 F. Supp. 38, 42 (M.D. Fla. 1978). As a growing body of case law holds, rigid attitudes toward the filing of a claim on behalf of family members, particularly spouses and minor children, may work an unfair and indefensible hardship. *E.g.*, Nelson v.

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Given the Attorney General's overall responsibility for tort claims management at the agency level, policing of the agencies should not be left to episodic and uneven intervention by the courts.

Unfortunately, the Justice Department sees its primary responsibility under the FTCA as defending the government in the adversarial setting of tort litigation. This view is not conducive to persuading agency attorneys to operate more by the spirit than the letter of the law in their dealings with claimants at the administrative level. Even more revealing than the lack of procedural magnanimity toward claimants in the Justice Department regulations is the Department's litigation policy of raising as a jurisdictional defense technical defects in an administrative claim that the agency never brought to the claimant's attention and that did not prevent the agency from addressing the claim and issuing a final denial letter on the merits.[319]

### G. *The Settlement Process*

Once a claim is validly filed, responsibility for investigating and evaluating it passes to the agency.[320] Few would say that the agencies may "unilaterally . . . shift the burden of investigation to private claimants while retaining only the responsibility of evaluating the information supplied."[321] Nevertheless, the agencies have almost sole discretion under both the statute and Justice Department regulations to determine how best to discharge this burden.

Congress clearly meant to assure the agencies of six months within which to assess and possibly negotiate settlement of a claim without the threat of court action. However, Congress did not intend that the passage of six months without final agency action

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United States, 541 F. Supp. 816, 817 (M.D.N.C. 1982); Forest v. United States, 539 F. Supp. 171, 174 (D. Mont. 1982). *But see* Jackson v. United States, 558 F. Supp. 14, 16 (D.D.C. 1982); Pringle v. United States, 419 F. Supp. 289, 291-92 (D.S.C. 1976). *See* ACUS Recommendations, 1 C.F.R. § 305.84-7(A)(1)(a) (1984).

319. This practice is becoming less well-received by the courts. *See, e.g.*, Executive Jet Aviation, Inc. v. United States, 507 F.2d 508, 516 (6th Cir. 1974); Hunter v. United States, 417 F. Supp. 272, 274 (N.D. Cal. 1976); Young v. United States, 372 F. Supp. 736, 740 (S.D. Ga. 1974). A Torts Branch monograph on the administrative claim procedures of the FTCA, prepared for the guidance of the agencies and United States attorneys, acknowledges the new trend and provides that "the defense [of a defective administrative claim] should be asserted only when it can be demonstrated that the lack of the requested information completely frustrated the agency's good faith efforts to achieve an administrative settlement." DEPARTMENT OF JUSTICE, TORTS BRANCH MONOGRAPH, Vol. C, ADMINISTRATIVE CLAIMS 17-18 (March 1983).

320. Corboy, *supra* note 110, at 636; Zillman, *supra* note 158, at 969.

321. Adams v. United States, 615 F.2d 284, 290 n.9, *aff'd on reh'g*, 622 F.2d 197 (5th Cir. 1980).

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should necessarily trigger litigation. The statute provides only that such failure gives a claimant the "option" to consider the claim as having been finally denied and consequently to sue, and that this option may be exercised "any time thereafter."[322] The claimant may elect not to sue without in any way prejudicing the right to do so at a later date. In this way, the act encourages, or at least avoids discouraging, the continuation of negotiations beyond six months,[323] or until a final denial is issued.

An area of uncertainty with potential for dispute in the settlement context is the question of whether the government or claimant is the offeror or offeree. There are indications that the government fancies itself the offeree. First, the sum certain required is in effect an opening offer. Further, Justice Department regulations allow amendment of a valid claim only "prior to final agency action,"[324] implying that the government has the power of final acceptance. Where, as in the case of settlement in excess of $25,000, the approval of the Attorney General or his designee is necessary, the Torts Branch invariably insists that agencies receive the prior unconditional assent of the claimant to a proposed settlement before committing either themselves or the government.[325] On the other hand, the statutory provision that recites the preclusive effects of settlement states that "*acceptance by the claimant* of any such award, compromise or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States."[326]

It can be important to know which party has the final power of acceptance. The claimant may regret the amount of settlement after agreement appears to have been reached; the claimant may even regret it sooner, but fail to act quickly enough in amending the claim. Most courts faced with this scenario have barred suit for any larger amount,[327] intending thereby to protect the integrity of the

322. 28 U.S.C. § 2675(a) (Supp. 1983).

323. An example of protracted negotiations is Douglas v. Untied States, 658 F.2d 445 (6th Cir. 1981). Plaintiff allegedly injured his ankle when a plank in the dock of the Detroit naval armory collapsed beneath him. Six years of communications between Douglas' attorney and the Navy ensued before the latter denied the claim for failure to provide the documentation requested. Only then did litigation take place. *Id.*

324. 28 C.F.R. § 14.2(c) (1984).

325. *See infra* notes 644-47 and accompanying text.

326. 28 U.S.C. § 2672 (Supp. 1983) (emphasis added).

327. Ferreira v. United States, 389 F.2d 191, 193 (9th Cir. 1968); Wexler v. Newman, 311 F. Supp. 906, 907-08 (E.D. Pa. 1970); Schlingman v. United States, 229 F. Supp. 454 (S.D. Cal. 1963). *Cf.* Wright v. United States, 427 F. Supp. 726, 729 (D. Del. 1977) (claim increase barred where settlement check negotiated). In *Ferreira*, the claimant was injured when his

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settlement process and to prevent claimants from obtaining an unfair advantage in subsequent litigation.[328]

However, an unusual set of circumstances led the Court of Appeals for the District of Columbia in the case of *Odin v. United States*[329] to proceed in a different direction. In *Odin*, the claimant, while unrepresented, filed an administrative claim for $791, reflecting the precise amount of medical bills incurred to that date in connection with the aftereffects of a swine flu immunization.[330] The claimant subsequently retained an attorney whose communications with the government over the course of the year strongly suggested that the claimant's injuries substantially exceeded that sum.[331] Nevertheless, the then-Department of Health, Education and Welfare (HEW) notified the claimant that her $791 claim, never as such amended, was granted in full.[332] The claimant through her attorney returned the $791 payment voucher unsigned, and included an amended administrative claim for one million dollars, which explained that the smaller figure had been based on a misunderstanding of the claim form and reflected only medical bills at the date of filing.[333] The Torts Branch of the Justice Department, acting for HEW, notified the claimant that it would disregard the amendment on the ground that the agency's acceptance of the initial claim terminated that claim and precluded the claimant both from amending it and from seeking a higher sum in court.[334] This view was sustained by the district court, but disavowed on appeal. The Court of Appeals held that the "final agency action," which admittedly bars subsequent amendment of a claim, does not take place until the agency procures the claimant's "acceptance" of the agency's "offer"

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tractor hit a hole left on his land by employees of the Bureau of Reclamation. A claim for $93.50 was allowed by the agency ten months after filing, without the claimant having taken steps to withdraw it. The claimant refused payment and sued for $75,000 on the basis of serious complications which had arisen and were allegedly unforeseeable at the time of filing. The suit was nonetheless barred on the grounds that it would be overly burdensome to require the agencies to process claims to an award which, although for the full amount claimed, could still be rejected by the claimant. *Ferreira*, 389 F.2d at 194.

328. A different situation may obtain where the increase represents loss or injury arising from the same incident but suffered by a different claimant. Such may be the case of settlement by a parent for medical expenses resulting from injury to a child, followed by a timely claim on the child's behalf for his or her own pain and suffering. *E.g.*, Stokes v. United States, 444 F.2d 69 (4th Cir. 1971).

329. 656 F.2d 798 (D.C. Cir. 1981).

330. *Id.* at 799.

331. *Id.* at 800.

332. *Id.*

333. *Id.*

334. *Id.*

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to settle.[335] The claimant, said the court, has the power of acceptance,[336] and acceptance, following uniform agency practice, occurs when the claimant signs and returns the payment voucher as an expression of acceptance.[337]

Although apt in its denunciation of the government's attitude to a claimant's "one false step,"[338] and though not unfair in result under the particular circumstances of the case,[339] *Odin* is not wholly convincing on the narrow legal issue presented. It is far from clear that Congress, in making acceptance of a settlement "final and conclusive" on the claimant, intended legally to vest the power of acceptance in the claimant as opposed to the agency. Moreover, the court's somewhat disingenuous assumption that unilateral action by the claimant can constitute "final agency action" ignores the Attorney General's legitimate concern that claimants not enjoy unfair leverage in subsequent litigation from an agency's prior assent to settlement.[340]

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335. *Id.* at 804.

336. The court relied on the language of the Act's release provision. *See supra* note 326 and accompanying text. It also relied on the suggestion in legislative history that the 1966 amendments "would provide the agencies with the authority to make settlement offers which could result in settlement in a large percentage of tort claims cases." S. REP. NO. 1327, *supra* note 103, at 4, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2518.

337. The voucher form, Standard Form 1145, is captioned "ACCEPTANCE BY CLAIMANT(S)" and provides a signature line for claimants to signify "acceptance" and to acknowledge its effect as a release in the terms of the statute.

338. *Odin*, 656 F.2d at 806. Judge MacKinnon said:

> [The court] refuses to countenance the creation of arbitrary barriers to claims for full compensation for government inflicted injuries. . . . There is absolutely nothing in the statute or its legislative history to indicate that Congress, in requiring claimants to seek relief initially from the agency that harmed them, intended to set up a labyrinth of procedural rules and niceties in which one false step would deprive injured citizens of the relief Congress intended to grant them.

*Id.*

339. The *Odin* court expressed confidence that the claimant, under the facts of that case, had not abused the settlement process. *Id.* at 806 n.30.

340. True, the Act specifically declares an agency's disposition of a claim not to be competent evidence at trial on the question of liability or amount of damages. 28 U.S.C. § 2675(c) (Supp. 1983). Whether this evidentiary bar is very effective in practice is highly questionable.

The provision originally was designed for multiple claimant situations, to remove the disincentive on the part of an agency to admit liability and settle a claim through administrative channels when a related claim had been brought by another claimant directly to court, as was possible until 1967. 2 L. JAYSON, *supra* note 84, § 319.03 at 17-35, § 322.05 at 17-59. The provision is still useful to the government today where one claimant seeks to use the administrative settlement of another claimant's related claim as evidence of liability for damages in his or her own litigation. However, it also applies to the single claimant situation where the claimant seeks to introduce in-court statements against interest, including settlement offers or the allowance of a lesser sum, made by the government during the administrative claim phase. *Id.* § 322.05 at 17-5.

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The question of which party enjoys the final power of acceptance of administrative settlements in tort is not well illuminated either by the statute or its legislative history, but for cases turning on this issue a clear answer is highly desirable. The *Odin* court rightly focused upon a fixed and visible event, namely the return of a signed voucher form. The event that was chosen, however, occurs late in the proceedings and serves mostly to trigger payment procedures on a claim the parties consider already settled. Further, upon receiving the voucher, the claimant has an indeterminate amount of time in which to sign and submit it. Most claimants evidently do so with dispatch, but the framework established by the *Odin* case invites speculation.

Actually, the party to settlement negotiations having the greatest reason to fear unfair speculation is the government. If the government withdraws from negotiations at the last moment, the claimant normally will not have compromised his or her litigation posture; settlement positions taken by the government, however, may haunt it in subsequent FTCA litigation. At some point in the settlement process, therefore, the claimant should be called upon for an irrevocable expression of assent to the terms of settlement. Practically speaking, such is already the case for settlements of more than $25,000. The Justice Department will not entertain approving settlements at this level until satisfied that the government already has the claimant's assent.

Disputes of the *Odin* variety are infrequent. Agencies should simply be alert to the fact that claimants have the opportunity to indulge in second thoughts and retract informal acceptances of agency settlement offers. If *Odin* produces a pattern of abuse, Congress should act to curb it. On the other hand, the position of the Torts Branch in *Odin* also should be rejected. Where an agency has evidence that a claimant's gross underestimation of a claim is innocent and not an abuse of the settlement process, and where it has not yet received from the claimant a signed voucher, the agency cannot possibly believe that it lacks authority to reopen matters. The agency possesses this authority and should be prepared to exercise it with reasonable discretion.

### H. *The Final Agency Denial*

An agency's final written denial of a claim under the FTCA triggers a six-month statute of limitations on suit in federal district court, running from the date that the notice of final denial is

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mailed.[341] After this time, suit is "forever barred."[342] The meaning of a final denial has occasioned little dispute. Obviously, an express repudiation of liability on the claim qualifies. The claimant's rejection of an agency's final settlement offer for less than the full amount sought also operates as a final denial.[343] The problem with the latter situation is that the timing of a final agency denial then turns on an expression of intent by the claimant. The least determinate situation of all is the open-ended exchange of counteroffers in which either party might at any time bring negotiations to a close.

One reason the potential for misunderstanding and confusion concerning the final denial has not materialized is that the FTCA requires agencies to issue final denials in the form of certified or registered mail. Justice Department regulations additionally require an express warning to dissatisfied claimants that they must bring suit, if at all, within six months of the date of mailing.[344] Until claimants receive such a communication, they can safely assume that their claim has not been finally denied and that the statute of limitations has not yet begun to run.[345] In sum, the final denial mechanism appears to be in good working order, and the occasional misunderstanding so idiosyncratic as to warrant no general reform. Only a few adjustments in the ground rules seem advisable.

First, the statutory and regulatory provisions that suit be brought within six months from the date the final notice of denial is mailed invites needless confusion and possible injustice. Several days may elapse between the mailing and arrival of the notice, and make the difference between a timely and untimely complaint.[346]

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341. 28 U.S.C. § 2401(b) (1982).

342. *Id.* Carr v. Veterans Admin., 522 F.2d 1355, 1357 (5th Cir. 1975).

The courts have clearly and properly barred suit after a period of six months following the mailing of a final denial, even when less than two years have elapsed since accrual of the claim. Schuler v. United States, 628 F.2d 199, 202 (D.C. Cir. 1980); Childers v. United States, 442 F.2d 1299, 1301 (5th Cir.), *cert. denied*, 404 U.S. 857 (1971); Claremont Aircraft, Inc. v. United States, 420 F.2d 896, 897 (9th Cir. 1970); Myszkowski v. United States, 553 F. Supp. 66, 68 (N.D. Ill. 1982); Heimila v. United States, 548 F. Supp. 350, 351 (E.D.N.Y. 1982).

343. S. REP. NO. 1327, *supra* note 103, at 3-4, *reprinted in* 1966 U.S. CONG. & AD. NEWS 2518.

344. 28 C.F.R. § 14.9(a) (1984).

345. The courts have rarely faced this issue. However, they have uniformly enforced the regulatory requirements against agencies that have failed to observe them. Sterner v. United States, 462 F.2d 1177, 1178 (D.C. Cir. 1972); Boyd v. United States, 482 F. Supp. 1126, 1129 (W.D. Pa. 1980); Interboro Mut. Indem. Ins. Co. v. United States, 431 F. Supp. 1243, 1245 (E.D.N.Y. 1977).

346. *See, e.g.*, Carr v. Veterans Admin., 522 F.2d 1355 (5th Cir. 1975). In *Carr*, plaintiff's administrative tort claim was finally denied by a mailing of February 5, 1973, and arrived on

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Congress should provide that the six-month limitation period runs from the date of arrival of the communication. This revision would guard against unfair surprise to claimants,[347] without substantially burdening the United States; the existing requirement that final denials be sent by registered or certified mail already guarantees a dated record of receipt. The present system—postponing the effectiveness of a claim until it reaches the agency, but giving effect to a denial the moment it is mailed—unfairly resolves ambiguities to the claimant's disadvantage.[348]

Second, the Attorney General's regulations do not require the agencies to provide a reason for their denial of a claim. At most, they suggest that the giving of a reason is not forbidden.[349] The regulations should impose such a requirement,[350] though the level of specificity in the reasons given must be left to the sound discretion of the officer in charge. As a matter of fairness, a claimant who has perfected a valid administrative tort claim is entitled to some explanation for its denial. And it has yet to be shown that the costs of stating reasons outweigh its obvious benefits.

The notion that a statement of reasons would unfairly tip the government's hand in the event of litigation is not credible. If the government has a sound and convincing reason for denying a claim, communicating it to the claimant may help prevent litigation. If the reason is debatable, it will not remain secret for long. Any answer to an FTCA complaint reveals as much by way of defense as a reasoned denial letter and usually a great deal more. Since a fair and adequate letter of explanation need not disclose anything elaborate about the agency's factual or legal analysis of the claim, it does not compromise the government's litigation interests. In any event, the Justice Department's attempt to free agencies from providing a reason for denial may be improper under the Administrative Procedure Act which mandates a "brief statement of the grounds for de-

February 9. Plaintiff brought suit on the claim on July 27, but service of process did not occur until August 7. The action was dismissed as time-barred based on the date of mailing rule, though it still would have been timely under a date of receipt rule. *Id.* at 1357.

347. *See id.* The court in *Carr* conceded that "it might be more equitable if the short period of limitations . . . commenced with receipt by the claimant of notice of the administrative agency's denial." *Id.*

348. *See supra* note 199 and accompanying text.

349. 28 C.F.R. § 14.9(a) (1984). "The notification of final denial *may* include a statement of the reasons for the denial and *shall* include a statement that, if the claimant is dissatisfied with the agency action, he may file suit . . . not later than 6 months after the date of mailing of the notification." *Id.* (emphasis added).

350. ACUS Recommendations, 1 C.F.R. § 305.84-7(A)(5)(a) (1984).

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nial" in connection with any written application or request.[351]

### I. *Reconsideration of a Claim*

Justice Department regulations invite a claimant who has received a final denial letter to "file a written request with the agency for reconsideration."[352] The claimant may exercise this option any time before filing suit and before expiration of the statute of limitations. By regulation, the request gives the agency six months from the date of the filing of the request to take final action, and bars the claimant from suing until such action or until expiration of the six months, whichever comes first.[353] Most indications are that a new six-month statute of limitations on filing suit begins to run at that time.[354]

Reconsideration still may operate as a trap for the unwary. In one case,[355] a claimant who received a notice of final denial sought to amend the claim to present new evidence, and was told he could

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351. 5 U.S.C. § 555(e) (1982).

352. 28 C.F.R. § 14.9(b) (1984). Presumably, reconsideration may be sought only once. Silverman, *supra* note 110, at 54.

If, following a final denial by one agency, the claimant files a claim arising out of the same incident with a second agency, the latter may consider the claim before it a request for reconsideration. 28 C.F.R. § 14.2(b)(4) (1984). Only if the second agency chooses to do so, and so advises the claimant, will the statute of limitations on suit be tolled. *Id.*

The Administrative Conference recommends that denial letters inform claimants of their right to request a reconsideration and of the six-month waiting period such a request implies. ACUS Recommendations, 1 C.F.R. § 305.84-7(A)(6)(a) (1984).

353. 28 C.F.R. § 14.9(b) (1984).

354. In spite of the apparent clarity of the current regulations, one commentator seems to believe that a request for reconsideration does not necessarily prolong the initial statute of limitations. He further urges that the statute or regulations be amended to codify what he construes as the current approach, namely, that a request for reconsideration has no effect unless and until the agency expressly notifies the claimant in writing that it has agreed to reconsider the claim. Zillman, *supra* note 158. Only the Army reports following that approach. Rouse Interview, *supra* note 141.

This proposal is undesirable. If a reconsideration request is filed toward the end of the six-month period following the denial letter, little time will have passed when suit must be brought in federal district court on the same claim. This process would short-circuit the reconsideration that has taken place. Moreover, such a suit is premature if the agency does agree to reconsider the claim because it is entitled to six months without suit in order to do so.

Claims officers themselves, who generally do not resolve doubtful questions of procedure to their disadvantage, do not behave as if they must expressly agree to reconsider a claim in order for a reconsideration request to take effect. The commentator may have been influenced by pre-1966 case law. At that time the courts conceded that a claimant, led to believe that the denial of his or her claim was being reconsidered, enjoys an extended statute of limitations. Trepina v. Wood, 227 F. Supp. 726, 729 (D. Mont. 1964); Stever-Wolkford, Inc. v. United States, 198 F. Supp. 166, 168 (E.D. Pa. 1961).

355. Woirhaye v. United States, 609 F.2d 1303 (9th Cir. 1979).

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do so. He conveyed his request within six months following the original denial, but did not actually furnish the new evidence until two weeks after that period had passed. The agency disregarded the request on the ground that it was no longer timely.[356] The disappointed claimant then filed suit, only to learn that his claim was now also too late for judicial consideration.[357] The court reasoned that the statute of limitations is tolled only when the agency leads the claimant to believe it *is* reconsidering the claim, not when it simply says it *would* reconsider it.[358]

In another case,[359] the claimant, upon receiving a notice of denial, made two further inquiries, the first of which led him to think the claim might be reconsidered. He later learned that this was not the case, and brought suit seven-and-a-half months after the first exchange and less than a month after the second. The court dismissed the action as untimely[360] and held that the agency's "courtesy" in supplying oral and written explanations did not "erase" the previous final denial.[361]

These results point up the ambiguity surrounding the reconsideration process and depict a real potential for misleading an honest and reasonably diligent claimant. The regulations themselves are not flawed. They fairly state that a request for reconsideration gives an agency six months to act and bars the claimant from suit during that period, unless the agency acts sooner upon the request. The regulations also incorporate by reference the rules governing final denial letters. Thus, final agency action on a request for reconsideration must be in writing, must be sent by certified or registered mail, and must contain notice of the right to sue within six months from the date of mailing.[362] Absent such a communication, the claimant has the option of bringing suit any time thereafter.

The lingering problem is to know whether a given communication by the claimant constitutes a sufficient request for reconsideration. For example, does the submission of new evidence, or a statement of intent to submit new evidence, constitute a request? Does a written request for clarification or elaboration constitute a request? Obviously not all written communications from a claimant

356. *Id.* at 1304-05.

357. *Id.* at 1305.

358. *Id.*

359. Claremont Aircraft, Inc. v. United States, 420 F.2d 896 (9th Cir. 1970).

360. *Id.* at 896-97.

361. *Id.* at 898.

362. 28 C.F.R. § 14.9(a), (b) (1984). For a different view, see *supra* note 354.

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following a final denial amount to requests for reconsideration. A claimant may not even want formal reconsideration if that entails a six-month bar to litigation. The claimant may simply have a question or a comment. Ultimately, claims officers should place the most reasonable interpretation possible on any such communication, and promptly indicate whether or not they interpret it as a request for reconsideration.[363] If they do take it as a request, confirmation to that effect might obviate the filing of a premature suit and the need for proceedings to have it dismissed.[364] If they do not, they should remind the claimant that the statute of limitations has been running since the denial letter was sent.[365]

Though this process may strike some claims officers as excessive handholding, many claimants do need guidance. This is because the regulations do not alert them to the risk that, in awaiting a response to some communication, they may find that the limitations period has lapsed. Even a claimant who appreciates the risk may need guidance. The claimant who reopens matters, yet by way of precaution still files suit within six months of the original denial letter, has not given the agency the six months which the regulations reserve for reconsideration of the claim. The suit is premature and subject to dismissal. On the other hand, waiting a full six months means allowing the original statute of limitations to expire. Even if the agency responds within six months, the original limitations period may by then have lapsed. In short, when the Justice Department extended claimants an invitation to seek reconsideration, it carefully protected the government's interest by securing the agencies a period of time in which to act while suspending the claimant's right to sue. But the Department has not put claimants similarly at ease, even though doing so might spare the courts from having to decide after the fact what claimants under differing sets of

363. *See* ACUS Recommendations, 1 C.F.R. § 305.84-7(A)(6)(b) (1984).

364. *See, e.g.*, Trepina v. Wood, 227 F. Supp. 726, 729 (D. Mont. 1964).

365. At the United States Army Claims Service, where a request for reconsideration does not, without more, trigger an extension of the limitations period, claims attorneys invariably provide just such a warning in their response should they decline to reconsider the request. Rouse Interview, *supra* note 141.

A request for reconsideration based specifically on new evidence which does not accompany the request, as in the first case cited in the text, may require more explanation. The claimant in that case might have been spared difficulty if the agency had clearly given either of the following two reasonable warnings: (a) that a request for reconsideration specifically premised on the furnishing of new evidence is not effective for any purpose until the new evidence is in fact furnished, or (b) that the request for reconsideration is provisionally effective, but conditional on the new evidence being supplied by a deadline set no earlier than the end of the period in which reconsideration might have been sought initially.

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circumstances may or may not reasonably have been led by the agencies to believe.[366]

The temporary bar to litigation affords agencies a limited opportunity to conduct a reconsideration without discovering that the claimant after all has gone to court. Most reconsiderations, however, do not require a full six months. Where denial on reconsideration is all but a foregone conclusion, agencies should act expeditiously to prevent claimants from being kept out of court. Suppose, however, that a claimant asks to withdraw a request for reconsideration before the end of six months. The regulations imply that a claimant may not *demand* withdrawal of a request for reconsideration. There is no reason, however, why a claimant may not *request* withdrawal, particularly since reconsideration was entirely optional in the first place. Agencies should routinely honor such requests, provided they have not yet expended significant resources on the reconsideration process.[367] The agencies alone should be allowed to make that determination, but should be required to make it fairly and objectively.

### J. *The Aftermath*

Following a final denial, and possibly a fruitless request for reconsideration, the disappointed claimant's remaining option is litigation. In fact, not all disappointed claimants exercise the option, and for this the administrative process itself is partly responsible. That process succeeds not only when it yields a fair settlement of a meritorious claim, but also when it dissuades a claimant from pressing a nonmeritorious one. In both situations it avoids needless litigation. In other cases claimants abandon their claim without abandoning a belief in its merits. This category of foregone litigation cannot easily be described as needless. Still, where claimants choose not to litigate because they have had the satisfaction of being heard, have realistically assessed their claim's strengths and weaknesses, and have weighed the costs of litigation more intelligently than would otherwise have been possible, the administrative claim procedure likewise serves a useful purpose.

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366. *See supra* notes 355-61 and accompanying text.

367. Prior to the 1966 amendments, a claimant could withdraw a claim optionally filed with the agency on fifteen days written notice. *See supra* note 97 and accompanying text.

The most convenient rule would be to allow claimants six months from the time of the withdrawal of a request for reconsideration in which to bring suit, as was the case before the 1966 amendments. Theoretically, a claimant could file a reconsideration request for the sole purpose of prolonging the normal limitations period, but this seems extremely improbable.

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Tort claims that result in litigation are not inherently incapable of settlement. In fact, one commentator estimates that sixty to seventy-five percent of them are settled prior to judgment.[368] The fact that this percentage approaches the eighty percent level that prompted congressional enactment of the 1966 amendments[369] is not cause for concern. Litigated cases now represent a very small portion of all claims filed, namely those claims that were neither settled nor abandoned during the administrative process. Moreover, many postlitigation settlements do not constitute a concession of liability, but reflect the Justice Department's rational decision to conserve scarce litigation resources for cases that are more significant. Agency[370] and Justice Department[371] officials alike agree that the Department may properly compromise litigation over a claim that an agency could not in good conscience settle.

Legislative history suggests that Congress never expected the agencies to achieve a final disposition of all the claims they receive,[372] and probably did not anticipate even as high a rate of final disposition as they actually have achieved.[373] In fact, the authors of the Senate Report on the 1966 amendments thought it "obvious" that action on difficult tort claims could not be completed in the six months allotted to the agencies, but were content that "the great bulk" of claims would probably be ripe for decision within that time.[374] Even so, the authors deliberately chose not to require claimants to wait any longer than six months before seeking a judicial remedy. Of course, not all FTCA litigation comes from impatient claimants. Some litigants are met with prompt and outright agency denials that may or may not be warranted; others reject early offers in the belief that litigation, whether through compromise settlement or judgment, will afford them better results; still others simply want their day in court. The fact remains, however, that in no category of litigation—and the FTCA is still ultimately a judicial remedy—do the disputants always reach agreement before going to court. The fact that approximately five to ten percent of all

368. 2 L. JAYSON, *supra* note 84, at 15-9. The current Torts Branch Director estimates the figure for post-litigation settlement at 80%. Interview with Jeffrey Axelrad (May 25, 1983) [hereinafter cited as Second Axelrad Interview].

369. *See supra* note 128 and accompanying text.

370. Nesvet Interview, *supra* note 23.

371. Second Axelrad Interview, *supra* note 368.

372. *See supra* notes 133, 304.

373. *See supra* note 130 and accompanying text.

374. S. REP. NO. 1327, *supra* note 103, at 5, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2518-20.

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tort claims brought to the agencies finally end up in court[375] is neither surprising nor disappointing.

Once litigation is brought under the FTCA, the agencies lose their authority to settle a claim. Only the Attorney General or his designee may "arbitrate, compromise or settle" it.[376] But the agencies do not cease to play a role. They prepare a formal litigation report for the benefit of the United States Attorney on the case. The agencies also conduct further investigations, help identify and locate witnesses, and are consulted throughout on factual and legal issues and, when appropriate, on litigation and settlement strategy or the advisability of appealing an adverse judgment.[377] Agency counsel may participate actively in the defense, though they rarely prepare pleadings or make court appearances. Almost invariably, agency personnel will figure among the witnesses, and the discovery process will implicate agency records. Where the claim alleges a regulatory tort, or where large sums of money or critical issues are at stake, the interest of the agencies in the litigation remains very much alive. But the administrative process as such will have come to a close.

## IV. Agency Practice

Though the preceding sections of this Article emphasize the legally problematic aspects of the claims process, the overwhelming majority of tort claims pass through administrative channels without raising any significant procedural difficulties. The fact remains, however, that neither the FTCA nor the Justice Department's regulations provide answers to important procedural issues. Indeed, both sources are conspicuously silent on how agencies should go about conducting the basic tasks of investigating and determining claims. Certainly, the Justice Department has taken a strikingly narrow view of its rulemaking authority. Its regulations impose on claimants certain requirements of form and content for a valid and sufficient claim, and detail the cooperation that agency claims officers may ask of claimants in connection with different kinds of

375. *See supra* note 144.

376. 28 U.S.C. § 2677 (Supp. 1983).

377. In most agencies, the same attorneys will be involved in the litigation as were involved in the administrative claim. In the Army, however, whatever responsibility the agency bears in litigation will be carried by the litigators in the Torts Branch of the Army JAG rather than by the Claims Division attorneys who saw the claim through its earlier phases.

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claims.[378] They further direct claimants how to amend a claim[379] and seek reconsideration.[380]

By contrast, however, Justice Department regulations do not significantly channel the procedural discretion of the agencies. In fact, they essentially tell an agency only when to submit a proposed settlement to review by a legal officer or the Justice Department,[381] how to convey a final denial notice,[382] and how to process a claim for payment after it has been settled.[383] Thus, the agencies remain largely free to select their procedures for investigating and initially determining claims[384] and may issue or not issue operational regulations as they see fit.[385]

Still, the relative autonomy of the agencies in organizing their claims activities has not prevented them from adopting basically the same procedural approach. From a rich universe of conceivable models, they have all adopted one that is primarily investigatory in character, differing among themselves only in details of operation. The term "investigatory" denotes the following type of procedure. The agency out of whose activities a claim arises takes charge of assembling what will be the factual basis of the determination. While the appropriate operating division of the agency may be asked to execute certain basic investigative work, responsibility for assembling the record, so to speak, ultimately rests with the claims division of the agency's Office of General Counsel or its equivalent, the same body that eventually passes upon the merits of the claim. Neither in its investigatory nor its evaluative functions does the agency conduct anything remotely approaching a judicial-style hearing. There is no formal record, no cross-examination or con-

378. 28 C.F.R. §§ 14.2-.4 (1984).

379. *Id.* § 14.2(c).

380. *Id.* § 14.9(b).

381. *Id.* §§ 14.5-.7. An agency referral to the Justice Department:

> shall be directed to the Assistant Attorney General, Civil Division, Department of Justice, in writing and shall contain: (a) A short and concise statement of the facts and of the reasons for the referral or request, (b) copies of relevant portions of the agency's claim file, and (c) a statement of the recommendations or views of the agency.

*Id.* § 14.7.

382. *Id.* § 14.9(a).

383. *Id.* § 14.10(a).

384. Section 14.8 of the Justice Department regulations, entitled "Investigation and Examination," simply authorizes an agency to enlist the cooperation of another agency in conducting its investigations.

385. *Id.* § 14.11. "Each agency is authorized to issue regulations and establish procedures consistent with the regulations in this part." Whether Congress expected the Justice Department to impose greater procedural guidance on the agencies is a matter of conjecture. *See supra* text accompanying notes 118-21. In fact, the Department has not done so.

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frontation of witnesses, no rules of evidence, and no special discovery devices—the elements normally associated with a formal hearing.

But the absence of procedural trappings is not all-important, for it also is possible to find those trappings in nonadversarial settings. More critical is the fact that the ultimate decisionmaker, though removed from the events giving rise to the claim, is not entirely neutral. Decisionmaking authority at the agency level is not vested in an independent claims commission, a body of administrative law judges, or some other unit with substantial institutional independence from the agencies out of whose activities the claims arise. Administrative tort claims in a very real sense are decided by the lawyers for one of the parties. The prevalence in this context of an agency-centered investigatory model of operation is not surprising. In fact, the filing of an administrative claim often does not even signify a "dispute" between the parties. Some sort of "incident" will have occurred, but whether that incident may fairly be described as a dispute will not yet be known. Thus, the model is essentially nonadversarial.

### A. *A Sense of Numbers*

Before presenting a composite chronological sketch of the agency-level settlement practices that put procedural flesh on the statutory and regulatory skeleton, the general distribution of tort claims among the various agencies should be mentioned. Certainly no federal agency, however distinctive its affirmative mission, is without an incidence of such claims. Each agency has addressed the relevant substantive and procedural questions and established the necessary machinery. Some agencies, particularly those with large numbers and recurring patterns of tort claims, have developed detailed FTCA regulations supplementing those of the Justice Department; they may also use these regulations in exercising whatever meritorious or other auxiliary claims authority they possess. Other agencies have essentially reenacted the Justice Department regulations, in some cases verbatim.[386]

386. For FTCA regulations of the particular agencies referred to in this Article, see 7 C.F.R. § 1.51 (1984) (Agriculture Department); 14 C.F.R. §§ 1261.300-.315 (1984) (NASA); 22 C.F.R. §§ 31.1-.17 (1984) (State Department); 32 C.F.R. §§ 536.1-.171 (1984) (Army), §§ 842.0-.181 (1984) (Air Force); 38 C.F.R. §§ 14.600-.610 (1984) (Veterans Administration); 39 C.F.R. §§ 912.1-.14 (1984) (Postal Service); 43 C.F.R. §§ 22.1-.5 (1984) (Interior Department). Adjacent sections of the regulations of the military services, the Veterans Administration and the State Department address the complex array of ancillary claims settlement authority— such as the Military, Foreign and National Guard Claims Acts, and the

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Although universal, tort claims strike some agencies more frequently than others. The statistics available when the FTCA was amended in 1966 showed that the incidence of tort claims was highly concentrated in a small number of agencies, typically those with extensive direct dealings with the public or those using a large number of motor vehicles. More than four-fifths of tort suits pending against the government at the end of October 1965 arose from the activities of five agencies: the Defense Department, the then-Post Office, the then-Federal Aviation Agency, the Department of Interior, and the Veterans Administration.[387] This pattern apparently has continued.[388] The admittedly skewed sample of settlements in excess of $25,000 approved by the Justice Department in calendar year 1982 shows the same marked concentration.[389] All but ten of 155 such claims arose from the activities of the same five agencies.[390]

A comparison of numbers of incoming claims is more reflective of the relative burdens on the agencies. For fiscal year 1982, the Veterans Administration received a total of 936 malpractice and

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statutes that authorize payment of tort claims arising abroad—conferred on those agencies. Unless incorporated by reference, the Justice Department regulations issued pursuant to the FTCA have no bearing on these provisions. In fact, most of the agencies busiest with claims of various sorts have produced an impressive battery of internal agency memoranda, handbooks, manuals and the like that detail substantive and, to a much greater extent, procedural aspects of the various claims programs. *See, e.g.*, Air Force Reg. No. 112-1, Claims and Tort Litigation (July 1, 1983); Army Reg. No. 27-20, Legal Services: Claims (Sept. 1970); United States Postal Service, Administrative Support Manual, pt. 250 (Oct. 15, 1982); Vet. Admin. Reg., *supra* note 301.

Regulations on the FTCA and on ancillary claims statutes may differ in their particulars. Non-FTCA State Department claims, for example, may require a formal sworn statement and greater particularity than the simple written statement required under the FTCA. 22 C.F.R. § 31.4(b) (1984). The Veterans Administration calls for claims to be filed in duplicate. 38 C.F.R. § 14.514(a) (1984).

387. S. REP. NO. 1327, *supra* note 103, *quoting from* H.R. REP. NO. 1532, 89th Cong., 2d Sess. (1966), and *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2519.

388. The General Accounting Office is in the process of devising a system for recording by agency the volume as well as the dollar value of payments out of the judgment fund on administrative tort claims in each fiscal year. That information is not now systematically available. Telephone Interview with Sharon Green, Chief of Claims Adjudication, Claims Group, Accounting and Financial Management Div., GAO (Feb. 21, 1984).

389. Memorandum from Lawrence Klinger to Jeffrey Axelrad, "Administrative Claims Survey: Calendar Year 1982" (Mar. 21, 1983) (on file with the Case Western Reserve Law Review) [hereinafter cited as Klinger Memo].

390. *Id.* The Army alone accounted for over half of the dollar value of such claims. The pattern for 1983 was similar. Of the 120 claims approved by the Justice Department, all but nine were generated by the named agencies. Memorandum from Lawrence Klinger to Jeffrey Axelrad, "Administrative Claims for 1983" (Jan. 4, 1984) (on file with the Case Western Reserve Law Review).

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1660 nonmalpractice claims,[391] and the Air Force a total of 1727 claims.[392] These totals pale by comparison with the reported 9323 tort claims processed administratively by the Postal Service in calendar year 1982.[393] Annual claims totals range downwards to an estimated 1500 for the Department of Interior,[394] 500 for the Agriculture Department,[395] 100 for the Federal Bureau of Investigation,[396] and fifty claims or fewer each in the State Department[397] and National Aeronautics and Space Administration.[398]

### B. *A Sense of Organization*

The volume of an agency's tort claims bears on that agency's choice of management techniques. A few examples should suffice to indicate the possibilities. In the State Department, a single Assistant Legal Adviser handles all of the agency's tort claims with the aid of one attorney-adviser and one secretary; the work does not consume all or even most of his time.[399] The small number of claims makes centralization entirely practicable. All final determinations are made by the Deputy Legal Adviser on the Assistant Legal Adviser's recommendation in the form of a self-contained memorandum; it is possible that the Deputy Legal Adviser will never examine the claims file. Only foreign claims may be finally settled outside the Office, and even then only in an amount up to $1000. The foreign missions are reluctant to issue a final denial;

391. CENTRAL OFFICE ANNUAL ADMINISTRATIVE TORT CLAIM REPORT FY 1982, October 1, 1981-September 30, 1982; FIELD OFFICE ANNUAL ADMINISTRATIVE TORT CLAIM REPORT FY 1982, OCTOBER 1, 1981 - SEPTEMBER 30, 1982. In the same period, 156 malpractice and 877 nonmalpractice claims were settled administratively. The figures confirm the variability of settlement rates within a single agency according to type of claim. *Id. See supra* notes 152-53 and accompanying text.

392. STATISTICAL REVIEW, AIR FORCE CLAIMS AND TORT LITIGATION ACTIVITY, FY 1982 at 3, 7. *See supra* notes 137-43. The Chief of General Claims in the Army Claims Service gives an estimate for the Army of as high as 5000. Rouse Interview, *supra* note 141.

393. Levin Interview, *supra* note 140.

394. Feeley Interview, *supra* note 147.

395. Nesvet Interview, *supra* note 23.

396. Kelley Interview, *supra* note 24.

397. Huang Interview, *supra* note 22.

398. Wieland Interview, *supra* note 152; Wieland Letter, *supra* note 144 (NASA statistical sheets). These figures include claims under the latter two agencies' meritorious claims statutes. Some agencies have annual tort claims totals below ten.

399. Huang Interview, *supra* note 22. In calendar year 1982, only 31 tort claims came into the Assistant Legal Adviser's office. The claims ranged in amount from a $500 claim for property stolen from an embassy abroad to a $100 million claim for the alleged negligence of State Department officials in failing to evacuate the claimant quickly enough from a foreign country to receive necessary medical attention. *Id.*

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they prefer that such a ruling come from Washington.[400]

In contrast, tort claims in the Veterans Administration, though officially handled by an Assistant General Counsel in the central office,[401] command the full-time attention of a deputy assistant general counsel and a staff of four attorneys. Tort claims also occupy agency lawyers in each of the fifty-four VA regional counsel offices. However, considering the large scale of the Veterans Administration's tort claims operation, matters are reasonably centralized. All tort claims, wherever filed, are routed to counsel headquarters in Washington for a superficial examination of their sufficiency. Only after review are they forwarded for investigation to the regional counsel office closest to where the claim arose. The regional office is authorized to approve final settlements up to $25,000,[402] and to issue final denials on claims of any amount. Any proposed settlement in excess of $25,000 requires approval from the General Counsel's office on the basis of the file assembled locally. The General Counsel's office, exercising a de novo standard of review, may deny the claim entirely, or may remand to the regional counsel with instructions to negotiate and settle the claim for a lesser amount within their authority or, if that cannot be done, to deny the claim altogether. In special cases the General Counsel may give regional counsel the authority to negotiate and settle a claim for an amount less than recommended but beyond its normal authority, subject to Justice Department approval. Of course, the General Counsel may simply endorse the regional counsel's recommendation and then seek Justice Department approval. Any decisive action taken in Washington, though handled by a staff attorney, requires a formal memorandum to the Deputy Assistant General Counsel, who reviews and revises the memorandum, and transmits it, accompanied by a draft decision, to the Assistant General Counsel for action.[403]

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400. *Id.*

401. Kane, Schmetterling, and Bradshaw Interview, *supra* note 149. The Assistant General Counsel has other important responsibilities: educational programs, vocational rehabilitation, loan guaranty programs, and bankruptcy.

402. *Id.* The fact that regional counsel is authorized and even disposed to settle a claim in an amount up to $25,000 does not mean it necessarily will do so. Advice of headquarters may be sought on any factual or legal issue or on matters of valuation. One Washington-based claims attorney reports spending a substantial portion of his tort claim activity time on the phone with district counsel or over files referred by them. *Id. See* 38 C.F.R. § 14.608 (1984) (referrals from district counsel).

403. Kane, Schmetterling, and Bradshaw Interview, *supra* note 149. Other agencies with a much smaller claims volume than the Veterans Administration nonetheless use a similar moderately decentralized system. At NASA, tort claims responsibility falls to an Assistant General Counsel for Litigation whose resources are devoted in far greater measure to other

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The Department of the Army probably carries centralization of large-scale tort claims operations to the limit. Any claim with a face value above $5000 must be directly handled at claims service headquarters in Fort Meade, Maryland.[404] Claims of $5000 or less are processed by the designated claims attorney, military or civilian, within the Judge Advocate's office of the post having geographic responsibility for the incident.[405] Substantive settlement authority, exercised on the basis of the officer's investigative report with findings and recommendations,[406] vests in the Staff Judge Advocate, the chief legal officer at the post, or by delegation in the claims officer.

The best measure of concentration in the Army Claims Service, apart from the Army's markedly low cutoff point for local settlement, is its policy on denials.[407] No local post may deny a claim, however small the sum sought.[408] The most it can do is prepare a "Seven Paragraph Memorandum and Opinion" specifically justifying its recommendation to deny.[409] The actual decision to deny

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matters, notably contracts and procurements. He and his assistant can handle the tort load themselves because NASA regional counsel have independent settlement authority up to $10,000 and an unlimited denial authority which, as so many other agencies report, they are reluctant to exercise. Proposed settlements over $10,000, and referrals from regional counsel in other cases, come to Washington for review and recommendation by the Assistant General Counsel and formal action by the General Counsel. Quite clearly, NASA could handle its entire yearly claims volume of roughly 50 claims directly out of Washington—much as the State Department does—but finds it more efficient to decentralize matters among the eight regional space centers out of whose operations its tort claims almost invariably arise. Wieland Interview, *supra* note 152.

404. 32 C.F.R. § 536.6(l)(2) (1984).

405. *Id.* § 536.6(k)(1). Alternatively, a post may have a separate unit claims office headed by a claims officer who is not normally an attorney; in that event, the claim will be supervised and handled there. Rouse Interview, *supra* note 141.

406. Rouse Interview, *supra* note 141. If a unit claims officer investigated the claim, he or she will prepare the report; if a subordinate unit officer investigated the claim, the report will come from the claims officer in the Judge Advocate's office.

The Army has devised a small claims procedure whereby amounts up to $750 may be paid on a proper claim without the filing of an investigative report. Army Reg. No. 27-20, Legal Services: Claims §§ 2-29 - 35 (Sept. 1970).

407. Rouse Interview, *supra* note 141. Like the Veterans Administration, the Army Claims Service also reports steady referrals of issues and whole claims from local agency attorneys even on matters fully within their settlement jurisdiction.

408. *Id.* This contrasts sharply with the usual agency practice of delegating to local agency attorneys either (a) authority to deny claims of a face value coextensive with their payment authority or, more often, (b) authority to deny claims up to any amount irrespective of the monetary ceiling on their payment authority. *But see* 32 C.F.R. § 536.6(h)(1) (1984), which provides: "If the claim is determined to be not meritorious, it will be disapproved provided the command has settlement authority for claims of the type and amount involved."

409. Internal Army regulations prescribe the contents and arrangement of a Seven-Paragraph Memorandum and Opinion:

(1) Claimant's name and address.
(2) Date and place of accident or incident.

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must come not only from Fort Meade, but specifically from the Chief of the General Claims Division of the Army Claims Service rather than a subordinate.[410] The rationale for this policy is as interesting as it is unusual. It reflects a belief that settlement decisions demand the attention of high-level authorities not only when subordinates propose to dip deeply into the Treasury to pay a claim—the customary rationale for delegating limited settlement authority but unlimited denial authority[411]—but also when they will pay nothing on a claim or a sum less than the claimant is prepared to accept. In effect, the Army Claims Service has reversed the usual presumption by giving local posts unreviewed settlement authority up to $5000 but no denial authority whatsoever. Its concern is that local claims attorneys sometimes may deny valid claims rather than undertake the difficulties of negotiating a compromise.[412]

When a claim has a face value of over $5000, and the Chief of the General Claims Division does not believe local post attorneys could settle it for less, settlement activity is entirely centered in Fort Meade, specifically in the hands of nine full-time "action officer" attorneys and nine full-time investigators acting in teams. Each action officer has settlement authority, subject to both the Chief's and the Justice Department's approval when the proposal is to pay more than $25,000. While subordinate officers are free to settle in amounts up to $25,000 and to negotiate alone with the Justice Department for approval of larger settlements,[413] no denial letter may

(3) Amount and date of filing of claim.
(4) Type of claim and brief description of accident or incident giving rise thereto.
(5) Facts.
(6) Opinions.
(7) Action.

Army Reg. No. 27-20, *supra* note 6, § 2-12.

410. Rouse Interview, *supra* note 141. Subordinate attorneys will handle the matter and as often as not reopen the investigation. But only the Chief of the General Claims Division can issue an initial denial. The Chief estimates his rate of reversal of recommendations to deny to be fifty percent. Interestingly, since the Army guarantees reconsideration by an attorney of higher rank than the initial decisionmaker, persons whose claims are finally denied necessarily get reconsideration, albeit on the written record, by the Chief of the entire Army Claims Service.

411. *See supra* note 408.

412. Rouse Interview, *supra* note 141. The denial policy described above is as good a manifestation as any of a view—held with unique conviction in the Army Claims Service—that agency-level claims attorneys owe loyalty as much to the claimant as to the Treasury. *See infra* notes 582-86 and accompanying text.

413. Rouse Interview, *supra* note 141. However, the Chief will review the memorandum of law and fact produced by the action officer in preparation for Justice Department approval. 32 C.F.R. § 536.6(h) (1984).

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be issued except by the Chief under the Chief's own name.[414]

At the other extreme is the Interior Department's uniquely decentralized operation. Notwithstanding the Department's heavy claims volume,[415] the General Law Division of the Washington Office of the Solicitor has a single attorney-adviser devoting full time to the administrative handling of tort claims.[416] This arrangement suffices because each of Interior's eight regions has a large regional solicitor's office and up to four field offices with claims personnel. Building on the investigative activities of non-attorney personnel attached to each installation within the Interior Department's jurisdiction, the Regional Solicitor, the Assistant Regional Solicitor, or more often one of the other attorneys in the regional or field office[417] handles the negotiations and considers entering into final settlements. They may finally settle claims up to $25,000, or deny a claim of any amount.[418] Although on paper the division of authority looks similar to the Veterans Administration, a number of factors—the heavy reliance on investigative reports and recommendations prepared at the local installation, the fact that reconsideration also takes place regionally rather than at headquarters, and the highly local character and generally lower dollar value

414. Rouse Interview, *supra* note 141. For a somewhat outdated but still apt narrative account of Army tort claim procedures, *see* Williams, *supra* note 96.

Lest Army claims organization be taken as applicable to all the armed services, a word should be said about Air Force operations. Though $7500 is the ceiling on settlements that may be entered into by the Judge Advocate offices in the 120 Air Force bases that serve as administrative subdivisions of the Department, 32 C.F.R. § 842.23(4) (1984), those offices retain primary investigative authority in all cases. The entire legal as well as factual workup of a case is coordinated there, which explains why each base has at least one standing claims attorney—again civilian or military—and often a full-time paralegal assistant. Settlements up to $7500 may be made by the Staff Judge Advocate, based on a Seven-Paragraph Memorandum, *supra* note 409, prepared by the claims officer; denials may be issued only when the claim does not exceed that amount. Action in all other cases—whether settlement or denial—takes place in Washington, but largely on the basis of the existing claims file. Semeta Interview, *supra* note 151; Purdon Interview, *supra* note 236.

415. *See supra* note 394 and accompanying text.

416. Feeley Interview, *supra* note 147. The attorney-adviser reports only indirectly to the Associate Solicitor of the General Law Division.

417. *Id.* The full-time headquarters attorney-adviser functions as a regional claims officer for claims arising in the Washington area. He relies, as do the true regional offices, on investigative reports prepared at the local installation out of whose operations a given claim arose, and in nine out of ten cases follows the recommendations in those reports. Should a claim arise within the National Capital Region of the National Park Service, one of two non-attorney claims investigators attached to the National Park Service conduct the investigation. The attorney-adviser's personal settlement authority is limited to $10,000. 43 C.F.R § 22.5 (1984). Higher awards require the approval of the Assistant Solicitor in charge of procurements and patents. Feeley Interview, *supra* note 147.

418. 43 C.F.R. § 14.6 (1984).

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of Interior Department claims compared to Veterans Administration claims[419]—combine to produce a uniquely decentralized tort claims operation.[420]

A distinctive feature of the Justice Department's handling of tort claims arising out of its own activities is the extent to which substantive authority is delegated to some of the Department's component agencies. For example, the FBI's specially created Civil Litigation Unit in Washington has settlement authority on a nationwide basis for amounts up to $5000.[421] The Unit has a small number of FBI attorneys and paralegals who work on claims alone. The Drug Enforcement Administration and United States Marshals' Service have similar centralized authority, although they can settle claims only up to $2500.[422] The Immigration and Naturalization Service and Bureau of Prisons also have $2500 settlement authority, but exercise it on a regional and local basis, respectively.

Component agencies within the Justice Department conduct their own investigations, usually on a local basis. The investigations are performed either by an attorney, as in the FBI, or a non-attorney, as in the Immigration and Naturalization Service or Drug Enforcement Administration. Where the agencies cannot settle a deserving claim within the monetary limits of their authority, the investigative file is sent to the Torts Branch of the Justice Department's Civil Division for further investigation and negotiation, as appropriate, and for possible settlement. In practice, claims are re-

419. Feeley Interview, *supra* note 147. A very substantial number of claims arise out of the Department's management of the government's extensive landholdings, operation of widely dispersed public facilities, and maintenance of a large police force and fleet of vehicles to service those facilities. *Id.*

420. *Id.* The current legal division of claims authority within the Department is of relatively recent origin. Until 1977, notwithstanding all the factors favoring decentralization, the regional counsel could not settle a tort claim in an amount in excess of $3500. Pressure from the regions for greater settlement autonomy led to the change. *Id.*

Another strikingly decentralized mode of operation is that of the Agriculture Department. The General Counsel's Office normally sees no claim at all, even one arising in the Washington area, unless its face amount exceeds $60,000. On all other matters, as one high-ranking Washington claims officer put it, "regional counsel are on their own." Washington will, at most, get copies of correspondence. Regional counsel conduct reconsideration of their own decisions and in principle deal directly with the Justice Department when a proposed settlement needs approval. How a claim is to be investigated is a matter between regional counsel and the "tort liaison officer" (rarely a lawyer) in the local office of the component Agriculture Department agency out of which the tort claim arose. The current organization, like that of the Interior Department, is of recent origin. Until raised a few years ago to $60,000—at that time the level of United States Attorneys' settlement authority—the ceiling on regional authority was set at $10,000. Nesvet Interview, *supra* note 23.

421. 14 C.F.R. § 0.89 (1984).

422. *Id.* § 0.104 (App. § 5).

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ferred to the Torts Branch even though deserving and even though well within component agency authority, if they entail close legal or policy issues, or if the component is simply unable or unwilling to conduct the negotiations necessary to achieve settlement. As elsewhere, those who have unlimited denial authority may be quite reluctant to exercise it. By contrast, the Parole Commission has no delegated settlement authority, nor do the Justice Department divisions such as Civil Rights, Land and Natural Resources, Antitrust, or the Office of Solicitor General. The tort claims to which the divisions' activities give rise are handled by the Torts Branch through the same attorneys who handle approval matters and tort litigation generally, though much of the burden is borne by a single Torts Branch paralegal.[423]

### C. *The Initial Stages of a Claim*

The FTCA requires that a claim be presented to the federal agency from whose activities the claim arose.[424] Regardless of where the claim is filed in a given agency,[425] it usually ends up in the legal department, either in the Office of General Counsel or a regional or district counsel's office, depending on the organization of the agency and its tort claims operations. Each claim, according to its amount or apparent complexity, is assigned to a particular claims attorney, or, for the routine claim in a claims-heavy office, to a paralegal.[426]

The first order of business is typically an examination of the claim's facial sufficiency. When Standard Form 95 has been used, determining whether the claim is without technical defect, recites a sum certain, and contains the information necessary for an investigation is usually easy. Most claims officers have developed for this purpose a mental checklist of essential elements.[427] If the claim is

423. Bodolay Interview, *supra* note 144. In more routine cases, the paralegal officer takes charge, with the Torts Branch Director serving as a reviewing authority. Otherwise, a Torts Branch attorney will take charge, working either alone or in conjunction with the paralegal, subject to review by an Assistant Torts Branch Director. *Id.*

424. 28 U.S.C. § 2675 (1982).

425. Agriculture Department claims, for example, are supposed to be filed with the local office of the component agency whose activities gave rise to the claim, not with regional counsel. Nesvet Interview, *supra* note 23.

426. The Attorney General's regulations impliedly approve the use of paralegals, subject to the requirement of review by an agency legal officer in the case of awards exceeding $5,000. 28 C.F.R. § 14.5 (1984).

427. *See, e.g.*, Letter from Marian Blank Horn, Associate Solicitor, Division of General Law, Department of the Interior, to Charles Pou, Jr., Administrative Conference of the United States (May 21, 1984); Letter from Captain G. Lewis Michael III, Deputy Assistant

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sufficient, the claims attorney or paralegal will then conduct an investigation, evaluate the claim based on the investigation, and conduct negotiations with the claimant or claimant's attorney if warranted by the prospect of settlement. If the claim is not sufficient, a claimant may encounter difficulties as Justice Department regulations do not require the agency to notify claimants of the existence of technical defects. Theoretically, an agency officer may sit upon a defective claim without action until the moment for a timely cure has passed.

Until recently, the courts have not imposed on agency attorneys any affirmative duty to point out a claimant's errors or omissions, however innocent and fatal they may be.[428] Some courts have now placed a measure of that responsibility on the agencies. For example, one court held that an agency should have taken the untotaled medical bills appended to a claimant's written demand for personal injury and property damage resulting from an automobile collision as the equivalent of a sum certain, rather than wait three-and-a-half months until less than thirty days remained under the statute of limitations to send him four copies of Standard Form 95 for completion and return.[429] Other courts use an estoppel concept to prevent technically deficient claims from failing.[430]

While these judicial decisions are sound and appropriate, it should be remembered that Congress enacted the 1966 amendments in order to reduce, rather than enlarge, judicial intervention in government tort claims. Preferably, agency attorneys, with or without

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Judge Advocate General, Department of the Navy, to Charles Pou, Jr. (May 18, 1984); Bodolay Interview *supra*, note 144; Kelley Interview, *supra* note 24.

428. Muldez v. United States, 326 F. Supp. 692, 694 (E.D. Va. 1971) (claims attorney has "no 'duty to speak' other than to provide the [standard] form as requested" and therefore need not specifically advise a claimant that a sum certain is indispensable to a valid claim). *See also* Mudlo v. United States, 423 F. Supp. 1373, 1376-78 (W.D. Pa. 1976) (suit dismissed for insufficient documentation even though there had never been any communication to this effect from the agency either to the claimant or his attorney).

429. Molinar v. United States, 515 F.2d 246, 249-50 (5th Cir. 1975).

430. *E.g.*, Campbell v. United States, 534 F. Supp. 762, 765 (D. Hawaii 1982) (government estopped from objecting to husband's filing a claim for his wife on the ground that he was not appointed guardian ad litem until after suit was brought, since the agency failed to object to his representation at the time of filing); Industrial Indem. Co. v. United States, 504 F. Supp. 394, 398 (E.D. Cal. 1980) (government neglected to set reasonable time limit for substantiating claim or to warn of consequences of not complying); Hunter v. United States, 417 F. Supp. 272, 274 (N.D. Cal. 1976) (absence of power of attorney not fatal where agency dealt with claim on merits without ever mentioning the defect); Sky Harbor Air Serv., Inc. v. United States, 348 F. Supp. 594, 596 (D. Neb. 1972) (insurers given party status where FAA failed to object earlier). *See also* Forest v. United States, 539 F. Supp. 171, 175 (D. Mont. 1982). *See generally* Comment, *supra* note 274, at 156, 162.

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encouragement from the Justice Department, will undertake independently to notify claimants of deficiencies in their claims and even consider helping correct those deficiencies.[431] Many do so, whether through early warning signals, the relation back of cures to the original filing date, or use of the telephone rather than the mails when time is of the essence, to give a few examples.[432] Affirmative agency action of this sort is also beneficial to the government, since reasonable overtures to claimants at the agency level may save resources that would otherwise be used in litigating procedural issues before a judiciary that is showing ever-greater solicitude for tort claimants against the government.[433]

A more far-reaching alternative would be for agencies to adopt a standard of substantial rather than strict compliance with the Attorney General's regulations on the filing of a claim.[434] It is well to remember that Congress neither legislated stringent and particular-

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431. *See* ACUS Recommendations 1 C.F.R. § 305.84-7(A)(1)(a) (1984).

Since most agency regulations are silent on the subject of an affirmative duty, any action taken is a matter of individual attorney preference. Regulations of the armed services, however, are an exception. While they expand upon the criminal prohibition against soliciting claims, *see supra* note 181, by expressly forbidding agency personnel to "represent or aid any claimant or potential claimant in the prosecution or support of any claim against the United States," 32 C.F.R. §§ 536.2(a) (Army), 842.6(a) (Air Force) (1984), they carve an exception for "the assistance [claims officers] render as an official part of their duties," *id.* §§ 536.2(b) (Army), 842.6(b) (Air Force), and specifically instruct them, on request, to advise a claimant on how to present a claim and to help prepare the claim and assemble the evidence, *id. See also id.* §§ 536.29(k)(4), (6) (Army claims officer should keep claimant and attorney informed of status of claim and familiarize them with all aspects of the procedure).

Similarly, an internal Postal Service Manual forbids assistance in the presentation of a claim, but then goes on to provide that "when necessary, desirable and considered in the best interest of the Postal Service, the person [who indicates a desire to file a claim] should be assisted in preparing the form and assembling evidence." UNITED STATES POSTAL SERVICE, ADMINISTRATIVE SUPPORT MANUAL § 253.211 (Oct. 15, 1982).

432. Agency Interviews. *See supra* notes 236-37 and accompanying text. When time is truly of the essence, the Army Claims Service has authorized claimants to bring an initial or corrected claim to the local Army Recruting Office and to have the recruiter telephone the Service to report that the claim was received and to confirm that it is defect-free. Rouse Interview, *supra* note 141.

433. It is repeatedly suggested that, whatever the level of good faith required of claims officers when dealing with an unrepresented claimant, little if anything is owed to the claimant who has retained counsel. *E.g.*, Hlavac v. United States, 356 F. Supp. 1272, 1276-77 (N.D. Ill. 1972) ("Plaintiff had a lawyer from the outset and cannot claim that she was a simple layman who did not understand what was required of her"); Zillman, *supra* note 158, at 962. Granted, the presence of counsel on the claimant's side properly affects the government attorneys' choice of strategies in substantive negotiations, particularly when the latter take on a bargaining character. *See infra* notes 516-21 and accompanying text. But it should have no bearing on their willingness to make modest procedural overtures at the threshold.

434. *See* ACUS Recommendations, 1 C.F.R. § 305.84-7(A)(1)(a) (1984). *See also supra* notes 314, 317-18 and accompanying text. A number of agency claims attorneys report that the only elements of the claim they absolutely insist be in place by the time the statute of

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ized claim requirements nor specifically authorized the Attorney General to do so. Although full compliance with each technical requirement may help standardize agency claims operations, less than full compliance does not make processing a claim impossible or even very difficult.[435] A recent study of the notice requirements for government tort claims in Illinois[436] persuasively concludes that their legislative and judicial[437] liberalization has permitted them to continue serving their intended purpose without causing unwarranted inconvenience or hardship to claimants. In fact, federal claims attorneys generally do profess liberalism in monitoring compliance with the formal requirements of the statute and the regulations,[438] but judging by the high volume of litigation over such issues, some must not.[439]

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limitations has run are an identification of the agency, the name and signature of the claimant (or representative), and a sum certain. *E.g.*, Huang Interview, *supra* note 22.

435. *See, e.g.*, Executive Jet Aviation, Inc. v. United States, 507 F.2d 508, 515 (6th Cir. 1974) ("The purpose of the [1966] amendment was not to make recovery from the Government technically more difficult . . . . [T]he Government . . . certainly was not prevented from attempting a compromise simply because the insurers did not join in [the victim's] administrative claim"); Apollo v. United States, 451 F. Supp. 137 (M.D. Pa. 1978):

> Since the policy behind the rule of resort to the appropriate administrative agency is to give the agency a chance to consider the claim and to settle the claim without litigation, it should not be necessary to have submitted a claim that is technically perfect and in conformity with all the associated regulations so long as defects are corrected and so long as the claim as considered contains the essential elements necessary to permit settlement.

*Id.* at 138-39.

436. *See* Corboy, *supra* note 110. The Illinois legislature amended the Tort Immunity Act in 1973 by inserting the words "in substance" before the list of information required in the notice of claim. ILL. REV. STAT. ch. 85, § 8-102 (1977). The Illinois Workmen's Compensation Act specifically provides that a defect or inaccuracy in a notice of claim does not invalidate the claim unless the employer can show undue prejudice. ILL. REV. STAT. ch. 48, § 138.6(c)(2) (1977). Such a showing has been virtually impossible where the employer has actual notice of the incident.

437. Examples cited include acceptance of a filing in the wrong forum, finding a waiver of the notice of claim requirement where the municipality is fully insured against the claim in question, Corboy, *supra* note 110, at 614, or where it fails to object, *id.* at 621, dispensation from the requirement in the case of counterclaims, *id.* at 614-15, and claims by infants and incompetents, *id.* at 623, disregard of factual errors or omissions in the notice of claim, *id.* at 618, allowing service by registered mail though personal service of the claim is technically required, *id.* at 619, and even—somewhat questionably— accepting the filing of a complaint in court as equivalent to the filing of a claim with the entity, *id.* at 624.

438. *See, e.g.*, Newman Interview, *supra* note 148; Semeta Interview, *supra* note 151; Letter from Marian Blank Horn, Associate Solicitor, Division of General Law, Department of the Interior, to Charles Pou, Jr., Administrative Conference of the United States (May 21, 1984).

439. *See supra* note 158. To some extent, however, Justice Department litigation strategy rather than agency practice is responsible for injecting technical defenses into the litigation. *See supra* note 319 and accompanying text.

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The following case,[440] on the issue of the sum certain requirement, illustrates an agency's failure to implement this approach. Three months following a collision with a postal truck, a claimant filed with the Postal Service a detailed Standard Form 95, a physician's report, and medical bills for injuries sustained in the accident. The original supporting exhibits met all the regulatory requirements but, because the form did not contain a sum certain, were returned to the claimant with instructions to perfect the claim. The claimant filed a new Standard Form 95 specifically requesting $22,000, but, despite instructions by the Postal Service, failed to resubmit the exhibits until after the statute of limitations expired. The agency considered the claim stale and refused to entertain it. The court properly disagreed:

> [T]he circumstances are that the Postal Service ultimately received conforming copies of the Form 95 and its supporting exhibits, but never at the same time.
>
> . . .
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> The [1966] amendments were intended to provide a framework conducive to the administrative settlement of claims, not to provide a basis for a regulatory checklist which, when not fully observed, permits the termination of claims regardless of their merits . . . . The Federal Tort Claims Act requires that the claimant give notice to permit the government to investigate the matter in a timely fashion and to permit negotiations in an effort to resolve the claim without litigation if the government determines there is some merit to the claim. Plaintiff's notice in 1977 was sufficient for those purposes, and he is properly now before this court.[441]

### D. *Investigating the Claim*

In many cases, agencies conduct routine accident investigations apart from any actual or imminent tort claim. Virtually all agencies have reporting procedures to be followed by any officer involved in an accident on the job and by his or her supervisor. Generally, these requirements are found in agency handbooks and manuals rather than published regulations.[442] An example is the Postal Ser-

440. Koziol v. United States, 507 F. Supp. 87 (N.D. Ill. 1981).

441. *Id.* at 88, 91.

442. *E.g.*, Army Reg. No. 27-20, *supra* note 6, ch. 2, § I; Air Force Reg. No. 112-1, *supra* note 386, ch. 4; Department of the Interior Departmental Manual § 451.1.8-.10 (Oct. 29, 1975). For example, an Interior Department Manual requires, irrespective of whether a tort claim is filed, that tort claims officers conduct an investigation of any incident involving injury to person or damage to or destruction of property, in addition to whatever investigations supervisors, safety officers and auditors may be required to make. The regulations precisely

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vice, where seventy-five percent of the claims result from motor vehicle accidents and another twenty percent from post office "slip-and-falls."[443] In the event of a motor vehicle accident, the government driver routinely completes a contemporaneous accident report on Standard Form 91,[444] a supply of which usually is carried in the vehicle glove compartment. Upon notification, a supervisor completes a Postal Service Form 1700, "Accident Investigation Worksheet," supplemented as appropriate by one or more witness statements on a Standard Form 94. The supervisor then contacts the local accident investigator stationed at each post office. The job of that officer is to conduct a full-scale investigation, which includes securing a driver's statement, photographs and diagrams, a first-hand view of the wreckage or the scene, police reports, witness statements, and an account by the victim. This information is then forwarded for review and storage to one of the 230 Management Sectional Centers into which the nation's post offices are grouped. If the incident eventually gives rise to a claim, this near-contemporaneous record of the event will begin the basic investigative file.[445]

When a claim is filed, the Management Sectional Center completes a brief Postal Service Form 2198, "Accident Report: Tort Claim," which concludes how the claim should be handled, based upon the completed accident investigation file as supplemented. The agency by this time will have the benefit of the claimant's allegations and proof of loss. Unless the Management Section Center is able to settle the claim for $100 or less,[446] Form 2198 must be sent, in the case of simple property damage claims of up to $1000, to the Postal Data Center[447] with geographic jurisdiction. These three Centers, staffed by claims clerks with no formal legal education but substantial experience in small claims adjustment,[448] are the primary apparatus within the Postal Service for evaluating small

state the matters the tort claims officers must investigate and the material the investigative report must contain.

443. Newman Interview, *supra* note 148.

444. A Standard Form 92-A ("Report of Accident other than Motor Vehicle") should be used on the appropriate occasion.

445. *Id.*; Levin Interview, *supra* note 140.

446. The Center may not deny any claim. *Id.*

447. The three Postal Data Centers are located in New York, Minneapolis and San Francisco. Although the centers handle approximately 75 to 80% of Postal Service claims, this accounts for only a small percentage of Postal Service claim dollars. *Id.*

448. As a practical matter, few cases in this category involve difficult or subtle legal issues. When legal advice is needed—for example, on the local contributory or comparative negligence standard or on the collateral source rule—the Centers make a telephone inquiry to Washington or, less often, to regional counsel. *Id.*

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claims. Though they lack investigative means, the Centers critically examine the existing file and, utilizing telephone and mail contact with claimants as well as referrals to the Law Department in Washington, determine the validity and worth of the claim. Any reconsideration of a denial will take place in Washington on the basis of the existing record.[449]

A claim alleging property damage in excess of $1000, or personal injury in any amount, is directed not to a Postal Data Center but to the Postal Inspection Service. The Service is organized in fifteen to twenty regional offices and composed of trained nonlawyer professional investigators.[450] Again, the accident investigation file, with Form 2198, constitutes the basis of the record. However, the Postal Inspection Service, unlike the Data Centers, is equipped to conduct further investigation if necessary. Although settlements of up to $5000 may be entered into by the Postal Inspection Service, claims in this range are commonly referred to headquarters for a first determination, especially in a nonroutine case.[451]

Different kinds of claims require different investigatory processes. The steps for investigating a motor vehicle accident are not sufficient for the crash of a military aircraft; for the latter event, there exist quite different investigative procedures.[452] And neither

449. *Id.* Reconsideration of a denial by one of the Postal Data Centers is handled by a paralegal officer in Washington with independent settlement authority up to $10,000. Action over that amount, whether on reconsideration or as an original matter, requires a decision by an agency attorney. The Claim Division's Supervising Attorney has maximum settlement authority up to $25,000. By in-house custom, though not regulation, the Supervising Attorney also observes a $25,000 ceiling in denying a claim. Thus, in practice, both settlements and denials in excess of $25,000 require the attention of the Assistant General Counsel.

450. Because it is organized on a narrower regional basis than the Postal Data Centers, the Postal Inspection Service is more inclined to direct legal questions to regional counsel than to the Law Department in Washington. *Id.*

451. *Id.* Thus, the Law Department receives three categories of claims: reconsiderations, proposed settlements above the authority of the Data Center or Inspection Service, and difficult cases even within that authority. It estimates the total as about 100 claims a month. For this, the Claims Division has a staff of five lawyers and one paralegal spending only part of their time on FTCA matters.

When a final settlement is reached at any level, it is recorded and processed for payment on Postal Service Form 2106 rather than through usual GAO channels. *See infra* notes 671-74 and accompanying text. This is because of a unique statutory provision which requires that all Postal Service tort payments come out of revenues. Treasury, Post Office and Executive Office Appropriation Act of 1966, Pub. L. No. 89-57, tit. II, 79 Stat. 196, 200 (1965), 39 U.S.C. 409(e) (1982). For the legislative history and purpose of this statute, see H.R. REP. No. 651, 97th Cong., 2d Sess. 3, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 1895.

452. *See* Air Force Reg. 110-14, Investigations of Aircraft and Missile Accidents (July 18, 1977). The regulations describe the purpose of the investigation as "to preserve available evidence for use in claims, litigation, disciplinary actions, administrative proceedings, and all other purposes." They also prescribe specific guidelines for (1) the proper inquiries, (2) the

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of these methods will meet the needs of a thorough investigation into alleged medical malpractice.[453] The investigatory principle is, however, the same in all cases. Routine near-contemporaneous reports constitute the starting point for investigating any tort claim that may arise out of the incident. To be sure, those reports invariably require amplification after the claim is filed, if only on damages or documentation of the alleged loss. Moreover, some tort claims arise out of incidents whose claims potential was not anticipated. These claims have no preexisting report file and therefore require

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use to be made of the separate and prior confidential Safety Investigation Report (Air Force Reg. No. 127-4), (3) the documentation needed, and (4) the precise sequence in which all forms, documents and exhibits are to be arranged.

453. *See, e.g.*, Office of the Judge Advocate General, United States Air Force, Handbook for Judge Advocates: Investigating Medical Malpractice Claims (Mar. 1983). The handbook is a 126-page step-by-step guide with forms and appendices.

In the Veterans Administration, investigation of a medical malpractice claim by district counsel entails at least the following steps: (1) contacting the hospital, (2) ordering a copy of the patient's complete medical record, (3) conducting a physical examination, (4) interviewing the treating physician, (5) obtaining hospital and pharmaceutical records (and even purchasing or maintenance records) where relevant, and (6) obtaining the opinion of an impartial medical expert on whether a deviation from accepted standards of practice occurred. The investigation culminates in a standard two-part district counsel report—the first part consisting of a statement of facts, the second, a brief on the applicable law—plus exhibits. Vet. Admin. Reg. No. M-02-1, *supra* note 301, § 18.07c. According to the regulation:

> The investigation is not complete until the following are acquired or accomplished and included in the report:
> 1. Understanding of the patient's medical history as understood by the physician.
> 2. Determination as to whether the medical history had any bearing on the course of treatment and how much it was taken into consideration by the treatment team.
> 3. Understanding of the significance of the symptoms presented by the patient and of the clinical, laboratory, and x-ray findings.
> 4. Understanding of the diagnosis and how it was reached.
> 5. Understanding of the treatment regimen or procedures, alternative methods of treatment available, the reason for selection of the treatment followed, including information as to the perils and hazards of alternatives. Where error in diagnosis is claimed, facts must be elicited to show how the diagnosis was determined.
> 6. The reasons for untoward results from treatment must be determined. Did the patient contribute to the poor result by failure to cooperate during treatment? Are there sound medical reasons for the results other than those claimed by the patient?
> 7. Where untoward results from diagnostic or surgical procedures occurred, were they of such a nature that they actually would not occur but for error?
> 8. If a serious drug reaction is claimed, the frequency or rarity of its occurrence must be determined. Were other less-dangerous drugs indicated? Was the patient warned of the risk? Did the patient history show prior reactions?
> 9. Relevant medical opinions must be documented by medical literature. Copies of the relevant medical literature should be obtained and attached to the report.
> 10. If failure to obtain consent is the issue, the most recent Federal cases on the subject as well as the relevant State cases must be studied before the investigation is completed. The facts concerning the information furnished the patient concerning the risks, consequences and complications must be developed, including the medical reasons for withholding or minimizing such risks or consequences.
>
> In summary, the attorney must *know* and report the medical facts, favorable or unfavorable, to fulfill his or her responsibility.

*Id.* § 18.07c(3)(f).

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investigation from the top.[454]

The larger agencies, especially those whose activities cause the bulk of federal tort claims, have their own trained staff investigators and internal networks for securing the assistance of skilled professional advice when needed.[455] Agencies that are not as well-equipped have express authority from the Attorney General to seek assistance from other agencies, including the performance of physical examinations.[456] Whatever the situation, one of the claims officer's greatest challenges is deciding how to delegate investigative responsibility in a given case and ensure that it is carried out in a timely and professional manner. Even in agencies that concentrate the adjudicative function in one attorney's office in the nation's cap-

454. Different investigative techniques are prescribed for different kinds of claims. *E.g.*, Air Force Reg. No. 112-1, *supra* note 386 §§ 4-19 to 4-32 (July 1, 1983) (describing steps and documents required for claims such as crop loss, soil damage and sonic booms). Following a list of items needed for all claims, an Army claims manual singles out for detailed and specialized treatment traffic cases, mail cases, explosion cases and overflight claims. Army Reg. No. 27-20, *supra* note 6, § 2-8.

455. Medical malpractice is a good example. In the Veterans Administration, upon encountering disagreement on the applicable standard of medical care or on whether the injury claimed resulted from substandard medical care, the district counsel is directed to request an opinion from the VA Medical District Director with geographic jurisdiction (except when the Director is found in the facility where the incident occurred). The Medical District Director in turn is charged with obtaining reviews from all relevant medical specialists within or without the VA. If medical issues remain outstanding, this file is forwarded to the Office of General Counsel for referral to the VA's Special Assistant for Professional Services. Vet. Admin. Reg. No. M-02-1, *supra* note 301, at 18.07c(3)(e).

The Air Force has a somewhat different system for medical malpractice claims. At each Air Force Medical Center, a Judge Advocate is assigned to the position of Medical Legal Officer or Law Consultant. The Medical Legal Officer provides medical-legal advice to any Air Force claims officer investigating an actual or potential malpractice claim at bases within the jurisdiction, and is available for consultation at any stage. When the investigative file is complete, the claims officer routinely sends it to the Medical Legal Officer with a cover letter containing a summary of the facts and legal issues involved. The latter in turn refers the file to the Medical Center's professional staff for expert review and an opinion on the adequacy of treatment. Upon this basis, the Medical Legal Officer prepares a nonbinding but persuasive medical-legal opinion with recommendations for the claims officer. Office of the Judge Advocate General, U.S. Air Force, Handbook for Judge Advocates: Investigating Medical Malpractice Claims, *supra* note 453, at § 2.

Evidently the Army follows a similar routine. However, the practice at the Army General Claims Division at Fort Meade is never to select a military or other government doctor for the examination of a claimant or for the review of a medical file. *See* Rouse Interview, *supra* note 141.

456. 28 C.F.R. § 14.8 (1984). Technically, an agency before which a claim is pending also enjoys statutory authority to apply to a federal district court for a subpoena ordering witnesses to appear for deposition or respond to interrogatories on the subject of the claim. 5 U.S.C. § 304 (1982). The agency is also entitled to the services of a Justice Department attorney, not only in conducting the examination of a witness but also in investigating the underlying claim. 28 U.S.C. § 514 (1982). However, this privilege is seldom exercised. 2 L. JAYSON, *supra* note 84, at 17-73 (1984).

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ital—indeed especially in those agencies—the primary investigative authority normally has to be lodged elsewhere.[457] In other agencies, however, the vital task of coordination itself is dispersed.

The Agriculture Department is illustrative. A claim is usually filed with the local office of the relevant component agency, normally one of the Department's multitude of bureaus. It is then sent to the designated "tort liaison officer" of the component agency, who in all but two instances sits in Washington, unless that agency has chosen to establish liaison facilities at the state or regional level. The tort liaison officer is seldom a lawyer and often has other primary staff responsibilities. He or she orchestrates the investigation from start to finish, though much of that investigation takes place at the distant program office where the claim was originally filed. Authority for the final investigative report and recommendation may not be clearly assigned;[458] it may rest with the tort liaison officer, the local program investigator, or someone at the state or regional level. When the report is complete, the matter is referred to agency attorneys for disposition: to the General Counsel's Office for claims over $60,000, and to regional counsel for all others. If the attorneys determine that the investigation is incomplete, instructions filter back down the investigative channels.[459]

The next responsibility of the officer handling the claim is to request detailed information from the claimant to the extent needed. In every case, the officer will want to know the circumstances surrounding the incident if they have not satisfactorily

457. In the State Department, for example, basic factual investigations may be carried out in the relevant bureau or other functional unit within the Department's regional office. Huang Interview, *supra* note 22.

458. Each agency is generally directed to produce "a narrative report" for agency counsel containing:

> 1. A background description of the program involved, referencing statutory authority and applicable regulations,
> 2. A complete description of the events in question including references to documents included and a response to every allegation made in the claim,
> 3. Agency analysis of who was at fault for losses or damages alleged in the claim, referencing the opinion of technical experts, either non-involved agency personnel or outside consultants, where necessary,
> 4. Any policy reasons arguing for or against settlement,
> 5. An analysis of damages claimed by claimants unless waived by [agency counsel], and
> 6. Any possible USDA claims against claimant whether or not they arose out of this incident.

Office of General Counsel, Memorandum to Heads of Department Agencies 3 (Oct. 5, 1981).

459. Nesvet Interview, *supra* note 23. The particular problems of the Agriculture Department in coordinating the investigation and preparation of claims for adjudication are specifically addressed in the Office of General Counsel. Memorandum to Heads of Department Agencies, *supra* note 458. *Id.*

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emerged from a prior investigative report, and to obtain full documentation of the alleged loss. Early access to such information may shed light on determinative threshold questions, such as whether the alleged tortfeasor was acting within the scope of government employment at the time of the incident, whether his or her actions proximately caused the injuries claimed, and whether the claim is timely. A clearly negative conclusion on any one of these will obviate further investigation, especially on the matter of damages. In cases less easily disposed of, the information gathered may reveal the identity of witnesses and open up avenues of factual and legal inquiry.

### E. *Patterns of Correspondence*

The extent and character of correspondence between the claims officer and the claimant is primarily a matter of style. An initial request for documentation may be followed by repeated demands for outstanding information as well as new requests as other issues or doubts arise. No generalization about the number or rhythm of these exchanges is possible. The two principal modes of communication are telephone and personal letter, used in different proportions according to taste. Each claims officer has a preferred form letter for recurring kinds of correspondence, often inspired by a model found in the attorneys' manuals of high claims volume agencies.[460] One agency, more particularly one of the eight regional installations in NASA's decentralized claims operations, has devised a standardized set of nonletter forms to elicit information from claimants beyond that specifically requested in Standard Form 95.[461] The set includes 432 standard interrogatories covering virtually every issue in any conceivable kind of claim, with particular

460. *E.g.*, Vet. Admin. Reg. No. M-02-1, § 18 (Aug. 1, 1981).

461. 4 NASA-AMES UNIVERSITY CONSORTIUM FOR ASTROLAW RESEARCH, FEDERAL MANAGEMENT LAW PRACTICE MANUAL 1 (Aug. 1, 1982). The installation, NASA-Ames Research Center, does not have a volume of tort claims that itself would warrant the obvious effort expended in compiling this careful and impressive set of forms. Claims for fiscal years 1980 through 1983 totalled fifteen. *See* Wieland Letter, *supra* note 144. The collection resulted from a collaborative effort between the Ames Research Center and the Hastings College of Law.

The manual containing the sample interrogatories also contains a useful step-by-step procedural checklist, with specific time limit indications, for processing claims under the FTCA and the NASA meritorious claims statute. Other items include a skeletal Small Claims Settlement Form for settlements not in excess of $5000, which obviates the need for a narrative report with formal findings of fact and conclusions of law. There are also standard letters for a variety of purposes including reminders to claimants to supply outstanding information.

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emphasis on the substantiation of damages.[462]

Closely related to the written character of the claims process is the physical separation of the parties. Among the criticisms lodged against the 1966 FTCA amendments was the alleged geographic distancing of claimants and their attorneys from those government officers having settlement authority.[463] Under the amendments, the "head of each Federal agency or his designee," usually a Washington-based claims attorney, replaced the local United States Attorney as the government's negotiating representative. At the same time, many claims lack sufficient value to justify the long-distance travel needed to bring claimants face to face with agency representatives. On the other hand, a recent trend toward decentralization in agency claims management may have been meant precisely to bridge this gap.[464] Claims officers and claimants alike take moderate advantage of the greater opportunities for direct contact that local and regional negotiations provide.[465]

Of course, Washington-based claims officers may travel to meet with claimants if they desire. Some almost never do;[466] a few find it productive enough to do so regularly;[467] most, however, choose to

462. Included are interrogatories addressed to the employer of the alleged tortfeasor. Though set in classic sworn statement format, the model interrogatories expressly state at the outset that the questions "are not to be construed as those filed with an Adverse Party" and "need not be answered under oath." However, they specifically purport to be continuations of Standard Form 95 which states civil and criminal penalties for presenting fraudulent claims and for making false statements.

463. *See supra* note 123 and accompanying text. For contemporaneous criticism of the amendments, see I. GOTTLIEB, *supra* note 123, at 26-33; Corboy, *supra* note 158; Jayson, *supra* note 111, at 19.

The distance factor was not the major criticism. Critics worried that claimants would be tempted, to their detriment, to negotiate without the benefit of counsel in a deceptively nonadversarial setting. Corboy, *supra* note 158, at 71. These critics also rightly predicted that the agencies would call upon claimants to divulge all the particulars of their claims without sharing comparable wisdom about the government's own case. *Id.* at 78. Above all, they voiced misgivings about lodging the government's settlement authority in the agency alleged to be responsible for the injury.

464. Local claims handling also brings agency adjudicators more closely in touch both with the factual circumstances of a case and the applicable substantive law. On the other hand, it may result in less skill and professionalism in the government's negotiation and possibly a reduced settlement rate. *See supra* note 147, and Feeley Interview cited therein.

Veterans Administration attorneys strongly emphasize the direct contact factor as a consideration in that agency's somewhat decentralized practice. Kane, Schmetterring and Bradshaw Interviews, *supra* note 149. *See supra* notes 401-03 and accompanying text.

465. Feeley Interview, *supra* note 147; Nesvet Interview, *supra* note 23.

466. An example is the Agriculture Department's supervising attorney for tort claims. Nesvet Interview, *supra* note 23.

467. The Chief of the Army's General Claims Division exemplifies this approach. Rouse Interview, *supra* note 141.

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travel only when the size of a claim, the prospect of settlement, and the utility of a firsthand look clearly justify the strain on agency resources.[468] Claimants likewise have the option of going to Washington or having their lawyer do so, or of retaining Washington counsel. Neither of these, however, is the rule.[469] In sum, the vast majority of claims continue to be handled through written correspondence and telephone conversations. Agency claims attorneys believe that claimants neither feel nor are prejudiced by this, and report virtually no complaints. Certainly, no published critique of FTCA claim practices emphasizes the issue.[470] While the absence of an organized FTCA plaintiffs' bar makes it difficult to test this impression, the loss of local United States Attorneys as negotiating partners is probably offset by the advantages to claimants of dealing with government officers who are relatively free of an adversarial mentality.

### F. *The Investigatory Model*

As the account to this point suggests, tort claims are presented and investigated in the federal agencies according to an investigatory model that is nonetheless marked by a good deal of give and take. The informality of agency claims adjudication has rarely been challenged either as a matter of law or policy. This, like much else concerning tort claims handling by the agencies, may be explained by the prospect of a judicial remedy under the FTCA. Thus, while the administrative process can only be described as a hearing in the loosest sense of the term, and while the decisionmaker is not entirely impartial, claimants may after six months move out of administrative channels and into a neutral judicial forum where they will not be prejudiced by what has previously occurred.[471] A lawsuit under the FTCA proceeds on the basis of a trial de novo and full application of the Federal Rules. There is also no presumption in favor of the correctness of the prior agency determination.[472]

The implicit invitation to proceed without counsel is an important aspect of the procedural informality at the agency level. Critics of the 1966 amendments saw this as a trap for the unwary, imagin-

468. Levin Interview, *supra* note 140.

469. *Id.*

470. *See* 2 L. JAYSON, *supra* note 84, at 17-20.

471. In most cases, however, claimants will already have presented much of their evidence to the agency. In addition, the sum stated in the administrative claim will be a presumptive ceiling on the damages recoverable in court. 28 U.S.C. § 2675(b) (1982).

472. Note, *The Federal Tort Claims Act and Administrative Claims*, 20 BAYLOR L. REV. 336, 342 (1968).

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ing a variety of risks, from a claimant's ill-advised statements against interest to acceptance of a patently inadequate sum in settlement of a valid claim.[473] While these fears are not groundless, the claimant's temptation to proceed without counsel is alleviated by the prevalence of contingent fee representation[474] and statutory ceilings on attorneys' fees.[475] In addition, simply having the option of proceeding unrepresented is seen as a distinct advantage by most claimants.

If the combination of administrative and judicial remedies under the FTCA meets the requirements both of due process and public policy, the meritorious claims statutes present a different situation. Since Congress expressly created an administrative remedy, it can be argued that the process governing that remedy must not be procedurally arbitrary or unfair. Yet, agencies with meritorious claims authority almost invariably conduct themselves along the same investigatorial lines as agencies do under the FTCA,[476] and their decisions are not apparently subject to review.

*Gerritson v. Vance*[477] is a rare challenge to the fairness of the investigatory model in the tort claims context. In addition to disputing the merits of the State Department's denial of her claim for personal injury arising abroad, the plaintiff contended that the agency's manner of handling such claims offended fundamental notions of due process. The challenge rested on allegations that the State Department failed to afford her an oral hearing and allowed

473. Jayson, *supra* note 111, at 38.

474. On the prevalence of contingent fees, see Axelrad Interview, *supra* note 144.

475. *See supra* note 112 and accompanying text.

476. Interview with S. Neil Hosenball, General Counsel, NASA in Washington D.C. (June 29, 1983); Purdon Interview, *supra* note 236; Kelley Interview, *supra* note 24. Few of the ancillary or meritorious claim statutes (*see supra* notes 20A, 20B) identify the kind of administrative procedure to be followed. In fact, the agencies generally have no reason to suppose that a written investigatory procedure would meet with congressional disfavor. One possible exception is the recent Panama Canal Act of 1979, 22 U.S.C. § 3771-78 (1982), 93 Stat. 484-87 (1979). This Act contemplates actual hearings. A Board of Local Inspectors conducts mandatory investigations of any incident giving rise to a vessel claim prior to a vessel's departure from the canal. *Id.* §§ 3777-78. The Board is also empowered to summon witnesses, administer oaths and require the production of documents. *Id.* § 3778(b).

Confusion is apt to arise under the Foreign Claims Act, 10 U.S.C. § 2734 (1982), which provides for the settlement of claims brought by residents of foreign countries for losses resulting from the acts of American military service personnel abroad. The Act and the service regulations provide for determinations to be made by Foreign Claims Commissions located at military bases abroad. In every foreign country where the United States has a military presence, each of the military services has in fact established commissions composed of Judge Advocates stationed at bases in that country. However, these commissions proceed in an entirely investigatory manner, without hearings as such. Purdon Interview, *supra* note 236.

477. 488 F. Supp. 267 (D. Mass. 1980).

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an impermissible fusion of the investigative and adjudicatory functions. Without addressing the threshold question of whether a statute such as the State Department's implicates a protected liberty or property interest, the court found that due process simply does not require an oral hearing in every sort of agency determination.[478] It concluded that the agency had afforded the claimant all the process that was due when it invited the claimant to submit memoranda of law, statements and affidavits of witnesses, medical reports and bills, and other proofs of loss for agency consideration, and when it gave the claimant an opportunity to respond to its initial denial of her claim by a petition for reconsideration.[479] As for plaintiff's challenge to the fusion of investigative and adjudicatory functions in the same office, the court had ample authority for the proposition that an adjudicatory procedure is not unfair simply because the person who gathers the evidence also rules upon it.[480] Conceivably, a court might insist on a higher procedural standard when faced with a true statutory entitlement;[481] but meritorious claims statutes are usually viewed as giving agencies very wide discretion and enabling them to act as if out of grace.[482]

Of course, an investigatory model may pass constitutional muster without necessarily embodying sound procedural policy. However, even from a policy perspective, meritorious claims statutes are very poor candidates for procedural formalities. Aside from the fact that formal hearings simply are not the exclusive avenue to truth, meritorious claims statutes require neither proof of fault nor

478. *Id.* at 269, relying on Boddie v. Connecticut, 401 U.S. 371, 378 (1970). *Cf.* United Fruit Co. v. United States, 33 F.2d 664, 666 (5th Cir. 1929) (in processing claims an agency may proceed in the manner it deems most appropriate).

479. *Gerritson*, 488 F. Supp. at 270. The opinion reflects the analytic framework set out in Mathews v. Eldridge, 424 U.S. 319, 332-35 (1976); it underscores the substantial administrative burden oral hearings would place on the agency, especially if held abroad, and expresses judicial skepticism that such hearings would appreciably improve the accuracy of the determinations.

480. *Gerritson*, 488 F. Supp. at 269, *citing* Withrow v. Larkin, 421 U.S. 35, 47-54 (1975); Richardson v. Perales, 402 U.S. 389, 410 (1971).

481. *See* Davis v. United States, 415 F. Supp. 1086, 1091-92 (D. Kan. 1976) (Federal Prison Industries Act entitles federal prison inmates to compensation for work-related injuries and triggers a due process right to an evidentiary hearing); Saladino v. Federal Prison Indus., 404 F. Supp. 1054, 1056 (D. Conn. 1975).

482. The Comptroller General recently ruled that even the Military Personnel and Civilian Employees' Claims Act, 31 U.S.C. § 3721 (1983), a logical candidate for higher procedural standards, does not rise to the level of a statutory entitlement. 62 Comp. Gen. 641 (1983). The Comptroller General acknowledged that the agencies must exercise their discretion either by the issuance of regulations or by case-by-case adjudication. In reaching that conclusion, however, he also emphasized that the statutory language "may" implies discretion and therefore "does not create a legal entitlement." *Id.* at 643.

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the application of well-defined statutory or regulatory standards. In short, they do not demand what evidentiary or adversarial hearings best offer.

Tort claims by contrast present a much stronger case for the use of quasi-judicial procedures, but as long as the FTCA continues to afford claimants relatively prompt access to the courts on a de novo basis, the administrative phase of the process is properly kept simple. Moreover, compensation of government tort victims, however important a purpose, is not the principal mission of the agencies.[483] It is even secondary for most agency legal departments, since, apart from the small if growing category of regulatory torts, tort claims remain an essentially random and unintended byproduct of agency operations. Their own claim on agency resources must be kept within bounds.

### G. *Claimant Access to Information*

An investigatory model does not necessarily imply secrecy in the gathering of information. Although denied an opportunity to confront witnesses or conduct cross-examination or oral argument, claimants presumably would find it useful to know what the government knows on the subject of their claims. However, demands for access to information in agency claim files are reportedly infrequent.[484] Disclosure by the government thus remains an issue with tremendous potential but little actual friction in the administrative tort claims process.

A probable explanation is that, unlike many other areas of administrative law, tort claims generally do not position the agencies against well-organized regulated interests accustomed to confronting the government. More often than not, tort claimants' contacts with the government are those of an average member of the public—episodic and nonregulatory. Claimants also are likely to be

483. This is not to say that the compensation of government tort victims could not be made the principal mission of a specialized agency, much as workmen's compensation for federal employees has been made the principal mission of the Labor Department's Office of Worker's Compensation Programs. Some state agencies follow this model when handling government tort claims. At the federal level, however, that would require a fundamental redesign of the existing system.

484. *See, e.g.*, Newman Interview, *supra* note 148; Purdon Interview, *supra* note 236. Reportedly, private parties are more likely to seek access to general agency files for the purpose of determining whether they have a tort claim that is worth bringing than for the purpose of documenting a tort claim already filed. In that event, the Freedom of Information Act will be the usual vehicle and agency attorneys assigned to FOIA rather than FTCA matters—assuming they are not one and the same—will receive and process the request. Nesvet Interview, *supra* note 23; Kelley Interview, *supra* note 24.

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unrepresented. Finally, unlike the regulatory process which tends to postpone any early or searching judicial review, the tort claim process can move swiftly into a full judicial phase, with all the opportunities for information disclosure which that implies. Still, even if claimants do not ordinarily make informational demands on the agencies, claims attorneys can usefully think about how open the process generally ought to be and about the proper framework for responding to a demand if and when one should arise.

1. *Prevailing Attitudes to Claimant Access*

No well-defined policy on information disclosure appears to exist within individual agencies, much less across agency lines.[485] This absence of policy is a good reflection of the basically unstructured nature of the administrative as compared to the judicial phase of the tort claim process. It is also in striking contrast to the Justice Department's position that compliance by claimants with an agency's demands for information is the precondition of a valid claim.[486] In any event, claimant access to information, like much else in the process, has become a matter of individual style among claims officers.

There is a surprisingly broad range of attitudes on the question of whether and to what extent to make agency-held information available to a claimant. A number of claims attorneys disclose no information at their disposal, except as a tactical measure calculated to elicit further information from claimants or to persuade claimants to lower their demands.[487] At the other extreme, at least one attorney conducts business on an open file basis and encourages claimants to do so too. He does not routinely transmit available information to a claimant without request, but does issue a standing invitation to inspect the claim file as it develops.[488] Most common

485. There is one exception. The Justice Department regulations provide that in personal injury cases claimants may be required to submit to a physical examination by an agency physician. 28 C.F.R. § 14.4(b)(1) (1984). If claimants agree to provide their own physician's report to the agency, as is almost invariably the case, they are then entitled to the agency physician's report. Obviously, this right of access is only a byproduct of a claimant's duty of disclosure to the agency.

486. *See supra* notes 250-59 and accompanying text.

487. *See, e.g.*, Axelrad Interview, *supra* note 144.

488. Rouse Interview, *supra* note 141. However, it appears that no agency allows claimants to take the formal deposition of agency personnel prior to litigation. *E.g.*, Vet. Admin. Reg. No. M-02-1, *supra* note 301, § 18.04c(3) ("Claimant's attorney is not to be permitted to interiew VA physicians before or during the administrative phase of a tort claim. After suit is filed, VA physicians are not to discuss a case against the Government except under the supervision and guidance of Department of Justice attorneys."). One experienced claims attorney

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is an intermediate approach according to which the claims attorney volunteers little if anything specific, but discloses particular information on request if no valid ground exists for withholding it.[489] In effect, claimants on request may have documentary material they are entitled to have under the Freedom of Information Act (FOIA).[490]

### 2. *A Freedom of Information Act Framework*

Using the Freedom of Information Act as the standard for determining the extent of claimant access to agency documents on a pending claim is sensible, regardless of whether claimants expressly invoke the FOIA when making their request. As a matter of law, the FOIA is as available to the claimant in agency settlement proceedings as it is to anyone else.[491] The very short time frame for disclosure under the FOIA[492] also makes it a practical vehicle for use in a six-month settlement period. More important, use of FOIA standards should afford claimants ample access to information without causing the government substantial prejudice in subsequent litigation, while simultaneously promoting the disposition of claims

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would allow the practice as part of a much broader sharing of information between claimant and agency. Letter from Joseph H. Rouse, Chief, General Claims Division, U.S. Army Claims Service to George Bermann at 3-4 (undated).

489. Letter from Sarah Hertz, *supra* note 233 at 3; Newman Interview, *supra* note 148; Feeley Interview, *supra* note 147. Thus claims files are generally not open. *E.g.*, Air Force Reg. No. 112-1, *supra* note 386, § 12-17b ("claim [f]iles . . . are the property of the Air Force. Do not give them to the claimant or his agent for review or reproduction; portions of files are releasable."). *Cf.* 32 C.F.R. § 842.6(b)(3) (1983) (Air Force) ("On request, the claimant may be furnished information or evidence obtained during the course of a claims investigation except when barred by law or regulation.").

490. 5 U.S.C. § 552 (1977). For an apparent endorsement of this standard, *see* 32 C.F.R. § 536.2 (1983) (Army).

Alternatively, disclosure may be viewed as subject to the standards applicable to civil discovery. *E.g.*, Vet. Admin. Reg. No. M-02-1, *supra* note 301, § 18.04c(1) ("Where a claim under the provisions of the [FTCA] has been filed or . . . can reasonably be anticipated, no information, documents, reports, etc., will be released except [for] . . . release of information which would be available under discovery proceedings, were the matter in litigation.").

The rationales for nondisclosure of specific information under the FOIA or the civil discovery analogy include the attorney-client privilege, the work product privilege, and the government's deliberative privilege, particularly where disclosure would reveal an analysis of the claim's merit or recommendations to a superior officer.

491. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n.10 (1975); Hoover v. Department of Interior, 611 F.2d 1132, 1137 (5th Cir. 1980); Columbia Packing Co. v. Department of Agriculture, 563 F.2d 495, 499 (1st Cir. 1977); United States v. Murdock, 548 F.2d 599, 602 (5th Cir. 1977); Brockway v. Department of Air Force, 518 F.2d 1184, 1192 n.7 (8th Cir. 1975).

492. Action on a FOIA request or appeal must be taken within ten or twenty working days, respectively, of its receipt. Only under a narrow set of "unusual circumstances" is an extension of up to ten days permitted. *Id.* § 522(a)(6)(A), (B).

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at the agency level. Claims may end up in litigation simply because claimants feel they lack sufficient information to weigh intelligently the strength of their case for settlement purposes prior to suit.[493] Claimants also may not be forthcoming in substantiating their claims because they do not believe the government is willing to disclose information detrimental to its position.[494] This too lessens the chances of agency-level settlement. In sum, the prospect of fuller disclosure under the Federal Rules of Civil Procedure than under agency claims practice may lead claimants and the government alike into otherwise avoidable litigation.

Central to understanding how the FOIA works in the tort claims context is the statutory exclusion of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."[495] Since Exemption Five, as it is known, has been construed to "exempt those documents, and only those documents, normally privileged in the civil discovery context,"[496] its application should in principle leave claimants in as good a position, as far as access to information is concerned, as if they had invoked discovery in litigation.[497] It should also afford a claimant as much as one might want or need to know in order to conduct intelligent settlement negotiations with the government. At the same time, the FOIA should not shortchange the government, for it shields from mandatory disclosure virtually anything the government would be privileged to withhold in litigation.

In fact, full disclosure under the FOIA is less generous to claimants than discovery in litigation, for the FOIA neither compels agencies to assemble information nor to prepare documents not already in existence.[498] The unrecorded identity of witnesses, accounts of an incident not reduced to writing, and other

493. Laughlin, *Federal Tort Claims Act Amendments: A New Charter for Injured Citizens*, 2 TRIAL 18 (1966). Mr. Laughlin was Chief of the Torts Section of the Justice Department at the time of the 1966 amendments and also their chief proponent.

494. *See supra* notes 303-04 and accompanying text.

495. 5 U.S.C. § 552(b)(5) (1977).

496. Federal Open Mkt. Comm. v. Merrill, 443 U.S. 340, 353 (1979); *Sears, Roebuck & Co.*, 421 U.S. at 149. *Accord* Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 184 (1975); EPA v. Mink, 410 U.S. 73, 85-86 (1973); Sterling Drug, Inc. v. FTC, 450 F.2d 698, 704-05 (D.C. Cir. 1971).

497. *Mink*, 410 U.S. at 86.

498. *Sears, Roebuck & Co.*, 421 U.S. at 161-62; Yeager v. Drug Enforcement Admin., 678 F.2d 315, 321 (D.C. Cir. 1982); DiViaio v. Kelley, 571 F.2d 538, 542 (10th Cir. 1978). *See also* Forsham v. Harris, 445 U.S. 169, 186 (1980); Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 152 (1980).

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undocumented information all lie beyond its reach. Yet the claimant will have disclosed precisely this kind of information to the agency as part of the claims process. Standard Form 95 demands much information not previously prepared or assembled, and claimants cannot answer the charge of an incomplete claim by stating that their files contain no documents on the missing item. This is not meant to suggest that the FOIA is an inadequate tool for information disclosure in the claims context; as a practical matter, agency attorneys are unlikely to leave accident reports, witness statements, and the like in unwritten form. Rather, it demonstrates that a square application of the FOIA does not give tort claimants an unfair advantage.

Both legal and policy considerations point decisively in favor of using the FOIA as the minimum standard of disclosure in the tort claims setting. Although the government might resist moving full-scale disclosure of nonprivileged information into the administrative phase of the FTCA, the FOIA hardly leaves the agencies any other principled choice. Where a claimant, with or without specific reference to the FOIA,[499] seeks access to the claim file, or to other information relating to a pending claim, agency claims attorneys should look to the FOIA for guidance. They should disclose information whenever the FOIA would mandate it, and they should consider disclosure even when the FOIA would not, if it appears that disclosure would advance the tort settlement process.[500] Unfortunately, a few agency claims attorneys continue to regard the FOIA as somehow alien to their own tort claim operations.[501]

499. Agencies have no sound reason to insist that a claimant specifically invoke the FOIA in support of an otherwise intelligible request for access to identifiable agency documents.

500. *See* ACUS Recommendations, 1 C.F.R. § 305.84-7(A)(4) (1984). Some agency guidelines expressly invite claims attorneys to divulge exempt portions of a claimant's file with the consent of the General Counsel. Air Force Reg. No. 112-1, *supra* note 386, § 12-17b(3); Vet. Admin. Reg. No. M-02-1, *supra* note 301, § 18.04c(1). The Army more emphatically endorses limited voluntary disclosure.

> Information within a category which is normally exempt from mandatory disclosure may also be released to a claimant or his attorney by the authority having jurisdiction over the request . . . if no ligitimate [sic] purpose exists for withholding it from him. In determining whether such a legitimate purpose exists, the authority should take into consideration whether the claimant or his attorney has released to the Army similar documents in his possession or obtainable by him alone.

Army Reg. No. 27-20, *supra* note 6, § 1-6b(2). A unique feature of Army Claims Service disclosure policy, echoing its peculiar denial policy (*supra* notes 407-12 and accompanying text), is the rule that only the Chief has authority to refuse a claimant's request for information. *Id.*

501. Letter from Captain G. Lewis Michael III, *supra* note 427, at 2. For the view that disclosure legislation is pertinent to agency policy on claimant access to information, see ACUS Recommendations, 1 C.F.R. § 305.84-7(A)(4) (1984).

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### 3. *Understanding the FOIA in the Tort Claim Setting*

To concede that the FOIA defines disclosure policy in the tort claim context only begins the analysis. There remains the problem of understanding how the relevant exemptions relate specifically to the kinds of information routinely involved in tort claims against the government. Unfortunately, even some claims attorneys who acknowledge that the FOIA applies in principle to the tort claim context have only a rudimentary and intuitive sense of what its exemptions legitimately entitle them to withhold. The incidence of claimant requests for access to claim files admittedly has not been great. But there is every reason to believe that claimants are beginning to press for access to agency-held information as never before.[502] Since agency handling of tort claims is a process of continuous information exchange, agency attorneys should have at least a basic familiarity with FOIA standards and the balance between legitimate private and governmental interests they are supposed to reflect.

Given its supervisory authority over both FTCA and FOIA practices, the Justice Department is uniquely situated to provide the agencies with guidance on how the FOIA specifically relates to tort claim inquiries. Its position cannot simply be that agency attorneys should divulge as little as possible and, at all costs, avoid disclosures that might tend to embarrass the Justice Department in eventual litigation. The Justice Department instead should specifically inform the agencies how key exemptions, such as Exemption Five, have been construed by the courts in cases involving tort or analogous claims, at least with respect to recurring kinds of documents. Its responsibilities are not only to safeguard the government's litigation interests, but also to guide the agencies themselves in properly implementing the FOIA and the FTCA at the agency level. Inevitably, the agencies themselves will have to handle the more subtle business of deciding when more liberal disclosure than the FOIA mandates might be productive of agency-level settlement.

An obviously important issue under Exemption Five is the government's qualified executive privilege to protect its deliberative processes.[503] Most courts have held that the exemption protects "internal communications consisting of advice, recommendations,

502. Kane, Schmetterling and Bradshaw Interview, *supra* note 149.

503. Jupiter Painting Contracting Co., Inc. v. United States, 87 F.R.D. 593, 597 (E.D. Pa. 1980) (noting that a document must be deliberative as well as predecisional to be privileged). *See generally* SHEPARD'S/MCGRAW HILL CIVIL ACTIONS AGAINST THE UNITED STATES, ITS AGENCIES, OFFICERS AND EMPLOYEES 226-27 (1982).

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opinions, and other material reflecting deliberative or policymaking processes, but not purely factual or investigatory reports."[504] Many courts take the view that this interpretation confines the exemption to predecisional materials.[505] But case law suggests that the outer bounds of the privilege are elusive. Courts are increasingly fond of disparaging the distinction between factual and policy information.[506] Occasionally, they shield from disclosure even purely factual memoranda when they conclude that not doing so would distinctly impede the free flow of information essential to the deliberative process itself.[507] There is at least agreement that the FOIA requires agencies to divulge nonexempt portions of otherwise exempt documents where such portions are reasonably severable,[508] and claims attorneys cannot consider themselves exempt from conscientious and good faith efforts of this sort. This cursory account

504. Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971). *Accord Mink*, 410 U.S. at 89 (1973); Tennessean Newspapers, Inc. v. FHA, 464 F.2d 657, 660 (6th Cir. 1972). Not all predecisional materials are necessarily shielded from discovery. "[T]o come within the privilege and thus within Exemption Five, the document must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).

505. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151-52 (1975). *But cf.* Vaughn v. Rosen, 523 F.2d at 1143-44.

506. *E.g.*, Mervin v. FTC, 591 F.2d 821, 826 (D.C. Cir. 1978).

507. Brockway v. Department of Air Force, 518 F.2d 1184, 1194 (8th Cir. 1975):

> [W]e do not mean to imply that we are rejecting the general fact-deliberation criterion established in the decisions of other courts. Rather, we hold that on the narrow facts presented here, specifically involving statements by witnesses to Air Force safety investigators upon assurances of confidentiality, common sense . . . indicates disclosure of these statements would defeat rather than further the purposes of the FOIA . . . .

*Id. Accord* Cooper v. Department of Navy, 558 F.2d 274, 278-79 (5th Cir. 1977) (safety and accident prevention report containing information obtained on promise of confidentiality not subject to mandatory disclosure; factual report made for possible legal or administrative action presumptively subject to disclosure), *modified on other grounds*, 594 F.2d 484 (5th Cir. 1979) *cert. denied*, 444 U.S. 926 (1979); American Fed'n of Gov't Employees v. Department of Army, 441 F. Supp. 1308, 1314 (D.D.C. 1977) (factual testimony held exempt from disclosure because disclosure would hamper investigation); Rabbitt v. Department of Air Force, 401 F. Supp. 1206, 1209 (S.D.N.Y. 1974). *See also* Mead Data Cent., Inc. v. Department of Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977) (while factual material ususally must be disclosed, sometimes factual material so relates to the deliberative processes that it should be exempt from disclosure) and cases cited at n.35; *cf.* National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 767 (D.C. Cir. 1974) (factual financial data exempt from disclosure under financial information exemption where there is an overriding need for confidentiality).

508. 5 U.S.C. § 552(b) (1982); Federal Open Mkt. Comm. v. Merrill, 443 U.S. 340, 346 (1979); *Mink*, 410 U.S. at 91; *Mead Data Cent., Inc.*, 566 F.2d at 256 ("[F]actual material must be disclosed but advisory material, . . . may be withheld."); Deering Milliken, Inc. v. Irving, 548 F.2d 1131, 1138 (4th Cir. 1977). Disclosure of factual matter is exempted where "inextricably intertwined" with protected material. Mervin v. FTC, 591 F.2d 821, 826 (D.C. Cir. 1978); Kreindler v. Department of Navy, 363 F. Supp. 611, 614 (S.D.N.Y. 1973).

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of a single privilege incorporated in but one of the statutory exemptions shows the value to claims attorneys in the different agencies of having some benchmarks for compliance with the FOIA.[509]

A good illustration of the potential impact of the FOIA on the tort claim process is the case of *United States v. Weber Aircraft Corporation*[510] While not arising under the FTCA, the case involved access to precisely the kind of document that figures prominently in that setting. The case arose from an accident allegedly caused by the failure of certain military parachute equipment. An Air Force captain sued the designer and manufacturer of the equipment for personal injury damages. After the suit was filed, the defendants requested copies of all Air Force investigative reports on the incident. The Air Force released the complete record of its collateral investigation conducted to preserve evidence for use in any subsequent actions or proceedings,[511] as well as factual portions of a second Mishap Report, a document produced solely for the purpose of taking corrective action in the interest of accident prevention. It withheld under Exemption Five the balance of the Mishap Report, consisting mostly of a medical report and statements by the accident victim and a colleague.[512]

The agency's action, though invalidated by the court of appeals on the ground that the government's executive privilege does not extend to purely factual material, was sustained by the Supreme Court.[513] The Court held, contrary to the ruling below, that the privileges in civil discovery incorporated by analogy in Exemption Five are not limited to those expressly identified by Congress in the legislative history of the Act. Specifically, the Court ruled that because statements made to air crash safety investigators upon express promises of confidentiality have been held to be entirely privileged in pretrial discovery,[514] they also are within the scope of Exemption Five. This privilege, however, is limited to statements made under a promise of confidentiality. Though the distinction between factual and deliberative material is no longer applicable to such state-

509. The need is probably even stronger with respect to the attorney work product privilege likewise incorporated in Exemption Five. *See infra* notes 530, 540-41, and cases cited therein. One court described application of that privilege in an FOIA context as "a task that would challenge the fabled Procrustes." Fonda v. CIA, 434 F. Supp. 498, 505 (D.D.C. 1977).

510. 465 U.S. 792 (1984), *rev'g* 638 F.2d 634 (9th Cir. 1982).

511. *See supra* note 452.

512. The medical report contained findings and recommendations of the "life sciences member" of the Aircraft Accident Investigation Board.

513. 465 U.S. 792 (1984), *rev'g* 638 F.2d 634 (9th Cir. 1982).

514. Machin v. Zuckert, 316 F.2d 336 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963).

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ments,[515] it has not lost its more general significance among principles governing agency disclosure of information.

### 4. *Some Preliminary Thoughts on Exemption Five*

A detailed analysis of the application of Exemption Five or any other exemption to the claims process is not appropriate here. However, since claims attorneys may be apt to exaggerate the extent to which the exemption cloaks the materials they gather in the course of investigating a tort claim, a few preliminary observations are in order. First, when applying executive privilege, the courts tend to be influenced by their estimate of the extent to which a given disclosure might adversely affect the government's competitive position in an ongoing proceeding, particularly when that proceeding is in the nature of a bargaining transaction.[516] The best non-tort examples to arise in FOIA litigation are requests for information during negotiations over the compulsory purchase of land,[517] or during bargaining over a contract purchase price between the government and the lessee of surplus government-owned property.[518] The courts have stated that full government disclosure in such cases is at variance with the competitive arm's length character of the underlying transaction.[519] Many claims officers seem to view the tort claim process just this way.[520]

Claims officers and claimants doubtless engage in many situations that can only be described as bargaining, each starting from exaggerated, if barely tenable, negotiation postures with the intent of meeting on some middle ground. On the other hand, tort claims of a routine character involve little if any real negotiation, especially when the claimant is unrepresented. Put simply, not all tort claimants are bargainers and not all tort settlements are the product of a

515. 465 U.S. at 800 n.17.

516. Federal Open Mkt. Comm. v. Merrill, 443 U.S. 340, 358 (1979); Hoover v. Department of Interior, 611 F.2d 1132, 1140 (5th Cir. 1980). The *Hoover* opinion rests both on the executive privilege protecting an agency's decisionmaking process and on the qualified privilege for the report of an expert witness. FED. R. CIV. P. 26(b)(4) (1972).

517. *Hoover*, 611 F.2d 1132.

518. Martin Marietta Aluminum, Inc. v. Administrator, Gen. Serv. Admin., 444 F. Supp. 945 (C.D. Cal. 1977).

519. Both *Hoover*, 611 F.2d 1132, and *Martin Marietta*, 444 F. Supp. 945, involved FOIA requests for disclosure of appraisal reports during pending negotiations. Disclosure was denied in both cases. The courts distinguished cases in which appraisals were sought and obtained after the transaction had been fully consummated. Tennessean Newspapers, Inc. v. FHA, 464 F.2d 657, 660 (6th Cir. 1972); Philadelphia Newspapers, Inc. v. HUD, 343 F. Supp. 1176, 1178 (E.D. Pa. 1972).

520. *See infra* notes 587-91 and accompanying text.

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bargain. More importantly, a direct analogy between agency tort claims adjudication and the rather stark bargaining processes that characterize the government's commercial transactions[521] simply does violence to Congress' purpose in enacting and amending the FTCA. Congress intended to afford adequate compensation for valid tort claims, not to construct a bargaining or negotiating process out of which a fair result might be assumed to emerge. As long as the agency claims process retains its pervasive ambiguity, it probably will demonstrate strong elements, depending on the case, both of an objective-entitlement and an adversarial-bargaining model. The scope of executive privilege under Exemption Five is just one area where this tension is apparent. Under these circumstances, the exemption cannot be expected to apply with uniformity throughout the agency claims process.

The second preliminary observation on Exemption Five in the claims context relates to the absolute attorney-client privilege incorporated into that exemption. More than one claims officer has expressed the view that, as the agency's attorney, he or she is bound not to disclose any confidential information. Other officers, without articulating it so clearly, act on the same view.[522] They are correct in supposing that agencies can constitute clients, and agency lawyers their attorneys, for purposes of the attorney-client privilege.[523] But this does not mean that every communication between agency and agency attorney is privileged. At least one court has recognized that protecting every statement made by agency personnel to one of the agency's attorneys in a government that is "top-heavy with lawyers"[524] would do considerable harm to the FOIA. Claims attor-

521. "There is little doubt that the appraiser's opinion on value would most likely set the ceiling price offered by a purchaser, thereby effectively preventing the agency from obtaining through arms-length bargaining a more favorable price—one presumably obtainable by a private seller negotiating competitively with a prospective purchaser." *Martin Marietta*, 444 F. Supp. at 950. *Accord* Government Land Bank v. Gen. Serv. Admin., 671 F.2d 663, 665 (1st Cir. 1982) ("Exemption 5 protects the government when it enters the marketplace as an ordinary commercial buyer or seller . . . . [The] FOIA should not be used to allow the government's customers to pick the taxpayer's pockets.").

The Supreme Court in *Federal Open Mkt. Comm.*, 443 U.S. at 359-60, stressed the particular emphasis in the legislative history of Exemption Five on "confidential commercial information," and concluded that the exemption "incorporates a qualified privilege for confidential commercial information . . . to the extent that this information is generated by the Government itself in the process leading up to awarding a contract."

522. *See, e.g.*, Nesvet Interview, *supra* note 23.

523. *See* Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 863 (D.C. Cir. 1980); *Mead Data Cent., Inc.*, 566 F.2d at 252-53; Thil Sec. Corp. v. New York Stock Exch., 57 F.R.D. 133, 138 (E.D. Wis. 1972).

524. Jupiter Painting Contracting Co., Inc. v. United States, 87 F.R.D. 593, 598 (E.D.

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neys need to be reminded that the attorney-client privilege extends only to those disclosures necessary for the client to obtain informed legal advice or legal services, and even then only to disclosures that but for the privilege would not otherwise be made.[525] Significantly, the information that a tort claimant is most likely to seek at the agency level has been assembled by an agency lawyer not primarily to render legal services or advice, but to discharge the obligation to investigate properly filed administrative tort claims. Moreover, the information, as such, consists of disclosures that would otherwise be made. In short, interposing the attorney-client privilege as a general obstacle to disclosure in this particular setting is unwarranted.

Similarly, agency attorneys should not routinely assume that the factual information they assemble in considering an administrative tort claim falls within the privilege for facts known and opinions held by experts not expected to testify which have been acquired or developed in anticipation of litigation or for trial.[526] Arguably, every administrative claim filed under the FTCA is in anticipation of litigation, especially since the agencies may only settle claims which fall within the FTCA's waiver of immunity to suit[527] and a prior claim is now a prerequisite to suit. Even though this view has a wide following among both agency and Torts Branch attorneys,[528]

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Pa. 1980) (deliberately construing the privilege narrowly in the governmental context); *cf. Kent Corp.*, 530 F.2d at 623 (not everything the government's "uncountable and ever-growing number of attorneys" put on paper can possibly constitute work product). Clearly, in order to assert the privilege successfully, an agency lawyer must have acted at the time in the capacity of provider of legal advice, rather than administrator or policymaker. Coastal Corp. v. Duncan, 86 F.R.D. 514, 521 (D. Del. 1980); Gulf Oil Corp. v. Schlesinger, 465 F. Supp. 913, 917 (E.D. Pa. 1979).

525. Fisher v. United States, 425 U.S. 391, 403 (1976); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950). The privilege is not limited to communications made in the context of litigation or even a specific dispute, but must relate to a situation where an attorney's counsel is sought on a legal matter. *Coastal States Gas Corp.*, 617 F.2d at 862. The court in *Coastal States* found the privilege did not extend to the communication of "neutral, objective analyses of agency regulations." *Id.* at 863.

526. FED. R. CIV. P. 26(b)(4)(B) (1972). Air Force disclosure regulations expressly exempt such material. Air Force Reg. No. 112-1, *supra* note 386, § 12-17b(3) ("While portions of the claim files are releasable, the following are exempt . . . (b) Lawyer's notes of interviews, (c) Expert's statements obtained in the investigation.").

527. *See supra* notes 124-25 and accompanying text. The FTCA essentially represents a waiver of sovereign immunity to suit, and the agencies' administrative settlement authority under it remains acutely dependant upon the government's exposure to liability in litigation. 28 U.S.C. § 2672 (Supp. 1983). *See* Gottlieb, *supra* note 39, at 16 (waiver of immunity rather than opportunity for administrative settlement is "the heart of the bill"). By coupling the language of settlement to the language of liability, the statute strongly suggests that the only claims amenable to administrative settlement are those to which the United States surrendered its sovereign immunity to suit. *See also* Willard Letter, *supra* note 180.

528. *See, e.g.*, Kelley Interview, *supra* note 24; Axelrad Interview, *supra* note 144; Letter

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it is of questionable validity. The handling of tort claims has become a conventional responsibility of agency counsel and a highly professionalized and standardized operation.[529] Though it has not evolved into a distinct and alternative dispute resolution mechanism, it does keep all but a small percentage of administrative claims out of litigation. Thus, while the argument for treating an agency's investigation of tort claims as not done in anticipation of litigation is not as strong as the argument for so treating its investigation of claims to a statutory entitlement, it still has considerable merit. The expert witness privilege therefore provides agency claims attorneys no more valid a refuge from the duty of factual disclosure under the FOIA than does the attorney-client privilege.

The qualified attorney work product privilege dominates thinking about the limits of mandatory disclosure to tort claimants.[530] This privilege likewise has contributed to a casual assumption that the contents of files on pending tort claims are off limits to claimants. Some claims officers believe that a claim file may be withheld in its entirety under the work product privilege on the theory that every agency tort claim proceeding represents potential if not imminent litigation, that the file would not be prepared if not for that prospect, and that disclosure would expose the government's case in any litigation that might occur.[531] This sweeping resort to the work

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from Captain G. Lewis Michael III, *supra* note 427 at p.2. One attorney put it this way: "The only time factual material in a tort claim file is not gathered in anticipation of litigation is when a statute or regulation specifically requires that an investigation and report be made irrespective of whether a tort claim is filed." Nesvet Interview, *supra* note 23.

529. *See supra* note 126 and accompanying text.

530. FED. R. CIV. P. 26(b)(3). In order to obtain through discovery material properly characterized as attorney work product, the requester must show substantial need for the material in preparing his or her case and an inability, without undue hardship, to obtain the substantial equivalent by other means. The courts are divided over whether such work product as constitutes "the mental impressions, conclusions, opinions or legal theories of an attorney" is absolutely or qualifiedly privileged. SHEPARD'S/MCGRAW HILL CIVIL ACTIONS AGAINST THE UNITED STATES, ITS AGENCIES, OFFICERS AND EMPLOYEES, *supra* note 503, at 248-49, and cases cited therein. On the work product privilege generally, see Upjohn v. United States, 449 U.S. 383, 397-402 (1981) (strong showing of necessity and unavailability by other means required to compel discovery of work product based on oral statements); NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 159-60 (1975) (NLRB Advice and Appeals memoranda fall within Exemption Five's protection of attorney work product); Hickman v. Taylor, 329 U.S. 495, 510-14 (1947) (discussing general policy against invading attorney's course of preparation); Jordan v. Department of Justice, 591 F.2d 753, 774-76 (D.C. Cir. 1978) (work product privilege applies only to materials prepared in anticipation of litigation); Note, *Discovery of Government Attorney Work Product under the FOIA*, 71 KY. L.J. 919, 926-31 (1983).

531. Kelley Interview, *supra* note 24; Letter from Captain G. Lewis Michael III, *supra* note 427. Under this view, no distinction is drawn between routine accident investigations

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product concept is not justified.[532]

It is doubtful that the information assembled by an agency attorney in consideration of a claim filed under the FTCA fairly can be characterized as assembled in anticipation of litigation, as the work product privilege would require.[533] While it is true that agency tort claims generally meet the test of an "articulable claim likely to lead to litigation,"[534] it is a gross exaggeration to view agency handling of tort claims as a simple prelitigation exercise.[535] Agency claims officers and claimants alike look upon agency-level consideration of tort claims as a genuine administrative task mandated by Congress and characterized by an increasingly well-de-

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that an agency is bound to perform, whether or not claims are ever filed, and investigations performed only for the purpose of considering actual claims.

Several agency regulations essentially codify this viewpoint. *E.g.*, Vet. Admin. Reg. No. M-02-1, *supra* note 301, § 18.04(c)(2) ("It is not contemplated that any investigative reports, reports of untoward incidents, or investigative reports prepared by or for [counsel] will be released since these are considered work products not subject to disclosure. While they may be prepared for various reasons and uses, they are considered as an essential element of the defense of a malpractice claim or suit."). Other agency regulations prefer to leave the notion of what is prepared in anticipation of litigation open-ended. *E.g.*, Air Force Reg. No. 112-1, *supra* note 386, § 12-17b(3) ("[T]he following are exempt . . . (a) Legal memoranda containing opinions, conclusions, and recommendations on disposition of the claim; (b) Lawyer's notes of interviews; (c) Expert's statements obtained in the investigation; (d) Other statements or materials assembled in contemplation of litigation.").

Agencies have specifically advised claims attorneys to gather witness statements and other factual material into an attorney memorandum which can be withheld en bloc as attorney work product. The Air Force manual for judge advocates investigating medical malpractice claims, for example, suggests use of the following somewhat self-serving introductory legend:

> This memorandum has been prepared by an Air Force Judge Advocate while investigating a claim or potential claim for damages against the United States. The attorney's impressions and observations summarized herein were obtained in anticipation of future litigation involving the same incident, and this memorandum would not have been prepared in the normal course of Air Force business activities but for the possibility that litigation might ensue.

Office of the Judge Advocate General, United States Air Force, Handbook for Judge Advocates: Investigating Medical Malpractice Claims, *supra* note 453, § 3.41.

532. *See* ACUS Recommendations, 1 C.F.R. § 305.84-7(A)(4) (1984).

533. *Coastal States Gas Corp.*, 617 F.2d at 864-65; *Jordan*, 591 F.2d at 775; *Coastal Corp.*, 86 F.R.D. at 522; Hercules Inc. v. Exxon Corp., 434 F. Supp. 136, 150-51 (D. Del. 1977). According to the court in *Coastal States*, "to argue that every audit is potentially the subject of litigation is to go too far." 617 F.2d at 864.

534. *Coastal States Gas Corp.*, 617 F.2d at 865. *See also Kent Corp.*, 530 F.2d at 623 (NLRB regional office reports on possible unfair labor practices constitute work product, even though drawn up before knowing whether charges have substance, because office's basic function is to litigate and it investigates on the assumption that any charge might ripen into litigation). *But cf. Hoover*, 611 F.2d at 1146 (Vance, J. dissenting) (appraisal report in compulsory purchase of property not prepared in anticipation of litigation but for ordinary business transaction).

535. *See supra* note 126 and accompanying text. *But see* Willard Letter, *supra* note 180 (describing the agency-level claims process as "an annex of and preliminary to litigation.").

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fined administrative procedure separate from its litigation origins.[536]

While no case squarely addresses the application of the work product privilege to tort claims investigations, analogous cases support the conclusion that the privilege is so limited. For example, the plaintiff in a tax refund suit sought access to relevant documents that had been prepared by IRS officials at various points in the administrative settlement procedure established for such claims. In resisting discovery, the government emphasized that although there are several stages in the administrative process at which refund claims may be settled, a certain number of disputes inevitably go to court. The possibility of litigation over any one tax refund claim, the government argued, means that documents prepared by the IRS in the course of handling all such claims are documents prepared in anticipation of litigation. While conceding that the documents in question had references to mental impressions and legal theories of the government's case, the court rejected the notion that they had been prepared in anticipation of litigation.[537] The court's findings concerning the IRS documents are equally applicable to reports assembled by agency tort claims attorneys under the FTCA. They are routinely prepared for every claim presented to the agency well before any lawsuit is filed; they are not prepared by or at the direction of the attorney who will actually try the case should it go to trial; they purport to be factual and objective in content; they do not necessarily define the legal strategy of the government in eventual litigation; and they do not result exclusively from the government's own investigative efforts, but at least in part from material provided by the claimant.[538] The court stated:

> Generally, it is this court's belief that IRS appellate conferee reports and IRS field agent reports are not prepared in anticipation of litigation or for trial. Presumably they are prepared in the assessment and review process and, if they be held to be in anticipation of litigation, it is hard to see what would not be. Litigation cannot be anticipated in *every* such case when *relatively few* result in litigation.[539]

536. The drafters of the Federal Rules did not anticipate that work product would cover materials "assembled in the ordinary course of business or pursuant to public requirements unrelated to litigation or for other nonlitigation purposes." FED. R. CIV. P. 26(b)(3) advisory committee note, 48 F.R.D. 487, 501 (1969).

537. Abel Inv. Co. v. United States, 53 F.R.D. 485 (D. Neb. 1971).

538. *Id.* at 489.

539. *Id.*, *quoting* Peterson v. United States, 52 F.R.D. 317, 320-21 (S.D. Ill. 1971) (emphasis added) (IRS appellate conferee reports and field agent reports not prepared in anticipation of litigation merely because they contain mental impressions, conclusions, opinions or

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Finally, even if one were to take the view that tort claims are investigated at the agency level in anticipation of litigation, a narrow definition of work product still would allow the agencies to accommodate most requests for information. Rule 26(b), to which the courts look in applying Exemption Five, strongly suggests that the privilege protects the confidentiality of "the mental impressions, conclusions, opinions, or legal theories of [the] attorney."[540] More specifically, the Supreme Court, in definitively recognizing a place for work product in Exemption Five, stated that "[w]hatever the outer boundaries of the attorney's work-product rule are, the rule clearly applies to memoranda . . . which set forth the attorney's theory of the case and his litigation strategy."[541]

To be sure, claimants who seek access to their claim file during the agency phase of the FTCA would be interested to know the claims attorney's "theories and perspectives"[542] on the claim, or legal strategy in the event of litigation; but their immediate objective is access to factual information about the circumstances of the incident, the issue of negligence, or the extent of loss. They are above all claimants, and at best only potential litigants. What they presumably seek is a fair administrative settlement in consideration of their claim, not some putative advantage in litigation that may or may not take place.

### H. *A Preliminary Evaluation of the Claim*

A claims officer must at some time come to a preliminary judg-

legal theories of the claim); *see also* United States v. San Antonio Portland Cement Co., 33 F.R.D. 513, 515 (W.D. Tex. 1963).

540. FED. R. CIV. P. 26(b)(3). Technically, work product covers any document or tangible thing prepared by the attorney in anticipation of litigation or trial, not simply materials setting forth the attorney's theory of the case or litigation strategy; but the privilege as to this broader category of materials is only qualified, not absolute. *Upjohn Co.*, 449 U.S. at 400; Moody v. IRS, 654 F.2d 795, 798 n.10 (D.C. Cir. 1981); Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975). So-called "opinion" work product as opposed to "ordinary" work product has been described as "the primary focus of the doctrine." Note, *supra* note 530, at 928.

541. *Sears, Roebuck & Co.*, 421 U.S. at 154. Some courts have implied that factual material may not normally be withheld under Exemption Five of the FOIA, even where work product privilege is claimed and might be sustained in a civil discovery setting. *Deering Milliken, Inc.*, 548 F.2d at 1137-38; Fonda v. CIA, 434 F. Supp. 498, 505 (D.D.C. 1977). *But see Mervin*, 591 F.2d at 825 (textual material not severable from memoranda containing subjective attorney work product). According to one recently formulated view, factual work product should be shielded from view under the FOIA, whatever the case may be in civil discovery, only when its disclosure would tend to reveal protected opinion work product. Note, *supra* note 530, at 929-30.

542. *Kent Corp.*, 530 F.2d at 623.

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ment about the merit and value of a claim. As far as federal tort claims are concerned, agency claims officers use as a touchstone the probable liability of the United States were the claim to be litigated under the FTCA. This requires the officer to consider a range of largely substantive questions, such as whether the elements of a tort cause of action under the applicable state law are present;[543] whether the claimed loss resulted from the conduct at issue; whether there was contributory or comparative negligence, assumption of risk, a valid release, or some other state law defense; whether the employee responsible for the injury was acting within the scope of employment;[544] and whether any of the FTCA exemptions may be applicable.[545] A host of narrower and more technical issues also may arise.[546]

If a claim is in principle compensable, the claims officer must determine which elements of damage are recoverable and evaluate the amount of the loss. Such determinations are made in accordance with state law and local damage standards, unless bills or written estimates will suffice for these purposes.[547] The claims officer then generally reduces the damage estimate by some factor to account for any uncertainty about the claim's validity in fact or in law. In this respect, the evaluation differs from a judge's. After overcoming factual or legal doubts to find for the plaintiff, a judge may award full value; a claims officer rarely does so. In addition, virtually all informed sources agree that the agencies are more conservative than the courts in evaluating the same claims.[548] In any event, unless an agency has an ancillary or meritorious claims stat-

543. Potential state law issues would include, by way of illustration, application of the law of dangerous instrumentalities, res ipsa loquitur, and recreational use statutes.

544. On this issue the report of the employee's supervisor naturally plays a crucial role.

545. The dominant practice among claims officers is to assert any and all of the exemptions even if the argument for applying them is only "colorable." Huang Interview, *supra* note 22. At Justice Department seminars on the FTCA, United States Attorneys and agency claims officers are instructed to raise every tenable defense. Axelrad Interview, *supra* note 144. This apparently means that officers should normally deny a claim on the basis of any available exemption even if they are not persuaded that the exemption is applicable, provided a court could plausibly hold that it is. One claims officer, pressed to state a formula, acknowledged that he would invoke an exemption if there were a 30 to 40% chance of being sustained in court. Huang Interview, *supra* note 22.

546. *E.g.*, the local collateral source rule, rights of representation under state law, and wrongful death limitations.

547. For example, the only step required in certain simple cases may be to add up medical bills or pick the lower of two car repair estimates.

548. 1 L. JAYSON, *supra* note 20, at 2-1 to -14. In contrast to courts, agencies may also feel free to discount valid claims to reflect the time and expense claimants save by not having to litigate. They also may be more reluctant to spend government money.

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ute conferring broader settlement authority, the claims officer's assessment of FTCA litigation exposure is the agency's starting point in determining its willingness to settle.[549] One result of the analysis is that agencies do not settle cases purely in consideration of their nuisance value.[550]

Some claims fall outside this analytic framework. Neither the agency nor the Justice Department may want to submit a claim raising a novel point of law to the usual prediction-of-judicial-outcome approach. This is especially true if the claim alleges a regulatory or program-related tort. Settlement of such claims may involve important policy questions central to the mission of the agency. The agency must decide whether to resist settlement in the interest of securing an early judicial decision on the issue or to promote settlement in hopes that a subsequent claim will present the issue in a more favorable light. Factors the agency will consider include the circumstances leading up to the claim, the strength or weakness of the claimant's case, the qualities of the available judicial forum, and the extent to which the agency's program-related interests are implicated. At the same time, if the legal and policy reasons for resisting payment are powerful, settlement may be rejected as a matter of law or principle or in consideration of agency morale.[551] This will especially be the case among claims officers who, while admitting that decisions to settle are not binding precedent, strongly prefer to treat like cases alike. Finally, agencies may choose to deny a claim as a means of testing an earlier judicial ruling they believe to be wrong. In many of these situations, the Justice Department will have a voice.[552] All in all, though tort claimants tend to focus only on the dollar value of their claim, the

549. Most agencies have not put the claim evaluation process in writing. By way of exception, current Air Force regulations allude to the factors that should determine the agency's willingness to compromise a claim filed against it. 32 C.F.R. § 842.86(a) (1984).

550. This attitude toward nuisance value claims is usually justified by reference to legislative intent under the FTCA. Semeta Interview, *supra* note 151. One officer also mentioned the possibility of personal liability should the GAO disallow the settlement. Huang Interview, *supra* note 22. Personal liability is imposed by statute if such a disallowance occurs because a payment is prohibited by law or does not represent a legal obligation under the fund involved. *See* 31 U.S.C. § 3528 (1982).

As to whether there might be exceptions to the policy against administrative settlement of nuisance value claims, one officer supposes that a claim arising out of an incident acutely embarrassing to the agency might for that reason alone be paid. Bradshaw Interview, *supra* note 149. Colleagues of his acknowledge a further exception for entirely meritless claims that the government, because of poor recordkeeping, likely cannot defeat in court. Kane and Schmetterling Interview, *supra* note 149.

551. *E.g.*, Axelrad Interview, *supra* note 144.

552. *See infra* notes 661-63 and accompanying text.

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government is likely to take a broader perspective influenced by larger litigation and program-related strategies.

If the outcome of a tort claim depends upon local law, the agency attorney has several sources of guidance. Experienced claims adjudicators are their own best sources, especially in high-volume agencies with typical, recurring claims. They understandably develop an intuition for isolating an appropriate damage estimate.[553] This is especially true of officers adjudicating claims on a local or regional level, for their cases arise from just a handful of jurisdictions. Other sources include the local U.S. Attorney,[554] the local tort bar, and conventional library resources. Particularly helpful on valuation matters are the manifold publications showing judgments and value ranges for particular injuries by geographic area. Although these publications are viewed skeptically by claims officers,[555] they are widely relied upon as aids to judgment.[556] Washington-based claims attorneys have access to the same sources as local claims attorneys. But they also have their own network, including the U.S. Attorney for the District of Columbia and the Torts Branch of the Justice Department, the acknowledged expert on the law of the FTCA.

Meritorious claims statutes present a quite different picture. Such statutes, as noted,[557] give certain agencies limited authority to settle and sometimes pay claims that are not compensable under the FTCA. These agencies vary widely not only in the standards gov-

553. *E.g.*, Wieland Interview, *supra* note 152.

554. *Id.*

555. *E.g.*, Nesvet Interview, *supra* note 23.

556. The agencies are aware of the difficulties of valuation, particularly in personal injury and death claims. A Veterans Administration claims manual states:

> In personal injury claims, actual expenses for medical care, loss of wages, earnings or profits, if allowable, and other allowable out-of-pocket costs proximately resulting from the injury may be determined readily. Difficulties frequently arise, however, in arriving at the value of a claim where loss of future earning power, loss of consortium, procreative loss, cosmetic defects, pain and suffering, and other elements which cannot be assessed by resort to a formula are involved. In death claims, such factors as loss of parental guidance and other intangibles may present problems. Knowledge of amounts allowed by the courts in similar situations and of amounts awarded as compromises in cases which did not proceed to judgment is essential if negotiations are expected to result in a fair and equitable settlement for both parties.

Vet. Admin. Reg. No. M-02-1, *supra* note 301, § 18.12(e). Dissatisfied with the commercial valuation guides, one agency claims officer has urged the Justice Department to compile for the agencies a district-by-district guide to judgment values, or to publish summary reports of settlements and verdicts by type of claim. Nesvet Interview, *supra* note 23.

557. *See supra* note 20B and accompanying text.

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erning their exercise of meritorious claims authority, but also in the extent to which they have articulated those standards.

At one extreme are agencies that have little familiarity with the meritorious claims statutes at their disposal; not surprisingly, standards for exercising the discretion those statutes confer simply do not exist. An example is the United States Postal Service. The Postal Service has a sweeping meritorious claims statute,[558] but the Law Department rarely uses it,[559] finding sufficient elasticity in the FTCA to reach virtually any appealing case. In a rare instance, the meritorious claims statute was used to compensate a good Samaritan injured while attempting to rescue the driver of a burning postal vehicle.[560] This example represents a narrow class of cases in which a private party suffers personal injury or property damage while furthering the interests of the Postal Service.[561] By contrast, the agency has consciously avoided using the statute as the basis for a sweeping assumption of no-fault liability.[562] The apparent reticence of the Postal Service can be explained by the difficulty of establishing standards that would confine no-fault liability to exceptional, non-recurring situations or otherwise keep it within reasonable bounds.[563] In short, while the Law Department is confident that the meritorious claims statute should not be used to circumvent specific FTCA limitations on tort recovery,[564] it lacks a strong conviction of how in fact it should be used.

Other agencies more readily deploy their meritorious claims authority for no-fault purposes. The FBI, for example, invokes its

558. The Postal Service has authority to settle claims for property damage or personal injury or death resulting from the operations of the Postal Service where there is "a proper charge against the United States" which is not cognizable under the FTCA. 39 U.S.C. § 2603 (1982).

559. Newman Interview, *supra* note 148.

560. *Id.*

561. Another case in which the Postal Service considered using its meritorious claims authority involved a mail carrier who destroyed a pool cue he was delivering when he used it to drive off an attacking dog. The claim, however, was not pressed. *Id.*

562. For example, the Postal Service would not use the statute to pay a claim for injury or damage caused by a postal driver suffering a heart attack at the wheel. *Id.* Interestingly, a study of Post Office claims adjudication conducted 30 years ago observed a similar tendency to use the FTCA wherever possible, rather than the agency's meritorious claims statute. Gellhorn & Lauer, *Federal Liability for Personal and Property Damage*, 29 N.Y.U. L. REV. 1325, 1359 (1954).

563. The Postal Service apparently made an effort a decade or so ago to draft a set of narrow no-fault standards for use of the meritorious claims statute, but was unsuccessful. Newman Interview, *supra* note 148.

564. *Id.*

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meritorious claims statute[565] about a dozen times a year to settle claims not amenable to settlement under the FTCA.[566] In these cases, the agency generally has caused property damage through nonnegligent investigatory conduct.[567] In principle, the FBI requires only a showing of proximate cause for recovery in these circumstances, and it applies the scope of employment concept loosely.[568] But although the FBI puts its meritorious claims statute to no-fault uses, it still will not circumvent any specific limitations of the FTCA. Like the Postal Service, it interprets the FTCA as the comprehensive definition of the federal government's liability in tort.[569]

Another agency that makes periodic use of its meritorious claims statute[570] is the National Aeronautics and Space Administration (NASA).[571] Like the FBI, it has issued no substantive standards, but that does not mean that its exercise of authority is either unguided or unprincipled. The agency's meritorious claims statute, known internally as the Space Act, has been used as a basis for payment a total of ten times over the last few fiscal years.[572] Most of the cases fit squarely within the General Counsel's understanding of Congress's central purpose in enacting the Space Act: providing compensation when, through the fault of no one in particular, hazardous or unusual space program operations inflict injury on isolated individuals.[573] In recurring situations such as sonic booms or overpressure in connection with rocket firings, NASA does not in-

565. The Attorney General is authorized to settle claims for property damage or personal injury or death arising out of the actions of the Director, Assistant Director, Inspector or Special Agent of the FBI. 31 U.S.C. § 3724 (1982).

566. Kelley Interview, *supra* note 24.

567. *Id.* For example, one case involved removal of an innocent person's car door for use as evidence. Another involved drilling a hole in a safe to get to its contents. Still another involved permanent damage to a tabletop as a result of fingerprint dusting. *Id.*

568. *Id.*

569. The Chief of the FBI Civil Litigation Unit reports that he has never considered using the statute to settle a tort claim falling within an FTCA exemption or otherwise not cognizable under the Act. Significantly, the Civil Litigation Unit commonly describes the statute as applying "without regard to negligence." *Id.*

570. The Space Act authorizes NASA to settle and pay claims of $25,000 or less for property damage, personal injury or death arising out of NASA activities. 42 U.S.C. § 2473(b)(13) (1982).

571. Hosenball Interview, *supra* note 476; Wieland Interview, *supra* note 152.

572. Wieland Letter, *supra* note 144. The incidence of use is less sparing than it may appear, for in the same period settlements under the FTCA only numbered approximately 50. *Id.*

573. The cases tend to be unusual, such as the disappearance of a painting on loan to a NASA facility, or destruction of a shrimper's nets by concrete capsules dropped from a spacecraft.

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sist on proof of causation, but it requires a showing from NASA records that the damage could have resulted from its activities as, for example, when space vehicles were traveling at a speed and location to suggest they might have caused the incident.[574] No showing of fault is required, and the concept of scope of employment is generally ignored.[575] On the other hand, the Space Act statute of limitations is strictly applied. The NASA and FBI examples demonstrate that agencies can use meritorious claims authority in a principled manner while proceeding on a case-by-case basis.

Still, when the volume of claims warrants it, agencies should consider developing written standards for the exercise of discretion under meritorious claims statutes. The military departments have done this with regard to their authority under the Military and Foreign Claims Acts.[576] The services have a common understanding of what Congress meant by its reference to noncombat activities: those that are peculiar to the military and its operations.[577] The services further share the view that the scope of employment concept should not stand in the way of recovery in otherwise appealing cases involving such activities.[578] On the other hand, their decision

574. Hosenball Interview, *supra* note 476; Wieland Interview, *supra* note 152.

575. Weiland Letter, *supra* note 144.

576. Air Force Reg. No. 112-1, *supra* note 386, at ch. 7; 32 C.F.R. §§ 842.40-.67 (1984); Army Reg. No. 27-20, *supra* note 6, at ch. 3. For an earlier study of substantive standards and procedures under the forerunner of the Military Claims Act, see Gellhorn & Lauer, *supra* note 562, at 1350-58.

577. *See, e.g.*, 32 C.F.R. § 536.14(e) (1984) (Army). The regulations provide as illustrations "practice firing of missiles and weapons, training and field exercises, and maneuvers, including, in connection therewith, the operation of aircraft, and vehicles, and use and occupancy of real estate, and movement of combat or other vehicles designed especially for military use." *Id.* The Navy regulations add naval exhibitions, operations of anti-aircraft equipment, sonic booms, the explosion of ammunition and most general of all, "use of instrumentalities having latent mechanical defects not traceable to negligent acts or omissions." *Id.* § 750.55(b). The Air Force regulations simply state that noncombat activities are "[a]ctivities, other than combat, war or armed conflict, that are particularly military in character and have little parallel in the civilian community." *Id.* § 842.41(c).

For support for the view that relief under the Military Claims Act is not contingent on a showing of fault, see Ward v. United States, 331 F. Supp. 369, 374-75 (W.D. Pa. 1971), *rev'd on other gounds*, 471 F.2d 667 (3d Cir. 1973); Lundeen v. Dept. of Labor and Indus., 78 Wash. 2d 66, 469 P.2d 886 (1970).

The services also agree that the scope of employment branch of the Military Claims Act should be limited to claims involving wrongful acts and that all the FTCA exemptions except the one barring foreign claims should be applicable.

578. *See, e.g., id.* § 842.42(b) (claims payable under Military Claims Act include those arising from noncombat activities of the Air Force regardless of whether they arose out of negligent or wrongful acts of employees acting within the scope of employment); § 842.63(c)(1-2) (scope of employment immaterial under Foreign Claims Act except in narrow circumstances). Presumably, all that is necessary for noncombat activity to come within the scope of the Act is a causal relationship to the injury.

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to limit settlement authority under the Military Claims Act by adopting broadly the FTCA exemptions[579] is questionable, although doubtless one way of channeling their discretion. All in all, the military departments have assigned each of the claims statutes at their disposal a more or less distinct purpose and made of them a more or less coherent whole.[580]

The failure of certain agencies to use or rationalize their use of meritorious claims authority is not wholly their fault. Congress has done a mixed job of revealing why some agencies have meritorious claims authority and others do not, or for what specific purposes if any those having that authority were given it. It is difficult to know which of the many limitations on FTCA coverage Congress expected or hoped an agency would disregard in wielding its meritorious claims authority. Conceivably, Congress only meant very generally to enable the agency to do the right and good thing. In the case of meritorious claims statutes that predated the FTCA but were retained by the savings clause,[581] it is even doubtful that Congress knew what it was saving those statutes for or that it would have enacted them at all had the FTCA preceded them. Their uncertain origins and uneven fortunes suggest that the meritorious claims statutes warrant serious legislative reexamination.

### I. *Agency Settlement Philosophy: An Open Question*

Agency settlement philosophies reflect a basic ambiguity in the nature of the FTCA. One way of looking at the administrative claim process is to view claimants as having an entitlement to an

579. *E.g.*, 32 C.F.R. §§ 536.15 (a)-(n) (1984) (Army). *See supra* note 532. The services do show certain differences. Air Force regulations do not include the FTCA's discretionary function exemption. *Id* § 842.50 (1984). Army regulations do, but only allow the Chief of the Claims Service to invoke it. *Id.* § 536.15(b). The regulations contain other self-imposed limitations, based upon either the existence of adequate alternative remedies or certain catch-all policy considerations. Examples of adequate alternative remedies would include claims compensable under FTCA or other worker's compensation statutes, taking claims, flood damage claims, and claims in contract or copyright or patent infringement. *See, e.g.*, 32 C.F.R. § 536.15(n)-(s), (w), (z) (1984) (Army). Independent policy considerations explain the exclusion of recovery for contributory negligence, *id.* § 536.15(u); claims based solely on compassion, *id.* § 536.15 (y); and claims not in the best interest of the United States, contrary to public policy, or filed by inhabitants of unfriendly foreign countries, *id.* § 536.15(c).

580. It is a measure of this coherence that claims officers at the military departments routinely examine a claim specifically filed under the FTCA or one of the ancillary statutes to see if it should be considered under some other statute as well. Purdon Interview, *supra* note 236; Rouse Interview, *supra* note 141; Semeta Interview, *supra* note 151. This also appears to be the case in the FBI and NASA. Kelley Interview, *supra* note 24; Wieland Interview, *supra* note 152.

581. *See supra* notes 47-48 and accompanying text.

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unliquidated sum of money, subject to their proving each of the elements of a compensable claim. In fact, tort claims are rarely viewed this way, regardless of their strength and merit. This is not because the elements of a valid tort claim are especially numerous or complex, but because they are often indeterminate and subjective. At a minimum, establishing such a claim entails a showing of wrongfulness and proximate cause, consideration of some poorly-understood statutory exemptions, speculation over injuries claimed, and highly uncertain damage determinations. Moreover, any number of different assertions may be made in the guise of a tort claim. Finally, an essential difference between tort claims and entitlements proper is the fact that no agency at the federal level has primary responsibility for handling the former or views doing so as its primary mission; by contrast, entitlement programs constitute the very business of the agencies that administer them, perhaps even their reason for being.

Nevertheless, claims attorneys may justifiably take fair compensation for government torts to be an affirmative agency obligation and view themselves as the providers of inchoate entitlements. If so, they would tend to approach the job in a spirit of strict impartiality and commitment to achieving the result that in fact and law is objectively correct. In fact, despite the issue of fault and the presence of the other more or less indeterminate elements mentioned earlier, claims officers have no greater reason at the outset to assume an adversarial relationship with claimants than they would with social security, workmen's compensation, veterans' benefits, or food stamp applicants at the initial application stage. Since Congress intended deserving tort claimants to recover from the government through the agencies rather than the courts, the parties share an interest in the fair determination and valuation of claims.

Although claims officers rarely would describe the FTCA as conferring an entitlement,[582] they occasionally refer to what a tort claimant, much like an applicant for statutory benefits, is "owed."[583] A former chief of the Army Claims Division described agency claims determinations as "in every sense a judicial act," performed in light of the evidence, the Act, and the law of the relevant

582. Consistent with this attitude is the uniform policy among claims officers of never awarding tort claimants a greater sum of money than claimed. Semeta Interview, *supra* note 151; Feeley Interview, *supra* note 147.

583. Bradshaw Interview, *supra* note 149; Huang Interview, *supra* note 22. Officers at several of the agencies referred to their having "dual" obligations. Purdon Interview, *supra* note 236; Rouse Interview, *supra* note 141; Semeta Interview, *supra* note 151.

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jurisdiction.[584] Some commentators argue that the government has a continuing duty to deal fairly and objectively with claims even after they have gone to litigation. The premise of this argument is that government should always temper its pursuit of advantage with a firm commitment to justice.[585] But, regardless of what may be expected from lawyers defending the government in tort litigation, agency claims attorneys can be expected to act fairly and objectively when considering a Standard Form 95 in the nonadversarial setting of an agency-level claim.[586]

There is, of course, a competing vision of the government claims attorney, yielding a different approach to settlement. It is embodied in the following account of a typical municipal claims attorney:

> In a way, the city attorney to whose desk comes a claim against his city is in the same position as the lawyer who represents the claimant. Both represent adversaries in a legal battle and the law theoretically provides a system by which the decision will go in favor of the combatant with the law on his side. The lawyer with a public body for his client can, with good logic, say that his job consists of using all legally proper means of preventing recovery by the claimant—initial rejection of every claim, the use of all legitimate methods of delay and obstruction, and a defense of action to the bitter end. Relaxation of the rules of battle needs to be made only where it would cost the city more to go on fighting

584. Williams, *The $2500 Limitation on Administrative Settlements under the Federal Tort Claims Act*, 1960 INS. L.J. 669, 672 (1960).

585. Generally . . . the settlement of government cases is governed by consideration of principle and reasonableness, rather than convenience and money . . . . The thought is that the Government . . . took its position out of principle, and not for the purpose of later bargaining. Government lawyers are enforcing the law and not merely seeking judgments for their client.

D. SCHWARTZ & S. JACOBY, *supra* note 1, at 26.

This is not apparently how the Justice Department conducts its tort litigation business. The Torts Branch Director views the Department as bound, like any private lawyer vigorously representing a client, to advance every tenable argument in support of the cause, to exploit any weakness in the claimant's case, and to part with the fewest dollars possible. Second Axelrad Interview, *supra* note 368. *See also* Axelrad Letter, *supra* note 152, at 1 ("Primarily, the administrative process is an annex to the litigative process."). *See infra* note 593.

586. *See* 2 L. JAYSON, *supra* note 84, at 17-18; Hertz Letter, *supra* note 233, at 4 ("Government officials have a special responsibility . . . to ascertain facts and provide a fair redress of grievances . . . in a manner that transcends private sector adversarial relationships."). *See also* ACUS Recommendations, 1 C.F.R. § 305.84-7(A)(5)(b) (1984).

The stated attitude of the General Accounting Office is that it has a responsibility, whenever passing on the merits of a monetary claim, to make whatever factual and legal findings are necessary to determine the validity of the claim and the amount, if any, due. It disclaims authority to bargain or compromise. "[A] claim determined to be valid should be paid in full. Likewise, public funds should not be used to pay any part of a claim determined not to be valid." GAO PRINCIPLES, *supra* note 1, at 11-6.

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than to compromise.[587]

This description casts the government attorney in the mold of private counsel in relentless pursuit of a client's personal advantage. In practice, it is an exaggeration; but it also contains some truth. One agency attorney describes tort claimants as "entirely on their own."[588] Another roundly disavows any obligation to the claimant.[589] Still a third confesses that defeating tort claims at the administrative level is a way of "keeping professional score," at least when the claimant has representation.[590] For his part, the Torts Branch Director squarely posits an adversarial model for the administrative tort claims process.[591]

However, there is something misleading about the hired-hand theory of the agency claims attorney, whatever its merits in describing other areas of government law practice. Subject only to review by a superior officer within the same department and to possible Justice Department approval, claims attorneys themselves decide government tort claims. Except in the most unusual circumstances, no one outside the legal department—neither top agency policymakers nor personnel in the division whose activities gave rise to the claim—considers a claim as a legal matter. From a practical point of view, claims attorneys are attorney *and* client, determining the government's bidding at the same time that they perform it. Claims attorneys in an agency's legal department thus constitute the agency's policymakers for tort claim settlements.

Along with the usual professional responsibilities of legal representatives, claims attorneys therefore have the ethical responsibilities of private persons who become enmeshed in legal difficulties and must stake out defensible positions. Like civil-suit defendants, they can acknowledge liability when it is fairly established and immediately pay a fair estimate of loss. Similarly, they can overlook certain purely technical defenses that would appropriately be invoked in litigation.[592] Alternately, they can adopt a less generous

587. French, *Research in Public Tort Liability*, 9 LAW & CONTEMP. PROBS. 234 (1942).

588. Nesvet Interview, *supra* note 23. According to this attorney, the only reason not to make "ludicrously low" settlement offers to claimants is that doing so may insult them to such an extent as to bring negotiations to an end. *Id.*

589. Feeley Interview, *supra* note 147.

590. Newman Interview, *supra* note 148.

591. Axelrad Letter, *supra* note 152, at 2; Second Axelrad Interview, *supra* note 368. *See also* Willard Letter, *supra* note 180 (citing "the true adversarial nature of the tort claim administrative process").

592. The statute of limitations cannot as such properly be overlooked. *See supra* notes 124-25 and accompanying text. Congress almost certainly did not mean by the FTCA to authorize the administrative settlement of either time-barred or exempt claims. Most likely,

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posture and do what most in fact do: offer to pay no more than a discounted probable judgment value. Finally, they can choose to fight the claim with any available argument and means, so as to pay as little as possible.[593] The difference between claims attorneys and civil defendants is that instead of directing or authorizing counsel to pursue that approach, claims attorneys pursue it themselves. Clearly, then, even the relatively well-defined legal environment of the FTCA offers a wide range of ethical positions.

Most claims officers in the federal agencies draw on both models. Virtually all recognize an obligation to examine a claim fairly and give claimants what they are due.[594] As one affirmed, "I stand ready to pay a valid claim."[595] On the other hand, claims officers emphasize the inchoate character of most tort claims, insisting that claimants and claimants' attorneys tend to exaggerate the strength and value of their claims and behave in an adversarial manner even

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Congress thought that claims more than two years old should as a policy matter be considered stale for all purposes. In any event, by attaching a limitations period on federal tort claim suits, and then closely tying agency settlement authority to the cognizability of those claims, Congress impliedly subjected settlement to the same time bar. *See, e.g.*, Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir. 1983).

To this end, the Torts Branch has instructed government attorneys as follows:

> In FTCA cases, the statute of limitations . . . is a jurisdictional requirement. Therefore, it cannot be waived. . . . Regardless of how meritorious the plaintiff's substantive claim might be, the statute must be raised if it is applicable.

TORTS BRANCH, DEPARTMENT OF JUSTICE, MONOGRAPH E, STATUTE OF LIMITATIONS 30-31 (1983).

Conceivably, Congress could authorize the agencies to adjust an otherwise time-barred tort claim when they find that the age of the claim, though barring suit, has not deprived them of sufficient probative information to act upon it intelligently. This would require very specific statutory language. *But cf.* Portis v. United States, 483 F.2d 670, 670-71 (4th Cir. 1973) (court finds it "incredibl[e]" that the government would interpose a statute of limitations defense while conceding legal liability for causing the near-total deafness of a nine-year-old child through medical malpractice in an Air Force hospital).

593. The Torts Branch Director uses the example of the grossly obese claimant who is legitimately offered a good deal less on a valid claim than any other claimant in identical circumstances. The argument is that a judge or jury might be influenced by the claimant's obesity and that the government has a right to take advantage of that fact. Similarly, in the hypothetical situation in which the government attorney knows that claimant's counsel, because of personal financial distress, is offering quick agency-level settlement at half the true value of the client's clearly valid claim, the Torts Branch Director would advise that the offer be accepted. Second Axelrad Interview, *supra* note 368.

On the other hand, the Director reports having returned a settlement as inadequate because it reflected a reduction in value based on spurious assertions of a statute of limitations defense. Not to do so, it was explained, would be to countenance deception by government personnel. *Id.*

594. *See generally* Hertz Letter, *supra* note 233, at 1-2; Horn Letter, *supra* note 438, at 1.

595. Nesvet Interview, *supra* note 23.

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during the administrative process.[596] Claims officers are also conscious, at least in prospective settlements of no more than $25,000, of being the only barrier between the claimant and the United States Treasury.[597] The dominant attitude, subject to subtle and important variations, is best described as highly skeptical objectivity.

The problem of placing a dollar value on a payable claim illustrates the attitudes of most claims attorneys. The decision whether a claim should be paid at all, as mentioned, involves a prediction of judicial outcome. Thus, an agency may be willing to settle a factually or legally uncertain claim, but, unless valuation requires nothing more than totaling medical or car repair bills or the like, will probably exact a stiff price for doing so.[598] In this respect, again, tort claims may be distinguished from true statutory entitlements. Decisionmakers award entitlements despite substantial doubts if the case for doing so outweighs the case for not doing so. They are without authority to reduce the payment.

In assessing their generosity, claims officers usually deny any affinity to insurance company claims adjusters who, one of them alleges, "settle as cheaply as they can get away with."[599] Most officers aim to settle a payable claim at the lower end of a broad zone of reasonable compensation.[600] They do not drive settlement figures below what is conscionable under the circumstances, but neither do they seek out the generous end of the spectrum, nor even the dead center.[601] The former head of the Torts Branch and a leading authority on the FTCA explains:

> Unlike many lawyers representing private defendants, the government lawyers are not as much concerned with settling a case at the very lowest possible sum as they are with effecting substan-

596. *See, e.g.*, Conway Letter, *supra* note 152, at 1; Sklute Letter, *supra* note 236, at 1; Bodolay Interview, *supra* note 144.

597. Huang Interview, *supra* note 22.

598. In other cases of less than clear liability—for example, cases marked by novel policy issues, substantial questions of statutory interpretation, or the chance to have an unfortunate precedent overruled—the agency may choose not to predict judicial outcome with a discount for uncertainty, but rather to deny the claim and let the court speak.

599. Huang Interview, *supra* note 22.

600. *See, e.g.*, Newman Interview, *supra* note 148; Wieland Interview, *supra* note 152.

601. Understandably, agency regulations do not directly address this issue. The Air Force comes closest to a formula:

> *Air Force Policy on Claims:* . . .
>
> b. Make prompt, just, and reasonable adjudications of all claims.
>
> c. Pay meritorious claims in the amount necessary to restore the claimant, as nearly as possible, to his or her position before the incident on which the claim is based.

Air Force Reg. No. 112-1, *supra* note 386, at ¶ 1-10.

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> tial justice. This does not mean that they will seek bottom dollar in a settlement negotiation. What it means is that they will approach the evaluation more objectively—more fairly—and will not attempt to "steal" a claim for pennies when its value is in dollars.[602]

### J. *Negotiating the Claim*

Where the agency upon investigation tentatively determines that a claim may be worth paying,[603] the case enters the negotiation stage. Though often intermittent, negotiations may extend throughout most of the settlement period. Each side presents its view of the claim, perhaps overstating the strength of its case and the weakness of the other party's.[604] Further exchanges of argument and information will follow, culminating in what may be the first of several offers and counteroffers.

The question whether to engage in this process and at what pace and rhythm to do so is a matter of individual style. The head of tort claims adjudication at the Postal Service, for example, finds it most productive to stake out a fair settlement figure early on and hold steadfastly to it.[605] But he credits with considerable success the aptitude of a colleague for settlement through dickering.[606] Although the ultimate level of settlement may be the same, dickering begins with what one attorney calls "initial lowballing," leaving room for

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602. 2 L. JAYSON, *supra* note 84, at 15-8. The excerpt describes settlement policy at the litigation stage, but the comments are equally applicable to agency-level practice.

603. An obvious reason for not conducting negotiations at an earlier stage is conservation of agency resources. A less obvious but equally important reason is the fear that, whatever the statute may say about the inadmissibility of settlement offers at trial, *see supra* note 340, the agency's mere willingness to negotiate may be taken as a concession of liability.

604. Agency regulations rarely treat the negotiation process as such, but Veterans Administration regulations are an exception:

> In most instances, the best approach requires a candid and full presentation of the reasons for the Government's position, pointing out strong points, difficulties of proof for the claimant, availability of Government medical experts, the authority of the Department of Justice to obtain the services of non-Governmental medical experts, and the amount awarded in similar situations in litigated and unlitigated claims. *The basic thrust is to generate a substantial doubt in the mind of the claimant's attorney concerning liability in the United States.* All related Government payments, past, present and future, should be used to reduce damages. Loss of earnings should be reduced to present value whereas future Government payments should not. Inflation factors should be used to increase future Government payment figures.

Vet. Admin. Reg. No. M-02-1, *supra* note 301, § 18.12a (emphasis added). The regulation confirms that agencies make use of the usual negotiation devices—including perhaps a moderate amount of factual manipulation—in negotiating with claimants.

605. Newman Interview, *supra* note 148.

606. *Id.*

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later agreement at or near the targeted amount.[607] Dickering provides greater room for maneuver and greater flexibility, but it takes time and carries its own risks.[608] Clearly, the quality of negotiations depends on the particularities of the claim and the working relationship between the government attorney and the claimant's representative. In this respect, tort claims negotiation is no different in the government setting than in any other, and its outcome is as usual a function of "appropriate and realistic concessions on both sides in light of all elements of the case."[609]

### K. *Monitoring the Progress of a Claim*

A typical claims attorney in a busy agency may have as many as eighty to one hundred claims in one stage or another at any time.[610] The delays entailed in delegating the investigation, waiting for reports to be prepared or examinations conducted, and eliciting responses by claimants to requests for documentation or to the agency's latest settlement position all make it probable that claims will be forgotten for relatively long stretches. Slippage of a month or six weeks is significant in a settlement procedure that Congress intended most often not to exceed six months. An obvious disadvantage is that the government may find itself in court before it has had a fair chance to settle.[611]

In no agency does the problem seem even remotely out of control.[612] Many officers have developed individual systems—logs, charts, and the like—for tracking the claims for which they are re-

607. Rouse Interview, *supra* note 141.

608. For example, if the government's "lowballing" aims excessively low or the process becomes unpleasant, the chances of settlement prior to suit will be reduced.

609. 2 L. JAYSON, *supra* note 84, at 15-9.

610. Levin Interview, *supra* note 140; Newman Interview, *supra* note 148.

611. Although the GAO has not studied the timeliness of the agencies in handling tort claims, it did examine the Justice Department's administration of swine flu claims. The GAO concluded that while the Department's procedures were reasonable, unnecessary delays resulted from inadequate follow-up efforts when claimants failed to produce requested information and from an insufficient number of physicians to conduct medical reviews. Letter from Gregory J. Ahart, Director of the U.S. General Accounting Office, to Sen. John A. Durkin 8-10 (Jan. 14, 1981) ("Processing of Claims Resulting from the Swine Flu Program").

612. The risk of prolonged delay is minimal for minor claims that can almost be resolved on the face of the claim itself, and for which the process from start to finish may take no more than six to eight weeks.

Prolonged agency silence may also be deliberate, as where the agency is prepared to concede liability, but the parties are simply too far apart on damages to warrant active negotiations. The time would not yet seem ripe for a denial letter. More questionable is the practice, admitted to by at least one claims attorney, of ignoring a claim that holds no real settlement promise, but as to which the agency does not relish the prospect of litigation. This practice may be used for claims that raise novel or difficult issues of law or bring embarrassment to the

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sponsible, and they report good results.[613] However, agencies that have channeled their computer capability into a systematic program of claims tracking are proving most efficient. With appropriate programming, each officer within a claims unit can chart the course of all pending claims and the intervals that have passed between the usual stages.[614] Attorneys who use computer techniques for monitoring the progress of their claims strongly endorse the enterprise.[615] Moreover, supervisory personnel find that it enables them to keep track of the pace and productivity of their staff attorneys, and thereby the efficiency of the entire office.[616] Computerized claims monitoring holds even more potential where there is delegation to field and regional officers of the authority to investigate, evaluate and settle claims.

The program of the Air Force claims service—Claims Administrative Management Program (CAMP)—illustrates a successful computer operation.[617] Every Air Force claims officer in the world completes and mails to headquarters a new Air Force Form 176 at every stage in the course of a claim, starting with its initial filing. The forms are keypunched and entered into a central system.[618] According to Air Force claims personnel, CAMP revealed a much higher incidence of overdue claims than expected, and showed which bases were most responsible for them.[619] The computer has been programmed to show the average claims processing time for each base and to print out an "overage list," that is, a list of longest-pending claims.[620] While the greatest advantage of CAMP and similar systems is the ability to gauge the efficacy of an agency's claims settlement operations,[621] the information stored has much

agency. An express denial letter could trigger litigation over a case that otherwise might go away.

613. Huang Interview, *supra* note 22.

614. Hertz Letter, *supra* note 233, at 6.

615. Purdon Interview, *supra* note 236.

616. Semeta Interview, *supra* note 151.

617. For detailed regulations on the operation and uses of CAMP, program by program, see Air Force Reg. No. 112-1, *supra* note 386, at ch. 3.

618. Personnel in charge of CAMP estimate that some 28,000 to 30,000 such transactions are entered in Washington each month. The system is not exclusively used for tort claims. It also tracks other kinds of claims as well as debt collection efforts, military justice and clemency matters, and even inventories of supplies. Purdon Interview, *supra* note 236; Semeta Interview, *supra* note 151.

619. Purdon Interview, *supra* note 236.

620. The Air Force also has in place one of the most extensive networks of training sessions for claims officers, paralegals and medical-legal consultants as well as on-site inspections. *Id.*

621. *Id.*

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wider potential value for planning and evaluative purposes. For example, the fact that many claims units have an astonishingly crude sense of their claims demography[622] probably implies missed opportunities for improvements in agency risk management.

Interestingly, there appears to be no direct correlation between the claims volume in a given agency and the sophistication of its data collection system. Both the high volume Air Force and relatively low volume NASA[623] are pioneers in data collection and management. On the other hand, both the high volume Interior Department and low volume FBI have lagged in these respects. Since all agencies would benefit, the Justice Department should spearhead efforts to develop data collection and retrieval systems adapted to the tort claims context, and should promote the systematic sharing of technology by those agencies that have developed and successfully used it.

### L. *Final Denials and Reconsiderations*

Recognizing how strict the courts have been on the question of what constitutes a proper formal denial for statute of limitations purposes,[624] most attorneys are scrupulously detailed when they come to the conclusion that negotiations have irrevocably broken down. They include in their denial letters the same recitals required in the case of an outright rejection.[625] This is sensible self-protection.

On the other hand, most final denial letters are notably short on reasons.[626] For example, some officers merely state that a claim is

622. *See supra* note 135 and accompanying text.

623. NASA has installed a computer system which tracks all its litigation and contract appeals matters and is in the process of extending it to all categories of claims. Wieland Interview, *supra* note 152.

624. *See supra* note 345.

625. The Veterans Administration has a specific formula for situations where settlement has proved impossible only because of a failure to agree on damages. The letter will state either that "the claim appears not to be amenable to administrative resolution and is therefore denied," or that "your demand for settlement exceeds our evaluation of the injuries sustained; you may accept this letter as a final denial of your claim." It has found such a letter preferable to combining denial letter language with a last counteroffer, as in the following: "You are invited to accept our counteroffer in the amount of [x] dollars by [a stated future date] or else your claim is deemed denied as of the date of this communication." For an example of the latter, see Heimila v. United States, 548 F. Supp. 350, 351 (E.D.N.Y. 1982).

626. Feeley Interview, *supra* note 147; Kelley Interview, *supra* note 24. Although Justice Department regulations do not require a statement of reasons for a denial, some agencies routinely provide one. Conway Letter, *supra* note 152, at 2; Sklute Letter, *supra* note 236, at 3.

Army regulations specifically direct that a denial be general when issued under a statute

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not cognizable rather than cite a specific statutory exemption which justifies denying it.[627] Others remark, without more, that the claim fails to state a basis upon which the government has submitted to liability or, equally uninformative, that "no tort was committed for which the government under the circumstances is responsible."[628] Behind such broad statements may lurk any number of findings: that the statute of limitations has run,[629] that the employee who caused the injury was acting beyond the scope of employment, that government action was not the proximate cause of injury, that no fault was proven, and so on. To what extent the agencies thereby exhibit normal bureaucratic behavior, or have taken the Justice Department's cue that justifications for denial are unnecessary, is indeterminable. To be sure, in some cases a statement of reasons for denial would be formalistic and superfluous, as in situations where the issues already were fully and explicitly ventilated. Nonetheless, few officers seem to acknowledge that offering a claimant a reasonably specific ground for denying a claim would serve a useful purpose.[630] For reasons already mentioned, the Attorney General's regulations should be amended to require a brief statement of the basis for the denial of a claim that comports with prevailing standards under the Administrative Procedure Act.[631]

Although Justice Department regulations give disappointed claimants the right to request that an agency reconsider its denial of a claim,[632] not every agency attorney mentions this right in the denial letter.[633] Veterans Administration and Interior Department

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allowing a judicial remedy or judicial review, on the curious rationale that the Justice Department is responsible for explaining the government's position in such cases. Denials under statutes providing for only administrative remedies are to be "much more explicit and certain." "[O]nly in this way," the regulations state, "can the claimant be required to completely particularize his grounds for appeal." 32 C.F.R. § 536.11(a) (1984).

Several claims attorneys report that they generally give claimants represented by counsel less specific and informative denial letters than they give those who file their claims pro se. Semeta Interview, *supra* note 151.

627. Bodolay Interview, *supra* note 144; Huang Interview, *supra* note 22.

628. Bodolay Interview, *supra* note 144.

629. However, most claims attorneys specifically cite the statute of limitations if that is the ground for denial. Doing so has the merit of possibly averting a pointless lawsuit.

630. *See, e.g.*, Axelrad Letter, *supra* note 152, at 6.

631. *See supra* notes 350-51 and accompanying text. *See also* ACUS Recommendations, 1 C.F.R. § 305.84-7(A)(5)(a) (1984).

632. *See supra* notes 352-54 and accompanying text.

633. *Compare* Axelrad Letter, *supra* note 152, at 8 (notice would confuse claimants), *with* Hertz Letter, *supra* note 233, at 6 (notice routinely given). The Administrative Conference recommends that claim denial letters inform claimants that they may request agency reconsideration of a denial and that such a request extends the waiting period before suit may be filed on the claim. ACUS Recommendations, 1 C.F.R. § 305.84-7(A)(6)(a) (1984).

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denial letters, for example, typically contain such a recital, though those coming from the Postal Service and the Departments of Agriculture, the Air Force, and the Army do not.[634] In the case of the Veterans Administration, the notice may be related to the fact that there, contrary to the procedure in most other agencies, reconsideration takes place at the Office of General Counsel in Washington on the basis of a de novo review.[635] If, as is more usual, reconsideration occurs in the same office that rendered the initial decision, the matter is often handled by a colleague of equal rank to the original decisionmaker or by an immediate superior.[636]

Having another claims attorney take a fresh look at the record upon reconsideration has distinct advantages. Once a claim file is in order, a second in-house opinion does not present a significant cost to the agency.[637] At present, claimants file requests for reconsideration in well under ten percent of all final denials.[638] Conceivably, an announced promise of fresh reconsideration would increase the request rate and the number of reversals of final denials at the agency level, thereby lowering the incidence of FTCA litigation. But one needs to be cautious in any such prediction. The rate of reversal on reconsideration is generally extremely low, and it does not seem to climb appreciably in agencies that place responsibility for reconsideration in new hands. This is not surprising when one considers that the chief reason reconsideration produces different results, in the rare cases that it does, is that the claimant has introduced new evidence of some significance.[639] Under those circumstances, the

634. Agency Interviews.

635. Vet. Admin. Reg. No. M-02-1, *supra* note 301, at § 18.09b. However, reconsideration is normally had on the record compiled below, with some possibility for additional investigation and direct claimant contact. Bradshaw Interview, *supra* note 149. By contrast, in the Department of Agriculture, reconsideration is conducted in the same office as the original determination and by the same personnel. Nesvet Interview, *supra* note 23.

636. *E.g.*, 32 C.F.R. § 842.89(a) (1984) (Air Force provides for reconsideration by next higher authority). *See also* Hertz Letter, *supra* note 233, at 6; Sklute Letter, *supra* note 236, at 4.

637. Axelrad Letter, *supra* note 152, at 9 (opposing reconsideration by different officers).

638. Bodolay Interview, *supra* note 144; Huang Interview, *supra* note 22. One claims attorney put the incidence at as low as two percent. Purdon Interview, *supra* note 236. The chief reason for the low number of requests for reconsideration appears to be that many disappointed FTCA claimants are eager for their day in court. Reconsideration, at best not a very promising prospect, will only postpone litigation for as long as six months. This theory is supported by reports that the rate of reconsideration is appreciably higher under statutes like the Military Claims Act which provide neither a judicial remedy nor even judicial review on the merits. Purdon Interview, *supra* note 236.

639. Nesvet Interview, *supra* note 23.

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identity of the person giving reconsideration may not be especially important.

### M. *The Role of the Justice Department in Agency Claims Action*

Apart from its regulatory authority under the FTCA, the Justice Department has two principal nonlitigation functions. It formally approves or disapproves proposed agency settlements above $25,000, as required by the FTCA,[640] and it provides agency attorneys on request with informal guidance on the settlement of specific claims. For the first of these functions, the Department has developed a structured procedure; the second, because of its nature, demands maximum flexibility.

#### 1. *Requests for Approval*

In conformity with the express terms of the FTCA,[641] Justice Department regulations require the prior written approval of the Attorney General or his designee for any proposed settlement above $25,000.[642] They further require that agencies furnish the Department "(a) [a] short and concise statement of the facts and of the reasons for the referral or request, (b) copies of relevant portions of the agency's claim file, and (c) a statement of the recommendations or views of the agency."[643] By custom, the Justice Department also demands a signed settlement agreement between the claimant and the agency that is made expressly conditional on the Justice Department's approval.[644]

Some agency claims attorneys do not like the Department's requirement of an agreement prior to approval action.[645] Basically, their inability to make binding concessions in negotiations impairs their ability to win concessions from the claimant or the claimant's attorney. Agency claims attorneys are in an especially awkward situation if the Justice Department withholds approval of a proposed settlement. The attorney not only has conspicuously failed to win the support of government colleagues for the settlement, but now must persuade the claimant to accept what may be a substantially

640. 28 U.S.C. § 2672 (1982).

641. *Id.*

642. 28 C.F.R. § 14.6(a) (1984).

643. *Id.* § 14.7. In practice, when agencies seek approval of a settlement as a whole, rather than advice on a specific issue, they refer the entire file to the Justice Department, not just portions of it. The prepared introductory statement will, however, highlight those portions of the file that are most relevant to the merits of the proposed settlement.

644. Axelrad Interview, *supra* note 144.

645. Agency Interviews.

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lower sum.[646] There is little incentive for the claimant to do that. Claimants often feel that if the agency attorney could be persuaded of the appropriateness of the higher settlement, so too might a court be persuaded. As a result, the attorney's credibility and leverage suffer. On the other hand, the Justice Department is understandably loath to assume the burden of final negotiations with the claimant, or to spend its limited resources scrutinizing what may prove to be only a hypothetical settlement. One solution would be to raise the agencies' level of settlement authority, perhaps to $100,000 as many claims attorneys suggest,[647] so that fewer settlements would need Department approval. If the number of settlements needing approval is low enough, the Department may be more willing to consider them on a hypothetical basis.

The Torts Branch has well-established procedures for handling agency requests for approval. Incoming requests are forwarded, depending on their subject matter, to one of three assistant directors.[648] They are then assigned to a team consisting of a Torts Branch attorney and a reviewer, usually the assistant director. This team examines the claim on the record, considering law, fact, and policy, and exercising what the Torts Branch describes as a deferential standard of review. In other words, the agency's disposition to settle is sustained "if it falls within the realm of reason."[649] If the attorney and reviewer support the settlement, the claim is sent to the Director for approval. If not, they personally consult with the Director, and, if he concurs, arrange a conference with a representative of the agency legal department and sometimes the regional investigator or coordinator.[650] There are several possible outcomes.

646. Largely for this reason, the Torts Branch may take over negotiations with a claimant after rejecting the initial settlement agreement. Purdon Interview, *supra* note 236.

647. Hertz Letter, *supra* note 233, at l; Horn Letter, *supra* note 438, at l; Rouse Letter, *supra* note 488, at 6; Sklute Letter, *supra* note 236, at 4; Nesvet Interview, *supra* note 23. *But see* Axelrad Letter, *supra* note 152, at 9 (opposing such a substantial increase). That figure, $100,000, is the current level of settlement authority of the United States Attorneys. One agency attorney complains that claimants sometimes refuse to negotiate seriously with the agencies because of the limits on agency settlement authority; after litigation begins, claimants can win a settlement from the local United States Attorney for as much as $100,000 without Justice Department approval. Rouse Interview, *supra* note 141.

648. The assistant directors have responsibility, respectively, for general torts, regulatory torts, and malpractice. Axelrad Interview, *supra* note 144.

649. *Id.* The reason for using a deferential standard is to give the agencies an incentive to seek and achieve administrative settlements. The Torts Branch claims as its purpose to strengthen that incentive. Its review of lower level action on tort claims arising out of the Justice Department's own activities, as well as compromise settlements by United States Attorneys, is more searching. *Id.*

650. *Id.*

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Settlement for any sum above $25,000 may be rejected; settlement in excess of $25,000 may be approved, but at a lower level than initially proposed;[651] or settlement at the proposed level may be agreed to after all.[652]

Since the Director has settlement authority only up to $150,000, he or she cannot finally approve proposed settlements above that amount. Assuming they have the Director's approval, they must be taken still one step further: to the Assistant Attorney General for amounts up to $750,000 and to the Deputy Attorney General for amounts beyond.[653] On the other hand, upon disapproving a proposed settlement above $150,000, the Director nonetheless invites agency counsel to request consideration of the proposed settlement by the Assistant or Deputy Attorney General. Agency counsel rarely press the matter that far,[654] but if they do, the file is sent along with memoranda from the Director and from agency counsel, and a conference may ensue.[655]

Agency claims attorneys commonly tell claimants that the need for Justice Department approval may mean a substantial delay in the settlement and payment of claims. They may also tell claimants about the risk that the Justice Department will view their claim less sympathetically, given its stricter interpretation of the FTCA and less liberal approach to damages.[656] These warnings may induce some claimants to accept settlements of $25,000 or less when otherwise they might not do so. Though there are dangers in this practice, there is also virtue in claimants appreciating the risks they run

651. In this event, the agency will receive advance written authorization to reopen negotiations with a view to settlement not in excess of the lower amount. If the agency succeeds in getting the claimant's assent, no further Justice Department action will be needed. *Id.*

652. In this event, the agency processes the settlement as usual, attaching written evidence that Justice Department approval has been obtained. *Id.*

653. *Id.*

654. The appeal is more likely to be pursued where a litigation rather than an administrative settlement in excess of $150,000 has been disapproved. *Id.*

655. Matters become more complex where the Director refuses to approve the proposed level of settlement, but would approve a lower one that likewise lies beyond his final approval authority of $150,000. Agency officers then have a choice. They may immediately appeal to the Assistant Attorney General just as before; if successful, the affair is virtually over. But even if they acquiesce in the Director's view, which is the more likely response, the matter is not at an end. Not only must negotiations with the claimant be reopened to secure assent to the less generous settlement, but once that is achieved, the new settlement must still be approved by the Assistant General Counsel whose views are not yet known. This scenario illustrates how each level of the Justice Department can avoid having to consider a settlement until agreement at all lower levels, including the claimant's and the agency's, has been secured. *Id.*

656. Newman Interview, *supra* note 148; Rouse Interview, *supra* note 141; Wieland Interview, *supra* note 152.

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in pressing for a higher sum than the agency can award. Still, claims officers should be careful not to coerce claimants into accepting artificially low settlements.

There are also less obvious risks associated with the perception that the Torts Branch uses its approval authority to impose on the agencies an unduly narrow interpretation of the FTCA and an unreasonably low measure of damages. One agency attorney acknowledges not seriously negotiating difficult claims likely to yield proposed settlements above $25,000, for the reason that success in doing so will only provoke an uphill battle with the Torts Branch for approval. He prefers to let six months pass and have the Justice Department meet the claimant directly in court.[657]

It is not clear how to interpret these charges. First, by no means every agency voices them. Moreover, there are countervailing considerations. To the extent the Torts Branch requires agencies in large settlements to interpret the law correctly, to make balanced and defensible characterizations of the facts, and to avoid giveaways in the form of tort claim settlements, it is only performing its proper function. And it is hardly surprising that agency attorneys resent being overridden by other government lawyers, especially when it embarrasses them before disappointed and possibly angry claimants. The fact remains, however, that Congress did not intend, in conditioning large agency settlements on prior Justice Department approval, that the Department should routinely block defensible agency-level settlements simply because it would take a harsher position in litigation and possibly even prevail. Judging by its stated policy of deference on requests for approval,[658] the Torts Branch evidently agrees, at least in principle. The matter bears further examination because, apart from the impact that pressure from the Torts Branch may have on agency morale, any short-circuiting of the administrative process should be avoided. Whether these problems have materialized to a significant degree cannot be deter-

657. This claims officer is not alone. Rather than ignore a claim under these circumstances, an attorney in another agency reports the even more anomalous practice of issuing an actual denial letter on the claim, though in his judgment the claim is valid and worth paying. As this attorney sees it, the claim will then go to court and likely be settled for an appropriate amount of money, up to the United States Attorney's settlement authority of $100,000, without the Torts Branch becoming involved.

An attorney in another agency facing similar difficulties acknowledges that an opposite pressure was exerted under a previous Administration. At that time, the Justice Department allegedly rejected proposed settlements as insufficiently generous to claimants. No agency attorney reported that kind of pressure from the current Administration.

658. *See supra* note 649 and accompanying text.

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mined without a close and systematic review of Justice Department approval practices which this general procedural study of the FTCA could not accomplish.[659]

2. *Consultation upon Request*

The overwhelming majority of cases never reach the Justice Department unless a proposed settlement exceeds $25,000 or a failure to settle provokes litigation.[660] However, there are several exceptions. First, Justice Department regulations bar agency settlement without prior consultation with the Department when in the opinion of the agency:

> (1) A new precedent or a new point of law is involved; or
> (2) A question of policy is or may be involved; or
> (3) The United States is or may be entitled to indemnity or contribution from a third party and the agency is unable to adjust the third party claim; or
> (4) The compromise of a particular claim, as a practical matter, will or may control the disposition of a related claim in which the amount to be paid may exceed $25,000.[661]

Consultation also is required "when the agency is informed or is otherwise aware that the United States or an employee, agent, or cost-plus contractor of the United States is involved in litigation based on a claim arising out of the same incident or transaction."[662] As a practical matter, agency claims attorneys decide whether either condition exists and, if so, bring the matter to the Department's attention.[663]

According to the regulations, any referral or request for advice addressed to the Torts Branch should be in writing and contain a brief statement of the facts and reasons for the referral or request, copies of relevant portions of the claim file, and a statement of the agency's own views.[664] In practice, claims attorneys in the agencies consult Torts Branch attorneys on a less formal basis when they feel sufficiently unsure or uneasy for any reason about the proper course of action on a given claim. In most cases in which referral is not

659. The Administrative Conference of the United States has addressed the problem in a general way. ACUS Recommendations, 1 C.F.R. § 305.84-7(A)(5)(b) (1984).

660. 28 U.S.C. § 2672 (1982).

661. 28 C.F.R. § 14.6(b) (1984).

662. *Id.* § 14.6(c).

663. The situation is different with the Justice Department approval required in settlements above $25,000. The GAO will not certify a tort claim in excess of $25,000 for payment out of the judgment fund without evidence of such review and approval. *Id.* § 14.10(a).

664. *Id.* § 14.7.

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obviously mandatory, there is neither a file transfer nor a written communication. A simple telephone call is the usual practice.

Both the Torts Branch Director and the agencies indicate that communication between them is easy and frequent, and that the Branch stands ready to guide agency officers in resolving factual, legal, or policy issues arising in any FTCA claim.[665] The Torts Branch provides structured guidance through annual FTCA seminars for United States Attorneys and agency claims personnel. It also publishes well-documented and up-to-date manuals presenting the relevant case law on every significant substantive and procedural issue arising under the FTCA.[666]

## N. *Effectuating the Settlement*

### 1. *Mode and Source of Payment*

Settlements are usually made simply as lump sum payments.[667] Those in an amount of $2500, or less are paid out of agency appropriations.[668] In most agencies the claimant receives a voucher[669] and a formal notice of approval of the claim. When the claimant signs and returns the voucher, a fiscal officer arranges for the Treasury Department to issue a check, which normally takes a week or two. The standard voucher contains release language identical to that contained in both the FTCA and Justice Department regulations.[670]

If the amount of settlement exceeds $2500, the FTCA provides for payment in the same manner as final judgments and litigation settlements, that is, out of the judgment fund.[671] According to the regulations, if the claimant is represented by an attorney, the voucher should designate both the claimant and attorney as pay-

665. Agency Interviews; Axelrad Interview, *supra* note 144.

666. In the belief that the manuals, though not prepared in anticipation of any particular piece of litigation, reflect the Department's legal theories and strategies for FTCA litigation, the Torts Branch Director views them as attorney work product not for release to the general public. However, he allowed the author to examine a complete set on Torts Branch premises.

667. Axelrad Interview, *supra* note 144.

668. 28 U.S.C. § 2672 (1982) (substantially restated in 28 C.F.R. § 14.10(a) (1984)). However, all judgments and settlements against the United States arising out of Postal Service activities are payable by the Postal Service from revenues. 39 U.S.C. § 409(e) (1982).

669. Standard Form 1145. *See supra* note 337 and accompanying text.

670. Acceptance of an award constitutes a complete release of the United States and any federal employee whose act or omission gave rise to the claim on account of the same subject matter. 28 U.S.C. § 2672 (1982); 28 C.F.R. § 14.10(b) (1984).

671. 28 U.S.C. §§ 2414, 2672 (1982); 31 U.S.C. § 1304(a)(3)(A) (1982). Again, Postal Service claims are payable from postal revenues. *See supra* note 668.

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ees.[672] Once executed and returned by the claimant, the form is sent to the Claims Group of the General Accounting Office, together with evidence of Attorney General approval for settlements above $25,000.[673] The time for processing payment of awards above $2500 from certification to the GAO to receipt of the check, is between six and eight weeks.[674]

The difference in source of payment for large and small settlements is largely historical, reflecting the fact that until 1959 agencies could settle and pay only claims of $1000 or less, and from 1959 to 1966 only claims of up to $2500.[675] Although processing payments from the judgment fund may take slightly longer than processing from agency appropriations, it has certain advantages. Basically, the judgment fund is automatically replenished, while agency funds are not. On rare occasions, agency funds available for the payment of tort claims run so low toward the end of the fiscal year that claimants do not get paid until the agency receives either a supplemental appropriation or its appropriation for the next fiscal year.[676]

More interesting are the questions whether and how the difference in source of payments affects agency assessment of claims. One critic of the 1966 amendments argued that the system makes agency officials more likely to settle claims at a level above $2500 in order to conserve agency funds, and to be more cautious below $2500.[677] To avoid potential distortions of this sort, Congress should discard the provision that settlements up to $2500 be paid from agency funds.[678] Given its low threshold, the provision does not significantly enhance agency accountability;[679] any substantial

672. 28 C.F.R. § 14.10(a) (1984).

673. *Id.* In lieu of a Standard Form 1145 executed by the claimant, the agency may send GAO a Form 1145 accompanied by either a claims settlement agreement or an executed Standard Form 95. *Id.*

674. For the better portion of that period, the paperwork is at the GAO for review of the documentation, preparation of the GAO's own documents, investigation into any possible setoffs, and entry into the computer system. At the Treasury, there is additional paperwork, followed by issuance of a check through the disbursing office. However, should the Torts Branch request expedited action, the entire operation can be reduced to ten working days. Telephone interview with Sharon Green, Chief of Claims Adjudication, Claims Group, Accounting and Financial Management Division, General Accounting Office (Feb. 21, 1984).

675. *See supra* notes 95-96, 115 and accompanying text.

676. I. GOTTLIEB, *supra* note 123, at 40 n.38.

677. Corboy, *supra* note 158, at 76-77.

678. For agency support of such a change, see Hertz Letter, *supra* note 233, at 5; Axelrad Letter, *supra* note 152, at 10.

679. However, the GAO opposes the change precisely on grounds of agency accountability as well as the added administrative burdens. Letter from Milton J. Socolar, Special Assis-

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administrative settlement, like any tort judgment or litigation settlement regardless of amount, comes from the judgment fund.[680]

### 2. *The Structured Settlement*

The Justice Department now uses structured administrative settlements in appropriate cases.[681] The two leading approaches to structured settlement are, first, the combination of a direct cash payment with an annuity for a stated number of years or for life and, second, a similar combination of direct cash payment with a reversionary trust.[682] Structured settlements are designed to protect vulnerable claimants against the possibility of early dissipation of large awards. They also protect the government by averting any unjust enrichment that may result from lump sum awards based on unrealistic life expectancies and unknown future medical expenses.[683] Although agreement on the particulars of a structured settlement is not easy,[684] the Justice Department continues trying to educate government attorneys in the use and utility of this mode of

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tant to the Comptroller General of the United States, to Charles Pou, Jr., Administrative Conference of the United States (May 23, 1984).

680. Prior to the 1966 amendments, all settlements, whether administrative or litigation-related, were paid out of funds of the agency whose employee was responsible for the tort. 28 U.S.C. § 2672 (1964 ed.), *amended by* 28 U.S.C. § 2672 (Supp. IV (1965-1968)). In an apparent effort to lighten the burden on agency appropriations, the amendments made all litigation settlements, as well as all administrative settlements in excess of $2,500, payable out of the judgment fund. *See supra* notes 115-16 and accompanying text.

If Congress was truly interested in promoting the fiscal accountability of agencies for incidents giving rise to tort claims, it would do essentially what it did in the Contract Disputes Act of 1978, that is, provide that payment of monetary awards and judgments be reimbursed to the judgment fund by the agency whose acts gave rise to the liability. Pub. L. No. 95-563, § 13(c), 92 Stat. 2388 (1978) (codified at 41 U.S.C. § 612 (1982)).

681. However, only 18 of the 120 administrative settlements approved by the Torts Branch in 1983 took a structured form. Of these, all but three were medical malpractice claims. Memorandum from Lawrence Klinger to Jeffrey Axelrad, "Administrative Claims for 1983" (Jan. 4, 1983), at 2 (on file at the Case Western Reserve Law Review Office).

682. Typically, the United States supplies the corpus of the trust in an amount settled upon by the parties, or ordered by the court in the case of litigation, and supplements the fund as needed. However, any amount remaining in the trust at the victim's death reverts to the government. Second Axelrad Interview, *supra* note 368.

683. The problem of unrealistic life expectancies is particularly significant when the award is to replace lifetime income; the problem of unknown future medical expenses comes to the fore when the award is for life-threatening injuries. *See generally* 1 L. JAYSON, *supra* note 20, at 10-6. *See also* Ciecka, *A Comparison of Lump-Sum and Structured Settlements*, 27 TRIAL LAWYERS GUIDE 450 (1983); Mangino, *Tailoring the Structured Settlement*, 10 THE BRIEF 8 (May 1981).

684. Structured settlement can complicate the calculation of allowable attorneys' fees. *See, e.g.*, Robak v. United States, 658 F.2d 471, 479-80 (7th Cir. 1981), *rev'g in part* 503 F. Supp. 982, 983-85 (N.D. Ill. 1980). On attorneys' fees limitations, *see supra* notes 690-95 and accompanying text.

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settlement.[685]

At least one court has held that the FTCA does not authorize a court to issue an award in the form of a judicially established trust or indeed in any form other than lump sum damages.[686] While noting that Congress probably never considered the matter, the court preferred not to endorse "novel types of awards against the government" until Congress "affirmatively authorize[s] them."[687] One court's unwillingness to entertain the structured resolution of an FTCA lawsuit should not bar agencies and claimants from administrative resolutions on such a basis. If the view that the FTCA does not allow structured settlements prevails, it certainly will affect agency practice, but this does not seem likely. First, the case is considered an aberration; other courts have endorsed the use of structured settlements in FTCA litigation awards.[688] Moreover, the case is naturally confined to the situation where the government presses for a trust or annuity over a claimant's objection. Although the case may have some bearing on the willingness of courts to make structured awards, its impact on agency-level settlements should be negligible.[689]

### 3. *The Attorney's Fee*

The FTCA specifically requires that attorneys' fees in FTCA cases come out of the award; it also makes it a crime to accept as a fee more than a certain percentage of the award.[690] That limit is twenty percent of the award in prelitigation administrative settlement and twenty-five percent in compromise settlement or judgment.[691] The ceiling, found in numerous federal statutes affording monetary recovery against the government, is designed to protect

685. Letter from Jeffrey Axelrad, Director, Torts Branch, Civil Division, Department of Justice, to the author (Apr. 27, 1984) at 4.

686. Frankel v. Heym, 466 F.2d 1226, 1228-29 (3d Cir. 1972).

687. *Id.* The court also alluded to "the continuing burden of judicial supervision that would attend a judgment creating a life trust." *Id.* at 1229.

688. For an endorsement of the use of a reversionary trust in FTCA litigation awards, see Robak v. United States, 503 F. Supp. 982, 983 (N.D. Ill. 1980), *rev'd on other grounds*, 658 F.2d 471 (7th Cir. 1981). The Comptroller General has expressly approved the practice with respect to administrative tort claims. Op. Comp. Gen. No. B-162924 (Dec. 22, 1967) (available on WESTLAW, Fed. Gen. Library, Comp. Gen. file); GAO PRINCIPLES, *supra* note 1, at 11-49 to -50.

689. An agency claims attorney with long experience in the field strongly urges that the FTCA and regulations be amended specifically to embrace structured settlement. Rouse Letter, *supra* note 488, at 8.

690. 28 U.S.C. § 2678 (1982). *See generally* United States v. Cohen, 389 F.2d 689, 691-92 (5th Cir. 1967). No prosecutions have been reported under the FTCA provision.

691. 28 U.S.C. § 2678 (1982).

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claimants from improvident bargains, reduce the incentive to file fraudulent or inflated claims, and help ensure that public funds go to those intended to benefit from them.

Some claims officers routinely remind claimants and their counsel of the fee ceiling and the sanctions for its violation. This is sufficient by way of government involvement in the policing of fees. The Treasury should not, for example, issue separate checks to the claimant and the attorney reflecting their respective shares of the award under any previously agreed upon allocation. This practice is awkward and impractical when the attorney has been engaged on any basis other than a fixed percentage fee. In any event, the government has good reasons not to become the attorney's collection agency.[692]

The government has not yet had to consider whether the FTCA impliedly restricts the fees of an attorney who is unsuccessful in settlement negotiations. When the parties have agreed upon a customary contingent fee and there is no recovery, there is no claim to a fee and therefore no issue. If they have agreed upon a fixed or hourly fee, does an attorney who collects or seeks to collect the fee violate the FTCA by exacting "in excess of 20 per centum of any award, compromise, or settlement?"[693] Congress, most likely assuming that FTCA attorneys would charge a fee contingent on success,[694] did not address the question. Still, it seems anomalous for an attorney who is strictly forbidden to collect more than $200 on a $1000 settlement to be able to collect an unrestricted amount where settlement fails. This could conceivably offer attorneys a greater financial reward for disserving their clients' interests than for serving them. The concern is probably more theoretical than real, since contingent fee arrangements are customary in government tort claims. From a similarly practical standpoint, even when the parties set a fixed fee, attorneys rarely serve their long-term professional interests by winning a client nothing on a valid tort claim for the sake of a higher fee. In any event, the government achieves its principal objective of ensuring that the lion's share of compensation for government torts reaches the victims when it confines the ceiling to fees on actual recoveries, leaving fees in the absence of recovery

692. There may be a genuine dispute over the quality or other aspect of the representation in which the government should avoid becoming involved.

693. 28 U.S.C. § 2678 (1982).

694. D. SCHWARTZ & S. JACOBY, *supra* note 1, at 49.

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to the wisdom of the parties concerned.[695]

### O. *The Audit and Review of Claims Settlements*

The decision whether and on what terms to settle a claim administratively under the FTCA is vested in the legal departments of the agencies, subject only to possible Justice Department advice or approval. The FTCA originally required each agency to report annually to Congress on the administrative payment of claims under the act, giving a brief description of each claim paid, the name of the claimant, the amount claimed, and the amount actually awarded.[696] Although agencies had far less settlement authority then, Congress evidently thought it desirable that they account for their settlement decisions. Congress dropped the reporting requirement in 1965,[697] one year before it made the filing of an administrative claim a prerequisite to suit and lifted the ceiling on agency-level settlements.

Apart from occasional investigation by a congressional committee, the only possibility of legislative review of agency tort claims activity lies with the General Accounting Office (GAO). However, the role of the GAO is limited. The GAO maintains the view that its sweeping statutory authority to settle and adjust all claims of or against the United States[698] does not entitle it to intervene on the merits of monetary claims when Congress has specifically vested settlement authority elsewhere.[699] This is clearly the case for tort

695. *See* Bulman, *Federal Tort Claims: Attorney Fees and Interest*, TRIAL AND TORT TRENDS 103 (M. Belli ed. 1965).

696. 28 U.S.C. § 2673 (1964 ed.) (repealed 1965).

697. Act of Nov. 8, 1965, Pub. L. No. 89-348 § 1(l), 79 Stat. 1310. Specific agencies may continue to make claims reports to particular congressional committees. The Veterans Administration, for example, periodically reports on its claims activities through its General Counsel to the Chairman of the Senate Committee on Veterans' Affairs. Vet. Admin. Reg. No. M-02-1, *supra* note 301, at § 18.14.

698. 31 U.S.C. § 3702 (1982). Despite the sweeping statutory language, the GAO takes the view that monetary claims normally should be presented to the appropriate agency, if any, before being brought to it. Apart from audit or action upon agency request, the GAO normally intervenes, if at all, by way of review or reconsideration at the claimant's request. 4 C.F.R. § 31.4 (1984); GAO PRINCIPLES, *supra* note 1, at 1-3, 11-14 (individual claimants generally may request review or reconsideration by the Comptroller General of settlements disallowing their claims in whole or in part); Note, *The Comptroller General of the United States: The Broad Power to Settle and Adjust All Claims and Accounts*, 70 HARV. L. REV. 350 (1956); Note, *The Control Powers of the Comptroller General*, 56 COLUM. L. REV. 1199 (1956). For a description of the largely investigatory procedures and practices of GAO's Claims Group on review and reconsideration of agency settlement determinations, see 4 C.F.R. §§ 31.2-.8 (1984); GAO PRINCIPLES, *supra* note 1, at 11-15 to -19; Baer, *Practice Before the General Accounting Office*, 19 FED. B. J. 275 (1959).

699. Where the GAO exercises review on the merits, a six-year statute of limitations

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claims, and probably equally so for claims arising under many of the meritorious claims statutes.[700] With a merits review barred, the GAO has only oblique means of control: the audit of a particular claim or an agency's claims handling procedures,[701] control incident to the mechanics of payment on a claim that has been settled,[702] and issuance of advance decisions to an agency upon its request.[703] Even these avenues are not well-developed in the federal tort claim area. The GAO rarely conducts audit reviews of the administration of the FTCA or other tort claim statutes.[704] Moreover, the GAO exercises little review incident to the mostly ministerial processing of tort settlements for payment by the Treasury. As for advance GAO rulings on agency request, they simply do not play an important role in implementation of the FTCA.[705] Agency claims officers prefer to seek advice on the wisdom or legality of settlement from the Justice Department, the body they consider most expert in the matter.[706]

Looking specifically at the GAO's control incident to the payment process, the GAO may examine threshold questions of cognizability, but not the merits of a settlement under statutes like the FTCA that make agency action final and conclusive. This effec-

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applies. 31 U.S.C. § 3702(b)(1) (1982). GAO PRINCIPLES, *supra* note 1, at 11-21 to -26. GAO rulings bind the executive branch, but not private parties. United States *ex rel.* Skinner & Eddy Corp. v. McCarl, 275 U.S. 1, 4 n.2 (1927); St. Louis, B. & M. Ry. v. United States, 268 U.S. 169, 174 (1925); United States v. Standard Oil Co. of Cal., 545 F.2d 624, 637-38 (9th Cir. 1976); Pettit v. United States, 488 F.2d 1026, 1031 (Ct. Cl. 1973).

700. The situation is clearest under meritorious claims statutes that, like the FTCA, expressly make the agency determination final and conclusive. *See* Op. Comp. Gen. No. B-176147 (July 5, 1972); Op. Comp. Gen. No. B-161131 (Apr. 18, 1967) (available on WESTLAW, Fed. Gen. Library, Comp. Gen. file). *See also* Military Personnel and Civilian Employees' Claims Act, 31 U.S.C. § 3721 (1982); 41 Comp. Gen. 235, 238 (1961) (claims under Military Claims Act are beyond GAO settlement jurisidiction); 3 Comp. Gen. 22, 24 (1923) (claims under Small Claims Act are beyond GAO settlement jurisdiction).

701. 31 U.S.C. §§ 3521-26 (1982).

702. *Id.* § 1304(a); 28 C.F.R. § 14.10(a) (1984).

703. 31 U.S.C. § 3529 (1982). The GAO takes the view that agencies should refer any monetary claims which involve doubtful questions of law or fact to the GAO for an advance ruling. GAO PRINCIPLES, *supra* note 1, at 11-14.

704. *But see* Ahart Letter, *supra* note 611.

705. This is not to say that the GAO does not issue advance rulings on the meaning or coverage of the FTCA. *E.g.*, 49 Comp. Gen. 758 (1970); 35 Comp. Gen. 511 (1956); 26 Comp. Gen. 891 (1947). Certainly, it has had more frequent occasion to interpret other claims legislation, presumably because the expertise and indeed the authority of the Justice Department in connection with the FTCA do not extend to these other statutes. *E.g.*, 62 Comp. Gen. 641 (1983) (Military Personnel and Civilian Employees' Claims Act); Op. Comp. Gen. No. B-197052 (Feb. 4, 1981) (Panama Canal Act) (available on WESTLAW, Fed. Gen. Library, Comp. Gen. file); 40 Comp. Gen. 691 (1961) (Military Claims Act).

706. Agency Interviews.

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tively forecloses GAO scrutiny of the decision to pay a given tort claim. The GAO will not reexamine issues calling for an agency's exercise of discretion or judgment, such as whether an employee acted negligently or within the scope of employment, or whether the claimant is entitled to the specific amount of damages awarded.[707] In fact, it rarely looks beyond matters that can be determined facially, for example, whether an agency impermissibly seeks to pay a claim that plainly arose in a foreign country or is time-barred.[708] The GAO's incidental review of an agency's exercise of meritorious claims settlement authority is similarly superficial.[709] Thus, although the GAO enjoys sweeping authority to settle monetary claims against the government, to conduct audits of agency operations, to issue advance advisory rulings, and to process the payment of FTCA settlements above $2500, its actual involvement in tort claim determinations is decidedly modest.

From the point of view of disappointed claimants, the lack of meaningful access to the GAO should not cause concern. Under the FTCA, now and for the foreseeable future, claimants consider the courts their refuge. However, there may be a significant vacuum as far as audits of manifestly unfounded or excessive settlements are concerned. Though watchdog activities of the Justice Department in settlements above $25,000 constitute an adequate safeguard against fraud and collusion in the largest tort claims under the FTCA, they have no application to the vastly greater number of settlements below that amount. In addition, the Department has no role in the agencies' use of the less well-defined meritorious claims statutes. Consideration should be given to making the prospect of GAO audits of tort claims more credible or, alternatively, to encouraging the agency Inspectors General to give the au-

707. GAO PRINCIPLES, *supra* note 1, at 11-10.

708. Application of the discretionary acts exemption is the best example of an issue sure to be avoided. GAO personnel who process claims for payment from the judgment fund report that fewer than one percent of claims presented for payment raise a substantial question. That question is most likely to be whether the claim is in tort, or rather reflects an operating or program expenditure for which the agency's own funds should be used. Green Interview, *supra* note 142. Personnel in the GAO claims division lend support to the suspicion that some payments processed as tort claims to be drawn from the judgment fund actually should be charged to agency appropriations. *Id.*

709. GAO PRINCIPLES, *supra* note 1, at 11-10, discussing 21 Comp. Dec. 250 (1914), which involved the Secretary of Agriculture's authority to reimburse owners of horses, vehicles and other equipment lost or damaged while being used for official business. *See* 16 U.S.C. § 502(d) (1974), 37 Stat. 843 (1913) [as amended] (authorizing Secretary to reimburse owners).

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dit of agency tort settlements a higher priority.[710] Either approach would introduce a healthy deterrent in the tort claim setting.[711]

## V. CONCLUSION

Although a plausible argument may be made that federal agencies have inherent authority to consider and pay claims for the private losses they cause, a sounder view is that they need express statutory authority before doing so. Existing settlement authority over tort and tort-like claims is based on an extensive but haphazard collection of statutes, the most significant of which is the FTCA. Some of the legislation fills gaps of one kind or another in FTCA coverage of claims against the government sounding in tort. Meritorious provisions, however, authorize payment of just or equitable claims regardless of fault. A comprehensive review of this proliferation of claims settlement authority is needed to ensure that the arrangement is rational and, more specifically, that the relationship between the various ancillary statutes and the FTCA is reasonably clear. The time is similarly ripe to consider raising the monetary ceilings on agency settlement authority under the FTCA and other claims legislation.[712]

However, the main concern of this Article is agency-level procedure for handling claims under the FTCA. To a modest extent in 1946, and more broadly in 1966, Congress authorized federal agencies under the FTCA to settle tort claims arising out of the negligent or otherwise wrongful acts of their employees while acting within the scope of their employment, insofar as the government has waived its sovereign immunity to such claims. The 1966 amendments sought to shift principal responsibility for handling federal tort claims from the courts to the agencies, much as the original Act meant to shift it from Congress to the courts.

Before they may sue under the FTCA, claimants first must have presented their claim to the responsible agency within two years of its accrual. The presentation of a valid claim gives the agency a minimum of six months to consider and act upon it. Although neither the statute nor the Justice Department regulations issued

710. Agency attorneys believe Inspectors General have not placed much emphasis on the audit of agency tort claims settlements. *E.g.*, Wieland Interview, *supra* note 152.

711. For a summary of the statutory provisions imposing civil and criminal penalties for the filing of false or fraudulent claims, *see* GAO PRINCIPLES, *supra* note 1, at 11-133 to -136. Agencies also are authorized to treat fraudulent presentation as entirely vitiating the claimant's rights. *Id.* at 11-134.

712. *See* ACUS Recommendations, 1 C.F.R. § 305.84-7(B)(1) (1984).

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pursuant to it give much structure to agency-level claims procedures under the FTCA, the agencies by their own practice and regulations have done so. The volume of claims varies greatly among the agencies, as does the way the agencies allocate responsibility for investigating and adjudicating them. Settlement rates differ as well. Nevertheless, from a procedural point of view, all agencies adhere to a basically investigatory model. That model is generally appropriate to the task and, given a claimant's right to seek a full de novo trial in federal district court no later than six months from the filing of an administrative claim, also consonant with procedural due process.

Unfortunately, the data maintained by the agencies do not furnish a basis for assessing how far the 1966 amendments actually have shifted final disposition of tort claims from court to agency or for gauging the fairness and objectivity of agency outcomes. From the available information, however, the displacement of tort litigation by tort claims administration seems to be meeting Congress' expectations. The agencies have achieved this result both by resolving a high proportion of claims worth paying and by exposing the meritless character of many claims that are filed. A more refined claims tracking system would give a still better picture of the efficacy of agency settlement efforts. In addition, it could readily improve the monitoring of pending claims and generate data useful for risk management.

Because tort claims adjudication is not the principal mission of any federal agency, the administrative process that has developed for this purpose remains relatively inconspicuous. Ultimate authority usually rests in each agency's legal department, subject only to the requirement of Justice Department approval of proposed settlements above $25,000 and Justice Department consultation in claims raising novel policy questions or related to pending litigation. But although agency procedures for handling tort claims have developed without much direction or supervision from the legislative or executive branch, they are significant in terms of the number of dollars at issue and the quality of the government's relationship with individual members of the public. They will become more important if Congress expands the government's liability under the FTCA to encompass constitutional torts and terminates private tort actions against individual federal officials.

The current procedures generally serve Congress' purposes, but at the same time leave room for substantial improvement. Although most claims attorneys appear to be fair-minded, the sys-

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tem allows them to operate in an inappropriately adversarial manner. When this happens, fairness and equity suffer, as indeed may the very efficacy of prelitigation settlement. The difficulties stem in part from a residual ambiguity in the administrative tort claim process itself. Congress, in 1966 as in 1946, left the process closely tied to litigation. For example, despite available arguments to the contrary, Congress almost certainly did not mean to give agencies settlement authority broader than the government's exposure to liability in litigation. Thus time-barred, statutorily exempt, or otherwise invalid administrative claims may not be settled by the agencies under the FTCA. More important, by preserving a de novo action in federal court as the claimant's fundamental tort remedy against the government, Congress lent the process a distinctly adversarial flavor.

On the other hand, Congress clearly expressed a policy favoring fair and adequate compensation for the losses of deserving tort claimants, preferably at the administrative level. To that extent, it created something along the lines of an entitlement, albeit an entitlement subject to so many uncertainties—such as proof of fault and proximate causation, determination of the losses that are compensable, and difficulties of valuation, to name a few—that it can only be described as highly inchoate. In addition, despite the litigation origins and premises of the FTCA, the agencies have developed a distinct administrative process for handling tort claims and manage to dispose of the great bulk of claims through those channels.

In other words, administrative tort claim settlement lies somewhere between, on the one hand, an autonomous dispute resolution process in which the claims officer acts as a neutral decisionmaker and, on the other, a simple prelude to litigation in which officer and claimant already are adversaries. The extent to which features of the objective-entitlement or adversarial-bargaining models predominate in any case depends, of course, on the situation. Most agency claims officers appear to be aware of and sensitive to the tensions between these competing models. Restructuring the agency claims process to eliminate the underlying ambiguity would require backing away from agency-level disposition of claims or, alternatively, developing a quasi-judicial mechanism in the different agencies or in a separate government-wide tribunal that would segregate the function of agency advocate from that of decisionmaker. The first change is undesirable as a policy matter. The second would entail unwarranted administrative burdens, including the creation of a new corps of administrative law judges, and probably

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reduce the efficiency and informality that characterize the current investigatory model.

Preference should be given to less ambitious reforms that accept the ambiguity inherent in the system, but also mitigate those aspects that have produced misunderstandings and occasional hardship for claimants. Examples of such improvements would be greater willingness by the agencies to consider claims under the FTCA even though they were not presented as such, to entertain properly filed FTCA claims under other payment authority where reasonable and appropriate, and to give claimants timely notice of formal defects in their FTCA filings and an opportunity to remedy them. Other agency practices in need of reform include an overly technical attitude toward the sufficiency of a claim, the position that all regulatory specifications of claims and all agency requests for information are equally "jurisdictional," a tendency to resolve doubtful procedural questions against the claimant even in the absence of substantial prejudice to governmental interests, unduly restrictive policies on information disclosure in connection with a pending claim, and a sometimes less than fully fair and objective approach to determining the merits and monetary value of a claim. Finally, this Article suggests a series of modest changes including more liberal rules on the timing and transfer of claims, effective notice to claimants about the meaning and effect of the sum certain requirement, the inclusion of a statement of reasons in denial letters, and some fine tuning of the reconsideration process.

It bears emphasis that claims personnel within and among agencies have adopted diverse practices and exhibit important attitudinal differences toward claimants. Claimants, for their part, are sometimes less than cooperative during the administrative process, and the attorneys who represent them may knowingly or unknowingly heighten the adversarial element. Agency claims officers rightly and inevitably guide their conduct accordingly. Still, the administrative process as a whole could be made fairer and more effective by efforts to reduce its adversarial character and to increase cooperation between claimant and claims officer. Confidence in the process and its results in turn would increase. The challenge of these adjustments, however, is that they must be made in the context of a system that continues to promise tort claimants full access to the courts as their basic, if no longer their first, avenue of relief.

A number of tort claims officers express concern about the Justice Department's commitment to fair and reasonable compensation in exercising its approval authority over prospective settlements

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above $25,000. A few find that their own willingness to negotiate with claimants over large and difficult claims suffers as a result. This problem would be eased, though not eliminated, by raising the ceiling on agency settlement autonomy. A different but related problem is the Justice Department's apparent practice of routinely raising technical defects in a claim as a jurisdictional defense in FTCA litigation, even when the defect relates to purely regulatory as opposed to statutory requirements and even though the agency processed and denied the claim on its merits during the administrative phase.

Since claimants still need wait only six months under the FTCA to obtain a trial de novo before an increasingly sympathetic judiciary, the perceived fairness of administrative claims handling has special importance. Significantly, the cumulative effect of the modest changes in agency practice recommended in this Article may be substantial enough to overcome the larger procedural problems, like nondisclosure of information by claimants, that continue to obstruct agency-level negotiations. They are in any event likely to render an already adequate administrative process still more open and productive.

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