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ADMINISTRATIVE HANDLING OF MONETARY CLAIMS: TORT CLAIMS AT THE AGENCY LEVEL

By

George A. Bermann
Professor of Law
Columbia University School of Law

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Anyone seeking an exhaustive account of case law and statutes in the federal tort claims area should consult Lester Jayson's three-volume treatise, Handling Federal Tort Claims, as supplemented to date, which proved infinitely valuable to the author in the conduct of his research.

ADMINISTRATIVE HANDLING OF MONETARY CLAIMS:
TORT CLAIMS AT THE AGENCY LEVEL

Chapter One

INTRODUCTION: DEFINING THE MONETARY CLAIM

How do federal agencies go about responding to monetary claims against the government? Even limited to its strictly procedural aspects, this question has to my knowledge never been studied as a government-wide phenomenon cutting across agency, program and subject matter lines. This is no wonder, for monetary claims against the government may take an immense variety of forms, each with its peculiar characteristics, procedural as well as substantive. The Administrative Conference clearly has placed on its agenda a procedural problem as broad and pervasive as any it has undertaken to study and one that understandably has escaped comprehensive review for all the time that the government has been in the important but not always very conspicuous business of satisfying demands from private parties for monetary relief.

The notion of monetary claim against the government clearly requires refinement if its procedural handling by the generality of agencies is to be examined in any meaningful and manageable way; this report focuses, for reasons that will be made clear, on tort and tort-like claims. Still, the universe of monetary claims against the government is a vastly larger one, and this introductory section, without seeking to construct anything even resembling a strict typology of such claims, seeks simply to sketch the extraordinary range of demands that fall within that larger universe.

What is a monetary claim against the government? A sensible way to start identifying the various kinds of monetary claims that may be made against the government is to ask from what sources the government derives authority to satisfy demands for money. This is so because one may assume that agencies and agency officials, unlike private persons, are not basically at large in deciding whether and how to spend funds, but must be able to point to some express or implied statutory authority to justify each expenditure. If agencies need substantive authority to satisfy monetary claims, then the sources of that authority are a guide to the kinds of claims that may seriously be presented to them for their consideration.

A. Statutory Entitlements

One whole category of monetary claim that emerges from this analysis is what may fairly be called an agency-level statutory entitlement. By this I mean a payment to which the claimant has a statutory right as against the government department in charge of the program. The claimant typically bears the burden of establishing eligibility for the entitlement by showing that he or she satisfies whatever criteria may be found in the relevant statute and implementing regulations. That a claimant enjoys a statutory entitlement does not necessarily mean that he or she is entitled to a predetermined sum of money. That may or may not be the case, for while some entitlements are expressed as fixed sums or referenced to mathematical formulas set out in statute or regulation, others are subject to more or less vague standards of valuation. What signifies a statutory entitlement is not that it embodies a claim of fixed value, but that it expresses a reasonably well-defined right

against the government. Typically, the claimant deals with an agency specifically designated to administer the entitlement program and the claim, if valid, is satisfied by funds made available to the agency for that purpose. I emphasize the agency-level character of most statutory entitlements in order to underscore the important point, from the perspective of the Administrative Conference, that the procedures by which such entitlements are regularly asserted and determined are administrative procedures. A claimant turns to court, assuming that avenue has not been cut off by the statute creating the entitlement, not as the principal mechanism for vindicating his or her claim, but as a means of redress against the agency's denial of the claim or failure to satisfy it in full. Judicial redress is secondary not only because postponed, but because the standard of review employed by the court is likely to be less than de novo both on findings and characterizations of fact and on the agency's exercise of discretion. This makes the procedural adequacy of the entitlement program only that much more important.

A good many entitlement programs -- indeed many of those that come most readily to mind -- obligate the government to provide benefits in the absence of any direct governmental responsibility for the circumstances giving rise to the claim. Social security, food stamps, medicare -- even farm support payments -- illustrate this sort of wealth redistribution. But such is not invariably the case. Examples come readily to mind of statutory entitlements as to which the government cannot assume so neutral and detached a posture. Take, for example, workmen's compensation benefits for those in the civilian or military employ of the federal government. As to these, the government occupies principally the role of employer rather than provider of social insurance, but it administers statutory entitlements nonetheless. A variant on this example is the Military Personnel and Civilian Employees' Compensation Act which provides compensation to government employees for certain losses of personal property and household goods incident to service. The statute does not presuppose governmental fault, but it does presuppose a certain governmental responsibility.

Much clearer examples of active government involvement in the loss to which a claim of statutory entitlement relates are programs to indemnify persons whose property is knowingly destroyed or damaged by government pursuant to statutory direction in the interest of some larger social good. An illustration would be the indemnification of herd owners for the Agriculture Department's compulsory "depopulation" of livestock infected with brucellosis or other highly communicable disease. Procedural aspects of such a program reflect the fact that indemnification is an element of a larger affirmative governmental program, here brucellosis eradication. Whereas food stamp claimants must come forward with an application and suitable evidence of eligibility, persons entitled to statutory indemnification can expect the government, as a legal condition of its action, to raise and address the matter. The central point is that even these essentially nongratuitous payment programs are in every sense of the word statutory entitlements, as I have used that term.

Despite its prominence as a subset of monetary claims against the government -- and despite the obvious importance of administrative

procedure in its implementation -- the statutory entitlement does not fall comfortably within a generalized study of agency handling of monetary claims. The reason is implicit in what has already been said. Predicated as they are on a statutory right, entitlement programs tend to operate within a more or less precise, but almost invariably statute-specific procedural framework. Within this framework, issues such as the individual's eligibility for the entitlement, valuation of his or her particular claim, and the eventual appropriateness of a reduction or termination of benefits will be established. To be sure, the statute establishing the entitlement program (or the program of which the entitlement is only an incidental feature) will rarely occupy the entire procedural field. Room may be left to apply, as appropriate, the adjudicatory procedures of the Administrative Procedure Act or supplemental procedures called for by regulations of the agency or agencies involved. Finally, the due process clause of the Constitution may superimpose on all of this its own procedural demands in the name of fundamental administrative fair play, especially where by hypothesis an entitlement is concerned. Still, a certain coupling, typically in one and the same programmatic legislation, is to be expected between the substantive entitlement, on the one hand, and the basic procedural framework by which claims to it are raised and decided, on the other. Though one might disengage the two, that is, enact a series of substantive entitlements without regard to procedural detail and submit the entire series to a separately enacted and largely standardized claims adjudication procedure, such has not been the general practice. Each entitlement scheme tends to carry its own procedural baggage, reflecting in some sense the view expressed by Mr. Justice Rehnquist, in a different context and for a quite different purpose, that "the grant of a substantive right [may be] inextricably intertwined with the limitations on the procedures which are to be employed in determining that right."[1]

If Congress tends to address on a statute-by-statute, and therefore necessarily somewhat haphazard, basis the procedural framework for administering our bewildering variety of statutory entitlements, what can be said about the exercise of the government's other claims payment authority? What are the sources of that other authority, and to what extent have administrative procedures for their exercise been articulated? Without purporting to exhaust the range of possibilities, one can broadly distinguish from claims of statutory entitlement at least the following: claims based on contracts with the government, claims based on an employment relationship with the government, and claims that, for lack of a more convenient concept, I shall call claims of a tort or tort-like character. It is to the final category that the focus of this report is turned, but a glance at established procedures for resolving contract and employee claims at the agency level may, by their contrast, help frame and inform the discussion.

B. Contract Claims

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[1] Arnett v. Kennedy, 416 U.S. 134, 153-54 (1974).

Though federal legislation has long provided an administrative mechanism for agency resolution of contract claims against the government -- and has recently reformed and modernized it -- the substantive basis for answering such claims is essentially nonstatutory. Aggrieved government contractors predicate their monetary claims against federal agencies not on any substantive statutory entitlement as such but on their contract with the government understood in light of the law of contracts as recognized by the courts.

Without fundamentally altering the substantive basis of government contract claims, Congress has simply facilitated their resolution through a comprehensive framework of administrative and judicial remedies. The Contract Disputes Act of 1978,[2] which applies to practically all government contracts for the purchase or sale of personal property or services, now requires that all claims be submitted in writing to the contracting officer for decision. That officer is not required to proceed in any particular fashion, and certainly not to conduct hearings of any sort. He or she, upon reaching a determination, simply issues to the contractor a reasoned decision in writing, with or without specific findings of fact, but with notice of the contractor's appeal rights. The standard contract dispute clause may, however, afford the contractor an opportunity, before or after the decision, for an informal conference with someone in the agency from a level above the office to which the contracting officer is attached with a view to effecting a compromise.

The Act requires the contracting officer to make a decision on claims of $50,000 or less within sixty days of the receipt of a written request from a contractor to that effect. On larger claims, the contracting officer must within the same period either render a decision or notify the contractor of the time when one will be reached. No matter what the size of the claim, the decision must be issued within a reasonable time and "in accordance with regulations promulgated by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of the information in support of the claim provided by the contractor." The Act encourages a speedy resolution of disputes by granting the Board of Contract Appeals the power to order the contracting officer to render a decision and by providing that the officer's failure to do so within the required time shall be considered a denial of the claim and generate a right of appeal in accordance with the procedures of the Act.

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[2] Act of Nov. 1, 1978, Pub. L. No. 95-563, 92 Stat, 2383, 41 U.S.C. §§ 601-13 (Supp. 1983). The Act was intended "to provide for a fair and balanced system of administrative and judicial procedures for the settlement of claims and disputes relating to government contracts." H.R. REP. NO. 95-1556, 95th Cong., 2d Sess. 5 (1978). On the Act generally, see Jacoby, The Contract Disputes Act of 1978: An Important Development, 39 FED. B. J. 10 (1980).

The contracting officer's decision is subject to two possible avenues of appeal: the agency's Board of Contract Appeals (within ninety days of the initial decision)[3] or suit in the Claims Court (within twelve months). The choice of remedy is a new concept and essentially requires the contractor's lawyer to make a strategic decision about which avenue of appeal is more promising. The Boards may grant any relief that would be available to a litigant asserting a contract claim in the Claims Court. Review of a Board decision may be brought within 120 days in the Court on a "substantial evidence" basis. In appeal proceedings, the Court in its discretion may retain the case, rather than remand to the Board, for such additional evidence or action as may be necessary for final disposition of the claim.

Whichever appellate forum the contractor chooses, the procedure is generally formal and trial-type and the decision made de novo, though resolution of contract disputes through the administrative process is generally speedier and less expensive than a trial de novo in the Claims Court. The Contract Disputes Act specifically provides for the accelerated disposition of appeals by the Board where the amount in dispute is $50,000 or less. In this event, resolution "whenever possible" should be within 180 days. A small claims procedure is also available for appeals involving $10,000 or less. Under this procedure, a single member of the Board decides the appeal within 120 days in accordance with simpler, less formal rules. Decisions reached this way, however, have no precedential value and are not subject to further appeal except for fraud. Use of both the accelerated and small claims procedures is at the sole discretion of the contractor.

While guaranteeing direct access to the courts from an adverse ruling by a contracting officer, Congress clearly has strengthened the attractiveness of the alternative administrative remedy. Revised selection provisions for board members are intended to guarantee as nearly impartial a view of the dispute as might be had in the Claims Court; and board procedures already in place for the conduct of hearings, introduction of evidence, motions, and the like, virtually ensure as full and as adversarial a ventilation of the issues.[4] The

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[3]The Contract Disputes Act provides for Boards of Contract Appeals of at least three members with no other inconsistent duties. Members are appointed under the Administrative Procedure Act and must have had no fewer than five years' experience in public contract law.

The Act authorizes the establishment of boards within an executive agency if justified by the workload. As of January 1982, thirteen were in existence. GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW p. 11-67 n. 14 (1982).

[4]The agencies have promulgated elaborate procedural rules for the conduct of proceedings before their respective Board of Contract Appeals. E.g., 41 C.F.R. §§ 12-60.1-.203 (1983)(Transportation Department). The procedures can only be described as fully evidentiary

(Footnote Continued)

government's interest as contracting party is clearly served by affording potential government contractors an impartial, accurate, procedurally fair, and reasonably expeditious means of resolving disputes at the agency level.[5] Congress expected that, in over ninety percent of claims appealed, contractors would prefer the less formal, time-consuming and expensive avenue of appeal furnished by the agency boards.

C. Monetary Claims by Employees

The government employee with employment-related grievances shares some of the characteristics both of a government contractor and of the beneficiary of a statutory entitlement. His or her monetary claims may be cast in terms of an alleged breach of contract (including, by extension, a violation of the civil service or civil rights laws) or of a simple statutory entitlement to work-related benefits or compensation. Not surprisingly, in light of the special employment relationship between the federal government and its employees, diverse administrative mechanisms exist for airing employee grievances, of a monetary nature or otherwise. This is as it should be, for the government, like any enterprise, has an interest in sorting out its personnel problems on an internal basis and in fashioning grievance procedures that promote employee morale.

The highly particular employment relationship out of which this disparate set of monetary claims flows makes it a questionable model for ventilating the far less discrete claims of individual members of the public. Nevertheless, a brief outline may be useful of some of the procedures by which employee claims are handled at the agency level. Of the numerous statutory schemes for making monetary payments to federal personnel, the two that are most broadly suggestive of claims likely to reach the government from the public generally are the Federal Employees' Compensation Act and the Military Personnel and Civilian Employees' Compensation Act. By contrast, a program like the Back Pay provisions of the Pay Administration Act is by its nature more strongly rooted in the employment relationship and less general in its implications.

(Footnote Continued)
and trial-type in nature.

The Contract Disputes Act specifically grants the Boards broad subpoena powers and authority to order discovery of all sorts. In the event of contumacy, the Boards may apply through the Attorney General to a district court for an order to comply; disobedience is punishable by the court as a contempt.

[5] Shedd, Administrative Authority to Settle Claims for Breach of Government Contracts, 27 G.W. L. REV. 481, 517-18 (1959).

The Federal Employees' Compensation Act (FECA)[6] establishes a comprehensive scheme for compensating the disability or death of a federal employee when it results from personal injury in the performance of duty; it constitutes, by virtually any standard, a statutory entitlement.[7] As such, it neither requires a showing of fault or negligence on the part of the government[8] nor bars recovery where the claimant himself or herself is at fault. In most cases, compensation follows a precise statutory schedule[9] of different sums for different specific kinds of injuries. To that extent, the amount of recovery is essentially predetermined -- a feature, as noted, common to many though by no means all entitlement programs. Eligibility -- covering such diverse items as employment status, scope of employment and causation, among others -- is thus the principal issue.

The interesting dimension of FECA, for our purposes, is procedural. The statute itself generally requires that a claim in writing be filed within a period of three years by the injured employee or by someone on his or her behalf and, except in case of death, be accompanied by a physician's certificate describing the nature of the injury and the probable extent of disability.[10] Labor Department regulations specify that a claim should be delivered to the Department's Office of Workers Compensation Programs, Employment Standards Administration ("Office") or to the employee's official superior for immediate referral by him or her.[11] Under the regulatory framework, the superior of an injured employee must assist the employee with the appropriate forms and advise him or her of the legal rights that FECA confers.[12]

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[6] Act of Sept. 7, 1916, 39 Stat. 742 (1916), 5 U.S.C. §§ 8101-51 (1980).

[7] 5 U.S.C. § 8102(a)(1980)("The United States shall pay compensation as specified by this subchapter . . ."). Payment is made from an Employees' Compensation Fund in the Treasury consisting of sums appropriated by Congress for that purpose. Id. § 8147.

[8] Id. The exclusion covers willful misconduct, an intent to cause injury to oneself or another, and intoxication.

[9] Id. § 8107.

[10] Id. §§ 8121-22 (1980). There are statutory provisions for postponing accrual in the case of latent disabilities and for tolling the limitations period in certain other circumstances. Independent of any claim, injured employees must report any on the job injuries to their superiors, and the latter in turn must immediately file with the Labor Department a report of such incidents. Id. §§ 8119-20.

[11] 20 C.F.R. 10.106 (1983). The Department has issued forms for these purposes.

[12] Id.

The initial determination on whether to make any award under the Act falls to claims examiners within the Office. In making findings of fact and applying the relevant legal principles, examiners consider the material submitted by the claimant, the official superior's report, the physician's report, "and [such] completion of [the] investigation as the Office may deem necessary".[13] The Director of the Office, however, has final authority over the initial decision to award or deny recovery. This stage entails no hearing, no evidentiary rules or procedures, and no requirement that a determination be made within any given period of time.[14] All that is demanded is that the decision be in writing, contain findings of fact and a statement of reasons, and be sent to the claimant's last known address together with information on the claimant's review and appellate rights.

Following an initial adverse determination, but within thirty days, the claimant may request a hearing at a convenient time and place before an Office representative designated by the Director for the purpose of presenting further evidence in support of the claim.[15] Though the presiding officer is not bound by common law or statutory rules of evidence and procedure -- but rather "may conduct the hearing in such manner as to best ascertain the rights of the claimant"[16] -- many features of a trial-type proceeding are present. Oral evidence, written statements and exhibits may be introduced; the hearing is recorded and the complete transcript made a part of the claims record; the presiding officer may issue subpoenas, administer oaths, examine witnesses, and require the production of documents;[17] and the claimant may be

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[13] Id. § 10.130, in essence restating the statutory provision. 5 U.S.C. § 8124(a) (1980). The statute specifically requires that the claimant submit to as many physical examinations as may be necessary to evaluate the claim. Id. §8123. The regulations themselves call for the claimant to provide an affidavit or other report of his or her earnings, and failure to do so may result in forfeiture of his or her right to compensation. 20 C.F.R. § 10.110 (1983). More generally, however, the claimant may submit any evidence -- including documenatary materials and witness statements -- he or she deems pertinent to a determination of the claim. Id. § 10.111.

[14] Id. § 10.130.

[15] 5 U.S.C. § 8124 (b)(1)(1980); 20 C.F.R. § 10.131 (1983). A prehearing conference may be held to clarify the issues. Id. § 10.132(a).

[16] 5 U.S.C. § 8124 (b)(2)(1980); 20 C.F.R. § 10.133(a)(1983). The regulations recite that since the procedures "are intended to be nonadversary in character," the employing agency shall not have a right to participate actively in the process, though it may submit relevant evidence. Id. § 10.140.

[17] 5 U.S.C. § 8126 (1980); 20 C.F.R. § 10.133 (1983).

represented by an attorney.[18] A final reasoned decision must be mailed to the claimant no later than thirty days following the completion of the hearing. The Office may review an adverse determination at any time on its own motion, but as a practical matter a claimant should file a written request "stating reasons why the decision should be changed and accompanied by evidence not previously submitted to the Office."[19]

The remaining avenue of appeal from a still adverse decision is an application for review by the three-member Employees' Compensation Appeals Board (ECAB), located in Labor Department headquarters in Washington. The Board makes its decision, by simple majority, on the basis of the record compiled below, supplemented only by such oral argument as either the claimant or the Director may request.[20] In any proceeding before the Board the parties may appear by counsel or in person.[21] The Board's written reasoned decision, which "may review all relevant questions of law, fact and discretion,"[22] is truly final and not subject to further review, except by the Board itself, and may consist of an affirmance, a reversal, or a remand to the Office for further proceedings.[23]

The Federal Employees' Compensation Act squarely makes the administrative framework I have described the exclusive remedy for claims covered by it, specifically barring any administrative or judicial proceeding under a federal tort liability statute like the FTCA.[24] And, as in the case of other statutory entitlements, Congress has declared Labor Department determinations under the Act "final and conclusive for all purposes and with respect to all questions of law."[25] The courts have consistently enforced the bar to judicial review, upholding it as constitutional in the rare instance where it has been

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[18] 5 U.S.C. § 8127(a)(1980). However, attorneys' fees are subject to approval by the Office. Id. § 8127(b). For rules on this, see 20 C.F.R. § 10.145 (1983).

[19] 5 U.S.C. § 8128(a)(1980); 20 C.F.R. § 10.136 (1983).

[20] 20 C.F.R. §§ 10.137, 501.4-.5 (1983). The Director is represented before the ECAB by attorneys from the Office of the Solicitor of Labor.

[21] Id. § 501.11.

[22] Id. § 501.2(c).

[23] Id. § 501.6.

[24] 5 U.S.C. § 8116(c)(1980). See infra note 72.

[25] The statute adds for good measure that determinations are "not subject to review by another official of the United States or by a Court by mandamus or otherwise." 5 U.S.C. § 8128(b)(1980).

challenged.[26] The completeness of the administrative framework, and particularly the strong trial-type features of the optional hearing, have defused the constitutional due process criticisms which its preclusion of judicial review might have generated.

A quite different procedure has been put in place for making determinations under the more recent Military Personnel and Civilian Employees' Claims Act.[27] The statute essentially allows heads of agencies to settle and pay claims of up to $25,000 for loss of or damage to personal property incident to service,[28] though it specifically conditions recovery on the claimant's having shown himself or herself to be entirely free of contributory negligence, and on a finding by the agency head that possession of the property was "reasonable or useful under the circumstances."[29] It also expressly confines attorneys' fees to ten percent of any amount recovered.[30]

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[26] Blanc v. United States, 244 F. 2d. 708, 710 (2d Cir.), cert. denied, 355 U.S. 874 (1957); Hancock v. Mitchell, 231 F. 2d 652 (3d Cir. 1956); Calderon v. Tobin, 187 F.2d 514, 516 (D.C. Cir,), cert. denied, 341 U.S. 935, reh'g denied, 342 U.S. 843 (1951). See also DiPippa v. United States, 687 F. 2d 14, 17 (3d Cir. 1982).

[27] Act of Aug. 31, 1964, Pub. L. No. 88-558, 78 Stat. 767-68 (1964), as amended, 31 U.S.C. § 3721 (1983). Prior to 1964, similar authority existed for the military departments alone.

On whether the statute creates a true statutory entitlement, see infra note 36. At any event, recovery under the statute is not conditional on a showing of fault. Anton v. Greyhound Van Lines, Inc., 591 F. 2d 103, 109 (1st Cir. 1978).

[28] Compensation may be made in money or in kind and is payable out of agency appropriations made for the purpose.

The prior ceiling of $15,000 was increased to its present amount in 1983. Act of Jan. 12, 1983, Pub. L. No. 97-452, 96 Stat. 2474 (1983). For legislative history and purpose, see 1983 U.S. CODE CONG. & AD. NEWS 4301. Up to $40,000 may be paid on a claim for loss in a foreign country incurred after December 30, 1978 in connection with certain evacuation operations in the wake of political unrest or hostile acts abroad or as a result of hostile acts against the United States or its personnel. The provision was prompted by the then recent events in Iran.

[29] 31 U.S.C. § 3721(f)(1983). Excluded also are claims for losses at quarters not assigned or provided in kind by the government. Id. § 3721(e). On the other hand, the statute specifically contemplates payments to survivors in the event of an employee's death. Id. § 3721(h). Substantiation of a claim by the claimant is a statutory requirement for recovery. Id. § 3721(f).

[30] Id. § 3721(i). A violation is punishable by a fine of up to $1000.

On procedural matters the statute is virtually silent, apart from its two-year statute of limitations on the filing of a written claim. Each agency has issued its own regulations and established its own procedures for implementing the compensation program.[31] Though they differ in detail, the regulations uniformly establish a simple written procedure for the filing of a claim. The claimant generally must furnish on a form provided for that purpose a statement of the circumstances surrounding the property loss, specific information and documentation whose details will vary with the particular kind of loss claimed, and receipts, repair bills and the like, as appropriate. The form is generally submitted to the claimant's immediate supervisor who in turn forwards it to the agency claims officer specifically designated to handle personnel property claims. Conversations with such officers confirm the impression that claims are handled on a purely written investigatory basis without a hearing or even a personal appearance, though often enough upon a firsthand inspection of the property. The armed services, whose volume of personnel property claims far exceeds that of the other agencies, have jointly developed a schedule of values and depreciation for most kinds of goods that form the object of such claims; their schedule, which generally operates as a ceiling for valuation purposes, is used by virtually all other departments of the federal government.

A finality clause in the statute[32] has been read to bar judicial review of the merits of any determination,[33] though claimants might conceivably secure access to the courts in order to raise questions of

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[31] By way of example, see 31 U.S.C. §§ 4.1-.12 (1983) (Treasury Department).

[32] 31 U.S.C. § 3721(k)(1983). In addition, the FTCA is necessarily inapplicable to service-related claims of military personnel due to the implied FTCA exemption recognized in Feres v. United States, 340 U.S. 135 (1950), which in fact was predicated in part precisely on the existence of a framework of administrative remedies like this personnel property claims provision. See Barr v. Brezina Constr. Co., 464 F. 2d 1141, 1143 (10th Cir. 1972), cert. denied, 409 U.S. 1125 (1973); Preferred Ins. Co. v. United States, 222 F. 2d 942, 945-46 (9th Cir.), cert. denied, 350 U.S. 837 (1955), reh'g denied, 351 U.S. 990 (1956); Zoula v. United States, 217 F. 2d 81, 84-85 (5th Cir. 1954).

[33] Macomber v. United States, 335 F. Supp. 197, 199 (D. R.I. 1971). The court construed the term "settlement" in the finality clause to include disallowance of a claim, as the definitions in the Act clearly require. It relied on the construction of similar language in veterans' benefits legislation. Cf. Milliken v. Gleason, 332 F. 2d 122, 123 (1st Cir. 1964), cert. denied, 379 U.S. 1002 (1965) (forfeiture of pension benefits for fraud).

statutory interpretation.[34] The combined absence of any real administrative hearing with the statutory preclusion of judicial review, however, might be thought to invite a challenge to the statute on procedural due process grounds. So far as I can tell, no such challenge has been made,[35] but other provisions of law less clearly in the nature of a statutory entitlement than this Act[36] have recently been held to trigger application of the due process clause and in fact to require full-scale evidentiary hearings at the agency level.[37] As we leave this cursory view of selected procedures for handling monetary claims by federal employees -- and move to government tort claims more generally -- suffice it to say that simple property loss claims of agency

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[34] See infra notes 144 and 196. Under predecessor statutes, the Court of Claims would review determinations of whether the damage or loss occurred incident to service. Brabson v. United States, 95 Ct. Cl. 187 (1943); Regnier v. United States, 92 Ct. Cl. (1941). Today, the General Accounting Office is likely to make such determinations on referral by an agency. E.g., 60 Comp. Gen. 633 (1981).

[35] In Macomber v. United States, supra note 33, the court emphasized that the plaintiff raised no constitutional grounds in his challenge to the agency's denial of his claim. Except for property loss claims of military personnel incident to service, which fall within the Feres doctrine, supra note 32, both the administrative and judicial remedies of the Federal Tort Claims Act presumably remain available to a claimant, but they require a showing of fault.

[36] The Comptroller General recently ruled that agencies do not have discretion under the Military Personnel and Civilian Employees' Claims Act to refuse to consider all claims submitted to them under the Act, but must exercise their discretion either by the issuance of regulations or by case by case adjudication. Op. Comp. Gen. No. B-209721 (Sept. 2, 1983). However, in reaching that conclusion, the Comptroller General also emphasized that the statutory language "may" implies discretion and therefore "does not create a legal entitlement." Id. at 4.

[37] See infra note 155 and cases cited therein, holding that the Constitution requires evidentiary hearings at the agency level for claims under the Federal Prison Industries Act, and this despite the fact that the statute, unlike the Military Personnel and Civilian Employees' Claims Act, does not specifically preclude judicial review and has been found to permit review on an "arbitrary and capricious" standard under the Administrative Procedure Act. See also Gerritson v. Vance, infra note 143, which addressed the constitutional adequacy of State Department procedures for handling claims under its highly discretionary authority to settle tort claims arising abroad, but on the merits found oral hearings not to be constitutionally required.

personnel do not entail very much by way of procedural formality when they occur incident to service.[38]

D. Tort and Tort-Like Claims Against the Government

After the rather special cases of statutory entitlements, on the one hand, and contract and employment-related claims, on the other, have been stripped away, there remains a largely undifferentiated mass of monetary claims assertable by members of the general public who regard themselves as having been injured in some fashion by the government and deserving of compensation for their losses. Such claims, for lack of a better term, may be identified simply as "tort and tort-like." But, as the discussion to follow makes plain, I mean to use this term to encompass an exceedingly broad range of theories upon which the government might be asked to answer for the losses of others. In virtually all these cases, the government is alleged to be the cause of the harm suffered, but the commonality ends there. Upon examination, the claims can usually be translated into one or more of several reasonably distinct legal theories of liability. The following list, without purporting to exhaust the possibilities or to set up watertight analytic categories, suggests some of these sorts of claims:

(1) claims in damages based on tort, that is, the negligent or otherwise wrongful infliction of loss or injury;

(2) claims in damages based on some notion of strict liability, that is, liability without fault for loss or injury arising from activity that may be characterized as especially hazardous or otherwise appropriately made subject to risk-based liability;

(3) claims for just compensation for the actual or constructive taking of private property by the government for a public purpose, which claims have a constitutional anchor in the Fifth Amendment;

(4) claims in damages for the breach of a fiduciary duty owed by the government to a specific claimant or class of claimants;

(5) claims in damages based on a theory of contract implied in law, of unjust enrichment, of restitution, or of estoppel;

(6) claims in damages against the government based upon a cause of action expressly or impliedly provided for by statute.

Though widely disparate, all these theories (with the exception of the third) borrow principles primarily developed to govern the noncontractual liability relations between private persons, and state causes of action that might plausibly be asserted in a court of law. Indeed, to the extent that sovereign immunity allows, a court is their natural forum. In this way, they differ from claims based upon statutory entitlement, which are peculiarly public in nature and for which typically some sort of administrative procedure has been specially designed. They are also unlike contractual and personnel-related claims which, though not peculiarly public in nature, have been made subject by statute to a conventional dispute resolution mechanism of sorts at the agency level.

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[38] The Federal Tort Claims Act, however, provides civilian employees with fuller procedural rights, though again it requires a showing of fault. See supra note 35.

Two sets of questions naturally arise with respect to agency handling of monetary claims of a tort and tort-like variety that were relatively easily answered for the kinds of claims I discussed at the outset of this chapter. First, do federal administrative agencies indeed have the authority to entertain and act favorably on them? Second, if the agencies do have such authority, by what procedural format do they exercise it?

My research strongly suggests that, for better or for worse, the courts rather than the agencies are regarded as having primary authority to dispose of such claims. This seems to be so, even though action of the agencies gave rise to the grievances and even though the agencies may be prepared to concede their merit. In the absence of express statutory authority to afford relief,[39] the agencies often can in effect do nothing about such claims. Suppose, for example, someone demands damages from a government agency on the ground that it has reaped financial benefit from information he or she provided, where no such windfall to the government was anticipated and where it may be regarded as unjust. Suppose, to take another example, someone seeks damages for violation of a statute expressly providing a judicial remedy in damages in that event, or fairly interpreted to imply such a remedy. The situation clearly has the makings of eventual litigation, but whether it has the makings of a prior administrative claim amenable to serious dispute resolution at the agency level is more doubtful. Notice how far removed we are from the world of statutory entitlements in which substantial doubt may exist over an individual's eligibility or over questions of valuation, but practically none over the relevant agency's authority to entertain and pay a valid claim or over the character of the administrative process by which those determinations are to be made.

Among the most striking conclusions to emerge from my interviews with agency claims officers, who, it should be remembered, are mostly associated with the legal departments of the agencies, is the degree of uncertainty over the amenability of many of these monetary claims to administrative dispute resolution. What I have heard would suggest that unless a given monetary claim can fairly be assimilated to a statutory entitlement, a government contract or an employment claim, on the one hand, or can be fit within the terms of some express statutory settlement authority of the agency, on the other, the agency often can do little more than invite the claimant to bring suit against the government for monetary relief.[40]

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[39] The existing grant of specific statutory authority that comes foremost to mind, and whose implementation is treated in detail in this report, is that conferred on the agencies by the Federal Tort Claims Act, infra note 69.

[40] 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)

(Footnote Continued)

I say often, because the agency, even without monetary settlement authority as such, may still be in a position to remedy a claimant's legitimate grievances by exercising other authority it does possess. Most obviously, it can roll back the specific action (from a complex regulatory action to a simple encroachment on land) that gave rise to the objection in the first place. If it has statutory authority to condemn property, it can exercise it so as to give the claimant in effect what an inverse condemnation suit would have achieved. I am told that agency real estate departments may actually negotiate after the fact with private parties over a sum of money to be paid for the unplanned use of real property and call upon general operating funds as a source of payment. This procedure has been formalized by the Army.[41] Agency contracting officers may use funds appropriated for a contract, or seek a contract modification, in order to cope with claims for damage to or loss of property in connection with the performance of a contract,[42] and reportedly have done so to pay what might fairly be regarded as claims for unjust enrichment. If one were to canvass the full range of specific statutory authorities at the agencies' disposal, and consider the scale of available appropriations under each, one would probably find that agencies are not quite as disarmed in the face of appealing claims for monetary redress as may at first appear. But obviously agencies do not in all circumstances have the authorization that would enable them to satisfy a deserving monetary claim by other available means and they may be unwilling, in the larger public interest, to roll back the action they have taken, even assuming they can do so and that doing so would make the claimant whole.

That a claimant should have to bring suit in order to get a ruling on a clear or even a colorable monetary claim falling within this residual category may or may not be desirable, but such does appear to be the case. Yet, Congress has on occasion decided otherwise. It evidently chose to give agencies express settlement authority -- to be sure, very modest at first, but dramatically enlarged since -- over claims that might otherwise go to district court litigation under the Federal Tort Claims Act. It has given them authority to settle administratively otherwise litigable claims under a variety of narrower statutes such as the Suits in Admiralty Act, Public Vessels Act,

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(reimbursement for loss of earnings from the suspension, revocation or 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 Army Claims appropriations. Department of Army Regulation No. 27-20, Legal Services: Claims § 13.11e (Sept. 1970).

[41] Department of Army Regulation No. 405-15 (Sept. 6, 1967), also referred to in Department of Army Regulation No. 27-20, supra note 40, § 13-11. The procedure is evidently contemplated in connection with military maneuvers, training exercises and emergency situations.

[42] Department of Army Regulation No. 27-20, supra note 40, §§ 13-9f, 13-10.

Copyright Infringement Act, Trading with the Enemy Act, and Swine Flu Immunization Act.[43] As already noted, most government contract and employment claims are meant to be ventilated fully and, if possible, resolved at the agency level before proceeding to court, assuming a judicial remedy is available at all. Ample precedent thus exists for authorizing agencies to entertain monetary claims arising out of their actions.

The fact remains that even among the numerous categories of monetary claims on which the government may be sued many have no identifiable administrative settlement counterpart. This is true of a good many of the claims upon which suit may be brought in the United States Claims Court. Take, for example, statutory causes of action in damages for unjust conviction and imprisonment,[44] for patent infringement,[45] for damages to oyster growers arising from dredging operations or other river and harbor improvements,[46] or for claims of Indian tribes.[47] In fact, the Claims Court entertains a much broader range of cases than these relatively narrow waivers of immunity would suggest. Its jurisdiction, as amplified and clarified by the Tucker Act of 1887, reaches to claims against the United States "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."[48] The Tucker Act, as amended, additionally grants the

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[43] See text at notes 98-140, infra. See also The Federal Fire Prevention and Control Act of 1974, Pub. L. No. 93-498, 88 Stat. 1535 (1974), 15 U.S.C. § 2210 (1982), authorizing the Administrator of the United States Fire Administration to award payments to local fire services for direct losses suffered in fighting a fire on property under the jurisdiction of the federal government. The Act also vests jurisdiction over disputes in connection with such a claim in the Claims Court. Id. § 2210(d) (Supp. 1983). For legislative history and purpose, see 1974 U.S. CODE CONG. & AD. NEWS 6191.

[44] 28 U.S.C. §§ 1495, 2513 (Supp. 1983).

[45] 28 U.S.C. § 1498(a) (Supp. 1983).

[46] 28 U.S.C. §§ 1497, 2501 (Supp. 1983).

[47] 28 U.S.C. § 1505 (Supp. 1983).

[48] 28 U.S.C. §§ 1346(a)(2), 1491(a)(1)(Supp. 1983). 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. 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

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district courts jurisdiction concurrent with that of the Claims Court over claims not exceeding $10,000.[49]

The substantive reach of the Tucker Act obviously lies beyond the scope of this report, but the statute clearly creates broad opportunities for recovering against the government in the courts as opposed to the agencies. The boundary between tort claims and the host of not altogether dissimilar kinds of claims -- express or implied contract, takings, and breach of fiduciary duty -- that may be encompassed by the Tucker Act is notoriously elusive.[50] A good example is the problem of inverse condemnation[51] or of contract claims sounding

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government of the United States." Not until 1863, however, did Congress make the court's judgments final, subject to appeal to the Supreme Court. It was the Tucker Act that added jurisdiction over claims "founded . . . upon the Constitution" and "for liquidated or unliquidated damages in cases not sounding in tort."

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 (1982).

[49] 28 U.S.C. § 1346(a)(2) (Supp. 1983). However, the district courts no longer share jurisdiction with the Claims Court over claims subject to the Contract Disputes Act of 1978.

[50] For a discussion, see 1 L. JAYSON, HANDLING FEDERAL TORT CLAIMS, §§ 53, 166.03 (1984).

[51] E.g., Sanborn v. United States, 453 F. Supp. 651, 655 (E.D. Cal. 1977) (inverse condemnation claim in Claims Court unaffected by pendency in district court of tort claim arising out of same facts, since claims are distinct.) The number of inverse condemnation or constructive taking claims brought under the Tucker Act is legion. E.g., United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950); United States v. Dickinson, 331 U.S. 745 (1947); United States v. Willow River Power Co., 324 U.S. 499 (1945); United States v. Cress, 243 U.S. 316 (1917); Lenoir v. Porters Creek Watershed Dist., 586 F.2d 1081 (6th Cir. 1978); NBH Land Co. v. United States, 576 F.2d 317 (Ct.Cl. 1978); Benenson v. United States, 548 F.2d 939 (Ct.Cl. 1977).

The prevailing test seems to turn on whether the loss constitutes a simple indirect injury to property, such as a trespass or conversion (actionable under the FTCA), or a permanent or inevitably recurring invasion (actionable under the Tucker Act). United States v. Cress, supra; Branning v. United States, 654 F.2d 88, 101-02 (Ct. Cl. 1981); Accardi v. United States, 599 F.2d 423, 429 (Ct.Cl. 1979); Benenson v. United States, supra; Barnes v. United States, 538 F.2d 865, 870 (Ct. Cl. 1976); Hartwig v. United States, 485 F.2d 615, 619-20 (Ct. Cl. 1973); Wilfong v. United States, 480 F. 2d 1326, 1328-30 (Ct. Cl. 1973); Fromme v. United States, 412 F.2d 1192, 1196 (Ct. Cl. 1969).

in tort.[52] The sole point I wish to make in this regard, however, is that the same agencies that enjoy sweeping claims settlement authority in the tort area may enjoy none in other closely related ones, and this regardless of how clear the government's liability under the applicable legal standards.

I discern just two formal means by which claims of this sort may be disposed of short of litigation. First, the General Accounting Office has statutory authority to "settle all claims . . . against the United States Government."[53] Where a monetary claim rests on recognized legal grounds, but the agency responsible for the loss lacks authority to satisfy it, the GAO is presumably an available forum for relief.[54] This forum is even available where an agency does have authority, but its determinations are not generally regarded as final and conclusive.[55] The Comptroller General has also had authority 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."[56]

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[52]A good illustration is the possible coexistence of a contract claim and a tort claim in conversion. Compare Aleutco Corp. v. United States, 244 F.2d 674, 678-79 (3d Cir. 1957) (existence of a valid Tucker Act claim does not bar an FTCA cause in tort for conversion), with Woodbury v. United States, 313 F.2d 291, 295-96 (9th Cir. 1963) (claim for violation of breach of fiduciary duties based on contract, even though incidentally tortious, is essentially a contract claim cognizable only under the Tucker Act). See generally 1 L. JAYSON, supra, note 50, at pp. 9-15 - 9-28, and cases cited therein.

Most recently, the Supreme Court has lent support to the view that FTCA and Tucker Act claims are not mutually exclusive. Hatzlachh Supply Co., Inc. v. United States, 444 U.S. 460 (1980), rev'g 579 F.2d 617 (Ct. Cl. 1978).

It has been held that once a claimant elects to pursue a remedy under the contract, it may not thereafter pursue a remedy in tort. United States v. Peter Kiewit Sons' Co., 345 F. 2d 879, 885-86 (8th Cir. 1965).

[53]31 U.S.C. § 3702 (a) (1983). The statute requires that the Comptroller General receive the claim within six years after it accrues.

[54]See GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW pp. 11-5 - 11-10 (1982), for a discussion of the nature of this authority and the limitations the GAO has placed on its exercise. See also text at notes 785-88, infra.

[55]See infra notes 777-79.

[56]31 U.S.C. § 3702(a) (1983). The purpose of the provision was to facilitate congressional consideration of private relief bills by giving it the benefit of the views of a body with expertise in investigating

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Evidently this mechanism is seldom invoked,[57] not only because the GAO itself has used its recommending authority sparingly, but also because the statutory framework for agency and court consideration of monetary claims has become so much more complete since 1928. In the final analysis, too, recommendation by the GAO is simply not necessary for the enactment of a private relief bill. Nevertheless, the General Accounting Office could conceivably entertain, in support of a monetary claim, some of the theories of relief -- unjust enrichment or estoppel, for example -- set out earlier in this section.[58]

The other formal avenue of redress lies with the Attorney General who has long enjoyed authority to settle claims referred to him under the rubric of defense of imminent litigation.[59] Presumably by this

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and adjudicating monetary claims. S. REP. NO. 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 GENERAL ACCOUNTING OFFICE, supra note 54, at pp. 11-137 - 11-163. See also Holtzoff, The Handling of Torts Claims Against the Federal Government, 9 L. & CONTEMP. PROB. 311, 321 (1942).

[57] GENERAL ACCOUNTING OFFICE, supra note 54, at p. 11-139.

[58] The GAO does not view its meritorious claims authority as applicable to claims sounding in tort. GENERAL ACCOUNTING OFFICE, supra note 54, at pp. 11-143 - 11-145, and decisions of the Comptroller General cited therein. Where Congress has enacted legislation providing relief for a certain type of claim, like tort, the GAO presumes it intended that legislation to set the limits on available relief. By this token, the GAO will not entertain under the meritorious claims heading claims for which agencies possess their own meritorious claims settlement authority or might otherwise afford an appropriate remedy such as veterans' benefits or payments under the Military Personnel and Civilian Employees' Claims Act. Id. at pp. 11-149 - 11-150.

[59] 28 U.S.C. § 2414 (1978). Settlements made pursuant to this authority are paid, like judgments and compromise settlements, out of the Permanent Indefinite Appropriation, established by 31 U.S.C. § 1304(a) (1983). The Deputy Attorney General may exercise this authority for the Attorney General. 28 C.F.R. § 0.161(b) (1983). 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
(Footnote Continued)

route agencies might help see to it that legally founded claims arising out of their activities, but for which they themselves can offer no immediate redress, do not in fact end up in court. Examples of claims that might be handled this way are causes of action in damages expressly or impliedly provided for by statute,[60] where the government is prepared to acknowledge actual or potential liability under the circumstances.

Finally, one rather less regular avenue of disposing of awkward claims deserves mention. Three chief agency claims officers with whom I spoke alluded to the possibility that a rare meritorious claim for which no agency-level redress exists might be paid, at the direction of the agency head, from a contingency (or "slush") fund to which only he or she, through the agency's chief fiscal officer, has access. I am led by one officer to believe that this happens in his agency as often as four or five times a year, though rarely for sums of money exceeding more than a few thousand dollars at a time. Another of the officers who reported the existence of a contingency fund mentioned no such informal ceiling, but supposed that only a politically well-connected claimant would have any realistic chance of collecting from it, and even then only under highly unusual circumstances or ones that constitute a source of real embarrassment to the agency. Significantly, access to a contingency fund may apparently be had only through strictly political channels; the agency's chief claims attorney and possibly even the General Counsel may be entirely unaware of the transaction and its documentation may be slight. Quite clearly, an agency's contingency fund cannot properly be looked to as a source for any systematic compensation of claimants. Whether it should be used at all for these purposes, given the risk of political favoritism and the absence of any real accountability, is highly questionable.

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, and that too many matters come to the Judge Advocate's Office in the form of tort claims that could and should be otherwise handled at the agency level.[61] His office reportedly spends considerable resources trying to

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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. 0, Subpt. Y, App., for details of the delegations and the requirement of action memoranda for the closing of a claim.

[60] See text at notes 38-39, supra.

[61] Personnel in the Claims Division of the GAO lend support to the
(Footnote Continued)

identify sources of authority upon which program officers might, but for some reason do not, legitimately draw for satisfying valid monetary demands that then must come in for treatment as tort claims. Claims units of other agencies, with assistance from other divisions of their offices of general counsel and possibly from the General Accounting Office, might usefully follow his lead in preparing an inventory of legal means apart from the Federal Tort Claims Act available for responding to monetary claims.[62]

All in all, the question whether agencies have adequate means at their disposal to entertain the full range of monetary claims with which they are presented -- or whether they, the claimants and the courts would benefit from their having more direct and explicit authority than they now enjoy -- calls for further investigation. Surely two issues that surfaced in my discussions -- the reported use of contingency funds for the payment of claims and the reported underuse of agency program authority for that purpose -- bear close scrutiny, though not necessarily by the Administrative Conference.

This report, by contrast, designedly focuses on the procedural handling of tort and tort-like claims for whose disposition the agencies do have express statutory authority. The reason for this is two-fold. In the first place, though governmental tort liability by its very nature may fairly be viewed as a problem of administrative procedure, the question of how agencies that uncontrovertibly possess settlement authority go about exercising it seems to me of more immediate concern to the Administrative Conference than the question whether agencies should possess a broader range of substantive settlement authority than they now do. Second, one can reasonably assume -- and my conversations with agency claims officers strongly bear this out -- that even if agencies were given or asserted a broader range of substantive settlement authority, they would be inclined to exercise it along the same general procedural lines that guide their exercise of the statutory authority they now have. Thus, concentration on tort and tort-like matters falling within existing agency settlement authority seems entirely appropriate. This emphasis should not obscure the more substantive dimension of agency claims authority to which the procedural dimension, as this study will time and again show, is closely tied; it is simply meant to sharpen the focus on procedure.

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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.

[62] Department of Army Regulation No. 27-20, supra note 40, ch. 13.

Chapter Two

AGENCY AUTHORITY TO ENTERTAIN TORT AND TORT-LIKE CLAIMS

This chapter more closely sets the stage for a study of the way federal agencies handle tort and tort-like claims by examining more directly the nature of their authority to do so. The fact that Congress has troubled itself to give agencies express statutory settlement authority is taken by virtually all agency claims officers to imply that they would not otherwise have it. Is that necessarily the case?

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

The question whether agencies have inherent authority to settle tort claims arising out of their activities, it appears, has never as such been the subject of a judicial ruling; a claimant, after all, is unlikely to challenge an agency's willingness to exercise it. But if the courts have not squarely addressed the issue, the General Accounting Office has. And it has unhesitatingly and unfailingly taken the view that agencies lack inherent authority to entertain and satisfy tort claims, however fair and equitable it might seem to do so. This view has been described repeatedly by the GAO as "but a corollary of the principle that no one is authorized to give away government money or property."[63]

In practice, the federal agencies plainly do not regard themselves as free, absent affirmative statutory authority, to compensate those they may have injured, even wrongly. No claims officer I met, however generally sympathetic to claimants, seems to question the legal correctness of this notion or is prepared to adopt any other as his or her working assumption. The universality of this belief is striking in itself.

Universally held though it may be, this belief is not self-evident either as a matter of law or of policy. To a surprising extent, it has been traced to the doctrine of sovereign immunity, which seems to me misguided. Properly understood, sovereign immunity bars suit against

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[63] GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW p. 11-17 (1982). E.g., Op. Comp. Gen. No. B-201054 (Apr. 27, 1981). Cf. 31 U.S.C. § 1301(a) (1983) ("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. See generally D. SCHWARTZ & S. JACOBY, LITIGATION WITH THE FEDERAL GOVERNMENT 162 (1970); 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).

the sovereign without its consent.[64] True, this immunity can be waived only by Congress, not by an officer or employee of the United States;[65] such waivers as are made are subject to the conditions Congress chooses to attach to them[66] and are to be strictly construed.[67]

But the fact that the federal government may not be sued except on the basis of a legislative waiver of sovereign immunity does not necessarily mean that the government may not pay a just claim administratively. Put differently, sovereign immunity -- whose reasons, we are told, "partake somewhat of dignity and decorum, somewhat of practical administration, somewhat of the political desirability of an impregnable legal citadel where government . . . may operate undisturbed by the demands of litigants"[68] -- may bar courts from compelling the government to satisfy monetary claims, but it would hardly seem to bar government from paying those claims of its own accord. If the government is barred from doing so, the rationale must lie elsewhere.

In fact, nothing in the Constitution or in federal legislation explicitly bars agencies from compensating persons they have harmed, and for agencies to consider payment of such claims a cost of doing business and, as such, an ordinary operating expense chargeable to general agency appropriations would be well within the realm of reason. So far as one can judge, payment of similarly just claims by private enterprise is commonly regarded as a legitimate business expense. To the extent that fair and efficient risk allocation justifies treating victim compensation as a cost incident to the doing of business in the private sector, it would seem to justify treating it that way in the public sector as well.

The ultimate rationale for the reported reluctance must lie in the belief that the authority to spend the public's money is too easily abused when guided only by the very general purpose of making whole those persons whom the agency may have injured (or, to put it

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[64] United States v. Testan, 424 U.S. 392, 399 (1976); United States v. Sherwood, 312 U.S. 584, 586 (1941); United States v. Shaw, 309 U.S. 495, 500-01 (1940); Holloman v. Watt, 708 F. 2d 1399, 1401 (9th Cir. 1983).

[65] United States v. Shaw, supra note 64, at 501; Munro v. United States, 303 U.S. 36, 41 (1938).

[66] Glidden Co. v. Zdanok, 370 U.S. 530, 572 (1962); Soriano v. United States, 352 U.S. 270, 276 (1957); United States v. Sherwood, supra note 64, at 587.

[67] United States v. King, 395 U.S. 1, 4 (1969); McMahon v. United States, 342 U.S. 25, 27 (1951); United States v. Sherwood, supra note 64, at 586-87.

[68] United States v. Shaw, supra note 64, at 501.

differently, whom individual claims officers fancy the agency may have injured). Visions of collusion and corruption, not to mention gross waste of agency resources, come naturally to mind. In all fairness, however, vague statutory mandates and the risk of unaccountability are endemic to the life and work of the administrative agencies. They already characterize many daily activities in which agencies engage in pursuit of their primary missions, activities implicating far greater sums of money than a normal exercise of inherent claims settlement authority. Unbridled discretion can be channeled by standards; actual exercises of discretion, especially in the claims area, can be audited and reviewed by independent personnel within the agencies and without. An agency could probably fashion a reasonably principled system of its own for handling tort claims against it if encouraged to do so.

The fact remains that agencies simply do not assert an inherent right to compensate for government-inflicted injury to person or property. Congress, then, clearly bears the burden of defining the authority if any that the agencies enjoy to entertain tort or tort-like monetary claims. It has done so over the years in what can only be described as a patchwork manner. Alongside the Federal Tort Claims Act (FTCA) may be found a disparate collection of narrow authorizations, many of them agency-specific, all legislated on a piecemeal basis, and together establishing no discernible overall design. I would find it highly artificial to pass to the question of administrative procedure in claims disposition without having some sense of the configuration and content of these various provisions. They can conveniently be surveyed in two parts: first, the Federal Tort Claims Act itself whose workings will be examined in detail in chapters three, four and five; second, other special tort claims legislation, including what may conveniently be grouped together as "meritorious claims" statutes, whose workings will not be closely examined in this report. This chapter concludes with the most preliminary of inquiries into the question whether the Constitution by itself, more particularly the due process clause, ever requires administrative claims procedures beyond those that exist.

B. The Federal Tort Claims Act: Overall Design

The Federal Tort Claims Act[69] is singular among claims statutes in its generality of application. Confined neither to specific agencies nor to specific categories of claimants, it contemplates virtually all situations marked by a "negligent or wrongful act or omission" on the part of a federal officer or employee, and an open-ended category of losses. For these and related reasons, the FTCA is foremost among existing statutory vehicles for agency disposition of tort and tort-like monetary claims.

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[69] The Federal Tort Claims Act was enacted as title four of the Legislative Reorganization Act of 1946, §§ 401-24, Pub. L. No. 79-601, 60 Stat. 812-44, codified in 1948 as 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-80.

The FTCA subjects the federal government to liability without limit for personal injury, death or property damage resulting from the negligent or otherwise wrongful acts or omissions of federal employees acting within the scope of their employment.[70] Liability follows the same principles as govern the liability of private persons under the law of the place where the alleged tort occurred, except that prejudgment interest and punitive damages are disallowed.[71] The Act, however, subjects this waiver of immunity to thirteen categorical exemptions.[72] A claimant may bring suit in the federal district court for the district where either the alleged tort occurred or the plaintiff has his or her residence,[73] provided he or she 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 from the mailing by that agency of a final denial.[74] The 1966 amendments to the Act, treated in detail in chapter three, greatly broadened the agencies' statutory authority to settle claims cognizable under the Act, and that phase has now become a virtual prerequisite to suit.

At the time the FTCA was enacted, federal agencies had precious little opportunity to entertain and pay tort and tort-like claims against them. The then Court of Claims[75] and the Supreme Court[76] had

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[70] 28 U.S.C. § 1346(b) (1976), § 2674 (1965).

[71] Id. § 2674.

[72] 28 U.S.C. § 2680 (Supp. 1983).

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 immunize the government from liability altogether. E.g., Federal Civil Defense Act of 1951, 50 App. U.S.C. § 2294 (1951) (terminated by own terms on June 30, 1974) (government immunity in connection with a civil defense emergency); Federal Employees' Compensation Act, 5 U.S.C. § 8116 (c) (1980) (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. § 702c (1970) (no government liability for damage from or by floods or flood waters); Panama Canal Act, 22 U.S.C. § 3761 (e) (Supp. 1983) (FTCA inapplicable to claims arising from operation of the Canal or related facilities). Exceptionally, other exemptions have been inferred by the courts on the basis of available alternative remedies. See infra notes 234-35.

[73] 28 U.S.C. § 1402(b) (1976).

[74] 28 U.S.C. § 2401(b) (1978).

[75] 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.

(Footnote Continued)

consistently declined to read the Court of Claims Act itself as embracing tort claims, a view that finally received legislative endorsement in the Tucker Act.[77] Since the agencies were deemed to lack settlement authority even over claims that did fall within Tucker Act jurisdiction unless some statute expressly gave it to them, they could hardly be expected to entertain the payment of claims sounding in tort. Apart from a number of tort claim statutes covering narrow fields of activity (some of which survive and are outlined shortly), significant tort legislation preceding the FTCA consisted of (a) the patent infringement statute of 1910, (b) the admiralty statutes of 1920 and 1925, broadly encompassing maritime torts, and (c) the Small Claims Act of 1922. I briefly discuss the patent infringement and admiralty statutes at a later point.

The Small Claims Act,[78] enacted in the wake of unprecedented numbers of private relief bills in the years following World War I,[79] was designed to relieve the pressures of claims matters on Congress, and more particularly on the Committees on Claims, as well as to assist those claimants unable effectively to present their case to Congress. Though small tort claimants might have been given access to the Court of Claims, Congress thought that litigation entailed greater expense and inconvenience than such claims generally warranted and preferred a purely administrative remedy.

(Footnote Continued)
7 (1863).

[76] E.g., Langford v. United States, 101 U.S. 341 (1879); Morgan v. United States, 14 Wall. (81 U.S.) 531 (1871); Gibbons v. United States, 8 Wall. (75 U.S.) 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." 14 Wall. (81 U.S.) at 534.

[77] In fact, 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., 1st Sess. 3-4 (1886), quoted in 1 L JAYSON, HANDLING FEDERAL TORT CLAIMS p. 2-17 (1984). As enacted however, the legislation expressly excluded cases "sounding in tort." See Schillinger v. United States, 155 U.S. 163, 168 (1894).

[78] 42 Stat. 1066 (1922), codified at 31 U.S.C. § 3723 (1983). See generally, Gottlieb, The Federal Tort Claims Act: A Statutory Interpretation, 35 GEO. L.J. 1, 13 n. 42 (1946).

[79] Reportedly, nearly one-third of these bills were for amounts
(Footnote Continued)

The legislation was narrow in scope: confined essentially to timely property damage claims,[80] not in excess of $1000, arising out of the negligent acts of government employees acting within the scope of their employment. It authorized the head of each executive department or other independent establishment of the government to consider and adjust any such claim and to certify it to Congress as a legal claim for payment out of appropriations to be made for that purpose. A claimant's acceptance of the amount determined to be due was deemed to be in full settlement of the claim. The Act provided no judicial review or other judicial remedy.

Due in part to its stringent limitations on recovery, the Small Claims Act did not succeed in stemming the tide of private bills, particularly in the Thirties and Forties, a period of expanding federal governmental activity.[81] No sooner was the Small Claims Act in place than Congress felt pressure to provide a less restrictive but procedurally more defined remedy for tort claims against the government. The years 1925 through 1946 saw no fewer than thirty different bills introduced in Congress with a view to providing a more sweeping measure of liability and at the same time a more uniform substantive and procedural framework for the handling of claims.[82] The formula ultimately landed upon in 1946 has been largely retained in the Federal Tort Claims Act as we know it today.[83]

(Footnote Continued)
under $1000 and arose out of accidents involving government vehicles. H.R. REP. NO. 342, 67th Cong., 1st Sess. 1-2 (1921).

[80]Personal injury and death claims were thought to be unusually susceptible to fraud, collusion and excessive compensation. 62 CONG. REC. 2297 (1922). Claims had to be filed within one year of their accrual.

[81]The institution of private relief legislation is venerable and has itself been the subject of close and usually critical examination. Gellhorn & Lauer, Congressional Settlement of Tort Claims Against the United States, 55 COLUM. L.REV. 1 (1955); Holtzoff, The Handling of Tort Claims Against the Federal Government, 9 L. & CONTEMP. PROB. 311, 321-26 (1942); Comment, Administrative Claim 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, 757 (1980); Note, The Federal Tort Claims Act, 56 YALE L.J. 534, 535-36 n.9 (1947). See generally United States v. Yellow Cab Co., 340 U.S. 543, 549-50 (1951).

[82]McGuire, Tort Claims Against the United States, 19 GEO. L.J. 133, 141 (1931).

[83]S. REP. NO. 1400, 79th Cong., 2d Sess. (1946), accompanying S. 2177, discussing the limitations of the Small Tort Claims Act.
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):
(Footnote Continued)

Unknown to a surprising number of claims officers with whom I spoke, the Small Claims Act remains very much on the books, the later enactment of the FTCA notwithstanding. The statute has been slightly modified, but only to facilitate the payment of claims settled under its authority; rather than having to report to Congress for special appropriations, agencies may now pay settlements out of the permanent indefinite appropriation, otherwise known as the judgment fund, in just the same way as judgments, litigation settlements, and most administrative settlements under the FTCA.[84] Far from wholly repealing the Small Claims Act, the FTCA expressly saved the Act as to claims not cognizable under its own provisions.[85] Thus, theoretically, agencies may make payments 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 has been saved.[86] One could further speculate that a claim not cognizable under the FTCA because it fails to state a cause of action acknowledged by the law of the particular state where the negligence occurred might still be compensable under the earlier statute. Certain tort defenses recognized at state law, like contributory negligence or assumption of risk, as well as certain more or less technical bars to recovery, might also thereby be avoided. I do not mean to suggest more here than that within its confines -- the low ceiling on recovery, the required showing of negligence within the scope of employment, and the one-year statute of limitations -- the Small Claims Act gives agencies modest possibilities for extending the bounds of recovery under the FTCA, possibilities that would be less modest if the $1000 figure fixed upon in 1922 when the Act was passed were adjusted to today's standards. Admittedly, the occasions are probably

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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 determination 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.

[84] 28 U.S.C. §§ 1304(a)(3)(B), 3723(c) (1983).

[85] Legislative Reorganization Act of 1946, supra note 7, § 424(b). See also 31 U.S.C. § 3723(a)(2)(1983). But see the discussion of the meaning of cognizability under the FTCA, text at notes 213-22, infra.

[86] 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 217.

few when an agency disposed to pay a claim essentially as a matter of grace under the Small Claims Act would be unable as a practical matter to do so under the FTCA. My surprise stems less from the disuse into which the statute has fallen than from the extent to which it is simply not known.

One last preliminary word about the Federal Tort Claims Act. The statute essentially represents a waiver of sovereign immunity to suit,[87] and the agencies' administrative settlement authority under it remains acutely dependent upon the government's exposure to liability in litigation. As shown in the next chapter, which examines the administrative claim process under the FTCA in greater detail, the statutory grant of settlement authority to the agencies was at first extremely modest. Initially, the filing of an administrative claim was entirely optional with the claimant, and in fact permissible only for the smallest of claims. Though the ceiling on administrative settlement was lifted in 1966, and filing with the agency made mandatory, governance of the administrative claims procedure to this day remains largely outside the Act.

Most fundamental of all, however, the FTCA continues to define agency settlement authority in terms of litigation exposure. 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 as to which the United States surrendered its sovereign immunity to suit:

> The head of each Federal agency or his designee... may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[88]

Admittedly, the language just quoted does not itself put the issue entirely to rest. If, on the one hand, it conditions settlement, like suit, on the commission of a tortious act within the definition of applicable state law by a federal employee acting within the scope of

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[87] Gottlieb, supra note 78, at 16, describing the waiver of immunity to suit, rather than the opportunity for administrative settlement, as "the heart of the bill."

[88] 28 U.S.C. § 2672 (Supp. 1983). The original version of the FTCA contained substantially the same language. Gottlieb, supra note 78, at 14 (liability in agency settlement, as in litigation, predicated on lex loci delicti); Note, The Federal Tort Claims Act, 56 YALE L.J. 534, 537 n.23 (1947) ("the jurisdiction granted courts and administrative agencies is identical").

office, it does not, on the other hand, expressly bar agencies from settling a claim that falls within one of the Act's thirteen exemptions or that is brought to their attention more than two years after accrual. Thus, a decent theoretical argument could be made that agencies may settle administratively an otherwise eligible tort claim, even though a lawsuit on the claim would be barred by the statute of limitations or by an exemption to the waiver of sovereign immunity to suit. Interestingly, the House and Senate Reports on the 1966 amendments described the settlement authority thereby broadly conferred on the agencies as confined to claims "aris[ing] out of the negligent or wrongful act of an employee . . . acting within the scope of his employment at the time."[89] They made no mention of existing exemptions to the government's waiver of immunity. In fact, sound policy reasons exist for setting aside the exemptions when it comes to agency-level settlement. The point can best be made by reference to the discretionary function exemption, whose legislative history suggests a desire to keep the courts from second-guessing the agencies on matters of policy or judgment.[90] That particular concern pales when an agency chooses of its own accord to compensate a government tort victim. Likewise, the rationale behind the so-called intentional torts exemption -- namely, avoiding the embarrassment and difficulty of defending that category of claims in litigation and the likelihood that inflated judgments will result[91] -- recedes to the vanishing point when an agency rather than a court is the forum for resolving them. In fact, similar arguments could be made with respect to virtually every exemption, except perhaps those whose rationale is the availability of entirely adequate administrative remedies apart from the FTCA.

The case for permitting waiver of the statute of limitations is equally strong. On a textual level, Congress placed the limitations period in the section of the Act governing access to the courts, not in the section authorizing agency settlement. Clearly, no claim may ever be sued upon unless first presented to the agency within two years of its accrual,[92] but does an agency have no right whatsoever to consider a claim filed somewhat later? That the government might pay an otherwise just and meritorious tort claim on which the statute of limitations on suit happens to have run strikes me as quite conceivable. Might not a private party compensate another for wrongfully inflicted injuries, though a lawsuit based on the incident is defeasible as time-barred or otherwise technically defective?

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[89] S. REP. NO. 1327, 89th Cong., 2d Sess. (1966), quoting from H.R. REP. NO. 1532, 89th Cong., 2d Sess., and reprinted in 1966 U.S. CODE CONG & AD. NEWS 2518.

[90] Gottlieb, supra note 78, at 44.

[91] Note, The Federal Tort Claims Act, 56 YALE L. J. 534, 547 (1947).

[92] 28 U.S.C. § 2401(b) (Supp. 1983).

Notwithstanding these arguments, Congress almost certainly did not mean by the Federal Tort Claims Act to authorize the administrative settlement of either time-barred or exempt claims, any more than it meant to authorize settlement under the FTCA of strict liability claims or claims arising out of employee conduct outside the scope of employment. Most likely Congress thought that claims over two years of age should as a policy matter be considered stale for all purposes. Strong textual support also exists for barring settlement of claims on account of which one or more of the exemptions protects the government from suit. By its very terms, the exemptions section of the FTCA makes the statute inapplicable to exempt claims.[93] As part of the statute, the agency settlement provision is no more applicable than any other.

But the agencies are right to construe their settlement authority under the Act narrowly, not so much on textual grounds as in terms of legislative intent. Congress took action in 1966 to expand agency settlement authority and to make the prior administrative claim a prerequisite to suit so that agencies might entertain and pay meritorious tort claims without awaiting litigation. On that rationale, Congress would have no reason to extend agency settlement authority to time-barred claims, claims categorically exempted from the government's waiver of sovereign immunity, or claims that could not successfully be prosecuted in court.

As a practical matter, agency claims officers uniformly take their settlement authority as coextensive with the government's exposure to legal liability,[94] not that too many of them have given serious thought to the possibility of construing the Act any differently. Except to acknowledge that even doubtful claims legitimately command a certain, albeit reduced, settlement value, they disavow any authority or willingness to settle a claim that is truly exempt, time-barred or otherwise infirm.

Clearly, Congress must expressly authorize broader settlement authority of tort and tort-like claims if it truly means to do so. To an extent, it has done just that, either by legislating narrow extensions of the Federal Tort Claims Act in selected areas or by enacting what I loosely call meritorious claims statutes in others. As a matter of fact, many claims officers apparently would welcome having such statutes at their disposal or, if they already have them, seeing them made more generous. The question whether Congress should go further, or more systematically, along this route than it already has, is worth asking, but essentially lies beyond the scope of this procedure-oriented study.

C. Special Tort Claims Legislation

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[93] Id. § 2680.

[94] Williams, The $2500 Limitation on Administrative Settlements Under the Federal Tort Claims Act, 1960 INS. L. J. 669, 672 (1960).

If the FTCA constitutes the centerpiece of agency authority to entertain tort and tort-like claims, the rest of the arrangement is in a state of utter disarray. One can scarcely even begin to typologize the multitude of ancillary statutes that afford agencies additional opportunities to satisfy monetary claims. The leading authority on the FTCA reports no fewer than some forty,[95] but the number far exceeds that if one construes the term monetary claim broadly enough. Some predate the FTCA and have survived it, a good many others having been repealed or allowed to lapse.[96]

These ancillary statutes defy generalization. Most 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 evidently do not. Some require that a federal officer or employee acting within the scope of his or her office or employment have caused the injury, while others require no more than injury in connection with a government program and not necessarily one of that particular agency. Only a few deal specifically with the claimant's contributory negligence. Most, but not all, place fixed monetary ceilings on the amount of recovery and, rarely, on the amount of allowable attorneys' fees. They carry varying statutes of limitations on the filing of a claim. Almost all preclude or are assumed to preclude judicial review of the disposition of a claim; a few, however, do not. In some cases, the agency may not only determine the claim, but also pay it; in others, it has authority only to recommend to Congress that the claim be paid. A few purport to be the exclusive remedy for any covered claim, while most do not, thereby leaving open the question whether exclusiveness, or at least a requirement of prior exhaustion of remedies, should be inferred.[97] What most all of them show is virtual inattention to questions of claims procedure.

I do not mean to examine any of these specific pieces of legislation in detail. A simple listing of the most prominent among them, however, should suggest their idiosyncratic character. I present them in a way that indicates whether they are best understood, on the one hand, as complementing the FTCA, for example by addressing claims likely to be exempt from that act, or, on the other hand, as true "meritorious claims" statutes requiring no predicate of fault on the part of the government.

(i) Tort Claim Statutes Ancillary to the FTCA:

Department of Health and Human Services

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[95] 1 L. JAYSON, supra note 77, at p. 1-11.

[96] Id. § 55.

[97] See text at notes 165-190, infra.

Authority to settle claims for personal injury or death arising out of administration of the national swine flu immunization program, based on any theory of liability that would govern a comparable action against the program participant under the law of the place where the act or omission occurred, "including negligence, strict liability in tort, and breach of warranty." [formerly 42 U.S.C. § 247b(k)(2)(1976), 90 Stat. 1113 (1976)][98]

* administrative claims authority and liability to suit governed by FTCA, except not limited to acts of federal employees acting within the scope of employment and not limited by the FTCA discretionary acts exemption
* 2-year statute of limitations[99]
* no ceiling on recovery
* exclusion where claimant has an exclusive compensatory remedy for benefits from the United States under some other statute,[100] but limitation period for such remedy suspended during pendency of Swine Flu Act proceeding[101]
* United States has right of recovery against program participants, state law notwithstanding
* judicial remedy available, again as under the FTCA, except not limited to acts of federal employees acting within the scope of employment and not limited by the FTCA discretionary acts exemption
* detailed semi-annual reports due from Secretary to Congress on settlement and litigation under this section.

Department of Justice

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[98]The exclusive liability provision, an important feature of the statute, distinguishes it sharply from the existing FTCA. The availability of an action against the United States for a covered claim displaces any claim against manufacturers or distributors of the vaccine or against any agency, organization or personnel administering it. 42 U.S.C. § 247b(k)(3)(1976). Procedures for substitution of the United States as exclusive defendant mirror those of the Federal Drivers Act, 28 U.S.C. § 2679(b)-(e) (Supp. 1983).

For legislative history of the National Swine Flu Immunization Program of 1976, see 1976 U.S. CODE CONG. & AD. NEWS 1987.

[99]The period of limitations is the same as under the FTCA, except that if suit is dismissed for failure to file a prior administrative claim, claimant has 30 days from the date of dismissal or 2 years from the date of accrual of the claim, whichever is later, to file a claim. 42 U.S.C. § 247b(k)(2)(A)(iii) (1976). See Ducharme v. Merrill-Nat'l Laboratories, 574 F.2d 1307, 1311 (5th Cir. 1978).

[100]However, the Feres doctrine, barring recovery for injuries to military personnel incident to service (see infra note 234), is not a bar. Hunt v. United States, 636 F.2d 580, 595 (D.C. Cir. 1980).

[101]42 U.S.C. § 247b(k)(5)(C) (1976).

Authority of the Attorney General (as successor to the Alien Property Custodian) to issue order directing the payment of money or delivery of property of a person who is not an enemy or ally of an enemy which has been seized by or turned over to the Alien Property Custodian or his successor under the Trading with the Enemy Act [50 U.S.C. App. § 9 (1968), 40 Stat. 419 (1917), as amended]

* claims arising under this statute expressly excluded from the FTCA[102]
* filing of an administrative claim is not a prerequisite to suit against the Alien Property Custodian, or the Attorney General as his successor, in United States district court
* administrative and judicial remedies constitute the exclusive remedy
* 2-year statute of limitations

Panama Canal Commission

Authority to settle and pay claims for property damage or personal injury or death arising from operation of the Panama Canal or related facilities [22 U.S.C. §§ 3761, 3771-78 (Supp. 1983), 93 Stat. 484-87 (1979)][103]

* FTCA expressly made inapplicable to claims cognizable under this act[104]
* no specified statute of limitations
* ceiling of $50,000
* payment of claims for damage to vessels, cargo, crew or passengers of vessels arising out of passage through canal locks under the control of United States personnel is reduced by the comparative negligence of the vessel, master, crew or passengers[105]
* such claims for damage arising outside the locks payable only if proximately caused by the negligence or fault of federal personnel acting within the scope of employment and line of duty, subject to reduction for comparative negligence[106]
* specific rules on measurement of damages for injuries to a vessel and exclusion of liability for delays under stated circumstances[107]

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[102] 28 U.S.C. § 2680(e)(1965).

[103] For legislative history and purpose, see 1979 U.S. CODE CONG. & AD. NEWS 1034.

[104] 22 U.S.C. § 3761(e) (Supp. 1983).

[105] Id. § 3771. Also excluded are claims for injuries to objects protruding beyond any portion of the hull of a vessel. Id.

[106] For other limitations on liability for such claims, and the possibility of recovering up to $120,000 (or more, upon special recommendation to Congress), see id §§ 3772, 3775(b).

[107] Id. §§ 3773-74.

* Board of Local Inspectors established to conduct mandatory investigation, prior to a vessel's departure from the Canal, of any incident giving rise to vessel (or vessel cargo, crew or passenger) claims, and to report to the Commission[108]
* claims payable out of any moneys appropriated for the Commission or, in certain cases, for maintenance and operation of the Canal
* acceptance by claimant deemed to be in full and final satisfaction of the claim
* judicial review of claims for injuries to vessels, cargo, crew or passengers of vessels arising out of passage through canal locks under the control of United States personnel available in a suit against the Commission[109] in federal district court for the Eastern District of Louisiana

Department of State

Authority to settle, in conformity with the provisions governing administrative settlement under the FTCA, and pay claims for property damage or personal injury or death arising in foreign countries from State Department operations abroad [22 U.S.C. § 2669f (1979), 70 Stat. 890 (1956) as amended][110]
* administrative claims authority parallel to that under the FTCA, except limited to tortious acts occurring abroad
* claims procedure set out in 22 C.F.R. §§ 31.1-.10, 31.18 (1983).
* claims payable from appropriated funds
* no judicial review available[111]

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[108] Id. §§ 3777-78. The Board is expressly authorized to summon witnesses, administer oaths and require the production of documents. Id. § 3778(b).

[109] Id. § 3776. Such actions are heard without a jury and proceed as if a case between a private party and a federal administrative agency. Any judgment is payable out of moneys appropriated for maintenance and operation of the Canal. No such damage action may otherwise be brought against the United States or the Commission, or against any of their officers or employees. Id.

No claim other than for damage to vessels, cargo, crew or passengers of vessels arising out of passage through canal locks under the control of United States personnel may be brought against the United States, the Commission or any federal officer or employee, except that the latter may be sued for acts outside the scope of their employment, not in the line of duty, or taken with an intent to injure. Id. § 3761(d).

[110] For legislative history and purpose, see 1956 U.S. CODE CONG. & AD. NEWS 4017.

[111] 22 C.F.R. § 31.18 (1983). The preclusion of judicial review, as well as the constitutionality of the State Department's administrative claims procedures, was sustained in Gerritson v. Vance, 488 F. Supp. 267 (D. Mass. 1980).

Tennessee Valley Authority

Authority to settle and pay claims for damages arising from the torts of TVA employees [implied by the courts from TVA's statutory authority to sue and be sued in its corporate name, 16 U.S.C. § 831c (b) (1974), 48 Stat. 58 (1933)][112]

* certain FTCA exemptions applied analogously[113]

United States Information Agency

Authority to settle, in conformity with the provisions governing administrative settlement under the FTCA, and pay tort claims arising in foreign countries in connection with United States government information and educational exchange programs conducted abroad [22 U.S.C. § 1474(5), 86 Stat. 493 (1972)][114]

* administrative claims authority parallel to that under the FTCA, except limited to tortious acts occurring abroad
* subject to agency regulations set out in 22 C.F.R. §§ 511.1-.12 (1983)

Veterans Administration

Authority to settle, in conformity with the provisions governing administrative settlement under the FTCA, and pay claims for property damage or personal injury or death arising in foreign countries from Veterans Administration operations abroad [38 U.S.C. § 236 (1979), 79 Stat. 1110 (1965)][115]

* administrative claims authority parallel to that under the FTCA, except limited to tortious acts occurring abroad
* claims procedure set out in 38 C.F.R. § 14.615-.617 (1983)
* 2-year statute of limitations
* no judicial review available

Claims in Admiralty

Mention should be made, in connection with this category of special claims settlement authority, of the Suits in Admiralty Act[116] and the Public Vessels Act.[117] While these statutes long predate the FTCA, they

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[112] E.g., Brewer v. Sheco Constr. Co., 327 F. Supp. 1017 (W.D.Ky. 1971).

[113] Pacific Nat'l Fire Ins. Co. v. TVA, 89 F. Supp. 978, 979 (W.D. Va. 1950) (exemption for discretionary acts).

[114] For legislative history and purpose of the basic statute, including the agency's authority to pay tort claims, see 1972 U.S. CODE CONG. & AD. NEWS 2861.

[115] For legislative history and purpose, see 1965 U.S. CODE CONG. & AD. NEWS 3811.

[116] 46 U.S.C. §§ 741-52 (Supp. 1983), 41 Stat. 525, 527 (1920).

[117] 46 U.S.C. §§ 781-90 (1975), 43 Stat. 1112 (1925).

retain full force since the FTCA expressly excludes from its coverage claims against the United States for which a remedy is provided by either of them.[118] The Suits in Admiralty Act covers damage caused by vessels owned, possessed or operated by or for the United States generally, while the Public Vessels Act covers damage caused by public vessels of the United States.[119] Both waive sovereign immunity from in personam suit in admiralty and make the government liable substantially to the same extent as any private shipowner or operator. They essentially borrow the concept of maritime tort. Any remedy provided is exclusive of any other action on the claim against an agency or employee of the United States.[120]

Both statutes, whose precise substantive relationship in the field of torts to one another and to the FTCA lie beyond the scope of this study,[121] specifically contemplate administrative settlements. The Suits in Admiralty Act gives the Secretary of the department having control of the possession or operation of the vessel in question authority to settle any claim within the coverage of the Act, but only until such time as a libel based on the claim has been filed; thereafter settlement authority apparently passes to the Department of Justice.[122] Claims cognizable under the Public Vessels Act rest exclusively, for settlement purposes, with the Justice Department both before and after a

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[118] 28 U.S.C. § 2680(d) (1965); 46 U.S.C. § 740 (1975).

[119] 1 L. JAYSON, supra note 77, § 7.01. Until amended in 1960, the Suits in Admiralty Act applied only to vessels employed as merchant vessels. Suits involving public vessels may only be brought under the Public Vessels Act. United States v. United Continental Tuna Corp., 425 U.S. 164 (1976); CIVIL ACTIONS AGAINST THE UNITED STATES, ITS AGENCIES, OFFICERS AND EMPLOYEES (Shepard's/McGraw-Hill) 115-17 (1982). The Public Vessels Act bars suit by a foreign national unless reciprocity by the foreign government is shown. 46 U.S.C. § 785 (1975).

[120] 46 U.S.C. §§ 745, 782 (1975).

[121] For a good illustration of the persistent uncertainties, see McCormick v. United States, 680 F.2d 345, 349 (5th Cir. 1982) (en banc), vacating 645 F. 2d 299 (1981) (1960 amendments to Suits in Admiralty Act intended to bring all maritime torts against the United States within the scope of that act and, to that extent, to oust the FTCA). Accord Patentas v. United States, 687 F.2d 707, 713 (3d Cir. 1982); Estate of Callas v. United States, 682 F.2d 613, 619 n.7 (7th Cir. 1982); Dick v. United States, 671 F.2d 724, 726 (2d Cir. 1982).

The Feres doctrine, infra note 234 and accompanying text, appears to be applicable to claims under the admiralty statutes. Beaucoudray v. United States, 490 F.2d 86 (5th Cir. 1974); Seveney v. United States, 550 F. Supp. 653, 657 (D. R.I. 1982).

[122] 46 U.S.C. § 749 (Supp. 1983).

libel has been filed.[123] Settlements under both statutes, like judgments, are paid out of any appropriations available for that purpose,[124] and must be reported to Congress on an annual basis.[125]

Like the FTCA, the admiralty statutes carry two-year statutes of limitations on the bringing of suit[126] and make the presentation of an administrative claim a prerequisite.[127] However, even though suit may not be brought until six months after the administrative claim has been filed, such filing does not necessarily toll the statute of limitations.[128]

Apart from settlement authority in connection with liability under the Suits in Admiralty and Public Vessels Acts, the Secretaries of the military services have substantial authority to settle and pay admiralty claims of the same general type as are cognizable under the Public Vessels Act.[129] The relevant statutes cover damage caused by a vessel or other property of or in the service of the particular military service, in connection with an "admiralty claim" or "maritime tort."[130] Although the statutes contain no limitations period, the military

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[123] 46 U.S.C. § 786 (1975).

[124] Id. §§ 748, 787. The Suits in Admiralty Act adds that if no appropriations are available, a sum sufficient to cover the award will automatically be appropriated out of any money in the Treasury not otherwise appropriated. Id. § 749.

[125] Id. §§ 752, 790.

[126] 46 U.S.C. §§ 745, 782.

[127] Id. § 740.

[128] For citations reflecting a split among the courts on the tolling question, see McCormick v. United States, supra note 121, at 349-50. In McCormick, the Fifth Circuit held, en banc, that tolling is appropriate where it would not defeat the basic purpose of the statute of limitations and would avoid injustice to the plaintiff. Id. at 351.

[129] This authority has been described as predicated strictly on legal liability and thus available only for claims on which court action could be maintained. Dick v. United States, 671 F.2d 724, 727 (2d Cir. 1982).

[130] 10 U.S.C. §§ 4801-06 (Supp. 1983) (Army); 10 U.S.C. §§ 7621-23 (Supp. 1983) (Navy); 10 U.S.C. §§ 9801-06 (Supp. 1983) (Air Force); 14 U.S.C. § 646 (Supp. 1983) (Coast Guard). For implementing regulations, see 32 C.F.R. §§ 536.45 (1982) (Army), 752 (1983) (Navy), 842.90-.99 (1983) (Air Force). The Army and Air Force regulations enumerate categories of claims that will not be allowed even though apparently within the settlement authority conferred.

services have borrowed the two-year period of the Suits in Admiralty Act and Public Vessels Act. Settlement amounts differ among the services. The Secretary of the Navy may settle and pay up to one million dollars for an authorized claim. Larger claims must be certified by him to Congress for payment.[131] The Secretaries of the Army and Air Force also have unlimited settlement authority, but their payment authority is limited to $500,000; payment in excess of that requires certification to Congress.[132] As to admiralty claims based on Coast Guard activity, the Secretary of the Treasury operates under a payment ceiling of $100,000.[133] All settlements, upon acceptance of payment, are final and conclusive.[134]

Claims for Patent or Copyright Infringement

Unlike the admiralty statutes, which form the basis of express exclusions from the FTCA, the statutes conferring a remedy in the Claims Court for patent[135] or copyright infringement[136] pass unmentioned in the FTCA. Nevertheless, these statutes have been construed as the exclusive remedy against the United States for claims of this kind.[137]

The patent infringement statute, which predates the FTCA by thirty-six years, provides that the United States shall be liable for "reasonable and entire compensation" whenever a patented invention is used by or for the United States, or is manufactured by or for the United States, without the license of the owner. It also makes the government liable, and exclusively so, when the invention is used or manufactured by a contractor or subcontractor or any person for the Government, with the Government's consent. The statute contains an express exclusion for claims of persons whose invention or discovery was made while they were employed by or serving the United States and related to the employee's official functions, as well as of persons who used government time, materials, or facilities in making the invention or discovery. Claims arising in a foreign country are likewise excluded. However, no limitation attaches to the amount of recovery or to attorneys' fees.

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[131] 10 U.S.C. § 7622 (Supp. 1983).

[132] Id. §§ 4802, 9802.

[133] 14 U.S.C. § 646 (Supp. 1983).

[134] 10 U.S.C. §§ 4806 (1959), 7622(d) (Supp. 1983), 9806 (1959); 14 U.S.C. 646(b) (Supp. 1983).

[135] 28 U.S.C. § 1498(a) (Supp. 1983).

[136] Id. § 1498(b).

[137] 1 L. JAYSON, supra note 77, § 9.01.

A parallel copyright infringement statute, enacted in 1960, provides an exclusive remedy in the Claims Court for copyright infringement by the United States or by a contractor, subcontractor or any person acting for the United States with the latter's consent. Similar exclusions apply. In addition to their discrepant limitation periods, the two statutes differ curiously on the question of administrative settlement. Only the copyright infringement statute authorizes the head of the government agency involved to compromise, settle in full satisfaction and pay out of agency appropriations an administrative claim prior to suit;[138] the patent infringement statute does not.[139] During the pendency of an administrative claim, which is not a prerequisite to suit, the three-year period of limitations on copyright infringement suits in the Claims Court is tolled.[140]

This first category of legislation ancillary to the FTCA obviously groups a wide assortment of statutes. They differ in such respects as breadth of coverage, ceilings on recovery, exclusiveness as remedy, source of payment, and so on. Some, like the admiralty, patent infringement, or Swine Flu statutes, prescribe essentially judicial remedies with some sort of agency-level claims procedure beforehand. Others contemplate a purely administrative remedy. Not only do the latter provide claimants no new cause of action, but they appear to foreclose judicial review of most any agency action taken under them.

The case of Gerritson v. Vance[141] illustrates well this last point. There, the plaintiff had filed an administrative claim with the State Department arising out of a personal injury sustained on the grounds of the United States Embassy in Zambia. The claim having been denied initially and upon reconsideration, plaintiff brought suit challenging the denial as both lacking in substantial evidence and based on claims procedures that deprived her of due process of law. The court dismissed the action, insofar as the substantial evidence issue was concerned, on jurisdictional grounds; the exemption for torts arising abroad clearly

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[138] 28 U.S.C. § 1498(b) (Supp. 1983). For legislative history generally of the copyright infringement statute, see 1960 U.S. CODE CONG. & AD. NEWS 3444.

[139] However, the Foreign Assistance Act of 1961, which permits suit against the United States in district court or Claims Court for patent infringement in connection with the furnishing of foreign assistance under the Act, and makes this the exclusive remedy, does give the relevant agency head such authority, provided claimant accepts payment in full satisfaction of the claim. 22 U.S.C. § 2356(b) (1979). The six-year statute of limitations on suit is tolled during pendency of the administrative claim. For legislative history and purpose of the 1961 Act, see 1961 U.S. CODE CONG. & AD. NEWS 2472.

[140] 28 U.S.C. § 1498(b) (Supp. 1983).

[141] 488 F. Supp. 267 (D. Mass. 1980).

deprived the court of jurisdiction under the FTCA. But it also declined to review the State Department's exercise of settlement authority under the ancillary statute on tort claims arising abroad. For this proposition, the court cited chiefly the State Department's own implementing regulations providing that settlement decisions on foreign claims shall not be subject to judicial review.[142] Since, however, agencies cannot on their own preclude judicial review where it is otherwise available, the court shored up its position by making an undocumented reference to "clear and convincing Congressional intent" to bar access to the courts on the merits of a claim.[143]

(ii) "Meritorious Claims" Statutes:

The statutes just canvassed complement the FTCA in the sense of affording an administrative and/or judicial remedy for tort and tort-like claims that happen to fall outside the coverage of that Act. However, Congress occasionally has given an agency authority to entertain claims arising out of its activities in the absence of any showing of fault. Enactments of this sort might be described as "meritorious claims" provisions to signify that the claims payable thereunder have "merit," if not a firm legal basis. Significantly, to a one, they furnish a strictly administrative remedy; agency action or inaction under this claims authority, like the State Department determination of the foreign tort claim in Gerritson v. Vance, also lies essentially beyond judicial review.[144] Though Congress may lodge authority to settle meritorious claims in the annual appropriations act for a given agency (sometimes renewing it in an uninterupted succession

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[142] 22 C.F.R. § 31.18 (1983). See Op. Comp. Gen. No. B-199449-OM (Aug. 7, 1980).

[143] 488 F. Supp. at 268. However, the court did address plaintiff's due process allegations, presumably on the theory that the implied statutory preclusion does not extend to constitutional issues. On the constitutional merits, it was not convinced. See infra note 615, and accompanying text.

In Towry v. United States, 459 F. Supp. 101, 104-08 (E.D. La. 1978), aff'd, 620 F. 2d 568 (5th Cir. 1980), cert. denied, 449 U.S. 1078 (1981), the court considered the Military Claims Act, text at notes 177-206, infra, a statute containing a finality clause, and concluded that preclusion of review did not violate due process. Cf. LaBash v. Department of Army, 668 F.2d 1153 (10th Cir.), cert. denied, 456 U.S. 1008 (1982) (express preclusion of review in Military Claims Act not a violation of due process where agency not alleged to have violated claimant's constitutional rights).

[144] LaBash v. Department of Army, supra note 143 (Military Claims Act); Towry v. United States, supra note 143 (same). But a court may well review an adverse determination under a meritorious claims statute where the challenge goes to the agency's interpretation of the statute. See infra note 196.

of such acts[145]), putting settlement authority of this sort on a more permanent and codified footing would seem preferable. Among the codified meritorious claims statutes are the following:

Department of Agriculture

Authority to reimburse owners for the damage or destruction of private property as a result of action by federal employees in connection with the protection, administration or improvement of the national forests [16 U.S.C. § 574 (1974), 46 Stat. 387 (1930), as amended]

* since predates FTCA, only available for claims not cognizable under that act
* no specified statute of limitations
* ceiling of $2500[146]
* does not cover personal injury or death
* payment out of any funds appropriated for the protection, administration or improvement of the national forests

Authority to reimburse owners for the loss, damage or destruction of horses, vehicles or other privately-owned equipment obtained by the Forest Service for use in connection with its work [16 U.S.C. 502(d) (1974), 37 Stat. 843 (1913), as amended]

* since predates FTCA, only available for claims not cognizable under that act
* no specified statute of limitations
* ceiling of $50 (where claimant is Forest Service employee), otherwise $2500,[147] absent a written contract; no ceiling where equipment used for emergency fire-fighting situations
* payment out of Forest Service appropriations

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[145] Holtzoff, The Handling of Federal Tort Claims Against the Federal Government, supra note 81, at 318. An example is the frequently extended authority of the Secretary of the Interior to compromise claims for damages by owners of private property in connection with the survey, construction, operation or maintenance by the government of irrigation works. Act of Mar. 3, 1915, 38 Stat. 859 (1915). The continuation of the Department's authority depends on its inclusion in successive annual public works appropriation acts. Op. Comp. Gen. No. B-199449-OM (Aug. 7, 1980). Implementation of this Interior Department authority is discussed in Gellhorn & Lauer, Federal Liability for Personal and Property Damage, 29 N.Y.U. L. REV. 1325, 1344-49 (1954). Responsibility for administering this particular program has recently been shifted from the headquarters of the Office of the Solicitor to its field offices.

[146] The ceiling, originally set at $500, was increased to $2500 in 1962. Pub. L. No. 87-869, 76 Stat. 1157 (1962). For legislative history and purpose, see 1962 U.S. CODE CONG. & AD. NEWS 3980.

[147] The provision of a higher recovery for nonemployees was added in 1958. Pub. L. No. 85-464, 72 Stat. 216. For legislative history and purpose, see 1958 U.S. CODE CONG. & AD. NEWS 2691.

Federal Bureau of Investigation

Authority in the Attorney General to settle claims for property damage or personal injury or death arising out of actions of Director, Assistant Director, inspector or special agent of the FBI where not amenable to settlement under the FTCA [31 U.S.C. § 3724 (1983), 49 Stat. 1184 (1936)]

* since predates FTCA, only available for claims not cognizable under that act
* 1-year statute of limitations
* ceiling of $500
* covers only activities within the scope of employment
* exclusion of claims by federal officers or employees arising during the scope of employment
* payment cannot be made by the Department; the claim, accompanied by a report, must be certified to Congress for appropriations out of which payment may be made[148]
*acceptance by claimant deemed to be in full and final settlement of the claim

Department of Health and Human Services

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 damages [42 U.S.C. § 223 (1982), 58 Stat. 710 (1944)][149]

* since predates FTCA, only available for claims not cognizable under that act
* 1-year statute of limitations
* ceiling of $3000
* payment cannot be made by the Department; the claim, accompanied by a report, must be certified to Congress for appropriations out of which payment may be made
* acceptance by claimant deemed to be in full and final settlement of the claim

Department of Interior

Authority to reimburse owners for the loss, damage or destruction of horses, vehicles, or other privately-owned equipment while in the custody of the National Park Service or the Department, where custody is had under some authorization, contract or loan, and for the purpose of fire-fighting, trail or other official business [16 U.S.C. 17f (1974), 46 Stat. 382 (1930)]

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[148]The General Accounting Office reports that an arrangement has been worked out whereby the FBI pays these claims out of current operating appropriations. GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW p. 11-121 (1982). See Op. Comp. Gen. No. B-115234 (Feb. 24, 1981).

[149]For legislative history and purpose, see 1944 U.S. CODE CONG. SERV. 1211.

* since predates FTCA, only available for claims not cognizable under that act
* no specified statute of limitations
* no ceiling on recovery
* agency employees may be eligible as claimants
* payment made from appropriations available for the rental of such equipment

Authority to settle and pay claims for damages to owners of private property resulting from government operations in the survey, construction, operation or maintenance of Indian irrigation projects [25 U.S.C. § 388 (1983), 45 Stat. 1252 (1929)]

* claims payable out of funds available for Indian irrigation projects
* settlement total for the fiscal year not to exceed 5 percent of the funds available that year for the project out of which the claims arise

Department of Justice

Authority to settle and pay claims for damage or loss of personal property of employees of federal penal and correctional institutions incident to their employment [31 U.S.C. § 3722 (1983), 63 Stat. 167 (1949), as amended]

* 1-year statute of limitations and requirement of a claim in writing
* ceiling of $1000
* limited to property found to be reasonable or useful under the circumstances
* no requirement of negligence or causation by a prisoner or federal employee
* total exclusion where damage or loss results from contributory negligence of the claimant or of an agent of the claimant
* exclusion if loss occurred at quarters not assigned or provided by the government
* authorization of appropriations for payment of claims
* acceptance by claimant deemed to be in full and final satisfaction of the claim

Authority to settle and pay claims of federal prisoners or their dependents for personal injury sustained in any industry or in any work activity in connection with the maintenance or operation of the institution to which they are confined [18 U.S.C. § 4126 (1969), 62 Stat. 852 (1948), as amended][150]

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[150] For legislative history and purpose, see 1949 U.S. CODE CONG. SERV. 1248; 1961 U.S. CODE CONG. & AD. NEWS 3028.

The Supreme Court has determined that this remedy, if available, is exclusive of any under the Federal Tort Claims Act. United States v. Demko, 385 U.S. 149 (1966). See also Sturgeon v. Federal Prison Indus., 608 F. 2d 1153, 1154 (8th Cir. 1979); Thompson v. United States, 495 F. 2d 192, 193 (5th Cir. 1974).

* claims procedure set out in 28 C.F.R. §§ 301.1-.26(1983)[151]
* regulations provide that claims may be filed within thirty days prior to the date of release or transfer from the institution, but allow them to be filed within sixty days after release or transfer when circumstances preclude doing so beforehand; claims may also be allowed within one year of release from the institution or from a community treatment center for good cause shown[152]
* regulations bar recovery if injury is sustained willfully or with intent to injure someone else or in willful violation of rules, in any activity not directly related to work assignment, in connection with institutional programs or maintenance of own quarters, or while away from work location[153]
* regulations place burden of proof of causation on the claimant
* regulations provide for an on-the-record hearing on appeal from the initial decision of the claims examiner[154]

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[151]The regulations require an immediate investigative report of any known incident that may give rise to a claim, and review by an institutional safety manager. A physical examination is compulsory in the event of a claim. Id. §§ 301.3-.6. Claims examiners make their determinations on the basis of all available evidence, and give a written notification with reasons and notice of appeal rights. Id. § 301.12(a). For appeal procedures, see infra note 92. Claims examiners are directed to follow the compensation schedule of the Federal Employees' Compensation Act and to use minimum wage standards where applicable. 28 C.F.R. § 301.21 (1983).

[152]Id. § 301.5(a). No award may be had if full medical recovery, without residual impairment, occurs while the inmate is in custody.

[153]Id. § 301.9. The regulations, however, contemplate payment of lost-time wages and cover occupational disease or illness proximately caused by work conditions. Id. § 301.1. Section 301.10 contains rules for computing lost-time wages.

[154]Id. §§ 301.13-.19. The regulations, introduced in 1981, were doubtless prompted by judicial holdings that prisoner compensation under the statute is an entitlement and that procedural due process requires a full adversarial hearing. See infra note 155.

Under the regulations, a claimant has thirty days, or longer in case of good cause, to request an appellate hearing before the Inmate Accident Compensation Committee. Alternatively, he or she may request that the Committee simply reconsider the decision. Upon such request, the claimant is entitled to a copy of the information on which the initial decision was made. Hearings, conducted at the Central Office of the Bureau of Prisons, are basically trial-type. Provision is made for oral testimony by witnesses as well as documentary submissions, questioning by the Committee, and questioning by the claimant of the Committee or of witnesses on behalf of the government. The hearing is recorded and copied or transcribed, and the claimant may be represented

(Footnote Continued)

* no fixed ceiling on damages, but recovery may not exceed that provided by the Federal Employees' Compensation Act
* claims payable from funds of Federal Prison Industries, a government corporation set up to provide employment, vocational training and rehabilitation for federal inmates
* accounts of all disbursements to be rendered to the GAO for settlement and adjustment
* limited judicial review deemed available[155]

Job Corps

Authority to settle claims for damage to person or property resulting from operations of the Job Corps where not cognizable under the FTCA [29 U.S.C. § 926(b) (1974), 87 Stat. 872 (1973),[156] repealed, 92 Stat. 1993 (1978)]

* former agency regulations excluded claims covered by FECA or Military Personnel and Civilian Employees' Claims Act[157]
* former agency regulations narrowed scope to claims (i) entailing the tortious act or omission of a Job Corps enrollee or the good

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(Footnote Continued)
by an attorney. However, the Committee is not bound by any rules of evidence or formal rules of procedure, and may not compel the attendance of witnesses.

The Committee is required to notify the claimant of its determination with a statement of reasons. Further appeal, on the record established below, may be had to the Associate Commissioner of Federal Prison Industries.

[155]The courts have permitted review only under the Administrative Procedure Act and on the basis of the arbitrary and capricious standard. Thompson v. Federal Prison Indus., 492 F. 2d 1082, 1084 n. 5 (5th Cir. 1974); Owens v. Department of Justice, 537 F. Supp. 373, 375 (N.D. Ind.), aff'd, 673 F.2d 1334 (7th Cir. 1981); Saladino v. Federal Prison Indus., 404 F. Supp. 1054, 1056 (D. Conn. 1975). However, exhaustion of the administrative remedies provided by the regulations is a prerequisite to suit. Sturgeon v. Federal Prison Indus., supra note 150, at 1155; Thompson v. Federal Prison Indus., supra, at 1084 n. 6.

The courts have also held that an award coming within the terms of the statute and implementing regulations is in the nature of an entitlement. Davis v. United States, 415 F. Supp. 1086, 1091-92 (D. Kan. 1976); Saladino v. Federal Prison Indus., supra, at 1057. And they have required, as a matter of constitutional due process, that an inmate be afforded a full evidentiary hearing on his or her claim and access to relevant portions of his or her file prior to such a hearing. Davis v. United States, supra, at 1097-1101; Saladino v. Federal Prison Indus., supra, at 1057-58. Revised regulations now reflect these demands. See supra note 154.

[156]For legislative history and purpose of the statute establishing the Job Corps program, see 1973 U.S. CODE CONG. & AD. NEWS 2935.

[157]45 C.F.R. § 1013.2-.3 (repealed).

faith efforts of the claimant or another to assist an enrollee in danger, (ii) where the enrollee was outside the geographic limits of his or her hometown when the incident occurred, and (iii) where the incident occurred at the center to which the enrollee was assigned, within 100 miles of the center, or while the enrollee was on authorized travel to or from the center[158]

* no specified statute of limitations
* ceiling of $500
* former agency regulations bar claims by the Job Corps enrollee[159]

National Aeronautics and Space Administration

Authority to settle and pay claims for property damage or personal injury or death arising out of NASA activities[160] [42 U.S.C. § 2473 (c)(13) (Supp. 1983), 72 Stat. 429 (1958)][161]

* 2-year statute of limitations
* ceiling of $25,000,[162] though claims in excess may be reported by NASA to Congress for its consideration if meritorious and otherwise covered by this provision
* amounts in excess of that payable from agency appropriations to be paid from permanent judgment fund[163]
* acceptance by claimant deemed to be in full and final satisfaction of the claim

National Oceanic and Atmospheric Administration (formerly Coast and Geodetic Survey)

Authority in Secretary of Commerce to settle claims for property damage or personal injury or death by acts for which the National Ocean Survey is responsible [33 U.S.C. 853 (Supp. 1983), 41 Stat. 929, 1054 (1920), as amended]

* since predates FTCA, only available for claims not cognizable under that act
* ceiling of $500[164]

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[158] Id. § 1013.2-.4 (repealed).

[159] Id. § 1013.2-.3 (repealed).

[160] NASA functions are identified in 42 U.S.C. § 2473(a) (1973).

[161] For legislative history and purpose, see 1958 U.S. CODE CONG. & AD. NEWS 3160.

[162] The ceiling was raised from $5000 in 1979. Pub. L. No. 96-48, 93 Stat. 349 (1979). For legislative history and purpose, see 1979 U.S. CODE CONG. & AD. NEWS 829.

[163] 31 U.S.C. § 1304(a)(3)(D) (1983).

[164] In 1975, Congress eliminated the original requirement that amounts found due be reported to Congress through the Treasury

(Footnote Continued)

Nuclear Regulatory Commission

Authority to settle and pay claims for property damage or personal injury or death resulting from explosion or radiation in connection with the detonation of explosive devices [42 U.S.C. 2207 (1973), 68 Stat. 952 (1954), as amended][165]

* 1-year statute of limitations
* ceiling of $5000, though claims in excess may be reported by the Commission to Congress for its consideration if meritorious and otherwise covered by this provision[166]
* exclusion where damage caused in whole or in part by the negligent or wrongful act of the claimant or his or her agents or employees
* acceptance by claimant deemed to be in full and final satisfaction of the claim

Authority to settle and pay claims for property damage or personal injury or death resulting from a nuclear incident involving the nuclear reactor of a United States warship [42 U.S.C. § 2211 (1974), 88 Stat. 1611][167]

* exclusion where loss caused by the act of an armed force engaged in combat or results from civil insurrection
* President may authorize payment of claims from any available contingency funds or may certify them to Congress for appropriations[168]

Peace Corps

(Footnote Continued)
Department for special appropriations. Pub. L. No. 93-608, 88 Stat. 1967 (1975). For legislative history and purpose, see 1974 U.S. CODE CONG. & AD. NEWS 7159.

[165]For legislative history and purpose of the Atomic Energy Act of 1954, see 1954 U.S. CODE CONG. & AD. NEWS 3456.

[166]The provision for claims in excess of $5000 was added in 1961. Pub. L. No. 87-206, 75 Stat. 478 (1961). For legislative history and purpose, see 1961 U.S. CODE CONG. & AD. NEWS 2591.

[167]For legislative history and purpose, see 1974 U.S. CODE CONG. & AD. NEWS 6363; 1975 U.S. CODE CONG. & AD. NEWS. 2251.

[168]Pursuant to this authority, President Ford delegated to the Secretary of Defense responsibility for authorizing payment of such claims, on such terms and conditions as he might direct, from contingency funds available to the Defense Department, or for certifying claims to the Director of the Office of Management and Budget with a recommendation for additional appropriation by Congress. Consultation with the Secretary of State is required in the case of claims by a foreign country or foreign national. Exec. Order No. 11,198, 41 Fed. Reg. 22,329 (1976), reprinted in 42 U.S.C. § 2211 at 96-97 (Supp. 1983).

Authority to settle and pay claims of a person not a U.S. citizen or resident for property damage or personal injury or death arising abroad from the act or omission of any Peace Corps employee or volunteer [22 U.S.C. § 2509(b) (1979), 75 Stat. 617 (1961), as amended][169]

* 1-year statute of limitations
* ceiling of $20,000[170]
* exclusion of claims by U.S. citizens or residents
* acceptance by claimant deemed to be in full and final satisfaction of the claim

Postal Service

Authority to settle claims for property damage or personal injury or death resulting from the operations of the Postal Service where "a proper charge against the United States" and not cognizable under the FTCA [39 U.S.C. § 2603 (1980), 84 Stat. 745 (1970), reenacting the substance of 43 Stat. 63 (1921), as amended, 48 Stat. 1207 (1934)]

* provisions of FTCA apply to tort claims arising out of Postal Service activities[171]
* no specified statute or limitations (except through incorporation of FTCA period)
* no ceiling on recovery[172]
* claims payable from postal revenues[173]

Department of State

Authority to settle and pay 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 the claim is not cognizable under

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[169]For legislative history and purpose of the Peace Corps Act, see 1961 U.S. CODE CONG. & AD. NEWS 2842.

[170]The original ceiling of $10,000 was raised to its present level in 1978. Pub. L. No. 95-331, 92 Stat. 414, 415. For legislative history and purpose, see 1978 U.S. CODE CONG. & AD. NEWS 1092.

[171]39 U.S.C. § 409(c) (1980). For regulations jointly governing FTCA claims and claims under this provision, see 39 C.F.R. §§ 912.1-.14 (1983).

[172]The original grant of authority in 1921, to the then Post Office Department, carried a $500 ceiling, which was eliminated as part of the Postal Reorganization Act of 1970, Pub. L. No. 91-375, 84 Stat. 719, 745 (1970).

[173]Pub. L. No. 89-57, § 201, 79 Stat. 200 (1965). A 1982 statute adds that judgments against the United States arising out of Postal Service activities shall be paid by the Postal Service from funds available to it. Pub. L. No. 97-258, § 2(k), 96 Stat. 1062. For legislative history and purpose, see 1982 U.S. CODE CONG. & AD. NEWS 1895.

any other statute or international agreement [22 U.S.C. § 2669(b) (1979), 76 Stat. 263 (1962)][174]

* no specified statute of limitations
* ceiling of $15,000, or its equivalent in foreign currency
* claim must be espoused by a foreign government on behalf of one of its nationals
* claims payable from appropriated funds

Authority to settle and pay claims for property damage arising from operations of the United States or its personnel in connection with any project of the International Boundary and Water Commission[175] [22 U.S.C. § 277(e) (1979), 53 Stat. 841 (1939)]

* since predates FTCA, only available for claims not cognizable under that act
* 1-year statute of limitations
* ceiling of $1000
* claim must be substantiated by a report of a board appointed by the American Commissioner
* claims procedure set out in 22 C.F.R. §§ 31.1-.10, 31.19-.23 (1983).
* claims payable from funds appropriated for the project in connection with which the loss occurred

Authority to settle personal injury and death claims of non-U.S. nationals arising in foreign countries where the United States exercises privileges of extraterritoriality, provided the injury or death results from acts or omissions of a federal officer, employee or agent [31 U.S.C. § 3725 (1983), 49 Stat. 1138 (1936)]

* no requirement that action be negligent or otherwise wrongful, or taken within the scope of employment
* 1-year statute of limitations
* ceiling of $1500
* no liability for acts of military personnel
* exclusion of claims for injury or death of U.S. nationals or U.S. government employees
* claims to be certified to Congress, accompanied by a report, for payment out of appropriations to be made for that purpose
* acceptance by claimant deemed to be in full and final settlement of the claim

Veterans Administration

Authority to reimburse veterans in Veterans Administration hospitals and domiciliaries for the loss of personal effects sustained

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[174] For legislative history and purpose, see 1962 U.S. CODE CONG. & AD. NEWS 2028.

[175] The Commission carries out certain flood control, conservation, sanitation and related projects on the international boundary between the United States and Mexico.

by fire, earthquake or other natural disaster while stored there [38 U.S.C. § 626 (1979), 72 Stat. 1144 (1958), as amended][176]

* claims procedure set out in 38 C.F.R. §§ 17.75-.77 (1983)

The Military, Foreign and National Guard Claims Acts

The Military Claims Act authorizes the Secretary of each military department to settle and pay claims against the United States for death, personal injury or property damage caused by civilian or military personnel of the departments, including the Coast Guard, either while acting within the scope of their employment or incident to noncombat activities.[177] The statute, originally enacted in 1943, on the eve of the Federal Tort Claims Act,[178] was meant to consolidate and expand a somewhat disorganized set of miscellaneous prior statutes authorizing administrative settlements of tort and tort-like claims by the military departments under different kinds of circumstances, and it did introduce a considerable measure of uniformity into their settlement standards and practices. With the passage in 1946 of the FTCA, the Military Claims Act was expressly made inapplicable to claims cognizable under that new Act.[179]

The Military Claims Act would seem to be an excellent example of an expansive meritorious claims statute. On the one hand, it might conceivably cover any tort claim that happens not to be cognizable under the FTCA, subject of course to its own limitations.[180] In fact, its

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[176]For legislative history and purpose of the 1973 amendment extending reimbursement provisions to earthquakes and other natural disasters, see 1973 U.S. CODE CONG. & AD. NEWS 6355.

[177]10 U.S.C. § 2733 (1983). Presumably all that is necessary for noncombat activity to come within the scope of the Act is a causal relationship to the injury. Scope of employment is not a requirement. The regulations expressly take this view. E.g., 32 C.F.R. §§ 842.42(b)(1983) (Air Force).

The statute contains an express statutory exclusion for reimbursement of medical, hospital or burial services furnished at the expense of the United States, 10 U.S.C. § 2733 (c) (1983), and for personal injury or death of military department personnel incident to service, id. § 2733(b)(3).

[178]Act of July 3, 1943, 57 Stat. 372 (1943). The Act was comprehensively revised in 1956. Act of Aug. 10, 1956, 70A Stat. 153 (1956).

[179]10 U.S.C. § 2733(b)(2)(1983).

[180]See 32 C.F.R § 536.14 (1983) (Army). For example, the statute would not cover a claim falling outside the FTCA due to the doctrine of Feres v. United States, 340 U.S. 135 (1950), since by its own terms it does not cover claims for personal injury or death of military

(Footnote Continued)

first branch reads broadly enough to allow the settlement of claims arising out of any action taken within the scope of employment even if not wrongful. But the military services have used their policymaking authority under the Act to confine this branch to tort-based claims and to preserve virtually every FTCA exemption apart from that for torts committed abroad;[181] moreover, in the absence of any statutory reference to the applicable law, they tend to apply the law of the place where the claim arose.[182] At the same time, claims arising out of nonwrongful acts may qualify for statutory coverage under the rubric of claims "otherwise incident to noncombat activities,"[183] even when those acts occurred outside the scope of employment or fall within a certain FTCA exemption.[184] Though the Military Claims Act leaves the definition of noncombat activities entirely wide open, the services agree that the term covers "activities essentially military in nature, having little parallel in civilian pursuits and which historically have been considered as furnishing a proper basis for payment of claims."[185]

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department personnel incident to service. 10 U.S.C. § 2733 (b)(3). Cf. United Services Auto. Ass'n v. United States, 285 F. Supp. 854, 856 (S.D. N.Y. 1968) (claim for property damage rather than personal injury suffered incident to service, though barred by Feres, is not within the Military Claims Act exclusion).

[181] E.g., 32 C.F.R. § 842.42(d)(1983)(Air Force). Thus, the Military Claims Act has been read as virtually inapplicable to domestic claims sounding in tort.

[182] 10 U.S.C. § 2733(b)(4)(1983). The statute was amended in 1968 to provide expressly for application of the local law of contributory or comparative negligence. Act of Sept. 26, 1968, Pub. L. No. 96-522, 82 Stat. 875.

[183] See 32 C.F.R. § 536.14(a)(1983)(Army). 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 grounds, 471 F. 2d 667 (3d Cir. 1973); Lundeen v. Department of Labor & Indus., 78 Wash. 2d 66, 469 P. 2d 886 (1970). Of course, the presence of fault does not bar treating a claim as one arising incident to noncombat activities. 32 C.F.R. § 536.14(d) (1983)(Army).

[184] See supra note 177 and infra note 197.

[185] 32 C.F.R. § 536.14(e)(1983)(Army). The regulations provide as illustrations "practice firing of missiles and weapons, training and field exercises, and maneuvers, including in connection [with them] the operation of aircraft and vehicles, and the use and occupancy of real estate, and movement of combat or other vehicles designed especially for military use." The Navy Regulations add naval exhibitions, operations of antiaircraft equipment, sonic booms, explosions of ammunition and,
(Footnote Continued)

A claim arising abroad is presumptively within the coverage of the Military Claims Act since by definition it falls outside the FTCA.[186] However, if the claimant is an inhabitant of a foreign country at the time of the incident, his or her exclusive administrative remedy arises under a separately enacted Foreign Claims Act,[187] a statute whose procedures differ somewhat from those of the Military Claims Act but whose coverage is basically the same.[188] Any statute such as the

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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 are somewhat more conceptual:

> The . . . noncombat activities ground . . . has no precise common law analogue. In some respects, the noncombat activities concept is more limited than common law absolute liability theories, yet more extensive than the ordinary res ipsa loquitur doctrine. It provides a means of compensation for damage that results from certain authorized military activities of U.S. forces . . .. In general, the events that are properly considered under the noncombat activities provision of the Act relate to actions that are peculiarly military in character.

32 C.F.R. § 842.42(a)(1983)(Air Force).

[186] 28 U.S.C. § 2680(k)(1965).

[187] 10 U.S.C. § 2734(1983). The Military Claims Act by its own terms is inapplicable to claims covered by the Foreign Claims Act. Id. § 2733(b)(2). American tourists and business people on travel abroad are not inhabitants of a foreign country, but United States nationals residing abroad are.

[188] The Foreign Claims Act covers property damage, personal injury or death occurring outside the United States where caused by civilian or military personnel of the armed forces or otherwise incident to their noncombat activities. Therefore, as under the Military Claims Act, negligence is not in all cases a necessary element. However, the Foreign Claims Act was amended specifically in 1968 to cover claims arising from an accident in the operation of military aircraft indirectly related to combat or occurring while preparing for or in transit to or from combat. 10 U.S.C. § 2734(b)(3)(1983). For legislative history and purpose, see 1968 U.S. CODE CONG. & AD. NEWS 3617.

For Air Force regulations under the Act, see 32 C.F.R. §§ 842.50-.54 (1983).

The American Battle Monuments Commission has separate but related statutory authority to settle and pay out of its appropriations claims for property damage, personal injury or death resulting from the negligent or wrongful acts or omissions of Commission personnel acting within the scope of their office or employment in connection with the Commission's activities abroad. Procedures of the Foreign Claims Act are incorporated by reference. Act of July 25, 1956, 70 Stat. 640,

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Military or Foreign Claims Act that permits an agency to consider claims arising abroad raises interesting questions of applicable law. In the absence of legislative guidance, the services have adopted the practice of applying "general principles of American law as stated in standard legal publications,"[189] where the Military Claims Act governs, and the local law of the foreign country, where the claimant is an inhabitant of the foreign country and proceeds under the Foreign Claims Act.[190]

A claim under either the Military or the Foreign Claims Act must be presented in writing within two years of its accrual.[191] The agencies are authorized to make an advance "emergency" payment of up to $1000 even before the formal filing of a claim, to be deducted from the ultimate settlement.[192] Payments of up to $25,000 may be made directly out of agency appropriations,[193] but anything beyond that comes out of

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641(1956), codified as 36 U.S.C. § 138b (1968). For legislative history and purpose, see 1956 U.S. CODE CONG. & AD. NEWS 3492.

[189] 32 C.F.R. §§ 536.21(b)(1983)(Army), 842.47(b)(1983)(Air Force). However, the local law will be applied in determining the effect of the claimant's own negligence on his or her right to recover damages. Id. Under Army regulations, general principles of American law also govern the measure of damages in claims arising abroad. Id. § 536.21(c). However, in the Air Force, the law of claimant's domicile may be used. Id. § 842.47(c).

[190] 32 C.F.R. § 842.52(d)(1983)(Air Force). The handling of contributory or comparative negligence follows the local law of the foreign jurisdiction. Id. § 842.52(c). My impression from conversations with Air Force attorneys is that the substantive nuances of foreign law may be overlooked, and that emphasis will be placed on proof of causation and on valuation under local standards. See infra note 147.

[191] 10 U.S.C. §§ 2733(b)(1), 2734(b)(1)(1983). The Foreign Claims Act does not appear to require a writing. Under the Military Claims Act, the period may be extended if war or armed conflict has taken place during the normal limitations period.

[192] Id. § 2736. The provision was originally limited to accidents involving an aircraft or missile operation, but made more general in 1968. Act of Sept. 26, 1968, Pub. L. No. 90-521, 82 Stat. 874 (1968). For legislative history and purpose, see 1968 U.S. CODE CONG. & AD. NEWS 3617. Pending legislation would raise the emergency payment ceiling to $10,000. H.R. 597, 98th Cong., 1st Sess. § 3 (1983).

[193] 10 U.S.C. §§ 2733(a), 2734(a)(1983). The original ceiling of $5000 was raised to $15,000 in 1970 (Pub. L. No. 91-312, 84 Stat. 412) and to its current level in 1974 (Pub. L. No. 93-336, 88 Stat. 291). For legislative history and purpose of the increases, see 1970 U.S. CODE
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the judgment fund.[194] Whatever the source, payment must be accepted in full satisfaction of the claim.[195] And lastly, the Military and Foreign Claims Acts specifically declare any action taken under them final and conclusive, meaning that it lies generally beyond judicial review.[196]

Each of the armed services has promulgated extensive regulations, both procedural and substantive, governing claims under the Military and the Foreign Claims Acts, as well as the FTCA. For example, Army regulations provide specific rules for the filing, investigation, processing and settlement of claims under the Military Claims Act that supplement general Army claims procedures. More interestingly, they recite twenty-nine widely different categories of claims not payable under the Military Claims Act. The list borrows most but not quite all the FTCA exemptions,[197] and amplifies them with a series of exemptions based on the existence of some other remedy deemed exclusive;[198] however, a few of the regulatory exemptions to the Military Claims Act reflect original policy-oriented considerations.[198a] Air Force

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CONG. & AD. NEWS 3427; 1974 U.S. CODE CONG. & AD. NEWS 3438. Pending legislation would raise the ceiling to $100,000. H.R. 597, 98th Cong., 1st Sess. (1983).

[194] 31 U.S.C. § 1304(a)(3)(D)(1983). Previously, sums in excess of $25,000 had to be reported to Congress for its consideration.

[195] 10 U.S.C. §§ 2733(e), 2734(e)(1983).

[196] Id. § 2735. See LaBash v. Department of Army, 668 F.2d 1153, 1155 (10th Cir.), cert. denied, 456 U.S. 1008 (1982); Bryson v. United States, 463 F. Supp. 908, 910 (E.D. Pa. 1978); Towry v. United States, 459 F. Supp. 101, 104-08 (E.D. La. 1978), aff'd, 620 F. 2d 568 (5th Cir. 1980), cert. denied, 449 U.S. 1078 (1981). See supra notes 81-82 and accompanying text. While claim determinations on the merits as such are not reviewable, the courts have reviewed an agency denial where based upon an issue of statutory interpretation. Welch v. United States, 446 F. Supp. 75, 78 (D. Conn. 1978) (review not precluded on question whether death occurred incident to service). See also Hudiburgh v. United States, 626 F.2d 813 (10th Cir. 1980).

[197] 32 C.F.R. §§ 536.15 (a)-(m). The foreign claims exemption, notably, is not asserted.

[198] E.g., the doctrine of Feres v. United States, 340 U.S. 135 (1950), claims compensable under FECA or other workmen's compensation statutes, taking claims, flood damage claims, and claims in contract or copyright or patent infringement. 32 C.F.R. §§ 536.15 (n)-(t), (w), (z).

[198a] Id. §§ 536.15(u)(complete contributory negligence), (y)(claim based solely on compassion), (cc) claims not in the best interest of the
(Footnote Continued)

regulations under the Military Claims Act do not contain any formal list of exemptions, but they do give a few guidelines on when certain kinds of claims -- bailments, lost or damaged mail, for example -- may be covered by the Act,[199] and lay down detailed rules on the internal delegation of original and appellate settlement authority.[200]

The National Guard Claims Act[201] is, for all practical purposes, identical to the Military Claims Act, except that it covers losses caused by personnel of the Army and Air National Guard who, as such, would not normally be considered federal employees.[202] Their actions come within the settlement authority conferred by the National Guard Claims Act if they were engaged at the time in training or certain other duties imposed by federal law or in noncombat activity defined in much the same way as the Military Claims Act defines it.[203]

Finally, the Secretaries of Defense, of the military services and of the Treasury (with respect to the Coast Guard) enjoy specific authority to settle and pay claims up to the modest limit of $1000 for property damage, personal injury or death caused by military department personnel in the use of government vehicles at any location or in the use of other government property at a government installation.[204] For the most part, this authority does not differ in important substantive or procedural respects from the military claims statutes already

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United States, contrary to public policy, or filed by inhabitants of unfriendly foreign countries).

[199] Id. § 842.46.

[200] Id. § 842.49.

[201] Act of Sept. 13, 1960, Pub. L. No. 86-740, 74 Stat. 878 (1960), codified as 32 U.S.C. § 715 (Supp. 1983). For legislative history and purpose of the Act, see 1960 U.S. CODE CONG. & AD. NEWS 3492.

[202] Only in 1981 was the Federal Tort Claims Act amended to bring members of the National Guard engaged in certain functions within the definition of a federal employee for whose tortious acts the federal government is vicariously liable. Act of Dec. 29, 1981, Pub. L. No. 97-124, 95 Stat. 1666 (1981), amending 28 U.S.C. § 2671 (Supp. 1983). Until 1981, the National Guard Claims Act was the only significant federal remedy in damages for losses caused by National Guard activities. Now the FTCA, both in its administrative and judicial remedies, is also available.

[203] For regulations on the handling of National Guard claims, see 32 C.F.R. §§ 536.140-.152 (1983)(Army), §§ 842.130-.135 (1983)(Air Force).

[204] Act of Oct. 9, 1962, Pub. L. No. 87-769, 76 Stat. 767 (1962), codified as 10 U.S.C. § 2737 (1983).

examined,[205] but legislative history makes it reasonably clear that Congress specifically contemplated the settlement of claims based on the tortious acts of government personnel even while acting outside the scope of employment.[206]

Obviously, this category of meritorious claims statutes, like the ancillary tort claims statutes complementing the FTCA, represents an awkward collection of piecemeal authorizations for agencies to satisfy monetary claims. The limitations of this study do not permit a careful examination of the legislative history of each statute to discern precisely what may have prompted its enactment. Those that predate the Federal Tort Claims Act naturally broke new ground; apart possibly from the Small Claims Act, they may have represented a claimant's only alternative to private relief legislation. No less revealing, though, are the meritorious claims statutes enacted after 1946, for they reflect a deliberate purpose to expand settlement authority in selected areas beyond the fault-oriented borders established by the FTCA. In many instances, however, a stringent ceiling on the amount that may be recovered practically confines the remedy to the very smallest of claims.

Short of a statute-by-statute look at legislative history, one can only hazard an educated guess as to what may account for Congress' singling out a handful of agencies for meritorious claims settlement authority. One or more of the following elements appear to characterize the meritorious claims provisions: unusually hazardous or sensitive activities [military claims, admiralty claims, administration and protection of the national forests, FBI activities, detonation of explosive devices, NASA operations, operations of Public Health Service vessels],[207] the destruction of private property in use for a public purpose [destruction of private property in work of Forest Service and

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[205] For regulations implementing this particular authority, see 32 C.F.R. §§ 536.161-.171(1983)(Army), §§ 842.80-.84(1983)(Air Force).

[206] See 1962 U.S. CODE CONG. & AD. NEWS 2833. This is doubly clear from the fact that the statute only covers claims not cognizable under any other provision of law. The statute contains exclusions for insured claims, for subrogated claims, for damages resulting in whole or in part from the claimant's own negligence, and for medical, hospital or burial expenses paid for by the government. These exemptions are largely mirrored in the regulations. 32 C.F.R. §§ 536.165(Army), 842.82(Air Force)(1983). There is a two-year statute of limitations and a requirement that payment be accepted in full satisfaction of the claim. 10 U.S.C. § 2737(c)-(g)(1983).

[207] Into this class of claims would fall a number of meritorious claims statutes that have been repealed or allowed to lapse: claims for damage caused by vessels belonging to or employed by the United States engaged in river and harbor work, for damage due to gunfire and military maneuvers, and for damage due to aircraft.

National Park Service], the promotion of foreign relations [tort claims presented by foreign governments on behalf of their nationals, Peace Corps activities, operations of International Boundary and Water Commission, and the Foreign Claims Act generally[208]]. But, to attribute too orderly a rationale to the totality of meritorious claims statutes would be foolish. Some simply cannot be explained on grounds of general principle,[209] but rather better, perhaps, as a response to a concern over liability and litigation spontaneously voiced at the time a new government program is being considered, as an immediate reaction to a particular incident, or indeed as the product of lobbying. 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 examining the legislative purpose of meritorious claims statutes now on the books, or the use to which agencies actually have put them over the years, one cannot recommend that they be extended to a greater number of agencies. Conceivably, authority to settle meritorious claims ought to be given to all agencies, a result easily achieved by amending the still extant Small Claims Act to include personal injury and death claims and to eliminate the required showing of negligence. On the one hand, the great majority of tort claims officers with whom I spoke would like their agencies to enjoy more spacious meritorious claims authority than they now do. For example, the Assistant Legal Advisor of the State Department regrets that his agency has meritorious claims authority essentially over foreign claims only. An Agriculture Department attorney reluctantly concludes that state recreational use statutes effectively bar him from making awards under the FTCA for injuries to children caused by various hazards in the national parks. A third opined that only broad meritorious claims

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[208]The Foreign Claims Act states in so many terms that its purpose is "[t]o promote and maintain friendly relations through the prompt settlement of meritorious claims." 10 U.S.C. § 2734(a)(1983). Air Force regulations emphasize the importance to our foreign relations of construing the Act broadly. "[T]he United States must accept responsibility for almost all damage caused by members and employees of its armed forces . . .. Cause and merit are the primary criteria in determining applicability of the Act. Proof of fault is required only to the extent necessary to show that the claim is meritorious." 32 C.F.R. § 842.52(a)(1983). Air Force claims attorneys confirmed in personal interviews that they "bend over backwards" under the Foreign Claims Act, demanding little more than a showing of but-for causation of damage.

[209]E.g. National Oceanic and Atmospheric Administration; Postal Service; Job Corps. The patent and copyright infringement claims statutes, 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.

authority can finally put an end to the inequities of private relief bills in tort. The Chief of the FBI Civil Litigation Unit believes that the five hundred dollar ceiling on his ability to pay just claims renders it all too often an inadequate remedy under the circumstances. On the other hand, some agency officials who enjoy very generous meritorious claims authority at the present time feel quite uncomfortable with it and use it rarely.[210] Certainly, Congress should view sympathetically requests for a higher ceiling on meritorious claims authority coming from agencies that have made principled use of that authority in the past, for inflation has done violence to many a monetary limit. 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 of any sort can be made.

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 above all to the FTCA is of obvious importance. The FTCA itself provides an answer with respect to administrative claims statutes that predate 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 . . . in respect of claims cognizable under [the Act]."[211] Otherwise, they expressly remain in effect.[212] Thus, a claim that could have been settled administratively under prior existing law can still 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, some ambiguity still surrounds the notion of cognizability under the FTCA.[213] If by a cognizable claim is meant simply one that is based on tortious acts of federal officers within the scope of their office, a tort claim falling within one of the FTCA exemptions remains cognizable under the Act and therefore no longer amenable to settlement under some earlier statute. This interpretation -- which the courts, incidentally, have given to the FTCA's explicit bar

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[210] See text at notes 688-89, infra.

[211] Legislative Reorganization Act of 1946, supra note 7, § 424(a), not codified in the United States Code. The section gives a nonexhaustive enumeration of statutes so repealed, including the Small Claims Act and the Military Claims Act.

[212] 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).

[213] Note, The Federal Tort Claims Act, 56 YALE L.J. 534, 550-51 (1947).

against tort actions under a particular agency's statutory authority to sue and be sued in its own name[214] -- has the virtue of promoting a uniform government-wide framework for the disposition of tort claims. Agencies might 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.[215]

On the other hand, a cognizable claim might be understood more narrowly as a tort claim arising out of acts within the scope of office that also does not fall within any of the FTCA exemptions. In fact, commentators commonly describe an exempt tort claim as simply not cognizable under the Act. 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]" -- strongly implies that there indeed are some such tort claims not cognizable under the Act, presumably the exempted ones.

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[214] Legislative Reorganization Act of 1946, supra note 7, § 423, 28 U.S.C. § 2679a (Supp. 1983). See CIVIL ACTIONS AGAINST THE UNITED STATES, ITS AGENCIES, OFFICERS AND EMPLOYEES (Shepard's/McGraw-Hill) 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. Peak v. SBA, 660 F.2d 375, 377-78 (8th Cir. 1981); FDIC v. Citizens Bank & Trust Co., 592 F.2d 364, 371 (7th Cir.), 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 entirely 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. USPS, 675 F.2d 756 (5th Cir. 1982); Sportique Fashions, Inc. v. Sullivan, 597 F. 2d 664 (9th Cir. 1979).

[215] 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 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.

All in all, one should probably not attempt to decide the issue in terms of plain meaning, because there simply is none. Policy considerations, however, strongly favor the second view. Congress enacted the FTCA chiefly to broaden the government's accountability in tort, but not necessarily to force its response to tort claims into a single standardized mold. Therefore, to deprive those agencies that previously had broad administrative settlement authority of the right to exercise it over the tort claims that Congress in 1946 chose to exempt from its general waiver of immunity would be wrongheaded. I argued earlier (largely on the theory that the FTCA exemptions seek to avoid dangerous interventions by the courts, not action by agencies to right their own wrongs) that agencies might be allowed to use their FTCA settlement authority to entertain tort claims which, on account of their exempt character, fall outside the Act's waiver of immunity to suit, though I concluded that such most likely was not Congress' intent.[216] But settlement authority found in statutes other than the FTCA stands on a quite different and more independent footing. Leaving pre-FTCA settlement authority intact would preserve the liberalizing purposes of those earlier statutes, without in the least ignoring the litigation-oriented concerns that inform the FTCA's own exemptions.[217]

Whatever view governs agency settlement authority predating the FTCA should also guide the interpretation of subsequent claims legislation. Obviously, the meaning of any such statute depends primarily on its own language. Some post-1946 enactments -- the

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[216] See text at notes 88-94, supra. Another relevant issue I raised in that connection is the statute of limitations. Might one argue that a claim otherwise cognizable under the FTCA ceases to be cognizable once it becomes time-barred, and at that point may be settled under pre-FTCA settlement authority? The question may be wholly theoretical since most specific claims statutes have their own statutes of limitations. Even where they do not, an agency is unlikely, except in special circumstances, to look with favor in the excercise of its discretion on a claim brought more than two years from the time it is taken to have accrued.

[217] The leading authority on the FTCA, without directly addressing the problem, appears to conclude with me that exempt claims should not be considered cognizable under the FTCA for these purposes. 1 L. JAYSON, supra note 77, at p. 2-75. The Comptroller General has ruled to the same effect, at least so far as the foreign claims exemption goes. 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 214. Those clauses were the predicate for judicial determination of tort claims; the statutes here discussed mostly entail administrative settlement by the agencies themselves.

NASA,[218] Peace Corps,[219] and Nuclear Regulatory Commission statutes,[220] for example -- make no reference at all to the FTCA. The agencies should not therefore feel bound by its exemptions, though they are properly influenced by the sound policy considerations discernible in those exemptions when they come to exercise the discretionary settlement authority their own statutes give them.[221] On the other hand, where a subsequent statute refers to the FTCA, the situation is more problematic. For the reasons I advanced earlier, however, I would not strain to interpret a statute allowing an agency to settle claims not cognizable under the FTCA,[222] without more, as disallowing the settlement of a tort claim exempt under the FTCA.

Some post-1946 claims statutes take a distinctly different shape in their reference to the FTCA. The State Department[223] and Veterans Administration,[224] among others, now may, in conformity with the provisions of the FTCA, settle a tort claim arising abroad. When it conferred that authority, Congress quite clearly meant only to allow the named agencies to disregard the foreign claims exemption[225] in acting upon a tort claim under the FTCA; their statutes do not plausibly entitle them to disregard any or all of the other exemptions. The fact remains, however, that Congress did not make its intention explicit.

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[218] See text at note 160, supra.

[219] See text at note 169, supra.

[220] See text at note 165, supra.

[221] 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.

[222] Examples include the Job Corps statute, text at note 156, supra, and the State Department statute governing claims by foreign nationals, text at note 174, supra, as well possibly as the Military and Foreign Claims Acts, text at notes 177-206, supra, comprehensively revised in 1956. The meritorious claims statute of the Postal Service, however, may present a different picture. 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. See supra note 171 and accompanying text. This may rule out payment of an FTCA-exempt claim.

[223] See text at note 110, supra.

[224] See text at note 115, supra.

[225] 28 U.S.C. § 2680(k) (1965).

Generally speaking, Congress should take greater care in enacting legislation that would enlarge an agency's authority to satisfy claims for loss or injury -- whether those claims are "meritorious" or sound in tort -- to clarify the scope of that authority especially in relationship to the agency's existing authority under the FTCA. The viability and meaning of pre-1946 settlement statutes has been clouded by a combination of 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 of precision whenever it means to extend it. An example of legislative drafting success in this regard is the Swine Flu Immunization Act of 1976, in which Congress made it clear beyond doubt that it was enlarging the bases of recovery under the FTCA to include strict liability and breach of warranty, was assuming vicarious liability for the acts of drug manufacturers and distributors as well as its own employees, and was waiving the discretionary function exemption and that exemption alone.[226]

E. Does the Existence of Another Remedy Actually Bar an FTCA Claim?

The discussion in the last section asked in effect what bearing the availability of an FTCA remedy should have on the interpretation of more specific statutes conferring claims settlement authority on particular agencies. But that discussion also in effect masked an underlying problem of deciding how far the FTCA itself reaches. Both claims officers and claimants, for procedural and substantive reason alike, need to know as a threshold matter whether the FTCA has any application to the kind of claim before them. This section will explore the problem in no greater detail than is necessary to show that the frontier between the FTCA and other monetary remedies, again from both a substantive and procedural point of view, stands in considerable disarray.

Conceptually, the simplest situation is that in which Congress builds an express exemption into the FTCA for claims as to which "adequate remedies are already available."[227] This rationale in fact explains a fair number of the existing FTCA exemptions: claims arising out of the assessment or collection of taxes and customs duty,[228] administration of the Trading with the Enemy Act,[229] activities of the Tennessee Valley Authority[230] and the Panama Canal Company,[231] and, of

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[226] See text at note 101, supra.

[227] S. REP. NO. 1400, 79th Cong., 2d Sess. 33 (1946).

[228] 28 U.S.C. § 2680(c)(1965).

[229] Id. § 2680(e).

[230] Id. § 2680(1).

[231] Id. § 2680(m). See supra note 104 and accompanying text.

course, claims cognizable under the admiralty statutes.[232] 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 constitute an exclusive remedy for a designated category of claims.[233] The courts have inferred from the availability of alternative remedies a few additional exclusions from the FTCA -- notably claims for personal injury or death or property damage of servicemen incurred as an incident to service,[234] and prisoner claims for which a fair, reasonable and comprehensive remedy exists[235] -- but far more often than not they decline to do so.[236]

In this more usual situation, claimants appear to have parallel remedies at their disposal. They have recourse to the FTCA, notwithstanding the fact that their claims may be compensable, for example, under the Court of Claims Act,[237] the Military Claims Act,[238]

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[232] Id. § 2680(d).

[233] See supra note 72, and examples cited therein. However, Congress would do well to add these exclusions specifically to the FTCA's own section on exemptions.

[234] Feres v. United States, 370 U.S. 135 (1950); Preferred Ins. Co. v. United States, 222 F.2d 942 (9th Cir.), cert. denied, 350 U.S. 837 (1955). Another consideration in Feres was the distinctly federal relationship of the soldier to his supervisors which the Supreme Court thought should not be disturbed by the application of substantive state law. The Court was also troubled by the effect of tort litigation on military discipline.

[235] United States v. Demko, 385 U.S. 149 (1966), relying in part on Johansen v. United States, 343 U.S. 427 (1952) (comprehensive workmen's compensation scheme for federal employees bars suit under Public Vessels Act).

[236] 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).

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

[238] United States v. Gaidys, 194 F.2d 762, 764 (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).

certain servicemen's[239] or veterans' benefits laws,[240] or[241] the meritorious claims statute of the Nuclear Regulatory Commission, to name a few enactments whose impact on the FTCA actually has been an issue in litigation. They are not even required at any point to make an election of remedies.[242]

The law does not even appear to require the exhaustion of available administrative remedies, apart of course from the FTCA's own administrative claim procedure, prior to filing suit under the Act. The leading expert on the FTCA has defended this view as consistent with Congress' purpose of providing simple and direct access to the federal courts.[243] Further, assuming a claimant has prior recourse to a parallel remedy, though not required to do so as a prerequisite to filing under the FTCA, the pendency of that claim does not even temporarily bar the FTCA proceeding.[244] In fact, claimants' counsel have been specifically cautioned, in order to avoid the expiration of the statute of limitations on any potentially applicable remedy, to pursue all of them concurrently.[245] Finally, administrative findings

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[239] Brooks v. United States, 337 U.S. 49 (1949).

[240] United States v. Brown, 348 U.S. 110 (1954).

[241] 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.

[242] Arkwright Mut. Ins. Co. v. Bargain City, U.S.A., Inc., supra note 177, at 227. See also United States v. Huff, 165 F. 2d 720, 725-26 (5th Cir. 1948); Bird & Sons, Inc. v. United States, 420 F. 2d 1051, 1057 (Ct. Cl. 1970); Lundeen v. Department of Labor & Indus., 78 Wash. 2d 66, 469 P. 2d 886 (1970). 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.

It has also been held that an FTCA claim arising out of allegedly invalid administrative action may go forward even though the action is appealable to other administrative bodies or even to the courts under the Administrative Procedure Act. Beins v. United States, 695 F.2d. 591, 596-99 (D.C. Cir. 1982).

[243] 2 L. JAYSON, supra note 77, at p. 11-18.

[244] Id. at p. 5-255.

[245] Id. at pp. 5-258, 15-12. That the FTCA statute of limitations is not tolled by the filing of a claim or suit under some other remedy is firmly established. E.g., Beins v. United States, supra note 242, 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)

(Footnote Continued)

made in connection with a prior claim have no binding effect in a subsequent FTCA proceeding, at least at the litigation stage,[246] except that monetary recovery under the FTCA presumably will be reduced by the amount of any prior award for essentially the same loss.[247]

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 it and not ousting it have their inconveniences. Certainly, where Congress has stated that the availability of another remedy bars resort to the FTCA, the practical problem has arisen of first determining whether that remedy in fact covers the particular claim in question. The courts generally have stayed the FTCA suit in the face of a substantial question of coverage under the exclusive remedy, and remitted that question to the persons primarily responsible for that determination;[248] if there is no such question, the tort claim goes forward.[249] This procedure works effectively only where the exclusive remedy is an administrative one;

(Footnote Continued)
(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).

[246]Joseph v. United States, 505 F.2d 525, 527 (7th Cir. 1974), holding that a Veterans Administration finding that a serviceman's injury was not service-related is not res judicata for purposes of a later FTCA claim, even though decisions on VA benefits are not as such judicially reviewable. Accord Bryson v. United States, 463 F. Supp. 908, 910 (E.D. Pa. 1978)(Military Claims Act); Ward v. United States, 331 F. Supp. 369 (W.D. Pa. 1971), rev'd on other grounds, 471 F. 2d 667 (3d Cir. 1973)(same).

[247]United States v. Brown, 348 U.S. 110, 113 (1954); Brooks v. United States, 337 U.S. 49, 53-54 (1949). Should, however, the claimant have executed a release of the United States upon accepting payment under the first remedy, or should the applicable statute provide that acceptance constitutes a release, no subsequent recovery may be possible.

[248]The question arises most frequently in connection with FECA or related workmen's compensation claims. E.g., DiPippa v. United States, 687 F. 2d 14, 16-17 (3d Cir. 1982); Hudiburgh v. United States, 626 F. 2d 813, 814 (10th Cir. 1980); Joyce v. United States, 474 F.2d 215, 219 (3d Cir. 1973); United States v. Charles, 397 F.2d 712, 714 (D.C. Cir.), cert. denied, 393 U.S. 897 (1968); Daniels-Lumley v. United States, 306 F.2d 769, 771 (D.C. Cir. 1962); Somma v. United States, 283 F.2d 149, 150-51 (3d Cir. 1960). See 2 L. JAYSON, supra note 77, at p. 11-16. This approach illustrates the administrative law doctrine of primary jurisdiction. Somma v. United States, supra, at 151.

[249]Wallace v. United States, 669 F. 2d 947, 951-52 (4th Cir. 1982); United States v. Udy, 381 F.2d 455, 458-59 (10th Cir. 1967).

where the exclusive remedy is judicial, the court can scarcely help but make the ultimate determination of coverage itself.

In theory, any question of the express or implied preclusion of the FTCA remedy deserves to be raised by the agency itself during the mandatory administrative claim phase, and presumably dealt with like any other issue going to the cognizability of the claim under the FTCA. Agency claims officers did not evoke this problem during our conversations, but it would seem to complicate their determination of a claim, as it clearly has that of the courts when the issue is put before them. Ideally, a claims officer would use the opportunity to apprise a claimant of any other potentially applicable administrative remedy of which he or she may be aware and actually entertain the claim under that rubric if personally authorized and otherwise in a position to do so.[250] Unfortunately, the practice presupposes a familiarity with the agency's overall inventory of claims authority that a given tort claims officer may or may not possess. Everyone's interest is best served when all available agency channels for satisfaction of a monetary claim are explored in the most expeditious and practical-minded way possible, and claims officers situated within the legal department of the agency out of whose activities such claims arise can best see to it that they are. A number of claims officers with whom I spoke seem disposed to play the role I envision; most do not, even though the role seems quite consistent with the informal, relatively open, and potentially nonadversarial character of the agency claims procedure under the FTCA. In any event, the notion that one administrative remedy necessarily excludes all others, or must be exhausted before any other is entertained, would tend to interfere with the flexible process I describe. I would prefer that agency tort claims officers be made familiar with the full range of available administrative channels and encouraged to explore them in any given case in the most sensible and orderly fashion that the particular circumstances suggest.[251]

The situation is different where Congress establishes a comprehensive framework for administrative relief intended -- for

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[250] 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"). 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. § 536.11(e). The Army Claims Service has facilitated this process by compiling for the use of all claims officers an inventory of agency authority, and not only the Army's, to make monetary payment to claimants. See supra note 62.

[251] See supra note 62. A claims officer should in any event take care that claimants do not run afoul of the applicable statute of limitations on one potential remedy while another is being explored, especially where he or she is not personally in a position to deem all relevant statutes conclusively satisfied by the initial filing.

reasons of agency expertise, uniformity in results, a more orderly disposition of claims, or otherwise -- to constitute the exclusive remedy for a category of claims. Its intention must be respected. Deciding whether such is the case calls for a statute-by-statute determination, but as a general rule limitations on access to a remedy like the FTCA should not lightly be inferred.

F. Does the Constitution Itself Require a Minimal Administrative Remedy for Tort and Tort-Like Claims?

Fundamental not only to the Federal Tort Claims Act, but also to other statutory authorizations to sue the government for monetary relief, is the notion that the United States may not be held liable in damages without its consent. On this premise, the courts have upheld as a valid limitation on the sovereign's waiver of immunity virtually every substantive and procedural condition Congress has placed on the right to sue the government. Sovereign immunity remains the relevant point of departure for analysis, however vigorously it is criticized as unjust and however often its harshness is invoked as a reason for legislating new and broader waivers.

Nevertheless, recent years have seen the notion of sovereign immunity pitted against constitutional values. Litigants have argued in effect that the Constitution requires that a damage remedy be available at least for certain governmental wrongs. In this final section, I mean only to articulate this far-reaching and interesting problem, recognizing that a full examination of its subtleties must await another day. I conclude with the modest observation that neither the handful of courts that have addressed the issue nor, by implication, Congress itself reads quite that much in the Constitution.

At least so far as the demands of Section 1983 on officials acting under color of state law are concerned,[252] the Constitution has been held to require states to provide some sort of opportunity to be heard on claims of injury to person or property by state officials, or, as the Supreme Court put the matter in the seminal case of Parratt v. Taylor,[253] "the means by which [a claimant] can receive redress for the deprivation."[254] Though presented in constitutional garb, Parratt v. Taylor illustrates a classic common law tort, the negligent misplacement by state prison authorities of a prisoner's personal property, in the case a $23.50 hobby kit. In the end, the Supreme Court rejected the prisoner's Section 1983 claim for the value of the lost materials,

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[252] 42 U.S.C. § 1983 (1981).

[253] 451 U.S. 527 (1981). The Supreme Court had twice before granted certiorari to decide whether mere negligence will support a claim for relief under Section 1983, but in both cases found it unnecessary to decide the issue. Baker v. McCollan, 443 U.S. 137 (1979); Procunier v. Navarette, 434 U.S. 555 (1978).

[254] 451 U.S. at 543.

predicated on the deprivation of property without due process of law in violation of the Fourteenth Amendment. But it did so not on the ground that the kit does not constitute property,[255] or that the unintended loss of property does not amount to a constitutional deprivation,[256] but on the ground that the dictates of procedural due process are satisfied when the state provides a means of redress which, despite certain limitations,[257] "could have fully compensated the respondent for the property loss he suffered."[258] Thus, recognizing the adequacy of existing administrative claim mechanisms has become an important means of ensuring that the Fourteenth Amendment through Section 1983 does not become "a font of the tort law to be superimposed upon whatever systems may already be administered by the states."[259]

If states must provide a procedurally adequate means of vindicating the losses to person or property caused by the negligence of their employees, what of a state that offers such procedures subject to certain categorical exemptions not unlike the FTCA's so-called intentional torts exemption or its exemption in relation to quarantines, to cite just two examples.[260] Neither Parratt v. Taylor nor any subsequent case, so far as I know, addresses the constitutional adequacy in the Section 1983 context of a state tort claims procedure, when the claim in question falls categorically outside its protections. Arguably, the reasonableness of the exemption itself justifies the lapse of otherwise constitutionally requisite procedures.

The question whether the constitutional right of a governmental tort victim to a minimally acceptable claims procedure is violated when his or her claim falls within a more or less artificial exception to that procedure does not seem to me entirely academic. It will inevitably arise in the context of one Section 1983 lawsuit or another,

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[255] The Court conceded that under Nebraska law, respondent enjoyed a property interest in the materials. Id. at 529 n. 1.

[256] Id. at 536-37. Justice Powell, concurring in the result, took this position. Id. at 546-52.

[257] The limitations are the absence of punitive damages and jury trial, as well as the unavailability of an action against the offending state officers personally.

[258] 451 U.S. at 544. A predeprivation hearing was found to be impracticable in the case of a random and unauthorized act where the loss does not result from an established state procedure and the state cannot predict when it may occur. Id. at 541.

[259] Id., quoting Paul v. Davis, 424 U.S. 693, 701 (1976).

[260] I cite these two FTCA exemptions because they are among those not based on the existence of adequate administrative or judicial remedies.

given the breadth and influence of the Parratt v. Taylor opinion. Of more immediate interest is the bearing of that question on the constitutionality of the Federal Tort Claims Act or, to be more precise, on the constitutionality of its limitations. A short answer is that its bearing can only be slight, not only because of the unique federalism aspects of Section 1983, but also because that provision has not been read to make claims for damages directly on the states, but only on officials acting under color of state law.[261] In short, its case law is a poor analogical predicate for anything on the federal level other than the personal liability of federal officials.

The fact remains, however, that some wrongful conduct on the part of federal officers acting within the scope of their employment lies beyond the FTCA and all the meritorious claims statutes on the books. Does constitutional due process require at least some administrative channel of relief against them? That is the challenge posed by Parratt v. Taylor projected onto the federal level. Sovereign immunity is not an adequate answer, for while it may bar access to the courts on an FTCA-exempt claim, it says nothing about the existence of a constitutional right to an agency hearing on the claim. Yet, there is obviously no point in mandating a procedural due process hearing at the agency level when the agency has no authority to redress the claim even if it is founded.[262] In order to ensure a meaningful agency hearing on tort claims falling outside the scope of the FTCA, one would first have to assert that the Constitution requires the federal government to redress at the agency level, if not necessarily in court, all tortious injury it causes; only then might one ask whether under the circumstances the relevant agency-level procedures, if any, meet minimal due process standards. Not too many years ago, one could scarcely imagine calling into question the constitutionality of the FTCA, given its sweeping definition of tortious conduct based on state law, its broad combination of administrative and judicial redress for torts committed by the government, its generous statute of limitations, and the absence of any fixed ceiling on damages. Parratt v. Taylor and

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[261] Quern v. Jordan, 440 U.S. 332, 341-45 (1979); Alabama v. Pugh, 438 U.S. 781, 782 (1978); Edelman v. Jordan, 415 U.S. 651, 675-77 (1974).

[262] The situation may be different where Congress specifically authorizes an agency of the federal government to entertain certain monetary claims. In such instances, the courts have addressed the question whether the agency's claim procedures are consonant with procedural due process. E.g., Gerritson v. Vance, supra note 143 (State Department foreign tort claims procedures are constitutionally adequate). In fact, where they view a particular claims statute as conferring an entitlement, the courts may impose far-reaching procedural constraints in the name of due process. See supra note 155 and cases cited therein (Federal Prison Industries Act confers on federal prisoners an entitlement to compensation for their work-related injuries secured by a procedural due process right to a trial-type hearing).

other developments in the Section 1983 context have changed this, at least so far as agency-level due process is concerned. Still, the Constitution does not unquestionably require the federal government to answer for its torts or to do so in a way that satisfies administrative due process.

I am aware of no serious challenge to the constitutionality of the FTCA's various exemptions as such, but the claim has been made that federal government liability for constitutional torts is itself a substantive constitutional imperative. Jaffee v. United States[263] represents such a claim. The petitioner there asserted that the government deliberately violated rights guaranteed by the First, Fourth, Fifth, Eighth and Ninth Amendments when it ordered him and other soldiers to stand in an open field near the site of a nuclear blast without the benefit of any protection against the resulting radiation. Alleging that his exposure to radiation caused him to develop inoperable cancer, Jaffee sought money damages from the United States, as well as an order directing it to warn all persons like himself about the medical risks they face and to provide or subsidize their medical care.

Recognizing that the Feres doctrine bars an FTCA remedy, Jaffee argued as an alternative that the courts should create an exception to the doctrine of sovereign immunity for the deliberate violation of constitutional rights. He put the challenge to sovereign immunity squarely on constitutional terrain, as indeed he had to, contending that "the applicable common law doctrine of governmental immunity must yield to the paramount necessity of vindicating constitutional guarantees." But the court flatly declined to carve even so limited an exception to the doctrine of sovereign immunity to suit in tort. "We believe that power lies only with the Congress."[264]

To be sure, Jaffee did not basically allege a deprivation of due process in the procedural sense, as in Parratt v. Taylor. That is to say, he did not question the procedural adequacy of the administrative remedies at his disposal,[265] though in fact they most likely did not

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[263] 592 F.2d 712 (3d Cir.), cert. denied, 441 U.S. 961 (1979).

[264] Id. at 718. Every other court to address the question has likewise agreed that only Congress can waive the sovereign's immunity to claims of constitutional tort, and that the Constitution does not by its own force do so. E.g., Garcia v. United States, 666 F.2d 960, 966 (5th Cir. 1982); Brown v. United States, 653 F.2d 196, 199 (5th Cir. 1981), cert. denied, 456 U.S. 925 (1982); Francisco v. Schmidt, 532 F. Supp. 850, 855 (E. D. Wis. 1982); McKnight v. Civiletti, 497 F. Supp. 657, 660 (E. D. Pa. 1980); Thornwell v. United States, 471 F. Supp. 344, 348 (D. D.C. 1979).

[265] The court itself, however, referred to the "rather comprehensive system of benefits for military personnel and definite and uniform

(Footnote Continued)

provide the relief he sought. Jaffee simply asserted the right to present his demands to a court of law. The opinion, however, still stands squarely for the proposition that constitutional considerations do not override Congress' discretion in deciding whether and upon what conditions to provide a damages remedy against the United States, and it probably means to pay no less respect to the administrative than to the judicial mechanism that Congress chose to establish when it enacted and amended the FTCA. In fact, virtually every court has concluded that Congress did not intend by enacting the FTCA to provide a remedy for the violation of federal constitutional rights,[266] and by implication was not obliged to do so.[267] In this respect, the FTCA differs from the Tucker Act, a statutory waiver of sovereign immunity commonly associated with the constitutional requirement of just compensation for the taking of private property for public use.[268] That courts and litigants have summoned extraordinary ingenuity in transforming constitutional into

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(Footnote Continued)
compensation for injuries or death of those in armed services, in addition to medical and hospital treatment." 592 F. 2d at 716.

[266] Brown v. United States, 653 F.2d 196, 201 (5th Cir. 1981), cert. denied, 456 U.S. 925 (1982) (arrest without probable cause and false testimony to grand jury); Contemporary Mission, Inc. v. USPS, 648 F.2d 97, 104-05 n. 9 (2d Cir. 1981) (harassment of members of charitable corporation due to their religious beliefs); Birnbaum v. United States, 588 F.2d 319, 327-28 (2d Cir. 1978) (CIA covert mail opening operations); Norton v. United States, 581 F.2d 390, 394 (4th Cir.), cert. denied, 439 U.S. 1003 (1978) (FBI search in alleged violation of 4th Amendment); Martinez v. Winner, 548 F. Supp. 278, 332 (D. Colo. 1982); Francois v. United States, 528 F. Supp. 533, 536 (E.D. N.Y. 1981); Barlow v. AVCO Corp., 527 F. Supp. 269, 272 (E.D. Va. 1981); Liuzzo v. United States, 508 F. Supp. 923, 933 (E.D. Mich. 1981). The usual reasoning is that the FTCA, by incorporating "the law of the place where the act or omission occurred" (28 U.S.C. § 1346(b)(1976)), necessarily excludes federal constitutional law as such. Socialist Workers Party v. Attorney General, 463 F. Supp. 515, 516, 519 (S.D. N.Y. 1978). Cf. Carlson v. Green, 446 U.S. 14, 23 (1980). Contra Founding Church of Scientology v. Director, FBI, 459 F. Supp. 748, 753 (D. D.C. 1978).

[267] Birnbaum v. United States, supra note 266, at 328 (reading the FTCA to encompass federal constitutional law "might be tantamount to a bypass of the sovereign immunity of the United States without the consent of Congress"). See also Norton v. United States, supra note 266, at 393.

[268] Montalvo v. Graham, 390 F. Supp. 533, 534 (E. D. Wis. 1975); Leesona Corp. v. United States, 599 F.2d 958, 964 (Ct. Cl. 1979).

common law torts,[269] where useful for stating a cause of action cognizable under the FTCA, does not affect the principle of the matter.

This is not to say that the Constitution furnishes no basis for a damage remedy in constitutional tort against a defendant other than the United States.[270] Obviously, the entire Bivens line of cases proceeds on this basis.[271] But, from a strictly theoretical point of view, a tort remedy in damages against federal officials, rather than the United States as such, can be derived from the Constitution without implicating sovereign immunity. In fact, a majority of the Supreme Court clearly believes that whatever deficiencies the Federal Tort Claims Act may present with respect to constitutional torts, the solution lies not in presuming to waive the sovereign's immunity to suit, but in insisting on the availability of a Bivens action against federal officials personally as an alternative remedy.[272] Judging by the steady succession of bills entertained by Congress over the last several sessions to expand the FTCA to encompass constitutional torts and thereby displace Bivens suits,[273] Congress itself evidently believes that neither the language of the FTCA as it now stands nor the bare force of the Constitution compels that result. If, as I expect, the FTCA amendments eventually will be enacted, the procedures that govern administrative settlement under the Act will become only that much more important. It is to those procedures that I now turn.

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[269] In Birnbaum, supra note 266, the court finally awarded damages under the FTCA for the CIA's mail opening activities on the basis of New York's common law protection against intrusion on personal privacy through the opening and reading of sealed mail.

[270] Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 395 (1971), holding that "damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials."

[271] "However desirable a direct remedy against the Government might be as a substitute for individual officer liability, the sovereign still remains immune to suit." Id. at 410 (Harlan, J., concurring). Compare Holloman v. Watt, 708 F. 2d 1399, 1402 (9th Cir. 1983) (sovereign immunity no defense to a Bivens suit). Accord Garcia v. United States, 538 F. Supp. 814, 816 (S.D. Tex. 1982).

[272] Carlson v. Green, supra note 266, at 20-23.

[273] See Administrative Conference of the United States, Recommendation 82-6, Federal Officials' Liability for Constitutional Violations. 1 CFR § 305.82-6 (1984).

Chapter Three

ADMINISTRATIVE SETTLEMENT UNDER THE FEDERAL TORT CLAIMS ACT: THE STATUTORY FRAMEWORK

Long before the Federal Tort Claims Act was enacted in 1946,[274] the notion of administrative settlement of tort claims already had gained a certain measure of legitimacy. Through a strikingly haphazard collection of statutes, the survivors among which are mostly mentioned in Chapter Two, Congress had authorized this or that agency to settle, and in some instances pay, a certain category of claims under a given set of conditions and circumstances. In 1922, the Small Claims Act gave settlement authority to all agencies, though its limitations were severe.[275] An early set of Federal Tort Claims bills in the Twenties and Thirties contemplated a predominantly administrative model for implementing the much more general liability in tort that Congress by that time had come to consider it only fair and just to assume.[276] One bill that actually passed both houses of Congress in 1929, but failed of executive approval, provided for a sharing of responsibility for the handling of tort claims among the General Accounting Office, the Employees' Compensation Commission and the agencies themselves; recourse to the Court of Claims was limited to property damage claims only and put squarely on a review rather than a de novo basis.[277] Every indication was that the eventual Federal Tort Claims Act would furnish an essentially administrative remedy.

This was not to be the case. A second series of bills leading up to the FTCA looked in a different direction. It contemplated a basically judicial model for the disposition of tort claims, with authority vested variously in the district courts and/or the Court of Claims;[278] the agencies received authority to dispose only of those tort claims that were judicially cognizable, and then only within the strictest of monetary limits. This litigation-oriented model was, of course, the shape that the FTCA eventually took.

In the end, the 1946 Act permitted the United States to be sued, without limitation as to amount, for the negligent or wrongful acts of

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[274] Legislative Reorganization Act of 1946, tit. 4, §§ 401-24, Pub. L. No. 79-601, 60 Stat. 812-44, codified in 1948 as 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-80.

[275] See text at notes 78-83, supra.

[276] See Gottlieb, The Federal Tort Claims Act: A Statutory Interpretation, 35 GEO. L. J. 1, 2 (1946).

[277] 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).

[278] See Gottlieb, supra note 276, at 3.

its employees acting within the scope of their employment, and it authorized the Attorney General to compromise and settle such suits. For their part, the heads of federal agencies might only settle administratively those claims not exceeding $1000,[279] a figure later raised to $2500 to correct for inflation.[280] More important, the decision to submit to the agency a claim even within that limited category remained entirely optional with the claimant, and having done so, the claimant still might, on fifteen days' written notice, withdraw the claim from agency consideration and bring suit.[281] In that event, the only effect of having filed a prior administrative claim was to make the amount of that claim, barring special circumstances, a ceiling on the sum that might be sought in court -- a restriction that itself could scarcely help but discourage many a prudent claimant from turning to the agency in the first place. All in all, the final architects of the FTCA evidently had in mind a very modest role for administrative settlement in the larger scheme of things.

Agency settlement authority under the FTCA was greatly expanded in 1966, when the statute underwent its only major amendment apart from passage of the Drivers Act and a rare alteration of the exemptions. The 1966 legislation, which governed only claims accruing on or after January 18, 1967, gave agency heads claims settlement authority without regard to amount (though subject to prior written approval by the Attorney General or his designee if in excess of $25,000),[282] and, no less important, made submission of claims to the agencies an absolute

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[279] Legislative Reorganization Act of 1946, supra note 274, § 403(a). The $1000 figure referred to the amount of the claim, not to size of any proposed settlement. Acceptance by the claimant of an administrative settlement constituted a complete release of both the United States and the employee. Id. § 403(d).

[280] Act of Sept. 8, 1959, Pub.L. No. 86-238, § 2, 73 Stat. 471, 472 (1959). The Senate Report had urged increasing the limit to $3000, still recognizing that by far 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. The figure of $2500 was a compromise. See generally Williams, The $2500 Limitation on Administrative Settlements Under the Federal Tort Claims Act, 1960 INS. L.J. 669, 673 (1960).

[281] 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 happened to expire during pendency of the administrative claim, an additional six months for filing suit became available, starting from the date of mailing of the agency denial or from the date the claim was withdrawn from the agency, as applicable. Legislative Reorganization Act of 1946, supra note 274, § 420. See Williams, supra note 280, at 670-71.

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

prerequisite to suit.[283] The previous $2500 ceiling had rendered satisfactory administrative settlement all but impossible except in modest property damage claims and exceptionally small personal injury claims; for larger claims, however valid, claimants had no choice but to bring suit, with a possibility of negotiated settlement thereafter. The decision to impose an exhaustion requirement, in turn, was based on evidence that claimants tended to bypass the agencies when the administrative settlement process was left optional.[284] Under the FTCA as amended, a claim brought to court safely within the period of limitations on its filing will still be dismissed as premature if not first presented to the responsible agency.[285]

Congress clearly intended by the 1966 amendments to encourage and facilitate disposition of tort claims against the government at the administrative level. Thus, if the original act was designed to ease the burdens of government tort claims on Congress by shifting primary responsibility for disposing of them to the courts,[286] the 1966

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[283] Id. § 2, amending 28 U.S.C. § 2675(a). The only exception to the exhaustion requirement is for the assertion of tort claims by way of third party complaint, cross-claim or counterclaim, all in deference to considerations of judicial economy. But the courts have limited the counterclaim exception to compulsory counterclaims (Northridge Bank v. Community Eye Care Center, Inc., 655 F. 2d 832, 836 (7th Cir. 1981); United States v. Chatham, 415 F. Supp. 1214 (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. Note, Notice of Claims Provisions: An Equal Protection Perspective, 60 CORNELL L. REV. 417 (1975).

[284] 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. 18 (1966).

[285] 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. 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).

[286] 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").

amendments sought to transfer much of the burden in turn to the agencies. Legislative history suggests, however, that the benefits of avoiding unnecessary litigation, with its attendant expense and delay, were also expected to flow to claimants, to the Department of Justice, and even to the agencies themselves.[287]

The basic changes just outlined required an adjustment in the statute of limitations. The original act required that a claim be taken directly to court within one year of accrual. If a claimant chose first to present a claim, necessarily for $1000 or less, to the agency, that too had to be done within one year. If no administrative settlement was reached, the claimant had an additional six months from the mailing of the denial or withdrawal of the claim in which to sue, if the limitations period would otherwise have expired sooner.[288] With the 1966 amendments, the limitations period, extended as of 1949 to two years,[289] was made applicable to the mandatory administrative claim, subject to the additional requirement that suit, if any, be brought no later than six months following the agency's mailing of a written notice of final denial of the claim.[290] As before, failure to meet the FTCA's time limitations would deprive the federal courts of jurisdiction over any suit based on the claim.[291]

To help enforce the jurisdictional prerequisite, Congress retained the provision of the original act to the effect that no demand forming the subject of an administrative claim could be sued upon until the agency had taken action on it,[292] while dropping the provision that a

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[287] S. REP. NO. 1327, 89th Cong., 2d Sess. 2-5 (1966), quoting from H.R. REP. NO. 1532, 89th Cong., 2d Sess. 6-10 (1966), and reprinted in 1966 U.S. CODE CONG. & AD. NEWS 2515-20; Hearings, supra note 11, at 12-15 (Statement of John W. Douglas, Assistant Attorney General).

[288] See supra note 281.

[289] Act of Apr. 25, 1949, 63 Stat. 62 (1949), amending 28 U.S.C. § 2401(b). Legislative history suggests the purpose of bringing the statute of limitations more closely in line with analogous state statutes of limitation on tort claims. H.R. REP. NO. 276, 81st Cong., 1st Sess. 2 (1949), reprinted in 1949 U.S. CODE CONG. & AD. NEWS 1226, 1227.

[290] Act of July 18, 1966, supra note 282, § 7, amending 28 U.S.C. § 2401(b).

[291] E.g., Stewart v. United States, 655 F.2d 741, 742 (7th Cir. 1981); Kielwien v. United States, 540 F.2d 676, 679 (4th Cir.), cert. denied, 429 U.S. 979 (1976); Best Bearings Co. v. United States, 463 F.2d 1177, 1179 (7th Cir. 1972). The requirement, being jurisdictional, is not waivable. Id.

[292] 28 U.S.C. § 2675(a) (Supp. 1983). The bar to suit during this (Footnote Continued)

claimant might, upon fifteen days' notice, absent prior agency disposition, withdraw a pending claim from agency consideration and commence suit.[293] Congress also dealt with a possible failure by the agency to dispose of a claim within six months after the administrative filing. Should that occur, a claimant might at his or her option either treat the failure 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.[294]

The amendment package contained a few additional elements designed to facilitate tort claim settlements in general. It conspicuously eliminated the original requirement of court approval of litigation settlements by the Attorney General.[295] More important though, for present purposes, were changes in allowable attorneys' fees. Specifically, the amendments raised the statutory ceiling on fees from ten to twenty percent of the amount recovered in the case of agency level settlements, and from twenty to twenty-five percent in judgments and litigation settlements.[296] Thus, while increasing allowable fees across the board, in order to bring them more in line with fees in

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(Footnote Continued)
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 North America 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).

[293] Act of July 18, 1966, supra note 282, § 3.

[294] 28 U.S.C. § 2675(a) (Supp. 1983). 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 FTCA, 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, at 42.

[295] Act of July 18, 1966, supra note 282, § 3, amending 28 U.S.C. § 2677. Justice Department determinations to settle were evidently rarely overruled. H.R. REP. NO. 1532, supra note 287, at 4, quoted in 1966 U.S. CODE CONG. & AD. NEWS 2521; Jayson, Federal Tort Claims Act Amendments: Trial Counsel Warns Problems Ahead, 2 TRIAL MAG. 19 (1966).

[296] Act of July 18, 1966, supra note 282, § 4, amending 28 U.S.C. § 2678. The increase was meant to help afford claimants competent representation and, a related matter, their attorneys reasonable compensation.
An unanswered question is the allowable fee in cases of no recovery. See text at notes 772-74, infra.

private tort litigation,[297] the reform also noticeably narrowed the gap in fees as between administrative and litigation channels, notwithstanding the generally much greater time and effort required by the latter. The increased incentive to settle prior to suit is obvious. As a related matter, fees were made "a matter for determination between the litigant and his attorney;"[298] agency approval of fees was no longer needed in administrative settlements, nor Justice Department or court approval in litigation settlements.

Probably no less important is the change brought about by the 1966 amendments in the source of payment of tort claim settlements. The FTCA originally provided that administrative settlements, then limited to claims not exceeding $1000 (later $2500), were to be paid out of agency appropriations, as indeed were settlements of larger claims to which only the Attorney General could consent after suit.[299] Under the amended act, agency-level settlements not exceeding $2500 continue to be so paid,[300] but larger ones (as well as all litigation settlements) come out of the so-called Permanent Indefinite Appropriation, otherwise also known as the judgment fund.[301] This seemingly curious situation -- agencies enjoying unlimited settlement authority, subject only to Attorney General approval of settlements upwards of $25,000, without having actually to pay for any but the very smallest among them -- was clearly calculated to strengthen the disposition of the agencies to settle.[302]

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."[303] The genesis of this provision evidently was some concern expressed at hearings on the amendments that the government would not necessarily have legal

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[297] H.R. REP. NO. 1532, supra note 287.

[298] Id.

[299] Legislative Reorganization Act of 1946, supra note 274, § 403 (c). The agencies thus paid all but actual judgments.

[300] However, the $2500 cutoff now refers to the size of the settlement rather than the amount of the claim.

[301] 28 U.S.C. § 2672 (Supp. 1983); 31 U.S.C. § 1304(a) (1983).

[302] This measure of fiscal irresponsibility on the part of the agencies -- the negative side of the coin, if you will -- has not apparently been a major cause of concern to Congress or to the General Accounting Office, more particularly. The question whether the heightened potential for collusion between agency and claimant has been exploited remains unexplored.

[303] Act of July 18, 1966, supra note 282, §§ 1, 9(a), amending 28 U.S.C. § 2672.

representation during settlement proceedings, and some hope that the Attorney General, through the regulations he prescribed, would provide some substantive legal guidance.[304] In fact, the regulations actually promulgated do practically nothing of the kind; their answer, so far as substantive legal issues go, is to instruct the agencies to submit all proposed settlements in excess of $5000 to review by one of their legal officers.[305] A second underlying concern was that agency settlement policies and procedures might vary widely from one agency to the next. Again, contrary to expectations voiced by some at the time,[306] the Justice Department has not used its rulemaking authority under the amended FTCA to provide the agencies with guidance on substantive issues, but confined itself to largely procedural matters. However, considering the by now substantial body of judicial interpretation of the statute, and the effective incorporation of the local substantive law of torts, agency officials can scarcely be said to be without moorings.

Even before the vast new settlement opportunities that came their way in the wake of the 1966 amendments, the agencies had played a crucial role in the investigation and initial evaluation of claims. Quite apart from the accident reports they routinely prepare in the event of a known mishap, whether a tort claim happens to come of it or not, 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. The fact remains, however, that the amendments brought the agencies a measure of autonomy in claims evaluation to which few were accustomed, and some critics at the time seriously questioned whether agency legal staffs were equipped to handle their new responsibilities.[307] The amendments brought a no less dramatic change for claimants and private practitioners handling federal tort claims. A claims officer attached to the agency, but often at a considerable geographic remove from the events, supplanted the local Assistant United States Attorney as their primary negotiating partner.

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[304] Hearings, supra note 284, at 14-15, 17.

[305] 28 C.F.R. § 14.5 (1983). 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: a novel legal issue or policy question, a potential government claim to 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. 28 C.F.R. § 14.6 (b),(c) (1983).

[306] Jacoby, The 89th Congress and Government Litigation, 67 COLUM. L. REV. 1212, 1214 (1967).

[307] I GOTTLIEB, A NEW APPROACH TO THE HANDLING OF TORT CLAIMS AGAINST THE SOVEREIGN 28-29 (1967). See infra note 314.

The FTCA administrative claims process still betrays in many important ways its origins as a fundamentally judicial remedy in tort. As already noted,[308] the general consensus is that agencies enjoy no broader substantive authority under the FTCA to issue an award than Congress conferred on the courts. From a procedural point of view, Congress seems to have thought chiefly in terms of advancing the settlement[309] of tort disputes in time from postlitigation to an earlier stage, rather than establishing some entirely self-standing administrative process. Yet agency handling of tort claims has taken on since 1966 a substantial life of its own, at least in a procedural sense. It has become one of the conventional responsibilities of an agency's office of general counsel and, especially in agencies with a high claims volume, a highly professionalized and standardized operation. 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 once put it, "more than a perfunctory exercise that serves merely as the necessary springboard for a judicial claim."[310]

Any precise assessment of the extent to which the 1966 amendments have achieved their goal of shifting disposition of government tort claims from court to agency would be difficult to make, though substantial gains have been widely reported.[311] A proper evaluation requires a clear sense of the drafters' purposes and expectations. Statistics made available by the Justice Department in connection with the 1966 hearings suggested that roughly eighty percent of all meritorious FTCA claims in litigation were in fact settled prior to trial.[312] The Department did not offer statistics on the incidence of prelitigation settlements, but given the then $2500 (previously $1000) ceiling on agency settlement authority, one can safely assume that all substantial settlements were being reached, at the earliest, only after suit had been begun.[313] In recommending passage of the 1966 amendments,

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[308] See text at notes 92-94, supra.

[309] See infra note 314 and accompanying text.

[310] Axelrad, Litigation under the Federal Tort Claims Act, 8 LITIGATION 22, 24 (1981).

[311] Id. at 24, 55; Pitard, Procedural Aspects of the Federal Tort Claims Act, 21 LOY. L. REV. 899 (1975).

[312] S. REP. NO. 1327, supra note 287, reprinted in 1966 U.S. CODE CONG. & AD. NEWS 2518. See also Laughlin, Federal Tort Claims Act Amendments: A New Charter for Injured Citizens, 2 TRIAL MAG. 18 (1966).

[313] However, in some agencies the volume and settlement rate of claims amenable to administrative settlement was impressive. In 1965, the Post Office processed over 5000 claims in the dollar range of $100 to $2500, allowing 3800 of them. (This does not take into account the

(Footnote Continued)

the Department clearly anticipated that many settlements reached only after litigation might be moved forward in time.[314] It adduced New York City statistics on private tort litigation showing that only forty percent of personal injury claimants actually proceed to litigation, the rest either settling or abandoning their claims at an earlier point.[315] Settlement at the administrative stage was expected to rid congested court dockets of many claims that, in the private tort claim sector, would not likely have gotten that far. The Department's immediate purpose may have been to husband its litigation resources, particularly the time of the United States Attorneys who most often represent the agencies in tort litigation;[316] but the advantages to deserving claimants in time and expense saved are no less obvious. What is more, the benefit cannot be measured entirely in terms of expedited settlement. It stands to reason that an ample agency claims process might also effectively demonstrate the weakness of a claimant's case, or the strength of the government's defense, and in that way cause many losing suits never to be brought.[317] Only slightly more questionable, from a factual and a policy point of view, is the possibility that more spacious settlement opportunities at the agency level actually encourage the filing of an additional quantity of meritorious claims which, if litigation were the only avenue, would not likely be pressed. Yet for all their enthusiasm over agency-level settlement, evidently neither the

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(Footnote Continued)
allowance by field officers of an additional 5200 claims of less than $100.) S. REP. NO. 1327, supra note 287, reprinted in 1966 U.S. CODE CONG. & AD. NEWS 2519.

[314] The stated prediction did not go 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 307, at 29 (1967).

[315] S. REP. NO. 1327, supra note 287, reprinted in 1966 U.S. CODE CONG. & AD. NEWS 2518. Note, however, that the New York City statistics did not distinguish meritorious from nonmeritorious claims, nor provide a breakdown as between abandonment and prelitigation settlement. Of the forty percent of claims litigated, less than ten percent went to trial and three percent actually to judgment. Id.

[316] It was hoped that Justice Department resources in the tort area might 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 287, reprinted in 1966 U.S. CODE & 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 312, at 38.

[317] Hearings, supra note 284, at 15 (Statement of John W. Douglas, Assistant Attorney General).

Justice Department nor Congress anticipated that all or even necessarily a substantial majority of claims could ever be disposed of short of litigation.[318]

To what extent have these expectations been met? Unfortunately, nowhere in government are there maintained the kind of tort claim filing and settlement statistics that would justify a precise appraisal. Whatever else they may state, the recommendations that come out of this report unquestionably should call for the development of much more complete and refined statistics than are now available.[319] In a nutshell, each agency should be able to tell for any given fiscal year the volume and dollar value of administrative tort claims filed, broken down as appropriate by type of claim and by the agency program or activity involved. They should then know the percentage, both in numbers and dollar values, of those same claims that in the course of the administrative process, however long it may have taken, were eventually settled (with amounts), were denied or deemed denied, or were abandoned, again with a breakdown by claim type and agency program or activity. No agency with which I am familiar has this kind of information on its own claims operations. Nor is it the kind of information that the Justice Department or even the General Accounting Office can possibly develop on a government-wide basis if the agencies do not furnish them with the underlying data. Without this information -- which should have a good deal of incidental interest for risk management and other purposes to the agencies that generate them[320] -- no agency can have a true sense of the efficacy of its claims processes; and it certainly cannot begin to correlate administrative with judicial outcomes for any given body of claims. To this end, I would urge that data be collected showing the percentage, again by number and dollar value and again broken down by category, of those administrative claims from each original universe of claims that were denied or deemed denied and that then went on to litigation, and of those the percentage that eventually ended up in compromise settlement or judgment, by amount. True, the inferences to be drawn from the resulting correlations may not always be obvious or unambiguous, but without correlations no inferences can be drawn at all.

At present, even agencies with the best documentation maintain operations data that are entirely segregated by fiscal year or other

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[318] 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 312, 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.

[319] See also text at notes 719-724, infra.

[320] See text at note 719, infra.

fixed time period, so that one cannot even begin to track and analyze over time the destiny of a given universe of claims. It may be interesting -- and from a fiscal point of view crucial -- to know how many claims were filed in a given fiscal year, how many claims were settled and how many denied in the same fiscal year, how many claims went to court, and how many to compromise settlement or to judgment, again in that same fiscal year -- and to have the corresponding dollar values -- but those data do not deal with a single set of original claims, but rather claims that had their genesis in filings spread out unevenly over that fiscal year and four or five earlier ones at least; and they ignore claims that, whatever their year of origin, did not happen to have their decisive moment in the fiscal year in question. The difference, in a word, is between a static and a dynamic picture of tort claims events. And in agencies with erratic yearly claim patterns, which to some extent is all of them, distortions inevitably result.

Given the relatively unscientific character of the claims data that we do have, what are we to make of them? Let me give one example. The Air Force in fiscal year 1982 received 1727 administrative filings under the FTCA, totaling $741,319,922. In the same period it settled 1143 claims, totaling $17,544,161. 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 before fiscal year 1983, we cannot properly speak of a fiscal year 1982 Air Force settlement rate. But assuming we could, the figures would be impressive: sixty-six percent of the number of claims filed were finally disposed of by payments representing a tiny fraction (barely over two percent) of the amounts initially sought.[321] As for a comparison with litigation settlements and judgments reached in fiscal year 1982, the impression is still very favorable. Some payment was made on a mere 89 claims at that stage,[322] though the dollar value was disproportionately high: $113,178,587. Similar logically flawed settlement rates could be contrived for several of the other agencies, with broadly similar results.[323] The evidence, for what it is worth,

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[321] By way of additional example, the Veterans Administration settled some 156 medical malpractice claims administratively in fiscal year 1982, paying out some $6.2 million. In the same period, it received claims totalling $775 million.

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

[323] For example, 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

(Footnote Continued)

suggests that the administrative process resolves an extremely high proportion of claims worth paying,[324] one that compares very favorably with those New York City statistics apparently held up by the Justice Department in 1966 as a model to which the federal government should aspire.[325] The fact that the per claim dollar value of postlitigation settlements and judgments greatly exceeds the per claim dollar value of prelitigation settlements[326] is itself hardly surprising, since the larger the claim the more likely claimant and government alike (not to mention claimant's attorney) will view it as worth litigating. In any event, the more relevant figure, so far as the legislative purpose behind the 1966 amendments goes, is probably the number rather than the dollar value of claims, and in this respect the administrative process certainly appears to be vindicating itself handsomely.[327]

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judgments (32 in number). The Postal Service successfully defended to judgment 188 tort suits.

[324]The figure is even 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 text at notes 522-23, infra.

[325]See supra note 315 and accompanying text. The Chief of the General Claims Division of the Army Claims Service guesses that of the roughly 5000 to 6000 tort claims filed with the Army annually in recent years only ten percent end up in court and, of course, many fewer in an actual judgment.

[326]In fact, 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, GAO reports 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 we added to the administrative settlement total the government-wide value of agency level settlements not in excess of $2500 none of which is reported by the agencies to the GAO. (An additional $4 million was paid out of the judgment fund in fiscal year 1983 in that portion of individual agency-level settlements under the Military, Foreign and National Guard Claims Acts in excess of $25,000.)

[327]In this respect, adding agency level settlements not in excess of $2500 to the numbers compiled by GAO would doubtless have a dramatic effect since, by all accounts, they are quite voluminous. 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.

What is more, the discussion thus far has not even begun to take into account the utility of the agency level claims process in exposing the more or less meritless character of most of the claims that are filed administratively, denied or deemed denied, and taken no further. Figures furnished me by a few agencies suggest that such claims represent a considerable percentage of all claims filed.[328] To what extent such claims might have fruitlessly clogged the courts if not for their ventilation at the agency level, one can only guess. At any rate, we stand to learn a good deal from gathering and analyzing data on what claimants do in the wake of an outright agency-level denial.[329] Arguably, the greater the tendency of disappointed claimants to accept such results, the greater their probable confidence in the fairness and accuracy of the administrative process.

Assuming that administrative procedures under the FTCA, as was hoped, are diverting large numbers of tort claims from litigation

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[328]For example, data gathered for me 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. And the Chief of General Claims at the Army Claims Service, who has as much experience in claims management as anyone with whom I spoke, thinks that disappointed claimants are on the whole as likely to accept defeat as to litigate.

Yet, other agency claims attorneys insist that upwards of ninety percent of claimants receiving agency level denials proceed to court. I have been given no data to support such an assertion and I find it 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. If the overwhelming majority of disappointed agency level claimants in fact sued, I think we would find a much larger ratio of FTCA lawsuits to FTCA administrative claims than we seem to have. Given the absence of reliable filing figures on a complete agency by agency basis, no accurate ratio can be posited; but informal estimates both in the literature and in my conversations would certainly put the ratio at no more than one to ten and more likely at one to fifteen or twenty. Writing 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, HANDLING FEDERAL TORT CLAIMS, p. 1-8 (1984). 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.

[329]Denials due entirely to a failure to agree on a settlement sum presumably trigger litigation.

channels,[330] one would still like to have a better idea of the range and distribution of agency-level outcomes. Ballpark figures are mostly all we have, and they vary considerably. At the high end, for example, a Department of Interior attorney supposes that seventy-five percent of all claimants achieve an agency-level settlement, and one that as often as not approaches the amount initially claimed. Evidently, the Postal Service enters into monetary settlements in at least as high a percentage of the time, though the individual amounts involved tend to be lower, and the differences between recovery and initial demand greater, than the Interior Department experiences.[331] At the other extreme, Veterans Administration attorneys place at only some twenty-five percent the portion of total yearly tort claims resulting in final settlements at the agency level.[332] This figure doubtless reflects the relatively high incidence of very large and often very speculative medical malpractice claims in that agency's claims diet,[333] as compared with that, say, of the Postal Service, which is heavily weighted toward the generally more modest and routine slip-and-falls and fender benders. Most of the agencies I examined -- including the armed services, the Federal Bureau of Investigation and the Agriculture and State Departments -- put settlement rates generally somewhere in between.[334]

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[330] See supra note 328, and figures cited therein. If administrative claims estimates are correct, the agencies are managing to dispose of as high a percentage of claims as ever, if not higher, 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 312, at 38.)

[331] 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.

Of course, settlement rates may vary within a given agency depending on the locus of authority. Thus, 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.

[332] 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.

[333] See infra note 543.

[334] 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

(Footnote Continued)

But claims officers are also quick to point out that the settlement rate of a given agency can fluctuate widely as one looks successively at different claims subsets, whether organized by dollar value or type of claim. Take the National Aeronautics and Space Administration. 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. The Department of Agriculture shows a wide disparity in the percentage of claims honored as between the rising number of regulatory and program-related torts, on the one hand,[335] and the more conventional vehicular accident claims, on the other. This point only confirms the importance of having data that are refined as well as accurate and comprehensive.

Taken together, this bundle of data and impressions suggests that the administrative claims process is largely achieving its intended purpose, and that Congress' faith in the agencies was not generally misplaced. Whether each agency exploits the process to its full potential is, of course, another matter and one that lies well beyond the capacities of this writer to gauge and probably beyond anyone's capacity until such time as the agencies maintain adequate data. At this point in the report, a less macroscopic viewpoint seems in order. The two chapters that follow explore the specific procedures by which agencies handle the tort claims that come their way, mostly under the Federal Tort Claims Act. Chapter four outlines and critiques the regulatory framework that governs agency administration of the Act. Chapter five looks more closely at particular agency practices within that framework.

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about evenly, though the dollar values not surprisingly do not. A table of general claims, which may include non-FTCA matters, suggests that the percentage of claims paid administratively to claims filed administratively in recent fiscal years has ranged between thirty and forty, though this is another example of the use of a noncomparable claims data base.

[335] The theme is echoed by others, including a chief claims attorney at the Federal Bureau of Investigation. 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.

Chapter Four

ADMINISTRATIVE SETTLEMENT UNDER THE FEDERAL TORT CLAIMS ACT: BASIC LEGAL ISSUES

The preceding chapter described the origin and contours of the administrative claim process under the amended Federal Tort Claims Act. The statute essentially requires that a claimant, prior to filing suit under the FTCA, present his or her claim to the appropriate federal agency and allow the agency a six-month period of time in which to consider it. If the agency finally denies the claim, the claimant has six months from the date of mailing of the letter of denial in which to bring suit. On the other hand, should the agency fail to act on the claim within the time allotted it, the claimant may exercise the option anytime thereafter of deeming such failure a denial of the claim and proceed to court. As the dimensions of this chapter suggest, within this apparently simple and straightforward statutory framework lurk a host of legal issues.

A. The Prior Claim

An exhaustive survey of litigated cases under the Federal Tort Claims Act shows that the statutory prior claim requirement has been a cause of needless confusion and occasional injustice to claimants;[336] many more instances doubtless never reach the courts and pass essentially unrecorded. But though this chapter dwells at length and in detail on the recurrent difficulties, I do not believe that experience implicates either the basic value of the prior claim requirement or the way agencies have generally gone about implementing it. Improvement in most respects may require no more than a fine-tuning of agency practices and some reconsideration of the Attorney General's regulations.

In most cases where an FTCA plaintiff is met with a jurisdictional defense based on the failure ever to file an administrative claim, he or she did not in fact purport at the time of the alleged prior claim to be filing one; oftentimes the plaintiff learns of the requirement only after filing suit and attempts at that point to characterize some previous action or communication on his or her part as satisfying it.

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[336] One commentator found 267 reported cases between 1966 and 1982 on the administrative procedures of the FTCA alone. The vast majority had to do with the sufficiency of the administrative claim as a prerequisite to suit. Zillman, Presenting a Claim under the Federal Tort Claims Act, 43 LA. L. REV. 961, 962, n.7 (1983). Critics of the 1966 Amendments had predicted substantial litigation. E.g., Corboy, The Revised Federal Tort Claims Act: A Practitioner's View, 2 THE FORUM 67, 73-74 (1967). See also Silverman, The Ins and Outs of Filing a Claim Under the Federal Tort Claims Act, 45 J. AIR L. & COM. 41, 60 (1979).

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).

The extraordinary range and variety of forms that such purported prior notices of claim have taken -- oral requests to the alleged wrongdoer for restitution or other relief,[337] communications with the United States Attorney,[338] some notice of intent to file a claim,[339] a general letter of complaint,[340] the initiation of state court,[341] workmen's compensation[342] or other state agency proceedings,[342a] and assorted

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[337] 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).

[338] E.g., Lehner v. United States, 685 F.2d 1187, 1189 (9th Cir. 1982); Best Bearings Co. v. United States, supra note 2; Grasso v. USPS, 438 F. Supp. 1231, 1237 (D. Conn. 1977); Turtzo v. United States, 347 F. Supp. 336 (E.D. Pa. 1972).

[339] 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).

[340] E.g., DiLorenzo v. United States, 496 F. Supp. 79, 84 (S.D.N.Y. 1980); Shubert Constr. Co., Inc. v. Seminole Tribal Hous. Auth., 490 F. Supp. 1008, 1011 (S.D. Fla. 1980); Mayo v. United States, 407 F. Supp. 1352, 1354 (E.D. Va. 1976). A much cited example of an insufficient claim is 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 apparently reasoned that the tort of unlawful detainer does not arise under state law until three days of possession beyond service of the Notice have passed and that treating the Notice as a tort claim for FTCA purposes would be to allow notification of a tort before it even occurs.

[341] 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); Landis v. United States, 335 F. Supp. 1321, 1323 (N.D. Ohio 1972). Neither are pleadings in federal court actions normally sufficient administrative tort claims. McWhirter Dist. Co., Inc. 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).

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

[342a] E.g., Hejl v. United States, 449 F.2d 124, 126 (5th Cir. 1971).

other forms of actual or constructive notice to the agency[343] -- itself suggests to me the wisdom of not liberalizing, either by legislative amendment or indulgent judicial interpretation, the present statutory requirement of a claim "in writing to the appropriate Federal agency."[344] 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 statute of limitations that is generous by most any standard.

On the other hand, though the statutory requirement of a prior claim is basically sound, the agencies should not be rigid in enforcing it. Significantly, neither the statute nor Justice Department regulations require that the claim take any particular form; I urge that the agencies also avoid doing so where consistent with the general purpose of the 1966 amendments and not prejudicial to the government's interests in sound claims adjudication. A good example of a situation calling for fairness and flexibility is one in which the claimant applies to the agency for a statutory benefit, or responsibly pursues some other administrative channel, only to learn that the FTCA was the only appropriate remedy under the circumstances. Where the two-year statute of limitations has not yet run, the claimant usually suffers no substantial prejudice in being asked to start over again, as it were. But it can happen that the statute has run.

Illustrative of the difficulty of establishing a general rule for such situations is the case of Gordon H. Ball, Inc. v. United States.[345] The plaintiff was under contract with the United States to construct a new dam on the Snake River in Idaho. As work was about to commence, the Teton Dam failed and the project could not go forward. Well within two years of this 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." Rather than appeal that determination, the plaintiff brought suit under the FTCA. The question arose whether the Teton Dam Disaster benefits application should be considered the equivalent of an administrative claim under the FTCA. If not, the FTCA action would be permanently time-barred.

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[343] E.g., Green v. United States, 385 F. Supp. 641, 644 (S.D. Cal. 1974). For example, an appeal to the Merit Systems Protection Board for a hearing on an alleged wrongful separation from a civil service position has been held not to constitute the filing of a tort claim. Dancy v. United States, 668 F. 2d 1224, 1228 (Ct. Cl. 1982).

[344] 28 U.S.C. § 2401(b) (Supp. 1983). Congress could take a useful precaution, however, by amending 28 U.S.C. § 2675 (Supp. 1983), the prior claim requirement, to make clear, as does 28 U.S.C. § 2401(b), the statute of limitations provision, that the claim must take written form.

[345] 461 F. Supp. 311 (D. Nev. 1978).

Though the case raises the question of how a court rather than an agency should respond to such a situation, like so many FTCA rulings it also carries implications for agency practice. The court in Gordon H. Ball thought it only fair and reasonable to accept an application for benefits as a claim for FTCA purposes where the government's interest in a prompt opportunity to consider the claim in tort has not been prejudiced by the delay. This may depend in turn on the similarity of factual and legal issues as between the tort and other remedy in question. Using this sort of standard, the court may have been correct in declining to treat the FTCA prior claim requirement as satisfied.[346] Liability under the Teton Dam Disaster Assistance Act is without regard to fault or evidently even proximate cause, and the plaintiff's claim under that Act in fact made no allegation of negligence. Agency investigation of most any FTCA claim arising out of the incident, on the other hand, would entail precisely such questions, as would any settlement negotiations to follow. To be sure, the two claims are not radically dissimilar, given their common core of physical damage to private property. Arguably, however, an 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 proceeded under the FTCA in the first place. As a general rule, unless the agency is presented with a claim and a claims context that fairly alert it to the presence of a claim sounding in tort, and otherwise satisfies the bare essentials of an administrative filing under the FTCA, it probably should not be required by the courts to accept it as such.[347]

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[346] Id. at 315.

[347] For instances where courts, without elaborating any particular standard of judgment, reached the probably correct conclusion not to treat a claim for statutory benefits as a prior claim under the FTCA, see Latz v. Gallagher, 562 F. Supp. 690, 692 (W.D. Mich. 1983) (filing of a flood insurance claim with the Federal Emergency Management Agency); Kelly v. United States, 554 F. Supp. 1001, 1004 (E.D. N.Y. 1983) (application for veterans benefits); Vanderberg v. Carter, 523 F. Supp. 279, 282-83 (N.D. Ga. 1981) (claims under CHAMPUS (Civilian Health and Medical Program of the Uniformed Services)); Knight v. United States, 442 F. Supp. 1069 (D. S.C. 1977) (claim for Veterans Administration service-related benefits); Dancy v. United States, 668 F.2d 1224, 1228 (Ct. Cl. 1982) (request for a hearing before the Merit Systems Protection Board to review separation from service through reduction in force.)

A related issue is whether an administrative claim should be construed for settlement or for jurisdictional 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 the additional theory as covered if the agency's investigation of the claim should fairly have revealed the basis of that theory. Bush v. United States, 703 F. 2d 491, 494-95 (11th Cir. 1983); Rooney v. United States,

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Once again, however, what a court requires agencies to do as a matter of law and what agencies should do as a matter of sound and enlightened administrative practice are not entirely the same things. I do not believe that an agency should decline to consider a claim under the FTCA just because it supposes that a court would not insist that it do so. Fixed standards of equivalence between the FTCA and the countless other existing monetary remedies against the government cannot possibly be prescribed. But surely no claim should necessarily be disregarded by an agency for FTCA purposes simply because it fails on its face to designate the Act,[348] or even because it happens to be cast in terms of some other remedy. In the final analysis, the agencies must be left to decide in all fairness whether a timely claim filed with them for other purposes sufficiently enables them to investigate and evaluate the circumstances from a tort perspective.

Of course, applications for statutory benefits are only a single variant of the much more general problem of deciding when communications should fairly be treated by agencies as claims for FTCA purposes. Granted that most oral requests, informal inquiries, and indeed very many applications for different statutory benefits would not in themselves satisfy the jurisdictional prerequisite to a tort suit, agency personnel to whom they are directed or find their way still should, as a matter of sound administrative policy, undertake whenever feasible to inform the private party of the existence of a tort remedy. In this connection, they should advise of the general requirement that a written claim be filed with the agency and make reference to Standard

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634 F. 2d 1238, 1243 (9th Cir. 1980); 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). 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. United States, 531 F. Supp. 614, 623 (D. Utah 1982); Mellor v. United States, 484 F. Supp. 641, 642 (D. Utah 1978).

[348] 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 for "Application for Relief on Account of Loss, Theft or Destruction of United States Bearer Securities," which necessarily stated a sum certain, preceded by an explanatory letter, deemed a valid FTCA administrative claim). Cf. Santiago Rivera v. United States, 405 F. Supp. 330, 331 (D. P.R. 1975) (letter to VA specifically inquiring whether compensation being paid in the form of VA benefits to relatives of the deceased veteran included compensation for his death resulting from food poisoning at VA hospital is not a valid FTCA claim). The claimant in Boyd was held in later proceedings to have failed to establish actionable negligence by the government. 493 F. Supp. 529, 533 (W.D. Pa. 1980).

Form 95 as a convenient vehicle for doing so.[349] Citing the regulations would also be a convenient way of bringing the statute of limitations and sum certain requirement to the party's attention, though mentioning them specifically would be better yet. These recommendations are in a sense the mirror image of what I recommended in chapter two. Just as agency tort claims attorneys should be encouraged to know something of the other means an agency has for entertaining monetary demands,[350] so should other agency officers -- and not only in the claims and entitlement areas -- be aware of the FTCA and bring it to a party's attention where appropriate. Nothing in the FTCA, the statute of limitations included, suggests that agency personnel act improperly when they take reasonably limited steps to keep someone who has come forward with a potentially deserving claim from innocently failing to perfect a valid FTCA demand. Only an assumption that the relationship between claimant and agency is from the start strictly adversarial[351] -- an assumption I do not share -- would justify an agency in doing any less. What I have in mind certainly does not rise to the level of soliciting claims in violation of law or agency regulation[352] or risk imposing the

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[349] For an example of such action, see Benitez v. Presbyterian Hosp., 539 F. Supp. 470, 472 (D. P.R. 1982), where, upon receiving from the plaintiff a letter expressing the view that she was damaged by her husband's death due to negligence of a Veterans Administration Hospital, the VA district counsel acknowledged receipt of the letter and enclosed a Standard Form 95 advising her to complete the form so that his office could investigate and evaluate the claim. She never did so. Id. See also 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).

[350] See supra notes 250-51 and accompanying text.

[351] Courts in the past have expressed such an attitude 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 injury. To the argument that the government was already on notice of the possibility of a related claim by the mother, the court made this remark:

> [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).

[352] It is generally a criminal offense for a federal officer or employee to act as agent or attorney for anyone prosecuting a claim

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kind of burdens that detailed assistance in the filing of claims would entail. Since each case necessarily presents unique circumstances, no further generalization would seem to me to be meaningful.

One distinctive and recurring pattern of hardship related to the administrative claim requirement does, however, require comment. I refer to the deserving claimant who is excusably ignorant of the fact that the tortfeasor was a federal officer acting within the scope of employment. The most common scenario involves the government driver who by law may not be sued at all under those circumstances and for whom the federal government, pursuant to the Drivers Act,[353] substitutes itself as sole defendant in any litigation that may be brought and removes the case from state to federal court as if originally filed under the FTCA. Normally, no claim will yet have been filed with the agency. Courts grappling with the inevitable government motion to dismiss for failure to exhaust administrative remedies usually do dismiss the complaint without prejudice in order to allow the filing of an administrative claim where still possible. The rub comes when the FTCA's two-year statute of limitations already has expired.

Since by definition the case now is in federal court, agency claims practice is not itself in issue, except when the claimant then specifically requests the agency to consider the claim and the agency says it is too late to do so. Suffice it to say that most courts by far have shown plaintiffs in this situation precious little sympathy. Understandably, they have declined to treat the state court filing as an administrative claim for FTCA purposes,[354] even when it took place

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against the United States. 18 U.S.C. § 205 (1969). 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. See infra note 576.

[353] 28 U.S.C. § 2679(b)(Supp. 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 (1979) (Veterans Administration); 42 U.S.C. § 233 (1982) (Public Health Service); 10 U.S.C. § 1089 (1983) (armed services); 22 U.S.C. § 2702 (Supp. 1983) (State Department).

[354] 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.
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within two years of accrual, which will not always be the case under longer state statutes of limitations.[355] Somewhat less obviously, timely communications with the government employee personally also have been deemed not to satisfy the requirement,[356] even if the employee may reasonably be assumed to have brought them to the agency's attention, and indeed even though plaintiff actually sent copies of the correspondence to the agency directly.[357] While some more recent decisions question whether the prior claim requirement should apply at all to removals under federal officer immunization statutes such as the Drivers Act,[358] other approaches that more responsibly accommodate all the relevant concerns are readily imaginable.

One would be to give the plaintiff in all Drivers Act suits mistakenly brought in state court a very short additional period of time in which to file an administrative claim. This approach, which in effect rescues the claim with minimal prejudice to the government, figures in the Swine Flu Immunization Act, a statute that likewise made the United States the exclusive defendant in cases that otherwise would be heard against a private defendant normally in state court.[359] A

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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 (10th Cir. 1970) (government as a matter of law became a party to the action as soon as it was filed in state court).

[355]Wilkinson v. United States, supra note 354; Melo v. United States, supra note 354. Meeker v. United States, supra note 354; Flickinger v. United States, supra note 354.

[356]Binn v. United States, 389 F. Supp. 988 (E.D. Wis. 1975).

[357]Driggers v. United States, supra note 354, at 1378-79.

[358]Kelley v. United States, 568 F. 2d 259 (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 (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). 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 v. United States, supra note 354, at 1000.

[359]The statute expressly provided 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
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minor disadvantage of adopting this approach to the Drivers Act situation is that it confers something of a windfall on claimants who are all along, or become early on, aware of the defendant's capacity as a government employee acting within the scope of employment. One recent court decision, seeking to underscore the distinction between the excusably unaware claimant, on the one hand, and the aware and inexcusably unaware claimant, on the other, developed what I regard, however, as an unduly rigid alternative. Under it, the latter category of claimant may not avoid the prior claim requirement, even if the time for filing such a claim has passed, while the former category is not subject to the requirement at all.[360] Apart from the fact that the court would make this categorization as of the time the state court suit began, irrespective of what the claimant came, or should have come, to know shortly thereafter, this policy too readily sacrifices the value of the agency claims procedure as a prior dispute resolution mechanism. I would prefer 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.[361] This places a due measure of responsibility on the claimant and at the same time preserves the advantages of allowing agency consideration of tort claims before they go to court.

B. Presentation of the Claim

This report does not address the question of when a tort claim accrues for purposes of the statutory requirement that it be presented to the appropriate federal agency within two years of its accrual.[362] In the absence of any formal guidance either from Congress or the Justice Department, the courts seem to approach the issue in no substantially different terms than they approach the accrual issue as it affects virtually every claim, in private as well as public litigation, to which a statute of limitations on suit attaches. And though the Supreme Court lately has sought to clarify the ground rules, at least on the vexing problem of accrual in medical malpractice claims,[363] little of its

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file such administrative claim." 42 U.S.C. § 247b (k)(2)(A)(iii) (1976) (emphasis added).

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

[361] Cf. United States v. LePatourel, 593 F. 2d 827, 830 (8th Cir. 1979) (accrual postponed where question whether FTCA covers torts by federal judges is still an open one).

[362] 28 U.S.C. §§ 2401(b), 2675(a) (Supp. 1983).

[363] United States v. Kubrick, 444 U.S. 111 (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 336, at 983-84. Kubrick establishes that federal rather than state law governs the question of accrual under the FTCA.

analysis is unique to the FTCA context or to governmental liability in general.[364]

On the other hand, the Attorney General 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.[365] This gloss on the statutory language would not seem appreciably to lighten the load on the agencies, but on occasion it has served to extinguish an otherwise valid claim mailed to the appropriate agency in the waning days of the two-year limitations period.[366]

From a legal point of view, the Justice Department was probably as free to select a receipt as a dispatch rule, but I think it unfortunate that it has done so. It could just as well have selected the date of postmark of the administrative claim, a standard that is arguably more objective than receipt by the agency. Apart from averting hardship to the occasional claimant whom the wording of the statute has not sufficiently alerted to the risks of an eleventh hour filing, a dispatch rule would avoid a distinctly ungenerous asymmetry in the operation of the statute of limitations. Both the FTCA and the regulations see to it that the six-month period within which suit, if any, must be brought following a final agency denial begins to run from the date the denial is mailed.[367] It would seem, then, that receipt rules do not uniformly enjoy the government's favor, but only when they operate to disfavor the claimant. Significantly, even the most cynical recorded critic of the 1966 amendments -- a plaintiff's attorney alert to the pitfalls to claimants set by the prior claim requirement -- assumed that the Attorney General would, if not for the sake of parallelism, then at least for ease of application, fix the moment of presentation at the date of mailing.[368] He underestimated the government's capacity to resolve procedural ambiguities to its own advantage, however small the scale. Incidentally, accepting the date of mailing as the operative moment for determining the timeliness of a claim does not necessarily shortchange the agencies in the time at their disposal to act upon it; the six-month period given them can easily be made to commence upon their receipt of the claim.

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[364] The Court specifically relied on the FTCA for little more than the observation that Congress intended "the reasonably diligent presentation of tort claims." Id. at 123.

[365] 28 C.F.R. § 14.2(a) (1983).

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

[367] See infra note 502.

[368] Corboy, supra note 336, at 75.

The current regulation, strictly applied by the agencies, also casts upon the claimant the entire risk of loss in transmission of a claim, even where he or she can later satisfactorily prove its timely dispatch. This very risk materialized in a piece of recent litigation that I describe at some length not only to illustrate the potential harshness of a rigid receipt rule, but what strikes me as a certain needless meanspiritedness in its implementation.

In Bailey v. United States,[369] attorneys for 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 for the estate under state law. According to the attorneys, a proper claim was mailed some sixteen months following the accident in question, well within the statute of limitations. Nine months thereafter (that is, just beyond two years from the incident), the attorneys learned of the agency's denial of a companion claim that they had filed with the agency on behalf of a colleague of the decedent injured in the same explosion and that had been under consideration by the agency for twenty-two months.[370] They immediately inquired as to the status of the estate's claim. At that point, the Air Force denied having any record of receiving any such claim and, though the attorneys immediately sent duplicate copies, refused to give it any consideration because by then two years and one month had elapsed since the incident.

The result seems harsh, though technically justified under the receipt rule. The attorneys had waited less than three months from the accident to file the two companion claims which did not require the appointment of a personal representative. Moreover, the Air Force, already entirely familiar with the incident from these other claims, knew perfectly well that a claim for the estate was imminent. In fact, correspondence over the estate's claim -- including submission of an autopsy report, a wage statement, and a funeral bill -- was exchanged between the attorneys and the Air Force between the third and tenth month following the incident. Phone conversations were also had. During that period, the claims officer actually requested and received

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[369] 642 F.2d 344 (9th Cir. 1981). For a similar situation, see Barlow v. Avco Corp., 527 F. Supp. 269, 273 (E.D. Va. 1981).

[370] 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 (Jameson, J., dissenting).

information on the decedent's dependents, earnings and length of employment; 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 himself to "keep counsel advised of the status of [all] the claims."

Obviously, the claim should have been sent by certified or registered mail in the first place. But for this, the claimant, through its attorneys, displayed diligence throughout, among other things by promptly furnishing evidence of the original timely filing upon learning that it had evidently gone astray. Though the Air Force may never have received that claim, it had substantial information concerning it, having investigated the same incident in order to deny the companion claims filed earlier and having received intermittently ample information on the decedent's own losses. In effect, all that was missing was the total amount claimed, and this the claimant promptly resupplied. All in all, to suppose that the government would have been in any way prejudiced under the circumstances by entertaining the duplicate claim one month beyond the limitations period or that doing so amounted to rescuing a claimant that had unreasonably slept on its rights seems quite fanciful. What is more, describing the filing of a prior claim as a "jurisdictional prerequisite," as both the agency and court did in denying the claim any consideration, does not sufficiently address the question whether the claim under the circumstances should have been deemed timely. Most agencies may prefer not to be burdened with the exercise of discretion called for under such admittedly rare circumstances; but, irrespective of what a court may or may not be willing to do for a claimant in such a situation, the agencies should take it upon themselves to enforce the statute in a fair and enlightened manner. In this case, not even a statutory mandate was at stake, for the receipt rule is strictly a Justice Department construction.

Since most incidents giving rise to government tort claims involve a single readily identifiable federal agency, the question rarely arises whether a claimant presented his or her claim to the "appropriate" one, as the Federal Tort Claims Act itself prescribes.[371] Nevertheless, one private practitioner writing about the Act advises attorneys to avert a potential problem by filing a complete claim "against each and every Federal agency which might be involved."[372]

A cursory reading of Justice Department regulations would suggest that the Department in this regard has done what the present report urges it do on a much broader and more consistent basis, namely, frame regulations that eliminate needless obstacles to the effective filing of a claim, where doing so does not substantially prejudice the government or work a result at basic variance with legislative purpose. The

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[371] 28 U.S.C. § 2675(a) (Supp. 1983).

[372] McCabe, Observations on the Federal Tort Claims Act, 3 THE FORUM 66, 78-79 (1967).

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 claim, and [shall] advise the claimant of the transfer. If transfer is not feasible the claim shall be returned to the claimant."[373] On this basis, courts have deemed a claim transferred to the proper agency when it should have been but was not.[374]

But the courts sometimes have inferred from the regulation a tolling of the statute of limitations as of the initial filing in order to render an otherwise valid claim timely rather than stale where that would make the difference.[375] In an apparent response to such overtures, the Attorney General recently amended the regulations to specify that the 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."[376] Leaving aside the question whether the Attorney General has been or could validly be delegated authority to determine when the statute of limitations on an FTCA lawsuit is satisfied, this particular exercise of that authority strikes me as regrettable. No less consonant with legislative purpose, and substantially fairer to claimants, would have been a regulation that not only directs the transfer where practicable of a wrongly filed but otherwise valid claim from one agency to another, but also provides that the original date of filing be used for determining its timeliness.[377]

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[373] 28 C.F.R. § 14.2 (b)(1)(1983).

[374] Barnson v. United States, 531 F. Supp. 614, 623-24 (D. Utah 1982). 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 and the Attorney General's regulations did not mandate the transfer of claims. Johnson v. United States, 404 F.2d 22, 24 (5th Cir. 1968).

[375] 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 valid where filed with the wrong agency one week before end of limitations period but reaches the proper agency only several months later). But see Lotrionte v. United States, 560 F. Supp. 41, 43 (S.D. N.Y. 1983).

[376] 28 C.F.R. § 14.2(b)(1)(1983). The amendment revives an idea found in a draft of the Attorney General's original regulations in 1966 and abandoned under criticism. I. GOTTLIEB, A NEW APPROACH TO THE HANDLING OF TORT CLAIMS AGAINST THE SOVEREIGN 11 (1967).

[377] Cf. 32 C.F.R. § 536.150 (1983) (Army) (statute of limitations on filing claims under National Guard Claims Act deemed tolled when claim

(Footnote Continued)

C. The Contents of a Valid Claim

The Federal Tort Claims Act says virtually nothing about what an administrative claim must contain, either to enable the agency to consider it or to satisfy the jurisdictional prerequisite to suit. The Attorney General's regulations fill that breach.[378]

Section 14.2(a) purports to identify 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."[379] Originally, the regulation

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(Footnote Continued)
filed with another agency, provided it is forwarded to the Army within six months or claimant makes inquiry with the Army within that time).

A related problem arises when the claimant alleges tortious conduct by employees of more than one agency. The prudent response is to file separate timely claims with each agency, with cross-referencing. A claimant who files a claim for the entire amount of loss with just one of the agencies 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 all appropriate agencies runs a risk if he fails to cross-reference them. In that event, according to the regulations, if any one of the agencies takes final action on the claim submitted to it, such action triggers the statute of limitations on suit 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)(1983).

One would similarly hope that where a claim is filed with only one agency, the Attorney General's transfer directive would apply and further that the original filing date would attach to all claims fairly encompassed in the original claim. The regulations in fact provide that "[w]hen 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)(1983).

To my knowledge, 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).

[378] See generally Note, Federal Tort Claims Act: Notice of Claim Requirement, 67 MINN. L. REV. 513 (1982).

[379] Prior to this regulation, some agencies would entertain no tort
(Footnote Continued)

linked this description of a claim to the agencies' exercise of settlement authority under Section 2672 of the FTCA. By recent amendment, it was made applicable also to Section 2401(b), the jurisdictional prerequisite to suit.[380]

A copy of Standard Form 95, to which the regulation makes reference, is appended to this report as Appendix A. Briefly, it calls for the claimant to identify himself or herself (or for his or her representative to do so), provide minimal personal information (age, marital status and employment), identify the place and time of the incident, describe all known facts and circumstances surrounding the loss including its cause, identify the persons and property involved, report the nature and extent of the damage or injury, provide the names and addresses of witnesses, and state a separate amount of damages for property damage, personal injury and wrongful death. Besides calling for details of insurance coverage and action, it requests substantiation of the claim, including a full written report by the attending physician and itemized bills for medical, hospital and burial expenses (in the case of claims for personal injury or death) and either signed receipted bills or two estimates of repair, or detailed information on value where repair is not economically feasible (in the case of claims for damage to property). 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." Standard Form 95 may be obtained from the legal department of virtually every federal agency and at most post offices.

Beyond the bare definition of a claim in Section 14.2(a) and the apparent incorporation by reference of the elements of Standard Form 95, the regulations provide for each basic category of claim -- death, personal injury, property damage -- the evidence or information that the claimant "may be required to submit."[381] For death claims, this includes evidence of death, employment and earnings, survivors, and dependents' support, health at the time of death, medical and burial bills, and the decedent's condition in the interval between injury and death.[382] Personal injury claimants may be required to provide doctors'

(Footnote Continued)
claim not filed on Standard Form 95, and the courts occasionally supported them. Johnson v. United States, 404 F. 2d 22, 24 (5th Cir. 1968). The rule is otherwise today. Crow v. United States, 631 F.2d 28, 30 (5th Cir. 1980).

[380] On the possible significance of this amendment, see text at notes 427-28 infra.

[381] 28 C.F.R. § 14.4 (1983).

[382] "Death. In support of a claim based on death, the claimant may be required to submit the following evidence or information: (1) An authenticated death certificate or other competent evidence showing
(Footnote Continued)

reports, itemized bills, and evidence of anticipated medical expenses and loss of income, and in addition submit to a physical or mental examination by a government physician.[383] For property damage claims, the agency may request proof of ownership, itemized repair bills or

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(Footnote Continued)
cause of death, date of death, and age of the decedent. (2) Decedent's employment or occupation at time of death, including his monthly or yearly salary or earnings (if any), and the duration of his last employment or occupation. (3) Full names, addresses, birth dates, kinship, and marital status of the decedent's survivors, including identification of those survivors who were dependent for support upon the decedent at the time of his death. (4) Degree of support afforded by the decedent to each survivor dependent upon him for support at the time of his death. (5) Decedent's general physical and mental condition before death. (6) Itemized bills for medical and burial expenses incurred by reason of the incident causing death, or itemized receipts of payment for such expenses. (7) If damages for pain and suffering prior to death are claimed, a physician's detailed statement specifying the injuries suffered, duration of pain and suffering, any drugs administered for pain, and the decedent's physical condition in the interval between injury and death. (8) Any other evidence or information which may have a bearing on either the responsibility of the United States for the death or the damages claimed." 28 C.F.R. § 14.4(a) (1983).

[383]"Personal Injury. In support of a claim for personal injury, including pain and suffering, the claimant may be required to submit the following evidence or information: (1) A written report by his attending physician or dentist setting forth the nature and extent of the injury, nature and extent of treatment, any degree of temporary or permanent disability, the prognosis, period of hospitalization, and any diminished earning capacity. In addition, the claimant may be required to submit to a physical or mental examination by a physician employed by the agency or another Federal agency. A copy of the report of the examining physician shall be made available to the claimant upon the claimant's written request provided that he has, upon request, furnished the report referred to in the first sentence of this paragraph and has made or agrees to make available to the agency any other physician's reports previously or thereafter made of the physical or mental condition which is the subject matter of his claim. (2) Itemized bills for medical, dental, and hospital expenses incurred, or itemized receipts of payment for such expenses. (3) If the prognosis reveals the necessity for future treatment, a statement of expected expenses for such treatment. (4) If a claim is made for loss of time from employment, a written statement from his employer showing actual time lost from employment, whether he is a full or part-time employee, and wages or salary actually lost. (5) If a claim is made for loss of income and the claimant is self-employed, documentary evidence showing the amounts of earnings actually lost. (6) Any other evidence or information which may have a bearing on either the responsibility of the United States for the personal injury or the damages claimed." 28 C.F.R. § 14.4(b)(1983).

estimates, purchase price and date, and salvage value.[384] As a later section of this report indicates,[385] litigants have come to contest not so much the authority of agencies to request supplementary information as the effect of noncompliance.

The regulations conclude with an invitation to the agencies "to issue regulations and establish procedures consistent with [these] regulations."[386] In fact, most agency regulations do not significantly expand on the definition of a claim or on the categories of evidence or information that a claims officer may request.

D. The Requirement of a Sum Certain

The regulatory requirement that claimants state a claim for damages in a sum certain has generated very little controversy as a matter of principle, but no small amount of litigation as applied. Though the FTCA does not by its terms impose the requirement, virtually every court called upon to address the question seems to agree that the Attorney General has a sound statutory basis for doing so.[387] The requirement is variously justified as useful in implementing the statutory provisions to the effect that the Attorney General approve any award in excess of $25,000[388] and that suit under the FTCA generally not be brought for any sum in excess of the amount of the claim presented to the agency;[389] it also facilitates any internal agency delegations of settlement authority that may exist. The requirement certainly does no violence to legislative history or to a common sense understanding of the term

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[384] "Property Damage. In support of a claim for injury to or loss of property, real or personal, the claimant may be required to submit the following evidence or information: (1) Proof of ownership. (2) A detailed statement of the amount claimed with respect to each item of property. (3) An itemized receipt of payment for necessary repairs or itemized written estimates of the cost of such repairs. (4) A statement listing date of purchase, purchase price and salvage value, where repair is not economical. (5) Any other evidence or information which may have a bearing on either the responsibility of the United States for the injury to or loss of property or the damages claimed." 28 C.F.R. § 14.4(c) (1983).

[385] See text at notes 406-468, infra.

[386] 28 C.F.R. § 14.11 (1983).

[387] 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); Bialowas v. United States, 443 F. 2d 1047, 1050 (3d Cir. 1971).

[388] 28 U.S.C. § 2672 (Supp. 1983).

[389] Id. § 2675(b).

"claim,"[390] and cannot help but expedite the settlement process. I suspect, as a practical matter, that few agency claims officers would consider making a settlement offer anyway without a prior demand for damages in a stated amount.

On the other hand, little can be said in favor of abolishing the sum certain requirement. The only serious complaint I have heard is that it encourages claim inflation.[391] Actually, the charge is more appropriately leveled not at the sum certain requirement, but 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. The wisdom of that rule may be open to question, but once accepted, the sum certain rule all but follows.

A study of the decided cases suggests that the requirement does not catch many claimants completely unawares or cause the courts, in the event of a contest over the issue, very much trouble in distinguishing a certain[392] from an uncertain[393] sum. If a claim does lack a sum

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[390] Avril v. United States, supra note 387, at 1091.

[391] Zillman, supra note 1, at 973. Certain agency claims attorneys voiced this complaint.

[392] E.g., Erxleben v. United States, supra note 387, at 273 (personal injury claim for "$149.42 presently"); Insurance Co. of North America 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, 397 (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 (E.D. Pa. 1973) ("approximate[ly] $100,000.00"). 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, supra note 387, at 249; Lester v. United States, 487 F. Supp. 1033, 1038 (N.D. Tex. 1980); Boyd v. United States, 482 F. Supp. 1126, 1129 (W. D. 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).

[393] E.g., Keene Corp. v. United States, 700 F.2d 836, 842 (2d Cir. 1983) ("$1,088,135 and . . . an additional amount yet to be ascertained"); Caton v. United States, supra note 387, at 638 ("Unknown at this time"); Bialowas v. United States, supra note 387, at 1050 ("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.

(Footnote Continued)

certain, claims officers usually point out the deficiency.[394] To a one, those I happened to interview reported doing so. In fact, most also relate back the claim as amended to the date originally filed where necessary to avoid a time bar,[395] though neither Justice Department nor agency regulations give them any inkling that it is proper to do so. Only claimants genuinely at a loss in quantifying their claim will in the end be put to trouble in contriving a figure. That figure may well prove, as is often alleged, to be inflated. But, given the pattern of frequent and open exchange that characterizes the administrative settlement process in most agencies, usually the claims officer will soon enough know whether claim inflation stems from honest uncertainty on the part of a claimant or from tactical considerations.

If the sum certain requirement could be shown to prejudice claimants significantly, I would urge its reconsideration, for in the final analysis the absence of a sum certain cannot be said to prevent an agency from conducting an investigation or assessing damages, provided the claimant has otherwise furnished sufficient factual information. However, in the absence of that showing, the convenience of a sum certain to the agencies and its overall consistency with the statutory scheme of the FTCA persuade me that the Justice Department should retain the requirement and the courts enforce it as they have.

This having been said, my reading of the cases and discussions with claims officers also persuade me that three limited reforms of agency practice should be made with respect to the sum certain requirement.

(Footnote Continued)
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).

[394] Melo v. United States, 505 F. 2d 1026, 1027 (8th Cir. 1974); Bialowas v. United States, supra note 387, at 1048; Robinson v. United States Navy, supra note 393, at 383.

[395] 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, supra note 393, at 118; 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 appeals court required that the sum certain be related back to the original filing, but its position was eased by the fact that claimant, even before filing an administrative claim, 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).

First, in view of the singular importance placed on the statement of a sum certain, I strongly urge that both the regulations and Standard Form 95 be amended specifically to advise claimants that a precise damages figure for all categories of claims is essential to their validity for all purposes, including the jurisdictional prerequisite to suit.[396] In fact, since claimants do not invariably consult the regulations or use Standard Form 95, agencies should advise individual claimants promptly if their claim lacks a sum certain and warn them in unmistakable terms that the failure to provide one by a given date will disqualify the claim from agency and possibly court consideration. The regulations currently require no measures of the sort and the courts for the most part have not presumed to do so either.

Second, the Justice Department should adopt a uniform policy on the question whether the subsequent supply of a sum certain relates back in time to the initial filing. At the moment, both the agencies[397] and the courts[398] appear to be divided. If, as I suspect the Justice Department would prefer, no relation back is to take place, then once again the regulations and, more important, Standard Form 95 should make this abundantly clear,[399] as should claims officers in any correspondence with a claimant or his or her attorney over the sufficiency of a claim. However, a better policy -- in light of the fact that the Attorney General rather than Congress actually has imposed the sum certain requirement -- would be to advise claimants specifically when a claim lacks a sum certain, state unmistakably the consequences of failing to

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[396] A few courts have expressed muted displeasure at the silence, particularly of Standard Form 95, on these points. Molinar v. United States, supra note 387, at 249; Jordan v. United States, supra note 395, at 988. Standard Form 95 appears to have been revised, perhaps in response to these concerns, to call some attention to the issue. The final instruction, in small print on the reverse of the form, states 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.'" With all respect, such boiler plate fails to communicate the particular rigors of the sum certain requirement and, more important, the consequences of an "invalid" claim.

[397] For example, the Assistant Legal Adviser at the State Department reports relating back the late statement of a sum certain, but 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.

[398] See supra note 395.

[399] The instruction on the reverse side of Standard Form 95, referred to supra note 396, fairly states that an agency might choose not to relate back the delayed submission of a sum certain. But it still leaves unclear the consequences of an "invalid" claim.

supply one, and give them a reasonable length of time without prejudice in which to do so.

Third and last, agencies should discontinue the practice of refusing to entertain a property damage claim supported by a sum certain and otherwise sufficient, simply because the personal injury or death claim arising out of the same incident and filed on the same form remains unquantified. If claims officers are truly forthcoming in discussing with claimants the significance of the sum certain requirement, the situation can mostly be avoided. Where it can not, the agencies should simply consider the death or personal injury claim surplusage and proceed with the property damage claim as stated. The courts have not required them to do so,[400] but the Attorney General should.

As observed a moment ago, 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."[401] The question how these

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[400] Allen v. United States, 517 F.2d 1328, 1329 (6th Cir. 1975); Robinson v. United States Navy, supra note 393, at 383.

[401] 28 U.S.C. § 2675(b) (Supp. 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, supra note C 1, § 410(b). 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. (1942) (unpublished statement of Assistant Attorney General Francis M. Shea), quoted in Gottlieb, The Federal Tort Claims Act: A Statutory Interpretation, 35 GEO. L. J. 1, 24 n. 71 (1946).

For some general observations on the provision, see Zillman, supra note 336, at 991. The burden of proof on the question whether the conditions for seeking a higher sum are met predictably rests on the claimant. Bonner v. United States, 339 F. Supp. 640, 650 n.5 (E.D. La. 1972). For examples of cases in which recovery in excess of the amount claimed administratively was had on the basis of newly discovered evidence, see Husovsky v. United States, 590 F. 2d 944, 954-55 (D.C. Cir. 1978); Molinar v. United States, supra note 387, at 249; 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 Kielwein 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.

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twin exceptions to the rule should be understood and applied quite obviously falls to the courts and, happily, beyond the scope of this inquiry into agency practice. On the other hand, the existence of the ceiling itself is something of which all claimants, particularly those who are unrepresented,[402] should be made aware early in the administrative claim procedure. At a minimum, both the Attorney General's regulations and Standard Form 95 should contain a conspicuous alert, as they currently do not, since the omission truly constitutes a trap for the unwary. But I would also have claims officers caution claimants on an individual basis, as appropriate, for evidently some claimants genuinely believe they can freely reserve the right to present additional bills to the agencies as they come in.[403]

Apart from invoking the exceptions for newly discovered evidence or intervening facts, claimants may also cope with this statutory ceiling on damages by amending the claim while still in administrative channels. Though the FTCA itself 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]."[404] The sum certain should be no less freely amendable than any other element of the claim.

Amending a claim entails only one conceivably adverse effect for a claimant, namely, the automatic renewal, as of the date of amendment, of the six-month period during which the agency may evaluate the claim and during which the claimant may not sue.[405] Arguably, some amendments, even in the damages figure, may be so minor as not to warrant a six-month extension. But to prescribe a variable set of extension

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United States, 446 F.2d 1380, 1382 (3d Cir. 1981); Nichols v. United States, 147 F. Supp. 6, 10 (E.D. Va. 1957).

[402]Even some attorneys not versed in the FTCA may wrongly assume that the liberal policy of the Federal Rules of Civil Procedure on the amendment of pleadings applies with full force. FED. R. CIV. P. 15(b) (1981). See Corboy, supra note 336, at 69.

[403]For an example, see Odin v. United States, discussed text at notes 495-502, infra.

[404]28 C.F.R. § 14.2(c) (1983). The regulation further requires that the amendment be in writing and be signed by the claimant or his or her representative.

[405]Id. A claimant, for this reason, may pass up 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).

periods to reflect the substantiality of any given amendment, assuming the latter can be measured, is obviously impractical; leaving the period of extension indeterminate would be still worse. A bright-line six-month rule is optimal.

E. The Substantiation Problem

If the FTCA does not as such call for inclusion of a sum certain as an element of a valid claim, it says nothing at all about having to document or substantiate the claim. Regulations of the Justice Department and of specific agencies, however, do appear to impose that requirement. I referred earlier to the long list of evidence or information that the claimant "may be required to submit."[406] The same regulations also contain a catchall provision to the effect 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."[407] How obligatory these demands are, or are meant to be, is a question I shall raise shortly. Suffice it to say that agencies purport to "require" substantiation of that kind and, in its absence, to regard a claim as invalid for all purposes. As noted,[408] Standard Form 95, on which claimants are urged though clearly not required to present their claims, contains spaces for various kinds of pertinent information and directs claimants to attach specified evidence in support of their claims; the reverse side advises that failure to supply the requested material within two years of the incident may render a claim "invalid."[409]

The threshold informational demands of the agencies raise subtle legal and policy questions, have generated substantial litigation,[410] especially of very recent years, and have divided the courts and commentators. That the prior claim requirement should itself produce extensive litigation frustrates to an extent one of the basic purposes -- litigation avoidance -- that the requirement and the FTCA amendments which introduced it were meant to serve. Doubtless, some claimants and claimants' attorneys are needlessly unresponsive to agency demands for information, but just as clearly some government attorneys view the satisfaction or nonsatisfaction of their demands as but another, only richer, litigable issue under the FTCA.

(i) The Government View

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[406] See supra notes 389-91 and accompanying text.

[407] 28 C.F.R. §§ 14.4 (a)(8), (b)(6), (c)(5) (1983).

[408] See text at notes 380-81, supra.

[409] See supra note 396.

[410] See supra note 336.

Before looking at the cases, I shall consider certain problems that arise under the substantiation requirements on their face. According to one critique, the regulations fail to advise claimants adequately about the information an agency is authorized to demand.[411] Reference to "[a]ny other evidence or information which may have a bearing on either the responsibility of the United States . . . or the damages claimed" is condemned as impermissibly broad. In fact, I find it difficult to see how any guide to settlement of the generality of tort claims by the generality of agencies can avoid generalities. True, agencies may occasionally call for tangential information simply because it "may have a bearing" on a claim, but relevant information ought to be within their reach even if it is in some larger sense tangential, provided it is not privileged. Significantly, I know of no case in which a claimant has challenged a particular request specifically for its vagueness or overbreadth.

If there is ambiguity in the regulations, it lies in the phrase, "the claimant may be required." Does the Justice Department mean that failure to furnish the information requested renders the claim invalid for purposes of satisfying the prerequisite to suit, or at most makes it unlikely that the agency will settle the claim? To be sure, the ultimate question is not how "mandatory" the Attorney General intended his regulations to be, but how "mandatory" Congress intended that he make them. In some sense, the ambiguity is attributable to Congress, and the ambiguity in the term "may be required" only mirrors it. Still, what do the substantiation requirements, on their own terms, mean? One court, emphasizing the term "required," favored a strict interpretation;[412] another, stressing the "may," favored a looser one.[413] Conceivably, the Attorney General simply wanted the agencies to have, and know they have, the authority to make documentary demands in aid of their settlement efforts. Certainly the definition of a valid claim at the outset of the regulations -- "written notification of an incident, accompanied by a claim for money damages in a sum certain"[414] -- suggests there is nothing more to it than that. But I do not think that view of the regulations stands up to scrutiny. Semantics apart, the instructions for completing Standard Form 95, which claimants are told may be used in filing a claim, fairly state that failure to supply

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[411] Note, Claim Requirements of the Federal Tort Claims Act: Minimal Notice or Substantial Documentation?, 81 MICH. L. REV. 1641 (1983).

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

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

[414] 28 C.F.R. § 14.2(a) (1983).

requested material on a timely basis may compromise the claim's validity.[415]

If this reading of government policy is correct, the question remains whether it has been communicated effectively to the public. Apart from their being less than conspicuously placed on Standard Form 95, the instruction and warning do not quite convey the force of the government's demands. They state only that the amounts claimed "should" be substantiated, and they suggest that nondocumentation "may render [a] claim 'invalid,'" without telling a layman what that means. More basically, Standard Form 95 is simply not the required vehicle for submitting claims under the FTCA. Thus, neither its spaces for the supply of information nor its instructions to substantiate constitute effective notice of what the agency requires by way of a claim. Certainly where a claimant has not used Standard Form 95, claims officers should feel duty bound to bring its apparent demands specifically to his or her attention before attempting to enforce them.[416] This is especially so because, as noted, the regulations do not clearly couch the validity of a claim in terms of its documentation, and the statute itself most certainly does not.

So much for the regulations on their face and for the probable intent behind them. What of the FTCA itself and the policies that prompted Congress to amend it in 1966? These, in the final analysis, should guide the courts in whose laps the controversies are falling.

(ii) The Judicial Response

The problem generally arises when a claimant refuses or otherwise fails to provide some or all of the specified information requested by the claims officer in charge, who thereupon concludes that no valid claim has been filed. Typically, the officer will deny the claim, often for that stated reason; but he or she also may deny the claim on the merits or even simply ignore it. Upon the claimant's subsequent suit, the issue invariably resurfaces with a motion by the government to dismiss the complaint for lack of subject matter jurisdiction on the

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[415] See supra notes 396 and 399, and accompanying text. On the tension between Standard Form 95 and the regulations taken as a whole, see Note, supra note 411, 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 for it to properly evaluate the claim." 39 C.F.R. § 912.8 (1983).

[416] See text at notes 406-410, supra.

ground that no prior claim had been presented to the agency,[417] and to do so with prejudice if two years have by that time elapsed since the claim accrued.[418] The court will be reminded that the prior claim requirement, being a condition upon which the sovereign has consented to be sued, cannot be waived,[419] and being jurisdictional, may be raised at any time by the government or by the court sua sponte.[420] Each case, of course, presents a unique set of circumstances. The claims will be different. The claimants will have had quantitatively and qualitatively different exchanges with the agency. And different kinds and amounts of information will already have been supplied when the impasse occurs. Still, out of more than a decade of litigation over the issue, only two broadly different judicial responses have emerged.

According to one view, a claimant must provide the agency with sufficient information to enable it to evaluate and settle the claim, or else there has simply been no valid administrative claim.[421] In what has become the leading case, Swift v. United States,[422] the claimant filed with the United States Forest Service a claim on Standard Form 95 seeking damages of two million dollars for personal injuries, the wrongful death of her husband and loss of consortium, all arising out of an automobile accident involving an agency employee. Wholly ignoring the agency's repeated requests over more than a year for documentation

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[417] E.g., Erxleben v. United States, supra note 387, at 270. Alternately, the objection may be framed in terms of a failure to exhaust administrative remedies. Crow v. United States, supra note 392, at 28, 30.

[418] Cooper v. United States, supra note 393, at 117-18; Robinson v. United States Navy, supra note 393, at 383.

[419] Bialowas v. United States, supra note 387, at 1048-49.

[420] FED. R. CIV. P. 12(h)(3) (1981). 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).

[421] Swift v. United States, 614 F. 2d 812, 814 (1st Cir. 1980); 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, supra note 393, at 383.

[422] 614 F. 2d 812 (1st Cir. 1980).

of the alleged personal injuries, the claimant took the position that the passage of more than six months since the filing without a final agency decision on the merits entitled her to sue. That she did, seeking two million dollars for wrongful death and loss of consortium alone. The district court dismissed the complaint for lack of jurisdiction,[423] and the First Circuit affirmed.

The First Circuit placed emphasis upon the Justice Department regulations authorizing agencies to call for the documentation of administrative claims, and on the agency's own regulations implementing them.[424] According to the court, as long as the information said to be needed is not forthcoming, the agency may properly consider the claim as not having been filed.[425] Not only does the agency then have no obligation to respond, but a court is without jurisdiction to hear the case as the jurisdictional prerequisite of a prior claim remains unsatisfied. Before Swift, most rulings on the sufficiency of the prior administrative claim as such went to the question whether a sum certain had been stated.[426] But unlike the sum certain requirement which, as I have earlier suggested, is fairly implied by the statute as well as inherently manageable, the substantiation requirement both stems from the Attorney General's regulations and lends itself to considerable and prolonged wrangling.

An important difficulty with the court's reasoning in Swift -- recognized by a growing number of decisions and the majority of commentators[427] -- is that the Justice Department apparently promulgated these regulations pursuant to Section 2672 of the Act, the provision conferring substantive settlement authority on the agencies, rather than Section 2675(a), the provision which makes the filing of an administrative claim a prerequisite to suit. Thus, the substantiation

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[423] The district court dismissed the complaint without prejudice, however, because it interpreted the agency warning as suspending the statute of limitations. 614 F. 2d at 815 n.3. If the court had not done so, the statue of limitations would have run and the claim would have been barred.

[424] 614 F. 2d at 814.

[425] Id.

[426] See cases cited supra notes 387, 390, 392-395.

[427] Note, Federal Tort Claims Act Administrative Claim Prerequisite, 1983 ARIZ. ST. L. J. 173, 188 (1983); Note Federal Tort Claims Act: Notice of Claim Requirement, 67 MINN. L. REV. 513, 520 (1982); Comment, The Art of Claimsmanship: What Constitutes Sufficient Notice of a Claim under the Federal Tort Claims Act?, 52 U. CIN. L. REV. 149, 164 (1983). But see Note, Claim Requirements of the Federal Tort Claims Act: Minimal Notice or Substantial Documentation?, 81 MICH. L. REV. 1641 (1983).

provisions guide agencies in getting a claim settled at the administrative level; they do not determine whether the claim meets the exhaustion requirement if it is not. Since the Swift decision, the Justice Department has amended Section 14.2 of the regulations to state that its definition of a claim applies as much to the jurisdictional question as it does to the question of agency settlement authority. One problem with this expedient is that the claim requirements of Section 14.2 are essentially uncontroversial. The more troublesome Section 14.4, with its sweeping potential for informational demands, contains no such reference.

The more basic difficulty, though, is that Congress probably gave the Attorney General rulemaking authority only for purposes of organizing agency settlement activity, not for purposes of controlling access to the courts. I, for one, would not lightly conclude that Congress in effect delegated to him, and indirectly to the agencies, the power to regulate the jurisdiction of the federal courts. If I am correct, a claimant who fails to document his or her claim may be unlikely to win an agency-level settlement, but does not thereby necessarily forfeit the right to sue.[428]

In all fairness, the Swift opinion does not turn entirely on a mechanical application of Justice Department or agency regulations on the documentation of claims. It is also informed by substantial policy considerations favoring the disposition of claims at the agency level where possible. Swift properly emphasized the connection between an adequate presentation of the claim to the agency and the agency's ability to evaluate it and possibly settle it at an early stage, as Congress intended.[429] Needless to say, most agency claims officers warmly welcome the support that Swift gives them, praising the decision less for its doctrinal correctness than for its practical contribution to their basic capacity to settle claims.

A second approach, more recently to emerge, would require the claimant, for purposes of satisfying the jurisdictional prerequisite, simply to provide the agency with sufficient information to enable it to

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[428] 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. For an instance, see Rothman v. United States, supra note 82, at 14. On Justice Department strategy on this issue generally, see text at notes 483-84, infra .

[429] 614 F.2d at 814, quoting Kornbluth v. Savannah, supra note 421, at 1268. For similar reasons, a claim must be reasonably precise and intelligible. Keene Corp. v. United States, 700 F.2d 836, 842 (2d Cir. 1983).

investigate the claim.[430] This has come to be known as the minimal notice standard.[431] In the widely-cited case of Adams v. United States,[432] for example, the claimants filed an administrative claim arising out of the alleged medical malpractice of Air Force physiciams in prenatal care and delivery, resulting in severe brain damage to their child. After partial compliance with an Air Force request for medical reports and expense records,[433] and after the lapse of over six months, the claimants brought suit. Concluding from their failure to comply with all the government's requests for substantiation that no sufficient administrative claim had been filed, the district court dismissed the action on jurisdictional grounds.

The Fifth Circuit reversed and remanded, holding that Section 2675(a), the prior claim requirement, as such demands no more than that the claimant give sufficient written notice of the claim to enable the agency to conduct an investigation, and also place a value on the

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[430] 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, on rehearing, 622 F.2d 197 (5th Cir. 1980); Reynoso v. United States, 537 F. Supp. 978 (N.D. Cal. 1982); Hoaglan v. United States, 510 F. Supp. 1058, 1061 (N.D. Iowa 1981). See also Erxleben v. United States, supra note 387, at 273, finding 28 C.F.R. § 14.2(a) applicable to defining a claim under Section 2675, but rejecting any "regulatory checklist" of jurisdictional prerequisites. The matter apparently remains unsettled in the other circuits.

[431] Note, Federal Tort Claims Act Administrative Claim Prerequisite, 1983 ARIZ. ST. L. J. 173, 180 (1983).

[432] 615 F.2d 284, on rehearing, 622 F.2d 197 (5th Cir. 1980).

[433] 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. They evidently contended that the Air Force already possessed or had access to much of the information demanded. There also seems to have been some misunderstanding over what the claims officer actually wanted by way of substantiation. But the district court, considering these nuances irrelevant, ruled that claimants, in order to perfect their claim, were bound to inform the agency that they had no unreported medical expenses, if indeed they had none, and to provide an estimate of future medical expenses. Note that the claimants in the leading cases in other circuits adopting the Adams view did not contend that the agency already had the information sought.

claim.[434] The court was persuaded by the legislative history of the 1966 amendments that Congress intended through Section 2675 to demand only the kind of notice that states and municipalities traditionally require of a claimant seeking compensation for a state or municipal tort, that is, notice of the approximate nature and circumstances of the injury, together with a claim for money damages,[435] and not substantiation of the claim on the merits as such. The regulations, in turn, received a narrow interpretation, as applicable to Section 2672 but not Section 2675.[436] Thus, although the agency might have felt that it lacked, and in fact have lacked, sufficient information to settle the claim under Section 2672, the Adamses may have presented sufficient notice of the incident to satisfy Section 2675. Said the court, "[e]quating 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

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[434] 615 F.2d at 289. The court apparently did not attach any importance to claimant's contention that the Air Force already had or had access to the additional information sought.

[435] "Congress deemed this minimal notice sufficient to inform the relevant agency of the existence of a claim." 615 F.2d at 289. See also Avery v. United States, 680 F.2d 608, 610-11 (9th Cir. 1982), quoting 17 E. McQUILLAN, MUNICIPAL CORPORATIONS § 4807 (3d ed. 1968), itself quoted in the legislative history of the 1966 Amendments.

The District of Columbia Code provision, cited specifically by the House Committee on the Judiciary with favor, requires by way of notice 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 ENCYCL. §§ 1-923, 12-309 (West 1966).

However, the Adams 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 made not for purposes of defining the contours of a valid claim, but to justify introducing the prior claim requirement as such into the FTCA in the first place. S. REP. NO. 1327, 89th Cong., 2d Sess. 3-4 (1966), quoting from H.R. REP. NO. 1532, 89th Cong., 2d Sess. (1966), and reprinted in 1966 U.S. CODE CONG. & AD. NEWS 2517-18. See Note, Claims Requirements of the Federal Tort Claims Act: Minimal Notice or Substantial Documentation?, 81 MICH. L. REV. 1641, 1648-49 (1983).

[436] 615 F. 2d at 288. In Tucker v. USPS, supra note 430, which adopted the Adams reasoning verbatim, the court was satisfied by full compliance with Section 14.2 of the regulations, notably the filing of a complete Standard Form 95. Failure to supply supporting documentation -- mostly itemized bills -- upon request by a Postal Service inspector pursuant to Section 14.4 did not affect satisfaction of the jurisdictional filing requirement.

to sue."[437] Furthermore, while the court joined earlier decisions in making a claim's validity conditional on the statement of a sum certain[438] it did not rely upon the regulations to reach that result.[439] It simply believed that the requirement, in combination with the court's minimal notice standard, would promote the fair treatment of claimants[440] without unduly prejudicing the prelitigation settlement of claims.

Still more recently, a variation on Adams has surfaced, according to which the validity of a claim for jurisdictional purposes depends on whether or not it contains sufficient information to enable the agency to arrive at a reasonable settlement figure. This was essentially the position of the Sixth Circuit in Douglas v. United States,[441] in which the claimant likewise failed to satisfy the agency's request for certain medical reports and insurance records, and was met with an explicit agency denial on that ground. In the ensuing litigation, the appellate court joined Adams in holding Section 2675 satisfied when the claimant places a value on the claim and gives the agency sufficient written notice of the claim to conduct an investigation, but it emphasized that the claimant had also provided sufficient information to permit calculation of a reasonable settlement figure.[442] Whether Douglas indeed means to set a standard of production distinct from that laid down in Adams is not entirely clear, but, if so, it is unfortunate. Though no standard for gauging the adequacy of a claim can be perfectly objective, one geared to the agency's ability to arrive at a settlement value seems unnecessarily to court differences of opinion in its

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[437] 615 F.2d at 290. According to a subsequent decision largely in agreement with Adams, "Section 2675(a) was not intended to allow an agency to insist on proof of a claim to its satisfaction before the claimant becomes entitled to a day in court." Avery v. United States, supra note 430, at 611.

[438] See supra note 387.

[439] 615 F. 2d at 291 n. 15.

[440] Id. at 289.

[441] 658 F.2d 445, 447-49 (6th Cir. 1981). The court also based its decision on estoppel, arguing that the agency's earlier indication that the claim contained enough information barred it from thereafter contesting its sufficiency. Id. at 449.

[442] Id. at 448-49. In reaching its decision, the court attempted to reconcile Adams with Swift on the ground that Swift and a number of earlier cases (Kornbluth and Rothman, supra note 421), notwithstanding their holdings, in fact involved allegations so conclusory that investigation and disposition of the claim was actually impossible.

implementation.[443] By comparison, 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. In this connection, the Ninth Circuit usefully elaborated on the Adams minimal notice standard by asking that a claim provide notice of the manner and general circumstances of the injury and the harm suffered, together with a demand for a sum certain.[444]

(iii) An Appraisal

So far as the proper interpretation of the FTCA is concerned, Adams seems to me, on balance, the basically sounder view. Given the rather meager legislative history of the 1966 amendments, the court probably cannot be faulted for not making a more convincing case for a minimal notice standard. In the final analysis, neither text nor legislative history provides a sufficient basis for supposing that Congress intended the measure of power to force information from unwilling claimants that Swift in effect confers on them. A more probable version is that Congress thought the inherent advantages of agency level settlement -- notably, more immediate payment and avoidance of the expense and inconvenience of litigation[445] -- a sufficient incentive to cooperate, as they indeed appear to have been for the vast majority of claimants. The less cooperative, as before, would litigate, provided they had previously filed with the agency a claim meeting the minimal notice standard.[446]

Of course, that Adams more closely approximates Congress' probable intent on the substantiation issue does not necessarily mean that it establishes the soundest framework possible for resolving it. I set out briefly here what I take to be the underlying policy considerations and then suggest the solutions that most responsibly accommodate them.

I first consider the element of fairness to claimants which weighed in heavily with the Adams court and courts that have followed its lead. Taking this factor into account, as I decidedly do, requires that the claimant's interest in the tort settlement process be accurately defined. Actually Congress did not express a very clear view of what

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[443] Comment, The Art of Claimsmanship: What Constitutes Sufficient Notice of a Claim under the Federal Tort Claims Act?, 52 U. CIN. L. REV. 149, 168-69 (1983).

[444] Avery v. United States, 680 F. 2d 608, 610 (9th Cir. 1982).

[445] On the advantages generally of administrative settlement in government tort claims, see 2 L. JAYSON, HANDLING FEDERAL TORT CLAIMS § 285 (1984).

[446] Reynoso v. United States, supra note 430, at 979 ("It is irrelevant for jurisdictional purposes whether plaintiff cooperated with the VA and provided all the information it requested, so long as he 'first presented' his claim to the VA, as required").

fairness to claimants requires, and recent decisions may well have distorted the influence of this factor in the shaping of the 1966 amendments. Properly viewed, the allusion in legislative history to fairness to claimants relates not to the FTCA amendments as such, but to the overall 1966 legislative package on government litigation of which these amendments were only one part. The four bills comprising 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."[447] In fact, the other three bills in the package -- one giving agencies enhanced authority to compromise claims against private persons and to put an end to collection efforts when the debtor lacks present or prospective ability to pay,[448] another imposing a statute of limitations on government claims in contract and tort,[449] a third allowing private persons who prevail in civil actions against the government to collect costs as part of the judgment just as the government could against them in the opposite situation[450] -- do manifest an intent to put citizens on a more nearly equal footing with the government in the litigation and prelitigation context. But this concern seems much less pronounced in the specific context of the FTCA amendments. As to them, fairness simply inheres in the greater likelihood that a deserving claimant will have recovery against the government without the delay, expense and inconvenience of litigation.[451] The change was thought to be in everyone's interest.[452]

To whatever extent fairness to claimants specifically underlay the 1966 amendments, the fact remains that any sound framework for the administrative settlement of tort claims would promote that value. The

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[447] S. REP. NO. 1327, supra note 435, at 2, reprinted in 1966 U.S. CODE CONG. & AD. NEWS 2515-16.

[448] Act of July 18, 1966, Pub. L. No. 89-505, 80 Stat. 304 (1966).

[449] Act of July 18, 1966, Pub. L. No. 89-507, 80 Stat. 308 (1966).

[450] Act of July 19, 1966, Pub. L. No. 89-508, 80 Stat. 308 (1966).

[451] S. REP. NO. 1327, supra note 435, at 3, 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."); 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 even be handled without need for counsel. Id. at 13. See Locke v. United States, 351 F. Supp. 185, 187 (D. Haw. 1972).

[452] See supra note 287.

challenge lies in fitting this consideration into the larger context of Congress' evident commitment to administrative settlement as an avenue of redress. Specifically, what risks do claimants run when agencies may demand proof of claim to their full satisfaction at the point of determining whether a sufficient prior claim has been filed? In the first place, if the government can demand full evidentiary documentation at this stage, it can indefinitely delay resolution of the claim both in administrative and in litigation channels for the simple reason that the six-month period which must pass before suit may be brought does not itself begin to run until a valid agency-level claim has been filed. Recent court decisions acknowledge this risk. As the Adams court put it, "[f]ederal court power [should] not depend on whether a claimant has successfully navigated his or her way through the gauntlet of the administrative settlement process, which, according to the vagaries of the claims agent, may touch picayune details, imponderable matters, or both."[453] A later decision described the rule of complete documentation as "permit[ting] federal defendants to be judge in their own cause by the initial determination of a claim's insufficiency."[454] When agencies may demand full documentation at the threshold, and also determine unilaterally what constitutes full documentation in any given case by reference to what they "need" to settle it, they acquire extraordinary control over the progress of the claim. Another concern of claimants which the courts have not identified, but which strikes me as no less significant, is that unnecessary factual disclosure may prejudice them if and when they later go to court. I explore this concern more fully shortly.

A second set of policy considerations bearing on the substantiation problem relates to the preference for agency-level disposition of tort claims, a preference that animated the 1966 amendments in the first place. As numerous courts have found,[455] adequate supporting documentation is usually necessary in order for an agency to evaluate a claim for settlement purposes and specifically to guard effectively against a perennially suspected claim inflation.[456] Available evidence suggests that settlement of private tort claims also normally proceeds on the basis of a fuller and more detailed documentation than a minimal

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[453] 615 F. 2d at 292.

[454] Avery v. United States, supra note 444, at 611.

[455] E.g. Rothman v. United States, supra note 421, at 16; Kornbluth v. Savannah, supra note 421, at 1267-68. See also Trail, Federal Tort Claims Act: Filing an Administrative Claim: A Two-Step Approach: Presentation and Substantiation, 27 JAB J. 421, 426 (1973).

[456] Note, Claim Requirements of the Federal Tort Claims Act: Minimal Notice or Substantial Documentation?, 81 MICH. L. REV. 1641, 1656 (1983).

notice standard itself can exact.[457] The more evidence and information an agency has at its disposal, the greater its confidence both in its disposition to settle and in the precise level of recovery at which to do so. Quite obviously, the sooner a busy claims unit obtains the material necessary for determining a claim, the greater its chances of doing so within a six-month period. Against this set of considerations taken alone, a claimant who prefers to wait out the six months standing between him or her and court, tight-lipped as to the real nature and extent of injury, does not evoke a great deal of sympathy.

Though others would take a different view,[458] I do not believe that the agencies alone should bear the burdens of investigating tort claims. They can appropriately ask some assistance of claimants, at least in the form of documentary production of material already in claimants' hands or readily accessible to them. To be sure, agencies are not defenseless; they always have the option of denying the tort claim on the merits and putting the claimant to establishing his or her case finally in court. But that alone scarcely ensures a substantial increase in prelitigation settlement.

Finally, an appropriate accommodation of these competing interests requires that the problem be kept in proper perspective. In a case that is truly susceptible to administrative settlement, the rational claimant normally will comply with reasonable agency requests for substantiation. Even partial disclosure, as in Adams, may provide an adequate basis for settlement. Finally, in many cases of noncompliance, administrative settlement for one reason or another is not likely anyway. Though the settlement process may founder at an early stage over the production of information, it may well be one that would only founder later. Still,

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[457] Id. at 1641 n. 48, and authorities cited therein. See especially H. BAER & A. BRODER, HOW TO PREPARE AND NEGOTIATE CLAIMS FOR SETTLEMENT 91 (1973) ("It is impossible to emphasize strongly enough the role of disclosure in facilitating settlement. Free and open exchange of information generates mutual confidence, and this in turn creates the atmosphere out of which successful settlements are negotiated."); P. HERMANN, BETTER SETTLEMENTS THROUGH LEVERAGE 160 (1965) ("Probably the greatest roadblock in the way of advantageous settlement of personal injury claims is failure of the opposing sides to furnish information to each other.").

Virtually all agency claims attorneys agree. One specifically would like to see Standard Form 95 amended to require the claimant also to spell out his or her theory of liability. And most would urge 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.

[458] E.g., Note, Federal Tort Claims Act Administrative Claim Prerequisite, 1983 ARIZ. ST. L. J. 173, 186 (1983). See also Adams v. United States, 615 F. 2d at 289. Neither did Congress intend for claimants to bear wholly the burden of investigation. Id. at 290 n. 9.

ground rules, preferably ones that satisfactorily balance the competing interests at stake, may be useful for the conduct of participants in agency settlement proceedings.

(iv) A First Solution

I discern essentially two solutions -- one closely tracking Adams, the other requiring some radical rethinking -- that would work fair and sound results. Let me begin by rejecting a third approach, that of Swift v. United States. Giving agencies the power to prevent tort litigation from going forward by unilaterally finding insufficient disclosure by claimants simply tips the scales too heavily in their favor. To be sure, the courts ultimately will decide, if only as a matter of determining their own jurisdiction under the FTCA, whether a sufficient administrative claim has been filed. But if they conclude, as the very logic of Swift would suggest, that no claim suffices unless supplemented by the documentation that the agency declared necessary or useful to settle the case, then the agencies indeed retain the upper hand. Perhaps the courts would not uncritically endorse every agency demand for information, sanctioning it by dismissal of the case with or without prejudice, but the fact remains that Swift offers precious little assurance to this effect.

In fact, the judicial supervision necessary to ensure that agencies did not abuse the upper hand conferred by Swift would itself be intolerable. We do now see courts determine after the fact whether an agency has exceeded its bounds in demanding the substantiation of claims,[459] and anticipation of eventual judicial mediation might well induce agencies to pose demands that are exaggerated and claimants to mount resistance even to those that are not. Should the courts become mired in policing the reasonableness of agency demands in the inevitably unique circumstances of each case, Congress' desire to lessen their involvement in the resolution of government tort claims obviously will have been frustrated. That their involvement would center on opening skirmishes rather than the merits of the claim is not much consolation.[460]

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[459] See Koziol v. United States, 507 F. Supp. 87, 90-91 (N.D. Ill. 1981) ("The legislative history of the Federal Tort Claims Act amendments of 1966 does not support the judicial obeisance to administrative regulations which the government urges here and which it has successfully urged in the past.").

[460] Avery v. United States, supra note 444, at 611 ("It would . . . be an inefficient use of judicial resources to require more than a minimal notice to satisfy section 2675(a). Since the claims presentation requirement is jurisdictional, if it were interpreted to require more than minimal notice, there would be, inevitably, hearings on ancillary matters of fact whenever the agency rejected a claim as incomplete.").

A first solution, based on the Adams approach, would permit an agency to request of a claimant whatever information it supposes useful, but to hold the claim insufficient for exhaustion purposes only if it lacks either a sum certain or such content as would enable the agency to conduct an investigation. As already mentioned, a minimal notice standard essentially relies on the inherent advantages of early settlement as an incentive to claimants to be forthcoming in the substantiation of their claims. In some cases, clearly, the standard would operate to deprive the agencies of information useful and pertinent to arriving at a settlement, which may even cause some claims to go unsettled at the administrative level that might have been settled in the wake of fuller disclosure. But the recalcitrant claimant is the exception, and it may not be worth bringing him or her to heel if that means letting the agencies routinely decide for themselves whether claimants have been forthcoming enough to have earned their day in court, or systematically placing that burden on the courts. In any event, Adams does not give claimants nearly the degree of advantage that Swift gives the agencies. A claimant who exploits the minimal notice standard may get into court on the claim rather more easily than he or she could under Swift, but once there must still demonstrate its merits to the court's full satisfaction. At some point, the appropriate sanction for a claimant's lack of cooperation will simply be the greater likelihood of an agency denial on the merits,[461] the cost and inconvenience of litigation, and the risk of adverse inferences in the judicial forum.

The Adams approach does not require claims officers basically to alter the way they deal with claimants. They would find it neither very practical nor very productive to distinguish sharply in their initial correspondence with a claimant between the information necessary to constitute a sufficient claim under the minimal notice standard, on the one hand, and whatever additional information might be useful for investigation and settlement purposes, on the other. No particular good will come of communicating at the outset to a claimant the suspicion that he or she might be less than fully forthcoming in substantiating the claim. However, should their exchange reveal a pattern of serious noncooperation, the claims officer should indicate promptly and unambiguously whether he or she is inclined to view the continued nonproduction of designated information as compromising the validity of the claim as such under the minimal notice standard.[462] Where agencies

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[461] Writing just after enactment of the 1966 amendments, the then Chief of the Torts Section of the Justice Department predicted that claimants not forthcoming with information necessary for the sound evaluation of their claim would simply be met with a denial. Laughlin, Federal Tort Claims Act Amendments: A New Charter for Injured Citizens, 2 TRIAL MAG. 18, 38 (1966).

[462] Several agencies -- NASA and the VA are two among those whose claims activities I examined -- have developed a series of three form

(Footnote Continued)

have been diligent in requesting specific information, and especially in communicating clearly the consequences of nonproduction, the courts have proven remarkably supportive.[463]

Given the uneven case law at present, the Adams approach actually should be codified in the Federal Tort Claims Act. Congress could easily accomplish this by amending the definitional section of the Act to clarify the elements of a valid claim, preferably by way of enumeration. The definition should then be carried over into the Attorney General's regulations, restated on Standard Form 95, and made use of in correspondence with claimants.

(v) A More Far-reaching Alternative

The other solution I envisage would require a more fundamental change in our conception of the tort claim process. Consider again, by way of introduction, why claimants in fact do not always make full disclosure at the agency level. As intimated earlier,[464] the reason for this is that the disclosure of information, be it favorable or unfavorable, may work a substantial prejudice to the claimant in any ensuing FTCA litigation. The government commonly goes into litigation, as a result of the prior administrative claim, with an unusually and perhaps unfairly complete sense of the claim's legal and factual weaknesses, but without having revealed very much about its own defense.

This observation essentially revives the fairness issue that seems to have animated so many of the courts opting lately for the minimal notice standard. More important, it brings into question the proper identity of agency-level tort settlement itself. Is that phenomenon to

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(Footnote Continued)
letters to be sent at given successive intervals to claimants who fail to supply information requested and deemed essential to the validity of the claim. In the VA, they may culminate in the form claim denial letter that recites nonproduction as the reason for denial, that cites Swift or its local progeny, and that scrupulously avoids addressing the merits of the claim.

Not all agencies proceed in this fashion. The Department of Agriculture reports no standardized follow-up procedures; it does not necessarily even issue a denial letter of any sort where a claimant has failed to cooperate. In many cases it prefers "letting sleeping dogs lie."

[463] See e.g., Avril v. United States, supra note 387, at 1091 (lack of sum certain uncorrected by the claimant though called to his attention by the agency); Bialowas v. United States, supra note 387, at 1048-50 (failure to provide specific damage amounts even though requested to do so); Cummings v. United States, supra note 421, at 41 (no evidence of injury furnished in response to Air Force requests); Robinson v. United States Navy, supra note 393, at 382-84 (requested property damage estimates and medical bills not supplied).

[464] See text at notes 454-55, supra.

be viewed as an autonomous dispute resolution process in the hands of a claims officer who approximates a neutral decisionmaker, or as a simple prelude to litigation conducted by someone who already stands in an adversarial or at least a bargaining relationship with the claimant? Whether prior disclosure unfairly prejudices a claimant's litigation posture in tort claims really depends on whether the courts are taken to constitute the primary forum for their resolution and agency process but a procedural barrier to be hurdled in order to gain entry. Plainly, the risk diminishes to the extent that the parties view administrative settlement as the central dispute resolution process. Under the latter view especially, the tort claimant who withholds evidentiary matter at the agency level in the interest of surprise or tactical advantage in court elicits very little sympathy.

As a matter of fact, the relative prominence of the administrative and judicial phases of the FTCA remains problematic to this day, notwithstanding the 1966 reforms, perhaps all the more because of them. On the one hand, administrative settlement is a virtually full-fledged dispute resolution mechanism; yet the prospect of FTCA litigation is also never very far from mind. In the final analysis, the pervasive ambiguity of the administrative tort claim, and of the agency claims officer who handles it, explains why the unfairness problem has been so difficult to define and resolve.

We come then squarely to a second option, namely, entitling the agency, as under Swift, to full disclosure at its request of all pertinent information as a condition of validity of the claim, on the understanding that the agency submits to equally broad disclosure. Establishing a certain parity in this regard would go a long way toward blunting the unfairness argument I identified a moment ago, besides contributing to more informed settlement negotiations at an early stage. In the process, the administrative claim itself would become much less a simple antechamber to litigation.[465]

To put the matter squarely, the chief reason that fairness might be thought to excuse claimants from documenting their claims fully at the agency level is that today, nearly two decades after the FTCA amendments on administrative settlements, the courts rather than the agencies continue to be viewed as the "real" tort battlegrounds; the Adams court was not wide of the mark when it implied that the present scheme basically leaves claimants free to repair to the courts once they have presented a proper claim to the agency and allowed jurisdiction to

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[465] After all, most information requested by the agency can eventually be obtained through discovery once suit is filed. We may assume that discovery will give parties access "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." FED. R. CIV. P. 26(b)(1) (1972).

attach either through final denial or the passage of time.[466] Conceivably tort claimants, like applicants for a statutory entitlement, could be made to present their claim fully at the agency level and, absent special circumstances, expect to be barred from adducing new evidence in court. If Congress left agency prerogatives at settlement somewhat undefined, it probably did so in order to avoid prejudicing a claimant's capacity to litigate effectively should settlement fail.[467] Unless and until claimants believe 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,[468] and above all the promise of impartiality on the agencies' part, continuing resistance to agency demands for documentation and a somewhat reduced administrative settlement rate can be expected. Whether the magnitude of conflict and foregone settlement is substantial enough to warrant so radical a change in the ground rules is of course another matter. But the change might be a healthy one, not only as a way out of the substantiation dilemma, but as a step toward putting administrative settlement negotiations on a generally more candid and productive footing.

(vi) A Coda on Agency Access to Information

Virtually any realistic adaptation of the agency claims process -- even one such as I have just described -- would leave litigation in the federal courts a serious prospect. So long as litigation casts its shadow over that process, some sort of 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?"[469] After all, any resolution of the Swift/Adams problem would leave the agencies free to demand some information or

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[466] 615 F.2d at 289-90. See also Reynoso v. United States, supra note 430.

[467] For a persuasive argument that Congres would not have wanted documentation requests to prejudice a claimant's interests in court, see Note, Claim Requirements of the Federal Tort Claims Act: Minimal Notice or Substantial Documentation?, 81 MICH. L. REV. 1641, 1653 n. 66 (1983). 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 435, at 5-6, reprinted in 1966 U.S. CODE CONG. & AD. NEWS 2518-20.

[468] 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 467, at 1656-57. The sanction for unexcused nondisclosure then would be a time bar to suit.

[469] Id. at 1654.

other as a condition of validity of the claim, and that information may be of the sort that is privileged in discovery.

I am prepared to concede that the catchall language of the regulations -- "[a]ny . . . evidence or information which may have a bearing on either the responsibility of the United States . . . or the damages claimed" -- reads broadly enough to encompass material that would be privileged in discovery, but I also see no harm in the agencies requesting privileged material, or in the Attorney General authorizing them to do so, provided they respect a claimant's right to exercise the privilege. The situation becomes problematic only if one subscribes to the view that failure to furnish information requested, even if privileged, renders the claim invalid as an administrative claim. Under no set of circumstances, though, does that view deserve to prevail.

As a practical matter, the issue is unlikely to arise under the Adams minimal notice standard, for agencies will rarely find themselves at a loss to investigate a claim on account of the absence of privileged information. Even Swift, however, should permit an exception for privileged information, and the courts would probably hold as much. I have uncovered no case in which a claim was ruled invalid for failure of the claimant to furnish the government information that it concededly could not obtain in litigation.

We come down then to the question whether the Justice Department should redraw its regulations to specify that information not discoverable in tort litigation is not discoverable in administrative channels either. Since I view the regulations as essentially indicating only what the agencies may request, and not what they may demand on pain of deeming a claim invalid for noncompliance, no change should be necessary. Furthermore, discovery privileges are generally waivable, and agencies should neither be barred nor even discouraged from seeking information that the claimant is perfectly at liberty to produce and whose production may very well conduce to a swifter and better informed settlement. Of course, no agency should attempt to coerce the disclosure of information in the face of an effective assertion of privilege by threatening otherwise to treat the claim as null and void. On the other hand, so long as some courts maintain the view that compliance with agency demands for information is essential to a claim's validity, the express incorporation of discovery standards in the regulations may be an important precaution and counterweight. Even so, however, the Department should avoid any implication that agencies behave improperly when they simply request privileged information.

Clearly my assumption, as a policy matter, is that agencies engaged in the administrative claim process should respect the privileges from discovery under the Federal Rules of Civil Procedure. Congress concededly had little or nothing to say about that precise issue, but it did recognize when it enacted the 1966 amendments that some tort claims would defy settlement and it deliberately preserved the claimant's option to sue on a de novo basis; it even consciously chose not to lengthen the six-month waiting period though that might have increased

marginally the rate of prelitigation settlement.[470] Congress would not likely have required, as part of the administrative process whose exhaustion it made a prerequisite to suit, that a claimant produce information he or she would be privileged to withhold in litigation. Besides prejudicing the claimant at trial, that policy would 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.

To be sure, complications may arise from the fact that the privileges, particularly those that are qualified rather than absolute, are no easier of application in the settlement than in the litigation context, yet by definition the courts will not be standing by to resolve the ensuing disputes. In any event, systematic resort to the courts on an interlocutory or ancillary basis surely would compromise the integrity and autonomy, not to mention the normally amicable spirit, of the agency claims process. But the magnitude of the problem should not be exaggerated. Claimants and claimants' attorneys do not appear to invoke privileges as such with any frequency in the agency phase of the FTCA. They may or may not furnish all the information an agency requests, but when they do not, they rarely give a reason. In fact, so far as I can tell, privilege has not even been invoked in court as a justification for not furnishing the agency with material it deemed essential. Other grounds -- typically that the agency already had the information or did not need it or had no authority to begin with to require it -- have been.

Assuming (whether or not the regulations are amended to reflect the assumption) that claimants may not be required to produce at administrative settlement what they could not be required to produce in discovery incident to litigation, I see no reason to provide specific machinery for resolving disputes over production demands before suit is filed on the tort claim itself. Either settlement will be reached notwithstanding the disagreement, or the claimant will be met with a denial of the claim or a ruling that the claim is insufficient under the regulations. In either of the last two circumstances, a claimant intent on pursuing matters will soon enough be in court, where the specific question of privilege in administrative settlement proceedings most likely will be overtaken by a substantially similar question of discovery in litigation.

F. Eligibility for Relief

Although the sum certain and substantiation issues account for the most live among controversies surrounding the validity of an administrative tort claim, the agencies have raised other kinds of objections at or near the threshold. I do not deal in any detail in this report with the question of eligibility as such to present an administrative claim. The question tends to be both highly technical in

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[470] S. REP. NO. 1327, supra note 435, at 8, reprinted in 1966 U.S. CODE CONG. & AD. NEWS 2519.

character and relatively devoid of policy considerations; in any event, the definition of a proper claimant at the agency level should not differ fundamentally from the definition of a proper FTCA plaintiff. The fact remains, however, that the statute leaves the term claimant undefined and that it is the Justice Department that has sought to regularize the agencies' response to the question of who can present a claim on behalf of whom. The solutions are on the whole reasonable.

A claim for property damage or personal injury may be presented either by the victim or by a "duly authorized agent or legal representative;"[471] if presented by the latter, the claim must be filed in the name of the claimant, signed by the agent or representative with an indication of his or her title or legal capacity, and "accompanied by evidence of . . . authority to present a claim on behalf of the claimant."[472] A claim for wrongful death, on the other hand, may be presented by the executor or administrator, or other person authorized under state law.[473] Finally, a lawfully subrogated insurer is expressly authorized to present a claim.[474] These provisions have generated a surprising volume of litigation with inconsistent results. Some courts seem content to waive what they take to be "technical defects,"[475] but others are not.[476] According to the leading study of litigation under the administrative claim provisions of the FTCA, a number of otherwise meritorious claims have run permanently afoul of the statute of limitations due to the fact that a technically ineligible person presented them.[477]

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[471] 28 C.F.R. § 14.3(a), (b) (1983). The victims in these cases are identified as the owner of the property and the injured person, respectively.

[472] Id. § 14.3(e).

[473] Id. § 14.3(c).

[474] Id. § 14.3(d).

[475] E.g., Locke v. United States, 351 F. Supp. 185, 188 (D. Hawaii 1972) (court should not stand on technicalities on evidence of representative capacity where the rights of children are involved and inequities would otherwise result). Accord 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).

[476] E.g., Triplett v. United States, 501 F.Supp. 118, 119 (D. Nev. 1980) (claim invalid for lack of evidence of attorney authority though no prejudice to the government); 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).

[477] Zillman, supra note 336, at 977.

I bypass the relatively narrow and technical issues of eligibility arising under the Attorney General's regulations (for example, the question under what circumstances the filing of a claim by one of the parties to a partially subrogated claim should also be treated as a filing by the other[478]) in order to advance a general observation. The solution to difficulties of this order lies not in inviting the agencies to ignore the Attorney General's requirements, but rather in insisting that they not respond to violations with undue harshness. Thus, the appropriate response in most cases would be to treat an otherwise valid and timely claim as having been duly filed, to call the claimant's attention to the deficiency and to allow a reasonable length of time, without penalty, for its correction if even that is truly necessary. For example, most claims officers who implement the Attorney General's apparent requirement of a written power of attorney are content with its delayed submission, usually at some time before the onset of actual negotiations;[479] in fact, some never call for one at all.

Again, the proper benchmark is fair and sound administrative practice, not some prediction of the limits of judicial tolerance. Agencies faced with a claim filed by the technically improper party should not, as a general matter, refuse to address the claim, provided it fairly gives them notice of the essentials. They need to be more discriminating than they have sometimes been in the past, as do the courts when the issue arises on the government's motion to dismiss for

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[478]The regulations provide that a partially subrogated claim "may be presented by the parties individually as their respective interests appear, or jointly." 28 C.F.R. § 14.3(d)(1983). Where the insurer or the insured presents only its claim for damages, the other may not benefit from it. Shelton v. United States, 615 F. 2d 713, 715-16 (6th Cir. 1980). But the opposite result has been reached where one party presents the whole claim with some mention of the other party's interest. Interboro Mut. Indem. Ins. Co. v. United States, 431 F. Supp. 1243, 1246 (E.D. N.Y. 1977). See also Cummings v. United States, 704 F.2d 437, 439-40 (9th Cir. 1983); Executive Jet Aviation, Inc. v. United States, 507 F. 2d 508, 516 (6th Cir. 1974).

[479]If a power of attorney is not supplied and this 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, supra note 443, recently has held that whether or not a valid power of attorney is supplied has nothing to do with satisfaction of the jurisdictional prerequisite to suit. Warren v. Department of Interior, No. 82-4642, 52 U.S.L.W. 2444 (9th Cir. Jan. 24, 1984)(en banc). Accord Graves v. United States Coast Guard, 692 F.2d 71, 74-75 (9th Cir. 1982). But 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, supra note 476.

want of a valid prior claim. Take, for example, the recurring problem of spousal claims for loss of consortium. Where a person files a claim for personal injuries without so much as mentioning a spousal claim for loss of consortium, the agencies and courts properly regard the latter as outside the ambit of the claim.[480] On the other hand, 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 truly minimal. Unfortunately,[481] the agencies and courts have not always acknowledged the difference.[482] As a growing body of case law now holds, rigidly technical attitudes toward the filing of a claim on behalf of family members, particularly spouses and minor children, may work an unfair and indefensible hardship. But the principle is even more general than that. Justice Department regulations should be amended, in the interest of fairness and decency, to adopt with respect to all claimants 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 rest on sheer technical deficiencies in otherwise valid, intelligible, and responsibly filed administrative claims, where they are not prejudiced as a result. Given the Attorney General's continuing responsibility for tort claims management at the agency level, this policing function should not be left entirely to episodic and uneven intervention by the courts.

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[480] Johnson v. United States, 704 F.2d 1431, 1442 (9th Cir. 1983); Fol v. United States, 548 F. Supp. 1257, 1258 (S.D. N.Y. 1982); Stephan v. United States, 490 F. Supp. 323, 324 (W.D. Mich. 1980); Stewart v. United States, 458 F. Supp. 871, 877 (S.D. Ohio 1978); Ryan v. United States, 457 F. Supp. 400, 402-03 (W.D. Pa. 1978); Heaton v. United States, 383 F. Supp. 589, 591 (S.D.N.Y. 1974). See generally Silverman, The Ins and Outs of Filing a Claim Under the Federal Tort Claims Act, 45 J. AIR L. & COM. 41, 50 (1979).

[481] Walker v. United States, 471 F. Supp. 38, 42 (M.D. Fla. 1978).

[482] E.g., Nelson v. United States, 541 F. Supp. 816, 817 (M.D. N.C. 1982); Forest v. United States, 539 F. Supp. 171, 174 (D. Mont. 1982); Campbell v. United States, 534 F. Supp. 762, 765 (D. Hawaii 1982); Estate of Santos v. United States, 525 F. Supp. 982, 985 (D. P.R. 1981); Van Fossen v. United States, 430 F. Supp. 1017, 1023-24 (N.D. Cal. 1977) ("[T]he government can in no way contend that it was surprised or deceived in its pretrial deliberations. In short, the expediting function which Congress envisioned as the role of the administrative procedure was not impeded here."); De Groot v. United States, 384 F. Supp. 1178, 1180 (N.D. Iowa 1974); Young v. United States, supra note 475, at 740-41; Locke v. United States, supra note 475, at 188. But see Jackson v. United States, 558 F. Supp. 14, 16 (D. D.C. 1982) (parents' own claim for wrongful death not a sufficient claim for spouse of decedent); Pringle v. United States, 419 F. Supp. 289, 291-92 (D. S.C. 1976) (claim null since while father qualified as executor of son's

(Footnote Continued)

Candidly speaking, I am not sanguine about the Justice Department's capacity to give agencies the needed encouragement. A Department that sees its primary responsibility under the FTCA as defending the government in the adversarial setting of tort litigation is not well situated to persuade agency attorneys to operate more by the spirit than the letter of the law in their dealings with claimants at the administrative level. As this report already makes clear, and will make still clearer when it is through, Justice Department regulations bear scarcely a trace of procedural magnanimity toward claimants, even where virtually nothing in the statute stands in the way. But the litigation practices of the Department are most eloquent of all. Time and again, the Department tries to keep a claimant out of court, permanently if possible, by raising as a jurisdictional defense technical defects in the administrative claim that the agency never brought to his or her attention and, what is more disturbing, that did not prevent the agency from addressing the claim and issuing a final denial letter on the merits.[483] Doing so under those circumstances is unfair as well as disingenuous. Because the practice goes more to ethics in Justice Department litigation strategy than to the handling of tort claims at the agency level, I mean to do no more than identify it as an unfortunately suggestive and negative signal to the agencies.

This report, finally, does not discuss the impact of the administrative claim requirement on class actions under the FTCA, an eligibility-related problem dealt with exhaustively and persuasively

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(Footnote Continued)
estate at time of suit, he did not so qualify at time of filing administrative claim).

[483] See e.g., Hunter v. United States, 417 F. Supp. 272, 274 (N.D. Cal. 1976); Ozark Airlines, Inc. v. Delta Airlines, Inc., 63 F.R.D. 69, 71 (N.D. Ill. 1974); Young v. United States, supra note 475, at 740; Sky Harbor Air Serv. v. United States, 348 F. Supp. 595, 596 (D. Neb. 1972).

The courts are less and less impressed with this litigation tactic. See e.g., Executive Jet Aviation, Inc. v. United States, supra note 478, at 516 ("We are convinced that our decision in no way will prejudice the Government except insofar as it may have hoped to avoid entirely a substantial portion of its potential liability through an adroit application of [the statute of limitations]."). See also Apollo v. United States, 451 F. Supp. 137, 138-39 (M.D. Pa. 1978). 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 judicial trend. "In light of the inclination of the courts, 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. It is extremely important that the requests to the claimant be documented, and that the claimant be warned of the consequences of his continued . . . withhold[ing of] evidence." DEPARTMENT OF JUSTICE, TORTS BRANCH MONOGRAPH, VOL. C, ADMINISTRATIVE CLAIMS 17-18 (Mar. 1983).

elsewhere. A recent study of class actions[484] concludes that while nothing in the Act expressly or impliedly bars use of the class action vehicle, the jurisdictional requirement of a prior administrative claim, as applied by the courts in the class action context, makes that vehicle for all practical purposes unavailable, however otherwise appropriate to the particular cause of action it might be. The courts in effect have held that each member of the class must submit a separate prior claim, not only showing individual authorization but also a distinct sum certain.[485] In the vast majority of cases, the requirement makes a class action administrative claim under the FTCA, and indirectly a class action suit, untenable. I do not rehearse here a problem that has been thoroughly considered elsewhere and that concerns only a highly peculiar subset of administrative tort claims.[486]

G. The Settlement Process

Once a claim is validly filed, responsibility for investigating and evaluating it can fairly be said to pass to the agency.[487] 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."[488] But how the agencies are to go about discharging that burden is left both by statute and Justice Department regulation almost entirely up to them. I reserve

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[484] Note, Administrative Exhaustion under the Federal Tort Claims Act: The Impact on Class Actions, 58 B.U.L. REV. 627 (1978).

[485] Lunsford v. United States, 570 F. 2d 221 (8th Cir. 1977) (victims of flooding caused by cloud seeding); Caidin v. United States, 564 F.2d 284 (9th Cir. 1977) (shareholders of failed bank); Blain v. United States, 552 F.2d 289 (9th Cir. 1977) (forest fire victims); Pennsylvania v. National Ass'n of Flood Insurers, 520 F. 2d 11 (3d Cir. 1975) (victims of major flooding in the state); In re Agent Orange Product Liability Litigation, 506 F. Supp. 757 (E.D. N.Y. 1980) (persons injured by use of Agent Orange in Vietnam); Luria v. CAB, 473 F. Supp. 242 (S.D. N.Y. 1979) (victims of government failure to regulate air travel charters); Kantor v. Kahn, 463 F. Supp. 1160 (S.D. N.Y. 1979) (same); Founding Church of Scientology v. Director, FBI, 459 F. Supp. 748 (D. D.C. 1978) (all Churches of Scientology in the United States).

[486] See supra note 484. Consideration should be given to amending the FTCA to simplify claims presentation requirements in the case of class claims, as some courts bound by the current strictures have urged. E.g., In re Agent Orange Product Liability Litigation, supra note 485, at 761.

[487] Corboy, Shielding the Plaintiff's Achilles' Heel: Tort Claim Notices to Governmental Entities, 28 DE PAUL L. REV. 609, 636 (1979); Zillman, supra note 336, at 969.

[488] Adams v. United States, supra note 432, at 290 n. 9. See also Koziol v. United States, supra note 459, at 90.

their practices, as best I can piece them together from interviews with individual claims officers, for the chapter that follows.

Congress clearly intended that agencies have a guaranteed six months in which to assess and possibly negotiate a claim without the threat of court action. However, it did not mean that the passage of six months without final agency action on a claim should necessarily trigger litigation. Thus, the statute provides specifically that such failure gives a claimant only the "option" to consider the claim as having been finally denied, and that this option may be exercised "any time thereafter."[489] The claimant may elect not to sue without in any way prejudicing his or her right to do so at a later date. To this extent, the act encourages, or at least avoids discouraging, the continuation of negotiations beyond six months and indeed indefinitely,[490] or until a final denial is issued.

An area of uncertainty with some potential for dispute in the settlement context is the question who is the offeror and who is the offeree. Just as buyer and seller in the sale of goods are not invariably or even presumptively the offeror or the offeree, neither are the claimant and claims officer in the administrative settlement of tort claims. What little indications we have would suggest that the government fancies itself in principle the offeree. First, the sum certain required of a valid claim is in effect an opening offer. Furthermore, Justice Department regulations allow amendment of a valid claim only "prior to final agency action,"[491] which strongly implies that the government has the power of final acceptance. And 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 generally. 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."[492]

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[489] 28 U.S.C. § 2675(a) (Supp. 1983).

[490] A good example of protracted negotiations is Douglas v. United States, supra note 441, discussed earlier in another connection. 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.

[491] 28 C.F.R. § 14.2(c) (1983).

[492] 28 U.S.C. § 2672 (Supp. 1983) (emphasis added).

Why, one may ask, do the parties need to know in advance which of them has the final power of acceptance? As a practical matter, each negotiation tends to be sui generis; if it succeeds, common ground will have been reached without either party explicitly reserving the last word. Controversy is least of all to be expected where the government agrees to settle a claim in full, for presumably the claimant has either originally or by timely amendment stated a sum certain with which he or she can live. But it can happen that the claimant comes to regret the amount of settlement after agreement is reached, or comes to regret it even sooner, but fails to act quickly enough in amending the claim. Most courts faced with this scenario have barred suit for any larger amount,[493] and this seems quite proper if we mean to protect the integrity of the settlement process and, more specifically, prevent claimants from obtaining an unfair advantage in subsequent litigation.[494]

However, an unusual set of circumstances recently has led the Court of Appeals for the District of Columbia Circuit in the case of Odin v. United States[495] to go off in a different direction. There, the claimant, unrepresented at the time, filed an administrative claim in the amount of $791, reflecting the precise amount of medical bills incurred to date in connection with the aftereffects of a swine flu immunization. In spite of informal indications over the course of the next year from the attorney whom claimant subsequently retained that her injuries substantially exceeded that sum, the then Department of Health, Education and Welfare notified her that her claim as filed was

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[493] 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 tractor went into a hole on his land left by employees of the Bureau of Reclamation. His claim for $93.50 was allowed by the agency ten months after filing, without the claimant earlier having taken steps to withdraw it. Refusing the payment, he sued for $75,000 on the basis of serious complications allegedly unforeseeable at the time of filing. Suit was barred. "[A] contrary reading of the statute would place upon federal agencies the unwarranted burden of processing claims to an award which, even though it is for the full amount of the claim, could be rejected by the claimant." 389 F.2d at 194.

[494] 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. Stokes v. United States, 444 F. 2d. 697 (4th Cir. 1971).

[495] 656 F. 2d 798, 806 (D.C. Cir. 1981).

granted in full. The amount of damages sought had never been amended. A payment voucher in the amount of $791 sent to the claimant and her attorney came back unsigned, together with an amended administrative claim for one million dollars, explaining that the smaller figure had been based on a misunderstanding of the claim form and only reflected medical bills to the date of filing. The Torts Branch of the Justice Department, acting for HEW, in turn notified the claimant that it would disregard the amendment on the ground that the agency's acceptance of the initial claim rendered that claim no longer pending and precluded the claimant both from amending it and from seeking a higher sum in court. This view was sustained by the district court, but disavowed on appeal. The Court of Appeals held in effect that the "final agency action," which admittedly bars subsequent amendment of a claim, does not itself take place until the agency procures the claimant's "acceptance" of the agency's "offer" to settle.[496] The claimant, said the court, has the power of acceptance,[497] and acceptance, following uniform agency practice, occurs when the claimant signs and returns the payment voucher expressly designed for this purpose.[498]

Though apt and eloquent in its denunciation of the government's attitude to a claimant's "one false step,"[499] and though perhaps not

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[496] Id. at 804.

[497] The court relied on the language of the Act's release provision. See supra note 492, 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 435, at 4, reprinted in 1966 U.S. CODE CONG. & AD. NEWS 2518.

[498] The voucher form (Appendix B to this report) contains a caption "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.

[499] 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. at 806.

unfair in result under the particular circumstances of the case,[500] Odin is not wholly convincing on the narrow legal issue before it. That Congress, in making claimant's acceptance of a settlement "final and conclusive on the claimant," intended to vest the power of acceptance in any technical sense in the claimant as opposed to the agency is far from clear. Moreover, the court's somewhat disingenuous definition of "final agency action" in terms of unilateral conduct by the claimant simply cannot satisfy the Attorney General's legitimate concern that claimants not enjoy unfair leverage in subsequent litigation from an agency's prior assent to settlement.[501]

The question of who enjoys the final power of acceptance of administrative settlements in tort is not intrinsically very interesting, and certainly not well illuminated either by the statute or its legislative history. But when a case turns upon it, a clear answer is highly desirable. The Odin court thus correctly tried to fasten upon some fixed and visible event, such as the return of a signed voucher form. The moment it chose, however, occurs rather late in the proceedings; in fact the form primarily serves to trigger payment procedures on a claim the parties consider for all practical purposes already settled. Furthermore, upon receiving the voucher, the claimant has an indeterminate amount of time in which to sign and submit it. Needless to say, most claimants do so with dispatch, but the framework established by Odin still is an invitation to speculate.

Realistically, the party to the negotiations, if any, that has reason to fear unfair speculation by the other is the government. If the government were to withdraw at the last moment, the claimant normally would not have compromised in the least his or her litigation posture. Thus I would seek to ensure that at some point in the

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[500] 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.

[501] 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 in practice very effective is highly questionable.

The provision originally was designed for multiple claimant situations, the idea being to remove the disincentive on the part of an agency to admit liability and settle a claim administratively when a related claim had been brought by another claimant directly to court, as was possible until 1967. 2 L. JAYSON, supra note 445, at pp. 17-35, 17-59. It 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. at p. 17-59.

settlement process, which necessarily follows a variety of forms and rhythms, the claimant make and know that he or she is making an irrevocable expression of assent to the terms of settlement. For most practical purposes, this is already the case in settlements of over $25,000, for the Justice Department will not even entertain approving such a settlement until satisfied that the government already has the claimant's assent.

Disputes of the Odin variety most certainly do not abound, and neither Congress nor the Justice Department may feel the moment ripe to redefine the locus of the power to accept or the formalities of acceptance. For the time being, agencies should simply be alert to the opportunities claimants have to play fast and loose or to indulge in abusive second thoughts. If Odin, which rests at bottom on statutory interpretation, does produce a pattern of abuse, Congress should act to curb it. On the other hand, I do not mean by my criticism of the general rule laid down in Odin to endorse in the least the position of the Torts Branch in that particular case. Where it has evidence that the initial filing of a grossly understated claim was 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. It has that authority and should be prepared to exercise it with reasonable discretion.

H. The Final Agency Denial

An agency's final denial in writing of a claim under the FTCA triggers a six-month statute of limitations on suit in federal district court, running from "the date of mailing . . . of notice of final denial."[502] After this time, suit if "forever barred."[503] Fortunately, precious little dispute has arisen over what constitutes a final denial. Obviously, an express repudiation of liability on the claim qualifies as such. But equally clearly, so must a final offer in partial satisfaction of the claim which the claimant rejects, and legislative history indicates as much.[504] The problem with that situation is that the moment of final agency denial turns on an expression of intent by

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[502] 28 U.S.C. § 2401(b)(Supp. 1983).

[503] 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).

[504] S. REP. NO. 1327, supra note 435, reprinted in 1966 U.S. CODE CONG. & AD. NEWS 2518.

the claimant. Least determinate of all is the quite common scenario of an openended exchange of counteroffers in which either party might at any time bring negotiations to a close.

One reason why the inherent potential for misunderstanding and confusion has not materialized is that the FTCA itself requires that final denials take the form of a certified or registered letter from the agency and that Justice Department regulations add the requirement of an express warning to dissatisfied claimants to bring suit, if at all, within six months of the date the denial letter was mailed.[505] Until receiving such a communication, a claimant may safely assume that the claim has not been finally denied and that the six-month statute of limitations has not yet begun to run.[506] The final denial mechanism thus appears to be in good working order, and the occasional misunderstanding so idiosyncratic as to warrant no general reform.

Only a few modest adjustments suggest themselves, one of them being really no more than a clarification. The Attorney General's requirement that any final denial be sent certified or registered mail and contain a reminder of the statute of limitations on suit, as mentioned, sets a useful objective standard for the timing of a final denial in otherwise doubtful settings. To ensure that it not only aids the courts in an occasional controversy over the statute of limitations, but also routinely guides claimants in their own conduct, the regulation might usefully be amended to make explicit what is already perfectly implicit, namely that no communication from an agency will in fact be treated as a final denial, for purposes of setting off the statute of limitations, unless it satisfies the criteria set out in the regulation.

Second, the statutory and regulatory provision that suit be brought within six months of the mailing date of the notice of final denial seems to court needless confusion and possible injustice. Several days may elapse between the mailing and arrival of the notice, and that may make all the difference between a timely and stale complaint, given plaintiffs' well-known penchant for bringing action at the tail end of the limitations period. Occasionally it has done just that.[507]

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[505] 28 C.F.R. § 14.9(a)(1983).

[506] Only rarely have the courts had to face this issue. But 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).

[507] Carr v. Veterans Admin., supra note 503. In Carr, plaintiff's administrative tort claim was finally denied by a mailing of February 5, 1973, which arrived on February 9. Plaintiff brought suit on the claim on August 7. The action was dismissed as time-barred based on the date

(Footnote Continued)

Congress easily could start the six months running from the date of arrival of the communication, especially as the present requirement of registered or certified mail guarantees a dated record of receipt with notice thereof to the agency. Doing so would guard against unfair surprise to claimants,[508] without substantially burdening the United States. In any event, 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.

Finally, and most substantially, the Attorney General's regulations pointedly refrain from requiring that agencies give a reason for their denial of a claim; at best, they suggest that giving a reason is not forbidden.[509] The fact is they should impose such a requirement. As a matter of elmentary fairness, a claimant who has taken the trouble, and managed, to perfect a valid administrative tort claim is entitled to some statement of reasons for its denial. To legislate any particular level of specificity in the reasons given would be futile; that simply must be left to the sound discretion of the officer in charge. But no agency should feel free to deny a claim without offering any reason at all.

No serious justification can be advanced for the absence of a requirement of reasons. That a claims officer would rather not be bothered is obviously not one, and no one has persuasively shown that the costs of stating reasons outweigh the benefits. Finally, the notion that a statement of reasons would unfairly tip the government's hand in the event of litigation is simply not credible. If the government's reason for denying a claim is a sound and convincing one, communicating it may only help prevent that litigation from happening; this is to everyone's advantage. Even if the reason is more debatable, it will not long remain a secret. Any passable answer to an FTCA complaint will inevitably reveal as much by way of defense as a reasoned denial letter, and usually a great deal more. Since a fair and adequate denial letter does not have to disclose anything very elaborate about the agency's factual or legal analysis of the claim, it need not compromise the government's litigation interests. In any event, the Justice Department's attempt to free agencies from providing even the "brief

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(Footnote Continued)
of mailing rule, though it still would have been timely under a date of receipt rule.

[508] 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."

[509] "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." 28 C.F.R. §14.9 (a)(1983)(emphasis added).

statement of the grounds for denial" that the Administrative Procedure Act mandates in connection with any garden-variety written application or request[510] is misguided if not flatly illegal. The regulations should positively reaffirm the requirement of reasons.

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."[511] The claimant may exercise this option any time before filing suit and before expiration of the statute of limitations on doing so. By regulation, the request furnishes the agency six months from the date of the request to take final action on it and bars the claimant from suing until such action or until the expiration of the six months, whichever comes sooner.[512] Most indications are that a new six-month statute of limitations on filing suit begins to run at that time. The claims officers with whom I spoke, almost to a one, share this view.[513]

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[510] 5 U.S.C. § 555(e)(1977).

[511] 28 C.F.R. § 14.9(b)(1983). Presumably, reconsideration may be sought only once. Silverman, supra note 480, at 54. However, one agency claims attorney reports permitting claimants to seek reconsideration as often as they wish.

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)(1983). Only if the second agency chooses to do so, and so advises the claimant, will the statute of limitations on suit be tolled. Id.

[512] 28 C.F.R. § 14.9(b)(1983).

[513] 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 takes to be the current approach, namely that a request for reconsideration has no effect whatsoever unless and until the agency expressly notifies the claimant in writing that it has agreed to reconsider the claim. Zillman, supra note 336, at 987. In fact, of all the agencies whose claims practices I examined, only the Army reported following that policy.

The proposal is undesirable. If a reconsideration request is filed toward the end of the six-month period following the denial letter, as well it may be, it will scarcely have been filed when suit must be brought in federal district court on the very same claim. No better way could be devised to shortcircuit the reconsideration that might in fact have taken place. What is more, such a suit is premature if the agency does agree to reconsider the claim, since it has a right to six months

(Footnote Continued)

Still, the reconsideration device can operate as something of a trap for the unwary. In one case, a claimant who received a notice of final denial sought to amend the claim to present new evidence, and was told he might do so. He conveyed his request within six months following the original denial, but did not actually furnish the new evidence until some two weeks after that period had passed. The agency disregarded the request on the ground that it was not timely. The disappointed claimant then promptly filed suit, only to learn that his claim had by then become too stale for judicial consideration.[514] 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. In a somewhat easier case, the claimant upon receiving a notice of denial made two further inquiries, the first of which evidently led him to think the claim might be reconsidered. It was not, and he brought suit some seven and a half months after the first exchange and less than a month after the second. The court dismissed the action as untimely. "[T]he courtesy of the Air Force in supplying subsequent oral and written explanation should not be held to erase . . . its previous 'final denial.'"[515]

These results point up a certain ambiguity about the reconsideration process and a very real potential for misleading an honest and reasonably diligent claimant. The regulations themselves are not flawed. As drafted, they fairly state that a request for reconsideration gives an agency six months from then to act and bars the claimant from suit during that period, unless the agency acts sooner on the request. They also incorporate by reference the rules governing final denial letters; that is to say, 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

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(Footnote Continued)
without suit in order to do so.

I find it significant that the vast majority of claims officers, who would not be expected lightly to resolve doubtful questions of procedure to their own disadvantage, do not suppose that they have to agree expressly to reconsider a claim in order for the reconsideration request to take effect. The commentator may have been influenced by case law dating from the period before the regulations specifically provided for a reconsideration procedure. 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-Wolford, Inc. v. United States, 198 F. Supp. 166, 168 (E.D. Pa. 1961).

[514] Woirhaye v. United States, 609 F. 2d 1303, 1306 (9th Cir. 1979).

[515] Claremont Aircraft, Inc. v. United States, 420 F. 2d 896, 898 (9th Cir. 1970).

months from the date of mailing.[516] Failing such a communication, the claimant has the option of bringing suit any time thereafter. Scrupulous observance of these rules should avoid most misunderstandings, and they apparently do.

The lingering problem is knowing whether a claimant has made a request for reconsideration sufficient to trigger this reasonably straightforward procedure. Does the simple submission of additional evidence, without more, constitute a request? Does a statement of intent to do so, as in the first of the two cases just mentioned? Does a written request for clarification or elaboration, as may have been the case in the second? Obviously not every written communication from a claimant following a final denial necessarily amounts to a request for reconsideration, and there is no litmus test for determining when it does. A claimant may not even want formal reconsideration, with its six-month bar to litigation. He or she simply may have a question to put or a comment to make. All that can be asked of claims officers is that they endeavor to place the most reasonable interpretation possible on any such communication, and promptly indicate that they do or do not, as the case may be, take it to be a request for reconsideration. If they do, nothing more is required at that point, except that confirming the fact might obviate the filing of a premature suit and proceedings to have it dismissed.[517] If they do not, they should plainly remind the claimant that the clock has not stopped running since the denial letter was sent.[518]

All of this may strike some claims officers as excessive handholding. But many claimants do need guidance, since the regulations do not and can not reasonably be expected to alert them to the risk that, in awaiting a response to some communication on their part, they

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[516] 28 C.F.R. § 14.9(a),(b) (1983). For a different view, see supra note 513.

[517] E.g., Trepina v. Wood, supra note 513, at 729.

[518] 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 for reconsideration based specifically on new evidence not accompanying the request, as in the first case cited in the text, may require more explanation. The claimant in that case might have been spared his 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.

may find that the statute of limitations has passed them by. Even if they appreciate the risk, they still may need guidance. The claimant who reopens matters, but out of caution files suit within six months of the original denial letter, has not given the agency the six months to which the regulations entitle it for reconsideration. The suit is plainly premature and subject to dismissal. On the other hand, waiting a full six months by definition means letting the original statute of limitations, and more, expire. Even if the agency makes some response within six months, the original limitations period may by that time have passed. The fact is that, in extending claimants an invitation to seek reconsideration, the Justice Department carefully protected the government's own prerogatives, for the regulations secure the agencies a period of time in which to act while unmistakably postponing the claimant's right to sue. For claims officers to put claimants similarly at ease would be no less simple. In doing so, they also would spare the courts from having to decide after the fact, on a motion to dismiss, what claimants under varying circumstances may or may not reasonably have been led to believe.[519]

A final word or two on the reconsideration request. Its temporary bar to litigation affords agencies a limited opportunity to conduct a reconsideration without discovering to their surprise that the claimant has gone to court after all. It serves a useful purpose. But plainly most reconsiderations do not require six months, as shown by the speed with which agencies manage to send most letters renewing a denial. Where denial on reconsideration is all but a foregone conclusion, agencies should act especially promptly, so as not to keep claimants artifically out of court. Suppose, however, a claimant asks to withdraw a request for reconsideration before the end of six months. May he or she do so? The regulations imply that a claimant may not demand its withdrawal. But I do not see why he or she may not request it, particularly since reconsideration was entirely optional with the claimant in the first place. In fact, agencies should routinely honor such a request, provided they have not as yet expended significant resources on the reconsideration process.[520] The agencies alone should be allowed to make that determination, but they should make it fairly and objectively.

J. The Aftermath

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[519] See supra notes 513-15 and accompanying text.

[520] Before the 1966 amendments, a claimant could withdraw a claim optionally filed with the agency on fifteen days' written notice. See supra note 293.

The most convenient rule would be to allow the claimant six months from the withdrawal in which to bring suit, as was the case in the pre-amendment days. Theoretically, a claimant could file a reconsideration request for the sole purpose of prolonging the normal limitations period, but this seems an extremely improbable tactic.

Following a final denial, and either no request for reconsideration or a fruitless one, 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 doubtless partly responsible. That process achieves its end 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. Still, in some cases a claimant abandons his or her claim without abandoning a belief in its merits. This category of foregone litigation cannot quite so easily be described as needless. But where a claimant chooses not to litigate because he or she at least has had the satisfaction of being heard, has come to a more realistic assessment of the claim's strengths and weaknesses, or can weigh the costs of litigation more intelligently and dispassionately than would otherwise have been possible, the administrative claim procedure also shows a measure of success.

Tort claims that go to litigation are not inherently incapable of settlement. In fact, it is estimated that between sixty and seventy percent of them are settled prior to judgment.[521] The fact that these percentages approach the eighty percent that prompted Congress to enact the 1966 amendments[522] obviously does not indict an administrative settlement process which now results in the settlement or abandonment of a vastly greater portion of claims than was previously even imaginable. The fact is that litigated cases now represent a very small subset of all claims filed. What is more, a good many postlitigation settlements do not represent in any sense a concession of liability, but a rational decision by the Justice Department to conserve scarce litigation resources for cases that count more heavily. Agency and Justice Department officials alike seem to 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 dispose finally of all the claims they received,[523] and probably did not anticipate even as high a rate of final disposition as they actually have achieved.[524] 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

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[521] 2 L. JAYSON, supra note 445, at p. 15-9. A current Torts Branch Director estimates the figure for postlitigation settlement as a full eighty percent.

[522] See supra note 312 and accompanying text.

[523] See supra note 467.

[524] See supra note 318 and accompanying text.

probably be ripe for decision within that time.[525] Even so, they deliberately chose not to make claimants wait any longer than that 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, or early offers they believe they can top in litigation, either through compromise settlement or judgment. Others just want their day in court. One cannot know the precise mix. But the fact remains that in no category of litigation -- and the FTCA is still ultimately a judicial remedy -- do the disputants always work things out before going to court. That something in the vicinity of five to ten percent of all tort claims brought to the agencies' attention finally end up in court[526] is neither very 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.[527] But the agencies do not cease to play a role. They will prepare a formal litigation report for the benefit of the United States Attorney on the case. They will conduct further investigations if necessary and will help identify and locate witnesses, expert or otherwise. They will be consulted throughout on factual and legal issues and, as appropriate, on litigation and settlement strategy or the advisability of appeal from an adverse judgment.[528] Agency counsel even may participate actively in the defense, though they rarely prepare pleadings or make court appearances. At all events, agency personnel will themselves constitute key witnesses and discovery of all sorts will implicate agency records. Especially where the claim advances a regulatory tort, rather than a slip-and-fall or fender bender, or where large sums of money or large issues are at stake, they will maintain the liveliest of interest. But the administrative process as such will have come to a close.

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[525] S. REP NO. 1327, supra note 435, at 5, reprinted in 1966 U.S. CODE CONG. & AD. NEWS 2518-19.

[526] See supra note 328.

[527] 28 U.S.C. § 2677 (Supp. 1983).

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

Chapter Five

ADMINISTRATIVE SETTLEMENT UNDER THE FEDERAL TORT CLAIMS ACT: A LOOK AT AGENCY PRACTICE

The administrative settlement of tort claims under the FTCA takes place within the reasonably straightforward statutory and regulatory framework described in the two preceding chapters. Though I have emphasized the legally problematic aspects of the claims process, the overwhelming majority of claims obviously pass through administrative channels without raising any significant difficulties of a procedural nature. In fact, as I have been quick to note, some of the problems I identify in the system remain, nearly twenty years after enactment of the FTCA amendments, potential rather than actual ones.

By these remarks, I do not mean to suggest that either the statute or the Attorney General's regulations provide answers to all important procedural issues that may arise. On the contrary, both of these sources are conspicuously silent on how agencies should conduct what really lies at the heart of the operation, namely the actual investigation and determination of a claim. In fact, the Justice Department has taken a strikingly narrow view of the rulemaking authority vested in it. Its regulations essentially dictate to claimants the form and content of a valid and sufficient claim,[529] and detail the measure of cooperation that agency claims officers may expect of them.[530] They further advise claimants of when and how to amend a claim or seek reconsideration.[531] But as for guiding and channeling the conduct of the agencies, the regulations say practically nothing, beyond instructing generally when to submit a proposed settlement to review by an agency legal officer or the Justice Department,[532] how to convey a notice of final denial,[533] and how to process a claim for payment once it has been settled.[534] The essence of agency responsibility under the FTCA -- investigating and initially determining a claim -- is as much

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[529] 28 C.F.R. §§ 14.2-.3 (1983).

[530] Id. § 14.4.

[531] Id. §§ 14.2(c), 14.9(b).

[532] Id. §§ 14.5-.7. For example, 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.

[533] Id. § 14.9(a).

[534] Id. § 14.10(a).

passed over by the regulations as it is by the statute itself.[535] In the end, the agencies are virtually free to adopt whatever manner of operation they choose and presumably to reduce it to writing or not as they see fit.[536] Whether Congress expected the Justice Department to impose greater procedural guidance on the agencies, is entirely conjectural.[537] The fact is it has not.

The purpose of the present chapter is to sketch the agency practices that put procedural flesh on the statutory and regulatory skeleton. My insights as well as my examples stem from conversations with personnel in the claims divisions of ten federal agencies -- the Departments of Agriculture, the Air Force, the Army, the Interior, Justice and State, the Federal Bureau of Investigation, the National Aeronautics and Space Administration, the United States Postal Service and the Veterans Administration -- as well as the General Accounting Office. The agencies chosen do not necessarily constitute a cross section; in fact, I selected them mostly for some peculiarity like an especially high claims volume or access to a meritorious claims statute in addition to the FTCA. They do provide an opportunity to examine claim settlement practices in a series of less than perfectly simple agency settings.

I find it striking, though not wholly surprising, that the relative autonomy of the agencies in organizing their claims activities has not prevented them from all heading in basically the same procedural direction. Out of a rich universe of conceivable models, they have landed upon one whose shared characteristics permit us to identify it as essentially investigatory in character. For the most part, the differences that emerge go to details of the operation. The presence of this strong common denominator leads me to present what I have learned from the agencies as small variations on a single common theme rather than as a series of identifiably distinct alternatives.

I use the term investigatory to denote the following sort of procedure. The agency out of whose activities a claim arises takes charge itself 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 foot- and paperwork, responsibility for seeing that the job is satisfactorily done 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 investigating nor its evaluating functions does the agency afford anything remotely approaching a judicial-style

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[535] Section 14.8 of the regulations, entitled "Investigation and examination," does no more than authorize an agency to enlist the cooperation of another agency in conducting its investigations.

[536] Id. § 14.11, authorizing agencies to issue regulations consistent with the Attorney General's.

[537] See text at notes 303-07, supra.

hearing. There will be no formal record, no cross examination or confrontation of witnesses, no rules of evidence, and no special discovery devices -- none of the elements normally associated with a formal hearing. In a very basic way, the model is simply nonadversarial. What makes this fact most evident is not so much the absence of the procedural trappings just mentioned (for it is possible to have those trappings in a nonadversarial setting), but the fact that the ultimate decisionmaker, though at a remove from the events giving rise to the claim, is not entirely neutral. Decisionmaking authority at the agency level has not been vested in an independent claims commission, a body of administrative law judges, or some other unit enjoying substantial institutional independence from the different agencies out of whose activities the claims arise. One might say without exaggerated contrast that administrative tort claims are decided essentially by lawyers for one of the parties. Viewed in that light, the prevalence of an agency-centered investigatory mode of operation is anything but surprising. In many cases, the filing of an administrative claim does not even signify a "dispute" between the parties.[538] Some sort of "incident" there will have been, but not necessarily a dispute. That will be revealed only in the outcome.

A. A Sense of Numbers

Before hazarding a composite chronological sketch of agency-level settlement practices, I should say a word about the relative burden of tort claims in the various agencies. On the one hand, no federal agency, however distinctive its affirmative missions, is without its incidence of them. Each has had to address the relevant substantive and procedural questions and establish the necessary machinery. Some agencies, particularly those with large numbers and recurring patterns of tort claims, have developed detailed regulations that supplement those of the Justice Department and that may also govern whatever meritorious or other auxiliary claims authority they may possess; others have essentially reenacted the Justice Department regulations, in some cases verbatim.[539]

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[538] Obviously some tort claims are filed after a dispute, in every practical sense of the term, has arisen. Such is the case of many so-called regulatory torts, as well as some conventional common law tort situations like conversion, trespass or false arrest or imprisonment.

[539] For FTCA regulations of the particular agencies in my sample, see 7 C.F.R. § 1.51 (1983) (Agriculture Department); 14 C.F.R. §§ 1261.300-.315 (1983) (NASA); 22 C.F.R. §§ 31.1-.17 (1983) (State Department); 32 C.F.R. §§ 536.1-.171 (1983) (Army), 842.0-.181 (1983) (Air Force); 38 C.F.R. §§ 14.600-.610 (1983)(Veterans Administration); 39 C.F.R. §§ 912.1-.14 (Postal Service); 43 C.F.R. §§ 22.1-.5 (Interior Department). Adjacent sections of the regulations of the military services, the Veterans Administration and the State Department, for example, address the complex array of ancillary claims settlement authority -- such as the Military, Foreign and National Guard Claims Acts, or the statutes that authorize payment of tort claims arising

(Footnote Continued)

But though universal, tort claims strike some agencies more frequently than others. Statistics reported at the time of the 1966 amendments showed the incidence of tort claims to be highly concentrated in a small number of agencies, typically those having extensive direct dealings with the public or making use of a large number of motor vehicles. Over four-fifths of tort suits pending against the government at the end of October 1965 arose out of the activities of five agencies: the Defense Department, the Post Office (as it was then called), the then Federal Aviation Agency, the Department of Interior and the Veterans Administration.[540] So far as one can tell,[541] the pattern has continued. Judging by the admittedly somewhat skewed sample of claims actually approved in calendar year 1982 by the Justice Department for sums in excess of $25,000, the incidence is dramatically uneven. Of 155 such claims, the agencies just mentioned collectively account for all but ten.[542] Comparisons in numbers of incoming claims are more elusive, but also more reflective of the actual relative burdens on the agencies. Figures given me by some of the agencies I sampled indicate dramatic variations. On the high end for fiscal year 1982, the Veterans Administration received a total of 936 malpractice and 1660

(Footnote Continued)
abroad -- conferred on those agencies. Unless incorporated by reference, the basic Justice Department regulations on the FTCA have no bearing on the latter 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 Regulation No. 112-1, Claims and Tort Litigation (July 1, 1983); Army Regulation No. 27-20, Legal Services: Claims (Sept. 1970); United States Postal Service, Administrative Support Manual, pt. 250 (Oct. 15, 1982); Veterans Administration Regulation No. M-02-1, pt. 18 (Aug. 1, 1981).

Regulations on the FTCA and on ancillary claims statutes may differ in their particulars. Non-FTCA State Department claims, for example, may demand by way of a claim a formal sworn statement and greater particularity than the simple written statement required under the FTCA. 22 C.F.R. § 31.4(b)(1983). The Veterans Administration calls for claims to be filed in duplicate. 38 C.F.R. § 14.616(a)(1983).

[540] S. REP. NO. 1327, 89th Cong., 2d Sess. (1966), quoting from H.R. REP. NO. 1532, 89th Cong., 2d Sess. (1966), and reprinted in 1966 U.S. CODE CONG. & AD. NEWS 2519.

[541] 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.

[542] The Army alone accounted for over half of the dollar value of such claims.

The pattern for 1983 was similar. Of 120 claims approved by the Justice Department, all but nine were generated by the named agencies.

nonmalpractice claims,[543] and the Air Force 1727 in the aggregate.[544] Even this healthy total is dwarfed by the reported 9323 tort claims processed administratively by the Postal Service in calendar year 1982. Annual claims totals range downwards through an estimated 1500 for the Department of Interior, 500 for the Agriculture Department, and 100 or so for the Federal Bureau of Investigation, until one reaches the comparatively modest levels of fifty claims or less each in the State Department and National Aeronautics and Space Administration, even counting claims under those two agencies' meritorious claims statutes. Clearly some agencies outside my sample have annual tort claims total that can be stated in one-digit numbers.

B. A Sense of Organization

The volume of an agency's tort claims business necessarily has a bearing, though not always the same bearing, on how it organizes its conduct of that business. To relate the organization of each agency in my sample would be tedious, especially as a few examples should suffice to indicate the possibilities. In the State Department, a single Assistant Legal Adviser within the Office of Legal Adviser personally handles all the agency's tort claims with the assistance of one attorney-adviser and one secretary; even then the work does not consume all or even most of his time.[545] Centralization on a scale like that is entirely feasible. All final determinations are made by the Deputy Legal Adviser on the Assistant Legal Adviser's recommendation, which takes the form of a self-contained memorandum, without the former necessarily ever examining the claims file. Only foreign claims may be finally settled elsewhere, namely in the foreign missions, but only in an amount up to $1000, and even then the missions are reportedly reluctant to issue a final denial; they prefer that such a ruling come from Washington.

By contrast, tort claims in the Veterans Administration, though officially handled by an Assistant General Counsel who likewise has

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[543] In the same period, incidentally, 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. See text at notes 334-35, supra.

[544] See text at note 321, supra. I do not have a comparable total for the Army, but the Chief of General Claims in the Army Claims Service gives a ballpark figure as high as 5000.

[545] In calendar year 1982, 31 tort claims came into the Assistant Legal Adviser's office, ranging 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 needed medical attention.

other important duties,[546] command the full-time attention of a deputy assistant general counsel with a staff of four attorneys. More important, tort claims occupy agency lawyers in each of fifty-four regional counsel offices. Nevertheless, considering the scale of the agency's tort claims business, matters are reasonably centralized. All tort claims, wherever filed, are routed to counsel headquarters in Washington for a superficial examination of their sufficiency. Only then are they forwarded to the district counsel office nearest where the claim arose. There an investigation will take place, and there final settlements of up to $25,000 may be reached[547] and final denials issued on claims up to 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. That office, exercising a de novo standard of review, may deny the claim entirely, or it may remand to district counsel with instructions to negotiate and settle the claim for a stated lesser amount within their authority or, if that cannot be done, to deny it altogether, or it may even exceptionally give regional counsel authority to negotiate and settle the claim for an amount less than that recommended but beyond their normal authority, subject to Justice Department approval. Of course, it may simply endorse the regional counsel recommendation in which case it will seek Justice Department approval itself. Any decisive action taken in Washington, though handled by an ordinary staff attorney, requires a formal memorandum to the Deputy Assistant General Counsel to be transmitted, upon his own review and revisions, together with a draft letter, to the Assistant General Counsel for action.[548]

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[546]The other duties of the Assistant General Counsel, as head of Professional Staff Group One, include educational programs, vocational rehabilitation, loan guaranty and bankruptcy.

The agency's other four assistant general counsel handle, respectively, (1) compensation, pensions and insurance, (2) hospital administration, personnel and labor relations, and constitutional torts, (3) Freedom of Information, Privacy Act and equal employment opportunity matters, and (4) contracts and construction.

[547]The fact that district 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. See 38 C.F.R. § 14.608 (1983) on referrals from district counsel.

[548]Other agencies with a much smaller claims volume than the Veterans Administration nonetheless use a similar moderately decentralized system. At the National Aeronautics and Space Administration, tort claims responsibility falls to an Assistant General Counsel for Litigation whose resources are devoted in far greater measure to other matters, notably contracts and procurements. He and

(Footnote Continued)

Even so, the Veterans Administration does not push centralization of large scale tort claims operations to the limit. The Department of the Army may take credit for that. Suffice it to say that any claim with a face value in excess of $5000 requires direct handling in claims service headquarters at Fort Meade, Maryland. Claims of a lesser face value are processed by the post having geographic responsibility for the incident, in particular by the designated claims attorney -- military or civilian -- within that post's Judge Advocate's office.[549] Substantive settlement authority, exercised on the basis of the officer's investigative report complete with findings and recommendations,[550] vests in the Staff Judge Advocate (the chief legal officer at the post) or by delegation in the claims officer directly. No more than $5000 may be authorized for payment at this level. Apart from the Army's markedly lower cutoff point on local settlement, even compared with the relatively centralized Veterans Administration, the best measure of concentration in the Army Claims Service is its policy on denials.[551] Put simply, no local post may deny a claim, however, small the sum sought.[552] The most it can do is prepare a so-called Seven-Paragraph

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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 fifty claims directly out of Washington -- much like 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.

[549]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.

[550]If a unit claims officer, supra note 549, 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 Regulation No. 27-20, Legal Services: Claims §§ 2-29 - 2-35 (Sept. 1970).

[551]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.

[552]This contrasts sharply with the more usual agency practices of delegating to local agency attorneys either (a) authority to deny claims of a face value coextensive with their payment authority or, more often,
(Footnote Continued)

Memorandum and Opinion specifically justifying its recommendation to deny;[553] a decision to deny must come from Fort Meade, and it must come from the Chief of the General Claims Division of the Army Claims Service personally rather than from any of his headquarters attorney subordinates.[554] The rationale for the policy is as interesting as it is unusual among agencies. Basically, it reflects a belief that settlements warrant the attention of high-level authorities not only when subordinates propose to dip deeply into the Treasury in making payment on a claim -- as is the customary belief and the reason why so many agencies delegate limited settlement authority but unlimited denial authority[555] -- but also when they propose to pay nothing at all on a claim or simply less than the claimant is prepared to accept. But why has Army Claims actually reversed the usual presumption, for local posts do have unreviewed settlement authority for up to $5000 but no denial authority at all? The answer lies in what may be a realistic fear that local claims attorneys sometimes end up denying valid claims simply because they are not sufficiently able or willing to negotiate a compromise.[556]

When a claim states a face value of over $5000 and the Chief of the General Claims Division does not realistically think local post

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(b) authority to deny claims up to any amount irrespective of the monetary ceiling on their payment authority.

[553]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.
(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 Regulation No. 27-20, supra note 550, § 2-12.

[554]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.

[555]See supra note 552.

[556]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 text at notes 702-07, infra.

attorneys could settle it for less, the entire procedure -- not just negotiation, but the coordination of all investigations -- is centered in Fort Meade. For the burdens that an already claims-heavy agency has thus taken upon itself, the General Claims Division needs, in addition to its chief, nine full-time "action officer" attorneys and nine full-time investigators, with teams composed of one of each. Each action officer has unlimited settlement authority, subject to the Chief's as well as the Justice Department's approval if he or she proposes to pay out over $25,000. Once again, while subordinate officers are free to settle for up to $25,000 and to negotiate alone with the Justice Department for approval of larger settlements,[557] no denial letter may go out except on the Chief's own decision and under his own name.[558]

Confirming the variety of organizational possibilities are the Interior Department's uniquely decentralized operations.[559] Notwithstanding the Department's heavy claims volume, the General Law Division of the Washington Office of the Solicitor has but one attorney-adviser, admittedly a man with twelve years' experience as an insurance company claims adjuster, who devotes full time to the administrative handling of tort claims.[560] This arrangement suffices

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[557] However, the Chief will review the memorandum of law and fact produced by the action officer in preparation for Justice Department approval.

[558] For a somewhat outdated but still apt narrative account of Army tort claim procedures, see Williams, The $2500 Limitation on Administrative Settlements Under the Federal Tort Claims Act, 1960 INS. L.J. 669 (1960).

Lest Army claims organization be taken as applicable to all the armed services, a word should be said about Air Force operations. Though $2500 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, 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 $2500 may be made by the Staff Judge Advocate, based on a Seven-Paragraph Memorandum, supra note 553, prepared by the claims officer; denials may be issued only when the claim does not exceed that amount. Action -- whether settlement or denial -- in all other cases takes place in Washington, but largely on the basis of the existing claims file.

[559] See text at note 540, supra.

[560] The attorney-adviser reports only indirectly to the Associate Solicitor of the General Law Division. The Associate Solicitor is responsible for essentially three branches of agency legal practice --

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because each of Interior's eight regions in turn has a good-sized regional solicitor's office and up to as many as four field offices with claims personnel. Building on the investigative activities of non-attorney operating personnel attached to each and every 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 offices[561] will handle the negotiations and consider entering into final settlements, which they may do up to $25,000, or denying a claim up to any amount. Though on paper the division of authority looks not unlike that of the Veterans Administration, a number of factors -- the heavy reliance on investigative reports and recommendations prepared at the local installation, the fact that reconsideration when requested also occurs on a regional rather than headquarters basis, and the highly local character and generally lower dollar value of Interior Department claims[562] compared to Veterans Administration claims[563] -- combine to make for a uniquely decentralized tort claims operation.

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equal employment opportunity compliance, administrative law and general legal services (including labor and personnel matters), and, finally, procurement and patents -- each of which is headed by an Assistant Solicitor. The attorney-adviser reports to the Assistant Solicitor in charge of procurements and patents. (Besides the General Law Division, the Office of the Solicitor has several program-oriented divisions: Indian Affairs, Energy and Resources, Parks Administration and Land Management.)

[561]The full-time headquarters attorney-adviser functions as a regional claims officer for claims arising in the Washington area, relying as do the true regional offices on investigative reports prepared at the local installation out of whose operations a given claim arose, and following in nine out of ten cases 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 itself will conduct the investigation. The attorney-adviser's personal settlement authority is limited to $10,000. Higher awards require the approval of the Assistant Solicitor in charge of procurements and patents.

[562]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.

[563]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.

Another strikingly decentralized mode of operation is the Agriculture Department's. The General Counsel's Office normally sees no

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Although I could expand still further on the organizational peculiarities of the different agencies in my limited sample, I will confine myself to one last example, which is none other than the Justice Department itself. A unique feature of its handling of tort claims arising out of the Department's own activities (as opposed to its exercise of approval authority over other agencies' settlements) is the extent to which substantive authority has been delegated to some of the Department's component agencies. For example, the Federal Bureau of Investigation enjoys and has vested in a specially created Civil Litigation Unit in Washington settlement authority on a nationwide basis up to $5000. It has a small number of FBI attorneys and paralegals for claims alone. The Drug Enforcement Administration and United States Marshals' Service have similar centralized authority, though only up to $2500. The Immigration and Naturalization Service and Bureau of Prisons also enjoy $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 and either by an attorney (as in the FBI) or a non-attorney (as in the Immigration and Naturalization Service or Drug Enforcement Administration), and proceed to settle deserving claims within the monetary limits of their own authority if they can. Otherwise the investigative file comes to the Torts Branch of the Justice Department's Civil Division for whatever further investigation and negotiation may be appropriate and for possible settlement. In practice, referrals are made to the Torts Branch even of claims within component agency authority if they entail close legal or policy issues, or when the component is simply unable or unwilling to conduct the hard negotiation necessary to achieve settlement. And as elsewhere, those who enjoy unlimited denial authority may be quite reluctant to exercise it.

By contrast, the Parole Commission has no delegated settlement authority, nor do any of the Justice Department divisions: Civil Rights, Land and Natural Resources, Antitrust, or Office of Solicitor General, for example. The tort claims to which their activities give rise are handled out of the Torts Branch through the same attorneys who

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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 Washingon 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 the Interior Department's, 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.

handle approval matters and tort litigation generally, though much of the burden is borne by a single Tort Branch paralegal officer.[564]

C. The Initial Stages of a Claim

Wherever they happen to be filed within a given agency,[565] tort claims usually make their way to its legal department, either the Office of General Counsel or a regional or district counsel's office, depending on how the agency and its tort claims operations are organized. Each claim, according to its amount or apparent complexity, will be assigned to a particular claims attorney or, for the routine claim in a claims-heavy office, to a paralegal.[566] His or her responsibility is to see that the factual basis of the claim is adequately investigated, to evaluate the claim personally on the investigative file as supplemented, and to conduct negotiations with the claimant or claimant's attorney if the prospects for settlement warrant it.

Among the first items of business on the agenda of a claims attorney is a cursory examination of a claim's sufficiency. If Standard Form 95 has been used, telling whether the claim is free of technical defects, recites a sum certain and otherwise contains what is necessary for an investigation to go forward is reasonably easy. Most of the claims attorneys with whom I spoke profess to run each claim against some sort of a mental checklist of essential elements and, as I indicated earlier, inform the claimant or his or her representative if the claim falls short in any respect. This seems to me without question a sound practice, unless one deems it contrary to principle to save a well-meaning claimant from innocent but costly errors in the filing of a claim.

One way for agency attorneys to spare claimants unfair hardship is to adopt a standard of substantial rather than strict compliance with the Attorney General's regulations on the filing of a claim.[567] Chapter

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[564] In more routine cases, the paralegal officer is in charge, with the Torts Branch Director serving as a reviewing authority. Otherwise, a Torts Branch attorney will be in charge either alone or in conjunction with the paralegal, subject to review by an Assistant Tort Branch Director.

[565] Agriculture Department claims, for example are supposed to be filed with the local office of component agency whose activities gave rise to the claim, not with regional counsel.

[566] 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 $5000. 28 C.F.R. § 14.5 (1983).

[567] See text at notes 479-83, supra. 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 limitations has run are an identification of the agency, the name and signature of the claimant (or representative), and a sum certain.

four detailed the rich variety of ways, technical and not so technical, in which a claimant may innocently fail to perfect a valid claim; I shall not rehearse them here, except to reiterate that Congress itself neither legislated stringent and particularized claim requirements nor specifically authorized the Attorney General to do so. Though full compliance with each and every regulation may help regularize agency claims operations, less than full compliance does not necessarily make it impossible to process a claim.[568] A recent study[569] of the notice requirements for government tort claims in Illinois[570] persuasively concludes that legislative[571] and judicial liberalization has allowed them to serve their intended purpose without causing unwarranted inconvenience or hardship to claimants. Federal claims attorneys with whom I happened to speak generally professed liberalism in monitoring

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[568] 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, 138-39 (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").

[569] Corboy, Shielding the Plaintiff's Achilles' Heel: Tort Claim Notices to Governmental Entities, 28 DE PAUL L. REV. 609 (1979). See also Note, Federal Tort Claims Act: Notice of Claim Requirement, 67 MINN. L. REV. 513, 530 (1982).

[570] 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.

[571] 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 or where it fails to object, dispensation from the requirement in the case of counterclaims and claims by infants and incompetents, disregard of factual errors or omissions in the notice of claim, allowing service by registered mail though personal service of the claim is technically required, and even -- somewhat questionably -- acceptance of the filing of a complaint in court as equivalent to the filing of a claim with the entity.

compliance with the formal requirements of the statute and regulations, but judging by the high volume of litigation over them, some in the government must not.[572]

Let me cite just one example having to do with an agency's enforcement of the sum certain requirement. Three months following a collision with a postal truck, a claimant filed with the Postal Service a detailed Standard Form 95, along with 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 him with instructions to perfect the claim. The plaintiff filed a new Standard Form 95, specifically requesting $22,000, but despite being instructed to do so by the Postal Service, failed to resubmit the exhibits until after the limitations period had expired. The agency called the claim stale and refused to consider it. As the court was to observe in sustaining the claim's validity, "[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":

> 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.[573]

What was shortchanged in the end was the agency process itself.

A second way to avoid unfair hardship to claimants, likewise alluded to in chapter four, is for agency attorneys to take certain very limited affirmative steps to salvage a technically deficient claim. My conversations with individual attorneys lead me to believe that they are often willing to give early warning signals of deficiencies, to relate cures back in time to the original filing, and to use the telephone rather than the mails when time is of the essence, to give just a few examples.[574] I do wish to emphasize though that if agency attorneys do

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[572] See supra note 336. To some extent, however, Justice Department litigation strategy rather than agency practice is responsible for injecting technical defenses into the litigation. See supra note 483 and accompanying text.

[573] Koziol v. United States, 507 F. Supp. 87, 88-91 (N.D. Ill. 1981).

[574] See supra notes 394-95 and accompanying text. When time is

(Footnote Continued)

make these kinds of overtures, it is not because Justice Department regulations give them the slightest encouragement to do so. So far as one can tell from the regulations, an officer theoretically may sit upon a defective claim without uttering a word until the moment for a timely cure has passed.

Until recently, the courts likewise have avoided imposing on agency attorneys any affirmative duty to point out a claimant's errors or omissions, however innocent and fatal they may be.[575] Of late, some have shifted a small measure of the burden to the agencies. One court told an agency that it should have taken the untotaled medical bills appended to claimant's written demand for damages 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, with less than thirty days left before the statute of limitations would expire, to send him four copies of Standard Form 95 for completion and return.[576] Other courts candidly embrace the notion of estoppel where more or less technical defects are concerned,[577] even in a case in which a claimant fails to substantiate his claim as requested and the agency simply neglects to set a reasonable time limit for doing so or to warn

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truly of the essence, the Army claims Service has authorized claimants to being an initial or corrected claim to the local Army Recruiting Office and to have the recruiter telephone the Service to report that the claim was received and to confirm that it is defect-free.

[575] Muldez v. United States, 362 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).

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

[577] 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); 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 also generally Comment, The Art of Claimsmanship: What Constitutes the Sufficient Notice of a Claim under the Federal Tort Claims Act?, 52 U. CIN. L. REV. 149, 156, 162 (1983).

of the consequences of nonproduction.[578] The fact remains, though, that Congress intended the 1966 amendments to the FTCA to reduce, not to enlarge judicial intervention in government tort claims. With or without encouragement from the Justice Department, agency attorneys should themselves meet well-intentioned claimants halfway on procedural aspects of the claims process to avoid their even becoming litigable issues,[579] and, as I have said, I have the impression that most of them do. In a sense, this recommendation only serves the government's enlightened self-interest, for reasonable overtures to claimants at the agency level may spare the government the resources entailed in litigating procedural issues before a judiciary that shows an ever greater solicitude for tort claimants against the government.[580]

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[578] Industrial Indem. Co. v. United States, 504 F. Supp. 394, 398 (E.D. Cal. 1980).

[579] Specific agency regulations are silent on the question, which makes it basically a matter of individual attorney preference. Regulations of the armed services, however, have something oblique to say. While they expand upon the criminal prohibition against soliciting claims (supra note 352) 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)(1983)), they not only 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)(1983)), but specifically enjoin them on request to advise a claimant on how to present a claim and even help in preparing the claim and in assembling the evidence (id.). Cf. 32 C.F.R. § 536.29(k)(4), (6)(1983)(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).

[580] One repeatedly hears in conversation and reads in the literature suggestions that, whatever good faith requires of a claims officer in dealing with an unrepresented claimant, he or she owes little if anything 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, Presenting a Claim under the Federal Tort Claims Act, 43 LA. L. REV. 961, 962 (1983). Granted, the presence of counsel on the other side properly affects the government attorney's choice of strategies in substantive negotiations, particularly when they take on a bargaining character. See text at notes 653-57, infra. But it should have no

(Footnote Continued)

D. Investigating the Claim

In a large number of cases, agencies may conduct routine accident investigations quite apart from any actual or imminent tort claim. Virtually all have an elaborate battery of procedures and forms for the mandatory completion of a contemporaneous accident report by the officer personally involved and of an immediate investigative report by his or her hierarchical superior. These generally may be found in agency handbooks and manuals rather than published regulations,[581] and the reader will be spared their details. Take by way of sole example the Postal Service, roughly seventy-five percent of whose claims arise out of motor vehicle accidents and another twenty percent out of post office slip-and-falls. In the event of a motor vehicle accident, the government driver routinely completes a contemporaneous accident report on Standard Form 91,[582] a supply of which will be carried in the vehicle glove compartment and a copy of which is attached to this report as Appendix C. Upon the mandatory notice, his or her supervisor completes a Postal Service Form 1700 ("Accident Investigation Worksheet") (Appendix D), supplemented as appropriate by one or more witness statements each on a Standard Form 94 (Appendix E). The supervisor in turn contacts the local accident investigator of which each post office has at least one. His or her job is to conduct a full-scale investigation which includes securing a driver's statement, photographs and diagrams, a firsthand view of the wreckage or the scene, police reports, witness statements, an account by the victim and so on. This file is now forwarded for review and storage to the one of 230 Management Sectional Centers into which the nation's post offices are grouped. Should a claim then happen to arise out of the incident, as well it may any time over the next two years, a complete and fresh record will be on hand to constitute the basic investigative file. Needless to say, elaborate internal agency guidelines govern the

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(Footnote Continued)
bearing on his or her willingness to make the modest and threshold procedural overtures to which I refer in this section.

[581] E.g., Army Regulation No. 27-20, supra note 550, ch. 2, sec. I; Air Force Regulation No. 112-1, Claims and Tort Litigation ch. 4 (July 1, 1983); 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, and this above and beyond investigations required by agency regulation to be made by supervisors, safety officers and auditors. The regulations spell out precisely the matters the tort claims officer must investigate and the material he or she must include in the investigative report.

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

investigation of accidents,[583] vehicular and nonvehicular alike, involving Postal Service employees.

What happens in the event a claim is actually filed? At that point, the Management Sectional Center completes a very brief Postal Service Form 2198 ("Accident Report: Tort Claim") (Appendix F) which will state a conclusion under the rubric "Remarks" on how the claim should be handled, based largely on the completed accident investigation file as the Center may have supplemented it upon receipt of the file and subsequent claim. By this time, of course, the agency will have the benefit of the claimant's precise allegations and showings of loss, and they will be scrutinized. Unless the Management Section Center is able to settle the claim for $100 or less,[584] it must send Form 2198, in the case of simple property damage claims of no more than $1000, to that one of the nation's three Postal Data Centers[585] having geographic jurisdiction. The Centers, the primary apparatus within the Postal Service for determining small claims, consist of claims clerks without any formal legal training, but high volume experience in small claims adjustment.[586] Though they essentially lack investigative means, the Centers critically examine the existing file and through telephone and mail contact with claimants -- interspersed with referrals on all sorts of issues to the Law Department in Washington -- determine whether the claim is valid and, if so, what it is worth. Should reconsideration of a denial be sought, it will be had on the existing record in Washington.[587] A claim alleging property damage in excess of $1000, or personal injury in any amount, is directed not to a Postal Data Center,

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[583] United States Postal Service, Methods Handbook Series M-19, Accident Investigations: Tort Claims, paras. 111-234.4 (July 11, 1977).

[584] The Center may not deny a claim in any amount.

[585] Postal Data Centers are located in New York, Minneapolis and San Francisco. They handle roughly seventy-five to eighty percent of Postal Service claims, though a small percentage of overall claim dollars.

[586] As a practical matter, few cases in this category involve subtle legal issues. Where legal advice is needed -- for example, on the local contributory or comparative negligence standard or on the collateral source rule -- the Centers will make a telephone inquiry to Washington or, less often, to regional counsel.

[587] As a rule, any 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 the amount of $10,000. Action over that amount, whether on reconsideration or as an original matter, requires the decision of an attorney, up to a maximum settlement authority of $25,000 in the case of the Claim Division's Supervising Attorney. By in-house custom, though not by regulation, the Supervising Attorney also observes a $25,000 ceiling in denying a claim. Thus, in practice, both settlements in excess of $25,000 and denials of claims over $25,000 require the attention of the Assistant General Counsel.

but to the Postal Inspection Service which is organized in fifteen to twenty regional offices and composed of trained nonlawyer professional investigators.[588] Again, the accident investigation file, covered by Form 2198, constitutes the core of the record, but the Postal Inspection Service, unlike the Data Centers, is equipped to reopen it itself if need be. Claims may be settled for up to $5000 at this level, but claims even within this range commonly pass to headquarters for a first determination, especially in a less than routine case.[589]

Clearly, different kinds of claims warrant different investigatory routines. The steps normally adequate for getting to the bottom of a motor vehicle accident will not quite do for the crash of a military aircraft; for this the relevant agencies have devised an entirely different set of investigative procedures.[590] And neither of these will answer the needs of a thorough investigation into an incident of possible medical malpractice.[591] But the principle is the same. In

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[588] 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.

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

If a final settlement is reached at any level, it will be recorded and processed for payment on Postal Service Form 2106 (Appendix G), rather than through usual GAO channels, because all Postal Service tort payments, by way of unique exception among agencies, come out of revenues. See supra note 173.

[590] See Air Force Regulation 110-14, Investigations of Aircraft and Missile Accidents (July 18, 1977). The regulations, which describe the purpose of the investigation as "to preserve available evidence for use in claims, litigation, disciplinary actions, administrative proceedings, and all other purposes," prescribe specific guidelines for the inquiries to be made, the use to be made of the separate and prior confidential Safety Investigation Report (Air Force Regulation No. 127-4), the detailed materials to be obtained, and the precise sequence in which all forms, documents and exhibits are to be arranged.

[591] 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 a minimum contacting the hospital, ordering a copy of the patient's complete medical record,

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each case, routine and near-contemporaneous reports will constitute the starting point for the investigation of any subsequent tort claim arising out of the incident. They invariably require amplification in

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conducting a physical examination, interviewing the treating physician, obtaining hospital and pharmaceutical records (and even purchasing or maintenance records) where relevant, and getting the opinion of an impartial medical expert through the VA's own district medical director on whether a deviation from accepted standards of practice occurred. The investigation culminates in a standard two-part district counsel report -- the first consisting of a statement of fact, the second, a brief on the applicable law -- plus exhibits. Veterans Administration Regulation No. M-02-1, § 18.07c (Aug. 1, 1981). 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.

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one respect or another after a specific claim comes in, if only on such questions as damages or documentation of loss which may not have been fully covered. Needless to say, some tort claims arise out of incidents whose claims potential no agency personnel at the time could have recognized. This means investigation from the top. Limitations of time and space do not permit a look at investigative techniques for the myriad kinds of claims an agency may receive. One Air Force claims manual alone describes the different investigative steps and documents required for a diverse list of claim types such as crop loss, soil damage, sonic boom, animal claims and mail claims;[592] entire manuals are devoted to large-scale and recurring types such as medical malpractice.[593]

The larger agencies, especially those generating the bulk of federal tort claims, have their own staffs of trained investigators and their own internal networks for securing the assistance of skilled professional advice where needed.[594] Agencies not so well-endowed have

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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).

[592] Air Force Regulation No. 112-1, §§ 4-19 - 4-32 (July 1, 1983). Following an extensive all-purpose list of items, an Army Claims manual singles out for detailed and specialized treatment traffic cases, mail cases, explosion and detonation cases and overflight claims. Army Regulation No. 27-20, supra note 550, § 2-8.

[593] See supra note 591.

[594] Medical malpractice is a good example. In the Veterans Administration, if the district counsel encounters disagreement on the applicable standard of medical care or on whether the injury claimed resulted from substandard medical care, he or she 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 specialists within or without the VA. If medical issues remain outstanding, the file is forwarded to the Office of General Counsel for referral to the VA's Special Assistant for Professional Services, a woman with special legal and medical background. Veterans Administration Regulation No. M-02-1, supra note 591, § 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 Law Consultant. The Consultant 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

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express authority from the Attorney General to request the assistance of other agencies in claims investigation, including the performance of physical examinations.[595] Whatever the situation, surely one of the claims officer's greatest challenges is deciding how precisely hands-on investigative responsibility should be delegated and possibly subdelegated in any given case, and ensuring that it is carried out in a timely and professional manner. Even in agencies that squarely concentrate the adjudicative function over all cases in one attorney's office in the nation's capital -- indeed especially in those agencies -- the primary investigative function as such will normally have to be lodged elsewhere.[596] But in other agencies, the vital task of coordination itself is dispersed.

Take the Agriculture Department by way of example. A claim is generally 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 that component agency who in all but two instances sits in Washington, unless the particular agency has chosen to establish liaison facilities at the state or regional level. The tort liaison officer is seldom a lawyer and most often has some other primary staff responsibility -- finance, contract, personnel, to name the most probable. He or she is in charge of orchestrating the investigation from start to finish, though much of that investigation will take place at the distant local program office where the claim was originally filed. (The person who conducts the local investigation

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it in full to the Medical Legal Officer under a cover letter containing a detailed summary of the facts and legal issues. The latter in turn refers the file to relevant members of the Medical Center's professional staff for an expert review and opinion on the adequacy of treatment, and on that basis compiles for the claims officer a nonbinding but persuasive Medical-Legal Opinion with recommendations. Office of the Judge Advocate General, United States Air Force, Handbook for Judge Advocates: Investigating Medical Malpractice Claims, supra note 591, § 2. Evidently the Army follows a similar routine. However, the practice at the level of 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.

[595] 28 C.F.R. § 14.8 (1983). Technically, an agency before which a claim against the United States 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 (1977). It is also entitled to the services of a Justice Department attorney, not only in conducting the examination but also in investigating the underlying claim. 28 U.S.C. § 514 (1968). These devices are evidently not much in use. 2 L. JAYSON, HANDLING FEDERAL TORT CLAIMS p. 17-72 (1984).

[596] 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.

should be beyond any suspicion of involvement in the incident giving rise to the claim or other ground for supposing bias.) Who will prepare the final investigative report and recommendation may itself not even be clear;[597] it may be the tort liaison officer, it may be the local program investigator, or it may be someone at the state or regional level. Only when the report is complete does the matter reach the attorneys for disposition: the General Counsel's Office for claims of a face value over $60,000, regional counsel for all others. Should the attorneys find a gap or two in the investigation, instructions will filter back down the investigative channels as appropriate for them to be filled.[598]

Sooner or later, the next order of business for the officer charged with handling a claim is to request detailed information from the claimant to the extent that it is needed. In every case, he or she will want to know the circumstances surrounding the incident, if it has not already been the subject of an adequate investigative report, and obtain more or less full documentation of the loss allegedly suffered and the amount claimed for it. Early access to such information may shed light on important threshold questions such as whether the alleged government tortfeasor was acting within the scope of employment at the time of the incident, whether his or her actions proximately caused the injuries alleged, whether the claim was timely filed, and many others. A clearly negative conclusion on any one of these may avoid any necessity for investigation, especially on intricate damages questions. In cases not so easily disposed of, on the other hand, it will alert the officer to the identity of possible witnesses and avenues of factual and legal inquiry more generally.

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[597] Each agency is directed generally to produce for agency counsel "a narrative report" 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, infra note 598, at 3.

[598] The particular problems of the Agriculture Department in coordinating the investigation of claims and preparing them for adjudication are specifically addressed in an Office of General Counsel Memorandum to Heads of Department Agencies (Oct. 5, 1981).

E. Patterns of Correspondence

The extent and character of correspondence between claims officer and claimant[599] is essentially a matter of style. An initial request for substantiation of a claim often will be followed up with repeated demands for information still outstanding and fresh requests as new issues or new doubts arise. No generalization is possible about the number or rhythm of these exchanges. The two principal modes of communication are telephone and personal letter, used in different proportions according to taste. Each claims officer has his or her preferred form letter for recurring kinds of corespondence, sometimes drawn from models found in attorneys' manuals prepared by supervisors in a high-volume agency claims division. Though the case may not be unique, I know of only one agency -- in truth only one of the eight regional installations in the National Aeronautics and Space Administration's decentralized claims operations -- that has devised a largely standardized set of nonletter forms for use in eliciting information from claimants beyond that specifically called for on Standard Form 95 itself.[600] It takes the form of 432 standard interrogatories covering virtually every item on which a claims attorney might want information from a party pressing any conceivable kind of claim for personal injury, death or property loss, with a particular emphasis on the substantiation of damages.[601]

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[599] Where a claimant is represented by counsel, all communications should be with counsel.

[600] 4 NASA-Ames/University Consortium for Astrolaw Research, Federal Management Law Practice Manual (Tort Matters) pt. 1 (Aug. 1, 1982). The installation, NASA Ames Research Center, does not have a volume of tort claims -- a total of fifteen for fiscal years 1980 through 1983 combined -- that itself would warrant the obvious effort expended in compiling this careful and impressive set of forms; but there is no reason why it cannot serve as a model for adoption by other NASA installations and other agencies generally. 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 seemingly very useful step-by-step procedural checklist, with specific time limit indications, for processing claims under the FTCA and the NASA meritorious claims statute. Another interesting item is a four-page Small Claims Settlement Form, in checklist format, for use in settlements not in excess of $5000. Presumably, it obviates the need to prepare the usual narrative report containing the formal findings of fact and conclusions of law normally necessary to justify settlement. Also in the manual are more conventional standard letters acknowledging receipt of Standard Form 95, requesting submission to a physical examination, and requesting information or documents, as well as a set of form follow-up communications when prodding is necessary.

[601] Included are interrogatories addressed to the employer of the alleged tortfeasor.

Though set in classic sworn statement format, the model

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Closely related to the largely written nature of the claims process is the physical separation between the parties. Among the milder criticisms lodged against the 1966 amendments to the FTCA was the alleged geographic distancing of claimants and their attorneys from those with authority to settle for the government,[602] for the "head of each Federal agency or his designee," in many cases a Washington-based claims attorney, came to replace the local United States Attorney as the government's negotiating representative. Only an unusual claim would justify the travel required to bring claimant and claims attorney face to face. On the other hand, the more recent decentralizing trend in agency claims management was meant in part -- just how great a part is hard to say[603] -- to bridge this gap. I do have the impression second-hand that claims officers and claimants alike take moderate advantage of the greater opportunity for face to face contact in local and regional negotiations.

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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, one is reminded, states civil and criminal penalties for presenting fraudulent claims for making false statements.

[602] See text at note 307. For contemporaneous criticism of the amendments, see I. GOTTLIEB, A NEW APPROACH TO THE HANDLING OF TORT CLAIMS AGAINST THE SOVEREIGN 26-33 (1967); Corboy, The Revised Federal Tort Claims Act: A Practitioner's View, 2 THE FORUM 67 (1967); Jayson, Federal Tort Claims Act Amendments: Trial Counsel Warns Problems Ahead, 2 TRIAL MAG. 18, 19 (1966). At the time of writing, Mr. Jayson was the former chief, and Mr. Gottlieb the former assistant chief, of the Torts Section of the Justice Department.

The distance factor was not the chief criticism. Critics worried that claimants would be tempted to their detriment to negotiate without the benefit of counsel in a deceptively nonadversarial setting. See text at notes 609-10, infra. They 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. And, above all, they voiced misgivings about lodging the government's settlement authority in the very agency whose activities gave rise to the claim.

[603] According to the Interior Department's attorney-adviser for tort claims, local claims handling also brings agency adjudicators more closely in touch both with the factual circumstances of a case and the applicable substantive law. The price paid for this may be a lesser degree of skill and professionalization in negotiating for the government, possibly reflected in a lower settlement rate (see supra note 331), and a certain loss of uniformity in agency practice.

Veterans Administration attorneys strongly emphasize the direct contact factor as a consideration in that agency's somewhat decentralized practice. See text at notes 546-548, supra.

Of course, even Washington-based claims officers are free to travel to a claimant's home base if they wish to do so. Some virtually never do;[604] a few who find it congenial or productive of settlement, or who think claimants appreciate and deserve personal contact, do so regularly;[605] the greater number choose to travel only if and when the size of the claim, the prospects of settlement, and the utility of a firsthand look clearly justify the strain on agency resources. A claimant likewise has the option of coming to Washington or having his or her lawyer do so, or of retaining Washington counsel specially for the claim; neither of these, however, is the rule.

Thus, the vast majority of claims continue to be handled through a pattern of written correspondence and telephone conversations. Agency claims attorneys seem to believe that claimants neither feel nor are prejudiced by this, and they report virtually no complaints. The absence of an organized FTCA plaintiffs' bar makes it difficult to test this impression, but significantly no published critique of FTCA practice makes a very great deal of the issue.[606] All told, I am inclined to think that whatever claimants may have suffered in losing the local United States Attorney as negotiating partner in the first instance is more than offset by the advanatages of dealing with a government officer who can more easily escape an adversarial mentality.

F. The Investigatory Model

The account thus far given of the way tort claims are most often presented and investigated in the federal agencies confirms that the process is basically investigatory and that it is marked, depending on the personalities involved, by a good deal of give-and-take. The informality of agency claims adjudication as such rarely has been challenged either as a matter of law or policy. This, like much that I have come across in the agency handling of tort claims, can best be explained by the presence on the not too far distant horizon of a full-scale judicial remedy in tort. No one would describe the administrative process as affording claimants a hearing except in the loosest sense of the term, and few would depict the attorney-decisionmaker as utterly impartial. But neither would many argue that requiring a claimant to pursue these channels for a period of no more than six months is in principle an unfair imposition. The process may not be entirely to claimants' liking, but, once in the neutral judicial forum, they will not find themselves prejudiced by what went on before, except possibly for the substantiation problem evoked

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[604] An example is the Agriculture Department's supervising attorney for tort claims.

[605] The Chief of the Army's General Claims Division exemplifies this approach.

[606] See 2 L. JAYSON, supra note 595, at pp. 17-19 - 17-20.

earlier.[607] A lawsuit under the Federal Tort Claims Act proceeds on the basis of a trial de novo, a de novo standard of judgment, and an undiluted application of the Federal Rules.[608] Apart from the usual production and persuasion burdens, the plaintiff need not contend with any presumption in favor of the correctness of the prior agency determination if any.

Part of the informality of the administrative claim procedure is the implicit invitation to proceed without the benefit of counsel. Critics of the 1966 amendments actually saw in this a trap for the unwary, imagining a variety of risks, from ill-advised statements against interest to acceptance of a patently inadequate sum in settlement of a valid claim.[609] Those fears may not be entirely idle, though the prevalence of contingent fee representation, combined with a statutory ceiling on attorneys' fees, does curb what might be a dangerous temptation to go it alone. The fact remains that most claimants, whether or not they choose to retain counsel at the agency level, would regard having the option of proceeding unrepresented as a distinct advantage.

If the combination of administrative and judicial remedies under the FTCA meets whatever due process and sound public policy require,[610] the meritorious claims statutes present a quite different situation. Since Congress has expressly created an administrative remedy, an argument can be made that the process governing it must not be procedurally arbitrary or unfair; yet virtually all either provide or are assumed to provide no judicial review of the action taken upon a claim, much less a judicial remedy as such. The procedural truth is that agencies enjoying such authority almost invariably conduct themselves along the same general lines -- an ex parte investigation supervised by the agency's own legal department, a paper record, and a pattern of informal written and telephonic exchange with the claimant -- as they do under the FTCA.[611]

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[607] See text at notes 406-468, supra. In addition, the sum stated in the administrative claim is a presumptive ceiling on the damages recoverable in court.

[608] Note, The Federal Tort Claims Act and Administrative Claims, 20 BAYLOR L. REV. 336, 342 (1968).

[609] Jayson, supra note 602, at 38.

[610] See text at note 607, supra.

[611] Few meritorious claims statutes -- and in this respect it is not particularly useful to distinguish at all between ancillary and meritorious claims statutes (see text at note 97, supra) -- identify the kind of administrative procedure to be followed; and the agencies generally speaking have no reason whatsoever to suppose that a written investigatory procedure would meet with congressional disfavor. One

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Gerritson v. Vance[612] is one of those rare instances calling for a judgment on the fairness of the investigatory model in the tort claims context. Besides disputing the merits of the State Department's denial of her claim for personal injury arising abroad,[613] the plaintiff contended that the agency's way of handling such claims offended fundamental notions of due process. The challenge went to the heart of the investigatory model, for it rested on claims that the State Department failed to provide her an oral hearing and that it indulged in an impermissible fusion of investigative and adjudicatory functions. Without ever really addressing the threshold question 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.[614] It concluded that when the agency invited the claimant to submit for its consideration memoranda of law, statements and affidavits of witnesses, medical reports and bills, and other proof of loss, and when it gave her an opportunity to respond to its initial denial of her claim by a petition for reconsideration, it afforded all the process that was due.[615] As for plaintiff's subsidiary challenge to the fusion of

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(Footnote Continued)
possible exception is the recent Panama Canal Act of 1979, notes at 103-09, supra, which contemplates more or less formal hearings.

Confusion is apt to arise under the Foreign Claims Act, text at notes 187-90, supra, 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 established at least one one-person and one three-person standing commission all of whose members are Judge Advocates at bases in that country. (Where, in a given country, the Army, Navy or Air Force has been assigned "single-service responsibility," this means that the Claims Commissions it has staffed in that country will exclusively handle claims arising out of activities of all the military branches.) I am assured, however, that the Commissions -- one- and three-member alike -- proceed in an investigatory manner without hearings as such. (In a three-member commission, one member will conduct the investigation, and the entire panel will adjudicate the claim.) For procedural regulations under the Foreign Claims Act, see supra note 188.

[612] 488 F. Supp. 267 (D. Mass. 1980).

[613] See text at notes 141-43 supra.

[614] 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).

[615] The opinion reflects the analytic framework set out in Mathews
(Footnote Continued)

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.[616] Conceivably, a court might insist on a higher procedural standard where faced with a true statutory entitlement;[617] but meritorious claims statutes are usually viewed as giving agencies very wide discretion and enabling them to act, as it were, out of grace.[618]

That an investigatory model passes constitutional muster in the meritorious claims context does not of course mean that it represents sound procedural policy, either for the meritorious claims statutes or, more importantly, for the FTCA. In fact, I believe it does that too. Meritorious claims statutes, to start with them, strike me as very poor candidates for procedural formalities. Apart from the fact that formal hearings are simply not the exclusive avenue to truth, meritorious claims statutes generally speaking require neither proof of fault (or of too many other discrete factual elements for that matter), nor the application of well-defined statutory or regulatory standards. In short, they do not demand what evidentiary or adversarial hearings can best offer. Tort claims, properly speaking, present a much stronger case for the use of such procedures, but so long as the FTCA continues to afford claimants relatively prompt access to the courts on a de novo basis, we would do well to keep the administrative phase of the process decidedly simple. Also, compensation of governmental tort victims, however worthy a purpose, is not the principal mission of the agencies;[619] it is even quite secondary to most agency legal departments

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(Footnote Continued)
v. Eldridge, 424 U.S. 319, 332-35 (1976), for it underscores not only the substantial administrative burden on the agency of oral hearings, especially if held abroad, but a certain skepticism that such hearings would appreciably improve the accuracy of the determinations. 488 F. Supp. at 270.

[616] Withrow v. Larkin, 421 U.S. 35, 47-54 (1977); Richardson v. Perales, 402 U.S. 389, 410 (1970).

[617] E.g., Davis v. United States, 415 F. Supp. 1086, 1091-92 (D. Kan. 1976), and Saladino v. Federal Prison Indus., 404 F. Supp. 1054, 1056 (D. Conn. 1975) (Federal Prison Industries Act confers on federal prison inmates an entitlement to compensation for work-related injuries and triggers a due process right to an evidentiary hearing.) See supra note 155.

[618] The Comptroller General recently ruled that even the Military Personnel and Civilian Employees' Claims Act, supra note 27, a far stronger candidate, does not rise to the level of a statutory entitlement. See supra note 36.

[619] 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 workmens' compensation for federal employees has been made the
(Footnote Continued)

that handle the problem, for, putting aside the growing but still small category of so-called regulatory torts, claims of this sort -- unlike programmatic and regulatory matters, and even the contract and personnel relations critical to their execution -- are essentially a random and unintended byproduct of agency operations. Their own claim on procedural resources must be kept within bounds.

G. Claimant Access to Information

An investigatory model does not necessarily imply secrecy in the gathering of information. Though denied an opportunity to confront witnesses or conduct cross-examination or oral argument, claimants presumably would find it useful to know what the government itself knows on the subject of their claims. To my surprise, however, agency attorneys report that demands to date for access to information in agency claim files have been few and far between.[620] Information disclosure thus remains an issue with tremendous potential but little actual friction in the administrative tort claim process. The explanation may lie in the fact that unlike many other corners of administrative law, tort claims do not generally pit the agencies against well-organized regulated interests accustomed to doing battle with the government on any available front. Tort claimants are mostly an atomized class; far more often than not, their contacts with the government resemble those of the average member of the public -- episodic and nonregulatory. Quite likely they will not be represented by an attorney. Finally, unlike the regulatory process which tends to postpone any very early or searching judicial review, the tort claims process can move swiftly into a full judicial phase, bringing on all the opportunities for information disclosure which that implies.

Still, the fact that claimants do not generally make informational demands on the agencies does not mean that claims attorneys should not think about how "open" they want the process to be as a matter of sound administrative policy, or about the proper framework for responding to a demand if and when one should arise.

(i) Prevailing Attitudes to Claimant Access

(Footnote Continued)
principal mission of the Labor Department's Office of Workers' Compensation Programs. Such is the model for handling of government tort claims in some states. But that would require a fundamental redesign of the federal tort claim system.

[620] 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.

So far as I can tell, no very well-defined policy on information disclosure exists within the agencies, much less across agency lines.[621] Its absence is as good a reflection as any of the basically unstructured nature of the administrative as compared to the judicial phase of the tort claims process, the latter of course being governed by the discovery provisions of the Federal Rules. It also contrasts strikingly with the Justice Department's position that compliance with an agency's demands for information is the precondition of a valid claim.[622] In any event, claimant access to information, like much else in the agency claims process, has become a question of individual style among claims officers.

I find a surprisingly broad range of attitudes on the question whether and how far to make agency-held information available to a claimant. A good number of claims attorneys report disclosing no information at their disposal, except as a tactical measure calculated to elicit further information from the claimant or to persuade the claimant to lower his or her demands. At the other extreme, at least one attorney purports to conduct business on an "open file" basis and to encourage claimants to do so too. He does not routinely transmit available information to a claimant even without request, but does issue something on the order of a standing invitation to inspect the claim file as it develops.[623] Most common by far is an intermediate approach summed up this way: volunteer little if anything very specific, but disclose particular information on request if no valid ground exists for withholding it.[624] What this most likely comes down to is that

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[621] There is one exception. Section 14.4(b)(1) of the Justice Department regulations provides that in personal injury cases claimants may be required to submit to a physical examination by an agency physician. If a claimant agrees to provide his or her own physician's report to the agency, as is almost invariably the case, he or she is then entitled to the agency physician's report. Obviously, however, this right of access is only a byproduct of a claimant's duty of disclosure to the agency.

[622] See text at notes 406-15, supra.

[623] So far as I can tell, however, no agency allows claimants to take the formal deposition of agency personnel prior to litigation. E.g., Veterans Administration Regulation No. M-02-1, supra note 591, § 18.04c(3) ("Claimant's attorney is not to be permitted to interview 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").

[624] Thus claims files are generally not open. E.g., Air Force Regulation No. 112-1, supra note 581, § 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").

(Footnote Continued)

claimants on request may have any documentary material to which they are entitled under the Freedom of Information Act.[625]

(ii) A Freedom of Information Act Framework

Using the Freedom of Information Act as a standard for determining the extent of claimant access to agency documents on a pending claim seems to me eminently sensible, whether or not claimants expressly invoke the FOIA in making their request. As a matter of law, the FOIA is as much available to the claimant in agency settlement proceedings as it is to anyone else.[626] On a procedural level, the very short time frame for disclosure under the FOIA[627] makes it a practical vehicle for use in a six-month settlement period. Finally, as a matter of policy, use of FOIA standards should afford claimants ample access to information without causing the government substantial prejudice in the event of subsequent litigation, while at the same time promoting the disposition of claims at the agency level. People who should know have surmised that some claims go to litigation simply because claimants feel they lack sufficient information to weigh intelligently the strength of

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(Footnote Continued)
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").

[625] 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 said to be governed by the standards applicable to civil discovery. E.g., Veterans Administration Regulation No. M-02-1, supra note 591, § 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").

Among the chief grounds for nondisclosure of specific information under either the FOIA or the civil discovery analogy are the attorney-client privilege, the work product privilege, and the government's deliberative privilege, particularly where disclosure would reveal an analysis of the strength or weakness of a claim or recommendations to a superior officer.

[626] 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).

[627] Action on a FOIA request or appeal must be taken within ten or twenty working days, respectively, of its receipt, absent one of a narrow set of "unusual circumstances" permitting an extension of no more than ten days. Id. § 522(a)(6)(A), (B).

their case for purposes of settlement prior to suit.[628] As I have already suggested,[629] they may also be less than forthcoming in substantiating their claims because they do not believe the government itself is willing to part with information especially if unhelpful to its cause. This, too, disserves the purpose of agency-level settlement. Put squarely, the prospect of a much fuller disclosure under the Federal Rules than under agency claims practice may well lead claimants and the government into otherwise avoidable litigation.

Central to any understanding of how the FOIA works in the tort claims context is the Exemption five 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."[630] Exemption five, which has been construed to "exempt those documents, and only those, documents, normally privileged in the civil discovery context,"[631] by definition should leave a claimant in nearly as good a position, so far as access to information is concerned, as if he or she had invoked discovery in litigation,[632] and in fact afford much that one might want or need to know in order to conduct intelligent settlement negotiations with the government. But neither would it shortchange the government, for the FOIA protects from mandatory disclosure just about anything that the government is privileged to withhold in litigation.

The truth is that even full disclosure under the Freedom of Information Act does not quite measure up to discovery in litigation, for the FOIA compels agencies neither to assemble information nor to prepare documents not already in existence.[633] In fact, it brings in nothing not already in documentary form in agency files; the unrecorded identity of witnesses, accounts of an incident not reduced to writing,

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

[629] See text at notes 454-55, supra.

[630] 5 U.S.C. § 552(b)(5)(1977).

[631] Federal Open Mkt. Comm. v. Merrill, 443 U.S. 340, 353 (1979); NLRB v. Sears, Roebuck & Co., supra note 626, at 149. Accord Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 184 (1975); EPA v. Mink, 410 U.S. 73, 86-87 (1973); Sterling Drug, Inc. v. FTC, 450 F. 2d 698, 704-05 (D.C. Cir. 1971).

[632] EPA v. Mink, supra note 632, at 86.

[633] NLRB v. Sears Roebuck & Co., supra note 626, 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).

and so on, all lie well beyond its reach. Yet the claimant will have disclosed precisely this kind of information to the agency as part and parcel of the claims process itself. Standard Form 95 itself is nothing short of a demand for a good deal of information not previously prepared or assembled, and a claimant cannot answer to the charge of an incomplete claim that his or her files contain no documents as such on the missing item. I do not mean to suggest that the FOIA is an inadequate tool for information disclosure in the claims context, for as a practical matter agency attorneys are unlikely to leave accident reports, witness statements, and the like in unwritten form. I mean only to demonstrate that a square application of the FOIA would not give tort claimants an unfair advantage.

All in all, both legal and policy considerations point decisively in favor of taking the FOIA as a 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, I fail to see where the FOIA leaves the agencies any other principled choice. Where a claimant, with or without specific reference to the Information Act,[634] seeks access to his or her 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 entertain the possibility of disclosure even when the FOIA would not, if in their estimation that might advance the tort settlement process.[635] Unfortunately, a few agency claims attorneys continue to regard the FOIA as somehow alien to their own tort claims operations.

(iii) Understanding the FOIA in the Tort Claim Setting

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[634] Agencies have no sound reason to place a premium on whether a claimant specifically invokes the FOIA in support of an otherwise intelligible request for access to identifiable agency documents.

[635] 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 Regulation No. 112-1, supra note 581, § 12-17b(3); Veterans Administration Regulation No. M-02-1, supra note 591, § 18.04c(1).

A more emphatic endorsement of limited voluntary disclosure is the Army's. "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 Regulation No. 27-20, supra note 550, § 1-6b(2). A unique feature of Army Claims Service discosure policy, echoing its peculiar denial policy (text at notes 551-58, supra), is the rule that only the Chief has authority to refuse a claimant's request for information. Id.

To concede that the FOIA basically defines disclosure policy in the tort claims context is only the beginning of the analysis. What the exemptions to the Act mean and how they relate specifically to the kinds of information that routinely turn up in tort claims investigations should govern actual disclosure practices in that setting. Unfortunately, even some claims attorneys who acknowledge that the FOIA in principle belongs in the tort claims context display only the most rudimentary and intuitive sense of what its exemptions legitimately entitle them to withhold. True, the incidence of claimant requests for access to claim files has not been great. But there is every reason to believe, and some claims officers report, that claimants are beginning to press for access to agency-held information as never before. Since agency handling of tort claims in any event is basically a process of continuous information exchange, those agency attorneys who make this their life's work would do well to have more than a passing 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 relates specifically to the tort claims process. Its position cannot simply be that agency attorneys should divulge as little as possible or nothing at all, or avoid any disclosure that might tend to embarrass the Justice Department in eventual litigation. I would urge rather that it enlighten the agencies specifically on how key exemptions, like Exemption five, have been construed by the courts in cases involving tort claims or analogous problems, at least with respect to frequently recurring kinds of documents. The more subtle question -- and one on which the agencies inevitably will be more on their own -- is the extent to which more liberal disclosure than the FOIA mandates would be productive for purposes of agency-level settlement. On this, there can be no hard and fast rules. Certainly, the Justice Department, least of all, can afford to be unmindful of the impact of routine agency disclosure on eventual tort litigation. Still, the Department's responsibilities are not only to safeguard the government's litigation interests, but also to guide the agencies in properly implementing the FOIA and the FTCA at the agency level.

Let me illustrate the point by reference to the government's qualified executive privilege to protect its deliberative processes, a privilege now firmly anchored in Exemption five.[636] Most courts have

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[636] Kent Corp. v. NLRB, 530 F. 2d 612 (5th Cir.), cert. denied, 429 U.S. 920 (1976); Jupiter Painting Contracting Co., Inc. v. United States, 87 F.R.D. 593 (E.D. Pa. 1980). See generally CIVIL ACTIONS AGAINST THE UNITED STATES AND ITS AGENCIES, OFFICERS AND EMPLOYEES (Shepard's/McGraw-Hill) 228 (1982).

Broadly comparable considerations arise in connection with the government's qualified privilege for documents whose disclosure would tend to reveal law enforcement investigative techniques and sources. ACLU v. Brown, 609 F. 2d 277 (7th Cir. 1979).

held that the exemption protects "internal communications consisting of advice, recommendations, opinions, and other material reflecting deliberative or policymaking processes, but not purely factual or investigatory reports,"[637] and many take as a point of departure the notion that only predecisional materials are worthy of protection under this head.[638] But, as a vast and not unbewildering case law suggests, the outer bounds of the privilege are elusive. Courts are even increasingly fond of disparaging the distinction between factual and policy information,[639] and occasionally they candidly shield from disclosure purely factual memoranda when they conclude that not doing so would distinctly impede the free flow of information essential to the deliberative process itself.[640] Finally, compliance with the spirit and

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[637] Soucie v. David, 448 F. 2d 1067, 1077 (D.C. Cir. 1971). Accord, EPA v. Mink, supra note 631, at 85-91; 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 5, 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).

[638] NLRB v. Sears, Roebuck & Co., supra note 626, at 151-52. But see supra note 637.

[639] E.g., Mervin v. FRC, 591 F. 2d 821, 826 (D.C. Cir. 1978); Montrose Chem. Corp. v. Train, 491 F. 2d 63, 67 (D.C. Cir. 1974). Jupiter Painting Contracting Co., Inc. v. United States, supra note 636, at 597.

[640] E.g., 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 confidentially, common sense . . . indicates disclosure of these statements would defeat rather than further the purposes of the FOIA.

Accord Cooper v. Department of Navy, 558 F. 2d 274, 277-78 (5th Cir. 1977), modified on other grounds, 594 F.2d 484, cert. denied, 444 U.S. 926 (1979) (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). Miles v. Department of Labor, 546 F. Supp. 437, 439-40 (M.D. Pa. 1982); Lloyd & Henniger v. Marshall, 526 F. Supp. 485, 486-87 (M.D. Fla. 1981); American Fed'n of Gov't Employees v. Department of Army, 441 F. Supp. 1308, 1314 (D. D.C. 1977); 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) and cases cited therein; Machin v.

(Footnote Continued)

now the letter of the FOIA requires agencies to divulge nonexempt portions of otherwise exempt documents where severing the portions or eliminating identifying details makes that feasible,[641] and there is no reason why claims attorneys should consider themselves exempt from having to make conscientious and good faith efforts of this sort. I only mean by this cursory account of a single privilege incorporated in but one of the exemptions to show that claims attorneys in the different agencies probably need a few more benchmarks than they now have.[642]

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,[643] which, while not arising under the FTCA, involves access to just the kind of document that figures prominently in that setting. The case grew out of an accident allegedly caused by the failure of certain military parachute equipment. An Air Force captain brought a damage action for his injuries against the designer and manufacturer of the equipment. 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 so-called collateral investigation conducted to preserve evidence for use in any subsequent actions or proceedings,[644] 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

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(Footnote Continued)
Zuckert, 316 F. 2d 336 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963); Kanter v. IRS, 496 F. Supp. 1004, 1006-07 (N.D. Ill. 1980). Cf. National Parks & Conservation Ass'n v. Morton, 498 F. 2d 765, 767 (1974) (FOIA trade secrets exemption).

[641] 5 U.S.C. § 552(b) (1977); Federal Open Mkt. Comm. v. Merrill, supra note 103, at 364; EPA v. Mink, supra note 631, at 91-92; Ryan v. Department of Justice, 617 F. 2d 781, 790 (D.C. Cir. 1980); Mead Data Cent., Inc. v. Department of Air Force, supra note 640, at 256; Deering Milliken, Inc. v. Irving, 548 F. 2d 1131, 1138 (4th Cir.; 1977); Wu v. NEH, 460 F. 2d 1030, 1033 (5th Cir. 1972), cert. denied, 410 U.S. 926 (1973); Kreindler v. Department of Navy, 363 F. Supp. 611, 613-14 (S.D. N.Y. 1973). Disclosure of factual matter is exempted where "inextricably intertwined" with protected material. Mervin v. FTC, 591 F. 2d 821, 826 (D.C. Cir. 1978).

[642] The case is probably even stronger with respect to the attorney work product privilege likewise incorporated in Exemption five. See infra note 661, and cases cited therein. One court described application of that privilege in an FOIA context as "a task that would challenge the fabled Proctrustes." Fonda v. CIA, 434 F. Supp. 498, 505 (D. D.C. 1977).

[643] 52 U.S.L.W. 4351 (U.S. Mar. 20, 1984), rev'g 688 F. 2d 638 (9th Cir. 1982).

[644] See supra note 590.

of statements by the accident victim and a colleague, and a certain medical report.[645]

The agency's action, though invalidated in the court of appeals on the ground that the government's executive privilege does not extend to purely factual material, was sustained recently by the Supreme Court.[646] The Court essentially held, contrary to the ruling below, that the privileges in civil discovery incorporated by analogy in Exemption five to the FOIA are not limited to those expressly identified by Congress in the legislative history of the Act. Specifically, it 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,[647] they are also within the scope of Exemption five. But this particular privilege -- whose merits the Court incidentally did not examine -- is limited to statements made under a promise of confidentiality. Though the distinction between factual and deliberative material is no longer applicable to them,[648] it has not lost its more general significance among principles governing agency disclosure of information.

(iv) Some Preliminary Thoughts on Exemption Five

Although a detailed analysis of the application of Exemption five or any other exemption to the claims process is best left to another day, I do believe that claims attorneys are generally apt to exaggerate the extent to which that particular exemption cloaks the materials they gather in the course of investigating a tort claim. I therefore conclude this section by hazarding just a few preliminary thoughts on the matter.

First, a further word about executive privilege that seems to me especially apt in the tort claim setting. Sometimes the courts seem to be influenced in applying this privilege by their estimate of the extent to which a given disclosure would adversely affect the government's competitive position in an ongoing proceeding, and that estimate increases when the proceeding in question can be described as a bargaining transaction.[649] Among the best non-tort examples to arise in

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[645] The medical report contained findings and recommendations of the "life sciences member" of the aircraft accident investigation board.

[646] See supra note 643.

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

[648] 52 U.S.L.W. at 4353 n. 17.

[649] Federal Open Mkt. Comm. v. Merrill, 443 U.S. 340, 358 (1979); Hoover v. Department of Interior, supra note 626 at 1140. 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).

FOIA litigation are requests for information during negotiations over the compulsory purchase of land[650] or during bargaining over a contract purchase price between the government and the lessee of surplus government-owned property.[651] The courts seem to be saying that full government disclosure in such cases is at variance with the competitive arm's length character of the underlying transaction.[652] I have the impression that many claims officers view the tort claim process at the agency level just that way. Are they justified in doing so?

Claims officers and claimants doubtless engage in very many situations in what can only be described as bargaining, each starting from exaggerated if barely tenable negotiation postures and working their way if possible to some middle ground. On the other hand, tort claims of a decidedly routine character may involve little if any real negotiation, especially where the claimant is unrepresented. One simply cannot say that all tort claimants are bargainers or all tort settlements the product of a bargain. More important, to draw a strict analogy between agency tort claims adjudication and the rather stark bargaining processes that characterize the government's commercial transactions[653] does a certain degree of violence to Congress' basic

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[650] Hoover v. Department of Interior, supra note 626.

[651] Martin Marietta Aluminum, Inc. v. Administrator, GSA, 444 F. Supp. 945 (C.D. Cal. 1977).

[652] Both Hoover and Martin Marietta, supra notes 650-51, involved FOIA requests for disclosure of appraisal reports during pending negotiations, and in both cases disclosure was denied. The courts distinguished cases in which appraisals were sought and obtained after the transaction had been fully consummated. Tennessean Newspapers, Inc. v. FHA, supra note 637, at 660; Philadelphia Newspapers, Inc. v. HUD, 343 F. Supp. 1176, 1178 (E.D. Pa. 1972).

[653] "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 Aluminum, Inc. v. Administrator, GSA, supra note 651, at 950. Accord Government Land Bank v. GSA, 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 taxpayers' pockets").

The Supreme Court in Federal Open Mkt. Comm. v. Merrill, supra note 649, 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."

purpose in enacting and amending the FTCA. Congress intended adequate compensation of meritorious claims, not a bargaining or negotiating process as such.

So long as the agency claims process retains the pervasive ambiguity I have identified periodically throughout this report, it will show 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 of many areas where the tension shows up. In view of this, one should not suppose that Exemption five can be applied with perfect uniformity throughout the agency claims process as currently organized, without regard to the nature of a particular claim or the character of an agency's ongoing dealings with a particular claimant. On the contrary, the combination of these important variations in the claims setting with an important if subtle element of entitlement suggest that any blanket characterization of the process as bargaining pure and simple -- whether for the purpose of limiting claimant access to information or any other -- should be avoided.

My second preliminary observation on Exemption five in the claims context relates to the absolute attorney-client privilege likewise incorporated in that exemption. More than one claims officer expressed to me the view that, as the agency's attorney, he or she is bound not to disclose any information that may be described as confidential. I suspect that other officers, without couching the matter quite so clearly, act on much the same view. True, agencies have been held to constitute clients, and agency lawyers their attorneys, for purposes of the attorney-client privilege.[654] But surely not every communication between agency and agency attorney is privileged. At least one court has squarely recognized that protecting under Exemption five every statement made by agency personnel to one of the agency's attorneys in a government such as ours that is "top-heavy with lawyers"[655] would do considerable violence to the FOIA. Claims attorneys need to be reminded that the attorney-client privilege fairly extends only to disclosures necessary in order for the client to obtain informed legal advice or

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[654] Coastal States Gas Corp. v. Department of Energy, 617 F. 2d 854, 863 (D.C. Cir. 1980); Mead Data Central, Inc. v. Department of Air Force, supra note 640, at 252-53; Thil Sec. Corp. v. New York Stock Exch., 57 F.R.D. 133, 138 (E.D. Wis. 1972).

[655] Jupiter Painting Contracting Co., Inc. v. United States, supra note 636, at 598 (deliberately construing the privilege narrowly in the governmental context). Cf. Kent Corp. v. NLRB, supra note 636, 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).

legal services, and even then only to disclosures that but for the privilege would not otherwise be made.[656] The materials that a tort claimant is most likely to seek at the agency level will have been assembled by an agency lawyer not chiefly in order to render legal services or advice, but to discharge an obligation, under Justice Department and agency regulations, to investigate properly filed administrative tort claims; as such, they constitute disclosures that would otherwise be made. Interposing the attorney-client privilege as a wholesale obstacle to disclosure in the setting of an administrative tort claim is thus quite unwarranted.

Similarly, agency attorneys should not routinely take the factual information they assemble in consideration of an administrative tort claim to fall 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.[657] Arguably, every administrative claim filed under the FTCA is by definition in anticipation of litigation, especially since the agencies may only settle claims that fall within the FTCA's waiver of immunity to suit,[658] and since a prior claim is now a prerequisite to suit. This view has a wide following among both agency and Torts Branch attorneys,[659] but I question its validity. As I suggested earlier,[660] the handling of tort claims has become a conventional responsibility of agency counsel and a highly professionalized and standardized operation. Though it has not evolved into a wholly distinct and alternate dispute resolution mechanism, the truth is that it keeps all but a small percentage of administrative claims out of litigation. Granted, the case for treating an agency's investigation of tort claims as not done in anticipation of

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[656] 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. v. Department of Energy, supra note 654, 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.

[657] FED. R. CIV. P. 26(b)(4)(B)(1972). Air Force disclosure regulations expressly exempt such material. Air Force Regulation No. 112-1, supra note 581, § 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").

[658] See text at notes 87-88, supra.

[659] 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.

[660] See text at notes 309-10, supra.

litigation is not as strong as the case for so treating its investigation of claims to a statutory entitlement; but it still has considerable merit. Agency claims attorneys should no more suppose that they have in the expert witness privilege than in the attorney-client privilege a general refuge from their duties of factual disclosure to claimants under the FOIA.

Beyond all doubt, however, it is the qualified attorney work product privilege that dominates thinking about the limits of mandatory disclosure to tort claimants;[661] this privilege too has taken on inflated proportions and contributed to an irresponsibly casual assumption that the contents of files on pending tort claims are entirely off limits to claimants. More than one claims officer takes the position that a claim file may be withheld in its entirety under the work product privilege on the theory that every agency tort claim proceeding is potential if not imminent litigation, that the file would not be prepared if not for that prospect, and that its disclosure would expose the government's case in any litigation that might occur.[662]

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[661] FED. R. CIV. P. 26 (b)(3)(1972). 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 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. CIVIL ACTIONS AGAINST THE UNITED STATES, ITS AGENCIES, OFFICERS AND EMPLOYEES, supra note 636, at 248, and cases cited therein. On work product generally, see Upjohn v. United States, 449 U.S. 383 (1981); NLRB v. Sears, Roebuck & Co., supra note 626; Hickman v. Taylor, 329 U.S. 495 (1947); Jordan v. Department of Justice, 591 F. 2d 753, 774-76 (D.C. Cir. 1978); Note, Discovery of Government Attorney Work Product under the FOIA, 71 KY. L. J. 919, 926-31 (1983).

[662] Under this view, no distinction is drawn between routine accident investigations 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., Veterans Administration Regulation No. M-02-1, supra note 591, § 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") (emphasis added). Others prefer to leave the notion of what is prepared in anticipation of litigation quite undefined. E.g., Air Force Regulation No. 112-1, supra note 581, § 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)

(Footnote Continued)

This sweeping resort to the work product concept, which happily is not widely had by those with whom I spoke, seems to me quite wide of the mark.

For the reasons just stated, I seriously doubt that the information assembled by an agency attorney in consideration of a claim filed under the FTCA can fairly be characterized en bloc as assembled in anticipation of litigation, as the work product privilege would require.[663] True, agency tort claims generally meet the test of an "articulable claim likely to lead to litigation,"[664] depending of course on the emphasis given the word "likely;" and asserting the work product privilege for material in this context does not constitute "withhold[ing] any document prepared by any person in the Government with a law degree simply because litigation might someday occur."[665]

(Footnote Continued)
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 then be withheld en bloc as attorney work product. The Air Force manual for judge advocates investigating medical malpractice claims, for example, does so, and 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 591, § 3.41.

[663] Coastal States Gas Corp. v. Department of Energy, supra note 654, at 864-65; Jordan v. Department of Justice, supra note 661, at 775; Coastal Corp v. Duncan, supra note 655, at 522; Hercules Inc. v. Exxon Corp., 434 F. Supp. 136, 150-51 (D. Del. 1977). According to the court in Coastal States, supra, "to argue that every audit is potentially the subject of litigation is to go too far."

[664] Coastal States Gas Corp. v. Department of Energy, supra note 654, at 865. See also Kent Corp. v. NLRB, supra note 636, 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).

[665] Coastal States Gas Corp. v. Department of Energy, supra note 654, at 865. Cf. Hoover v. Department of Interior, supra note 626, at
(Footnote Continued)

Still, I think it a gross exaggeration to view agency handling of tort claims as a simple prelitigation exercise.[666] Agency claims officers and claimants alike have come to look upon agency-level consideration of tort claims as a genuine administrative task mandated by Congress and characterized by an increasingly well-defined administrative procedure[667] cut loose from its litigation origins. The practices of administrative settlement, as well as the statistics, bear them out.

I know of no case squarely addressing the place of work product in tort claims investigations. But analogous cases strongly support my conclusions. The plaintiff in a tax refund suit, for example, 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. Conceding that the documents in question had reference to mental impressions and legal theories of the claim, the court squarely rejected the notion that they had been prepared in anticipation of litigation.[668] Everything the court said about the tax refund papers in reaching this conclusion would apply equally well to reports assembled by agency tort claims attorneys under the FTCA. They are routinely prepared for every claim presented to the agency, and well before any lawsuit is filed; they are not prepared by or at the direction of the attorney who will actually try the case if it goes to litigation; 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.[669] The court also quoted language from an opinion in a practically identical case that is well worth repeating here:

> Generally, it is this court's belief that IRS appellate conferee reports and IRS field agent reports are not prepared

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(Footnote Continued)
1146 (Vance, J. dissenting) (appraisal report in compulsory purchase of property not prepared in anticipation of litigation, but for ordinary business transaction).

[666] See supra note 310 and accompanying text.

[667] 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).

[668] Abel Inv. Co. v. United States, 53 F.R.D. 485 (D. Neb. 1971).

[669] Id. at 489.

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.[670]

Finally, even if one were to take the view that tort claims are investigated at the agency level essentially in anticipation of litigation, a suitably narrow definition of work product would still allow the agencies to accommodate most requests for information. The language of Rule 26(b), to which the courts look in applying Exemption five, strongly suggests that what lies at the heart of the privilege is the confidentiality of "the mental impressions, conclusions, opinions, or legal theories of [the] attorney."[671] More to the point, the Supreme Court case that definitively recognized a place for work product in Exemption five could not have stated more plainly what lies at the core of work product protection in the FOIA context. "Whatever 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 his case and his litigation strategy."[672] To be sure, the claimant who

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[670] 53 F.R.D. at 489, 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 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).

[671] FED. R. CIV. P. 26(b)(3) (1972). 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. v. United States, supra note 661, at 400; Moody v. IRS, 654 F.2d 795, 798 n. 10 (D.C. Cir. 1981); United States v. Leggett & Platt, Inc., 542 F. 2d 655, 660 (6th Cir. 1976); 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, Discovery of Government Attorney Work Product under the FOIA, 71 KY. L. J. 919, 928 (1983).

[672] NLRB v. Sears, Roebuck & Co., supra note 626, 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. v. Irving, supra note 641, at 1137-38; Fonda v. CIA, supra note 114, at 505. Cf. Mervin v. FTC, supra note 641, at 825. 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 671, at 929-30.

seeks access to the file on his or her claim during the agency phase of the FTCA would be interested to know the claims attorney's "theories and perspectives"[673] on the claim, or legal strategy in the event of litigation, but his or her immediate objective will be access to factual information about the circumstances of the incident, the issue of negligence, or the extent of loss. The requester is above all a claimant, and at best only a potential litigant. What he or she presumably seeks is a fair administrative settlement in consideration of the claim, and not some putative advantage in litigation that may or, far more likely, may not ever take place.

H. A Preliminary Evaluation of the Claim

At some point, within a highly elastic time frame, the claims officer has to come to some judgment about the merit and the value of a claim. This report, prepared as it is for the Administrative Conference, skirts issues of substantive tort law as such. But a subject like governmental tort liability, by its very nature basically remedial in concern, in a very real sense straddles the divide between procedure and substance. Some comment on a claims officer's standards of judgment seems in order.

(i) Standards under the Federal Tort Claims Act

I have already hinted earlier in this report at the basic standard of judgment, so far as the FTCA is concerned. Essentially, agency claims officers take as their touchstone for determining the merits of an administrative claim the probable exposure of the United States to liability on the claim were it to be litigated under the Act. This requires in effect that the officer determine, with more or less rigor, a whole range of largely substantive questions: whether the elements of a cause of action in tort under the applicable state law are present;[674] whether the facts warrant a conclusion that the loss claimed proximately resulted from the conduct at issue; whether the same facts justify a finding of contributory or comparative negligence, assumption of risk, the existence of a valid release, or any other state law defense; whether the employee responsible for the injury was acting within the scope of employment at the time;[675] and, not least of all, whether any of the FTCA exemptions, express or implied, may be applicable,[676] to

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[673] Kent Corp. v. NLRB, supra note 636, at 623.

[674] The number of potential issues -- the law of dangerous instrumentalities, res ipsa loquitur, recreational use statutes, and so on -- is legion.

[675] On this, the report of the employee's supervisor will play a crucial role.

[676] The dominant practice among claims officers evidently is to assert any and all of the exemptions even if only "colorable," to borrow the term used by several of them. (At Justice Department seminars on the FTCA, United States attorneys and agency claims officers are

(Footnote Continued)

single out only the most salient recurring issues. A host of narrower and more technical issues too numerous and diverse to mention may also arise.[677]

If a claim is in principle compensable, the claims officer still must determine what elements of damage are by law recoverable and evaluate the proximately caused loss in monetary terms. These operations, too, will be performed in light of state law and local damages standards, unless all that is involved is adding up medical bills or taking the lower of two car repair estimates. The agency then probably will reduce the amount by some factor to reflect the extent to which the claim is a doubtful one either in law or in fact. In this respect, if none other, the claims officer's evaluation differs from a judge's. Having overcome factual or legal doubts in order to find for the plaintiff, the judge may well proceed to award full value; that the claims officer rarely will do. In fact, whether because every reasonably complex claim entails some element of risk on the basis of which to discount its judgment value, or because the agencies follow the dubious practice of discounting even unquestionably valid claims to reflect a claimant's time and expense saved, or because agency officials are simply more careful with government money than judges tend to be, agencies are reported to be more conservative than the courts in evaluating the same claims.[678] With these nuances kept in mind, I think it fair to say that unless an agency has at its disposal also an ancillary or meritorious claims statute conferring a broader range of settlement authority, the dimensions of FTCA litigation exposure -- as the claims officer sees them -- fundamentally define the agency's willingness to settle.[679] A corollary of this principle is that

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instruced to raise every "tenable" defense.) I take this to mean that an officer will normally deny a claim on the basis of an exemption even if not persuaded that it is applicable, provided a court could plausibly hold that it is. One attorney, pressed to state a formula, acknowledged that he would invoke an exemption if there were a thirty to forty percent chance of being sustained in court.

[677]The local collateral source rule, rights of representation under state law, and wrongful death limitations come to mind by way of example.

[678]1 L. JAYSON, supra note 595, at p. 1-14.

[679]The analytic framework I have sketched probably strikes the agencies as so self-evident that generally speaking they have not reduced it to writing. The Air Force is an exception:

> Compromise -- An agreed equitable settlement is based on practical factors - trial risk, the uncertainties of the facts (bona fide dispute), an evaluation of the credibility of witnesses, the availability of witnesses and other evidentiary support, and related practical considerations -- including the application of the law to the facts in determining either liability or damages and

(Footnote Continued)

agencies do not settle cases purely for their nuisance value.[680] I shall have more to say about settlement philosophy generally in the next section.

Plainly, not every federal tort claim lends itself to quite so neat an analytic framework. A given claim may raise a highly novel point of law that neither the agency nor the Justice Department wants to submit to the usual "prediction of judicial outcome" approach. Especially if it alleges a regulatory or program-related tort, a claim may raise important policy questions going to the central mission of the agency. It may be a matter of judgment whether the agency should resist settlement in order to secure an early judicial decision on the point or whether it should entertain settlement more readily in the expectation that a subsequent claim will provide a better vehicle for bringing the issue to a head in the courts. Obviously, the circumstances of the event, the strength or weakness of the claimant's case, the qualities of the anticipated judicial forum, the extent to which the agency's program-related interests have become clarified, and a host of other considerations will have a role to play in this calculation. On the other hand, if the legal and policy reasons for resisting payment seem strong enough, settlement will be rejected at any price as a matter of

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(Footnote Continued)

> the precedent value of settlement . . ..
>
> The claim file should clearly reflect the questions of legal liability, proof, etc., and the probability of the claimant's prevailing on the legal and factual issues involved, and estimates of the cost to the Government of litigation, so the decision to compromise is fully supported. The approving authority will always consider the following essential factors in determining whether a compromise is desirable.
>
> (a) Whether there was any negligent or wrongful act or omission of an Air Force employee that was a proximate or a contributing cause of the accident or incident and the risk of Government liability if litigated.
>
> (b) Reasonableness of the claimant's current demand or offer (damages, nature of injuries, substantiation of claim, claimant's risk of litigation, and possible costs).

32 C.F.R § 842.110(d)(1983).

[680] This attitude to nuisance value claims is firmly maintained by virtually every claims officer with whom I spoke, and usually justified in terms of fidelity to legislative intent under the FTCA. One officer, however, also mentioned the possibility of personal liability should the GAO disallow the account. See supra note 63.

As to whether there might ever be an exception to the policy against the administrative settlement of nuisance value claims, one officer allowed that if one arose out of an incident of acute embarrassment to the agency, it might possibly be paid. Another officer actually reported an exception for the entirely meritless claim that the government, by reason of lamentable recordkeeping, likely cannot defeat in court. It is a matter of definition whether one considers the latter an example of a nuisance value claim.

law or principle or in consideration of agency morale. Such cases must arise if claims officers in fact believe as they profess that, though decisions to settle or not settle do not as such constitute binding precedent, essentially like cases must be treated alike. An agency also may view the denial of a claim as a legitimate means of testing and seeking to have overruled or discredited an earlier judicial ruling it believes to be plainly wrong. In all these situations, the Justice Department may be expected to have something to say.[681] I think we can safely conclude that while the vast majority of tort claimants may see little more to their claim than its dollar value, the government cannot help but have an eye on and occasionally be decisively moved by its larger litigation and program-related strategies.

To the extent that the outcome of a tort claim turns on the substance of local law and practice -- and by no means is this always the case -- the agency attorney has several sources of guidance. Experienced claims adjudicators are their own best sources, especially in high-volume agencies with recurrent kinds of claims. Officer upon officer spoke of having developed by dint of experience an educated "feel" for certain kinds of cases and especially for isolating an appropriate range of value. The busier the officer, the larger the number of colleagues, and years of experience, to tap. By nearly all accounts, though, those officers who adjudicate claims on a local or regional level have the advantage when it comes to acquiring knowledge of local law, for their cases grow out of but a handful of jurisdictions.

Whatever the level at which adjudication takes place, the local United States Attorney's office is invariably described as the agencies' leading consultant on such matters. The United States Attorneys draw freely from their own tort litigation experience, their familiarity with local law and their sense of local judgment values: a reservoir that normally answers an agency claims attorney's needs. Still, other sources of enlightenment are available. Claims officers, again especially local and regional ones, reportedly have recourse to members of the local tort bar, to the local bar association library and, as trained professionals, to all the conventional sources of local law -- reported judgments, digests, textbooks and loose-leaf services. When it comes to valuation questions in particular, there exists an abundance of published aids -- Verdicts and Settlements, Speiser's Recovery for Wrongful Death, The Modern Federal Practice Digest on Damages, The Personal Injury Valuation Handbook, the American Medical Association's Guide to the Evaluation of Permanent Impairment and so on -- showing, by geographic area, judgments and judgment valuation ranges for every recurring kind of injury or loss under different stated circumstances. Though kept reasonably in tune with developments in local law and practice, they are all viewed with the most profound of skepticism by the majority of officers with whom I spoke. But they are apparently

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[681] See text at notes 734-47, infra.

widely relied upon at least as an aid to judgment which is all they are really meant to be.[682]

All the sources available to the local and regional claims attorneys are also available, in some instances less directly, to those who are Washington-based. One does not need to sit in the same city as the local United States Attorney in order to draw on his or her wisdom. Still, headquarters attorneys have their own networks such as the United States Attorneys in the District of Columbia, particularly on questions of general tort law. And when it comes to the law of the Federal Tort Claims Act itself, the Torts Branch is the acknowledged expert. Finally, before a claim file ever reaches Washington, it will have passed through many hands: investigators and inspectors; liaison officers and coordinators; agency real estate officers, economists and medical constultants; initial decisionmakers and recommending authorities. Each of these, even the nonlawyers, has his or her experience and contacts on which to make more or less informed legal judgments, and each will leave his or her trace on the claim file. At some point in the process, a formal report and recommendation on the legal as well as the factual aspects of the claim will be prepared and serve as centerpiece for the analysis to follow. Thus, even when a claim requires adjudication in Washington, it comes with certain legal moorings.

(ii) Standards under the Meritorious Claims Statutes

Something remains to be said about standards under statutes other than the Federal Tort Claims Act. I can be brief about what I have called statutes ancillary to the FTCA, particularly those waiving the foreign claims exemption. The legal analysis does not appear to be very

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[682] The agencies are well 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.

Veterans Administration Regulation No. M-02-1, supra note 591, § 18.12(e). Dissatisfied with the commercial valuation guides, one agency claims officer urges the Justice Department to compile for the agencies a district-by-district guide to judgment values, or simply publish systematically summary reports of actual settlements and verdicts by claim type.

distinctive. For example, the State Department enforces the usual statute of limitations, the usual exemptions (except of course for that covering claims that arise abroad) and the usual reference to local law, though the last of those tends to require some extra effort.[683] Where research on the substance of foreign law is indicated, the Assistant Legal Advisor has recourse to a foreign mission, to the foreign law section of the Library of Congress, to foreign counsel or to any other source of foreign law advice, preferably one that is free. A memorandum on the applicable foreign law will appear in the investigative file.

Of greater interest are the meritorious claims statutes which, as the partial listing in chapter two suggests, give certain agencies limited authority to settle and sometimes pay claims for injury to person or property that for one reason or another are not compensable under the FTCA. To what extent have the agencies that enjoy this added measure of settlement authority articulated substantive standards for its exercise?

My impression is a checkered one, based on the handful of agencies whose practices I examined. At one extreme are agencies that, to judge by conversations with individual claims attorneys, have no familiarity whatsoever with the meritorious claims statutes at their disposal, and that have been at their disposal for some time; not surprisingly, standards for the exercise of discretion under those statutes simply do not exist. In other cases, a claims attorney will have what can best be described as some vague recollection of meritorious claims settlement authority, but substantial difficulty recollecting any case in which it was used.

A variant on this theme is the United States Postal Service. Though favored with a sweeping meritorious claims statute,[684] the Law Department reports rarely using it; evidently it finds sufficient elasticity in the Federal Tort Claims Act to reach most appealing cases. Offhand, the Assistant General Counsel could recollect only one specific instance in which the statute was actually used, namely the case of the good Samaritan injured while attempting to rescue the driver of a burning postal vehicle. The situation, like another in which the Postal Service came close to using its meritorious claims authority,[685] represents an extremely narrow class of cases in which a private party suffers personal injury or property damage in furtherance of the best interests of the Postal Service. The agency has consciously avoided

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[683] Foreign tort claims settled in recent years under the statute have involved such allegations as medical malpractice, false imprisonment and the negligent giving of advice.

[684] See text at notes 171-73, supra.

[685] The case arose when a mail carrier destroyed a pool cue he was delivering when he used it in driving off an attacking dog. The claim, however, was not pressed.

using the statute as a basis for a sweeping assumption of no-fault liability.[686]

The apparent reticence of the Postal Service may be explained by the difficulty of arriving at standards that would allow it to keep its no-fault liability within reasonable bounds or, better yet, confined to truly exceptional nonrecurring circumstances. Some ten or twelve years ago, the Assistant General Counsel himself reportedly tried to draw up a set of narrow no-fault standards and abandoned the effort. The Law Department also avoids using its meritorious claims statute in order to circumvent particular limitations of the FTCA on recovery in tort. Even if there were not an apparent statutory bar,[687] the Service has difficulty discerning in what specific ways Congress would have wanted it to do so.

Other agencies see their way more easily to using meritorious claims authority for no-fault purposes, and this may have more to do with the nature of their activities than anything else. The Federal Bureau of Investigation is a good example. That agency invokes its statute, authorizing it to settle claims not amenable to settlement under the FTCA,[688] as many as a dozen times a year. In each such case, the FBI injured or distroyed property non-negligently in the course of its investigative activities. In one instance, it removed an innocent person's car door for use as evidence; in another, it drilled a hole in a safe to get to its contents; in a third, the fingerprint dust it scattered did permanent damage to a table top. In principle, all that the FBI requires for recovery under these kinds of circumstances is a showing of proximate cause; it applies the scope of employment concept only in a loose way. What most disconcerts claimants and the FBI alike is the five hundred dollar limitation on recovery for any single incident. But though the FBI is prepared to put its meritorious claims statute to limited no-fault uses, it does not look upon the statute as a means of expanding the specific limits of the Federal Tort Claims Act for claims sounding in tort. Like the Postal Service, it takes the FTCA as a comprehensive definition of the federal government's tort liability.[689]

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[686] By way of example, the Postal Service would not use the statute to pay a claim for injury or damage proximately caused by a postal driver suffering a heart attack at the wheel. Interestingly, a study of Post Office claims adjudication conducted some thirty years ago likewise observed a tendency to use the FTCA wherever possible, to the exclusion of the agency's meritorious claims statute. Gellhorn & Lauer, Federal Liability for Personal and Property Damage, 29 N.Y.U. L. REV. 1325, 1359 (1954).

[687] See supra note 171.

[688] See text at notes 147-48, supra.

[689] The Chief of the FBI Civil Litigation Unit allowed that he had

(Footnote Continued)

Another agency that makes periodic use of its meritorious claims statute as the occasion arises is the National Aeronautics and Space Administration. Like the FBI, it has issued no substantive standards under the Act, but that does not mean that its exercise of authority is either unguided or unprincipled. Judging by available figures, the agency's meritorius claims statute -- known internally as the Space Act[690] -- has been used as a basis for payment some ten times over the past three fiscal years.[691] Some occasions are truly one of a kind: for example, the mysterious disappearance of a painting on loan to a NASA facility. Others fit squarely within what the General Counsel's Office takes to have been Congress' central purpose in enacting the Space Act, namely providing compensation when, through the fault of no one in particular, hazardous or otherwise unusual space program operations inflict injury on isolated individuals. An example is the shrimper who received compensation under the Space Act when his nets were torn by concrete capsules dropped from the Gemini craft over the waters off Galveston. Standards become necessary in frequently recurring situations such as claims of structural damage allegedly due to sonic boom or overpressure in connection with rocket firings. NASA does not insist on proof of causation beyond peradventure, but it has informally required a showing from NASA records that a space vehicle was traveling at a speed and a location at the relevant time that would make it possible for it to have caused the damage in question or, in the case of overpressure, that the pressure in fact exceeded a certain more or less arbitrary cutoff applied evenly in the case of all such claims. The Space Act itself contains a statute of limitations, and it is strictly observed. On the other hand, not only is a showing of fault not required, but the concept of scope of employement is more or less politely ignored. One can conclude from the NASA and the FBI examples alike, I think, that agencies are capable of using meritorious claims authority in a discreet and principled manner, even while proceeding essentially on a case by case basis.

Where the volume of claims warrants it, however, agencies should consider developing written standards for their exercise of discretion under meritorious claims statutes. The military departments have undertaken to do this with respect to their authority under the Military

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(Footnote Continued)
never even entertained the idea that the statute might be used to settle a tort claim falling within an FTCA exemption or otherwise not cognizable under the Act. It is telling that the Civil Litigation Unit commonly describes the statute as applying "without regard to negligence."

[690] See supra note 161 and accompanying text.

[691] The incidence of use is less sparing than it may appear, for in the same period actual settlements under the Federal Tort Claims Act only numbered about fifty.

and Foreign Claims Acts.[692] As indicated earlier, the services have a common understanding of what Congress meant by the cryptic statutory reference to noncombat activities, namely those that are peculiar to the military and its operations;[693] and they share the view that technicalities of scope of employment should not stand in the way of recovery in an otherwise appealing case involving such activities.[694] I would quarrel on policy grounds,[695] on the other hand, with the apparent decision to limit their authority under the Military Claims Act -- even with respect to noncombat activities -- by so heavy a borrowing of the FTCA exemptions,[696] but there is no denying that they have thereby channeled their discretion. Both reading the regulations and talking with the people involved persuade me that the military departments have made considerable sense of the claims statutes at their disposal. They have assigned each a more or less distinct purpose and made of them collectively a more or less coherent whole.[697]

If some of the agencies have failed to use or rationalize their use of meritorious claims authority, the fault probably cannot be laid entirely at their feet. Congress itself has done a mixed job of

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[692] Air Force Regulation No. 112-1, supra note 581, ch. 7; 32 C.F.R. §§ 84.50-.54 (1983) (Air Force); Army Regulation No. 27-20, supra note 22, ch. 3. For an earlier study of substantive standards, as well as procedures, under the forerunner of the Military Claims Act, see Gellhorn & Lauer, supra note 686, at 1350-58.

[693] See supra note 183 and 185, and accompanying test. 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 but the one barring foreign claims should be applicable. See supra note 181.

[694] See supra notes 177 and 184, and accompanying text.

[695] See, by way of analogy, the discussion, text at notes 88-94, supra, of whether agencies should have authority under the FTCA to pay exempted tort claims even if suit upon them is barred.

[696] See supra note 663. The services do show certain differences. Air Force regulations do not include the FTCA's discretionary function exemption; Army regulations do, but only allow the Chief of the Claims Service to invoke it. The regulations contain other self-imposed limitations, either based upon the existence of adequate alternative remedies or certain catchall policy considerations. See supra notes 198 and 198a, respectively.

[697] It is a measure of this coherence that claims officers at the military departments routinely examine a claim filed specifically under the FTCA or under one of the ancillary statutes to see if it should also be considered under some other statute as well. This also appears to be the case in the Federal Bureau of Investigation and the National Aeronautics and Space Administration.

explaining to those agencies that have meritorious claims authority why they have it and others do not, or, as to those that have it, for what purposes it was given them. What particular limitations on FTCA coverage -- the requirement of fault, reference to state tort law and its many wrinkles, action by an officer or employee within the scope of office or employment, proximate causation, any or all of the FTCA exemptions -- did Congress specifically expect or hope an agency would feel free to disregard in wielding its meritorious claims authority? Or did it give these agencies a carte blanche to do the right and good thing? In the special case of meritorious claims statutes that predate the FTCA, I entertain serious doubt, despite the savings clause in that Act,[698] whether Congress really knew what it was saving those statutes for and whether it would have bothered to enact them in the first place if the FTCA had preceded them into the statute books.

The answers to these questions must await another day, after the meritorious claims statutes as a group have been closely studied from a substantive point of view. I mean only to suggest that the very uneven fortune of these statutes in the agencies' hands is to some extent a function of genuine and understandable ignorance by the agencies of their why and wherefore. Evidently, some agencies manage to make sense as well as principled use of their meritorious claims statutes, though they simply may be the ones that had more direction from Congress to begin with. One cannot quarrel with the idea that the agencies should develop standards for the exercise of statutory discretion, but the fact remains that many meritorious claim statutes give every appearance of being either historical relics or idiosyncratic excrescences on the Federal Tort Claims Act. The time has come for Congress to take a look at the claims settlement statutes it has episodically put on the books.

I. Agency Settlement Philosophy: Still an Open Question

Traces of a basic ambiguity in the nature of the Federal Tort Claims Act have surfaced time and again in the course of this report, and I have tried to show at each point the implications for the way agency claims officers go about their work. This section of the report, following directly on my discussion of the analytic framework for evaluating a claim, seems a useful place at which to put the problem squarely on the record.

One way of looking at the process is to view claimants as having an entitlement of sorts to an unliquidated sum of money, subject to their proving each of the elements of a compensable claim. In fact, one rarely looks at tort claims this way, however strong and meritorious they may be. This is not because the conditions of a valid tort claim are so numerous or complex -- eligibility requirements for a statutory entitlement may be no less so -- but because they are so often indeterminate and subjective by nature. At a minimum, tort claims entail a showing of wrongfulness, imponderables like proximate cause, well- and not so well-understood statutory exemptions, speculation over many of the injuries claimed and, above all, a high degree of

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[698] See supra notes 88-89, and accompanying text.

indeterminacy in damages. The assertions that may be made in the guise of a tort claim are almost boundless. Among the differences between tort claims and entitlements proper is the fact that no agency at the federal level has primary responsibility for handling government tort claims; by contrast, entitlement programs are the business of the agencies that administer them, and usually the very reason for their being.[699]

Still, a claims attorney may view just compensation for government torts as an affirmative agency obligation, with himself or herself the dispenser of inchoate entitlements of sorts. If so, the attorney 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. Despite the prominence of fault in the FTCA setting, and all the elements of indeterminacy I have mentioned, claims officers have no more reason to assume an adversarial relationship with claimants, at least at the outset, than he or she would with social security, welfare or food stamp applicants at the initial application stage. If deserving tort claimants are meant to recover against the government, as indeed appears to have been Congress' intent, and are meant to do so if possible in the agencies rather than the courts, then the parties share an interest in the fair determination and valuation of claims.

In fact, no claims officer I spoke with described the FTCA as conferring an entitlement,[700] though quite a number referred to what a claimant is "owed" much in the manner of veterans' benefits or food stamps.[701] But consider the following description of the claims process offered by a former chief of the Army Claims Division well before the 1966 amendments made exhaustion of that process a prerequisite to suit:

> The adjudication by an approving authority is in every sense a judicial act. The judge advocate, a trained attorney and a member of the bar, weighs and considers the evidence in the light of the law and precedents of the jurisdiction in which the claim arose. His function parallels that of the judge of the district court where the claimant has the alternative of presenting his demand.[702]

Some commentators would take matters a step further, arguing that the government has a continuing duty to deal with a claim fairly and

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[699] See supra note 619 and accompanying text.

[700] Consistent with this attitude is the uniform policy among claims officers of not under any circumstances awarding tort claimants a greater sum of money than claimed.

[701] Officers at several of the agencies -- the Army and Air Force come most readily to mind -- referred to their having "dual" obligations.

[702] Williams, The $2500 Limitation on Administrative Settlements under the Federal Tort Claims Act, 1960 INS. L. J. 669, 672 (1960).

objectively even after it has gone to litigation, the notion being that government should always temper its pursuit of advantage with a firm commitment that justice be done.[703] But whatever one may expect of government lawyers when they defend the government in tort claims litigation, they can reasonably be expected to act fairly and objectively when they consider a Standard Form 95 in the nonadversarial setting of an agency-level claim.[704]

The government claims attorney, of course, can be looked at in a different way. Again, I draw from the literature, in this case an account of the 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 the action to the bitter end.

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[703] "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, LITIGATION WITH THE FEDERAL GOVERNMENT 26 (1970).

This is not my impression of how the Justice Department conducts its tort litigation business. By his own account, the Torts Branch Director takes the Department to be bound, like most any private lawyer vigorously representing his or her client, to advance every tenable argument in support of the cause (regardless of how he or she may believe the issues would fairly be decided), to exploit any and every weakness in the claimant's case and, so far as the bottom line in litigation settlement or judgment is concerned, always to part with the fewest dollars possible. See infra note 708.

[704] See 2 L. JAYSON, supra note 595, at p. 17-18.

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." GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW p. 11-6 (1982).

> Relaxation of the rules of battle need to be made only where it would cost the city more to go on fighting than to compromise.[705]

This second model casts the government attorney squarely in the mold of private counsel in relentless pursuit of a client's personal advantage and, judging by my conversations at the federal agencies, may be something of an exaggeration. But it also contains an element of truth. One agency attorney described the tort claimant as "entirely on his own."[706] Another roundly disavowed any obligation to the claimant. Still a third confessed that defeating tort claims at the administrative level is a certain way of "keeping professional score," at least where the claimant has representation. And, for his part, the Torts Branch Director posits a squarely adversarial model for the administrative tort claim process. "Justice emerges by way of the invisible hand from the clash of opposing forces."

Whatever the situation may be in other areas of government law practice, I find something profoundly misleading about the hired hand theory of the agency claims attorney. Subject only to review by a superior officer within the same legal department and possibly to approval by the Justice Department, claims attorneys themselves -- not some ultimate client -- decide government tort claims. Except in the most unusual of circumstances, no one outside the legal department -- neither the top policymakers nor even personnel in the division whose activities gave rise to the claim -- will consider a claim as a legal matter; they will be consulted at the investigative stage, but they do not decide the claim as such. From a very practical point of view, the claims attorney is attorney and client, essentially determining the government's bidding at the same time that he or she does it. One might even say that the claims attorneys in a given agency's legal department constitute that agency's policymakers, albeit in the somewhat marginal context of tort claim settlements.

What I infer from this is that agency claims attorneys bear, alongside the usual professional responsibilities of a legal representative, much the same range of ethical responsibilities as any private person who becomes enmeshed in legal difficulties and must stake out a defensible position. They can acknowledge liability where it is fairly established and pay straightaway what any fairminded person would say a given loss is worth. They can overlook some purely technical defense of which they might avail themselves if they chose to do so in the event of litigation, though probably not a defense like the statute of limitations which is assumed to define their settlement authority.[707]

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[705] French, Research in Public Tort Liability, 9 L. & CONTEMP. PROB. 234 (1942).

[706] 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 put an end to the negotiations.

[707] See text at notes 92-94, supra. See, e.g., Augustine v. United

(Footnote Continued)

They can adopt a somewhat less generous posture and do what most in fact do, that is, offer to pay no more than some discounted probable judgment value. Finally, like any client, they can choose to fight the claim at all costs, with any available argument and means, the objective being to pay the very least possible, if indeed anything at all.[708] The only difference is that instead of directing or authorizing hired counsel to pursue such a tack, they put on the attorney's hat and pursue it themselves. Without purporting to set the moral tone of government attorneys, either as policymakers or hired hands, I wish to show that even the relatively well-defined legal environment of the FTCA, offers an enormous range of ethical postures from which to choose.

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States, 704 F.2d 1074, 1077 (9th Cir. 1983). Thus, a claims officer may no more settle and pay a time-barred tort claim than a mere "meritorious" claim in the absence of meritorious claim settlement authority. 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.

DEPARTMENT OF JUSTICE TORTS BRANCH MONOGRAPH, VOL. E, STATUTE OF LIMITATIONS 30-31 (Mar. 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. But this would require very specific statutory language. But cf. Portis v. United States, 483 F. 2d 670, 671 (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).

[708] The Torts Branch Director likes to give the following example. In administrative no less than litigation settlement, a grossly obese claimant will be offered substantially less on a valid claim than any other claimant in otherwise identical circumstances. This is so not because his or her actual loss is any less, but because a judge or jury might be influenced by the obesity factor and because the government has a right to take advantage of this fact. Similarly, in the hypothetical situation in which the government attorney knows that claimant's counsel, out of strictly personal financial distress, is offering quick agency-level settlement at half the true value of his or her client's clearly valid claim, the Torts Branch Director would advise that the offer be accepted.

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.

What attitudes do most claims officers in fact bring to their settlement activities? My overall impression is that claims attorneys in the federal agencies prefer not casting themselves entirely in either of the two molds pictured here. I find a subtle and fascinating variation in attitudes among officers, though almost everyone draws in some measure upon each of the models. On the one hand, virtually all recognize at some level an obligation to examine a claim fairly and give claimants their due. As one affirmed, "I stand ready to pay a valid claim." On the other hand, claims officers readily emphasize the inchoate character of so many tort claims, and they insist that claimants and claimants' attorneys alike are prone to exaggerate and to assume adversarial postures of their own. Claims officers are also conscious, at least in prospective settlements not in excess of $25,000, of standing virtually alone between claimant and the United States Treasury. The dominant attitude, again subject to subtle and fascinating variations, might best be described as "highly skeptical objectivity."

How do claims attorneys put their own inchoate attitudes into operation? In the preceding section, I outlined a purely analytic framework for assessing a government tort claim. Here I mean only to suggest how the attitude I have just described may be thought to affect the analysis. No claims attorney I met had quite contrived a verbal formula to express that impact, but I do come away with a strong intuition. Let me illustrate it by reference chiefly to the problem of placing a value on a payable claim.

I have already said that the decision whether a claim should be paid at all normally involves a prediction of judicial outcome. I also posited -- at least where valuation requires more than simply totaling doctor bills or choosing between car repair estimates -- that payment would run short of full value to the extent that a claim is less than perfectly sound in the facts or in the law.[709] Thus, an agency may be willing to settle a somewhat uncertain claim, but probably will exact a more or less stiff price for doing so. The practice only confirms the difference between a tort claim, on the one hand, and a true statutory entitlement, on the other. Decisionmakers in the entitlement arena, by contrast to the tort claims arena, will make an award even over substantial doubts if, objectively viewed, the case for doing so outweighs the case for not doing so; that is their duty and I believe they are without authority to compromise it by reduction factors or

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[709] I also mentioned that in other cases of less than clear liability -- marked, for example, by novel policy issues, substantial questions of statutory interpretation, the chance to have an unfortunate precedent overruled -- the agency may well choose not to play the game of predicting judicial outcome at all, even with a discount for uncertainty, but rather deny the claim and let the court speak for itself.

similar devices. Tort claims, for all the reasons I have stated,[710] are different creatures.

Still, claims adjudication means putting a dollar value on a discrete loss. In assessing their own generosity, most claims officers like to distance themselves somewhat from insurance company claims adjusters who, one of them alleged, "settle as cheaply as they can get away with." But if agency claims officers do not emulate the insurance companies, what do they do? Most officers seem to accept as a valid characterization that they shoot for settlement at the lower end of an admittedly broad zone of reasonable compensation levels for a given claim. 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, or even necessarily dead center.[711] The former head of the Torts Branch and leading authority on the FTCA put it this way:

> 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 substantial justice. This does not mean that they will not 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.[712]

J. Negotiating the Claim

In a good many cases -- no one is in a position to say just how many -- the better part of the settlement period is spent in negotiation between the parties. This presupposes, of course, that the claim has already been fully investigated and a tentative determination made that it may be worth paying.[713] Each side gives its view of the claim,

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[710] See text at note 699, supra.

[711] Understandably, agency regulations do not really address the question. 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 Regulation No. 112-1, supra note 581, § 1-10.

[712] 2 L. JAYSON, supra note 595, at p. 15-8. Mr. Jayson was describing settlement policy at the litigation stage when he made the observation, but his comments are equally applicable to agency-level practice.

[713] An obvious reason for not conducting negotiations at an earlier stage is conservation of agency resources. A less obvious but important reason is the fear that, whatever the statute may say about the

(Footnote Continued)

perhaps overstating by some measure the strength of its own case and the weakness of the other party's.[714] Eventually the exchange may take the form of offer and counteroffer, coupled with an exchange of argument and information, all to shore up one's own position and cast doubt on the other's.

Even within a single agency, the question whether to engage in this process and, if so, at what pace and rhythm, is a matter of individual style. The head of tort claims adjudication at the Postal Service, for example, finds it most productive and congenial to stake out a fair settlement figure early on and then prove hard to move. But he admires and credits with considerable success the aptitude of his supervising attorney colleague for settlement through dickering. Though ultimate settlement levels may be the same, dickering presupposes what one attorney calls "initial lowballing," which leaves plenty of room for an eventual convergence at or near the targeted amount. Dickering obviously provides greater room for maneuver, hence greater flexibility; but it takes time and carries its own risks.[715]

I do not need to emphasize, as did each and every claims officer, that even those tort claims involving prolonged negotiations are not all alike, and that the quality of negotiations depends heavily on the particularities of the claim and the working relationship that develops between the government attorney and whoever represents the claimant. In

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inadmissibility of settlement offers at trial (see supra note 501), the agency's mere willingness to negotiate may be taken as a concession of liability.

[714] Agency regulations rarely treat the negotiation process as such, but Veterans Administration is 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.

Veterans Administration Regulation No. M-02-1, supra note 591, § 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.

[715] 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.

this respect, of course, tort claim negotiation is no different in the government setting than any other. Its outcome will be a function of what one expert aptly describes as "appropriate and realistic concessions on both sides in light of all elements of the case."[716]

K. Monitoring the Progress of a Claim

A typical claims attorney in a busy agency may have as many as eighty to a hundred claims in one stage or another of pendency at any given time. The delays entailed in delegating the investigation, in standing by while reports are prepared or examinations conducted, in waiting for the claimant to respond to a request for documentation or clarification or to the agency's latest settlement position, all make it highly probable that claims will disappear from sight or mind for relatively long stretches. The slippage of even a month or six weeks looms quite large in a settlement procedure that Congress intended in most cases not to exceed six months from start to finish. An obvious disadvantage, but hardly the only one, is that the government may find itself in court before it has really gotten its teeth into a claim.[717]

Nowhere does the situation seem to be even remotely out of control,[718] and cures like extending the six-month settlement period to a year or more may be worse than the disease. Still, matters could be improved. Many officers have personal techniques -- spread sheets, logs, charts and the like -- for tracking the progress of the claims for which they are responsible. Those that have them insist that they help

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[716] 2 L. JAYSON, supra note 595, at p. 15-9.

[717] So far as I know, the General Accounting Office has not studied the timeliness of the agencies in handling tort claims. However, 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 in the event that claimants failed to produce requested information and from an insufficient number of physicians for the conduct of medical reviews. GENERAL ACCOUNTING OFFICE, PROCESSING OF CLAIMS RESULTING FROM THE SWINE FLU PROGRAM (1981).

[718] The risk of prolonged delay approaches the vanishing point in the case of minor claims that can practically be resolved on the face of the claim itself, and in which the process from start to finish may take no more than six to eight weeks.

Also, prolonged agency silence may be deliberate, as where the agency is prepared to concede liability, but the parties are simply too far apart 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 virtually ignoring a claim that holds no real settlement promise but as to which the agency does not relish the prospect of litigation. These may include claims that raise novel or difficult issues of law or bring embarrassment to the agency. An express denial letter could trigger litigation over an affair that otherwise might go away.

keep claims from lapsing into temporary oblivion. One attorney who personally does no conscious tracking of claims handed me a file for some unrelated purpose only to discover upon opening it that he had inadvertently failed to respond to the claimant's latest communication, by then some several months old. But another who does maintain a log, and who claims to resolve finally upwards of eighty percent of his claims within six months or less, would find that his log scarcely bears out his estimate.

I am most impressed by those agencies that have channeled their computer capability into a systematic program of claims tracking. With appropriate programming, each officer within a claims unit can see graphically what course each pending tort claim is taking and the intervals that have passed between the usual stages in the lifetime of a claim. I can imagine no better tool for a busy claims attorney who seeks the most efficient allocation at any given time of the resources at his or her disposal. Those attorneys who are using computer techniques for monitoring the progress of their claims enthusiastically assure me that I am right. So, I might add, do supervisory personnel who find that the technology also allows them to keep track of the pace and productivity of their staff attorneys and thereby the efficiency of the entire office. To the extent that the investigation, evaluation and settlement of claims are delegated to field and regional officers, computerized claims monitoring holds that much more potential.

The program in place is the Air Force claims service -- Claims Administrative Management Program (CAMP)[719] -- illustrates an apparently successful computer operation. Each claims officer world-wide completes and mails to headquarters a new Air Force Form 176 (Appendix H) at every stage in the life of a claim from its initial filing onward. There it is keypunched and entered.[720] Once in place, according to Air Force claims personnel, CAMP immediately revealed a much higher incidence of overdue claims than had ever previously been imagined, and showed precisely what bases were most responsible. The computer has since been programmed, among other things, to produce data showing the average claims processing time for each base and even to print out an "overage list," that is, a list of claims oldest first.[721] At the same time, the

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[719] For detailed regulations on the operation and uses of CAMP, program by program, see Air Force Regulation No. 112-1, supra note 581, ch. 3.

[720] 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 used for tort claims exclusively. It also tracks other kinds of claims, debt collection efforts, military justice and clemency matters, and even inventories of supplies.

[721] The Air Force also has in place one of the most extensive networks of training sessions for claims officers, paralegals and medical-legal consultants, and on-site inspections known as "staff assistance visits" or, less euphemistically, "instructional audits."

information stored for claims tracking purposes is a virtual gold mine for more far-reaching statistical ends. The fact that many claims units have an astonishingly crude sense of their claims demography[722] probably implies missed opportunities for improvements in risk management. But CAMP and like systems have obvious promise above all for gauging the efficacy of an agency's claims settlement operations.[723]

To my surprise, I do not find any 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[724] are pioneers among agencies in the kind of data management I have in mind. On the other hand, both the high volume Interior Department and low volume FBI show a certain lag. However, since all agencies stand to benefit, I would strongly urge that the Justice Department spearhead efforts to develop data collection and retrieval systems adapted to the tort claims context and promote the systematic sharing of technology by those agencies that have developed and successfully used it with those that have not.

L. Final Denials and Reconsiderations

Chapter three set out in some detail the procedural framework by which an agency may deny a claim and a claimant may request reconsideration. My conversations with claims attorneys added little to that picture. Recognizing how strict the courts have been on the question of what constitutes a proper formal denial for statute of limitations purposes,[725] most attorneys do not leave it to chance when they come to the conclusion that negotiations, if any, have irrevocably broken down. They include the same recitals required in the case of an outright rejection.[726] This is only sensible self-protection.

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[722] See text at notes 319-21, supra.

[723] Id.

[724] NASA already has in place computer tracking of all its litigation and contract appeals matters and is in the process of extending it to all categories of claims.

[725] See supra note 506.

[726] 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).

Most final denial letters I have seen are notably short on reasons,[727] though there are plenty of exceptions. For example, some officers will recite that a claim is not cognizable rather than cite a specific statutory exemption for denying it. Others will state, without more, that the claim fails to state a basis upon which the government has submitted to liability or, what is not much more informative, that "no tort was committed for which the government under the circumstances is responsible." Behind an explanation of that sort may lurk the statute of limitations,[728] a finding that the employee who caused the injury had acted beyond the scope of his or her authority, that government action was not the cause of injury, that no fault was proven, or any of a number of things. The examples of imprecision could be multiplied. To what extent the agencies thereby exhibit normal bureaucratic behavior, or have actually taken the Justice Department's cue that reasons are expendable, I cannot say. Of course, in some cases a statement of reasons would be formalistic and superfluous, as where the issues already were fully and explicitly ventilated. The fact remains that few officers with whom I spoke seemed to acknowledge that offering a claimant a reasonably specific ground for denying his or her claim would serve much of a useful purpose. For reasons mentioned in chapter four,[729] the Attorney General's regulations should be amended to require a brief statement of the reasons for the denial of a claim that comports with prevailing standards under the Administrative Procedure Act.

Though Justice Department regulations give disappointed claimants the right to request that an agency reconsider its denial of a claim,[730] not every agency attorney mentions this possibility in the denial

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[727] Though Justice Department regulations refrain from requiring a statement of reasons for a denial, specific agency regulations may impose such a requirement. E.g., 32 C.F.R. § 842.8(a)(1983) (Air Force).

Army regulations specifically direct that the explanation for a denial be general when it is issued under a statute allowing a judicial remedy or judicial review, on the curious rationale that the Justice Deparment has responsibility for explaining the government's position in such cases. Denials under statutes providing administrative remedies only are to be "much more explicit and certain." "Only 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)(1983).

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.

[728] However, most claims attorneys cite the statute of limitations specifically if that is indeed the ground for denial. Doing so may have the merit of averting a pointless lawsuit.

[729] See text at notes 509-10, supra.

[730] See text at notes 511-18, supra.

letter. Veterans Administration and Interior Department denial letters, for example, typically contain such a recital, but those coming from the Departments of Agriculture, the Air Force and the Army, as well as the Postal Service, do not. The difference, at least in the case of the Veterans Administration, may have something to do with the fact that there, unlike most other agencies, reconsideration takes place at the Office of General Counsel in Washington on the basis of a de novo review.[731] If, as is the more usual case, reconsideration occurs in the same office as rendered the initial decision, the matter very often will at least be handled by a colleague of equal rank to the original decisionmaker or by an immediate superior.[732]

Having someone upon reconsideration take a fresh look at the record has distinct advantages. Once a claim file is in order, a second in-house opinion does not present a significant marginal cost to the agency, especially as claimants generally speaking file requests for reconsideration in well below ten percent of all final denials.[733] Conceivably, an announced promise of fresh reconsideration would elevate the request rate and the number of reversals of final denials at the agency level, and thereby lower the incidence of FTCA litigation. But I am dubious. The rate of reversal on reconsideration generally appears to be extremely low and does not climb appreciably higher in agencies that put the file for reconsideration in a new set of hands. My impression is that the chief reason why reconsideration produces new results, in the rare cases where it does, is that the claimant has adduced new evidence of some significance. If that is the case, the identity of the person giving reconsideration may be quite secondary.

M. The Role of the Justice Department in Agency Claims Action

Apart from its regulatory authority under the Federal Tort Claims Act, the use of which I closely examined in chapter four of this report, the Justice Department has two principal nonlitigation functions under the FTCA. It formally approves or disapproves proposed agency

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[731] Veterans Administration Regulation No. M-02-1, supra note 591, § 18.09b. However, reconsideration is normally had on the record compiled below, with some possibility for additional investigation and direct claimant contact. By contrast, in the Agriculture Department, reconsideration is conducted in the same office as the original determination and by the same personnel.

[732] E.g., 32 C.F.R § 842.8(c)(1)(ii)(1983)(Air Force) (reconsideration by next higher authority).

[733] One claims attorney put the incidence at as low as two percent. In any event, it is low. The chief reason for this appears to be that many disappointed FTCA claimants are eager for their day in court, which reconsideration -- at best not a very promising prospect -- will only postpone 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 provides neither a judicial remedy nor even judicial review on the merits.

settlements in excess of $25,000, as required by the Act,[734] and it provides agency attorneys upon request with informal guidance on the settlement of specific claims. For the first of these functions, the Department has developed a more or less structured procedure; the second by its very nature calls for a maximum of flexibility.

(i) Requests for Approval

In conformity with terms of the FTCA itself,[735] Justice Department regulations require the prior written approval of the Attorney General or his designee in the case of any proposed settlement in excess of $25,000.[736] They further require that agencies furnish the Department for this purpose "(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."[737] By custom, the Justice Department also specifically demands a signed settlement agreement between the claimant and agency made expressly conditional on the Justice Department approval for which it is prepared.

Agency claims attorneys are not entirely happy with the Department's requirement of an agreement in hand prior to any action on approval. It is easy to sympathize with them, for their inability to make binding concessions in the negotiation doubtless impairs their ability to win concessions from claimant or claimant's attorney in return. Yet, the Torts Branch constantly reminds them that they can only talk "tentative" settlement with a claimant when more than $25,000 may be at stake. Things become doubly awkward if and when the Justice Department withholds approval of a proposed settlement. Not only will the attorney conspicuously have failed to win the support of his or her own government colleagues for the settlement, but he or she may now have to persuade the claimant to accept what may be a substantially lower sum.[738] And why, one may well ask, should the claimant do that? If the agency attorney could be persuaded of the rightness of the higher settlement, so might a court. All in all, the attorney's credibility and leverage may no longer be entirely intact. On the other hand, the

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[734] 28 U.S.C. § 2672 (Supp. 1983).

[735] Id.

[736] 28 C.F.R. § 14.6(a)(1983).

[737] 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 rather than just portions of it; however, the prepared introductory statement will highlight those portions of the file that are most relevant to the merits of the proposed settlement.

[738] Largely for this reason, it has happened that the Torts Branch takes over negotiation with the claimant after rejecting the initial settlement proposal.

Justice Department is understandably loath to assume the burden of bringing negotiations with the claimant that last difficult mile, or even to spend its limited resources scrutinizing what may prove to be a wholly hypothetical settlement. One solution would be to raise the agencies' level of settlement authority sufficiently high -- to $100,000, for example, as the majority of claim attorneys with whom I spoke enthusiastically urge[739] -- so that fewer settlements need Department approval in the first place. If the number of settlements is low enough, the Department may be more willing to entertain them on a more or less hypothetical basis.

The Torts Branch has well-established procedures for handling requests for approval from the agencies. Incoming requests are forwarded by subject matter to one of three assistant directors,[740] who in turn assign them to a team consisting of a Torts Branch attorney and a reviewer who is likely to be the assistant director himself or herself. They examine the claim as a team on the record, from the point of view of law, fact and policy, exercising what the Branch describes as a deferential standard of review. In other words, they will sustain the agency's disposition to settle "if it falls within the realm of reason."[741] If the attorney and reviewer support the settlement under the prevailing standard, they refer it to the Director for approval. If they do not, they consult with him in person and, should he concur, a conference with someone from the agency's General Counsel's Office and possibly the regional investigator or coordinator will be in order. The possible outcomes are several. Settlement for any sum in excess of $25,000 may be rejected, or perhaps authorized but at a lower level than

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[739] $100,000 is the current level of settlement authority of the United States Attorneys. One agency attorney complains that sometimes claimants do not seriously negotiate with the agencies because of the limits on their authority; after litigation they can win a settlement from the local United States Attorney for as much as $100,000 without need of Justice Department approval.

[740] The assistant directors have responsibility, respectively, for general torts, regulatory torts and malpractice.

[741] The stated rationale for using a deferential standard is that it operates as an incentive to the agencies to seek and achieve administrative settlements. The Torts Branch reportedly wants to strengthen that incentive. It describes the 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, as more searching. But see text at notes 753-62, infra.

initially proposed,[742] or the Torts Branch may be persuaded to go along with the proposed settlement after all.[743]

Since the Director has settlement authority only up to $150,000, any proposed settlement above that amount of which he approves must be taken at least one step further -- to the Assistant Attorney General for amounts up to $750,000 and to the Deputy Attorney General for amounts beyond. Should the Director disapprove a proposed settlement above his own settlement authority, he invites agency counsel to have him refer the matter to the Assistant Attorney General. Rarely will agency counsel press the matter that far,[744] but if he or she does, the file will be sent up along with memoranda from the Director and most likely from agency counsel, and a conference may ensue.[745] The Deputy Attorney General becomes involved only if a proposed settlement exceeds $750,000.

A final word on requests for approval by the Justice Department. Agency claims attorneys report commonly telling claimants that the need for approval can mean a substantial delay in the settlement and payment of claims. They also advert to the risk that the Department will view the claim much less sympathetically, given its stricter reading of the Act and more hard-nosed attitude to damages. Warnings of this sort reportedly induce some claimants to accept settlements of $25,000 or less where they might not otherwise do so. While in the best of all worlds the government would present a united front on what the FTCA

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[742] 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 it succeeds in getting the claimant's assent, no further Justice Department action will be needed.

[743] In this event, the agency processes the settlement as usual, attaching written evidence that Justice Department approval has been obtained.

[744] The appeal is more likely to be pursued in the case where a litigation rather than an administrative settlement in excess of $150,000 has been disapproved.

[745] Matters become more complex where the Director disapproves the proposed level of settlement, but would approve a lower one that still lies beyond his final approval authority of $150,000. Agency counsel has a choice. He or she may immediately appeal to the Assistant Attorney General just as before and, if successful, the affair is virtually over. But even is he or she acquiesces in the Director's view, which is more likely, the matter is not at an end. Not only must negotiations with the claimant be reopened to secure assent to a less generous settlement, but once that is achieved, the new settlement must return to Justice for approval by the Assistant General Counsel whose views are not yet known. This scenario illustrates how each level of the Justice Department is spared having to consider a settlement until each and every necessary expression of assent at lower levels, including the claimant's and the agency's, has been secured.

means and how claims arising under it should be evaluated, I do see virtue in claimants knowing the actual bureaucratic risks they run in pressing for a higher sum than the agency itself can award. I have no reason to believe that the government thereby systematically coerces claimants into accepting artificially low settlements, though agency claims attorneys would not likely volunteer that view to me even if it were the case. Talking with attorneys who have had substantial experience representing FTCA claimants might disclose a somewhat different perspective.

There is a second set of risks associated with the perception that the Torts Branch uses its approval authority to impose on the agencies an unduly narrow interpretation of the Act and an unreasonably low measure of damages. One agency attorney confesses that he no longer seriously negotiates difficult claims that in all likelihood would yield a proposed settlement of over $25,000, because successfully doing so would then only bring on an uphill battle in the Torts Branch; he prefers to let six months pass in one fashion or another and have the Justice Department meet the claimant directly in court. He is not alone in his report.[746]

I frankly do not know what to make of these charges. To begin with, by no means did every agency voice them. But apart from that, the problem is a subtle one. To the extent that the Torts Branch insists that agencies in large settlements act under a correct view of the law, make balanced and defensible characterizations of the facts, and avoid giveaways in the form of tort claim settlements, it is only doing its job. Needless to say, agency attorneys do not enjoy, any more than any other professional, having someone else look over their shoulder, especially when it embarrasses them before disappointed and angry claimants. On the other hand, I do not believe that, in conditioning agency settlement of large claims on prior Justice Department approval, Congress meant to give the Department the power routinely to block defensible agency-level settlements simply because it would take a harsher position in litigation and might even prevail. Judging by its adoption of a deferential standard of review on requests for approval,[747] the Torts Branch, at least in principle, does not believe

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[746] 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 a third agency relating similar difficulties at the present time acknowledges that an opposite pressure was exerted under a previous Administration. The Justice Department then allegedly rejected proposed settlements as insufficiently generous to claimants. No agency attorney reported that kind of pressure from the current Administration.

[747] See supra note 741 and accompanying text.

Congress meant to do so either. The matter bears further examination for, apart from whatever impact the feeling of strong downward pressure from the Torts Branch may have on agency morale, the administrative process itself risks being short-circuited in claims that matter most from a dollar point of view. I do not purport to know whether the risk has materialized, and I do not see how one could possibly know if it has without conducting the close and systematic review of Justice Department approval practices that this general procedural study of the FTCA could not accomplish.

(ii) 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 brings on litigation. In two closely related situations, however, the Department may nonetheless be consulted on an FTCA administrative claim. Technically speaking, referral in the first situation is mandatory, for, regardless of amount, Justice Department regulations bar agency settlement without prior consultation with the Department where:

(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[748]

Consultation is also 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."[749] For all practical purposes, however, agency claims attorneys alone decide whether one of the stated conditions exists and, if so, bring the matter to the Department's attention.[750]

In practice, claims attorneys in the agencies consult one or another Torts Branch attorney on a much less formal basis than the regulations on their face would indicate. They may do so if they feel sufficiently unsure or uneasy for whatever reason about the proper course of action on a given claim. The frequency and character of such contacts is a matter of personal preference. According to the regulations, any referral or request for advice addressed to the Torts

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[748] 28 C.F.R. § 14.6(b) (1983).

[749] Id. § 14.6(c).

[750] The situation is different with the Justice Department approval required in settlements above $25,000. The General Accounting Office 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).

Branch should be in writing and contain a short and concise statement of the facts and reasons for the referral or request, copies of relevant portions of the file and a statement of the agency's own views.[751] In most cases in which referral is not obviously mandatory, however, there is neither a file transfer nor a written communication. A simple telephone call is the usual medium.

I have the firm impression, both from the Torts Branch Director and the agencies, that the channels of communication are wide open, and that the Branch stands ready and willing to guide agency officers on how a factual, legal or policy issue arising in any FTCA claim ought to be resolved. The Torts Branch has established a separate Aviation Litigation Unit, likewise headed by a Director, to conduct or oversee FTCA aviation litigation at the trial level and to perform in this area the same consultative functions that the Torts Branch performs more generally.

By way of more structured guidance, the Torts Branch conducts Federal Tort Claims Act seminars roughly on an annual basis for United States Attorneys and agency claims personnel. It also publishes well-documented and up-to-date manuals, in the form of seventeen separate monographs, presenting the relevant case law on every significant substantive and procedural issue arising under the Act. Widely circulated among the agencies and United States Attorneys offices, the manuals are a rich source of guidance for anyone in government called upon to consult the Act.[752]

N. Effectuating the Settlement

(i) Mode and Source of Payment

Settlement normally takes the form of a lump sum amount, making payment a reasonably simple and straightforward matter. Settlements of $2500 or less are paid out of available agency appropriations.[753] In most agencies the claimant receives a voucher -- Standard Form 1145 (Appendix B) -- to which reference has already been made,[754] together with a formal notice of approval of the claim. He or she signs and returns the voucher to the agency; a fiscal officer then arranges for

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[751] Id. § 14.7.

[752] 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 looks upon them as attorney work product not for release to the general public. However, he graciously allowed the author to examine a complete set on Torts Branch premises.

[753] 28 U.S.C. § 2672 (Supp. 1983), substantially restated in 28 C.R.F. § 14.10(a) (1983). However, settlements of claims against the Postal Service are by law payable from postal revenues. See supra note 173.

[754] See supra note 498.

the Treasury to issue a check, which normally takes a week or two. The Standard Form contains release language, mirroring that contained both in the FTCA and in Justice Department regulations.[755]

If the amount of settlement exceeds $2500, the amended FTCA provides for payment in the same manner as final judgments and litigation settlements under the Act, that is, out of the judgment fund.[756] According to the regulations, if the claimant is represented by an attorney, Standard Form 1145 should designate both the claimant and attorney as payees. The agency sends the form, once executed and returned by the claimant, to the Claims Group of the General Accounting Office (together with evidence of Attorney General approval in settlements in excess of $25,000).[757] The time for processing the payment of awards of over $2500 -- from certification to the GAO to receipt of the check -- runs between six and eight weeks.[758]

The difference in source of payment for large and small settlements is largely historical, reflecting the fact that until 1966 agencies could only settle claims of $2500 or less, and paid such settlements themselves.[759] Though processing payments from the judgment fund may take slightly longer than from agency appropriations, it has certain advantages, for the judgment fund is continually and automatically replenished, while agency funds are not. It has happened, quite rarely, that 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

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[755] 28 U.S.C. § 2672 (Supp. 1983); 28 C.F.R. § 14.10(b) (1983). 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.

[756] 28 U.S.C. §§ 2414, 2672 (Supp. 1983); 31 U.S.C. § 1304(a)(3)(A) (1983). Again, postal service claims are payable from postal revenues. See supra note B111.

[757] 28 C.F.R. § 14.10(a) (1983). In lieu of a Standard Form 1145 executed by the claimant, the agency may send GAO an 1145 accompanied by either a claims settlement agreement or an executed Standard Form 95.

[758] 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, an 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.

[759] See supra note 299, and accompanying text.

the agency receives either a supplemental appropriation or, worse yet, its appropriations for the next fiscal year.[760]

More interesting is the question whether and, if so, how the difference in source of payments might affect an agency's assessment of a claim. One critic of the 1966 amendments charged that the system gives agency officials an incentive to inflate settlements to just in excess of $2500 so as to husband agency funds, and even flatly to deny deserving claims that simply cannot be brought above the threshold.[761] The assertion, though plausible, remains undocumented. Still, to avoid any possible distortion of this kind, Congress should discard the provision that settlements of up to $2500 be paid from agency funds. Given its very low threshold, the provision cannot do very much to advance agency accountability. Any substantial administrative settlement necessarily comes from the judgment fund, as do tort judgments and litigation settlements regardless of amount.[762]

(ii) The Structured Settlement

The attraction in litigation circles over the last five to ten years of structured as opposed to lump sum settlements is now being felt in the FTCA setting. So far as I can tell, the Justice Department fully accepts the idea of structured administrative settlement in an appropriate case.[763]

The two leading models for structured settlement are (a) the combination of a direct cash payment with an annuity for a stated number of years or, more likely, for life, and (b) a similar combination of

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[760] I. GOTTLIEB, A NEW APPROACH TO THE HANDLING OF TORT CLAIMS AGAINST THE SOVEREIGN 40 (1967)

[761] Corboy, The Revised Federal Tort Claims Act: A Practitioner's View, 2 THE FORUM 67, 76-77 (1967).

[762] Prior to the 1966 amendments, all settlements, whether administrative or litigation, were paid out of funds of the agency whose employee was responsible for the tort. 28 U.S.C. § 2672 (1964 ed.). 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 $2500, payable out of the judgment fund. See supra note 302 and accompanying text.

If Congress were 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.

[763] However, only 18 of the 120 administrative settlements approved by the Torts Branch in 1983 took structured form. Of these, all but three were medical malpractice claims.

direct cash payment with a reversionary trust.[764] Structures of this sort are thought to protect vulnerable claimants against the possibility of early dissipation of a large award, while offering the government a hedge against the unjust enrichment that may result from using unrealistic life expectancies and including unknown future medical expenses in the calculation of lump sum damages. The first of these considerations may take on special importance where the award essentially represents replacement of income over a lifetime. The second becomes an issue when the injuries suffered take on a life-threatening character.

Given the number of possible elements in the equation, agreement on a structured settlement may not be an easy matter.[765] Still, tailoring a settlement to fit the particular needs and risks associated with the parties should be no more costly or difficult or otherwise less desirable in the government tort context than any other. Judging by my conversations, as well as by the prominence of structured settlement on the agenda of the Justice Department's annual FTCA seminars, the Department is actively trying to educate government attorneys in the use and utility of this settlement mode.

At least one court has opined that the FTCA does not authorize a court to issue an award in the form of a judicially established trust or, for that matter, in any form other than outright lump sum damages.[766] While admitting that Congress probably never thought about the matter, it preferred not to endorse "novel types of awards" until Congress expresses itself affirmatively in their favor.[767] As a strictly practical matter, one court's unwillingness to order or even entertain the structured resolution of an FTCA lawsuit does not bar agencies and claimants from coming to terms administratively on such a basis. But if the view should come to prevail that the FTCA as a matter of law simply does not allow structured settlement, that could not help but affect agency practice. However, the case I refer to is widely

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[764] Typically, the United States supplies the corpus of the trust in an amount settled upon by the parties (or, in the case of litigation, ordered by the court) and undertakes to supplement the fund as needed. However, any amount remaining in the trust at the victim's death reverts to the government.

[765] Structured settlement can also complicate the calculation of allowable attorneys' fees. See, e.g., Robak v. United States, 658 F. 2d 471 (7th Cir. 1981), rev'g in part 503 F. Supp. 982, 983-85 (N.D. Ill. 1980). On attorneys' fees limitations, see text at notes 770-74, infra.

[766] Frankel v. Heym, 466 F. 2d 1226, 1228-29 (3d Cir. 1972).

[767] Id. at 1229. The court alluded secondarily to "the continuing burden of judicial supervision that would attend a judgment creating a life trust." Id.

viewed as aberrant,[768] and in any case confined to the situation where the government presses for a trust or annuity over a claimant's objection. Whatever its bearing on the willingness of courts to make structured awards, its bearing on agency-level settlement should be negligible.[769]

(iii) The Attorney's Fee

The FTCA specifically requires that attorneys' fees come out of the award and not exceed twenty percent of the award in the case of prelitigation settlement (or twenty-five in the case of compromise settlement or judgment).[770] An attorney who violates the limitation, by collecting or even by demanding a larger fee than is allowable, is subject to punishment by a fine of up to $2000 and/or imprisonment of up to one year.[771] The ceiling, found in one form or another in a number of federal statutes authorizing monetary recovery against the government, means to protect claimants from improvident bargains, dampen incentives to the filing of fraudulent or inflated claims against the government, and generally help ensure that public funds go chiefly to those intended to benefit from them.

Certain agency claims officers routinely remind claimants and claimants' attorneys of the existence of a fee ceiling and of the sanctions for its violation, and I would not recommend that the government do more in policing fees. The Treasury should not, for example, undertake to issue separate checks to claimant and attorney reflecting their respective shares of the award under any previously agreed upon allocation, as it has in the past. Doing so becomes awkward if not wholly impractical where the attorney has been engaged on any basis other than a fixed percentage contingent fee. In any event, the government should not interpose itself in effect as the attorney's collection agent, for a genuine dispute may exist over the quality or other aspect of the representation in which the government should absolutely avoid getting involved.

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[768] For a rather enthusiastic 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). See also Gretchen v. United States, 618 F. 2d 177 (2d Cir. 1980); Foskey v. United States, 490 F. Supp. 1047 (D. R.I. 1979). The Comptroller General has expressly approved the practice with respect to administrative tort claims. Op. Comp. Gen. No. B-162924 (Dec. 22, 1967); GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW pp. 11-50 - 11-51 (1982).

[769] An agency claims attorney with perhaps the longest experience in the field strongly urges that the Act and regulations be amended specifically to embrace structured settlement.

[770] 28 U.S.C. § 2678 (Supp. 1983).

[771] Id. See generally United States v. Cohen, 389 F. 2d 689, 691

(Footnote Continued)

In the nature of things, the government has not had to face the interesting question whether the FTCA impliedly restricts the fees of an attorney who fails to produce any tort settlement in favor of his or her client. Where the parties have agreed upon a customary contingent fee, there is of course no recovery, no claim to a fee, and therefore no issue. But suppose they have agreed upon a fixed or fixed hourly fee. Does an attorney who collects or seeks to collect it violate the FTCA by exacting a fee "in excess of 20 per centum of any award, compromise, or settlement?"[772] Congress, doubtless assuming that FTCA Attorneys would typically charge fees contingent on success,[773] did not address the question. But for an attorney who is strictly forbidden to collect more than $200 on a $1000 tort claim successfully negotiated to be able to collect any amount whatsoever should he or she totally fail does seem in a sense anomalous. It could conceivably offer attorneys a greater financial reward for disserving than for serving their clients' interests. In fact, the concern is probably more theoretical than real, for customary contingent fee arrangements do prevail in government tort claims; and even where the parties set a fixed fee, an attorney rarely would find his or her long-term professional interest served by winning a client nothing on a meritorious tort claim for the sake of a higher fee in the case at hand. In any event, the government achieves its principal objective of ensuring that the lion's share of public funds spent in compensation of government torts actually reaches the victims when the ceiling applies only to fees on actual recoveries and fees, if any, in the absence of recovery are left to the wisdom of the parties directly concerned.[774]

O. The Audit and Review of Claims Settlements

That the decision whether and, if so, on what terms to settle a claim administratively under the FTCA is essentially vested in the legal departments of the agencies -- subject to possible Justice Department advice or approval -- is not inconsistent with some sort of outside audit and review. My impression, however, is that no substantial oversight occurs. The FTCA originally required each agency to report annually to Congress on the administrative payment of claims under the Act, giving a one- or two-line description of each claim paid, plus the name of the claimant, the amount claimed and the amount actually awarded.[775] Although agencies could not at that time settle a claim in excess of the modest sum of $1000, later $2500, Congress evidently thought it desirable that they account for their activities. Curiously,

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(Footnote Continued)
(5th Cir. 1967). No prosecutions have been reported under the FTCA provision.

[772] 28 U.S.C. § 2678 (Supp. 1983).

[773] D. SCHWARTZ & S. JACOBY, supra note 703, at 49.

[774] See Bulman, Federal Tort Claims: Attorney Fees and Interest, TRIAL AND TORT TRENDS 109 (M. Belli ed. 1965).

[775] 28 U.S.C. § 2673 (1964 ed).

Congress dropped the reporting requirement in 1965,[776] only 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 the occasional investigation by a congressional committee, the only real possibility for legislative review of agency tort claims activity seems to lie with the General Accounting Office. However, the role of the GAO is rather limited. In the first place, GAO's position has consistently been that, though it enjoys sweeping statutory authority[777] to settle and adjust all claims of or against the United States, it may not intervene on the merits of monetary claims where Congress has specifically vested settlement authority elsewhere.[778] Such is obviously the case for claims sounding in tort, and probably equally so for cases arising under many of the meritorious claims statutes I have mentioned in this report.[779] With a merits

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[776] Pub. L. No. 89-348, 79 Stat. 1310 (1965). Specific agencies may continue to make claims reports to particular congressional committees. The Veterans Administration, for example, reports on its claims activities periodically through its General Counsel to the Chairman of the Senate Committee on Veterans' Affairs. Veterans Administration Regulation No. M-02-1, supra note 591, § 18.14.

[777] 31 U.S.C. § 3702 (1983). Despite the sweeping statutory language, the GAO takes the view that monetary claims should normally 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 (1983); GENERAL ACCOUNTING OFFICE, supra note 768, at pp. 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, 50 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 (1983); GENERAL ACCOUNTING OFFICE, supra, at pp. 11-15 - 11-19; Baer, Practice Before the General Accounting Office, 19 FED. B. J. 275 (1959).

[778] Where the GAO exercises review on the merits, a six-year statute of limitations applies. 31 U.S.C. § 3702 (b)(1) (1983). GAO rulings have been held to 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, Brownsville & Mexico Ry. Co. v. United States, 268 U.S. 169, 174 (1925); United States v. Standard Oil Co. of California, 545 F. 2d 624, 637-38 (9th Cir. 1976); Pettit v. United States, 488 F. 2d 1026, 1031 (Ct. Cl. 1973).

[779] The situation is clearest where, as under the FTCA, the agency

(Footnote Continued)

review in the tort area mostly barred, the GAO has chiefly oblique means of control: the audit of a particular claim or an agency's claims handling program in general,[780] control incident to the mechanics of payment on a claim that has already been settled,[781] and the issuance of advance decisions to an agency at the latter's request.[782] Even these avenues are not particularly well-developed in the federal tort area. Evidently, the GAO rarely conducts audit reviews of the administration of the FTCA or of other tort claim statutes;[783] as shown below, the GAO exercises a narrow scope of review incident to the mostly ministerial process of readying tort settlements for payment by the Treasury; and, as for advance rulings on agency request, they do not play an important role in implementation of the FTCA.[784] Every agency claims officer with whom I spoke reported seeking advice on the property or wisdom of settlement, like the propriety or wisdom of particular settlement terms, from the Justice Department which they take to be the expert in the field.

Looking specifically at the GAO's control incident to the payment process on tort claims, the distinction between merits and cognizability

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(Footnote Continued)
determination is by statute made final and conclusive. Op. Comp. Gen. No. B-176147 (July 5, 1972); Op. Comp. Gen. No. B-161131 (Apr. 18, 1967); Op. Comp. Gen. No. B-72568 (Apr. 19, 1948). See also Military Personnel and Civilian Employees' Claims Act, 31 U.S.C. § 3721 (1983); 41 Comp. Gen. 235 (1961) (claims under Military Claims Act are beyond GAO settlement jurisdiction); 3 Op. Comp. Gen. 22, 24 (1923) (claims under Small Claims Act are beyond GAO settlement jurisdiction).

[780] 31 U.S.C. §§ 3521-26 (1983).

[781] 28 U.S.C. § 2672 (Supp. 1983); 31 U.S.C. § 1304(a) (1983); 28 C.F.R. § 14.10(a) (1983).

[782] 31 U.S.C. § 3529 (1983). The GAO takes the view that agencies should refer any monetary claims doubtful in law or in fact to the GAO for an advance ruling. GENERAL ACCOUNTING OFFICE, supra note 768, at p. 11-14.

[783] But see GENERAL ACCOUNTING OFFICE, PROCESSING OF CLAIMS RESULTING FROM THE SWINE FLU PROGRAM (1981), discussed supra note 717.

[784] This is not to say that the GAO has not issued advance rulings on the meaning or coverage of the FTCA. E.g., 49 Op. Comp. Gen. 758 (1970); 35 Op. Comp. Gen. 511 (1956); 26 Op. Comp. Gen. 891 (1947). Certainly, it has had more frequent occasion to construe 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., Op. Comp. Gen. No. B-20721 (Sept. 2, 1983) (Military Personnel and Civilian Employees' Claims Act); Op. Comp. Gen. No. B-197052 (Feb. 4, 1981) (Panama Canal Act); Op. Comp. Gen. No. B-190106 (Mar. 6, 1978) (Military Personnel and Civilian Employees' Claims Act); 40 Op. Comp. Gen. 691 (1961) (Military Claims Act).

under statutes that make agency action final and conclusive largely forecloses scrutiny of the decision to pay a given tort claim. The GAO will not reexamine an issue 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.[785] In fact, it rarely looks beyond matters that can be determined on the face of things, for example, whether an agency impermissibly seeks to pay a claim that indisputably arose in a foreign country or is plainly time-barred.[786] Analogously, review of an agency's exercise of meritorious claims settlement authority incident to payment on a claim does not involve much more than an assurance of respect for the scope and purpose of the legislation.[787] All in all, while the GAO's 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 over $2500 give it a significant foothold in the torts area, its involvement has had a quite modest impact, much as Congress doubtless intended.

From the point of view of disappointed agency-level claimants, the lack of meaningful access to the GAO should not cause real concern; under the FTCA as we know it and are likely to continue knowing it, claimants view the courts as their refuge. On the other hand, there may be a significant vacuum so far as audits of manifestly unfounded or excessive settlements are concerned. Though watchdog activities of the Justice Department in settlements over $25,000 constitute a more than adequate safeguard against fraud and collusion in the very largest of tort claims under the FTCA, they have no application to the vastly larger number of settlements below that amount; and the Department does not figure at all in the agencies' use of the less well-defined meritorious claims statutes at their disposal. Consideration should be given to making GAO audits of tort claims a more credible prospect than they now appear to be. Alternatively, the agency Inspectors General who, I am informed at a number of the agencies, have not given the audit

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[785] GENERAL ACCOUNTING OFFICE, supra note 768, at p. 11-10.

[786] Application of the discretionary acts exemption is the best example of an issue sure to be avoided.

I am informed by those at GAO in charge of processing claims for payment from the judgment fund that fewer than one percent of claims presented for payment raise a substantial question. That question is most likely to be whether the claim in issue really sounds in tort, or rather reflects on an operating or program expenditure for which the agency's own funds should be used. See supra note 61.

[787] GENERAL ACCOUNTING OFFICE, supra note 768, at p. 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 text at notes 146-47, supra.

of agency tort settlements a significant priority on their agendas, might perform a useful deterrent function in the tort claim setting.[788]

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[788] For a summary of the statutory provisions imposing civil and criminal penalties for the filing of false or fraudulent claims, see GENERAL ACCOUNTING OFFICE, supra note 768, at pp. 11-133 - 11-136. Agencies are also authorized to treat fraudulent presentation as entirely vitiating the claimant's rights under a claim. Id. at p. 11-134.

Chapter Six

CONCLUSION AND RECOMMENDATIONS

A study of agency handling of monetary claims presupposes a reasonably precise notion of a monetary claim. A moment's reflection suggests that the term encompasses a broad variety of phenomena including, among others, claims under government contracts, personnel-related claims of government employees, and a host of different statutory entitlements. Obviously, such diverse kinds of claims do not all call for the same kind of agency-level procedure. In this report, I have chosen to focus on agency handling of tort and tort-like claims, surveying preliminarily the authority of the agencies to entertain such claims and, in much greater depth and detail, the procedures by which they exercise it.

Agency Claims Settlement Authority

Though a plausible argument may be made that federal agencies have inherent authority to consider and pay claims for the private losses they occasion, a sounder view would be that they need express statutory authority before doing so. In fact, an examination of existing settlement authority over tort and tort-like claims reveals an extensive but haphazard collection of statutes, the most significant of which is the Federal Tort Claims Act. Some of this legislation essentially fills gaps of one kind or another in the coverage of the FTCA, thus still presupposing tortious conduct on the government's part. "Meritorious claims" provisions, on the other hand, authorize the payment of just or equitable claims irrespective of fault. Even these two categories of statutes are quite artificial, for each displays very numerous and often quite inexplicable variations in matters of scope and procedure.

I believe the time has come to conduct a comprehensive review of this proliferation of claims settlement authority, with a view to making it more rational and coherent and to clarifying the exact relationship between the various ancillary statutes and the FTCA. In this context, the exercise of meritorious claims authority by the handful of agencies possessing it warrants particular scrutiny. The fact that numerous agencies without any such authority show an interest in having it, and that others would like their payment ceilings raised, makes a study of the meritorious claims statutes especially timely. Though the examination I urge necessarily spills over the line between substance and procedure, it seems to me an appropriate one for the Administrative Conference to undertake.

A related matter only broached by the report, but worthy of further Conference consideration, is the question whether and how agencies dispose of monetary claims upon which suit may be brought, but over which they enjoy no express administrative settlement authority. I gather that in the absence of a statute specifically contemplating agency-level settlement, like the FTCA or the Contract Disputes Act, no clearly delineated authority or procedure exists for ventilating monetary causes of action before they reach the litigation stage. As noted in the report, agencies probably have the means to entertain many such claims under certain of their program-related authority, and the

Attorney General is expressly empowered to settle "imminent litigation." But appreciating the full extent to which claims settlement activity might reasonably be shifted from the litigation to the administrative process requires a more general survey than this FTCA-oriented study can possibly accomplish. Among the many elements of the landscape are the actual rule of the GAO in handling litigable claims and the use of high-level contingency funds to which a number of agency officials alluded.

Still, the main focus of this report and the recommendations that follow is agency-level procedures for handling claims under the FTCA. To a modest extent in 1946, and more spaciously in 1966, Congress authorized the agencies to settle claims in tort arising out of the negligent or otherwise wrongful acts of their employees while acting within the scope of their employment, at least insofar as the government had waived its sovereign immunity to suit with respect to them. 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.

Agency-level Procedures under the FTCA

Before he or she may bring suit under the FTCA, a tort claimant first must have presented the 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 in which to consider and act upon it. Though neither the statute nor the Justice Department regulations issued pursuant to it give a very significant amount of structure to agency-level claims procedures under the FTCA, the agencies by their own practice and regulations have done so. The agencies vary considerably in their volume of claims, in the way they allocate responsibility internally for investigating and adjudicating them (particularly in the extent to which they have decentralized their operations), and in their apparent rates of settlement. Nevertheless, from a procedural point of view, all seem to adhere to a basically investigatory model that I find generally appropriate to the task and, given a claimant's right to full de novo trial in federal district court no later than six months from the filing of an administrative claim, entirely consonant with procedural due process.

Unfortunately, the data maintained by the agencies do not furnish a basis for saying just 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 claim administration does seem to be meeting and most likely exceeding Congress' expectations. The agencies have accomplished this both by resolving a high proportion of claims worth paying and by exposing the meritless character of a good many of the other claims that are filed. Still, a more refined claims tracking system would afford a better picture of the efficacy of agency settlement efforts, especially as broken down among types of claims and level of compensation sought. Such a system would also improve the monitoring of pending claims and generate data of special interest from a risk management point of view.

Because tort claims adjudication is not the principal mission of any agency at the federal level, the administrative process that has developed for this purpose remains a somewhat inconspicuous one; ultimate authority in most cases rests in each agency's legal department, subject only to the requirement of Justice Department approval in the case of proposed settlements over $25,000 and Justice Department consultation in claims raising novel policy questions or related to pending litigation. Though agency procedures for handling tort claims have been allowed to develop in relative freedom from congressional or executive branch mandate, they are very important in terms both of the number of dollars at issue and of the government's relationship with individual members of the public; and they only stand to grow in importance if Congress acts to displace suits against individual federal officials and to expand the government's liability under the FTCA to encompass constitutional torts. They also have the potential for constituting an informal and relatively open means of dispute resolution.

The current procedures, as I have come to understand them, seem generally to be serving Congress' purposes, but they leave room for substantial improvement in the specific ways set out in the recommendations that follow. Basically, though the great majority of claims attorneys appear to be fair-minded, the system risks operating in an inappropriately adversarial manner and thereby both offending notions of fairness and equity and jeopardizing the efficiency and quality of prelitigation settlement. To a considerable extent, the difficulties grow out of a residual ambiguity in the identity of the administrative tort claim process itself. On the one hand, Congress, both in 1946 and 1966, left the process closely tied to litigation under the FTCA. For example, despite respectable arguments that could be made to the contrary, Congress almost certainly did not mean to give agencies settlement authority any broader than the government's exposure to liability in litigation. Thus time-barred, statutorily exempt or otherwise infirm administrative claims may not properly be settled by the agencies under the FTCA. More important, by preserving a de novo action in federal court as the claimant's fundamental remedy in tort against the government, Congress also imparted to the entire process -- including the administrative phase -- a distinctly adversarial flavor.

On the other hand, Congress clearly expressed the policy view that deserving tort claimants should receive fair and adequate compensation for their losses, preferably at the administrative level. To that extent, it created something of an entitlement, albeit an entitlement marked by so many imponderables -- proof of fault and proximate causation, the determination of what is a compensable loss, and problems of valuation, to name a few -- that it can only be described, by contrast to veterans benefits and food stamps, for example, as highly inchoate. The fact remains also that, however strong the litigation origins and premises of the FTCA, the agencies have developed a distinct administrative process for handling tort claims and that the great bulk of claims are disposed of in these channels rather than in the stark adversarial setting of litigation.

In other words, administrative tort claim settlement lies somewhere between, on the one hand, an autonomous dispute resolution process in which the claims officer approximates a neutral decisionmaker and, on the other, a simple prelude to litigation in which officer and claimant already stand in a squarely adversarial relationship. The extent to which the features of these objective-entitlement and adversarial-bargaining models predominate in any given situation depends on all the circumstances of the case.

Few agency claims officers appear to be unaware of or insensitive to the tensions between these competing models, though each has found his or her own particular mode of resolving them. In fact, I do not urge the Administrative Conference to recommend that Congress radically restructure the agency claims process in order to eliminate the ambiguity. As a practical matter, such restructuring would necessitate either turning back on the trend toward agency-level disposition of claims or developing a quasi-judicial mechanism in the agencies or in a separate government-wide tribunal that would sharply segregate the function of agency advocate from that of decisionmaker. The first kind of change is plainly undesirable as a matter of basic policy. The second seems to entail unwarranted burdens of an administrative character -- including most likely a fleet of administrative law judges or their equivalent -- and a probable loss in the efficiency and informality that characterize the current investigatory model.

On the contrary, most of the difficulties I discern in the current operations could be avoided by a less ambitious reform that accepts ambiguity as inherent in the system but seeks to mitigate the less wholesome aspects that have produced misunderstandings and occasional hardship for claimants. An example of such improvement would be a greater readiness on the agencies' part to consider claims under the FTCA even though not presented in terms of that statute, and to entertain properly filed FTCA claims under other payment authority where reasonable and appropriate. This report has highlighted among questionable agency practices an overly-technical attitude to the sufficiency of a claim, a tendency to resolve doubtful procedural questions against the claimant even in the absence of any 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.

Without doubt, striking attitudinal differences divide both the agencies and the claims personnel within a given agency. Also, claimants themselves are often represented by persons who assume an entirely adversarial posture and must be dealt with accordingly. But the administrative process as a whole could be made fairer and more effective by efforts to reduce its adversarial character and to maximize cooperation between claimant and claims officer. Confidence in the process and its outcomes in turn would increase. The challenge is to make these adjustments in the context of a system that continues to promise tort claimants full access to the courts as their basic, though no longer their first, avenue of relief.

In their accounts of agency-level procedure, a number of tort claims officers expressed concern over the Justice Department's own commitment to fair and reasonable compensation in the exercise of its approval authority in prospective settlements over $25,000; a few specifically reported that their own willingness to negotiate settlements with claimants for sums over that threshold has substantially diminished as a result. Because the charge, if founded, is a serious one, it may warrant further exploration, though to some extent the alleged problem would be eased by raising the ceiling on agency settlement autonomy as recommended below. Of somewhat less direct bearing on administrative settlement procedures, but nonetheless relevant and quite troublesome, is the Justice Department's apparent practice of raising each and every technical defect in a claim as a jurisdictional defense in FTCA litigation, even though the defect relates to regulatory rather than statutory requirements and even though the agency managed to address and deny the claim on the merits during the administrative phase.

The fact that claimants need only wait six months in order to obtain a trial de novo before a judiciary that has shown itself increasingly sympathetic to them on both procedural and substantive issues gives the perceived fairness of administrative claims handling a very special importance. I therefore urge that the Administrative Conference make the following specific recommendations with respect to agency regulations and practice under the FTCA and related statutes and, to a much lesser extent, with respect to the basic legislation itself:

Specific Recommendations

A. AGENCY EXERCISE OF SETTLEMENT AUTHORITY

1. Providing Guidance to Claimants.

(a) Agency personnel should be required as part of their duties to take reasonable steps to keep a claimant who has come forward with a potentially deserving claim from innocently failing to perfect a valid statutory demand, committing technical error, or running afoul of a statute of limitations.

(b) Before disapproving a claim under a particular statute, claims officers should consider the full range of channels legally available for satisfying monetary claims and ensure that the claim is not fairly payable under the FTCA or any other basis available to the agency. Likewise, agency personnel outside the claims area who regularly process other monetary demands should inform the private party of the existence of a tort remedy and applicable requirements when appropriate. To this general end, agencies should inventory all legal means available for handling monetary claims and encourage their personnel to see that these means are explored in an expeditious and practical fashion.

(c) The Attorney General should amend his regulations to accept as sufficient substantial compliance with the formal requirements imposed on claimants. In other words, the regulations should direct agencies not to rely on technical defects in otherwise valid, intelligible, and responsibly filed administrative claims, where they are not prejudiced as a result. Even where the defect is a substantial one, the claimant

should normally be specifically so apprised and allowed a reasonable opportunity to remedy it.

2. Filing the Claim.

(a) The Attorney General's regulations should be amended to treat an FTCA administrative claim as still timely though received after expiration of the statute of limitations, provided it was mailed before expiration of that period and the claimant can produce persuasive evidence of that fact. The regulations should also specify that, where a claim has been filed with the wrong agency and transferred to another agency, the original date of filing will be used for determining its timeliness. However, to help ensure that agencies have an adequate amount of time to investigate and consider claims, the six-month period given the agencies for that purpose should not commence until the claim has been received by the appropriate agency.

(b) Agencies should require claims officers to advise claimants that the absence of a sum certain for all categories of claims may preclude their consideration by both agency and court, and that, subject to timely amendment and the existing statutory exceptions, the amount of the administrative claim constitutes a ceiling on the damages that may later be sought in court.

(c) The Attorney General's regulations should afford claimants who initially fail to provide a sum certain a reasonable time in which to supply it without prejudice. Until the regulations are clarified, agency officers should be required to make clear their policy on relation back of amended claims.

(d) Agencies should not refuse to entertain a valid property damage claim supported by a sum certain simply because the personal injury or death claim arising out of the same incident and filed on the same form has not been quantified.

3. Substantiation of Claims.

(a) The Attorney General's regulations should be amended to incorporate the minimal notice standard adopted in Adams v. United States, 615 F.2d 284, on rehearing, 622 F.2d 197 (5th Cir. 1980), for purposes of agency determinations of a claim's validity.

(b) Should exchanges with a claimant reveal a pattern of serious noncooperation in furnishing substantiating data, the claims officer should promptly and clearly indicate whether he or she is inclined to view the continued nonproduction of designated information as compromising the validity of the claim under the prevailing legal standard.

4. Access to Information

(a) Where a claimant, with or without specific reference to the Freedom of Information Act and related statutes, seeks access to his or her claim file or to other information relating to a pending claim, agencies should look to these statutes as a minimum standard of disclosure. Agencies should consider release even when these statutes would not require it, if more liberal disclosure might advance

settlement, and they should endeavor to establish a mutually free and open exchange of relevant information.

(b) Given his supervisory authority over both FTCA and FOIA practices, the Attorney General should provide claims officers with specific guidance on how the FOIA, as construed by the courts in analogous cases, relates to the tort claims process.

(c) When presented with a demand for information relevant to a pending tort claim, agencies should not interpose as wholesale obstacles to disclosure the government's executive privilege for deliberative materials, or the attorney-client, expert witness, or qualified attorney work product privileges. By way of example, "work product" should be construed narrowly in the FOIA context to accommodate most requests for data about the circumstances of the incident, negligence and damage issues, or other factual information not comprising the mental impressions, conclusions, opinions, litigation strategy, or legal theories of the agency's attorney.

5. Claims Decisions.

(a) Agencies should give, and the Attorney General's regulations should be amended to require that they give, a brief statement of reasons for the denial of an FTCA or other claim. (See 5 U.S.C. § 555(e).)

(b) Agency claims officers, aided by the General Accounting Office, should ensure that all payments to be made under the FTCA are properly classed as tort claims (drawn from the judgment fund) and do not constitute program-related or general operating expenses (properly charged to agency appropriations).

(c) Agencies should comply with the decision in Odin v. United States, 656 F.2d 798 (D.C. Cir. 1981), by relieving claimants of settlement terms where they have not yet signed and returned the payment voucher. However, since this policy conceivably will give claimants an unfair advantage and diminish the integrity of the administrative settlement process, agencies should be alert to instances of abuse and seek appropriate amendment of the FTCA if they become widespread.

(d) Whatever the mode in which an agency claims officer deals with claimants, the officer's ultimate goal should be a fair and objective assessment of the merits of a claim and of its monetary worth. To this end, the officer normally should refrain from raising marginal defenses and from paying claims at an unreasonably low level. Thus, for example, an unquestionably valid claim should be paid at full value without regard to extraneous factors such as savings to the claimant in avoiding litigation. On the other hand, it is not improper for a claims officer to evaluate a claim by predicting the probable outcome of litigation, discounted by the degree of factual or legal uncertainty that the claim presents.

(e) The Justice Department should not exercise its approval authority over large administrative settlements in such a way as to impose on agencies the position it would take if the claim were in the

adversarial setting of court litigation, or otherwise act in a manner that would tend to discourage claims officers from making serious efforts to reach a fair and reasonable settlement with a deserving claimant.

(f) Unless nonwaivable, a defect in an administrative claim should not be raised as a jurisdictional defense in subsequent FTCA litigation if it is not a substantial one, or if it was not brought to the claimant's attention by the agency and the agency, in spite of the defect, addressed and disposed of the claim on the merits.

6. Reconsideration.

(a) Claim denial letters should inform claimants that they have the right to request the agency's reconsideration of its denial, and that such a request extends the six-month waiting period before suit on the claim may be filed in federal district court.

(b) In cases where the claimant communicates with a claims officer following a final denial, the officer should promptly indicate to the claimant whether the officer does or does not take the communication to be a request for reconsideration and state specifically the procedural implications of that determination.

(c) Where feasible, reconsideration should be conducted by agency personnel other than those principally responsible for the initial denial, though it should normally take place on the basis of the existing claim file as supplemented by the claimant.

(d) Agencies should routinely permit claimants to withdraw a request for reconsideration before the six-month waiting period is up, provided the agency has not as yet expended significant resources reconsidering the claim.

7. Claims Management.

(a) Agencies should maintain data on the volume and dollar value of tort claims. The data, which should include information on the outcomes of administrative claims and subsequent litigation, should be categorized so as to permit agencies to evaluate their handling of claims and to assess and manage risks.

(b) Agency claims officers should use some form of case monitoring, and preferably computer techniques, for tracking the progress of the claims for which they are responsible. The Attorney General should coordinate efforts to develop computerized data collection and retrieval systems adapted to the tort claims context and should promote the systematic sharing of such technology.

B. STATUTORY CHANGES

1. Enlarging and Defining Agency Settlement Authority.

(a) Congress should conduct a comprehensive reexamination of the meritorious and other ancillary claims statutes in force to ensure that each of them is warranted and that together they form a coherent whole both on their own terms and in relation to the FTCA. In the course of

oing so, Congress systematically should raise ceilings on agency uthority to settle claims where inflation has rendered them obsolete.

(b) Congress should take particular care in enacting legislation that would enlarge an agency's authority to satisfy claims for loss or injury -- whether those claims are "meritorious" or sound in tort -- to be precise about the scope of that authority, especially in relationship to the agency's existing authority under the FTCA. A good example of legislative precision in this regard is the Swine Flu Immunization Act, 42 U.S.C. § 247 b(k)(2), 90 Stat. 1113 (1976).

(c) Congress should codify an agency's settlement authority, rather than leave it in the agency's annual appropriation, whenever it has become a more or less permanent feature.

(d) Congress should revise the exemptions section of the FTCA specifically to reflect exemptions found in or inferred from other statutory provisions.

(e) Congress should consider raising the level of agency settlement authority under the FTCA sufficiently high -- to $100,000, for example -- to encourage claimants to negotiate seriously with agencies.

(f) Congress should discard the provision that FTCA settlements of up to $2500 be paid from agency funds.

2. Statute of Limitations. Congress should amend the FTCA to postpone accrual of a claim for statute of limitations purposes until the claimant first knows or should reasonably have known of the government's connection with the claim.

3. Substantiation of Claims. Congress should monitor the magnitude of conflict and foregone settlement traceable to disputes over the substantiation of claims under the minimal notice standard (see Paragraph A.3.(a)) and, if it remains a serious problem, consider putting administrative settlement negotiations on a more candid and productive footing by requiring as a condition of sufficiency of a claim that claimant and agency fully disclose to the other on request all pertinent information. Congress should enforce any such requirement by suitable sanctions for noncooperation.

APPENDIX A

CLAIM FOR DAMAGE, INJURY, OR DEATH	INSTRUCTIONS: Prepare in ink or typewriter. Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary.	FORM APPROVED OMB NO. 43-R0597

1. SUBMIT TO:	2. NAME AND ADDRESS OF CLAIMANT (*Number, street, city, State, and Zip Code*)

3. TYPE OF EMPLOYMENT ☐ MILITARY ☐ CIVILIAN	4. AGE	5. MARITAL STATUS	6. NAME AND ADDRESS OF SPOUSE, IF ANY (*Number, street, city, State, and Zip Code*)

7. PLACE OF ACCIDENT (*Give city or town and State; if outside city limits, indicate mileage or distance to nearest city or town*)	8. DATE AND DAY OF ACCIDENT	9. TIME (*A.M. OR P.M.*)

10. AMOUNT OF CLAIM (*in dollars*)			
A. PROPERTY DAMAGE	B. PERSONAL INJURY	C. WRONGFUL DEATH	D. TOTAL

11. DESCRIPTION OF ACCIDENT (*State below, in detail, all known facts and circumstances attending the damage, injury, or death, identifying persons and property involved and the cause thereof*)

12. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (*Number, street, city, State, and Zip Code*)

BRIEFLY DESCRIBE KIND AND LOCATION OF PROPERTY AND NATURE AND EXTENT OF DAMAGE (*See instructions on reverse side for method of substantiating claim*)

13. PERSONAL INJURY

STATE NATURE AND EXTENT OF INJURY WHICH FORMS THE BASIS OF THIS CLAIM

14. WITNESSES

NAME	ADDRESS (*Number, street, city, State, and Zip Code*)

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

15. SIGNATURE OF CLAIMANT (*This signature should be used in all future correspondence*)	16. DATE OF CLAIM

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM	CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS
The claimant shall forfeit and pay to the United States the sum of $2,000, plus double the amount of damages sustained by the United States. (*See R.S. §3490, 5438; 31 U.S.C. 231.*)	Fine of not more than $10,000 or imprisonment for not more than 5 years or both. (*See 62 Stat. 698, 749; 18 U.S.C. 287, 1001.*)

95-106

☆ GPO: 1979 0-281-187 P.O. 5021

STANDARD FORM 95 (Rev. 6-78) PRESCRIBED BY DEPT. OF JUSTICE 28 CFR 14.2

PRIVACY ACT NOTICE

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.

A. *Authority:* The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 *et seq.*, 28 U.S.C. 2671 *et seq.*, 28 C.F.R. 14.3.

B. *Principal Purpose:* The information requested is to be used in evaluating claims.

C. *Routine Use:* See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.

D. *Effect of Failure to Respond:* Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim "invalid".

INSTRUCTIONS

Complete all items—insert the word NONE where applicable

Claims for damage to or for loss or destruction of property, or for personal injury, must be signed by the owner of the property damaged or lost or the injured person. If, by reason of death, other disability or for reasons deemed satisfactory by the Government, the foregoing requirement cannot be fulfilled, the claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with said claim establishing authority to act.

If claimant intends to file claim for both personal injury and property damage, claim for both must be shown in item 10 of this form. Separate claims for personal injury and property damage are not acceptable.

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically reparable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

Any further instructions or information necessary in the preparation of your claim will be furnished, upon request, by the office indicated in item #1 on the reverse side.

(d) Failure 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".

INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property.

17 DO YOU CARRY ACCIDENT INSURANCE? ☐ YES, IF YES, GIVE NAME AND ADDRESS OF INSURANCE COMPANY (*Number, street, city, State, and Zip Code*) AND POLICY NUMBER. ☐ NO

18. HAVE YOU FILED CLAIM ON YOUR INSURANCE CARRIER IN THIS INSTANCE, AND IF SO, IS IT FULL COVERAGE OR DEDUCTIBLE?	19 IF DEDUCTIBLE, STATE AMOUNT

20. IF CLAIM HAS BEEN FILED WITH YOUR CARRIER, WHAT ACTION HAS YOUR INSURER TAKEN OR PROPOSES TO TAKE WITH REFERENCE TO YOUR CLAIM? (*It is necessary that you ascertain these facts*)

21 DO YOU CARRY PUBLIC LIABILITY AND PROPERTY DAMAGE INSURANCE? ☐ YES, IF YES, GIVE NAME AND ADDRESS OF INSURANCE CARRIER (*Number, street, city, State, and Zip Code*) ☐ NO

☆ GPO: 1979 0-281-187 P.O. 5021

STANDARD FORM 95 BACK (Rev. 8-81)

Standard Form 1145
7 GAO 5400
1145-104

APPENDIX B

VOUCHER FOR PAYMENT UNDER FEDERAL TORT CLAIMS ACT

Voucher No. .....

Schedule No. .....

Claim No. .....

PAID BY

U.S. .....
(Department, bureau, or establishment)

Voucher prepared at .....
(Give place and date)

THE UNITED STATES, Dr.,

To .....
(Payee(s))

Address .....

Amount claimed, $..... Date claim accrued ....., 19.....

Amount of award, compromise, or settlement ..... $.....

BRIEF DESCRIPTION OF CLAIM: (See attachments for further explanation in detail.)

ACCEPTANCE BY CLAIMANT(S)

I, (We), the claimant(s), do hereby accept the within-stated award, compromise, or settlement as final and conclusive on me (us), and agree that said acceptance constitutes a complete release by me (us) of any claim against the United States and against the employee of the Government whose act or omission gave rise to the claim, by reason of the same subject matter.

Date ....., 19.....

SIGN ORIGINAL ONLY

.....
(Claimant)

.....
(Claimant)

This claim has been fully examined in accordance with the provisions of the Federal Tort Claims Act (28 U.S.C. 2672), and is approved in the

amount of $.....

.....
(Head of Federal agency, or authorized designee)

Date ....., 19.....

SIGN ORIGINAL ONLY

Title .....

Pursuant to the authority vested in me, I certify that this voucher is correct and proper for payment in the

amount of $.....

.....
(Authorized certifying officer)

Date ....., 19.....

SIGN ORIGINAL ONLY

Title .....

ACCOUNTING CLASSIFICATION

Paid by Check No. .....

U.S. GOVERNMENT PRINTING OFFICE: 1966—O-255-145 #14G

APPENDIX C

14. OPERATOR'S STATEMENT OF ACCIDENT AND USE OF SAFETY EQUIPMENT

Tell in your own words how the accident happened. D

AS VEHICLE EQUIPPED WITH SEAT BELTS? ☐ YES ☐ NO *If "Yes," were they in use at time of accident?* ☐ YES ☐ NO

) Have you answered ALL the questions as completely as possible?

n compliance with the Privacy Act of 1974, the following information is provided: Solicitation of the information requested on this form is authorized by Title 40 U.S.C. Section 491. Disclosure of the information by a Federal employee is mandatory as it is the first step in the Government's investigation of a motor vehicle accident. The principal purposes for which the information is intended to be used are to provide necessary data for use by legal counsel in legal actions resulting from the accident and to provide accident information/statistics for use in analyzing accident causes and developing methods of reducing accidents. Routine use of the information may be by Federal, State or local governments, or agencies, when relevant to civil, criminal, or regulatory investigations or prosecutions. An employee of a Federal agency who fails to report accurately a motor vehicle accident involving a Federal vehicle or who refuses to cooperate in the investigation of an accident may be subject to administrative sanctions.

OPERATOR SIGN HERE ▶ DATE SIGNED

NSN 7540-00-634-4041 STANDARD FORM 91 PAGE 4 (REV. 11-76)

OPERATOR'S REPORT OF MOTOR VEHICLE ACCIDENT

This form is to be completed by the Government operator at the time and the scene of the accident if possible. See the Privacy Act Statement on page 4.

DEPARTMENT OR AGENCY

NAME AND LOCATION OF ORGANIZATION TO WHICH YOU ARE ASSIGNED

1. OPERATOR DATA

LAST NAME — FIRST NAME — MIDDLE INITIAL | AGE (*Print clearly*)

RANK, RATING OR TITLE | SERVICE NUMBER OR SOCIAL SECURITY NO. | GOVT. MOTOR VEHICLE OPERATOR PERMIT NO.

HOME ADDRESS (*Number, street, city, State, ZIP code*) | HOME TELEPHONE NO.

2. ACCIDENT TIME AND LOCATION

ACCIDENT OCCURRED ▶ DATE / / | DAY OF WEEK | TIME a.m. p.m. | NUMBER OF HOURS ON DUTY PRIOR TO ACCIDENT

PLACE OF ACCIDENT (*If in city, give number, street, city and State. If outside city limits, indicate mileage to nearest city, or other landmark.*)

ORIGIN OF TRIP | DESTINATION

PURPOSE OF TRIP

3. FEDERAL VEHICLE (*Including privately owned Federally operated*)

MAKE | TYPE | REGISTRATION NUMBER OR OTHER IDENTIFICATION

PARTS OF VEHICLE DAMAGED (*Describe*) | OPERATOR'S ESTIMATED AMOUNT OF DAMAGE $

IF THIS WAS A BACKING ACCIDENT, WAS A GUIDE AVAILABLE? ☐ YES ☐ NO *If "Yes," was guide used?* ☐ YES ☐ NO

4. OTHER VEHICLE INVOLVED (*If more than one, show in item 12, page 3.*)

MAKE | TYPE | YEAR

OPERATOR'S STATE PERMIT NUMBER | VEHICLE LICENSE NUMBER AND STATE

OPERATED BY: NAME

OPERATED BY: HOME ADDRESS (*Number, street, city, State, ZIP code*)

OWNED BY: NAME

OWNED BY: ADDRESS (*Number, street, city, State, ZIP code*)

PARTS OF VEHICLE DAMAGED (*Describe*) | OPERATOR'S ESTIMATED AMOUNT OF DAMAGE $

5. OTHER PROPERTY DAMAGED (*Explain. If more space is needed, continue in item 12, page 3.*)

91-108

STANDARD FORM 91 PAGE 1 (REV. 11-76)
Prescribed by GSA, FPMR 101-39.8

	NAMES	HOME ADDRESSES
6. PERSONS INJURED		
7. OCCUPANTS IN YOUR VEHICLE		
8. OCCUPANTS IN OTHER VEHICLE(S)		
9. WITNESSES AND POLICE		
	POLICE OFFICER	BADGE NUMBER / PRECINCT OR HEADQUARTERS

10. ACCIDENT CONDITIONS

INDICATE:	FEDERAL VEHICLE (*Includes privately owned Federally operated*)	OTHER VEHICLE (2)
DIRECTION OF TRAVEL		
SIDE OF STREET OR HIGHWAY		
APPROXIMATE SPEED	MILES PER HOUR	MILES PER HOUR

CONDITION OF ROADWAY (*Wet or dry, icy, etc.*)	WEATHER (*Clear, foggy, rain, snow, etc.*)	TYPE OF ROADWAY (*concrete, macadam, etc.*)

OTHER INFORMATION (*Explain stop signs, traffic signals, obstructions, etc.*)

OTHER VEHICLE OWNER'S INSURANCE INFORMATION

STANDARD FORM 91 PAGE 3 (REV. 11-76)

11. EVENTS AFTER ACCIDENT

STATE WHO GAVE MEDICAL AID, IF ANY WAS GIVEN	WHERE WAS INJURED TAKEN

CONDITION OF OTHER DRIVER

If other driver or persons injured made statements as to cause of accident and extent of personal or property damage, relate conversation, also, give names and addresses of others hearing such statements.

12. OTHER VEHICLE OR PROPERTY INVOLVED CONTINUATION—*If more than one vehicle involved*

MAKE	TYPE	YEAR
OPERATOR'S STATE PERMIT NUMBER	VEHICLE LICENSE NUMBER AND STATE	

OPERATED BY	NAME
	HOME ADDRESS (*Number, street, city, State, ZIP code*)
OWNED BY	NAME
	ADDRESS (*Number, street, city, State, ZIP code*)

PARTS OF VEHICLE DAMAGED (*Describe*)	OPERATOR'S ESTIMATED AMOUNT OF DAMAGE
	$

OTHER PROPERTY DAMAGED (*Explain*)

13. DIAGRAM WHAT HAPPENED BY USING THESE SYMBOLS, BELOW

[illegible]

STANDARD FORM 91 PAGE 3 (REV. 11-76

APPENDIX D

U.S. Postal Service
ACCIDENT INVESTIGATION WORKSHEET

THIS FORM IS FOR POSTAL USE ONLY.
Copies should not be given to others at scene of accident.

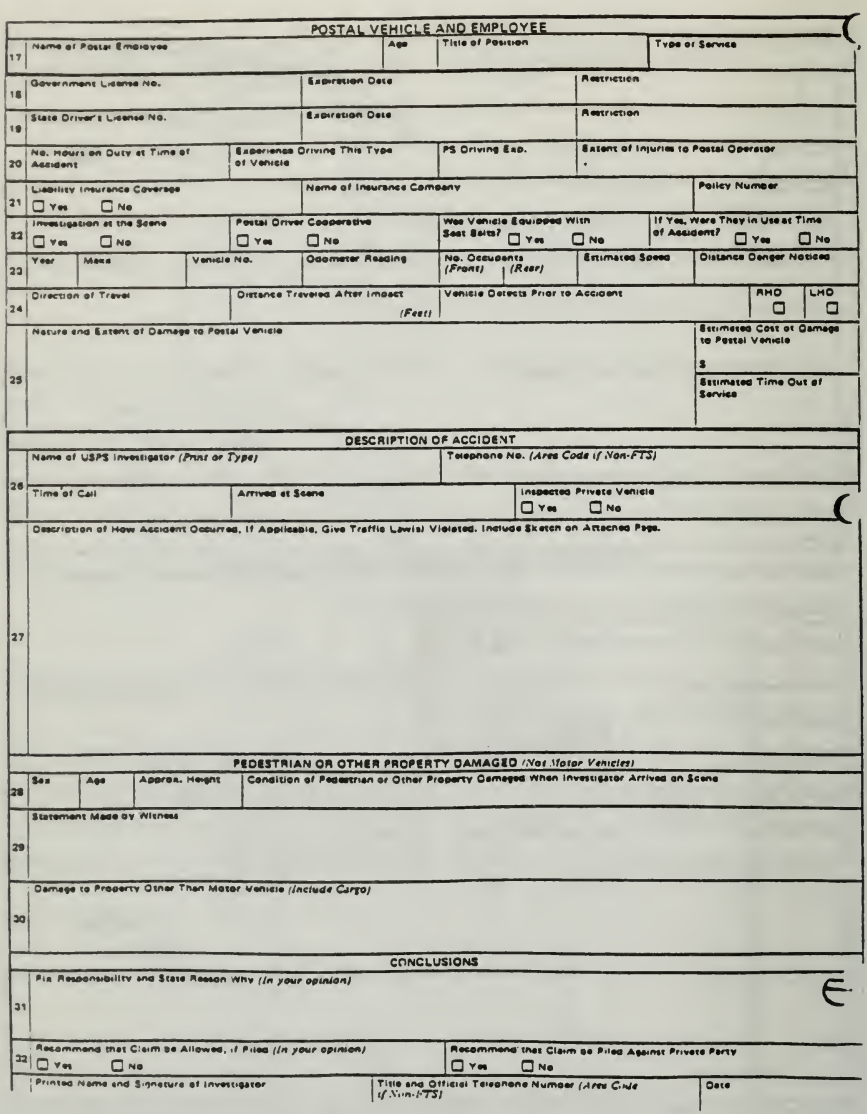
1	Post Office	Date	Time	Day of Week	Case No.	
2	Exact Location	Road Width	No. of Lanes	Traffic Control	Legal Speed	
3	Type of Road	Road Conditions		Visibility	Weather	
4	Photos Taken ☐ Yes ☐ No Claim Forms Issued ☐ Yes ☐ No	Police Charges	Offense	To		
			By *(Officer's Name, Badge No., and Precinct)*			
5	Witness Name, Age, Address & Telephone No. *(Include Apt./Suite No.)*		Passenger Name, Age, Address & Telephone No. *(Include Apt./Suite No.)*			
6	Injured or Killed *(Name and Address) (Include Apt./Suite No.)*		*(Sex)*	First Aid By		
				Taken To *(Doctor or Hospital)*		
			(Age)	Taken By		
7	Point of Contact *(Postal Vehicle)*		*(Other Vehicle)*			
8	P.O. Operator Was Going *(From)*		*(To)*			

OTHER VEHICLE(S) *(If More Than One Use Additional Sheet for Each Vehicle)*

9	Name of Other Driver	Age	Name, Address and Telephone No. of Owner *(Include Apt./Suite No.)*	
	Street Address	Sex		
	City, State and ZIP Code	Telephone No.		
10	Driver License *(State & No.)*	Expiration Date	Public Liability Insurance Company and Address *(Include Apt./Suite No.)*	
11	Condition of the Driver	Was Seat Belt Installed? ☐ Yes ☐ No	In Use? ☐ Yes ☐ No	
12	Year / Make	Model	Type -	Color / Registration *(Year, State & No.)*
13	Odometer Reading	Number of Occupants *(Front)* / *(Rear)*	Estimated Speed	Distance Danger Noticed
14	Direction of Travel	Distance Traveled After Impact *(Feet)*	Driven Away ☐ Yes ☐ No *(If No, How Moved?)*	
15	Extent of Damage to Other Vehicle or Vehicles		Estimated Cost $	
16	Statement of Other Driver			

The collection of this information is authorized by 39 USC 401. This information will be used to record and resolve the circumstances relating to the accident and to evaluate your driving skills. As a routine use, this information may be disclosed to an appropriate law enforcement agency for investigative or prosecutive purposes, to a congressional office at your request, to OMB for review of private relief legislation, to GSA when one of its automobiles is involved in an accident, to a labor organization as required by the NLRA, and where pertinent, in a legal proceeding to which the Postal Service is a party. Provision of the requested information is mandatory; failure to do so may result in disciplinary action.

PS Form 1700 *(Page 1)* *(Heavy BLACK AREAS are for Non-Vehicle Information ONLY)*



POSTAL VEHICLE AND EMPLOYEE

17 Name of Postal Employee | Age | Title of Position | Type of Service

18 Government License No. | Expiration Date | Restriction

19 State Driver's License No. | Expiration Date | Restriction

20 No. Hours on Duty at Time of Accident | Experience Driving This Type of Vehicle | PS Driving Exp. | Extent of Injuries to Postal Operator

21 Liability Insurance Coverage ☐ Yes ☐ No | Name of Insurance Company | Policy Number

22 Investigation at the Scene ☐ Yes ☐ No | Postal Driver Cooperative ☐ Yes ☐ No | Was Vehicle Equipped With Seat Belts? ☐ Yes ☐ No | If Yes, Were They in Use at Time of Accident? ☐ Yes ☐ No

23 Year | Make | Vehicle No. | Odometer Reading | No. Occupants (Front) (Rear) | Estimated Speed | Distance Danger Noticed

24 Direction of Travel | Distance Traveled After Impact (Feet) | Vehicle Defects Prior to Accident | RHO ☐ | LHO ☐

25 Nature and Extent of Damage to Postal Vehicle | Estimated Cost of Damage to Postal Vehicle $ | Estimated Time Out of Service

DESCRIPTION OF ACCIDENT

26 Name of USPS Investigator (Print or Type) | Telephone No. (Area Code if Non-FTS)

Time of Call | Arrived at Scene | Inspected Private Vehicle ☐ Yes ☐ No

27 Description of How Accident Occurred, If Applicable, Give Traffic Law(s) Violated. Include Sketch on Attached Page.

PEDESTRIAN OR OTHER PROPERTY DAMAGED (Not Motor Vehicles)

28 Sex | Age | Approx. Height | Condition of Pedestrian or Other Property Damaged When Investigator Arrived on Scene

29 Statement Made by Witness

30 Damage to Property Other Than Motor Vehicle (Include Cargo)

CONCLUSIONS

31 Fix Responsibility and State Reason Why (In your opinion)

32 Recommend that Claim be Allowed, if Filed (In your opinion) ☐ Yes ☐ No | Recommend that Claim be Filed Against Private Party ☐ Yes ☐ No

Printed Name and Signature of Investigator | Title and Official Telephone Number (Area Code if Non-FTS) | Date

FIELD SKETCH *(Use appropriate one. See reverse.)*

#1–POSTAL VEHICLE

#2–PRIVATE VEHICLE

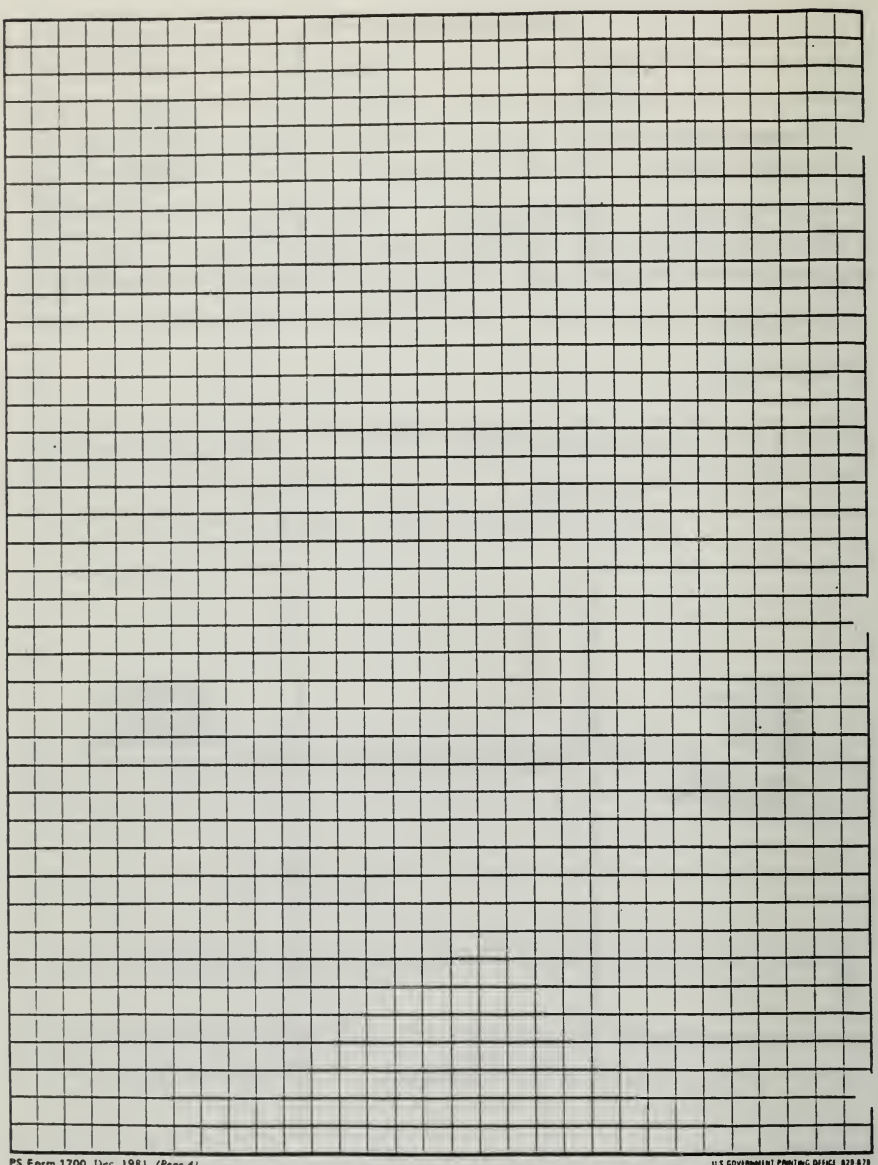
INDICATE NORTH

INDICATE
Width of roadway
traffic flow,
parked vehicles,
traffic signs or
signals, etc.

OBTAIN ACCURATE MEASUREMENTS FROM FIXED OBJECTS

ALSO INDICATE
Approach of vehicles,
point of impact and
place where vehicles
stopped after accident.

PS Form 1700, Dec. 1971 (Page 2)



U.S. GOVERNMENT PRINTING OFFICE 828-878

APPENDIX E

STATEMENT OF WITNESS
(Attach additional sheets if necessary)

1. DID YOU SEE THE ACCIDENT?

2. WHEN DID THE ACCIDENT HAPPEN?
a. TIME a.m. p.m.
b. DATE

FORM APPROVED
O.M.B. NUMBER
29-R0246

3. WHERE DID THE ACCIDENT HAPPEN? *(Give street location and city)*

4. TELL IN YOUR OWN WAY HOW THE ACCIDENT HAPPENED

5. WHERE WERE YOU WHEN THE ACCIDENT OCCURRED?

6. WAS ANYONE INJURED, AND IF SO, EXTENT OF INJURY IF KNOWN?

7. DESCRIBE THE APPARENT DAMAGE TO PRIVATE PROPERTY

8. DESCRIBE THE APPARENT DAMAGE TO GOVERNMENT PROPERTY

9. IF TRAFFIC CASE, GIVE APPROXIMATE SPEED OF:
a. GOVERNMENT VEHICLE *Miles per Hr.*
b. OTHER VEHICLE *Miles per hr.*

10. GIVE THE NAMES AND ADDRESSES OF ANY OTHER WITNESSES TO THE ACCIDENT *(If known)*

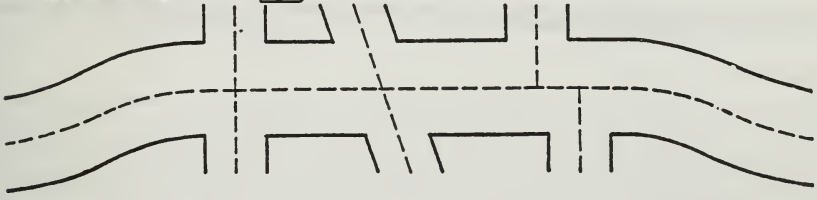
a. NAMES	b. ADDRESSES *(Include ZIP Code)*

WITNESS COMPLETING THIS FORM

11. HOME ADDRESS *(Include ZIP Code)*	12. WITNESS *Sign here* ►	a. HOME TELEPHONE NO.
		b. TODAY'S DATE
13. BUSINESS ADDRESS *(Include ZIP Code)*		TELEPHONE NO.

14. INDICATE ON THE DIAGRAM BELOW WHAT HAPPENED:

1. Number Federal vehicle as 1—other vehicle as 2—additional vehicle as 3, and show direction of travel by arrow (*Example:* → 1 2 ←)
2. Use solid line to show path before accident ——— 2 Broken line after accident - - - - - - - 2
3. Show pedestrian by →○
4. Show railroad by +++++++++++++++
5. Give names or numbers of streets or highways
6. Indicate north by arrow in this circle ○



FILE REFERENCE:

This office has been notified that you witnessed an accident which occurred

It will be helpful if you will answer, as fully as possible, the questions on the other side of this letter. Please read the Privacy Act Statement below.

Your courtesy in complying with this request will be appreciated. An addressed envelope, which requires no postage, is enclosed for your convenience in replying.

Sincerely

Enclosure

In compliance with the Privacy Act of 1974, the following information is provided: Solicitation of the information requested on this form is authorized by Title 40 U.S.C. Section 491. Disclosure of the information by a Federal employee is mandatory as it is the first step in the Government's investigation of a motor vehicle accident. The principal purposes for which the information is intended to be used are to provide necessary data for use by legal counsel in legal actions resulting from the accident, and to provide accident information/statistics for use in analyzing accident causes and developing methods of reducing accidents. Routine use of the information may be by Federal, State or local governments or agencies, when relevant to civil, criminal, or regulatory investigations or prosecution.

* GPO : 1981 O - 341-526 (6468) STANDARD FORM 94 BACK (REV. 11-76)

APPENDIX F

U.S. POSTAL SERVICE

ACCIDENT REPORT — TORT CLAIM

(To be used only for accidents involving injury or property damage of private persons)

POSTAL INSTALLATION ACCIDENT CASE NO.

POST OFFICE, STATE AND ZIP CODE | CLASS | DATE OF ACCIDENT

NAME OF EMPLOYEE INVOLVED | ROSTER DESIGNATION | TYPE OF VEHICLE INVOLVED ☐ GOVERNMENT VEHICLE ☐ CONTRACT VEHICLE ☐ BORROWED ☐ EMPLOYEE'S CAR

Does employee have automobile liability insurance covering him for this accident? ☐ YES ☐ NO | NAME OF INSURANCE COMPANY | OWNER OF POSTAL OPERATED VEHICLE

Does private person have automobile liability insurance covering him for this accident? ☐ YES ☐ NO | NAME OF INSURANCE COMPANY | VEHICLE OR LICENSE NO.

MAKE

CAPACITY

NAMES AND ADDRESSES OF PRIVATE PARTIES INVOLVED	AMOUNT OF CLAIM FILED
1.	
2.	

BRIEF DESCRIPTION OF HOW ACCIDENT OCCURRED

OPINION AS TO THE NEGLIGENCE OF THE POSTAL EMPLOYEE INVOLVED; AS TO WHETHER BILLS OR ESTIMATES SUBMITTED ARE PROPER

REMARKS

PERSONAL INJURY ☐ YES ☐ NO

PROPERTY DAMAGE ☐ $1000 OR LESS ☐ EXCEEDS $1000

SIGNATURE AND TITLE OF AUTHORIZED OFFICIAL | DATE OF REPORT

INVESTIGATOR (Name & Title) | TELEPHONE (Include Area Code) | POSTAL INSTALLATION FINANCE NO.

▶ FOLLOWING TO BE COMPLETED BY POSTAL DATA CENTER ONLY ◀

SIGNATURE AND TITLE OF APPROVING OFFICER | TYPE OF SETTLEMENT CODE | DATE

CC	VENDOR NO.						FINANCE NO.							FAC	W/C	SUB LOC	CLAIM NO.									ACC'YR.
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30

ACCOUNT NO.						SUB.LOC.AC.		FY		PAYMENT AMOUNT							T-P	T.S	SEQUENCE NO.									A/C
48	49	50	51	52	53	54	55	56	57	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80

PS Form Mar. 1979 2198 (Use additional sheet(s), if necessary)

APPENDIX G

U.S. POSTAL SERVICE
LAW DEPARTMENT
ADJUDICATION – TORT CLAIMS

CLAIMANT	CLAIM NO.	INSPECTOR IN CHARGE	ACCT. NUMBERS (Check one)
	CASE NO.	ACCIDENT	A/C 55212.
	ACCIDENT PLACE		A/C 55213.
	POSTAL INSTALLATION INVOLVED		A/C 55215.
	AMOUNT CLAIMED – PERSONAL $		A/C 55101.
	AMOUNT CLAIMED – PROPERTY $		A/C 55103.
	AMOUNT CLAIMED – TOTAL $		A/C 55105.
	AWARDED – AMOUNT $ / DISAPPROVED / REFERRED		A/C 55107.
	TOTAL PERSONAL INJURY INCLUDED IN ABOVE AWARD $	TOTAL PROPERTY DAMAGE INCLUDED IN ABOVE AWARD $	CHECK NO.

A – FINDINGS: After careful consideration of the evidence I make the following factual findings:

	1. Operator of postal vehicle failed to yield the right of way at an intersection and collided with private car.		6. Operator of postal vehicle negligently changed lanes and collided with private vehicle.
	2. Operator of postal vehicle pulled away from a parked position and collided with private vehicle.		7. Improperly parked vehicle rolled downgrade unattended and collided with private property.
	3. Operator of postal vehicle backed and collided with private vehicle.		8. Operator of postal vehicle made a turn from improper lane and collided with private vehicle.
	4. Operator of postal vehicle collided with rear of stopped vehicle.		9. Operator of postal vehicle collided with parked vehicle.
	5. Operator of postal vehicle crossed over center line and collided with private vehicle.		10. Operator of postal vehicle failed to yield the right of way and collided with a pedestrian.
	11. Other		

B – CONCLUSION: Therefore, under the provisions of the Federal Tort Claims Act and the regulations issued thereunder I find, that responsibility rests with the Government and that the total award for the damage and/or injury, or that disallowance of the claim, as indicated above, is proper.

OTHER

SIGNATURE AND TITLE OF APPROVING OFFICER	TYPE OF SETTLEMENT CODE	DATE

CARD CODE	VENDOR NO.							FINANCE NO.							FAC	W/C CODE		SUB LOCATION			CLAIM NO.										YEAR OF ACCIDENT	
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30			

ACCOUNT NO.					SUB LOCATION ACCOUNT		FISCAL YEAR		PAYMENT AMOUNT							T/P	T/S	SEQUENCE NO.										A/C	
48	49	50	51	52	53	54	55	56	57	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80		

PS Form Feb. 1975 2106

☆ U.S. GOVERNMENT PRINTING OFFICE: 1980—324-799

APPENDIX H

1-2 CC	3 GC	4-7 LOC	8-9 FY	10-14 CLAIM NO	15 S	16-18 TYPE	19-23	24-39 CLAIMANT NAME	40-47 GBL NO
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(8A)	(8B)

48-53 TRANS DATE	54-55 ST/CD	56 PI	57-58 PROP	59-64 DATE OF INCIDENT	65-73 AMOUNT CLAIMED	74-79 DATE PRESENTED	80 JL
(9)	(10)	(11)	(12)	(13)	(14)	(15)	(16)

PART 1

48-53 TRANS DATE	54-55 ST/CD	56-62 AMT EMRG PAY	63-64 DC	65-68 DLOC
(9)	(10)	(17)	(18)	(19)

PART 2

48-53 TRANS DATE	54-55 ST/CD	56-61 DATE SETTLED	62-70 AMOUNT PAID
(9)	(10)	(20)	(21)

PART 3

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