

2009

# Understanding the Federal Tort Claims Act: A Different Metaphor

Paul F. Figley

*American University Washington College of Law*, [pfigley@wcl.american.edu](mailto:pfigley@wcl.american.edu)

Follow this and additional works at: [http://digitalcommons.wcl.american.edu/facsch\\_lawrev](http://digitalcommons.wcl.american.edu/facsch_lawrev)



Part of the [Contracts Commons](#)

---

## Recommended Citation

Figley, Paul F. "Understanding the Federal Tort Claims Act: A Different Metaphor." *Tort Trial & Insurance Practice Law Journal* 44 (Spring/Summer 2009): 1105- 1138.

This Article is brought to you for free and open access by the Scholarship & Research at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Articles in Law Reviews & Other Academic Journals by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact [fbrown@wcl.american.edu](mailto:fbrown@wcl.american.edu).

# Tort Trial & Insurance Practice Law Journal

UNDERSTANDING THE FEDERAL TORT  
CLAIMS ACT: A DIFFERENT METAPHOR

*Paul F. Figley*

Reprinted from the Tort Trial & Insurance  
Practice Law Journal  
Volume 44:3/44:4 Spring/Summer 2009

Published quarterly by the Tort Trial and  
Insurance Practice Section  
American Bar Association

Copyright © 2009 American Bar Association

TORT TRIAL AND INSURANCE PRACTICE SECTION

■ AMERICAN BAR ASSOCIATION ■

# UNDERSTANDING THE FEDERAL TORT CLAIMS ACT: A DIFFERENT METAPHOR

*Paul F. Figley*

I. Setting the Stage: Sovereign Immunity and the Background of the FTCA .....	1106
II. The Scope of the FTCA: The Dimensions of the Bridge and Excluded Claims.....	1109
III. Prerequisites for Suit Under the FTCA: Steps to Be Taken Before the Bridge Can Be Crossed.....	1118
IV. Statutory Bars to Suit: The Checkerboard Nature of the FTCA Bridge .....	1121
A. Exceptions in the Text of the FTCA.....	1122
B. Statutes That Explicitly Bar Suit.....	1133
C. Other Statutes That Bar Suit.....	1136
V. Conclusion.....	1138

At first blush the Federal Tort Claims Act may seem puzzling and counterintuitive. Its overall purpose is to provide a tort remedy for persons injured by wrongful acts or omissions of the federal government, but it contains numerous exceptions, exclusions, and prefiling requirements that frequently bar such claims. By and large, it provides full compensation to persons injured by commonplace negligence of government employees, but no remedy for those whose claims involve intentional torts, rest on strict liability theories, or arise from a hodgepodge of other circumstances.<sup>1</sup>

---

1. See Parts II–IV, *infra*.

---

---

*Paul F. Figley has been the associate director of the Legal Rhetoric Program at the Washington College of Law, American University since 2006. His previous experience includes thirty-two years as a litigator for the Department of Justice, representing the United States and its agencies in appellate and district court litigation involving torts, national security, and information law. The author thanks Patricia Fitzgerald for her research assistance.*

---

---

Some scholars have suggested that aspects of the statute are confusing or contradictory.<sup>2</sup>

The aim of this essay is to present a straightforward explanation of how the Federal Tort Claims Act (FTCA) functions as a limited waiver of the United States' sovereign immunity. Judge Max Rosenn of the Third Circuit provided a particularly useful metaphor when he spoke of "a traversable bridge across the moat of sovereign immunity."<sup>3</sup> This essay builds on that metaphor to explain the structure and operation of the FTCA.<sup>4</sup> It is a simple explanation, intended as a starting point for understanding FTCA jurisprudence.<sup>5</sup>

## I. SETTING THE STAGE: SOVEREIGN IMMUNITY AND THE BACKGROUND OF THE FTCA

The Federal Tort Claims Act provides the exclusive vehicle for suits against the United States or its agencies sounding in tort.<sup>6</sup> It is also the exclusive remedy for the common law torts of federal employees acting within the scope of their employment.<sup>7</sup> It is a successful statute that has largely met

---

2. See, e.g., Dianne Rosky, *Respondeat Inferior: Determining the United States' Liability for the Intentional Torts of Federal Law Enforcement Officials*, 36 U.C. DAVIS L. REV. 895 (2003) (arguing that the doctrine of respondeat superior creates contradictions in doctrine based on the controlling state law); Richard W. Bourne, *A Day Late, a Dollar Short: Opening a Governmental Snare Which Tricks Poor Victims out of Medical Malpractice Claims*, 62 U. PITT. L. REV. 87, 87 (2000) (claiming that the FTCA acts as a trap when Congress designates certain medical practitioners as federal employees); William P. Kratzka, *Some Recommendations Concerning Tort Liability of Government and Its Employees for Torts and Constitutional Torts*, 9 ADMIN. L.J. AM. U. 1105 (1996) ("the structure of the FTCA invites confusion").

3. Judge Rosenn used this phrase in *Jaffee v. United States*, 592 F.2d 712, 717 (3d Cir. 1979), a suit brought as a class action by a soldier allegedly injured in a nuclear weapons test. Plaintiff argued that the United States could be sued for money damages for deliberate violation of constitutional rights under the authority of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (finding a constitutional tort cause of action against federal officials who allegedly violated plaintiff's Fourth Amendment rights), and *Butz v. Economou*, 438 U.S. 478 (1978). Judge Rosenn rejected that argument, reasoning, "[b]ecause [plaintiff] has sued the Government itself, *Bivens* and *Butz* do not afford him a traversable bridge across the moat of sovereign immunity." *Jaffee*, 592 F.2d at 717.

4. The essay also suggests how the "moat of sovereign immunity" might be used to explain the FTCA in a classroom or lecture hall setting. For fifteen years I have used the metaphor at presentations for various groups of attorneys and, more recently, first-year law students.

5. An in-depth analysis of the FTCA and related issues is provided in the excellent three-volume treatise LESTER S. JAYSON & ROBERT C. LONGSTRETH, *HANDLING FEDERAL TORT CLAIMS* (2007).

6. See *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 477 (1994) (holding unanimously that claims for constitutional torts are not cognizable under the FTCA). *Meyer* also held that federal agencies are not subject to direct suit for constitutional torts under *Bivens*. *Id.* at 486. Likewise, the United States has not waived sovereign immunity for suits under the Civil Rights Acts. *Dist. of Columbia v. Carter*, 409 U.S. 418, 424-25 (1973) (federal government is exempt from 42 U.S.C. § 1983).

7. 28 U.S.C. § 2679(b)(1).

Congress's reasons for enacting it. It creates an effective administrative procedure that efficiently resolves without litigation the vast majority of tort claims against the federal government.<sup>8</sup> It grants the federal courts subject matter jurisdiction to decide those claims that cannot be settled, subject to specific limitations set forth by Congress.<sup>9</sup> In doing so it effectively transferred responsibility for deciding disputed tort claims from Congress to the courts.

The doctrine of sovereign immunity is a key foundation of the FTCA.<sup>10</sup> This doctrine, as it is understood in American jurisprudence, provides that a sovereign state can be sued only to the extent that it has consented to be sued and that such consent can be given only by its legislative branch.<sup>11</sup> "Thus, except as Congress has consented to a cause of action against the United States, 'there is no jurisdiction . . . in any . . . court to entertain suits against the United States.'"<sup>12</sup> This body of law is the moat protecting the United States from suit.

Before Congress enacted an applicable waiver of sovereign immunity, Americans injured by torts of the federal government could not sue it for damages.<sup>13</sup> This did not leave them without a remedy because the First Amendment guaranteed their right to petition the government for redress of grievances.<sup>14</sup> From the early days of the Republic, citizens asked Congress

---

8. See JAYSON & LONGSTRETH, *supra* note 5, § 17.01; Jeffrey Axelrad, *Federal Tort Claims Act Administrative Claims: Better Than Third Party ADR for Resolving Federal Tort Claims*, 52 ADMIN. L. REV. 1331 (2000) (arguing that the administrative claim system is efficient because it enables many claims to be settled before reaching court).

9. See, e.g., 28 U.S.C. §§ 1346(b) and 2680.

10. While the origins, validity, and value of the doctrine of sovereign immunity are beyond the scope of this essay, the United States' sovereign immunity for suits seeking money damages is grounded on the Appropriations Clause of the Constitution. U.S. CONST. art. I, § 9, cl. 7. The first half of the clause is the Appropriations Clause. The second half is the Statement and Accounts Clause. The clause reads in full: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." *Id.* See Paul F. Figley & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 MICH. L. REV. 1207 (2009).

11. *United States v. Testan*, 424 U.S. 392 (1976).

12. *Id.* (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)); *United States v. Dalm*, 494 U.S. 596, 610 (1990) ("If any principle is central to our understanding of sovereign immunity, it is that the power to consent to such suits is reserved to Congress."); *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 514 (1940) ("Consent alone gives jurisdiction to adjudge against a sovereign. . . . Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body.").

13. See generally *Cohens v. Virginia*, 19 U.S. 264, 411–12 (1821) ("The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits.").

14. U.S. CONST. amend. I. See Paul Fredric Kirgis, *Section 1500 and the Jurisdictional Pitfalls of Federal Government Litigation*, 47 AM. U. L. REV. 301, 302 (1997) (citing WILSON COWEN ET AL., *THE UNITED STATES COURT OF CLAIMS, A HISTORY, PART II: ORIGIN-DEVELOPMENT-JURISDICTION, 1855–1978*, at 9 (1978)).

to enact special legislation granting a financial remedy for particular injuries caused by the government.<sup>15</sup> The legislative process, however, proved ill-suited for resolving tort claims.<sup>16</sup> John Quincy Adams complained about the inordinate time Congress spent on claims matters.<sup>17</sup> Millard Fillmore urged that a tribunal be established to handle private claims.<sup>18</sup> Abraham Lincoln called for such a change in his first annual message to Congress.<sup>19</sup>

Over the years Congress enacted laws establishing remedies for a wide variety of claims, beginning with the 1855 Court of Claims Act<sup>20</sup> that was interpreted to exclude torts.<sup>21</sup> In 1886 it enacted the Tucker Act that explicitly excluded torts.<sup>22</sup> In the following years it passed numerous statutes providing some form of tort remedy for various categories of claimants, including horse owners,<sup>23</sup> oyster growers,<sup>24</sup> and persons injured by operations of the Post Office.<sup>25</sup> From the early 1920s pressure grew for enact-

15. See *Hearings on HR 5373 and HR 6463 Before House Judiciary Committee*, Serial No. 13, 77th Cong., 2d Sess., at 49 (1942) [hereinafter *Hearings on HR 5373 and HR 6463*].

16. See *id.* at 49–55, Appendix II, Criticisms by Congressmen of Existing Procedure of Relief by Private Claim Bills; Kent Sinclair & Charles A. Szypszak, *Limitations of Actions Under the FTCA: A Synthesis and Proposal*, 28 HARV. J. ON LEGIS. 1, 6 (1991); Axelrad, *supra* note 8, at 1332 (“Moreover, congressional committees were ill-suited for sifting through claims and fairly determining the worth of individual injuries.”) (citing 1–2 JAYSON & LONGSTRETH, *supra* note 5, § 2.08 (quoting H.R. REP. NO. 69-667, at 1–2 (1926))).

17. *Hearings on HR 5373 and HR 6463*, *supra* note 15, at 49.

18. 5 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 91 (2004). President Fillmore reasoned that

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

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

19. “The investigation and adjudication of claims in their nature belong to the judicial department.” *Hearings on HR 5373 and HR 6463*, *supra* note 15, at 46 (citing First Annual Message to Congress, Dec. 3, 1861, CONG. GLOBE, 37th Cong., 2d sess., Pt. III, app., pp. 1, 2).

20. The Court of Claims Act was enacted February 24, 1855, 10 Stat 612.

21. *Spicer v. United States*, 1 Ct. Cl. 316 (1865); *Pitcher v. United States*, 1 Ct. Cl. 7 (1863). See also JAYSON & LONGSTRETH, *supra* note 5, § 2.03.

22. The Tucker Act, enacted March 3, 1887, 24 Stat. 505, presently in 28 U.S.C. §§ 1346(a), 1491, provides a remedy for actions “not sounding in tort,” although the original House version had included torts. 18 CONG. REC. 622 (1887), cited in JAYSON & LONGSTRETH, *supra* note 5, § 2.04, n.25.

23. Act of March 4, 1913, 37 Stat 843; amended by Act of January 31, 1931, 46 Stat 1052, and currently in 16 U.S.C. § 502(d) (“to reimburse owners of horses, vehicles, and other equipment lost, damaged, or destroyed while being used for necessary fire fighting, trail, or official business”).

24. Act of June 25, 1948, ch. 646, 62 Stat. 941 (oyster growers’ damages from dredging operations, 28 U.S.C. § 1497).

25. Act of June 6, 1921, 42 Stat 63 (Appropriations, Second Deficiency Act).

ment of a comprehensive law to more efficiently handle tort claims against the government.<sup>26</sup> The number of claims continued to increase and the burden of serving on the claims committees became more onerous.<sup>27</sup> Between 1920 and 1946 Congress considered more than thirty bills dealing with the subject.<sup>28</sup> Finally, on August 2, 1946, the FTCA was enacted as part of the Legislative Reorganization Act of 1946.<sup>29</sup>

This background shows that Judge Rosenn's description of sovereign immunity as a moat protecting the United States from suit<sup>30</sup> is perceptive and apt. When it enacted the FTCA, Congress created a drawbridge across that moat. The dimensions, prerequisites, and gaps of that drawbridge will be addressed in the remainder of this essay.<sup>31</sup>

## II. THE SCOPE OF THE FTCA: THE DIMENSIONS OF THE BRIDGE AND EXCLUDED CLAIMS

When Congress granted district courts subject matter jurisdiction to hear FTCA suits, it defined the scope of its waiver of sovereign immunity in the jurisdictional grant.<sup>32</sup> In *Federal Deposit Insurance Corp. v. Meyer*, the

---

26. JAYSON & LONGSTRETH, *supra* note 5, § 2.09[1]–[2]. See also Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625, 674 (1985) (“By the late 1920’s [sic], the accommodation regarding congressional payment and judicial non-enforceability of judgments began to break down.”).

27. JAYSON & LONGSTRETH, *supra* note 5, § 2.08, nn. 8–9. See also Dalehite v. United States, 346 U.S. 15, 24–25 (1953) (referring to the private bill system as “notoriously clumsy”) (citing H.R. REP. NO. 1287, 79th Cong., 1st Sess., at 2).

28. JAYSON & LONGSTRETH, *supra* note 5, § 2.09[1].

29. Pub. L. No. 79-601, 60 Stat 812, 842 (1946) (An Act to Provide for Increased Efficiency in the Legislative Branch of the Government).

30. *Jaffee v. United States*, 592 F.2d 712, 717 (3d Cir. 1979).

31. While discussing sovereign immunity and the FTCA's background, the lecturer can capture the audience's visual attention by simultaneously creating the necessary fulcrum for the “bridge across the moat of sovereign immunity” metaphor—a castle. This might be done in several ways, but one proven method is to use scissors to cut battlements along one side of a cardboard box. (I use a white, photocopy paper box. I have found it useful to pre-cut the drawbridge and the vertical segments of the battlements.) With care, the background discussion and the battlements can be finished simultaneously. The audience will recognize the object as a castle.

At this juncture the lecturer can identify Judge Rosenn and his metaphor. With that explanation, the audience will understand that the box/castle represents the interests of the United States and that a drawbridge cut in the castle symbolizes the FTCA. At this point I take from inside the box a blue, construction paper moat complete with sea monsters (created for me some years ago by the seventh-grade son of a colleague), hold it up, and ask the audience what it is. Invariably someone correctly identifies it as the moat of sovereign immunity. The stage is now set for explaining how the statute functions.

32. 28 U.S.C. § 1346(b)(1):

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of

Supreme Court confronted the issue whether the FTCA waived the United States' sovereign immunity for constitutional torts.<sup>33</sup> To resolve that issue, the *Meyer* Court dissected the language of the jurisdictional grant:

Section 1346(b) grants the federal district courts jurisdiction over a certain category of claims for which the United States has waived its sovereign immunity and "render[ed]" itself liable. *Richards v. United States*, 369 U.S. 1, 6, 82 S. Ct. 585, 589, 7 L. Ed. 2d 492 (1962). This category includes claims that are:

"[1] against the United States, [2] for money damages, . . . [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b).

A claim comes within this jurisdictional grant—and thus is "cognizable" under § 1346(b)—if it is actionable under § 1346(b). And a claim is actionable under § 1346(b) if it alleges the six elements outlined above.<sup>34</sup>

This analysis effectively explains why courts lack subject matter jurisdiction over claims that do not fall within the precise language of the jurisdictional grant.<sup>35</sup> Claims not encompassed by the language of § 1346(b) are excluded from the FTCA's general waiver of sovereign immunity and could never fit on the FTCA bridge.<sup>36</sup>

The first three elements of § 1346(b) are straightforward and can be briefly addressed.<sup>37</sup> Simply put, the FTCA cannot be used to sue any per-

---

the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

33. 510 U.S. 471, 477 (1994). *Meyer* was brought by a former employee of a failed savings and loan association who was discharged, allegedly in violation of his due process right to property (continued employment), by the government agency that acted as receiver of the institution. The Court held that Meyer's constitutional tort claim was not cognizable under the FTCA because a private person would not be liable on such a claim under state law. *Id.* at 477-78 (citing 28 U.S.C. § 1346(b)).

34. *Id.* at 477.

35. "Sovereign immunity is jurisdictional in nature." *Id.* at 475.

36. Of course, the FTCA is only one bridge across the moat of sovereign immunity; other bridges might be cut on the shorter sides of the box/castle. These might be identified as the Tucker Act and the Suits in Admiralty Act.

37. The presentation here is simplified so it can be readily understood. There are nuances to almost every FTCA issue.



son or entity other than the United States.<sup>38</sup> The only remedy available under the FTCA is “money damages,”<sup>39</sup> and then only for claims “for injury or loss of property, or personal injury or death. . . .”<sup>40</sup> The other elements of § 1346(b) have received more attention.

Because the jurisdictional grant is for torts arising from a “negligent or wrongful act or omission,”<sup>41</sup> the FTCA does not support claims for strict or absolute liability. For example, the Supreme Court held that suits arising from sonic booms do not fall within the FTCA.<sup>42</sup> Likewise, claims alleging strict liability for blasting<sup>43</sup> or other ultrahazardous activity are barred,<sup>44</sup> as are claims arising under strict liability dram shop acts<sup>45</sup> and state statutes modeled on § 402A of the *Restatement (Second) of Torts*.<sup>46</sup>

---

38. See, e.g., *Denney v. U.S. Postal Serv.*, 916 F. Supp. 1081, 1083 (D. Kan. 1996) (citations omitted) (finding that plaintiff had not named the correct defendant in her personal injury claim after falling on the sidewalk in front of the post office because the FTCA permits only the United States to be sued, not the agency allegedly responsible for the tort).

39. See, e.g., *Janis v. United States*, 162 Fed. App'x 642, 643–44 (9th Cir. 2006) (holding FTCA would not support injunction prisoner sought “to stop prison officials and employees from hindering . . . plaintiff from redressing his grievances”).

40. See, e.g., *Idaho ex rel. Trombley v. U.S. Dep't of Army*, 666 F.2d 444, 446 (9th Cir. 1982) (barring state's claim for fire-fighting costs because they were not “for injury or loss of property”); *Oregon v. United States*, 308 F.2d 568, 569 (9th Cir. 1962) (same); *People of California v. United States*, 307 F.2d 941 (9th Cir. 1962) (same).

The statute places other limits on damages. It bars punitive damages and prejudgment interest. 28 U.S.C. § 2674. It limits the amount of post-judgment interest. 28 U.S.C. § 1304(b)(1). No award can exceed the amount claimed administratively, absent newly discovered evidence or intervening facts. 28 U.S.C. § 2675(b). It also limits attorney fees. 28 U.S.C. § 2678.

41. 28 U.S.C. § 1346(b)(1).

42. *Laird v. Nelms*, 406 U.S. 797 (1972). See also *Peak v. Small Business Admin.*, 660 F.2d 375, 378 (8th Cir. 1981) (“The holding in *Laird* did not indicate that such claims are not governed by the provisions of the FTCA, but simply that they are barred by the provisions of the FTCA. The practical effect . . . is the same as if Congress had included it as an exemption under section 2680.”).

43. See generally *Laird*, 406 U.S. at 800 (“the presently prevailing view as to the theory of liability for blasting damage is frankly conceded to be strict liability for undertaking an ultrahazardous activity. . . .”).

44. See *Lively v. United States*, 870 F.2d 296, 300 (5th Cir. 1989) (affirming dismissal of strict liability claim for asbestos sale; “it is clear that strict liability ‘no fault’ claims are not cognizable under the FTCA”).

45. See *Miller v. United States*, 463 F.3d 1122, 1125 (10th Cir. 2006) (affirming dismissal; “because the exclusive vehicle for recovery against a dramshop in Utah is governed by a strict liability statute under which the plaintiff need not establish negligence, such action is not within the scope of the FTCA’s immunity waiver”).

46. See *In re Bomb Disaster at Roseville*, 438 F. Supp. 769, 771 (E.D. Cal. 1977) (barring strict liability and § 402A claims arising from explosion of eighteen boxcars carrying government bombs). See also *In re All Maine Asbestos Litig.*, 581 F. Supp. 963, 972 (D. Me. 1984):

There is no doubt that the Maine statute upon which Count II is based, 14 M.R.S.A. § 221 (1980), is a strict liability statute. *Adams v. Buffalo Forge Co.*, 443 A.2d 932, 934–44 (Me. 1982). See *Restatement (Second) of Torts* § 402A (1965) and Comment a. Consequently, Count II does not state a claim over which this Court has jurisdiction under the FTCA.

For the FTCA to apply, the “negligent or wrongful act or omission” must be that of an “employee of the Government.”<sup>47</sup> Accordingly, the FTCA does not cover the torts of employees of the District of Columbia,<sup>48</sup> territorial governments,<sup>49</sup> or the fiancée of a VA physician house-hunting in a new city.<sup>50</sup>

Nor, as a general matter, does the FTCA apply to torts of government contractors.<sup>51</sup> The Supreme Court recognized in *Logue v. United States*,<sup>52</sup> where a federal prisoner committed suicide while housed in a county jail, that a contractor may be deemed a federal employee if the government controls the detailed physical aspects of its operations.<sup>53</sup> The Court held that the contractor exclusion applied in *Logue* because the United States had “no authority to physically supervise the conduct of the jail’s employees,” although the contract required the county to follow the Bureau of Prisons’ “standards of treatment for federal prisoners, including methods of discipline, rules for communicating with attorneys, visitation privileges, mail, medical services, and employment . . . .”<sup>54</sup> In some jurisdictions, the United States may be liable for the torts of a contractor if the claim is based on a nondelegable duty.<sup>55</sup>

47. 28 U.S.C. § 2671. The FTCA defines “Employee of the government” to include

(1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and

(2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

48. *Cannon v. United States*, 645 F.2d 1128, 1137 (D.C. Cir. 1981).

49. *Harris v. Boreham*, 233 F.2d 110, 116 (3d Cir. 1956) (finding that a maintenance supervisor in the Virgin Islands is not a government employee under the FTCA).

50. *Brandes v. United States*, 783 F.2d 895 (9th Cir. 1986), *rev’g* 569 F. Supp. 538, 543 (N.D. Cal. 1983).

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

52. 412 U.S. 521 (1973). See *United States v. Orleans*, 425 U.S. 807 (1976) (holding community service agency was not a federal agency even though it received federal funding and complied with federal regulations).

53. *Logue*, 412 U.S. at 527.

54. *Id.* at 530. In both *Orleans* and *Logue* the Supreme Court cited the RESTATEMENT (SECOND) OF AGENCY § 2 (1958). *Orleans*, 425 U.S. at 815, n.4; *Logue*, 412 U.S. at 528 n.5.

55. Compare *Dickerson, Inc. v. United States*, 875 F.2d 1577, 1582–84 (11th Cir. 1989) (deciding that the United States was liable under the FTCA for negligent transport of PCBs by a contractor because Florida law imposed a nondelegable duty), with *Roditis v. United States*, 122 F.3d 108, 111–12 (2d Cir. 1997) (per curiam) (dismissing FTCA claim of plaintiff who fell on a post office construction site maintained by a contractor because the New York nondelegable duty to maintain premises would be a form of strict liability).

Since the jurisdictional grant limits the waiver of sovereign immunity to torts of federal employees "acting within the scope of [their] office or employment," the FTCA does not apply to acts or omissions that are outside the scope of employment.<sup>56</sup> Whether a federal employee is acting within the scope of employment turns on the respondeat superior law of the state in which the wrongful act or omission occurred.<sup>57</sup> This brings into play the common issues of state law regarding respondeat superior liability, including whether the act was incidental to the employee's responsibilities,<sup>58</sup> was intended to further the employer's interests,<sup>59</sup> or was within the time and space limits of the employment.<sup>60</sup> It also involves special issues such as frolic and detour,<sup>61</sup> the going and coming rule,<sup>62</sup> and the special mission rule.<sup>63</sup>

56. 28 U.S.C. § 1346(b)(1).

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

58. *See, e.g., Council on Am. Islamic Relations v. Ballenger*, 444 F.3d 659, 662, 664–66 (D.C. Cir. 2006) (per curiam) (finding that a congressman's phone interview with a reporter from a newspaper in his home district discussing his marriage in which he referred to plaintiff as a "fundraising arm for Hezbollah" was incidental to his responsibilities); *Meridian Int'l Logistics, Inc. v. United States*, 30 F.3d 139 (9th Cir. 1994) (unpublished table decision) (finding that FBI agent was acting in a way that was "broadly incidental" to his employment when he made allegedly tortious statements about plaintiff).

59. *See, e.g., Taboas v. Mlynczak*, 149 F.3d 576 (7th Cir. 1998) (holding that defendant's allegedly defamatory statements about Taboas's mental stability were motivated, at least in part, by employer's interest in maintaining a safe workplace); *Aversa v. United States*, 99 F.3d 1200 (1st Cir. 1996) (finding that assistant U.S. attorney's allegedly tortious statements regarding plaintiff's involvement in a money-laundering scheme were intended, at least in part, to further the Department of Justice's interests).

60. *See, e.g., Tonelli v. United States*, 60 F.3d 492, 495 (1st Cir. 1995) (finding that a postal worker who opened and photocopied plaintiffs' adult-oriented mail was not acting within the time and space of his employment); *Vollendorff v. United States*, 951 F.2d 215 (9th Cir. 1991) (holding that Army pilot who kept government-required medication in his home, which was subsequently ingested by a child, causing permanent damage, was acting within the time and space of his employment).

61. *See, e.g., Mider v. United States*, 322 F.2d 193, 197 (6th Cir. 1963) (holding two soldiers were on a frolic; "They took the government vehicle to go to Abner's home for an entirely personal weekend frolic, and became intoxicated on the way, and, before the collision which occurred fifty-five miles from the Base.").

62. *See, e.g., Clamor v. United States*, 240 F.3d 1215 (9th Cir. 2001) (holding that a Navy civilian employee leaving work for the day when his car hit the plaintiff's was not acting within the scope of his employment under the FTCA); *Arnold v. United States*, 39 F.3d 1175 (4th Cir. 1994) (unpublished table decision) (finding that an Army sergeant was not acting within the scope of his employment when he was driving his own car after leaving work for the day).

63. *See, e.g., Smollen v. United States*, 46 F.3d 65 (5th Cir. 1995) (finding that although Department of Energy employee was in Houston on a special mission generally, he was not acting within the scope of his employment when his car hit a pedestrian after a personal meeting).

The jurisdictional grant applies only to wrongful acts or omissions "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."<sup>64</sup> Thus, Congress did not create new causes of action when it enacted the FTCA.<sup>65</sup> Rather, the act incorporates the existing and evolving tort law of the states.<sup>66</sup> Moreover, the United States' liability is like that of a private person, not of a state or municipality.<sup>67</sup> This means that there is no FTCA subject-matter jurisdiction unless the case involves a tort under state law.<sup>68</sup> If there is no actionable duty under state law against a private person, there can be no tort claim against the United States.<sup>69</sup> Accordingly, if private parties do not engage in analogous activity, there is no analogous private person liability, and the waiver of sovereign immunity does not apply.<sup>70</sup> Likewise, if a private person cannot be sued in tort for violation of a federal statute or regulation, then the government cannot be sued in tort for such a violation.<sup>71</sup>

64. 28 U.S.C. § 1346(b)(1).

65. *Feres v. United States*, 340 U.S. 135, 142 (1950) ("Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities.")

66. *Indian Towing Co. v. United States*, 350 U.S. 61, 68 (1955) ("The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of Governmental activities in circumstances like unto those in which a private person would be liable."). See also George W. Conk, *Will the Post 9/11 World Be a Post-Tort World?* 112 PENN ST. L. REV. 175, 247 (2007) (discussing the swine flu campaign, and stating that "the Federal Tort Claims Act retains vitality and that it incorporates the flexibility of underlying state common law. . .").

67. *Rayonier, Inc. v. United States*, 352 U.S. 315, 318 (1957) (holding United States is liable to the same extent as a private person for negligence pertaining to forest fires). But see Chelsea Sage Durkin, Comment, *How Strong Stands the Federal Tort Claims Act Wall? The Effect of the Good Samaritan and Negligence Per Se Doctrines on Governmental Tort Liability*, 39 ARIZ. ST. L.J. 269, 274-79 (2007) (noting that the Ninth Circuit applies state law applicable to municipalities and state officials in FTCA cases in which private parties do not engage in analogous activity).

68. See, e.g., *Delta Sav. Bank v. United States*, 265 F.3d 1017, 1025-26 (9th Cir. 2001) (finding that there is no subject matter jurisdiction because plaintiff bank could not point to any liability arising under California law); *Williams v. United States*, 242 F.3d 169 (4th Cir. 2001) (the United States is not liable for Native American hospital's failure to provide emergency care to non-Indian because there was no duty to do so under state tort law).

69. See, e.g., *Walters v. United States*, 474 F.3d 1137, 1141 (11th Cir. 2007) (finding that the United States was not liable for an accident that occurred as a result of loose gravel on a roadway because a private party would have no duty to prevent such a condition); *Pate v. Oakwood Mobile Homes, Inc.*, 374 F.3d 1081, 1084 (11th Cir. 2004) (holding that there is no analogous duty of private parties to insure that OSHA violations are abated).

70. See *Jayvee Brand, Inc. v. United States*, 721 F.2d 385, 390 (D.C. Cir. 1983) (affirming dismissal of suit by pajama manufacturers challenging ban on flame retardant; "quasi-legislative or quasi-adjudicative action by an agency of the federal government is action of the type that private persons could not engage in and hence could not be liable for under local law. Thus, there is here no jurisdiction to entertain a suit against the federal government.")

71. In *Art Metal-USA, Inc. v. United States*, 753 F.2d 1151 (D.C. Cir. 1985), the D.C. Circuit affirmed dismissal of an action that alleged that the General Services Administration

On a more mundane level, any defense that is available under state law to a private person defendant is available to the United States in an FTCA suit. These defenses include contributory negligence,<sup>72</sup> comparative negligence,<sup>73</sup> superseding cause,<sup>74</sup> assumption of risk,<sup>75</sup> recreational use statutes,<sup>76</sup> and the statutory employer doctrine.<sup>77</sup>

The "private person liability" element is also the root of the *Feres* doctrine, which holds that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of

---

negligently failed to follow its own procurement regulations when it refused to approve governmental contracts with the plaintiff. The court held that violation of a federal statute or regulation cannot form the basis of an FTCA suit: "[B]y basing its negligence claim entirely on violation of *federal duties*, [plaintiff] fails to consider that the FTCA waives the immunity of the United States only to the extent that a private person in like circumstances could be found liable in tort *under local law*." *Id.* at 1157 (emphasis in original). See, e.g., *Delta Sav. Bank*, 265 F.3d at 1024-25 ("Plaintiffs suggest, without support, that an FTCA claim can be brought for violations of federal statutes that provide private federal causes of action, even if there is no analogous state law. This is not so.").

72. See, e.g., *Kahn v. United States*, 795 F. Supp. 473, 476 (D.D.C. 1992) (finding contributory negligence where plaintiff stepped into Kennedy Center elevator car that was two feet lower than the floor); *Allnutt v. United States*, 498 F. Supp. 832, 844 (W.D. Mo. 1980) (finding contributory negligence where pilot struck power line while flying below 100 feet); *Craft v. United States*, 237 F. Supp. 717, 719 (D.S.C. 1965) (finding contributory negligence where plaintiff sat on folding checkerboard table that collapsed).

73. See, e.g., *Murff v. United States*, 785 F.2d 552, 555 (5th Cir. 1986) (barring suit where airplane pilots' negligence exceeded that of air traffic controllers; "The Texas form of comparative negligence permits no recovery against one who is less negligent than the plaintiff. See Article 2212a, TEX. REV. CIV. STAT. § 1."); *Yeary v. United States*, 754 F. Supp. 546, 553 (E.D. Mich. 1991) (applying Michigan's pure comparative negligence standard in pedestrian-postal vehicle case, court reduced damages by forty percent); *Walton v. United States*, 484 F. Supp. 568, 576 (S.D. Ga. 1980) (applying Georgia comparative negligence standard in lost burial vault case, court granted no recovery because plaintiff's fault exceeded government's).

74. *Ins. Co. of N. Am. v. United States*, 527 F. Supp. 962, 971 (E.D. Ark. 1981) (finding for United States because superseding negligence of airplane pilot caused crash).

75. See, e.g., *Clem v. United States*, 601 F. Supp. 835, 845 (N.D. Ind. 1985) (applying Indiana "incurred risk doctrine" where swimmer entered unfamiliar waters after being informed no lifeguard was present and the waters were hazardous); *Mullins v. Blackwell*, 283 F. Supp. 462, 463 (N.D. Ga. 1967) (assumption of risk doctrine barred suit by federal prisoner struck by baseball while spectator at game).

76. See, e.g., *Matheny v. United States*, 469 F.3d 1083 (7th Cir. 2006) (finding that the Indiana Recreational Use Statute foreclosed recovery from a woman who was injured by a protruding pipe while sled-riding in a national park); *Wilson v. United States*, 989 F.2d 953 (8th Cir. 1993) (holding that the Missouri Recreational Use Statute protected the United States from liability for a Boy Scout's death while on government-owned lands).

77. See, e.g., *Vega-Mena v. United States*, 990 F.2d 684 (1st Cir. 1993) (finding that the United States was the plaintiff's statutory employer under the Puerto Rico Workman's Compensation Act, meaning that the United States was not liable in tort for injuries the plaintiff sustained after falling into a vat of diesel fuel waste); *Leigh v. Nat'l Aeronautics & Space Admin.*, 860 F.2d 652 (5th Cir. 1988) (holding that the Louisiana statutory employer doctrine protected the United States from liability for injuries employee of a subcontractor sustained while testing the external tank of the space shuttle).

or are in the course of activity incident to service.”<sup>78</sup> In *Feres*, the Supreme Court examined the FTCA and concluded that Congress had not intended to waive sovereign immunity for injuries that arise incident to military service.<sup>79</sup> The Court explained, “We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence.”<sup>80</sup>

Whether *Feres* applies to a particular claim turns on whether the injury arose incident to military service.<sup>81</sup> In determining that issue, courts consider a variety of factors, with no single one being dispositive. Important factors in resolving whether an injury arose incident to service include the following: whether the injury arose while a service member was on active duty;<sup>82</sup> whether the injury arose on a military situs;<sup>83</sup> whether the injury

78. *Feres v. United States*, 340 U.S. 135, 141 (1950). The Court explained:

One obvious shortcoming in these claims is that plaintiffs can point to no liability of a “private individual” even remotely analogous to that which they are asserting against the United States. We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving.

79. *Id.* at 146.

80. *Id.* In the *Feres* opinion, the Court discussed three rationales for the proposition that, when it enacted the FTCA, Congress did not intend to waive sovereign immunity for suits by servicemen against the United States: (1) the absence of private person liability, *id.* at 141; (2) the availability of a separate, uniform, comprehensive, no-fault compensation scheme to military personnel, *id.* at 145; and (3) the distinctly federal relationship between the government and members of the armed forces, and the corresponding unfairness of permitting service incident claims to be determined by non-uniform local law, *id.* at 142–44.

In *United States v. Johnson*, 481 U.S. 681, 691 (1987), the Court explained that the *Feres* doctrine also furthers military discipline: “Moreover, military discipline involves not only obedience to orders, but more generally duty and loyalty to one’s service and to one’s country. Suits brought by service members against the Government for service-related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline. . . .”

81. A second, much less frequently used body of *Feres* jurisprudence arises from the decision in *United States v. Shearer*, 473 U.S. 52 (1985) (Army private kidnapped and murdered by another private who had been convicted of manslaughter but retained in the service). It bars FTCA suits brought for injuries to service members that are “the type of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.” *Id.* at 59. It applies to claims such as those that go “directly to the ‘management’ of the military; [that] call into question basic choices about the discipline, supervision and control of a serviceman.” *Id.* at 58. The test here does not focus on the injured service member, but on the nature of the challenged activity.

82. See *Chambers v. United States*, 357 F.2d 224 (8th Cir. 1966) (barring claim under *Feres* because of claimant’s active-duty status and presence on base, even though engaged in off-duty recreation).

83. See *Morey v. United States*, 903 F.2d 880 (1st Cir. 1990) (sailor falling off pier on return to ship was *Feres* barred); *Millang v. United States*, 817 F.2d 533 (9th Cir. 1987) (off-duty marine run over by on-duty MP on military installation was *Feres* barred). But see *Dreier v. United States*, 106 F.3d 844 (9th Cir. 1996), where *Feres* did not bar suit when an active-duty soldier visiting an on-base recreational area during his off-duty hours fell into the facility’s drainage channel and drowned. The court reasoned that, “though Drier’s presence on the

arose during a military activity;<sup>84</sup> whether the service member was taking advantage of a privilege or enjoying a benefit conferred as a result of military service when the injury arose;<sup>85</sup> and whether the injury arose while the service member was subject to military discipline or control.<sup>86</sup> If the injury arose out of an activity incident to service, suit is barred regardless of whether the claim is filed for the injuries to the U.S. service member,<sup>87</sup> for injuries to a foreign service member,<sup>88</sup> for loss of consortium by the service member's spouse,<sup>89</sup> or on a third-party indemnity against the United States for payments made to an injured service member.<sup>90</sup> By the same token, *Feres* does not bar a serviceman from suing for injuries to a spouse or family member so long as those injuries were not incurred "incident to service."<sup>91</sup>

---

base at the time of his death weighs in favor of a *Feres* bar, . . . the situs of his injury is not determinative." *Id.* at 852. *Dreier* is inconsistent with the weight of authority.

84. See *Costo v. United States*, 248 F.3d 863 (9th Cir. 2001) (*Feres* barred suit by family members of sailors who drowned while participating in Navy-led recreational rafting trip); *Galligan v. City of Philadelphia*, 156 F. Supp. 2d 467 (E.D. Pa. 2001) (West Point cadet injured while watching Army-Navy football game was *Feres* barred).

85. See *Quintana v. United States*, 997 F.2d 711 (10th Cir. 1993) (*Feres* barred medical malpractice claim by National Guard member who was performing inactive duty for training when she injured her knee and subsequently received medical treatment at Air Force hospital while off duty); *Herreman v. United States*, 476 F.2d 234 (7th Cir. 1973) (soldier hitching ride on military aircraft while on leave was *Feres* barred).

86. See *Pringle v. United States*, 208 F.3d 1220 (10th Cir. 2000) (Army serviceman's claim for injuries sustained when he was ejected from on-base social club was *Feres* barred because the club was under the operational control of the base commander who had the authority to deny servicemen entry into the club).

87. See *Dozler v. United States*, 869 F.2d 1165 (8th Cir. 1989) (*Feres* barred claim for wrongful death of soldier murdered in Army barracks); *Ordahl v. United States*, 601 F. Supp. 96 (D. Mont. 1985) (*Feres* barred suit by serviceman who was struck in the eye by a dart fired from fellow serviceman's blowgun while in Air Force barracks).

88. See *Aketepe v. United States*, 925 F. Supp. 731 (M.D. Fla. 1996) (*Feres* barred suit by Turkish sailors injured when their destroyer was struck by live missiles fired from U.S. carrier during naval exercise), *aff'd on other grounds*, 105 F.3d 1400 (11th Cir. 1997); *Daberkow v. United States*, 581 F.2d 785, 788 (9th Cir. 1978) (West German pilot killed while on training flight).

89. See *Skees v. United States*, 107 F.3d 421 (6th Cir. 1997) (*Feres* barred widow's loss of consortium claim after Army failed to prevent husband's suicide); *De Font v. United States*, 453 F.2d 1239 (1st Cir. 1972) (*Feres* barred derivative claim from serviceman's widow for mental anguish permitted under Puerto Rican law).

90. *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666 (1977) (*Feres* barred government contractor from seeking indemnity for damages paid to National Guard pilot injured by life-egress system).

91. *Hicks v. United States*, 368 F.2d 626 (4th Cir. 1966) (serviceman may recover for wrongful death of civilian wife after treatment in military hospital); *Costley v. United States*, 181 F.2d 723 (5th Cir. 1950) (*Feres* does not bar claim for wrongful death of wife); *Phillips v. United States*, 508 F. Supp. 544 (D.S.C. 1981) (sailor and wife could recover for "wrongful birth" of son).

In summary, unless a claim falls within the specific language of § 1346(b), it is excluded from the FTCA's general waiver of sovereign immunity.<sup>92</sup> To fall within the FTCA's waiver, a claim must

- be "against the United States"
- seek "money damages"
- "for injury or loss of property, or personal injury or death"
- "caused by the negligent or wrongful act or omission"
- "of any employee of the Government"
- "while acting within the scope of . . . [federal] employment"
- "under circumstances where . . . a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."<sup>93</sup>

Absent any of these elements, the claim cannot use the FTCA as a bridge across the moat of sovereign immunity.

### III. PREREQUISITES FOR SUIT UNDER THE FTCA: STEPS TO BE TAKEN BEFORE THE BRIDGE CAN BE CROSSED

Before an FTCA suit can be filed in court on a claim that meets all the elements of § 1346(b), the claimant must first comply with the procedural requirements of the statute. In a sense, these preconditions are akin to those for using a castle's drawbridge; if the bridge keeper lets down the bridge only in daytime or for those who have the password, no one can cross it at night without the password. The FTCA bridge across the moat of sovereign immunity cannot be used unless the statute's prerequisites are met.

The first FTCA prerequisite is for the claimant to exhaust the administrative remedies created by the Act. The Act provides, "[a]n action shall not be instituted . . . unless the claimant shall have first presented the claim to the appropriate Federal agency. . . ."<sup>94</sup> To meet the presentation requirement, the claimant must at least file an administrative claim in writing<sup>95</sup> with the "appropriate Federal agency"<sup>96</sup> that states a sum certain of the

92. Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 477 (1994).

93. 28 U.S.C. § 1346(b).

94. *Id.* § 2675(a).

95. *Id.* § 2401(b). *See, e.g.,* Gonzalez v. United States, 284 F.3d 281 (1st Cir. 2002) (barring childbirth negligence suit under FTCA for failure to file administrative claim even though plaintiff did not know that employees of federally supported health center were deemed to be federal employees for FTCA purposes).

96. 28 U.S.C. §§ 2401(b), 2675(a). *See, e.g.,* Hart v. Dep't of Labor *ex rel.* United States, 116 F.3d 1338 (10th Cir. 1997) (affirming dismissal of plaintiff's claim because the completed administrative claim was filed on the last day of the limitations period with the attorney general rather than the Department of Labor).



damages suffered<sup>97</sup> and identifies the conduct involved.<sup>98</sup> More information may be required in some circuits.<sup>99</sup>

Suit can be filed once the agency either denies the claim "in writing" or fails to dispose of it "within six months after it is filed. . . ."<sup>100</sup> In *McNeil v. United States*, where a pro se plaintiff filed suit four months before filing his administrative claim, the Supreme Court unanimously held that "The FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies."<sup>101</sup> As a consequence, there can be

---

97. See 28 U.S.C. § 2675(b); *Millares Guiraldes de Tineo v. United States*, 137 F.3d 715, 720 (2d Cir. 1998) (holding that purported administrative claim of DEA informant who had been incarcerated in Chile "failed to meet the FTCA's requirements because it did not mention any specific sum of money").

98. See, e.g., *Tidd v. United States*, 786 F.2d 1565 (11th Cir. 1986) (barring suit arising from "swine flu vaccination received on October 21, 1976, in Jefferson County, Alabama," where administrative claim "designated the 'accident' as having occurred in Maylene, Alabama, on December 5, 1976 . . .").

99. There is a split of authority as to whether an administrative claim must provide enough information to support settlement negotiations. The FTCA authorizes the attorney general to prescribe implementing regulations. 28 U.S.C. § 2672. Those regulations are set forth at 28 C.F.R. § 14.2. "Under this regulation a 'claim' has four elements: (i) notification of the incident; (ii) a demand for a sum certain; (iii) the title or capacity of the person signing; and (iv) evidence of this person's authority to represent the claimant." *Kanar v. United States*, 118 F.3d 527, 528 (7th Cir. 1997).

The Seventh Circuit requires compliance with the regulations. In *Kanar*, the issue was whether the administrative claim requirement was met where Long, the claimant's attorney, failed to give the agency evidence of his authority to represent the claimant when requested to do so. The court affirmed dismissal on grounds that the claim was invalid, even though it identified the tortious conduct and stated a sum certain, reasoning that the agency's decision to close the file was "a reasonable response to the disdain of a reasonable request. As a result, *the settlement process that Congress created as a prelude to litigation* (see *McNeil v. United States*, 508 U.S. 106 (1993).) *was thwarted*. Long's omission was not harmless; it scotched the process." *Id.* at 531 (emphasis added).

The Eleventh Circuit requires less:

A proper notice of claim under the statute occurs where the claimant "(1) gives the agency written notice of his or her claim sufficient to enable the agency to investigate and (2) places a value on his or her claim." . . . Once that prerequisite has been complied with, any further obligation on the part of a claimant ceases. Although a claimant has an obligation to give notice of a claim under § 2675, he or she does not have an obligation to provide further information to assist *settlement* of the matter.

*Tidd*, 786 F.2d at 1567 (citing *Adams v. United States*, 615 F.2d 284, 289 (5th Cir.), *clarified on reh'g*, 622 F.2d 197 (1980) (emphasis by court)). See generally *Farmers State Sav. Bank v. Farmers Home Admin.*, 866 F.2d 276, 277 (8th Cir. 1989) (citing cases).

The government has a special form for federal tort claims, SF-95, although its use is not mandatory. *Williams v. United States*, 693 F.2d 555, 557 (5th Cir. 1982).

100. 28 U.S.C. § 2675(a).

101. 508 U.S. 106, 113 (1993). The Court reasoned:

The most natural reading of the statute indicates that Congress intended to require complete exhaustion of Executive remedies before invocation of the judicial process. Every premature filing of an action under the FTCA imposes some burden on the judicial system and on the Department of Justice which must assume the defense of such actions. Although

no class action suits under the FTCA unless all the class participants have filed administrative claims and had them denied.<sup>102</sup>

A second prerequisite is that suit be filed within both of the FTCA's two statutes of limitations. One requires that the administrative claim be presented in writing to the appropriate federal agency within two years after the claim accrues.<sup>103</sup> A claim accrues when the claimant is "in possession of the critical facts that he has been hurt and who has inflicted the injury."<sup>104</sup> Accrual is not delayed until the claimant knows that there was tortious conduct.<sup>105</sup> State law tolling doctrines such as those for infancy<sup>106</sup> or incompetency<sup>107</sup> do not apply to the FTCA statutes of limitations. It appears that the doctrine of equitable tolling does not apply to FTCA cases.<sup>108</sup>

---

the burden may be slight in an individual case, the statute governs the processing of a vast multitude of claims. The interest in orderly administration of this body of litigation is best served by adherence to the straightforward statutory command.

*Id.* at 112 (footnote omitted).

102. *See, e.g.*, *Lunsford v. United States*, 570 F.2d 221 (8th Cir. 1977) (affirming dismissal of unnamed persons in class action suit for failure to file an administrative claim following flood that resulted from cloud seeding). *See also Dalrymple v. United States*, 460 F.3d 1318, 1325 (11th Cir. 2006) (requiring compliance with sum certain requirement in suit arising from execution of warrants regarding custody of Cuban child-refugee Elian Gonzalez; "because each claimant must independently satisfy the prerequisite for filing suit under the FTCA by providing a sum certain claim, . . . the other ninety-seven claimants who filed a sum certain claim do not satisfy the statutory prerequisite for the [four] dismissed plaintiffs who omitted a sum certain in their claims.").

103. 28 U.S.C. § 2401(b). *See, e.g.*, *Garrett v. United States*, 640 F.2d 24, 26 (6th Cir. 1981) (holding claim for wrongful death of prisoner accrued on day he died, not on day Bureau of Prisons released autopsy report).

104. *United States v. Kubrick*, 444 U.S. 111, 122 (1979) (medical malpractice); *see also Indus. Constructors Corp. v. U.S. Bureau of Reclamation*, 15 F.3d 963, 968 (10th Cir. 1994) (rejecting argument that filing claim would have been futile).

105. *Kubrick*, 444 U.S. at 123-24.

106. *MacMillan v. United States*, 46 F.3d 377, 381 (5th Cir. 1995) ("under the FTCA, the limitations period is not tolled during the minority of the putative plaintiff, rather 'his parent's knowledge of the injuries is imputed to him'") (citing *Zavala v. United States*, 876 F.2d 780, 782 (9th Cir. 1989)).

107. *Chomic v. United States*, 377 F.3d 607, 615 (6th Cir. 2004) ("courts have uniformly held that mental incompetency, standing alone, will not toll the running of the statute of limitations under the FTCA").

108. *See JAYSON & LONGSTRETH, supra note 5, § 14.01[2]*. Some courts have held that equitable tolling is applicable to the FTCA. *See, e.g.*, *Glerner v. United States*, 30 F.3d 697, 702 (6th Cir. 1994) (applying equitable tolling because the VA did not give a veteran the form he requested); *Hughes v. United States*, 263 F.3d 272, 278 (3d Cir. 2001) (applying equitable tolling and placing statute of limitations burden of proof on United States). The subsequent Supreme Court decision in *United States v. Beggerly*, 524 U.S. 38 (1998), undermines those decisions. In *Beggerly* the Court explained:

Equitable tolling is not permissible where it is inconsistent with the text of the relevant statute. . . . Here, the QTA [Quiet Title Act], by providing that the statute of limitations will not begin to run until the plaintiff "knew or should have known of the claim of the United States," has already effectively allowed for equitable tolling. . . . Given this fact, and the

The second FTCA statute of limitations requires that suit be filed within six months of the denial of the administrative claim.<sup>109</sup>

A third prerequisite is that suit be filed in the right court. Only federal district courts have subject matter jurisdiction over FTCA cases.<sup>110</sup> Venue is proper only in a federal district where “plaintiff resides or wherein the act or omission complained of occurred.”<sup>111</sup> The FTCA venue provision can be waived.<sup>112</sup>

If all of these prerequisites are met, and the claim meets all the elements of § 1346(b)’s grant of jurisdiction, the FTCA’s bridge is open to it.<sup>113</sup> Whether the claim can cross the bridge depends upon whether it falls within any of the holes Congress placed in the FTCA’s general waiver of sovereign immunity.

#### IV. STATUTORY BARS TO SUIT: THE CHECKERBOARD NATURE OF THE FTCA BRIDGE

Congress’s authority to waive sovereign immunity for suits in tort includes the power to limit that waiver.<sup>114</sup> When it enacted the FTCA, Congress included explicit exceptions for several categories of claims from the statute’s general waiver of sovereign immunity.<sup>115</sup> These exceptions are, effectively,

---

unusually generous nature of the QTA’s limitations time period, extension of the statutory period by additional equitable tolling would be unwarranted.

*Id.* at 48–49 (internal citations omitted). The FTCA likewise delays accrual until the plaintiff knows of the injury and its cause. See *Kubrick*, 444 U.S. at 122. See also *McIntyre v. United States*, 367 F.3d 38, 61, n.8 (1st Cir. 2004) (interpreting *Beggerly* as “holding that equitable tolling does not apply to actions under the Quiet Title Act, 28 U.S.C. § 2409a, for reasons that could also apply to the FTCA”).

109. 28 U.S.C. § 2401(b); *Willis v. United States*, 719 F.2d 608 (2d Cir. 1983) (suit barred by six-month limitations period even though suit filed less than two years after auto accident). See generally *McNeil v. United States*, 508 U.S. 106 (1993).

110. 28 U.S.C. § 1346(b); *Whisnat v. United States*, 400 F.3d 1177, 1180 (9th Cir. 2005) (explaining that the FTCA confers subject matter jurisdiction on federal district courts to hear tort actions against the government for the negligence of its employees) (citing 28 U.S.C. § 1346(b)).

111. 28 U.S.C. § 1402(b); *Reuber v. United States*, 750 F.2d 1039 (D.C. Cir. 1984) (affirming dismissal of FTCA claim because the plaintiff was a resident of Maryland, which is also where the alleged tortious act occurred, and plaintiff could point to no act or omission in the District of Columbia, where plaintiff filed suit).

112. See *Upchurch v. Piper Aircraft Corp.*, 736 F.2d 439, 440 (8th Cir. 1984) (holding United States waived venue objection by not including it in answer).

113. An FTCA suit “shall be tried by the court without a jury. . . .” 28 U.S.C. § 2402.

114. *United States v. Kubrick*, 444 U.S. 111 (1979) (stating that courts should not extend the waiver of sovereign immunity beyond that which Congress intended). See also *LM ex rel. KM v. United States*, 344 F.3d 695, 698 (7th Cir. 2003) (explaining that the FTCA creates a broad waiver of sovereign immunity, but it is limited by the statutory exceptions).

115. These exceptions are codified at 28 U.S.C. § 2680(a)–(n) (stating, “The provisions of this chapter and section 1346 (b) of this title shall not apply to—[listed claims].”

holes in the FTCA bridge; where an FTCA exception applies, the claim is barred.<sup>116</sup> Congress has enacted other laws that explicitly bar suit or have been interpreted to bar claims that might otherwise fall under the FTCA. These statutes put more holes in the bridge.<sup>117</sup>

#### A. *Exceptions in the Text of the FTCA*

The first exception included in the FTCA is the due care exception of § 2680(a). It applies to “[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid. . . .”<sup>118</sup> This provision prohibits “tests by tort action of the legality of statutes and regulations.”<sup>119</sup> It applies when (1) a “federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow” and (2) the employee uses “due care” in executing the statute or regulation.<sup>120</sup> In practice, it blocks tort suits that question a government action, taken with due care, that is authorized by a statute or regulation.<sup>121</sup> Accordingly, the due care exception bars FTCA suits such as those challenging an agency’s interpretation of benefits available under its regulations<sup>122</sup> or its decision to release documents under the Freedom of Information Act.<sup>123</sup>

116. See *Dalehite v. United States*, 346 U.S. 15, 32 (1953) (“One only need read § 2680 in its entirety to conclude that Congress exercised care to protect the Government from claims, however negligently caused, that affected the governmental functions.”); *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 485 (2006) (“The FTCA qualifies its waiver of sovereign immunity for certain categories of claims (13 in all). If one of the exceptions applies, the bar of sovereign immunity remains.”).

117. I illustrate this to my audience by cutting a piece off the bridge of my cardboard castle as I discuss each exception.

118. 28 U.S.C. § 2680(a).

119. *Dalehite*, 346 U.S. at 33. The Court explained:

It was not “intended that the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act, should be tested through the medium of a damage suit for tort. The same holds true of other administrative action not of a regulatory nature, such as the expenditure of Federal funds, the execution of a Federal project and the like.”

*Id.* at 27 (quoting from *Hearings on HR 5373 and HR 6463*, *supra* note 15, at 6, 25, 33 (Statement by the then Assistant Attorney General Francis M. Shea)).

120. *Crumpton v. Stone*, 59 F.3d 1400, 1403 (D.C. Cir. 1995) (barring suit by widow of military officer who alleged Army negligently released information about her and her family pursuant to FOIA request).

121. See, e.g., *Welch v. United States*, 409 F.3d 646, 652 (4th Cir. 2005) (barring suit by immigrant held in custody for 422 days under a statute later declared unconstitutional as applied to him). See *JAYSON & LONGSTRETH*, *supra* note 5, § 12.03 [text at n.1.].

122. See *Baie v. Sec’y of Def.*, 784 F.2d 1375, 1376 (9th Cir. 1986) (“We also agree with the district court that whether the Assistant Secretary’s administrative interpretation of CHAMPUS excluding penile implants from the statute as ‘prosthetic devices’ was arbitrary or contrary to law may not be tested in an action under the FTCA.”).

123. See *Crumpton*, 59 F.3d at 1403.

A second exception contained in § 2680(a), prohibits “[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.”<sup>124</sup> This is the discretionary function exception, often considered the most important FTCA exception.<sup>125</sup> The discretion protected by the exception, the discretion to exercise judgment, has roots deep in American jurisprudence.<sup>126</sup>

Two elements must be met under the discretionary function exception. First, a government action must “involv[e] an element of judgment or choice.”<sup>127</sup> There can be no judgment or choice if a “federal statute, regulation or policy specifically prescribes a course of action for an employee to follow.”<sup>128</sup> Second, the required judgment must involve social, economic, or political policy, the sort of judgments the exception was intended to protect.<sup>129</sup> This test is met if the actions taken are “susceptible to policy analysis,” regardless of whether the employee consciously made a policy determination.<sup>130</sup> Nor does it matter whether the decision was made at

124. 28 U.S.C. § 2680(a).

125. Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT’L L. REV. 521 (2003) (“Of [the FTCA exceptions], the most important is the ‘discretionary function’ exception.”); Mark C. Niles, “*Nothing but Mischief*”: *The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275 (2002) (arguing that the judicial interpretation of the discretionary function exception broadens the scope of sovereign immunity).

126. The Supreme Court explained:

The “discretion” protected by the section is not that of the judge—a power to decide within the limits of positive rules of law subject to judicial review. It is the discretion of the executive or the administrator to act according to one’s judgment of the best course, a concept of substantial historical ancestry in American law.

*Dalehite v. United States*, 346 U.S. 15, 34 (1953) (citing *Marbury v. Madison*, 1 Cranch 137, 170 (1803); *Spalding v. Vilas*, 161 U.S. 483, 498 (1895); *Alzua v. Johnson*, 231 U.S. 106 (1913); *Louisiana v. McAdoo*, 234 U.S. 627, 633 (1914); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 131 (1940)).

127. *Gaubert v. United States*, 499 U.S. 315, 322 (quoting *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)).

128. *Id.*

129. *Id.* at 322–23. The Court explained:

Furthermore, even “assuming the challenged conduct involves an element of judgment,” it remains to be decided “whether that judgment is of the kind that the discretionary function exception was designed to shield.” *Ibid.* See *Varig Airlines*, 467 U.S., at 813. Because the purpose of the exception is to “prevent judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort,” *id.*, at 814, when properly construed, the exception “protects only governmental actions and decisions based on considerations of public policy.” *Berkovitz*, *supra*, at 537.

*Id.*

130. *Id.* at 324–25:

For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be

the planning or operational level.<sup>131</sup> "It is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies. . . ." <sup>132</sup> Because the exception, by its terms, is applicable "whether or not the discretion involved be abused,"<sup>133</sup> when its elements are met, it bars claims arising from flawed policies or negligent conduct.<sup>134</sup>

The discretionary function exception applies to a broad range of decisions. The Supreme Court has found it bars suits alleging that the fire that destroyed Texas City was the result of negligence in the program to send fertilizer to postwar Europe,<sup>135</sup> that airplanes crashed because the Federal Aviation Administration delegated safety inspections,<sup>136</sup> and that a bank failed because of poor "day-to-day" decisions made by government-appointed bank managers.<sup>137</sup> The exception bars suits arising from broad decisions of nationwide import such as President Carter's determination to cancel wheat sales in retaliation for the Soviet Union's invasion

---

grounded in the policy of the regulatory regime. The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.

As a consequence, a detailed factual record is not required: *Gaubert* was resolved on a motion to dismiss. *Id.* at 320.

131. *Id.* at 325 ("A discretionary act is one that involves choice or judgment; there is nothing in that description that refers exclusively to policymaking or planning functions.")

132. *Id.* at 322 (quoting *United States v. Varig Airlines*, 467 U.S. 797 (1984)).

133. 28 U.S.C. § 2680(a).

134. *Dalehite v. United States*, 346 U.S. 15, 22-23, 43 (1953); *Domme v. United States*, 61 F.3d 787, 789 (10th Cir. 1995) (rejecting argument that the exception "does not apply to 'mandatory common law duties'" to supervise contractor operating government-owned national laboratories); see also *infra* note 136.

135. *Dalehite*, 346 U.S. at 22-23, 43. The Supreme Court included in the appendix to its decision the district court's findings of numerous "blunders, mistakes, and acts of negligence, both of omission and commission, on the part of Defendant" in the fertilizer program. *Id.* at 45-46. The district court found negligence in the decisions to begin the program, continue the program, use a material to coat the fertilizer, use paper bags for shipping, pack the fertilizer so it did not cool, not label it as an explosive, and not notify the carriers, the city, or the state of its dangers. *Id.* at 45-47.

136. *Varig Airlines*, 467 U.S. 797.

137. *United States v. Gaubert*, 499 U.S. 315, 319-20 (1991):

[Government-substituted bank officers] recommended the hiring of a certain consultant to advise IASA on operational and financial matters; they advised IASA concerning whether, when, and how its subsidiaries should be placed into bankruptcy; they mediated salary disputes; they reviewed the draft of a complaint to be used in litigation; they urged IASA to convert from state to federal charter; and they actively intervened when the Texas Savings and Loan Department attempted to install a supervisory agent at IASA.

In *Berkovitz*, the Court held the exception did not apply to a suit alleging that polio vaccine was licensed for release to the public in contravention of mandatory agency regulations that set specific scientific standards for that licensing. *Berkovitz v. United States*, 486 U.S. 531, 546-47 (1988).

of Afghanistan,<sup>138</sup> President Reagan's decision to order missile strikes on Tripoli and Benghazi in response to acts of terrorism instigated by the Libyan government,<sup>139</sup> and the FDA commissioner's order prohibiting importation of Chilean grapes even though the order was based on allegedly negligent laboratory work.<sup>140</sup> It also bars claims for smaller, everyday events such as falling trees (if forestry officials have discretion to determine what inspections to conduct),<sup>141</sup> the sale of used motor vehicles "as-is" (if the terms of sale involve policy considerations),<sup>142</sup> or moose-snowmobile accidents at national parks (if moose management involves balancing policy considerations).<sup>143</sup>

The next exception is more straightforward. The postal exception of § 2680(b) bars suit for "any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter."<sup>144</sup> It applies only to claims relating to the transmittal of the mails. It allows the government to be sued for torts tangentially related to mail transmittal, such as leaving mail where it can cause a slip and fall,<sup>145</sup> negligently driving postal trucks,<sup>146</sup> or surreptitiously reading the mail.<sup>147</sup> The postal exception bars suits for late deliveries,<sup>148</sup> lost items,<sup>149</sup> and stolen mail containing incredibly valuable works of art created by the sender.<sup>150</sup>

138. *Galloway Farms, Inc. v. United States*, 834 F.2d 998, 1004 (Fed. Cir. 1987).

139. *Saltany v. Reagan*, 886 F.2d 438 (D.C. Cir. 1989), *aff'g in relevant part and rev'g in part* 702 F. Supp. 319 (D.D.C. 1988), *cert. denied*, 495 U.S. 932 (1990), *op. after remand, reh'g denied, sub nom. Saltany v. Bush*, 960 F.2d 1060 (D.C. Cir.), *cert. denied sub nom. Clark v. Thatcher*, 506 U.S. 956 (1992).

140. *Fisher Bros. Sales, Inc. v. United States*, 46 F.3d 279 (3d Cir.) (alleging that laboratory negligently concluded that sample grapes contained poison), *cert. denied sub nom. Balmaceda, Inc. v. United States*, 516 U.S. 806 (1995).

141. *Autery v. United States*, 992 F.2d 1523, 1528 (11th Cir. 1993) (barring suit where black locust fell on decedent's car while he drove through Great Smoky Mountain National Park).

142. *Myślakowski v. United States*, 806 F.2d 94, 98 (6th Cir. 1986) (barring suit for failure to warn arising from vehicle rollover where sale of used postal vehicles "as-is-where-is" "included, inferentially, no test driving, no mechanical inspection, no refurbishing or reconditioning, no express warranties, and certainly no warnings").

143. *Tippett v. United States*, 108 F.3d 1194, 1199 (10th Cir. 1997) ("[I]t is irrelevant whether Ranger Phillips directed plaintiffs into danger. . . . Even if discretion is exercised negligently, the exception can . . . shield the government from liability. The relevant inquiry is whether Ranger Phillips was exercising discretion grounded in public policy when he directed plaintiffs around the moose.") (citation omitted).

144. 28 U.S.C. § 2680(b).

145. *Dolan v. U.S. Postal Serv.*, 546 U.S. 481 (2006).

146. *See generally id.* at 487-88.

147. *Cruikshank v. United States*, 431 F. Supp. 1355, 1360 (D. Haw. 1977).

148. *See Rider v. U.S. Postal Serv.*, 862 F.2d 239, 242 (9th Cir. 1988) (political mail delivered too late to be used).

149. *See Georgacarakos v. United States*, 420 F.3d 1185 (10th Cir. 2005) (barring suit by prisoner for loss of sixteen of twenty-three books mailed together in a box).

150. In *Anderson v. U.S. Postal Serv.*, 761 F.2d 527, 528 (9th Cir. 1985), plaintiff, a composer, mailed some of his original compositions to himself and insured them for \$100. When

The exception set forth at § 2680(c) blocks “claim[s] arising in respect of the assessment or collection of any tax or customs duty, or the detention of . . . property by any . . . law enforcement officer. . . .”<sup>151</sup> The first clause bars tort suits pertaining to taxes such as those alleging that a tax-sale was mishandled,<sup>152</sup> bank and retirement accounts were improperly attached,<sup>153</sup> or tax refunds were not properly paid.<sup>154</sup> The second clause bars suit for detention of goods, whether the claim is for a wrongful detention<sup>155</sup> or for

---

his package was stolen, he brought suit for \$800,000. *Id.* The court affirmed dismissal based on the postal exception. *Id.*

The exception also has been applied to suits for transmittal of mail bombs. See *Gager v. United States*, 149 F.3d 918 (9th Cir. 1998) (mail bomb delivered to home of Nevada Highway Patrol trooper).

151. The exception states:

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter [28 U.S.C. §§ 2671 et seq.] and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.. [sic]

28 U.S.C. § 2680(c).

152. See *Green v. United States*, 434 F. Supp. 2d 1116, 1127–28 (D. Utah 2006).

153. See *Weiner v. IRS*, 986 F.2d 12, 12–13 (2d Cir. 1993).

154. See *Aetna Cas. & Sur. Co. v. United States*, 71 F.3d 475, 477–78 (2d Cir. 1995); *Chambers v. United States*, 107 F. Supp. 601, 602 (D. Kan. 1952) (barring suit where liquor belonging to wife was seized under search warrant against her husband and a “portion of the liquor was missing when a court order was entered directing that it be returned to her”).

155. See *United States v. \$149,345 U.S. Currency*, 747 F.2d 1278, 1283 (9th Cir. 1984). The court explained:

The [claim] also falls outside the Federal Tort Claims Act because the alleged injury arises from the detention of the money itself and the propriety of the detention is at issue. 28 U.S.C. § 2680(c) excludes from coverage of the Federal Tort Claims Act claims for detention of goods or merchandise by law enforcement officers. . . . [T]here appears to be no valid reason to treat a seizure of money differently from goods. The apparent intent of section 2680(c) is to limit governmental liability for improper seizures and to restrict claimants to the statutory procedures of the forfeiture laws. . . . These aims are just as important for seizures of currency as for merchandise.

*Id.* (citations omitted).



loss or damage to detained goods.<sup>156</sup> The detention of goods clause applies whenever any law enforcement officer (not just those enforcing customs or excise laws) holds, ships, or stores detained goods.<sup>157</sup>

The three subsequent exceptions are straightforward and rarely litigated. Section 2680(d) applies to claims that are cognizable under the Suits in Admiralty Act or Public Vessels Act.<sup>158</sup> Section 2680(e) applies to claims arising from the administration of the Trading With the Enemy Act.<sup>159</sup> Section 2680(f) addresses “[a]ny claim for damages caused by the imposition or establishment of quarantine by the United States.”<sup>160</sup>

The next provision,<sup>161</sup> § 2680(h), the intentional tort exception, is special.<sup>162</sup> Generally speaking, it retains sovereign immunity for claims arising from the eleven specific torts it names.<sup>163</sup> It bars claims for assault or battery by federal employees and applies whether harm was intended,<sup>164</sup>

---

156. *Kosak v. United States*, 465 U.S. 848, 862 (1984) (“the Tort Claims Act does not cover suits alleging that customs officials injured property that had been detained by the Customs Service”).

157. *See Ali v. Fed. Bureau of Prisons*, 522 U.S. 214 (2008) (barring suit by federal prisoner who alleged his personal property was lost during transfer to another prison).

158. It bars “[a]ny claim for which a remedy is provided by chapter 309 or 311 of Title 46, relating to claims or suits in admiralty against the United States.” 28 U.S.C. § 2680(d).

159. It bars “[a]ny claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1–31 of Title 50, Appendix.” 28 U.S.C. § 2680(e).

160. 28 U.S.C. § 2680(f). Many of the cases that address the quarantine exception involve agriculture. *See Rey v. United States*, 484 F.2d 45, 46 (5th Cir. 1973) (barring suit where hogs died from cholera vaccine after other hogs were quarantined with cholera); *Saxton v. United States*, 456 F.2d 1105, 1106 (8th Cir. 1972) (barring claim that alleged “emotional injury from the quarantining of samples taken from the [plaintiffs’] cattle”).

161. Section 2680(g) was repealed. Sept. 26, 1950, ch. 1049, § 13(5), 64 Stat. 1043.

162. Because it is special, when I cut its avatar from the bridge, I give that piece of cardboard to someone in the audience.

163. It bars “[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. . . .” 28 U.S.C. § 2680(h).

Throughout the FTCA, the meaning of a legal term is what Congress intended and is not dependent on state law. *See United States v. Neustadt*, 366 U.S. 696, 705–06 (1961) (“Whether or not this analysis [of ‘misrepresentation’] accords with the law of States which have seen fit to allow recovery under analogous circumstances, it does not meet the question of whether this claim is outside the intended scope of the Federal Tort Claims Act, which depends solely upon what Congress meant by the language it used in § 2680(h).”); *Dry v. United States*, 235 F.3d 1249, 1257 (10th Cir. 2000) (“The definition of a term used in the FTCA ‘is by definition a federal question.’”), citing *Molzof v. United States*, 502 U.S. 301, 305 (1992) (interpreting “punitive damages” language of 28 U.S.C. § 2674).

164. *See Turner v. United States*, 595 F. Supp. 708, 709 (W.D. La. 1984) (barring suit where military recruiter “deceived four . . . adult women, into believing that in order to join the [National] Guard, they had to submit to complete physical examinations conducted on the spot by him as the recruiter. . . .”).

a joke ran afoul,<sup>165</sup> or plaintiff characterizes the act as negligent.<sup>166</sup> The assault and battery exception does not apply to claims for medical malpractice.<sup>167</sup> Nor does it apply if acts of other government employees give rise to a separate cause of action. In *Sheridan v. United States*, where a patient at Bethesda Naval Hospital fired a gun at passing motorists, the Supreme Court explained that “the negligence of other Government employees who allowed a foreseeable assault and battery to occur may furnish a basis for Government liability. . . .”<sup>168</sup>

Section 2680(h) also bars claims for false imprisonment, false arrest, malicious prosecution, and abuse of process. Prior to 1974, these exceptions, and the assault and battery exception, were important in suits alleging wrongdoing by federal law enforcement officials.<sup>169</sup> Congress determined that the FTCA should provide a remedy for such torts.<sup>170</sup> Accordingly, it amended § 2680(h) by adding a proviso that voids the FTCA exceptions for assault, battery, false imprisonment, false arrest, malicious prosecution, and abuse of process for acts of federal law enforcement

---

165. See *Lambertson v. United States*, 528 F.2d 441, 442 (2d Cir. 1976) (barring suit where meat inspector “pulled plaintiff’s wool stocking hat over his eyes and, climbing on his back, began to ride him piggyback,” causing his face to strike meat hooks).

166. See *United States v. Faneca*, 332 F.2d 872, 875 (5th Cir. 1964) (barring suit for injuries from tear gas used by federal officials confronting a hostile crowd when James Meredith entered the University of Mississippi; “Nor can plaintiff recover under the Tort Claims Act for the ‘negligent’ firing on him by the group of marshals and Border Patrolmen.”).

167. See *Keir v. United States*, 853 F.2d 398, 410–11 (6th Cir. 1988).

168. 487 U.S. 392, 401 (1988). On remand, the case was dismissed because there was no actionable duty under Maryland law. *Sheridan v. United States*, 969 F.2d 72, 74 (4th Cir. 1992), *aff’g* 773 F. Supp. 786 (D. Md. 1991).

169. See, e.g., *Jones v. Fed. Bureau of Investigation*, 139 F. Supp. 38, 40–41 (D. Md. 1956) (dismissing under § 2680(h) complaint that alleged FBI agents threatened plaintiff’s “sick wife and three little children for a period of 20 to 30 minutes,” falsely imprisoned them and plaintiff in an apartment, carried plaintiff away, and stole his property); *Swanson v. Willis*, 220 F.2d 440 (9th Cir. 1955) (affirming dismissal of suit against a deputy U.S. marshal that alleged false arrest and battery in the course of an arrest).

170. The Senate Report, S. REP. NO. 93-588, 93d Cong., 2d Sess. (1974), *as reprinted in* 1974 U.S.C.C.A.N. 2789, 2791, stated:

The effect of this provision is to deprive the Federal Government of the defense of sovereign immunity in cases in which Federal law enforcement agents, acting within the scope of their employment, or under color of Federal law, commit any of the following torts: assault, battery, false imprisonment, false arrest, malicious prosecution, or abuse of process. Thus, after the date of enactment of this measure, innocent individuals who are subjected to raids of the type conducted in Collinsville, Illinois, will have a cause of action against the individual Federal agents and the Federal Government.

The law enforcement proviso is an exception to the § 2680(h) exception to the FTCA’s general waiver of sovereign immunity. Accordingly, when I discuss the proviso, I request return of the § 2680(h) avatar (see note 162, *supra*), cut off a portion of it, and put that portion back on the bridge.

officers.<sup>171</sup> Subsequently, there has been relatively little litigation involving the latter four exceptions, although they continue to apply to acts of prosecutors and other federal employees who are not law enforcement officers.<sup>172</sup>

Section 2680(h) also bars claims for libel or slander, for misrepresentation or deceit, and for interference with contract rights. The libel and slander exception bars traditional claims for libel and slander<sup>173</sup> and other claims for which defamation is a necessary element.<sup>174</sup> It does not bar claims for invasion of privacy, except those based on false statements.<sup>175</sup>

The misrepresentation exception applies when a plaintiff's injury arises from its reliance on information communicated by the government. Two Supreme Court cases delineate its scope. First, in *United States v. Neustadt*,<sup>176</sup>

---

171. Pub. L. No. 93-253, 88 Stat. 50 (Mar. 16, 1974), added the following language to § 2680(h):

Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346 (b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

172. *Gen. Dynamics Corp. v. United States*, 139 F.3d 1280, 1286 (9th Cir. 1998) (holding prosecutors are not law enforcement officers; "Where, as here, the harm actually flows from the prosecutor's exercise of discretion, an attempt to recharacterize the action as something else must fail."); *Wilson v. United States*, 959 F.2d 12 (2d Cir. 1992) (holding parole officers are not law enforcement officers); *Solomon v. United States*, 559 F.2d 309 (5th Cir. 1977) (holding Post Exchange security employees are not law enforcement officers).

173. See *Cooper v. Am. Auto. Ins. Co.*, 978 F.2d 602, 613 (10th Cir. 1992) (barring claim alleging that federal "employees negligently brought false information to the attention of third parties"); *Council on Am. Islamic Relations, Inc. v. Ballenger*, 366 F. Supp. 2d 28, 30, 32 (D.D.C. 2005) (barring suit for congressman's statement, given in interview about his marital problems, that characterized his neighbor "as the 'fund-raising arm for Hezbollah'").

174. See *Art Metal-USA, Inc. v. United States*, 753 F.2d 1151, 1156 (D.C. Cir. 1985) (rejecting argument that claim for injurious falsehood is not encompassed by the libel and slander exception; "Art Metal's argument . . . is based on an illusory distinction between its interest in its reputation (which would be vindicated by a defamation action showing lost profits) and its pecuniary interest in its products (which would be vindicated by an injurious falsehood action requiring pecuniary harm).").

175. Compare *Birnbaum v. United States*, 588 F.2d 319, 328 (2d Cir. 1978) (holding that § 2680(h) did not bar invasion of privacy claim where CIA had opened and read plaintiff's mail; "the torts of trespass and invasion of privacy do not fall within the exception of § 2680(h)"), with *Metz v. United States*, 788 F.2d 1528, 1535 (11th Cir. 1986):

[T]he government officials' allegedly slanderous statements are essential to Mr. Metz's action for false light privacy and Ingrid Metz's claim for intentional infliction of emotional distress. See *Block v. Neal*, 460 U.S. at 297-99. There is no other governmental action upon which these claims could rest. These claims, therefore, "arise out of" slander for the purposes of § 2680(h) and are not actionable under the FTCA.

176. 366 U.S. 696 (1961).

the purchaser of a house that had been appraised by the Federal Housing Administration alleged that in reliance on the agency's negligent inspection and appraisal, he had paid a price above the fair market value.<sup>177</sup> The Court held that regardless of whether the FHA was negligent or owed plaintiff a "specific duty" to obtain and communicate information carefully," the misrepresentation exception barred his claim because plaintiff's injuries resulted from his reliance on the FHA's statement.<sup>178</sup>

In the second case, *Block v. Neal*,<sup>179</sup> the plaintiff had obtained a loan from the FHA for a prefabricated house. After plaintiff moved into the house, she discovered defects she attributed to the FHA's negligence in supervising its construction.<sup>180</sup> The FHA argued that plaintiff's claim was one of "misrepresentation" and, therefore, barred by § 2680(h).<sup>181</sup> The Court rejected the argument, noting "the Government's misstatements are not essential to plaintiff's negligence claim."<sup>182</sup> It held that the misrepresentation exception "does not bar negligence actions which focus not on the Government's failure to use due care in communicating information, but rather on the Government's breach of a different duty."<sup>183</sup>

The exception applies whether the misrepresentation is intentional<sup>184</sup> or negligent.<sup>185</sup> It bars suit for both commercial losses<sup>186</sup> and personal injuries.<sup>187</sup> Because it is inapplicable when the government owes a separate

177. *Id.* at 700-01.

178. *Id.* at 710-11.

179. 460 U.S. 297 (1983).

180. *Id.* at 290.

181. *Id.* at 296.

182. *Id.* at 297.

183. *Id.* In *Block* the Court reaffirmed its *Neustadt* holding: "Neustadt alleged no injury that he would have suffered independently of his reliance on the erroneous appraisal. Because the alleged conduct that was the basis of his negligence claim was in essence a negligent misrepresentation, Neustadt's action was barred under the 'misrepresentation' exception." *Id.* at 296-97.

184. See *Frigard v. United States*, 862 F.2d 201, 202 (9th Cir. 1988) (barring suit by swindled investors where "[t]he gravamen of their complaint alleged that the CIA used BBRDW [an investment company] as a cover for its operations; wrongfully permitted . . . the firm president, to defraud investors; and misrepresented that BBRDW was a legitimate company"); *Redmond v. United States*, 518 F.2d 811, 812 (7th Cir. 1975) (barring claims that agents and operatives of the government permitted plaintiff to be defrauded by a "securities dealer" described as a "highly competent confidence man working with government agents to recover a stolen U.S. Treasury bond").

185. See *United States v. Neustadt*, 366 U.S. 696, 702 (1961) ("§ 2680(h) comprehends claims arising out of negligent, as well as willful, misrepresentation.").

186. See *Reamer v. United States*, 459 F.2d 709 (4th Cir. 1972) (barring suit for misrepresentation that law student could defer active duty until completion of semester if he enlisted, resulting in monetary loss when he was ordered to active duty).

187. See *Schneider v. United States*, 936 F.2d 956, 962 (7th Cir. 1991) (barring suit for personal injury caused by construction defects in manufactured homes; "the government's communication of its approval of Tri State's plans created the assurance that the plaintiffs relied on to their detriment"); *Bergquist v. United States*, 849 F. Supp. 1221, 1231 (N.D. Ill.

duty, it does not bar suits arising from medical malpractice<sup>188</sup> or faulty navigational aids.<sup>189</sup>

The exception for "interference with contract rights"<sup>190</sup> has been applied to claims of interference with employment,<sup>191</sup> debarment from government contracts,<sup>192</sup> and seizure of assets.<sup>193</sup> It applies whether the interference is caused by government conspiracy<sup>194</sup> or simple bureaucratic delay.<sup>195</sup>

Section 2680(h) only applies to suits that arise from its listed intentional torts. Accordingly, it does not bar torts such as trespass,<sup>196</sup> conversion,<sup>197</sup> intentional infliction of emotional distress,<sup>198</sup> or invasion of privacy<sup>199</sup> so long as none of the excepted torts is a necessary part of the claim.<sup>200</sup> The Supreme Court, however, has rejected attempts to avoid the effect of the § 2680 exceptions by artful pleading, suggesting that the courts must "look

---

1994) (barring claim that the National Weather Service negligently issued tornado warnings); *Vaughn v. United States*, 259 F. Supp. 286, 287-88 (N.D. Miss. 1966) (barring claim where construction crew relied on government map and unexpectedly struck gas pipeline).

188. See *Beech v. United States*, 345 F.2d 872, 874 (5th Cir. 1965); *Phillips v. United States*, 508 F. Supp. 544, 548 (D.S.C. 1981).

189. See *Ingham v. E. Air Lines, Inc.*, 373 F.2d 227, 239 (2d Cir. 1967) (allowing suit where air traffic controllers failed to provide accurate weather information).

190. The RESTATEMENT (SECOND) OF TORTS § 766 (1977) identifies an action for "inducing breach of contract or refusal to deal" as an act by someone not privileged to do so that "induces or otherwise purposely causes a third person not to (a) perform a contract with another, or (b) enter into or continue a business relation with another."

191. See *Moessmer v. United States*, 760 F.2d 236, 237 (8th Cir. 1985) (barring claim that CIA pressured private firm to not hire former agency employee; "We hold that Moessmer's claim for interference with prospective economic advantage is the equivalent of a claim for interference with contract rights, and thus falls within the section 2680(h) exemption.>").

192. See *Art Metal-USA, Inc. v. United States*, 753 F.2d 1151, 1155 (D.C. Cir. 1985).

193. See *United States v. Mullins*, 228 F. Supp. 748, 750 (W.D. Va. 1964).

194. See *Daisley v. Riggs Bank, N.A.*, 372 F. Supp. 2d 61, 64 (D.D.C. 2005) (barring claim that Treasury official and bank officer "conspired to orchestrate [plaintiff's] termination").

195. See *Shapiro v. United States*, 566 F. Supp. 886, 888 (E.D. Pa. 1983) (barring claim of former State Department attorney who "averred that the Government's negligence in providing a letter concerning his conflict of interest situation delayed the beginning of his association with [a law firm].").

196. See *Ira S. Bushey & Sons, Inc. v. United States*, 276 F. Supp. 518, 526 (E.D.N.Y. 1967), *aff'd*, 398 F.2d 167 (2d Cir. 1968) (intoxicated seaman opened floodgate valves on floating drydock).

197. *Preston v. United States*, 596 F.2d 232, 239-40 (7th Cir. 1979) (Commodity Credit Corporation kept farmers' share of proceeds of grain sold from bankrupt warehouse).

198. *Truman v. United States*, 26 F.3d 592 (5th Cir. 1994) (sexual harassment not involving assault or battery); *Gross v. United States*, 676 F.2d 295, 298 (8th Cir. 1982) (farmer unfairly excluded from participating in Department of Agriculture feed grain program); *Cruikshank v. United States*, 431 F. Supp. 1355, 1360 (D. Haw. 1977) (opening plaintiff's mail).

199. *Birnbaum v. United States*, 588 F.2d 319, 328 (2d Cir. 1978) (allowing invasion of privacy claim where CIA had opened and read plaintiff's mail; "the torts of trespass and invasion of privacy do not fall within the exception of § 2680(h)").

200. See, e.g., *Art Metal-USA, Inc. v. United States*, 753 F.2d 1151, 1156 (D.C. Cir. 1985) (rejecting argument that claim for injurious falsehood is not encompassed by the libel and slander exception).

beyond the literal meaning of the language to ascertain the real cause of complaint."<sup>201</sup>

Section 2680(i) deals with claims arising from fiscal operations and monetary regulation.<sup>202</sup> It rarely comes up, though it has been applied to a pro plaintiff.<sup>203</sup>

The combatant activity exception of § 2680(j) bars all claims arising from "combatant activities."<sup>204</sup> The term includes "not only physical violence, but activities both necessary to and in direct connection with actual hostilities."<sup>205</sup> The exception applies regardless of whether there is a formal declaration of war.<sup>206</sup> In *Koobi*, the Ninth Circuit applied the combatant activities exception to bar suit when a U.S. warship mistakenly shot down an Iranian civilian aircraft, noting that the exception is intended "to ensure that the government will not be liable for negligent conduct by our armed forces in times of combat."<sup>207</sup>

The foreign tort exception of § 2680(k) bars "claim[s] arising in a foreign country." In its 2004 *Sosa* opinion, the Supreme Court held that the "foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred."<sup>208</sup> In doing so it rejected a prior line of cases that allowed suit to proceed if plaintiffs alleged that a tort in the United States caused the foreign injury.<sup>209</sup> The exception applies whenever injury is suffered in foreign lands,

---

201. *United States v. Neustadt*, 366 U.S. 696, 703 (1961); *United States v. Shearer*, 473 U.S. 52, 55 (1985) (plurality opinion; "[n]o semantical recasting of events can alter the fact that the battery was the immediate cause of [the injury] and consequently, the basis of respondent's claim").

202. It applies to "[a]ny claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system."

203. See *Forrester v. U.S. Gov't*, 443 F. Supp. 115 (S.D.N.Y. 1977).

204. It applies to "claim[s] arising out of the combatant activities of the military or naval forces, or Coast Guard, during time of war." 28 U.S.C. § 2680(j).

205. See *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948) (holding exception did not bar suit for pollution of U.S. coastal waters by warships after conclusion of World War II) (quoted in *Koobi v. United States*, 976 F.2d 1328 (9th Cir. 1992)).

206. See *Clark v. United States*, 974 F. Supp. 895, 898 (E.D. Tex. 1996) (Operation Desert Storm), *aff'd without published opinion*, 116 F.3d 476 (5th Cir. 1997) (unpublished table decision); *Koobi*, 976 F.2d 1328 (1988 tanker war); *Rotko v. Abrams*, 338 F. Supp. 46, 47 (D. Conn. 1971) (Vietnam), *aff'd on basis of district court opinion*, 455 F.2d 992 (2d Cir. 1972).

207. *Koobi*, 976 F.2d at 1334 ("[I]t simply does not matter for purposes of the 'time of war' exception whether the military makes or executes its decisions carefully or negligently, properly or improperly. It is the nature of the act and not the manner of its performance that counts.").

208. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004) (alleging that DEA improperly procured the kidnapping of plaintiff so that he could be tried in the United States for complicity in the torture and murder in Mexico of a DEA agent).

209. See *id.* at 709-12, 752-54.

including injuries that arise at U.S. embassies,<sup>210</sup> on U.S. military bases,<sup>211</sup> or in ungoverned regions.<sup>212</sup>

The three remaining exceptions are rarely litigated. They bar claims arising from the activities of “the Tennessee Valley Authority,”<sup>213</sup> “the Panama Canal Company,”<sup>214</sup> or “a Cooperative Bank, a Federal Land Bank or a Federal Intermediate Credit Bank.”<sup>215</sup>

### B. Statutes That Explicitly Bar Suit

A number of statutes preclude government liability under the FTCA for various kinds of claims. Some create their own comprehensive systems and explicitly prohibit any other judicial remedy. The Federal Employee’s Compensation Act (FECA)<sup>216</sup> provides a comprehensive, workers’ compensation-type remedy for federal employees killed or injured on the job that is exclusive<sup>217</sup> and bars any FTCA suit if a FECA remedy may be available.<sup>218</sup> The Longshore and Harbor Workers’ Compensation Act also

210. See *Meredith v. United States*, 330 F.2d 9, 11 (9th Cir. 1964) (barring claim arising at U.S. embassy in Bangkok, Thailand: “There is nothing in the Federal Tort Claims Act which indicates that it was intended to apply to personal or property damage sustained in our embassies and consulates abroad.”).

211. See *United States v. Spelar*, 338 U.S. 217, 219 (1949) (barring claim arising at U.S. airfield in Newfoundland); *Bird v. United States*, 923 F. Supp. 338 (D. Conn. 1996) (barring claim by wife of serviceman for medical malpractice at the U.S. Naval Facility, Guantanamo Bay, Cuba).

212. See *Smith v. United States*, 507 U.S. 197, 201–05 (1993) (barring claim that arose in Antarctica).

213. Section 2680(l) applies to “[a]ny claim arising from the activities of the Tennessee Valley Authority.”

214. Section 2680(m) applies to “[a]ny claim arising from the activities of the Panama Canal Company.”

215. Section 2680(n) applies to “[a]ny claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.”

216. 5 U.S.C.S. § 8101 *et seq.*

217. 5 U.S.C. § 8116(c).

The liability of the United States or an instrumentality thereof under this subchapter [5 U.S.C. §§ 8101 *et seq.*] or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen’s compensation statute or under a Federal tort liability statute.

218. *Sw. Marine v. Gizoni*, 502 U.S. 81, 90 (1991) (“FECA contains an ‘unambiguous and comprehensive’ provision barring any judicial review of the Secretary of Labor’s determination of FECA coverage. . . . Consequently, the courts have no jurisdiction over FTCA claims where the Secretary determines that FECA applies.”) (citations omitted); *Grijalva v. United States*, 781 F.2d 472, 474 (5th Cir. 1986) (holding that plaintiff who received FECA benefits for injuries from auto accident “cannot now collaterally attack the Secretary’s determination of coverage in this Tort Claims Act suit”).

provides an exclusive, workers' compensation remedy for, *inter alia*, employees of nonappropriated fund instrumentalities.<sup>219</sup> Similarly, there are explicit provisions barring FTCA suits for the denial of Social Security,<sup>220</sup> Medicare,<sup>221</sup> and veterans' program benefits.<sup>222</sup>

Other statutes explicitly bar specific categories of claims. Perhaps the most important is the Flood Control Act of 1928, which provides, "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place. . . ."<sup>223</sup> The legislative history of the act shows that when Congress embarked on the national flood control program, it "clearly sought to ensure beyond doubt that sovereign immunity would protect the Government from 'any' liability associated with flood control."<sup>224</sup> In *Central Green*, the Supreme Court explained,

---

219. 5 U.S.C. § 8173 ("This liability is exclusive and instead of all other liability of the United States . . . in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute.").

220. 42 U.S.C. § 405 (h) ("Finality of Commissioner's decision. . . . No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 or 1346 of title 28, United States Code [the FTCA], to recover on any claim arising under this title.").

221. The Medicare statute incorporates the § 405(h) rule from the Social Security Act. 42 U.S.C. § 1395ii, "Application of certain provisions of title II [42 U.S.C. §§ 401 et seq.]," states:

The provisions of sections 206 and 216(j), and of subsections (a), (d), (e), (h), (i), (j), (k), and (l) of section 205 [42 U.S.C. §§ 406, 416(j), and 405(a), (d), (e), (h), (i), (j), (k), and (l)], shall also apply with respect to this title [42 U.S.C. §§ 1395 et seq.] to the same extent as they are applicable with respect to title II [42 U.S.C. §§ 401 et seq.], except that, in applying such provisions with respect to this title, any reference therein to the Commissioner of Social Security or the Social Security Administration shall be considered a reference to the Secretary or the Department of Health and Human Services, respectively.

222. 38 U.S.C. § 511:

**§ 511. Decisions of the Secretary; finality**

(a) The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

223. 33 U.S.C. § 702c.

224. *United States v. James*, 478 U.S. 597, 608 (1986) ("§ 702c's language . . . and [t]he equally broad and emphatic language found in the legislative history shows [sic] that Congress understood what it was saying. We therefore conclude that the legislative history fully supports attributing to the unambiguous words of the statute their ordinary meaning." (citing *National Mfg. Co. v. United States*, 210 F.2d 263, 270 (8th Cir. 1954) ("The cost of the flood control works itself would inevitably be very great and Congress plainly manifested its will that those costs should not have the flood damages that will inevitably recur added to them."))).



“the text of the statute directs us to determine the scope of the immunity conferred, not by the character of the federal project or the purposes it serves, but by the character of the waters that cause the relevant damage and the purposes behind their release.”<sup>225</sup> Accordingly, the Flood Control Act bars suit whenever floods or floodwaters that were or were not contained in a flood control project allegedly cause personal injury, death,<sup>226</sup> or property damage.<sup>227</sup>

Other statutes have similar explicit bars to suit. For example, 10 U.S.C. § 456 bars any claim “brought against the United States on the basis of the content of a navigational aid prepared or disseminated by the National Geospatial-Intelligence Agency.”<sup>228</sup> The Panama Canal Act of 1979 bars any suit against the United States or the Panama Canal Commission except those involving ships in transit.<sup>229</sup> The Prison Litigation Reform Act limits the ability of current prisoners to sue for emotional injuries.<sup>230</sup>

225. *Cent. Green Co. v. United States*, 531 U.S. 425, 434 (2001).

226. *James*, 478 U.S. at 608.

227. *See, e.g., Cent. Green Co.*, 531 U.S. 425; *National Mfg.*, 210 F.2d 263.

228. 10 U.S.C. § 456.

#### § 456. Civil actions barred

(a) Claims barred.—No civil action may be brought against the United States on the basis of the content of a navigational aid prepared or disseminated by the National Geospatial-Intelligence Agency.

(b) Navigational aids covered.—Subsection (a) applies with respect to a navigational aid in the form of a map, a chart, or a publication and any other form or medium of product or information in which the National Geospatial-Intelligence Agency prepares or disseminates navigational aids.

*See Hyundai Merch. Marine Co. v United States*, 888 F. Supp. 543 (S.D.N.Y. 1995), *aff'd*, 75 F.3d 134 (2d Cir. 1996) (barring admiralty suit alleging navigational chart inaccurate).

229. 22 U.S.C. § 3761:

(d) Action for damages on claims cognizable under this chapter; action against officers or employees of United States for injuries resulting from acts outside scope of their employment. Except as provided in section 1416 of this Act [22 U.S.C. § 3776], no action for damages on claims cognizable under this chapter shall lie against the United States or the Commission, and no such action shall lie against any officer or employee of the United States. . . .

*See Husted v. United States*, 667 F. Supp. 831, 832 (S.D. Fla. 1985), *aff'd*, 779 F.2d 58 (11th Cir. 1985) (unpublished table decision) (dismissing FTCA auto accident suit and accepting argument that “the Panama Canal Act of 1979 . . . provides for general immunity regarding actions against the United States or its Panama Canal Commission for actions arising in the Canal Zone”).

230. 28 U.S.C. § 1346(b)(2). The statute, enacted in 1996, bars suit by prisoners for mental or emotional injury unless accompanied by a physical injury. It states:

No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

The Anti-Assignment Act presents a different sort of absolute bar. It prohibits any transfer or assignment of any claim against the United States until after the "claim is allowed, the amount . . . is decided, and a warrant for payment . . . has been issued. . . ." <sup>231</sup> The Anti-Assignment Act applies to voluntary assignments but not transfers required by operation of law. <sup>232</sup> It prohibits assignment of tort claims against the United States. <sup>233</sup>

### C. *Other Statutes That Bar Suit*

Even in the absence of exclusivity language, where a statute assigns a particular court jurisdiction over a subject, that jurisdiction may be exclusive and bar FTCA liability. For instance, the Clean Water Act grants the U.S. Court of Federal Claims jurisdiction over claims to recover certain cleanup costs from the United States. <sup>234</sup> Because Congress picked that court to re-

---

The bar only applies while the prisoner remains incarcerated. *See generally* Kerr v. Puckett, 138 F.3d 321, 323 (7th Cir. 1998). The "physical injury" requirement may be satisfied by a "less-than-significant-but-more-than-de minimis physical injury as a predicate to allegations of emotional injury." Perez v. United States, 2008 U.S. Dist. LEXIS 42906 (M.D. Pa. May 30, 2008) (holding immediate effects of asthma attack were de minimis) (internal citations omitted).

The Prison Litigation Reform Act operates effectively as an exception to the law enforcement proviso exception to the § 2680(h) exceptions to the FTCA's waiver of sovereign immunity. Whether it is worthwhile to deal a third time with the § 2680(h) avatar in the lecture setting depends upon the time available and the mood of the audience.

231. 31 U.S.C. § 3727:

#### § 3727. Assignments of claims

(a) In this section, "assignment" means—

(1) a transfer or assignment of any part of a claim against the United States Government or of an interest in the claim; or

(2) the authorization to receive payment for any part of the claim.

(b) An assignment may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued. . . .

232. The "statute . . . is aimed at voluntary assignments and does not affect transfers by operation of law." Danielson v. United States, 416 F.2d 408, 410 (9th Cir. 1969) (citing Erwin v. United States, 97 U.S. 392 (1878) ("obligation owing to the trustees in bankruptcy . . . by virtue of law . . . is not voluntary and a transfer pursuant to . . . [court] order is not such a transfer as falls within the provisions of the Anti-Assignment statute").

233. United States v. Shannon, 342 U.S. 288, 293-94 (1952) (holding that FTCA suit for damaged property purchased by plaintiff violated the Anti-Assignment Act).

The Anti-Assignment Act also prohibits the sale of annuities from structured settlements funded by the United States. Transamerica Assurance Corp. v. United States, 423 F. Supp. 2d 691, 695 (W.D. Ky. 2006), *aff'd*, TransAmerica Assurance Corp. v. Settlement Capital Corp., 489 F.3d 256, 257 (6th Cir. 2007).

234. 33 U.S.C. § 1321(i):

#### (i) Recovery of removal costs

In any case where an owner or operator of a vessel or an onshore facility or an offshore facility from which oil or a hazardous substance is discharged in violation of subsection (b)

(3) of this section acts to remove such oil or substance in accordance with regulations promulgated pursuant to this section, such owner or operator shall be entitled to recover the

solve those claims, its jurisdiction over cleanup cost is held to be exclusive.<sup>235</sup> Accordingly, suits for cleanup costs cannot be brought under the FTCA.<sup>236</sup>

Likewise, when statutes create comprehensive remedy programs, those remedies may be held to be exclusive and to preclude suit in tort even if they do not contain exclusivity language. For example, the Civil Service Reform Act (CSRA)<sup>237</sup> is held to be the exclusive remedy by which federal employees can seek redress of employment-related grievances<sup>238</sup> or improper job actions,<sup>239</sup> barring FTCA liability. The Prison Industries Fund<sup>240</sup> that creates a workers' compensation-type remedy for federal prisoners, is held to be the exclusive, non-FTCA remedy for prisoners injured while working in prison industries.<sup>241</sup> In a similar vein, the existence of a

---

reasonable costs incurred in such removal upon establishing, in a suit which may be brought against the United States Government in the United States Court of Federal Claims, that such discharge was caused solely by

- (A) an act of God,
- (B) an act of war,
- (C) negligence on the part of the United States Government, or
- (D) an act or omission of a third party without regard to whether such act or omission was or was not negligent, or of any combination of the foregoing causes.

235. *See* *Sea-Land Serv., Inc. v. United States*, 684 F.2d 871, 873 (Ct. Cl. 1982) ("the statute, therefore, clearly allocates exclusive jurisdiction of subsection (i)(1) actions to the Court of Claims. . . .").

236. *See* *Platte Pipe Line Co. v. United States*, 846 F.2d 610, 611-12 (10th Cir. 1988) ("[T]he Claims Court has exclusive jurisdiction over such claims. . . . [T]he intent of Congress as reflected in the Clean Water Act would be frustrated if Platte were allowed to bring an action for cleanup costs under the FTCA.").

237. Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (codified at scattered sections of 5 U.S.C.).

238. *Kennedy v. U.S. Postal Serv.*, 145 F.3d 1077, 1078 (9th Cir. 1998) (barring suit where supervisor destroyed plaintiff's records: "Federal employees alleging employment-related tort claims subject to the CSRA may not bring an action under the FTCA.").

239. *Premachandra v. United States*, 739 F.2d 392, 394 (8th Cir. 1984) (barring FTCA suit by VA employee who had been wrongly discharged and then reinstated: "Congress did intend the civil service laws to provide the sole remedy for federal employees in Premachandra's circumstances.").

240. 18 U.S.C. § 4126.

241. *See* *United States v. Demko*, 385 U.S. 149 (1966); *Vander v. U.S. Dep't of Justice*, 268 F.3d 661, 663 (9th Cir. 2001):

The Prison Industries Fund may be used to compensate "inmates . . . for injuries suffered in any industry or in any work activity in connection with the maintenance or operation of the institution in which the inmates are confined." 18 U.S.C. § 4126(c). That is the sole source of compensation for the injury; its remedy is exclusive.

Prisoners can bring suit under the FTCA for injuries they incur outside their prison industry workplace. *See* *Plummerv. United States*, 580 F.2d 72, 77 (3d Cir. 1978) (allowing suit for mental suffering by eight prisoners who contracted tuberculosis from a prisoner who had the disease).

*See generally* *United States v. Muniz*, 374 U.S. 150 (1963).

comprehensive system of benefits and support for military service members was a key factor in the Supreme Court's *Feres* decision, holding that the FTCA did not waive sovereign immunity for claims arising incident to military service.<sup>242</sup>

#### V. CONCLUSION

The FTCA succeeds at the task Congress set for it. It generally waives the United States' sovereign immunity for the torts of federal employees and provides an effective mechanism to resolve claims against the government administratively or, if necessary judicially. It also preserves the United States' sovereign immunity as Congress directed. The FTCA can be readily understood as a drawbridge across the moat of sovereign immunity, providing a remedy for those claims that fit within the bounds of the drawbridge, comply with the procedures of the bridge keeper, and avoid the exceptions Congress built into the bridge.

---

242. *Feres v. United States*, 340 U.S. 135, 142, 145 (1950).