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Paul Figley*

Defending Government Tort Litigation: Considerations for Scholars

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Abstract: I am honored by the invitation to participate in this symposium on “What Practitioners Can Teach Academics About Tort Litigation” and to share my views from the defense side of government tort litigation. I have a foot in each camp of the practitioner/academic divide. For three decades I defended the federal government in Federal Tort Claims Act (FTCA) litigation, serving for the last 15 of those years as Deputy Director of the FTCA Staff in the Civil Division of the U.S. Department of Justice. I worked with the FTCA and its jurisprudence on a daily basis—litigating cases, assessing and negotiating proposed settlements, advising agencies and Assistant U.S. Attorneys, and commenting on proposed legislation. I left Justice in 2006 to become an academic, a role in which I have had the pleasure of teaching Torts to first year law students and the time and freedom to write about sovereign immunity, the FTCA, and other things.

Tort liability of the federal government is a wonderfully complex area.¹ It ranges from the most ordinary matters—intersection collisions, medical malpractice, and slip and fall cases—to the extraordinary—such as nation-wide vaccine programs,²

¹ In this article I will address only federal government liability. It is what I know best and is representative of the sorts of concerns that also guide state and municipal liability.

² See *Berkovitz v. United States*, 486 U.S. 531, 546–47 (1988) (holding FTCA’s discretionary function exception did not bar suit alleging that polio vaccine licensed for release to public did not comply with mandatory FDA regulations); Karen Shichman Crawford & Jeffrey Axelrad, *Legislative Modifications to Tort Liability: The Unintended Consequence of Public Health and Bioterrorism Threats*, 45 CREIGHTON L. REV. 337, 337–44 (2012) (discussing tort aspects of the Swine Flu vaccine program adopted during the Ford Administration).

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responses to acts of international aggression³ and terrorism,⁴ and the near destruction of small towns,⁵ cities,⁶ and large metropolitan areas.⁷ Scholars attracted to this rich field should bear in mind that litigation against the government falls outside the norm of American tort law. The federal government is so categorically different from other tort defendants that many of the considerations often at play in tort litigation simply do not fit.

Some background would be helpful in explaining those differences. In American jurisprudence a sovereign state can be sued only to the extent that it has consented to be sued and only its legislative branch can give that consent.⁸ “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.’”⁹ Accordingly, as a general matter no one could sue the federal government in tort until Congress enacted the FTCA in 1946.¹⁰ Prior to that, the remedy for people injured by government torts was to exercise their First Amendment right to seek redress and pursue a private relief bill from Congress.¹¹

3 See *Galloway Farms, Inc. v. United States*, 834 F.2d 998 (Fed. Cir. 1987) (barring suit by wheat farmers when President Carter cancelled wheat sales to the Soviet Union in response to its invasion of Afghanistan).

4 See *Saltany v. Reagan*, 886 F.2d 438 (D.C. Cir. 1989) (per curiam), *aff'g in relevant part and rev'g in part*, 702 F. Supp. 319 (D.D.C. 1988) (barring suit for missile strike on Libya ordered by President Reagan).

5 *Creek Nation Indian Hous. Auth. v. United States*, 905 F.2d 312 (10th Cir. 1990) (holding FTCA discretionary function exception barred suit where bombs transported on truck of government contractor exploded during vehicle fire).

6 See *Dalehite v. United States*, 346 U.S. 15, 35–36 (1953) (holding FTCA discretionary function exception barred suit; Texas City, Texas, was destroyed when government fertilizer exploded while being loaded on ships).

7 See, e.g., *In re Katrina Canal Breaches Litig.*, 696 F.3d 436, 441 (5th Cir. 2012) (holding FTCA discretionary function exception barred suit alleging negligent maintenance of waterway).

8 See, e.g., *United States v. Testan*, 424 U.S. 392, 399 (1976).

9 *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”).

10 Congress had passed waivers of sovereign immunity pertaining to governmental torts in specific settings or circumstances. See, e.g., Act of June 16, 1921, ch. 23, 42 Stat. 29, 63 (providing remedy to persons injured by Post Office operations); Railroad Control Act of 1918, ch. 25, § 10, 40 Stat. 451, 456 (creating remedy against the United States for claims arising from the government’s operation of railroads and utilities under its wartime authority).

11 U.S. CONST. amend. I.

Legislation was a very poor way to decide tort cases. It was inefficient, slow, and arbitrary.¹² Membership on either chamber's Claims Committee was burdensome and unpopular—the system took a great deal of legislative time and attention but failed to decide claims on their merits.¹³ For decades Congress debated various proposals for a general torts bill.¹⁴ Finally, in 1946 it enacted the FTCA.¹⁵

The FTCA replaced the private bill system with a “well-defined, continually operating machinery to redress wrongs arising out of Government activity.”¹⁶ It established an administrative system to settle tort claims against the government that has worked effectively,¹⁷ but leaves claimants the option of going to court.¹⁸ The administrative procedures were amended in 1966 to require, *inter alia*, that a claimant notify the responsible agency of a claim in writing and state a sum certain.¹⁹

Congress enacted the FTCA to provide a remedy for people injured by run-of-the-mill torts of federal employees.²⁰ It gave courts the authority to decide cases

12 See Hearings on H.R. 5373 & H.R. 6463 before the H. Comm. on the Judiciary, 77th Cong. 49–55 (1942). This point was obvious generations ago. John Quincy Adams, Abraham Lincoln, and Millard Fillmore agreed that Congress should not decide private claims against the government. See *id.* at 49 (quoting John Quincy Adams); *id.* at 46 (quoting Abraham Lincoln); JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 2627 (1908) (citing First Annual Message (Dec. 2, 1850)).

13 See Hearings on H.R. 5373 & H.R. 6463, *supra* note 12, at 49–55 (Appx. II “Criticisms By Congressmen Of Existing Procedure Of Relief By Private Claim Bills”).

14 See generally Hearings on H.R. 5373 & H.R. 6463, *supra* note 12, at 40–42 (discussing the introduction of various legislative remedies in previous decades).

15 The FTCA was Title IV of the Legislative Reorganization Act of 1946. Pub. L. No. 79-601, 60 Stat. 812 (codified as amended in scattered sections of 28 U.S.C.). Title I prohibited private bills on claims “for which suit may be instituted under the [FTCA] . . .” *Id.* § 131.

16 See, e.g., Hearings on H.R. 5373 & H.R. 6463, *supra* note 12, at 45.

17 See 3 LESTER S. JAYSON & ROBERT C. LONGSTRETH, HANDLING FEDERAL TORT CLAIMS, § 17.01 (Matthew Bender 2020) (noting that in one year the Postal Service settled more than 10,000 administrative tort claims); Jeffrey Axelrad, *Federal Tort Claims Act Administrative Claims: Better than Third Party ADR for Resolving Federal Tort Claims*, 52 ADMIN. L. REV. 1331 (2000) (discussing the effectiveness of the administrative claims process).

18 As the Supreme Court explained in *Dalehite v. United States*, 346 U.S. 15, 24–25 (1953):

[The FTCA] was the offspring of a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work. And the private bill device was notoriously clumsy. Some simplified recovery procedure for the mass of claims was imperative. This Act was Congress' solution, affording instead easy and simple access to the federal courts for torts within its scope.

19 Act of July 18, 1966, Pub. L. No. 89-506, 80 Stat 306. See 28 U.S.C. §§ 2672, 2675(a).

20 See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 706 n.4 (2004) (“The FTCA was passed with precisely these kinds of garden-variety torts in mind.”); *Feres v. United States*, 340 U.S. 135, 139–140 (1950) (noting FTCA was intended for claims that “would have been actionable if inflicted by an individual or a corporation”).

that were not resolved on the administrative level, but defined their jurisdiction with care.²¹ Congress included a number of explicit exceptions to the Act's general waiver of sovereign immunity²² whose general purposes were to "ensur[e] that 'certain governmental activities' not be disrupted by the threat of damages suits; avoid[] exposure of the United States to liability for excessive or fraudulent claims; and not extend[] the coverage of the Act to suits for which adequate remedies were already available."²³ One of these exceptions, the discretionary function exception, explicitly clarified that litigation under the FTCA is not a means to challenge government policy.²⁴ Read as a whole, the FTCA implicitly makes the same point—it exists to provide a remedy for the kinds of negligent or wrongful acts for which a private person would be liable.²⁵

In *FDIC v. Meyer*²⁶ the Supreme Court addressed the FTCA's jurisdictional grant when it unanimously held that a claim asserting a constitutional tort is not cognizable under the FTCA:²⁷

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. 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."

21 See 28 U.S.C. § 1346(b)(1).

22 See 28 U.S.C. § 2680.

23 *Kosak v. United States*, 465 U.S. 848, 858 (1984) (citing numerous congressional hearings and reports).

24 See 28 U.S.C. § 2680(a); *Dalehite v. United States*, 346 U.S. 15, 26–27 (1953) (quoting Assistant Attorney General who testified before Congress):

The exception was drafted as a clarifying amendment to the House bill to assure protection for the Government against tort liability for errors in administration or in the exercise of discretionary functions. . . . 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."

25 It is not sufficient that a state or local government would be liable. See, e.g., *United States v. Olson*, 546 U.S. 43, 44 (2005) ("[W]e reverse a line of Ninth Circuit precedent permitting courts in certain circumstances to base a waiver simply upon a finding that local law would make a 'state or municipal entit[y]' liable").

26 510 U.S. 471 (1994).

27 *Id.* at 477.

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.²⁸

Accordingly, a claim is not valid unless, *inter alia*, a government employee acting within the scope of employment committed a negligent or wrongful act under circumstances where a private person would be liable under the “law of the place where the act or omission occurred.”²⁹ By adopting the substantive tort law of the place of the act or omission, Congress cut off any need to develop a federal common law for torts.³⁰

In practice, state law defines the causes of action and measure of damages available in a federal tort claim.³¹ State law affirmative defenses are available to the government.³² Other potentially applicable affirmative defenses arise under federal law. Some are statutory, including the FTCA’s explicit exceptions mentioned earlier,³³ two statutes of limitations,³⁴ and other federal statutes that independently bar suit—such as the Flood Control Act³⁵ and the Federal Employees Compensation Act.³⁶ Rarely, broader governmental defenses may apply—such as the Political Question doctrine³⁷ or the State Secret privilege.³⁸

Legislative changes to two areas of law are pertinent to why the government is a unique tort defendant. One addressed the immunity of federal employees; the second changed the sources of payments for judgments and settlements.

Prior to 1988, federal employees could not be sued for on-the-job torts because the weight of judicial authority held them to be “absolutely immune from State common law tort actions for harm that resulted from activities within the scope of

28 *Id.* (citations omitted) (bracketing by Court).

29 *Id.*

30 See *Richards v. United States*, 369 U.S. 1, 7 (noting that the FTCA “was designed to build upon the legal relationships formulated and characterized by the States”).

31 See *Hatahley v. United States*, 351 U.S. 173, 182 (1956). The FTCA does bar “interest prior to judgment [and] punitive damages.” 28 U.S.C. § 2674.

32 See, e.g., *Good Low v. United States*, 428 F.3d 1126, 1128 (8th Cir. 2005) (applying South Dakota law of comparative negligence and last clear chance doctrine).

33 28 U.S.C. § 2680.

34 28 U.S.C. § 2401(b) (providing administrative claim must be filed within two years of accrual and suit must be filed within six months of denial of administrative claim).

35 33 U.S.C. § 702c.

36 5 U.S.C. § 8101 et seq.

37 See, e.g., *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842–44 (D.C. Cir. 2010) (barring suit for missile strike on Sudan ordered by President Clinton).

38 *Bowles v. United States*, 950 F.2d 154, 156 (4th Cir. 1991) (barring suit by plaintiff injured in auto accident that alleged State Department negligently trained employee).

their employment.”³⁹ Federal employees also had statutory immunity for suits arising from their operation of motor vehicles under the Federal Driver’s Act.⁴⁰ On January 13, 1988, the Supreme Court held in *Westfall v. Erwin*⁴¹ that federal employees have such absolute immunity from suit for common law torts only if their allegedly tortious conduct is in the perimeter of their duties “and is discretionary in nature.”⁴² The Court explicitly invited Congress to give more direction, stating: “Legislated standards governing the immunity of federal employees involved in state-law tort actions would be useful.”⁴³

Within the year Congress enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the Westfall Act),⁴⁴ which provided federal employees complete statutory immunity for common law torts arising from acts or omissions within the scope of their federal employment and substituted the United States as defendant in their place.⁴⁵ Congress acted to preserve the morale and vigor of the federal workforce by protecting government employees from the risk of devastating liability.⁴⁶ The Westfall Act does not apply to claims based on the Constitution or a federal statute that creates a cause of action against individuals.⁴⁷

39 H.R. REP. NO. 100-700, at 2 (1988). See *Gen. Elec. Co. v. United States*, 813 F.2d 1273, 1276–77 (4th Cir. 1987) (recognizing absolute immunity for federal employees acting “within the outer perimeter of their line of duty”); *Poolman v. Nelson*, 802 F.2d 304, 307 (8th Cir. 1986). But see *Johns v. Pettibone Corp.*, 769 F.2d 724, 728 (11th Cir. 1985) (holding federal officials have absolute immunity only for discretionary conduct within scope of employment).

40 Federal Drivers Act, Pub. L. No. 87-258, 75 Stat. 539 (1961) (providing for substitution of the United States as a defendant under the FTCA in cases “resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment”). Similar statutes applied, *inter alia*, to federal medical personnel. See e.g., 10 U.S.C. § 1089 (Department of Defense); 22 U.S.C. § 2458 (NASA); 38 U.S.C. § 4116 (Veterans Administration); 22 U.S.C. § 2702 (State Department); 42 U.S.C. § 233 (Public Health Service).

41 484 U.S. 292 (1988).

42 See *id.* at 300.

43 *Id.*

44 H.R. REP. NO. 100-700, at 2–4; Westfall Act, 100 Pub. L. No. 694, § 2, 102 Stat. 4563 (1988).

45 The Westfall Act provides, in part:

The remedy against the United States provided by [the FTCA] for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee’s estate is precluded without regard to when the act or omission occurred.

100 Pub. L. No. 694, § 5, 102 Stat. 4563, 4564 (codified at 28 U.S.C. § 2679(b)(1)).

46 H.R. REP. NO. 100-700, at 3.

47 28 U.S.C. § 2679(b)(2).

Under its procedures, if a federal employee is sued for a covered tort for actions taken within the scope of employment the United States will be substituted as defendant,⁴⁸ the case will proceed under the FTCA,⁴⁹ and the individual will be dismissed from the action.⁵⁰

Payments of FTCA judgments and settlements, like any other government payment, must be in accordance with law. The Constitution's Appropriations Clause⁵¹ requires a specific funding source for any government payment.⁵² Absent specific authorizing legislation, judgments or settlements against the United States or federal agencies cannot be paid from agency appropriations.⁵³ Suitable legislation could be an appropriation for particular settlements or judgments, a general appropriation for categories of settlements or judgments, or a statute that authorizes payments from a pre-existing appropriation.⁵⁴

When first enacted the FTCA authorized the use of agency appropriations to pay settlements of up to \$1000⁵⁵—later amended to \$2500.⁵⁶ Judgments and settlements in excess of that amount could be paid only when Congress specifically appropriated money to pay them.⁵⁷ In the early 1950s the increasing number of judgments and settlements requiring specific appropriation bills placed an incessant administrative burden on Congress and agencies, causing delayed payment of valid judgments.⁵⁸ In response, in 1956 Congress created the Judgment Fund—a permanent, indefinite appropriation for the payment of judgments of up to \$100,000.⁵⁹ Accordingly, FTCA judgments for that amount or less were paid automatically.⁶⁰ The legislation successfully reduced the administrative burdens, the delays in payments, and the irritations associated with those delays.⁶¹ In 1961,

48 28 U.S.C. § 2679(d)(1), (5).

49 28 U.S.C. § 2679(d)(4).

50 28 U.S.C. § 2679(b)(1).

51 U.S. CONST. art. I, § 9, cl. 7.

52 3 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-978SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW §§ 14–31 to –32 (3d ed. 2008) [hereinafter GAO-08-978SP] (citing *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424–26 (1990)), available at <http://www.gao.gov/special.pubs/d08978sp.pdf>.

53 *Id.* §§ 14–30 to –44. *But see* 28 U.S.C. § 2672 (settlements for less than \$2500).

54 *See* GAO-08-978SP, *supra* note 52, §§ 14–31 to –32.

55 The Legislative Reorganization Act of 1946, Pub. L. No. 79-601, § 4.03, 60 Stat. 812, 843 (“CLAIMS OF \$1,000 OR LESS”).

56 Act of Sept. 6, 1959, Pub. L. No. 86-238, 73 Stat. 471.

57 *See* GAO-08-978SP, *supra* note 52, § 14–31.

58 *See id.*

59 Supplemental Appropriation Act of 1957, Pub. L. No. 84-814, § 1302, 70 Stat. 678, 694–95 (1956) (codified at 31 U.S.C. § 1304).

60 *Id.*

61 H.R. REP. NO. 87-733, at 2, 4 (1961); *see also* H. REP. NO. 87-428, at 2 (1961).

Congress expanded the Judgment Fund to cover litigative settlements of up to \$100,000⁶² and in 1966, to cover administrative settlements between \$2500 and \$100,000.⁶³ In 1977, it opened the Judgment Fund to pay, *inter alia*, any FTCA judgment regardless of amount and any FTCA settlement for more than \$2500.⁶⁴ The Judgment Fund legislation fundamentally altered the source for paying FTCA settlements and judgments; payments that previously came from the responsible agency's appropriations are now paid from an amorphous, unmonitored, unlimited account that has no corporeal existence and is not subject to regular Congressional review.

The federal government differs from other torts defendants in significant ways because of its status as a government, the procedures that apply to claims against it, and the goals it has when dealing with those claims. Being the government, by its very nature makes it different. The Supreme Court has long recognized that the federal government is a unique litigant.⁶⁵ It is involved in a broader range of litigation and is a party to more cases "than even the most litigious private entity."⁶⁶ Unlike other litigants, the executive and legislative branches are co-equal with the judicial branch and their interests must be respected.⁶⁷ In the torts context

62 Act of Aug. 30, 1961, Pub. L. No. 87-187, § 2, 75 Stat. 415, 416.

63 Act of July 18, 1966, Pub. L. No. 89-506, § (c), 80 Stat. 306.

64 Supplemental Appropriations Act of 1977, Pub. L. No. 95-26, ch. 14, 91 Stat. 61, 96-97. The Judgment Fund is an open-ended appropriation available to pay "final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when – (1) payment is not otherwise provided for; (2) payment is certified by the Secretary of the Treasury; and (3) the judgment, award, or settlement is payable under" the specified authorities, one of which is the FTCA. 31 U.S.C. § 1304. It is not "an all-purpose fund for judicial disbursement." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 432 (1990). Rather, it can be used "only on the basis of . . . a substantive right to compensation based on the express terms of a specific statute." *Id.*

65 *United States v. Mendoza*, 464 U.S. 154, 159 (1984) (holding nonmutual collateral estoppel is generally not available against the government); *U.S. Immigration & Naturalization Serv. v. Hibi*, 414 U.S. 5, 8 (1973) (holding government "is not in a position identical to that of a private litigant" for purposes of estoppel); *Horowitz v. United States*, 267 U.S. 458, 461 (1925) ("The United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign."); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917) (estoppel).

66 *Mendoza*, 464 U.S. at 159-61.

67 See e.g. *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 468 (1951) (recognizing Attorney General can validly withdraw authority of subordinates to release documents); Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 662-664 (2000) (explaining the theory that each branch of government has an independent obligation to interpret and protect the Constitution, necessitating some level of judicial deference to the political branches).

this includes recognition of the need for centralized management of litigation and limits on judicially mandated appearances of high level executive branch officers at settlement conferences.⁶⁸ The government also has a deeper pocket than any other defendant. The Judgment Fund is available to pay the entirety of any FTCA final judgment or valid settlement.⁶⁹

Government agencies—at any level from the local sanitation department on up—are not responsive to financial deterrence in the same way as private entities because those agencies are not motivated primarily by financial concerns such as accumulating or preserving wealth.⁷⁰ Agencies are unlikely to significantly alter their behavior in order to avoid tort liability because their key interests are political or programmatic.⁷¹ When agencies weigh the political cost of taking resources from core programs and functions to pay for safety and liability avoidance they are likely to choose preservation of their programs and functions.⁷² This is particularly so where agencies perceive that tort settlements or judgments will not alter their budgets, either because a general fund will pay the damages or because expended agency funds will be restored in the next budget cycle.⁷³ Tort damages paid as a result of such choices can be explained away as “a cost of public policy.”⁷⁴

68 See *In re Stone*, 986 F.2d 898, 905 (5th Cir. 1993) (in FTCA case “the district court abused its discretion in routinely requiring a representative of the government with ultimate settlement authority to be present at all pretrial or settlement conferences”); see also *United States v. U.S. Dist. Ct.*, 694 F.3d 1051, 1053 (9th Cir. 2012) (tax case).

69 31 U.S.C. § 1304(a). The Judgment Fund’s primary purpose is to pay judgments and settlements negotiated by the Department of Justice. See GAO-08-978SP, *supra* note 52, § 14–34.

70 See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 355–56 (2000) (concluding that one cannot expect governments to “behave like a private, profit-maximizing firm”); Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1539 (1992) (noting that government is less responsive to monetary signals).

71 Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 965 (2005) (“Government officials do not derive any intrinsic value from public funds . . . and therefore do not necessarily attach any disutility to losing it through compensation payments.”); Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 826 (2007) (noting “[T]he deterrent and punitive effects of tort liability are far more uncertain in the public sector”).

72 See Rosenthal, *supra* note 71, at 826 (“When the political cost of diverting public resources to loss prevention is sufficiently high, government will not make the investment even when it is economically justified”).

73 See Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 758 (2004) (examining similar incentive structures within the context of police departments); Levinson, *Empire-Building*, *supra* note 71, at 966 (acknowledging that legislators who approve of an agency’s activities may simply replace any losses imposed by liability in the following appropriations cycle).

74 See Krent, *supra* note 70, at 1539.

Federal agencies are particularly unaffected by tort deterrence considerations. Federal agencies make the same sorts of choices between funding functions and programs versus funding safety improvements as do the state and municipal agencies. They are also aware that the Judgment Fund will pay virtually all of any tort judgments or settlements arising from agency torts.⁷⁵ Finally, because of the Westfall Act, individual federal employees have no concern about being personally liable for torts they commit while in the course of their employment.⁷⁶

The controlling statutes and procedures also make the government a different sort of tort defendant. For example, federal agencies cannot settle claims or cases for programmatic, policy, or public relations purposes; to warrant settlement a claim must involve significant litigative risk for the government. In principle, this derives from the nature of sovereign immunity and Congress' power of the purse. Congress established the FTCA's scope and limitations, and it would be improper for federal agencies to make payments the statute did not authorize.⁷⁷

In practice, Department of Justice oversight of both FTCA litigation and significant administrative settlements prevents federal agencies and attorneys from entering FTCA settlements that are not well grounded in the facts and the law.⁷⁸ An agency might propose such settlements for reasons that arguably make sense from the agency's perspective. For example, an agency might propose to settle an automobile accident claim in order to show support for its employee and secure immunity for her under the Westfall Act even

⁷⁵ *But see* Andrew F. Popper, *Rethinking Feres: Granting Access to Justice for Service Members*, 60 B.C. L. REV. 1491, 1541–42 (2019) (arguing that federal government employees would be deterred by the prospect of being “hailed into court”).

⁷⁶ Two points should be made about Westfall Act immunity. First, that immunity is limited to common law torts. Federal employees remain subject to suit for Constitutional torts and for suit under a federal statute that creates a cause of action against an individual. Second, the fact that this immunity decreases the deterrence aspect of tort law hardly means that the immunity is ill-founded or should be rescinded.

⁷⁷ *See* Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 986 (1991) (noting that elected officials rather than government lawyers have the responsibility to decide public policy).

⁷⁸ The Attorney General holds the authority to approve administrative settlements over \$25,000 and litigative settlements and can delegate that authority. *See* 28 U.S.C. § 2672; 28 C.F.R. § 14.6(c) (2019). A settlement is valid if, *inter alia*, an attorney with authority to do so has approved it in writing. *See* 28 U.S.C. § 2672; 28 C.F.R. §§ 14.5, 14.6(c). A settlement that exceeds the authority of the government attorney who agreed to it is not valid and cannot be paid from the Judgment Fund. *See* GAO-08-978SP, *supra* note 52, § 14–34 (citing *White v. U.S. Dep't of Interior*, 639 F. Supp. 82 (M.D. Pa. 1986), *aff'd mem.*, 815 F.2d 697 (3d Cir. 1987)).

though the weight of evidence showed she was acting outside the scope of employment at the time of the accident. An agency might support an overly generous proposed settlement because that claimant seems particularly sympathetic or because such an award would further the agency's policy interests. On occasion, agencies have proposed non-meritorious FTCA settlements to cover-up embarrassing facts or gross misfeasance. In any of these circumstances the settlement would cost the agency nothing because the Judgment Fund would pay the damages. In considering whether to approve a proposed settlement, the Department of Justice considers only the legal merits and litigative risk.⁷⁹

Tort class actions, as a practicable matter, are not available against the government because of the FTCA's procedures. Under the Act's administrative claim requirement each claimant must file an executed administrative claim that sets forth a sum certain and evidences the authority of the signer to present the claim on behalf of the claimant.⁸⁰ Accordingly, a purported class action suit will be barred unless each class member is identified in an administrative claim that provides the required sum certain and evidence of authority.⁸¹ Of course, even if those administrative requirements are met, the case must satisfy the other requirements for a class action.⁸²

79 See, e.g., 28 C.F.R. Part 0, Subpart Y, Appendix [Directive No. 1-10] § 2(a) (2019). Disputes between agencies and the Department of Justice on tort settlements are rarely a matter of public record. One example is the Prescott litigation that consolidated fifteen lawsuits involving 216 former Nevada Test Site workers or their families who alleged that exposure to ionizing radiation caused their diseases. See *Prescott v. United States*, 858 F. Supp. 1461 (D. Nev. 1994). During the trial Department of Energy Secretary Hazel O'Leary gave a series of interviews in which she called on the government to compensate people who had been exposed to radiation and acknowledged that her views differed from those of the Department of Justice. See John H. Cushman, Jr., *204 Secret Nuclear Tests By U.S. Are Made Public*, N.Y. TIMES (Dec. 8, 1993), <https://www.nytimes.com/1993/12/08/us/204-secret-nuclear-tests-by-us-are-made-public.html>; Keith Schneider, *Energy Official Seeks to Assist Victims of Tests*, N.Y. TIMES (Dec. 29, 1993), <https://www.nytimes.com/1993/12/29/us/energy-official-seeks-to-assist-victims-of-tests.html>. The Prescott trial ended in a complete victory for the United States—the court ruled that suit was barred by the discretionary function exception, *Prescott*, 858 F. Supp. at 1466–71; the government had not violated the standard of care, *id.* at 1472–73; and plaintiffs failed to show causation, *id.* at 1473–79.

80 See 28 U.S.C. § 2675 (a), (b); 28 C.F.R. § 14.2 (a).

81 See *Lunsford v. United States*, 570 F.2d 221, 223–227 (8th Cir. 1977) (rejecting class action arising from flood allegedly caused by cloud seeding); *Caidin v. United States*, 564 F.2d 284, 286–87 (9th Cir. 1977) (rejecting class action arising from bank failure allegedly caused by negligence of the Comptroller of the Currency).

82 See Fed. R. Civ. P. 23 (a), (b); see also *In re Katrina Canal Breaches Consol. Litig.*, No. 05-4182, 2009 U.S. Dist. LEXIS 48837, at *275 (E.D. La. June 9, 2009).

The government has very different goals than the typical tort defendant. First, it affirmatively wants a functioning system that provides fair compensation in an orderly fashion to those injured by the run-of-the-mill common law torts of its employees.⁸³ As the Supreme Court recognized in *Indian Towing Co. v. United States*:⁸⁴

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 and not to leave just treatment to the caprice and legislative burden of individual private laws.⁸⁵

The Department of Justice is invested in seeing that the administrative claims process functions as Congress intended.⁸⁶ Of course, government attorneys will raise appropriate defenses, contest asserted damages, and vigorously negotiate settlements, but they will also support the claims process by affirmatively helping claimants avoid the FTCA's procedural pitfalls. For example, it is the practice of Civil Division attorneys to warn claimants of approaching statute of limitations deadlines.

Second, sometimes, even though the government has rock solid defenses or has won in court, Congress decides it should pay anyway. Three examples where FTCA suits were barred demonstrate the point. When government bombs aboard a contractor's truck destroyed much of Checotah, Oklahoma, Congress authorized the payment of up to \$5,000,000 to pay property loss claims.⁸⁷ After the Supreme

83 See Hearings on H.R. 5373 & H.R. 6463, *supra* note 12, at 37.

84 350 U.S. 61 (1955).

85 *Id.* at 68–69.

86 See also *McNeil v. United States*, 508 U.S. 106, 112 (1993) (“Every premature filing of an action under the FTCA imposes some burden on the judicial system and on the Department of Justice Although the burden may be slight in an individual case, the statute governs the processing of a vast multitude of claims”).

87 *Creek Nation Indian Hous. Auth. v. United States*, 905 F.2d 312 (10th Cir. 1990) (holding discretionary function exception barred suit where bombs transported on truck of government contractor exploded during vehicle fire). National Defense Authorization Act for Fiscal Year 1987, § 126, Pub. L. No. 99-349, 104 Stat. 710, 721 (1986) (amended by Pub. L. No. 99-500, 100 Stat. 1783-295 (1986)). At 3:00 a.m. on August 4, 1985, a contractor's truck carrying ten 2,000-pound government bombs collided with another vehicle on the outskirts of Checotah, Oklahoma, population 4000. Hearing Before the Subcomm. of the H. Comm. On Government Operations, 99th Cong. at 76–78 (MT-SS Rept. ON MOTOR VEHICLE ACCIDENT INVOLVING TRANSPORT OF USF MX 84 BOMBS AT CHECOTAH, OK 4 AUGUST 1984). Three bombs exploded, causing substantial property damage to the town's school, firetruck, churches, homes and much of its infrastructure. *Id.* at 8, 12 (Statement and Testimony of Mayor Beard). The burden of such destruction is devastating to a small town. *Id.* at 38 (colloquy among Mr. McCandles, Mr. Walker, and Mr. Stambaugh). Although it owned the bombs, the United States was not liable under the FTCA. *Creek Nation Indian Hous. Auth.*, 905 F.2d at 313.

Court held in *Dalehite* that the discretionary function exception barred suits arising from the explosion of government fertilizer that destroyed Texas City, Texas,⁸⁸ Congress authorized the payment of up to \$25,000 for each personal injury or property claim.⁸⁹ In response to the devastation caused by Hurricanes Katrina, Rita, and Wilma in 2005, and by Gustav and Ike in 2008, Congress appropriated nearly \$121.7 billion in hurricane relief to the Gulf States.⁹⁰

Allocations such as these occur when Congress makes the political determination that an event's circumstances justify such a remedy, or it has previously established programs that provide assistance in particular situations.⁹¹ These allocations are extra-judicial and an exercise of Congress' power of the purse. The payments rarely match the amounts that might be attained in successful tort litigation, but torts judgments include soft damages and typically must cover attorneys' contingency fees.

A final distinction is relevant to this discussion. The law pertaining to government liability is much less susceptible to judicial modification than is the law regarding private person liability. Most of the time, as Judge Calabresi noted in the *Journal of Tort Law* two years ago, "judges and judicial lawmaking are particularly important in Torts."⁹² Statutes, however, define the government's tort liability and

88 *Dalehite v. United States*, 346 U.S. 15, 17–23 (1953). On April 16 and 17, 1947, much of Texas City, Texas, was destroyed when government fertilizer exploded as it was loaded on ships for transport to Europe as part of a post-war program to increase food production. See *id.* at 45–47 (App. to opinion of the Court).

89 An Act to provide for settlement of claims resulting from the disaster which occurred at Texas City, Texas, on April 16 and 17, 1947, Pub. L. No. 84-378, ch. 864, § 5(b), (c), 69 Stat. 707 (1955).

90 See, e.g., *In re Katrina Canal Breaches Litig.*, 696 F.3d 436, 441 (5th Cir. 2012) (holding FTCA discretionary function exception barred suit alleging negligent maintenance of waterway); Bruce R. Lindsay & Jared C. Nagel, FEDERAL DISASTER ASSISTANCE AFTER HURRICANES KATRINA, RITA, WILMA, GUSTAV, AND IKE 13, Summary (2019) (hereinafter CRS FEDERAL DISASTER ASSISTANCE). It is not practicable to identify amounts directed to damage caused by each particular storm. *Id.* at 8. During Hurricane Katrina 1.2 million people evacuated from New Orleans, over 1,800 died, and 300,000 homes were destroyed or rendered inhabitable; economic losses were "between \$125 billion and \$150 billion." *Id.* at 13, Summary.

91 Occasionally, Congress may pass a private law for the benefit of a particularly sympathetic family. See, e.g., An Act For the relief of retired Sergeant First Class James D. Benoit and Wan Sook, Benoit, Pub. L. No. 107-2, 116 Stat. 3119 (2002) (awarding \$415,000 to compensate for death and wrongful retention of remains of David Benoit "resulting from a fall . . . from an upper level window while occupying military family housing supplied by the Army in Seoul, Korea"); 1 JAYSON & LONGSTRETH, *supra* note 17, at § 1.24. Private laws are not the norm, and most private relief bills do not become law. See also *id.* at § 3.02 (noting one purpose of the FTCA is to have a single standard applicable to all claimants).

92 Guido Calabresi, *Reflections of a Torts Teacher on the Bench*, 11 J. OF TORT LAW 161, 163 (2018) (explaining when and how courts can make structural changes in the law).

the remedies available against it. This follows from our understanding of sovereign immunity—that a sovereign state can only be sued if it has consented to be sued and that consent can only be given by its legislative branch.⁹³ While courts can interpret statutes like the FTCA that waive sovereign immunity, they are constrained by the statutory language and the legislative branch’s primacy in this area. Furthermore, having interpreted statutory language once, the judicial branch is hard pressed later to reinterpret that same language in a different way.⁹⁴

Where does all this leave academics who write on Federal Tort Claims Act issues? They might begin with recognizing the current state of affairs. First, the FTCA system of administrative claims with a right to go to court is largely successful in meeting its core purposes of providing reasonable compensation to people injured by the everyday, private person torts of government employees and doing so without undermining the government’s ability to govern. Second, this system has many moving parts and changes to one will likely affect others. Third, FTCA jurisprudence is an area in which major changes are much more likely to come through legislation rather than litigation.

From a practitioner’s viewpoint, the most helpful FTCA scholarship is that which accurately describes a complex area of the law and synthesizes developments in it. Also helpful are articles that address specific statutory issues that have not been finally resolved by the courts. Normative assessments and proposed reforms may be of less practical value in government liability jurisprudence than in other areas of tort law because substantial change is beyond the likely reach of the judiciary, although they may be helpful in assessing proposed legislation.

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⁹³ See, e.g., *United States v. Testan*, 424 U.S. 392, 399 (1976).

⁹⁴ This is the case with the Feres Doctrine, derived from the Supreme Court’s 1950 conclusion that when Congress enacted the FTCA it had not intended for the Act to encompass claims by service members arising out of activity incident to their military service. *Feres v. United States*, 340 U.S. 135, 146 (1950). Criticism of Feres as a “judicially created exception” to the FTCA began in the 1970s and gained momentum after Justice Marshall’s dissent in *Stencel Aero Eng’g Corp. v. United States*, 431 U.S. 666, 674 (1977) (Marshall, J. dissenting) (“I cannot agree that that narrow, judicially created exception to the waiver of sovereign immunity contained in the Act should be extended . . .”). By the 1990s that assertion was widely repeated in federal appellate decisions and academic articles. See Paul Figley, *In Defense of Feres: An Unfairly Maligned Opinion*, 60 AM. U. L. REV. 393, 465–67 (2010) (discussing history of the “judicially created exception” argument). Despite widespread calls for judicial modification or abolition of Feres, the only substantial narrowing of the Doctrine occurred when Congress enacted a statute to allow servicemembers to pursue medical malpractice claims under the non-adversarial Military Claims Act. 10 U.S.C. § 2733a(a), (b), added by § 731(a)(1) of the National Defense Authorization Act of 2020, Pub. L. 116-92, 133 Stat. 1457 (2019).