

EARLY WARNINGS, THIRTEENTH CHIMES: DISMISSED FEDERAL-TORT SUITS, PUBLIC ACCOUNTABILITY, AND CONGRESSIONAL OVERSIGHT

*Helen Hershkoff**

2015 MICH. ST. L. REV. 183

ABSTRACT

The head of the Veterans Administration resigned in 2014 when problems in VA hospitals came to light. At the time, many members of Congress expressed shock at the depth of VA mismanagement and duplicity. This Article argues that important information about VA—and other agency—performance can be gleaned from the hundreds of lawsuits filed each year against the United States under the Federal Tort Claims Act but are dismissed for lack of subject-matter jurisdiction. Dismissed FTCA suits potentially signal agency practices that warrant review and reform, but these decisions have extremely low salience, and a jurisdictional dismissal often is conflated with a merits determination that misconduct did not occur. This Article recommends various mechanisms that Congress and third-party overseers should use in order to investigate and follow-up on cases that are dismissed under the FTCA, cases that run the gamut from medical malpractice at the VA to sexual abuse in the military. The proposal is allied with “new governance” theories and their emphasis on learning and dynamic feedback as a basis for policy formation. The proposal also builds on theoretical commentary treating litigation as a public good that generates information critical to sound policy making. And the argument takes account of principal-agent problems and acknowledges when a third-party overseer might be preferred in place of Congress to undertake the investigation that is suggested. At a time when many

* The author is the Herbert M. and Svetlana Wachtell Professor of Constitutional Law and Civil Liberties and Co-director of the Arthur Garfield Hays Civil Liberties Program at New York University School of Law. She thanks Stephen Loffredo for helpful comments on an earlier draft and Inayat Ali Hemani and Jacob Rae for research assistance. Financial support for this project came from the Filomen D’Agostino and Max Greenberg Faculty Research Fund and is gratefully acknowledged.

commentators question whether tort remedies meaningfully deter public wrong doing, the proposal seeks to encourage greater accountability through information exchange and oversight.

TABLE OF CONTENTS

INTRODUCTION	184
I. FEDERAL TORTS, JURISDICTION, AND THE MEANING OF PRE-TRIAL DISMISSAL	195
A. The FTCA’s “Jurisdictional Brand”	195
B. Administrative Gatekeeping	196
C. The Involuntary Federal Plaintiff	200
D. Procedural-Turned-Jurisdictional Bases for Dismissal....	201
E. The Jurisdictional Wild Card.....	205
F. The Canary in the Coal Mine.....	206
II. FTCA SUITS AS INFORMATION SIGNALS	211
A. Claim Presentment: Information About Mental Health Care for Veterans	212
B. Jurisdictional Exceptions: Information About Sexual Abuse in the Military	218
III. OVERSIGHT AND OVERSEERS.....	228
A. Leveraging FTCA Suits to Improve Congressional Activity	229
1. <i>Policy Making: Information and Institutional Competence</i>	229
2. <i>Agency Performance: Information and Deterrence</i>	232
3. <i>Constituent Service: Information and Private Bills</i>	234
B. Information Transmission and Second Looks	236
1. <i>Lawmakers and Staff</i>	237
2. <i>General Accountability Office</i>	238
3. <i>Congressional Research Service</i>	241
4. <i>Administrative Conference of the United States</i>	242
C. Back to the Future: Judicially Barred Federal-Tort Claims and Private Bills	243
CONCLUSION	246

INTRODUCTION

In 2014, the head of the Veterans Administration (VA) resigned from office amidst a scandal that VA hospitals had created

false patient records to hide scheduling delays in veterans' medical care.¹ In response, Congress and the President worked with unusual bipartisan energy to pass the Veterans Access, Choice, and Accountability Act of 2014, with an estimated price tag of \$18 billion, revamping service delivery and allowing officials to be fired for poor performance.² Like Captain Renault in the movie *Casablanca*, politicians expressed shock at the depth of VA mismanagement and its managers' rank duplicity.³ Lawmakers easily could have known about substandard practices at the VA—and even attempted to undertake reform—had they been more attentive to their constituents' lawsuits under the Federal Tort Claims Act (FTCA), the statute that waives the immunity of the United States and subjects it to suit in federal court for various tortious acts by its agents.⁴ Successful FTCA claims identify clear instances of agency negligence;⁵ claims that are dismissed on jurisdictional grounds potentially reveal even deeper breakdowns in agency practice. Unfortunately, dismissed FTCA suits remain an unmined source of information for most policy makers. Admittedly, allegations in a federal-tort complaint, or any complaint, are by design one-sided and

1. Greg Jaffe & Ed O'Keefe, *Obama Accepts Resignation of VA Secretary Shinseki*, WASH. POST (May 30, 2014), <http://www.washingtonpost.com/politics/shinseki-apologizes-for-va-health-care-scandal/2014/05/30/e605885a-e7f0-1>.

2. Veterans Access, Choice, and Accountability Act of 2014, Pub. L. No. 113-146, 128 Stat. 1754 (codified as amended at 38 U.S.C. §§ 101-803 (2014)); see also Joe Davidson, *New VA Law Tackles Agency Problems, but Also Hurts Employee Rights*, WASH. POST (Aug. 7, 2014), <http://www.washingtonpost.com/blogs/federal-eye/wp/2014/08/07/new-va-law-tackles-agency-problems-but-also-hurts-employee-rights/> (summarizing the law and observing it includes “the gratuitous and punitive hit on the civil service rights of . . . members in the department”); David Hawkings, *Veteran Voices, Influence Fade on the Hill*, ROLL CALL (June 2, 2014, 3:53 PM), <http://blogs.rollcall.com/hawkings/veterans-affairs-scandal-congress-few-vets-on-hill/> (stating that the proposed comprehensive VA health bill “would cost at least \$18 billion during the next five years”).

3. See Lesatseaside, *Casablanca Gambling? I'm Shocked!*, YOUTUBE (Mar. 18, 2010), https://www.youtube.com/watch?v=SjbPi00k_ME.

4. See 28 U.S.C. § 1346(b); §§ 2671-2680 (2012).

5. The General Accounting Office's review of VA paid tort claims—undertaken in 2011 at special request of the Senate and House Committees on Veterans Affairs—suggested not only a pattern of substandard service delivery in veteran hospitals, but also a failure to transmit information about the problem within the agency so that reforms could be undertaken. See RANDALL B. WILLIAMSON, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-6R, VA HEALTH CARE: VA USES MEDICAL INJURY TORT CLAIMS DATA TO ASSESS VETERANS' CARE, BUT SHOULD TAKE ACTION TO ENSURE THAT THESE DATA ARE COMPLETE 3, 14 (2011), available at <http://www.gao.gov/assets/590/585978.pdf>.

have not yet been tested through discovery or trial. Some FTCA claims may even sound “kooky” or conspiratorial: Consider a complaint alleging that the VA altered the plaintiff–veteran’s medical records,⁶ or that the VA set up “mythical [f]ile numbers” resulting in the denial of compensation benefits to the plaintiff–veteran.⁷ Such claims may seem as presumptively implausible as those “about little green men, or the plaintiff’s recent trip to Pluto”⁸ that a court would reject as a matter of “judicial experience and common sense.”⁹ A year before the VA scandal came to light, a district court in Ohio dismissed with prejudice a veteran’s claim that the VA unjustifiably had delayed processing his benefits.¹⁰ Plaintiff, pro se and suffering from mental health problems, wrote much of the complaint in large capital letters; the court characterized the pleading as “delusional,” “frivolous,” and “rambling.”¹¹ Yet as recent headlines show, truth is sometimes stranger than even the most fantastic pleading.¹² For all of their biases and defects, federal-tort claims that are dismissed for lack of jurisdiction may signal agency problems, which—if timely investigated—could prevent administrative catastrophe and individual hardship.

The approaching seventieth anniversary of the Federal Tort Claims Act marks an occasion to think about the statute and to consider whether its strategy of legalizing constraints on

6. *Deloria v. Veterans Admin.*, 927 F.2d 1009, 1011 (7th Cir. 1991) (dismissing for failure to exhaust administrative remedies a claim of a veteran suffering from post-traumatic stress disorder “that VA employees conspired to deprive him of his benefits by altering his medical records”).

7. *Verner v. U.S. Gov’t*, 804 F. Supp. 381, 383-84 (D.D.C. 1992) (alleging that staff in Waco, Texas altered records in order to deny benefits to the plaintiff).

8. *Ashcroft v. Iqbal*, 556 U.S. 662, 696 (2009) (Souter, J., dissenting).

9. *Id.* at 679 (majority opinion).

10. *See Bush v. United States*, No. 1:13-CV-587, 2013 WL 5722802, at *7 (S.D. Ohio Oct. 21, 2013).

11. *Id.* at *1, *5-6.

12. *Cf.* VA OFFICE OF INSPECTOR GEN., VETERANS BENEFITS ADMIN., 13-03699-209, REVIEW OF THE SPECIAL INITIATIVE TO PROCESS RATING CLAIMS PENDING OVER 2 YEARS 2 (2014), available at <http://www.va.gov/oig/pubs/VAOIG-13-03699-209.pdf> (“[The Veteran Benefits Administration] removed provisionally-related claims from the pending inventory although additional work was needed to finalize these claims. This process ultimately misrepresented VBA’s actual workload of pending claims and the progress toward eliminating the overall claims backlog.”). The report states that staff in the Waco, Texas VA office “reported they felt pressured to make final or provisional decisions without all of the necessary evidence in order to close the claims.” *Id.* at 12. Processing manipulation variously resulted in the overpayment and the underpayment of claims depending on the individual claimant’s medical and financial situation. *See id.* at 14.

governmental action has improved public accountability.¹³ Called “the most sweeping waiver ever made of the traditional immunity of the sovereign,”¹⁴ the FTCA confers jurisdiction on the federal courts to enter money judgments against the United States for injuries negligently caused by its agents. Congress intended the statute to provide injured parties with “easy and simple” access to the federal courts for torts within its scope,¹⁵ thereby relieving itself of two burdens: investigating the thousands of tort claims submitted to it each year for payment¹⁶ and enacting legislation for any claimant Congress chose to compensate.¹⁷ Instead of the often criticized

13. Federal Tort Claims Act, Pub. L. No. 79-601, 60 Stat. 812, 842, (codified as amended at 28 U.S.C. § 1346(b), §§ 2671-2680 (2012)); see Herbert R. Baer, *Suing Uncle Sam in Tort: A Review of the Federal Tort Claims Act and Reported Decisions to Date*, 26 N.C. L. REV. 119, 120-21 (1948) (referring to the statute’s enactment date as when “governmental non-liability for tort was really doomed”).

The topic is timely for another reason. The Supreme Court of the United States has granted certiorari in a pair of FTCA cases concerning the availability of equitable tolling of the time periods to file administrative claims and to file federal lawsuits. See *June v. United States*, 550 F. App’x 505 (9th Cir. 2013), cert. granted, 134 S. Ct. 2873 (2014); *Wong v. Beebe*, 732 F.3d 1030 (9th Cir. 2013), cert. granted sub nom. *United States v. Wong*, 134 S. Ct. 2873 (2014). The author’s position is that the time periods are classic claims-processing provisions and not jurisdictional, so equitable tolling ought to be available. See *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 137-38 (2008). However, this Article does not primarily address the question that the Court has accepted for certiorari; whatever the Court’s disposition, the reforms I suggest remain necessary. Late filings sometimes are due to claimant error, especially when the claimant appears pro se. But the late filing also could be due to agency error, as for example, when an agency employee neglects to give the claimant important information about the dispute-resolution process or fails to provide a necessary form. The situations embedded in these cases may reveal agency lapses or administrative policies that require structural revision in addition to any judicially ordered relief for the individual claimant. Agency problems are not solved simply by characterizing them as jurisdictional and so outside the judiciary’s power to redress.

14. Robert E. Lewis, *Litigation Under the Federal Tort Claims Act*, 27 TEX. L. REV. 807, 807 (1949).

15. *Dalehite v. United States*, 346 U.S. 15, 24-25 (1953).

16. See, e.g., *United States v. Muniz*, 374 U.S. 150, 154 (1963) (reporting that from the sixty-eighth through the seventy-eighth Congresses, 2,000 private bills were introduced seeking compensation for tortious injury by agents of the federal government; 20% were enacted); see also Roscoe Pound, *The Tort Claims Act: Reason or History?*, 486 INS. L.J. 402, 404 (1963) (“It came to be settled practice . . . for injured individuals to apply to the legislature for relief by a special Act.”).

17. See Alexander Holtzoff, *The Handling of Tort Claims Against the Federal Government*, 9 LAW & CONTEMP. PROBS. 311, 323-26 (1942) (describing the congressional procedure for handling private bills).

private-bill system¹⁸—aspects of which are depicted in the popular movies *The Godfather* and *American Hustle*¹⁹—Congress consented to pay damages if adjudged liable under “the law of the place,” the state law that would govern liability if a private person were sued under the same circumstances as the United States.²⁰

Unlike a constitutional tort action—so-called *Bivens* liability—an FTCA judgment runs against the United States, which litigates in place of an individual officer and is formally substituted as a party.²¹

18. Justice Frankfurter referred to the “caprice and legislative burden of individual private laws.” *Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955); *Dalehite*, 346 U.S. at 24-25 (calling the private-bill system “notoriously clumsy”); see also Paul F. Figley, *Understanding the Federal Tort Claims Act: A Different Metaphor*, 44 TORT TRIAL & INS. PRAC. L.J. 1105, 1107-09 (2009) (discussing the administrative burdens that persuaded Congress to transfer decision making over tort claims to the Article III courts).

19. *The Godfather* includes a scene involving a father’s efforts to obtain a private bill conferring citizenship so his daughter can marry a man facing deportation to Italy. J. Geoff Malta, *Mario Puzo’s The Godfather*, <http://www.thegodfathertrilogy.com/gf1/transcript/gf1transcript.html> (last visited Jan. 26, 2015) (relating the scene where Godfather Corleone instructs his consigliere to buy a “special bill” from a congressman—“[n]ot . . . our *paisan*. Give it to a Jew congressman, in another district”). *American Hustle* recounts the infamous “Abscam” investigation:

“I understand you can introduce legislation,” said DeVito, the conversation recorded and later played back before a federal jury.

“Right, a bill. Private bill,” agreed Lederer. “Sure.”

The congressman left the hotel with a brown bag containing \$50,000 in cash.

“Spend it well,” DeVito told him.

Ted Sherman, *Jersey Hustle: The Real-Life Story of Abscam*, NJ.COM (Nov. 25, 2013, 8:09 AM), http://www.nj.com/inside-jersey/index.ssf/2013/11/jersey_hustle_the_real-life_story_of_abscam.html; see also Richard T. Boylan, *Private Bills: A Theoretical and Empirical Study of Lobbying* 1 (Jan. 15, 1998) (unpublished manuscript) (on file with New York University School of Law), available at <http://128.118.178.162/eps/pe/papers/9801/9801002.pdf> (discussing the scandals associated with private bills and modeling the idea that the introduction of a private bill increases the public’s perception of the sponsor as corrupt).

20. 28 U.S.C. §1346(b)(1) (2012). See generally 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 (1985).

21. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). See Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 815 (2010) (contrasting the *Bivens* model with government liability under the FTCA).

A judgment under the statute thus carries a powerful message: It establishes that the federal government as an entity is responsible for plaintiff's injuries because they were caused by official negligence. The history of the FTCA suggests that its legalization strategy—converting political grievances presented to Congress into legal claims cognizable in court—has succeeded on its own terms;²² it provides compensation to litigants who prevail on the merits. In 2006, the FTCA's sixtieth year, the President's budget assumed that judgments in federal-tort suits would total \$477 million.²³ Cases that are dismissed on jurisdictional grounds carry a more complicated message; the court has not yet reached the merits, so although the United States can claim a litigation victory, the question whether government negligence caused plaintiff's injury remains unasked and unanswered.

This Article argues that as with many efforts at legalization—defined as subjecting public action to judicially enforced legal constraints—courts have tended toward a legalistic approach in their interpretation of the FTCA that undermines the statute's effectiveness. Looking at the history of the FTCA, the trend ought not to be surprising. When it was enacted, commentary warned that procedural “snarls” might block valid statutory claims;²⁴ 1966 amendments mandating administrative review as a threshold to suit elicited similar concerns.²⁵ The “easy and simple” federal-court access that Congress substituted for the private-bill system is now complicated, as the First Circuit Court of Appeals has put it, by “a

22. Figley, *supra* note 18, at 1138 (stating that “[t]he FTCA can be . . . 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”).

23. See STACY ANDERSON & BLAKE ROBERTS, HARVARD LAW SCH. FED. BUDGET POLICY SEMINAR, CAPACITY TO COMMIT IN THE ABSENCE OF LEGISLATION: TAKINGS, WINSTAR, FTCA, & THE COURT OF CLAIMS, Briefing Paper No. 12, at 28, available at http://www.law.harvard.edu/faculty/hjackson/CapacitytoCommit_12.pdf.

24. Comment, *The Federal Tort Claims Act*, 56 YALE L.J. 534, 540 (1947) (discussing aspects of the FTCA that “may entangle unwary claimants in intricate legal snarls”). *But see* McNeil v. United States, 508 U.S. 106, 113 (1993) (stating that because the statutory text is clear “it is certainly not a ‘trap for the unwary’”).

25. See 3 LESTER S. JAYSON & ROBERT C. LONGSTRETH, HANDLING FEDERAL TORT CLAIMS: ADMINISTRATIVE AND JUDICIAL REMEDIES § 17.01 (Matthew Bender & Co. 2014) (1963) (setting out criticisms of and justifications for the administrative claim process).

barrier of technicalities;²⁶ even a meritorious FTCA claim may be dismissed on procedural or jurisdictional grounds before the United States has answered the complaint and denied plaintiff's factual allegations.²⁷ In such cases the court side steps the question of government wrong, focusing instead on the claimant's failure to follow a procedure that the government has attached to its waiver of sovereign immunity.²⁸ Under these circumstances, the decision to dismiss the suit should not be taken as judicial absolution of the government's alleged misconduct. Yet, as the theory of legalization predicts, legalism leads inexorably to "retreatism"—because the court has not found the challenged actions to be unlawful, the political branches decline to take responsibility even to investigate whether the alleged misconduct was in fact substandard and in need of revision.²⁹ A court's dismissal of the suit thus has unintended but negative spillover effects on political responsiveness, deflecting attention from possible agency misconduct that could require reform.

Karl N. Llewellyn famously stated, "For what substantive law says should be means nothing except in terms of what procedure says that you can make real."³⁰ That procedural rules might be undermining the FTCA's substantive goals creates a serious cost for individuals who are injured by the government's negligence but whose claims are dismissed on what Justice Scalia might call "nit-

26. *Lopez v. United States*, 758 F.2d 806, 809 (1st Cir. 1985).

27. See 14 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS* § 3658, at 622 (3d ed. 1998) ("The plaintiff's failure to follow each of the procedural prescriptions of the Federal Tort Claims Act can lead to very significant . . . litigation consequences.").

28. See Helen Hershkoff, *Waivers of Immunity and Congress's Power to Regulate Federal Jurisdiction—Federal-Tort Filing Periods as a Testing Case*, 39 SETON HALL LEGIS. J. (forthcoming June 2015).

29. See Jeffrey L. Jowell, *Implementation and Enforcement of Law*, in *LAW AND THE SOCIAL SCIENCES* 287, 295 (Leon Lipson & Stanton Wheeler eds., 1986) (stating "[t]he essence of the defect of legalization lies in the tendency to legalism" and characterizing "retreatism" as an "avoidance of decisions, refusal to take responsibility for any definitive rule application, or cynical manipulation of the rules for the purely personal gain or convenience of the official"). Jowell drew from the idea of retreatism developed by Robert A. Kagan in his various writings about regulatory enforcement. See, e.g., ROBERT A. KAGAN, *REGULATORY JUSTICE: IMPLEMENTING A WAGE-PRICE FREEZE* 94-96 (1978); see also Robert K. Merton, *Social Structure and Anomie*, 3 AM. SOC. REV. 672, 676 (1938) (coining the term retreatism as a form of deviance).

30. K. N. LLEWELLYN, *THE BRAMBLE BUSH: SOME LECTURES ON LAW AND ITS STUDY* 8 (1930).

picking” grounds.³¹ But legalism also generates public costs apart from the individual misery involved. Social psychologists predict that a legal system’s use of unfair procedure erodes social trust and dilutes support for public institutions.³² This insight has particular relevance given the parties to an FTCA suit: ordinary people versus the United States. Court dismissals on procedural and jurisdictional grounds, often before discovery, may constrict access to information about agency practices, and for this reason can distort policy making by isolating lawmakers from problems that may need investigation and reform. Moreover, when courts treat injuries as not cognizable,

31. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 285 (2012) (“It is one thing to regard government liability as exceptional enough to require clarity of creation as a matter of presumed legislative intent. It is quite something else to presume that a legislature that has clearly made the determination that government liability is in the interest of justice wants to accompany that determination with nit-picking technicalities that would not accompany other causes of action.”); *cf.* Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 *IND. L.J.* 119, 127 (2011) (drawing “attention to the substantial costs imposed by heightened pleading standards on plaintiffs with meritorious claims”). As an example, consider a plaintiff who commences a personal-injury suit in state court, unaware—and indeed, reasonably unaware—that defendant is a federal employee, that the United States will substitute itself as a party, that the new defendant will remove the action from state to federal court, that a garden-variety state-tort action will be restyled as a federal-statutory-tort suit, and that eventually the federal action will be dismissed because plaintiff did not timely present the claim to a federal agency for investigation and possible settlement, and now the time to file the administrative claim has run, despite the fact that the state statute of limitations on the claim has not run and so a private individual, if sued, would be liable under state law for the injuries caused by the federal officer’s acts. *See, e.g.,* Kelly v. Total Health Care, Inc., No. CIV.JFM-99-2433, 2000 WL 151280, at *1 (D. Md. Jan. 28, 2000), *aff’d*, 3 F. App’x 15 (4th Cir. 2001); 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, 89-91 (2000) (discussing the problem). In other cases, government lawyers, relying on the statute’s use of the “law of the place” to determine liability, exacerbate the legalist morass by raising local defenses of the sort—such as state statutes of repose—that Justice Frankfurter decades ago characterized as inconsistent with the statute. *See* *Indian Towing Co. v. United States*, 350 U.S. 61, 63-65 (1955) (stating that the FTCA “cuts the ground from under” the doctrine of sovereign immunity and is “not self-defeating by covertly embedding the casuistries of municipal liability for torts”); *see also* George A. Bermann, *Federal Tort Claims at the Agency Level: The FTCA Administrative Process*, 35 *CASE W. RES. L. REV.* 509, 661 (1985) (warning against the government’s “apparent practice of routinely raising technical defects in a claim as a jurisdictional defense in FTCA litigation, even when the defect relates to purely regulatory as opposed to statutory requirements and even though the agency processed and denied the claim on its merits during the administrative phase”).

32. *See* TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 162-63 (1990).

the other branches tend to push those injuries out of view as not important or as not meriting attention. In classic Holmesian fashion,³³ a claim that is dismissed as outside the government's waiver of sovereign immunity may tend perversely to ratify the status quo; the government conduct that forms the core of the litigation is ignored while savings to the public fisc are celebrated. Whether harm actually occurred and reform is needed are questions that fall out of the picture.

The point of this Article is neither to criticize the strategy of legalization nor to urge elimination of the FTCA's damages remedy.³⁴ Rather, the goal is to recommend accountability mechanisms that can supplement the FTCA through political action, so that elected branches do not retreat from problems behind the shield of legalist excuses. Commentary observes that Congress often lacks "information needed to understand the capacity and limitations of the courts."³⁵ So, too, Congress lacks information needed to understand the capacity and limitations of judicial decisions—specifically, to decipher the signals that dismissed FTCA suits send about agency performance. At a time of acute government dysfunction,³⁶ a project aimed at educating Congress to cure its

33. See *United States v. Thompson (The Western Maid)*, 257 U.S. 419, 433 (1922) ("[If t]he United States has not consented to be sued for torts, . . . it cannot be said that in a legal sense the United States has been guilty of a tort. For a tort is a tort in a legal sense only because the law has made it so.").

34. Commentators disagree as to whether tort liability deters public actors from misconduct. Compare Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 347-48 (2000) (arguing that the traditional tort compensation system does not deter the government in the same manner as a private entity), with Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 847-48 (2001) (arguing that the traditional tort system does have a deterrent effect on governmental actors). Even when money judgments are entered in an FTCA suit, the damages generally are not charged against the agency's budget (the exception is for judgments that are less than \$2,500), and the individual officer is absolutely immune from judgment for torts done in the course of employment. See 28 U.S.C. § 2672 (2012). Nevertheless, the compensatory and social-trust goals of damage awards are distinct from that of deterrence and are important to affected individuals as well as to the public.

35. Robert A. Katzmann, *The Underlying Concerns*, in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 7, 10 (Robert A. Katzmann ed., 1988).

36. See, e.g., Cameron Joseph, *Government Dysfunction Biggest Threat to U.S.*, HILL (May 11, 2014, 11:48 AM), <http://thehill.com/blogs/blog-briefing-room/205797-gates-biggest-threat-to-america-is-government-dysfunction>

misperceptions about case dismissals may appear not only naïve and esoteric, but also so narrow as to be trivial. To the contrary, the project has conceptual and practical urgency given the principle of public accountability that informs the FTCA and the range of problems to which the statute applies—problems that cut across agencies, employees, and partisan interest.

The Article proceeds in three parts. Part I sets the stage by explaining the jurisdictional and procedural framework of the federal-tort claims process. The FTCA is well known as a waiver of sovereign immunity, but is less familiar in its practical details outside the special circle of plaintiff-side tort lawyers and government lawyers.³⁷ Understanding the framework helps to explain the inexorable trend toward legalism in the judiciary's approach; it also highlights the error in conflating a dismissed federal-tort claim with a finding that the government's conduct was neither injurious nor negligent.

Part II looks at two categories of FTCA cases with an eye toward the information that dismissed lawsuits might generate about agency performance: cases dismissed on procedural grounds for failure to meet the requirement of agency presentment and cases dismissed on jurisdictional grounds because the claim is said to be outside the government's waiver of sovereign immunity. In both, dismissal of the suit means that the claim is "forever barred," and court-ordered damages will never be available.³⁸ The cases discussed—admittedly not a scientific sample—mark government "victories," illustrate a typical ground of pre-merits dismissal, and show how the dismissal encourages political "retreatism" by deflecting legislative attention away from what may be a serious problem of agency performance because the court instead has focused on technical defects in the plaintiff's case. Although the dismissal may save the taxpayer money in the short run, the public suffers a considerable cost if Congress fails even to investigate the distress signals that these decisions send. I argue that these cases could serve as "early warnings" to Congress of agency problems; they also may sound the unwelcome "thirteenth chime" of a clock, indicating the persistence of a problem despite the appearance of institutional regularity.

(discussing statements made by former Defense Secretary Robert Gates that congressional gridlock threatened national security).

37. See generally PAUL FIGLEY, *A GUIDE TO THE FEDERAL TORT CLAIMS ACT* (2012).

38. See 28 U.S.C. § 2401.

Part III turns to reform. My aim is to leverage dismissed FTCA cases to regulatory advantage—to turn information costs into information benefits—by complementing legal accountability with political accountability through enhanced oversight mechanisms.³⁹ It is broadly acknowledged that an information gap exists between Congress and the courts, and that mediating structures can improve inter-branch communication.⁴⁰ In an effort toward bridging the judicial–legislative divide, the Governance Institute created a pilot project enabling Congress to take a “second look at laws” when court decisions identify grammar errors, textual gaps, or legal ambiguity that warrant “statutory housekeeping” and technical revision.⁴¹ Court decisions dismissing FTCA claims on procedural or jurisdictional grounds likewise require a second look—at the agency conduct that precipitated the filing of the lawsuit. Yet every branch of government lacks incentives to respond to or to act on the information that these decisions contain. The court has declined to reach the merits and has barred the claim forever, the U.S. Attorney’s office has declared victory, and the agency whose employees are implicated in the suit likely would prefer to keep performance problems under the radar.

Inviting Congress to take a second look at agency performance through the lens of dismissed FTCA cases resonates with “new governance” theories and their emphasis on learning and dynamic feedback as a basis for policy formation.⁴² The proposal would support efforts to increase dialogue between legislators and courts,

39. Of course, similar mechanisms should be in place when the government loses an FTCA suit. The theory of tort liability is that a money judgment motivates the tortfeasor to take a second look at practices that do not produce optimal levels of care. Whether that theory works in practice is an open question. Unless agencies are required to do so, it is unlikely that they will conduct an after-action report to determine whether existing rules and regulations, methods of training, levels of supervision, and so forth contributed to the alleged injuries. But the practice would be a sound one. *See, e.g.,* Roger E. Honomichl, *Claims Judge Advocate Communication with Medical Treatment Facilities*, ARMY LAW., July 1987, at 63 (reporting that although Army claims personnel prepared after-action reports on paid medical malpractice claims, the information was not routinely transmitted to medical staff who sought access to this information for guidance “on how to avoid substandard care”).

40. *See, e.g.,* Katzmann, *supra* note 35, at 7.

41. *See* Robert A. Katzmann & Stephanie M. Herseth, *An Experiment in Statutory Communication Between Courts and Congress: A Progress Report*, 85 GEO. L.J. 2189, 2189 n.3, 2190 (1997) (internal quotation marks omitted).

42. *See, e.g.,* Daniel J. Fiorino, *Environmental Policy as Learning: A New View of an Old Landscape*, 61 PUB. ADMIN. REV. 322, 322 (2001) (putting forward “a learning model [as] a useful way to understand and explain policy change”).

and would encourage communication between lawmakers and constituents. The proposal is consistent with commentary, including my own work with Kevin E. Davis, arguing that litigation is a public good that provides policy makers with important information that may not be available from other sources.⁴³ And the argument takes account of principal-agent problems by acknowledging that a third-party overseer might be needed in place of Congress to undertake the suggested review. At a time when commentators are focused on how government can nudge citizens to take appropriate action, the proposal uses citizen grievances to nudge Congress to exercise meaningful oversight of government conduct and to achieve regulatory reform when needed.⁴⁴ To come full circle, Part III returns to the question of compensation for the victims of government negligence when claims are held not cognizable within the meaning of the FTCA.

I. FEDERAL TORTS, JURISDICTION, AND THE MEANING OF PRE-TRIAL DISMISSAL

Many claims fail under the FTCA, not because the court finds that the government's actions were not negligent or injurious, but because the suit is dismissed for procedural defects and a lack of jurisdiction. This Part describes the complicated procedures that a claimant must navigate in order to avoid having her complaint dismissed on procedural or jurisdictional grounds; it sketches out the kinds of information that the lawsuit potentially generates; and it seeks to explain why claims that are dismissed on procedural grounds or for lack of jurisdiction have extremely low salience and are likely to remain unknown or invisible to most lawmakers.

A. The FTCA's "Jurisdictional Brand"

Congress enacted the FTCA in 1946 with the goal of providing persons injured by government negligence an "easy and simple" pathway to federal judicial relief.⁴⁵ To that end, the statute grants the federal district courts exclusive jurisdiction over

43. See Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 513-15 (2011) (referring to information as a "key byproduct of public adjudication").

44. See generally RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

45. *Dalehite v. United States*, 346 U.S. 15, 24-25 (1953).

civil actions on claims against the United States, for 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 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.⁴⁶

Nevertheless, practice under the FTCA has become difficult and complex, complicated by 1966 amendments that establish a two-tier decision making process and by judicial decisions that impose additional procedural requirements. The FTCA's "jurisdictional brand," as one appeals court has described it, is now "replete with mandates, deadlines, requirements and exceptions" and "cannot be reasonably classified as claimant-friendly."⁴⁷ In consequence, large numbers of FTCA suits are dismissed on jurisdictional or procedural grounds before the court has considered the merits or the parties have undertaken discovery; these dismissals may inadvertently camouflage serious administrative problems and encourage the political branches to retreat from investigating problems despite the need for reform.

B. Administrative Gatekeeping

The 1946 statute by design shifted responsibility for disputes about government negligence from Congress to the Article III courts.⁴⁸ Initially, the FTCA gave the claimant the option of either immediately filing a federal lawsuit or instead first trying to obtain an administrative settlement that would obviate the need for litigation (at least for claims that were valued at less than \$2,500).⁴⁹ In 1966, Congress amended the FTCA to mandate agency review and to expand the agency's settlement authority.⁵⁰ The statutory change resulted in a further shift of responsibility, this time from the

46. 28 U.S.C. § 1346(b)(1) (2012).

47. *Mader v. United States*, 654 F.3d 794, 807-08 (8th Cir. 2011).

48. *See* *Bermann*, *supra* note 31, at 531.

49. *Id.* at 530-32.

50. *See id.* at 531-32. Currently settlement may be finalized without the prior written approval of the Attorney General if for less than \$25,000, and even here exceptions apply. *See* 28 U.S.C. § 2672 (providing that the heads of federal agencies "in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any [FTCA] claim"). Prior to the amendment, 80% of all litigated cases settled, but the statistics do not indicate whether settlement came before or after discovery. *See* H.R. REP. NO. 89-1532, at 6-9 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2515, 2516-17.

courts to the agencies whose actions were involved with the events giving rise to the claim of injury.⁵¹ The statute now provides that “[a]n action shall not be instituted upon a claim . . . unless the claimant shall have first presented the claim to the appropriate Federal agency.”⁵²

What does it mean to present a claim to an agency? The statute only indirectly addresses this question. One section provides that a court action cannot “be instituted for any sum in excess of the amount of the claim presented to the federal agency,” other than when newly discovered evidence or intervening facts impact the amount of the claim.⁵³ In addition, the Attorney General has promulgated regulations, stating:

[A] claim shall be deemed to have been presented when a Federal agency receives from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident; and the title or legal capacity of the person signing, and is accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative.⁵⁴

Another requirement of presentment is set out in a separate statutory section governing the period for filing a claim with the agency.⁵⁵ The claim must be “presented in writing to the appropriate Federal agency within two years” of the claim’s accrual, regardless of the state statute of limitations that would apply to a private suit.⁵⁶

51. See Bermann, *supra* note 31, at 531.

52. 28 U.S.C. § 2675(a). The sole exceptions from the requirement of presentment are claims that arise by compulsory counterclaim, crossclaim, or third-party claim. *Id.*; see, e.g., *Thompson v. Wheeler*, 898 F.2d 406, 410 (3d Cir. 1990) (providing an example of a third-party complaint that was removed to federal court, treated as an FTCA suit, and presentment was not required).

53. 28 U.S.C. § 2675(b).

54. 28 C.F.R. § 14.2(a) (2014).

55. 28 U.S.C. § 2401(b).

56. *Id.* Under the Attorney General’s regulations, if a claim is presented to the wrong agency, the receiving agency “shall transfer it forthwith to the appropriate agency,” advising the claimant of the transfer, and if the correct agency cannot be identified, will return the claim to the claimant. 28 C.F.R. § 14.2(b)(1). Moreover, if multiple agencies are “or may be involved in the events giving rise to the claim,” an agency that has been presented with the claim “shall contact all other affected agencies” to determine which agency shall “investigate and decide the merits of the claim,” and the designated agency shall inform the claimant of its role. *Id.* § 14.2(b)(2). It follows that in presenting a claim, a claimant is expected to “identify each agency to which the claim is submitted”; if the claim fails to indicate that

The statute does not say what procedures agencies should use in investigating or settling the claims that are presented; regulations promulgated by the Attorney General provide “guidance,” including authorizing the use of alternative dispute resolution, but the regulations make clear that they do “not create or establish any right to enforce any provision . . . on behalf of any claimant against the United States.”⁵⁷ Typically, agency staff responsible for investigating

multiple agencies were involved in the events giving rise to the injury, “and any one of the concerned Federal agencies takes final action on that claim,” the settlement is conclusive upon the claimant who is barred from seeking additional relief. *Id.* § 14.2(b)(3). However, a second agency may treat the final agency decision as a request for reconsideration, unless federal litigation already has been filed. *Id.* Conversely, if the claimant files a new claim with the second agency, the six-month rule is not tolled “unless the second agency specifically and explicitly treats the second submission as a request for reconsideration . . . and so advises the claimant.” *Id.* § 14.2(b)(4).

57. 28 C.F.R. § 14.6. Some agencies have promulgated regulations for this purpose. As an example, consider regulations of the Department of Agriculture:

- (e) Advice to Prospective Claimants. When a private person complains of injury or loss of property or personal injury or death alleged to be caused by the negligent or wrongful act or omission of an agency employee, and expresses an intention to seek monetary compensation for damages from the Government, the agency must inform the person of procedures for filing a claim under the FTCA.

Unless a private person appears to have incurred concrete damages and to have expressed an intention to seek monetary compensation from the United States, agency personnel should not encourage or require them to submit FTCA claims. . . . Mere expression of dissatisfaction with the conduct of agency programs does not provide grounds for suggesting a claim under the FTCA would be an appropriate method to indicate such dissatisfaction.

. . . .
Where a claim has been submitted by an attorney for the claimant, all correspondence should be directed to the attorney rather than the claimant.

- (g) Administrative Report. When the claim is forwarded to OGC for determination, it must be accompanied by a single memorandum in narrative form setting forth the agency position on the claim.

The administrative report should be reviewed by the Tort Contact to ensure that it contains:

- (1) A background description of the program involved, referencing statutory authority and applicable regulations.

and processing the claim will require the claimant to provide supporting information, and failure to do so can result in the denial of the claim. Again, the Attorney General's regulations enumerate some of the kinds of evidence that might be required.⁵⁸ Agencies have not elected to be governed by the Federal Rules of Civil Procedure; the usual rules of federal evidentiary privilege do not attach to the claimant's disclosures; and the agency does not provide an indigent or uninformed claimant with legal counsel or paralegal assistance.⁵⁹ The claimant has no symmetrical right to obtain

-
- (2) A complete description of the events in question, including references to documents included and a response to every allegation made in the claim.
 - (3) An agency analysis of who was at fault for losses or damages alleged in the claim, referencing the opinion of technical experts, who may be either non-involved agency personnel or outside consultants, as necessary.
 - (4) An analysis of damages claimed, unless OGC advises that it does not need them.
 - (5) Any policy reasons arguing for or against settlement.
 - (6) Details of any claims USDA might have against the claimant, whether or not they arose out of the incident which is the subject of the claim against USDA.

To the administrative report should be attached copies of all documents relevant to the issues involved in the claim. The claim and supporting documents should be submitted to OGC in triplicate. Original agency records should not be forwarded to OGC unless specifically requested. However, they should be preserved and remain available for use in litigation.

Office of the General Counsel Directive 2510-001, Claims Against the United States § 7(e)-(g) (U.S.D.A. 1995).

58. See 28 C.F.R. § 14.4(a)(1)-(6) (providing that in "a claim based on death, the claimant may be required to submit" documentation that includes an authenticated death certificate, information about employment and salary, information about survivors and support provided to each, itemized bills for medical and burial expenses, and information about decedent's "general physical and mental condition before death"). The regulations further require a physician's detailed statement if damages for pain and suffering are claimed, as well as "[a]ny other evidence or information which may have a bearing on either the responsibility of the United States for the death or the damages claimed." *Id.* § 14.4(a)(7)-(8).

59. Some agencies have designed their claims-investigation processes to shield all intra-agency information under the attorney-client privilege. See, e.g., Office of the General Counsel Directive 2510-001, *supra* note 57, § (7)(c) ("Investigation. When an agency receives a claim or learns of an incident likely to result in a claim, it is responsible for ensuring that an investigation of the incident is undertaken and for the preservation of all relevant evidence. Any such investigation is conducted at the request of OGC [Office of General Counsel], and any report derived from such investigation is considered attorney work product.").

information from the agency and is not given access to any information about the events leading to the injury, or even the name of the officer or officers who engaged in the tortious conduct. Although the claimant may seek information about the events through the Freedom of Information Act, that statute exempts from disclosure many categories of information that might be significant to the claimant's establishing liability;⁶⁰ moreover, many claimants appear before the agency pro se and may not know about FOIA or how to use it.

While the claim is pending before the agency, the claimant may amend the claim "at any time prior to final agency action."⁶¹ The agency has six months from the date of any amendment to reach a decision, and the claimant's time to file in court "shall not accrue until six months after the filing of an amendment."⁶² Otherwise, once the agency has "finally denied" the claim and sent written denial by certified or registered mail, the claimant has six months to file a federal action.⁶³ If the agency does not deny the claim within the six-month period, the claimant may elect to proceed to court.⁶⁴

C. The Involuntary Federal Plaintiff

The other route into federal court may be called involuntary: An injured party files a garden-variety personal-injury suit in state court, not knowing that the tortfeasor is an agent or employee of the United States, and defendant then removes the action to federal court. Initially, the FTCA did not bar the injured party in this circumstance from suing the federal employee in state court.⁶⁵ Two statutory enactments have closed off this possibility. A 1962 amendment makes the FTCA the exclusive remedy for tort actions against federal agencies,⁶⁶ and a 1988 amendment, resulting from enactment of the Federal Employees Liability Reform and Tort Compensation Act (known as the Westfall Act), makes the FTCA the exclusive remedy for tort actions against federal employees arising

60. See, e.g., *Crumpton v. Stone*, 59 F.3d 1400, 1402 (D.C. Cir. 1995) (discussing the relation between FOIA requests and the FTCA exclusion of discretionary functions from liability).

61. 28 C.F.R. § 14.2(c).

62. *Id.*; see Donald N. Zillman, *Presenting a Claim Under the Federal Tort Claims Act*, 43 LA. L. REV. 961, 985 (1983) (discussing the procedure).

63. 28 U.S.C. § 2675(a) (2012).

64. *Id.*

65. 28 U.S.C. § 2679 (1952).

66. Act of Sept. 21, 1961, Pub. L. No. 87-258, 75 Stat. 539.

from the scope of their employment.⁶⁷ When a suit is mistakenly filed in state court, the Attorney General defends the lawsuit, certifies that the employee was working in the scope of federal employment, substitutes the United States for the employee, and removes the action to federal court.⁶⁸ The Westfall Act bars relief against individual employees for torts committed in the course of employment even if the FTCA precludes relief against the government.⁶⁹

D. Procedural-Turned-Jurisdictional Bases for Dismissal

Once the tort claim becomes a federal lawsuit, the government may seek to dismiss the action on a number of threshold grounds. Some of these grounds are typical of suits involving the United States as a defendant.⁷⁰ Other procedural rules are special to federal-tort cases. In particular, courts treat the condition of presenting a claim to an agency as a jurisdictional requirement that cannot be waived; moreover, a claim must include a written statement that is sufficiently detailed and that specifies a sum certain for the damages sought or else it will be jurisdictionally barred.⁷¹ The circuits are divided as to the jurisdictional significance of the Attorney General's regulation requiring proof of representative authority.⁷²

67. Act of Nov. 18, 1988, Pub. L. No. 100-694, § 5, 102 Stat. 4564.

68. 28 U.S.C. § 2679(c)-(d) (2012). "Westfall" certification also takes place if the suit is filed in federal court but names the federal employee rather than the United States as a party. *See* Maron v. United States, 126 F.3d 317, 325-26 (4th Cir. 1997).

However, if the suit is filed in federal court and names the federal agency rather than the United States as a party, Westfall certification is not available and the case may be dismissed as jurisdictionally defective if the limitations period for amendment under Federal Rule 15 has run. *See* Allen v. Veterans Admin., 749 F.2d 1386, 1388-90 (9th Cir. 1984). Indeed, a plaintiff may be subject to sanctions under Federal Rule 11 for naming the agency as the defendant. *See* K.W. Thompson Tool Co. v. United States, 656 F. Supp. 1077, 1086 (D.N.H. 1987), *aff'd on other grounds*, 836 F.2d 721 (1st Cir. 1988).

69. *United States v. Smith*, 499 U.S. 160, 165 (1991).

70. For example, the commencement of the FTCA suit is subject to the special service rules and other special procedural advantages that apply to the United States when it is a litigant in federal court. *See, e.g.*, FED. R. CIV. P. 4(i)(1). Failure to meet these rules could result in dismissal of the suit.

71. *See supra* Sections I.A-B.

72. *See, e.g.*, *Schmidt v. United States*, No. 2:09-CV-0660, 2013 WL 5492311, at *4 (E.D. Cal. Oct. 2, 2013), *aff'd*, No. 2:09-CV-0660, 2014 WL 576196 (E.D. Cal. Feb. 11, 2014). Initially, the Attorney General's regulation applied only to presentment to the agency under 28 U.S.C. § 2672, but by amendment in 1987 the

The procedural-turned-jurisdictional requirements of presentment and sum certain have been called “unyielding”⁷³ and “mandatory,”⁷⁴ and are grounds for the court’s dismissing of the suit even if the agency earlier had accepted the administrative claim and investigated the incident, and the claimant showed good faith efforts to comply with the requirements.⁷⁵ Indeed, even a trivial deviation

Attorney General extended its reach to include presentment as a condition of federal suit under 28 U.S.C. § 2675. *See* 28 C.F.R. § 14.2 (1987). The regulation thus purports to add a third condition—proof of representative capacity—to the statute’s requisites to jurisdiction. Presumably, the Attorney General is without authority to narrow the waiver of the United States to suit in federal court; its authority is only to define the scope of the agency’s settlement power. *See* *Byrne v. United States*, 804 F. Supp. 577, 581-82 (S.D.N.Y. 1992). The better reading is that the regulation imposes a claim-processing condition but not a jurisdictional condition to suit.

73. *Hohri v. United States*, 782 F.2d 227, 245 (D.C. Cir. 1986), *vacated sub nom. on other grounds*, *United States v. Hohri*, 482 U.S. 64 (1987).

74. *Jackson v. United States*, 730 F.2d 808, 809 (D.C. Cir. 1984).

75. *See* *McNeil v. United States*, 508 U.S. 106, 107-08, 113 (1993) (affirming dismissal of FTCA complaint filed by pro se prisoner when the administrative claim, later denied, was filed four months after the filing of the lawsuit even though substantial progress in the lawsuit had not occurred). *See also* *Donovan v. Bureau of Prisons*, where the court dismissed a prisoner’s FTCA suit, filed pro se, for his failure to exhaust administrative remedies when the following steps had been taken:

Prior to September 7, 2006, Donovan submitted his claim to a Program Director. (Docket No. 16-2.) On September 7, 2006, the Program Director denied Donovan’s claim and instructed him to appeal to the Community Corrections Manager if he was unsatisfied. (Docket No. 16-2.) On September 12, 2006, Donovan appealed to, the court assumes, the Community Corrections Manager. (Docket No. 19 at 1, 6.) This appeal was denied on December 16, 2006. (Docket No. 19 at 6.) Donovan then appealed, (Docket No. 19 at 6), but it is unclear to whom he appealed. The next step in the process would [be] an appeal to the Regional Director, 28 C.F.R. § 542.15, and therefore the court shall presume that this is to whom the plaintiff appealed. Donovan alleges that he received no response and does not allege that he has pursued any further remedies.

This administrative path is the proper path for an inmate to exhaust a claim relating to an aspect of his confinement, but it is not the proper path for an inmate to exhaust a claim under the FTCA. The fact that the BOP has numerous divergent administrative processes is not meant to act as a trap to unwary litigants. Rather, it is designed to ensure more efficient processing of inmate claims. In fact, 28 C.F.R. § 542.10(c) states, “If an inmate raises an issue in a request or appeal that cannot be resolved through the Administrative Remedy Program, [(28 C.F.R. part 542, subpart B)] the Bureau will refer the inmate to the appropriate statutorily-mandated procedures.”

from procedural requirements at the agency level can trigger a later jurisdictional dismissal—for example, a complaint was dismissed as failing to state a sum certain when the claim alleged an amount “not in excess of . . . \$50,000.”⁷⁶ In addition, a state case removed to federal court is subject to the same procedural and jurisdictional conditions as a suit that begins through the administrative process: The newly minted federal plaintiff is expected to present a claim to the agency and to exhaust the administrative process before proceeding in federal court. The federal court will dismiss the complaint as premature if the plaintiff cannot show that she previously presented the claim to the agency and that she declined the agency’s settlement; in some circumstances, it will be too late for the claimant to present the claim to an administrative agency even though the statute of limitations has not run on the tort itself, and the suit will be barred “forever.”⁷⁷

Donovan never requested a sum certain, as is required for claims under the FTCA, but instead requested “that this Office instruct officials at the Parsons House and/or BOP to honor the court’s Order of waiver and to reimburse me the payments already made as such a collection would clearly violate the sentencing judge’s Order of waiver.” (Docket No. 19 at 5.) Thus, it was evident that Donovan was pursuing his administrative remedies regarding an aspect of his confinement, *see* 28 C.F.R. part 542, subpart B, rather than his tort remedies, *see* 28 C.F.R. part 543, subpart C., and therefore, assuming that the BOP had an affirmative duty to inform Donovan he had not chosen the proper path to exhaust a claim under the FTCA, there was not sufficient reason for the BOP to conclude that Donovan intended to pursue a FTCA claim.

No. 07-C-105, 2008 WL 4603337, at *4-5 (E.D. Wis. Oct. 16, 2008) (citation omitted).

76. *Schwartzman v. Carmen*, 995 F. Supp. 574, 576 (E.D. Pa. 1998) (internal quotation marks omitted); *see, e.g., Montoya v. United States*, 841 F.2d 102, 104-05 (5th Cir. 1988) (finding no jurisdiction when the damages sought were “in excess of \$1,500” for property damage and the sum was not set forth for personal injury (internal quotation marks omitted)); *Keene Corp. v. United States*, 700 F.2d 836, 841 (2d Cir. 1983) (finding no jurisdiction when the damages sought were “\$1,088,135 and . . . an additional amount yet to be ascertained” (internal quotation marks omitted)).

77. A 1988 amendment treats the claim as timely if it “would have been timely had it been filed on the date the underlying civil action was commenced, and . . . the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.” Act of Nov. 18, 1988, Pub. L. No. 100-694, § 6, 102 Stat. 4565 (codified at 28 U.S.C. § 2679(d)(5) (2012)). The litigant could face forfeiture even if the state statute of limitations is longer than the FTCA’s two-year period governing presentment to the agency. *See Celestine v. Mount Vernon Neighborhood Health Ctr.*, 403 F.3d 76, 84 (2d Cir. 2005). The Supreme Court of

If the case survives dismissal at this stage, the sum certain set out in the original claim sets a cap on damages that the claimant-turned-plaintiff may judicially seek.⁷⁸ Some courts have held that the *ad damnum* clause in the judicial complaint—as well as the theories underpinning the request for damages—must align identically with the claim presented to the agency. Other courts have held that a claim can be sufficient, even if it does not identify its legal theory, if it sets forth detailed facts from which a legal theory might be inferred by “a legally trained reader.”⁷⁹

The suit proceeds in federal court as any statutory matter would, with the panoply of case management conferences and information exchange. During the discovery process, plaintiff will likely seek access to information about the events producing the injury, the personnel involved, and the government’s investigation of the incident. In response, the government may seek to withhold information on grounds of privilege, citing defenses that are available under state law⁸⁰ or work-product protection to shield investigative reports.⁸¹ In some cases, the government may seek to invoke executive privilege as a bar to disclosure.⁸² If the case proceeds to trial, the district court, as in any suit, is required to prepare findings of fact and to state conclusions of law.⁸³ The Supreme Court has underscored that the findings in an FTCA suit must articulate facts in non-conclusory and definite terms.⁸⁴ Similarly, the trial court’s findings supporting damage awards must

the United States has granted certiorari in a pair of cases that pertain to equitable tolling that would affect the result in *Celestine*. See *supra* note 13.

78. 28 U.S.C. § 2675(b).

79. *Murrey v. United States*, 73 F.3d 1448, 1453 (7th Cir. 1996).

80. See *Menses v. U.S. Postal Serv.*, 942 F. Supp. 1320, 1323-34 (D. Nev. 1996) (rejecting the government’s invocation of a state statute barring disclosure of unemployment records).

81. See *Gillman v. United States*, 53 F.R.D. 316, 318-19 (S.D.N.Y. 1971) (refusing to compel the government to produce a hospital board’s reports inquiring into the decedent’s suicide for purposes of changes in procedures, but compelling the production of portions of the record depicting the facts of the event).

82. See *United States v. Reynolds*, 345 U.S. 1, 3-4, 11 (1953) (holding that necessity for information did not overcome the government’s privilege against revealing military secrets in FTCA suit involving the crash of an Air Force plane during a test of secret equipment).

83. See FED. R. CIV. P. 52(a).

84. See *Dalehite v. United States*, 346 U.S. 15, 24 n.8 (1953) (“Statements conclusory in nature are to be eschewed in favor of statements of the preliminary and basic facts on which the District Court relied. Otherwise, their findings are useless for appellate purposes.” (citation omitted)).

be stated with particularity.⁸⁵ The court's final judgment is subject to appeal as a matter of right; in certain circumstances various non-final orders—such as the denial of a motion to dismiss on discretionary-function grounds—may be immediately reviewable under the collateral-order doctrine.⁸⁶

E. The Jurisdictional Wild Card

Even if a federal-tort plaintiff hurdles the procedural requirements of presenting a written claim to the agency and sets forth a sum certain for damages, shows evidence of representative authority for pursuing the claim, survives a motion to dismiss for failure to state a claim, goes through discovery, survives a motion for summary judgment, and proceeds to trial, the lawsuit nevertheless might face dismissal on jurisdictional grounds if the challenged action that forms the core of the claim is found to be outside the government's waiver of sovereign immunity. The statute's grant of jurisdiction under 28 U.S.C. § 1346 is subject to exclusions set out in a separate section of the United States Code and to an exception that the Supreme Court has judicially created.⁸⁷ Boiled down, jurisdiction is withheld from thirteen categories of conduct: claims arising from "a discretionary function . . . whether or not the discretion involved be abused";⁸⁸ "the loss, miscarriage, or negligent transmission of letters or postal matter";⁸⁹ "the assessment or collection of any tax or customs duty, or the detention of any goods" (subject to exceptions);⁹⁰ certain "suits in admiralty";⁹¹ certain acts related to portions of Title 50 of the United States Code related to war and defense;⁹² acts resulting from quarantine;⁹³ acts resulting from "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation,

85. See *Fuchstadt v. United States*, 434 F.2d 367, 370 (2d Cir. 1970) (issuing a remand order when the district court failed to itemize elements of a personal-injury award).

86. See *Lutz v. Sec'y of the Air Force*, 994 F.2d 1477, 1478-79 (9th Cir. 1991) (finding jurisdiction on immediate review of a denial of a motion to dismiss on *Feres* grounds); *Feres v. United States*, 340 U.S. 135, 159 (1950).

87. 28 U.S.C. § 2680 (2012); *Feres*, 340 U.S. at 159.

88. 28 U.S.C. § 2680(a).

89. *Id.* § 2680(b).

90. *Id.* § 2680(c).

91. *Id.* § 2680(d).

92. *Id.* § 2680(e).

93. *Id.* § 2680(f).

deceit, or interference with contract rights”;⁹⁴ “the fiscal operations of the Treasury or by the regulation of the monetary system”;⁹⁵ “combatant activities . . . during time of war”;⁹⁶ from activities in a foreign country, of the Tennessee Valley Authority, of the Panama Canal Company, or of a “Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.”⁹⁷

These jurisdictional exclusions date mainly to the FTCA’s original enactment in 1948.⁹⁸ A claim held to fall within one of these exceptions is outside the United States’ consent to suit—meaning, it is not cognizable under the statute—and the federal court is required to dismiss the action. As with any jurisdictional rule, the defect cannot be waived or forfeited and can be raised by the court *sua sponte* or by the government for the first time on appeal. In other contexts, the Supreme Court has expressed support for subject-matter jurisdiction rules that are “straightforward” and “[s]imple” so that they can produce “certainty and predictability.”⁹⁹ FTCA jurisdictional rules for the most part are neither straightforward nor simple; determining whether a claim is outside the government’s waiver may involve a fact-intensive inquiry about activities, supervision, and the course of employment. Much of this information can be learned only through discovery; for present purposes, what is important is the fact that even when the suit is dismissed, the jurisdictional inquiry will shed light on agency practice, personnel conduct, and internal agency procedures that pertain to such matters as training, supervision, and discipline, and could highlight administrative problems.

F. The Canary in the Coal Mine

Every stage of the FTCA dispute process elicits information about agency practice that ought to be of interest to policy makers. At the claim stage, the claimant’s version of the incident is in primary view with all of the cognitive biases that an injured party

94. *Id.* § 2680(h) (noting that § 2680(g) was repealed in 1950). Jurisdiction is extended for “acts or omissions of investigative or law enforcement officers of the United States Government” claims arising “out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.” *Id.*

95. *Id.* § 2680(i).

96. *Id.* § 2680(j).

97. *Id.* § 2680(k)-(n).

98. *Id.* § 2680.

99. *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) (quoting *First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 621 (1983)).

brings and without countervailing information from the government.¹⁰⁰ At the administrative stage, information about agency practice could be available from the agency's internal investigation, its communications with the claimant, and its response behind the scenes to procedures and practices that might have contributed to the alleged injury. During the judicial proceeding, additional information will come to light through discovery and court papers concerning such topics as staff conduct, internal practices, and patterns of behavior that may be sub-standard. This information is available even if the lawsuit is dismissed for lack of jurisdiction. Indeed, to use a somewhat worn-out cliché, a judicially barred federal-tort suit is the proverbial canary in the coal mine warning of conditions that require further investigation and possible reform.¹⁰¹ Nevertheless, a number of factors obscure the informational significance of these decisions and give them exceptionally low salience.

First, and most obviously, any government victory, even if on procedural or jurisdictional grounds, tends to be seen as a vindication of the government's position on the merits, casting doubt on the truth of plaintiff's allegations and creating the perception that the suit was filed to extort an unwarranted settlement.¹⁰² The combination of hindsight and outcome bias recasts the alleged victim of government misconduct as a renegade or at least as undeserving. Not all claims are credible; smoke does not always signify fire. But it is a mistake to assume that claims that do not make it through the FTCA's procedural-turned-jurisdictional filter are fraudulent, trivial, or not deserving of further investigation. As an example, consider a case in which the court dismissed as time-barred a medical-malpractice claim filed on behalf of a child who was born with "serious medical problems including mental incompetency" because hospital personnel left the mother unattended in the labor room; the fact that the FTCA does not permit infancy to toll the limitations period does

100. See 28 U.S.C. § 2675 (2012).

101. Ben Zimmer, *A Canary, a Coal Mine and a Cliché*, WALL ST. J. (Mar. 14, 2014), <http://online.wsj.com/news/articles/SB10001424052702304914904579437322017716030> ("A once lively figure of speech has been deadened into a cliché for any early warning signal.")

102. Cf. Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 IND. L.J. 1191, 1198-99 (2014) (drawing a distinction between implausible and frivolous litigation).

not diminish the significance of the negligent medical practice if investigated and shown to be true.¹⁰³

Second, because the complaint alleges negligence, it is easy to shrug one's shoulders and take Mr. Micawber's view that "accidents will occur" notwithstanding the agency's best efforts.¹⁰⁴ Cognitive bias that favors the social status quo tends to discourage the government's acknowledging of institutional problems and instead to encourage casting tort victims as hapless or unlucky.¹⁰⁵ Moreover, legal doctrine tends to frame many public-law problems as merely localized or atomistic mishaps that involve an individual situation without broader significance.¹⁰⁶ The private-bill origins of the FTCA reinforce the tendency of seeing tort claims against the United States as private problems unrelated to structural causes or and undeserving of national attention;¹⁰⁷ a consistent criticism of the private-bill system was that it wasted congressional time on insignificant private problems and diverted attention from significant public problems.¹⁰⁸ In practice, the functional line between a private

103. See *McCall ex rel. Estate of Bess v. United States*, 310 F.3d 984, 985 (7th Cir. 2002).

104. See CHARLES DICKENS, *THE PERSONAL HISTORY OF DAVID COPPERFIELD* 291 (1850) (stating that "accidents will occur in the best regulated families").

105. See Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CAL. L. REV. 1119, 1119 (2006) (explaining that consistent with System Justification Theory, decision makers may have a self-interest "to defend and justify the social status quo"); see also Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO ST. L.J. 251 (2009) (considering the effect of cognitive biases on agency action in the face of institutional problems).

106. See Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108 (1976) (suggesting "that the antidiscrimination principle embodies a very limited conception of equality, one that is highly individualistic and confined to assessing the rationality of means" and urging that "the group-disadvantaging principle" better "represent[s] the ideal of equality").

107. Cf. Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225, 254 (1986) (explaining that the individual tort model as applied to government torts creates the danger that "injuries caused by institutional structures will not even be perceived").

108. See *United States v. Yellow Cab Co.*, 340 U.S. 543, 549-50 (1951) (stating that "the overwhelming purpose of Congress was to make changes of procedure which would enable it to devote more time to major public issues"); *The Federal Tort Claims Act*, *supra* note 24, at 534 (reporting that the "system of private claim bills . . . has been denounced for usurpation of Congressional energies which might otherwise be devoted to consideration of important national problems"). The sentiment that private bills wasted congressional time dates back at least to the early nineteenth century. See Irvin M. Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 GEO L.J. 1, 1 n.2 (1946) (quoting John Quincy Adams's statement

bill and public law was not always clear,¹⁰⁹ and we need not engage with the private–public distinction¹¹⁰ to know that national policy draws from information that often starts with an individual: a patient dies in a hospital because of the waiting time for care;¹¹¹ a female employee is barred from seeking equal pay for equal work;¹¹² a fatal car accident takes place because of concealed defects in the ignition system.¹¹³ Nevertheless, “Mr. Micawber’s optimism”¹¹⁴ makes it easy

in 1832, ““There ought to be no private business before Congress.”” (citing 8 MEMOIRS OF JOHN QUINCY ADAMS 480 (Charles Francis Adams ed., 1876)).

109. Cf. THOMAS ERSKINE MAY, ERSKINE MAY’S TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT 463 (Sir David Lidderdale ed., 19th ed. 1976) (“[I]t is sometimes difficult to determine to which category particular bills belong, and the question may arise whether a public bill, in that it affects certain private interests, ought not more properly to have been introduced as a private bill, or whether a bill, introduced as a private bill, should be prevented from proceeding on the ground that its scope is so wide that it affects public policy.”).

110. See Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1425 (1982) (discussing “a virtual obsession with separating public and private law, both conceptually and practically, during the nineteenth century”).

111. See Drew Griffin, Scott Bronstein & Tom Cohen, *Obama Signs \$16 Billion VA Overhaul into Law*, CNN (Aug. 7, 2014, 3:50 PM), <http://www.cnn.com/2014/08/07/politics/obama-va-bill/> (discussing the enactment of VA reforms and reporting that a daughter “watched her father die while waiting months just to see a doctor at the dysfunctional Department of Veterans Affairs”); see also Scott Bronstein & Drew Griffin, *A Fatal Wait: Veterans Languish and Die on a VA Hospital’s Secret List*, CNN (Apr. 23, 2014, 9:19 PM), <http://www.cnn.com/2014/04/23/health/veterans-dying-health-care-delays/> (reporting that “[a]t least 40 U.S. veterans died waiting for appointments at the Phoenix Veterans Affairs Health Care system, many of whom were placed on a secret waiting list”).

112. See Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (reversing the Supreme Court’s holding in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), that the statute of limitations for an equal-pay claim commences on the date of initial wage decisions, not the most recent paycheck).

113. See Ryan Vlastelica, *General Motors Issues Three New Recalls, Cites Ignition Systems*, REUTERS (Jan. 2, 2015, 12:36 PM) <http://www.reuters.com/article/2015/01/02/us-gm-recalls-reports-idUSKBN0KA1RZ20150102> (stating ignition problems caused fatal accidents and led to recall of 2.5 million cars).

114. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 562 (2007) (criticizing the *Conley* ““no set of facts”” test as relying on “Mr. Micawber’s optimism”). Indeed, Dickens appropriated the phrase from an eighteenth-century treatise on fortifications and used only half the sentence: “But, notwithstanding all human precautions that can be taken, yet accidents will happen, which are to be repaired as soon as possible, and whereby the engineer will learn how to avoid them afterwards, in the remainder of his works.” JOHN MULLER, A TREATISE CONTAINING THE

for lawmakers to ignore dismissed suits that can be explained as deviant or idiosyncratic.

Third, FTCA cases are filtered through an arduous but one-sided administrative process—the agency investigates the claimant and compels disclosure from the claimant, but the claimant cannot obtain discovery from the agency. The investigative process is structured against disclosure by the agency—no information is released to the claimant about the policy or practice that may be at the core of the FTCA claim, and the agency is not required to report to Congress about unpaid claims.¹¹⁵ Cognitive biases could obscure the agency’s ability to detect error or misconduct among staff; at a minimum the investigating agency may lack the requisite incentives to bring intra-agency problems to light.¹¹⁶ Moreover, the absence of pre-litigation discovery during the agency proceeding makes it more difficult for a plaintiff to survive dismissal once she comes to court given heightened pleading requirements and the inability of overcoming informational barriers.¹¹⁷ For example, a challenge to the SEC’s failure to investigate the Madoff Ponzi scheme was dismissed when plaintiffs were unable to identify with specificity “mandatory directives” aimed at constraining SEC enforcement authority, and so the suit was barred under the discretionary-function exception without a serious review of the agency’s actions.¹¹⁸

Fourth, the FTCA recognizes that damage awards are a legitimate price of public accountability and seeks to spread the costs of government negligence from the individual victim to the general public.¹¹⁹ Nevertheless, federal-tort suits often are cast as drags on

PRACTICAL PART OF FORTIFICATION IN FOUR PARTS 168 (1755), *available at* <https://archive.org/stream/atreatisecontai00mullgoog#page/n228/mode/2up/search/precautions>.

115. See *Ashcroft v. Iqbal*, 556 U.S. 662, 684-85 (2009).

116. See Andrew Case, Note, *Protecting Rights by Rejecting Lawsuits: Using Immunity to Prevent Civil Litigation from Eroding Police Obligations Under Brady v. Maryland*, 42 COLUM. HUM. RTS. L. REV. 187, 226 (2010) (stating with respect to alleged constitutional violations by police that “confirmation bias can prevent even well-meaning supervisors from detecting error and disciplining subordinates”).

117. See *Iqbal*, 556 U.S. at 684-85.

118. See *Dichter-Mad Family Partners, LLP v. United States*, 707 F. Supp. 2d 1016, 1039-48 (C.D. Cal. 2010), *aff’d*, 709 F.3d 749 (9th Cir. 2013).

119. See *Platis v. United States*, 288 F. Supp. 254, 274 (D. Utah 1968), *aff’d*, 409 F.2d 1009 (10th Cir. 1969) (“The Tort Claims Act reflects a strong public policy, recognized by Congress, to protect the citizenry from torts committed by the public servants, to lift the risks that may be ruinous if left to lie upon the individual victim of the particular accident . . . and to achieve an allocation and apportionment

the treasury: The Justice Department, itself burdened by budget cuts and staff reductions,¹²⁰ includes information about FTCA suits in its annual reports, describing case dismissals—on whatever grounds—as relieving the government from the burden of “unmerited damages.”¹²¹ Yet at this stage of the proceeding one cannot know whether damages are merited or unmerited; a court that has dismissed a suit on jurisdictional or procedural grounds has not reached the merits. For this reason, the decision should not be taken as ratification of the status quo, but rather as a signal that investigation of potential problems might be warranted.

II. FTCA SUITS AS INFORMATION SIGNALS

Judicially barred FTCA suits typically do not attract a great deal of attention even though they may signal serious problems within an agency. This Part focuses on a pair of federal-tort decisions—in which the government was the prevailing party—to demonstrate the practical significance that these suits could hold for policy making and public accountability. I focus on procedural dismissals when the claimant is blocked from court for failure to meet the agency-presentment requirement and on jurisdictional dismissals when the claim is found to be outside the government’s waiver of sovereign immunity. In some situations, the dismissed suit could function as an early warning of problems that have been ignored and need regulatory attention; in other situations, the dismissed suit could serve as the proverbial thirteenth chime of the clock, signaling systems that have broken down and need repair.

of the loss among not a relatively small segment of the consuming public, but among the entire federal taxpaying public.”).

120. U.S. DEP’T OF JUSTICE, CIVIL DIV., FY 2015 BUDGET AND PERFORMANCE PLANS 5 (2014), available at <http://www.justice.gov/sites/default/files/jmd/legacy/2013/12/14/civ-justification.pdf> (reporting that because of the budget freeze, the Civil Division of the Justice Department lost 265 staff, almost 17% of the Civil Division’s total staff).

121. *Id.* at 17 (showing a table entitled “Performance and Resources” that reports “Percent of defensive cases in which at least 85 percent of the claim is defeated”); see *id.* at 22 (reporting that “[c]ivil also defeats billions of dollars in unmerited damages”).

A. Claim Presentment: Information About Mental Health Care for Veterans

As previously indicated, Congress added the claim-presentment requirement to the FTCA in 1966 as a threshold barrier both to agency consideration and to judicial review. A later amendment extended the claim-presentment requirement to the agency-settlement process. From the beginning, this condition elicited criticism—admittedly from plaintiff-side tort lawyers who felt themselves excluded from the amendment process—whether it was appropriate to condition access to federal court upon an initial administrative review by the agency involved in the tortious conduct. Moreover, without the benefit of discovery, it was objected that claimants were unlikely to know the full scope of their claim or be able to assess damages. Critics predicted that the requirement of presentment would curtail substantive rights and, at a minimum, delay payments even when liability was acknowledged.¹²² “Presentment” now forms the core of the FTCA dispute-resolution process, euphemistically described as “deceptively simple.”¹²³ The requirement is intended to give the agency sufficient information to see if the claim is worth investigating and settling; yet a suit that is dismissed by the court for failing to meet the presentment requirement may be meritorious and point to agency problems that require investigation and reform.

Consider the medical negligence claim at issue in *Mader v. United States*.¹²⁴ On the second anniversary of the suicide of her husband, a veteran with a history of depression and paranoia, a widow submitted a wrongful death claim to the Veterans Administration.¹²⁵ She started the claim process in the usual way,

122. See Philip H. Corboy, *Revised Federal Tort Claims Act: A Practitioner's View*, 2 FORUM 67, 68 (1967) (stating that “while the purpose of the amendments is to produce primarily an administrative convenience in the handling of federal tort claims, it is likely that the amendments have ventured into the twilight zone between ‘substance’ and ‘procedure’ where there will be a great likelihood that they will infringe upon the substantive rights of claimants”).

123. Bermann, *supra* note 31, at 541.

124. *Mader v. United States*, No. 8:08CV119, 2008 WL 5111047, at *1 (D. Neb. Dec. 2, 2008), *rev'd*, 619 F.3d 996 (8th Cir. 2010), *rev'd*, 654 F.3d 794 (8th Cir. 2011) (en banc).

125. *Id.* at *1-2.

submitting a written claim on Standard Form 95.¹²⁶ The form listed the claimant as Nancy Mader, widow and personal representative of Robert Mader, and “was signed by ‘John P. Ellis, Attorney for Claimant.’”¹²⁷ The form stated a sum certain for the damages claimed and described the injury: “The deceased Robert L. Mader, was improperly treated and medicated by Dr. Ruth Schmidtmyer of the VA Hospital, Lincoln, Nebraska, when she deviated from the standard of care by abruptly taking the deceased off of the drug Paxil. The decedent committed suicide on August 3, 2004.”¹²⁸ On September 19, 2007, the VA denied the claim on two alternative grounds: First, claimant had failed to submit proof that she was the decedent’s representative or that her counsel had authority to present a claim on her behalf; and second, the VA had investigated the claim and failed to find negligence.¹²⁹ As to the first ground, the federal appeals record shows that on August 21, 2006, the VA mailed a letter to claimant’s lawyer requesting proof of representative capacity; the appeals record also includes the VA’s statements that it telephoned counsel but again did not receive the proof.¹³⁰ As to the second ground, the VA wrote:

“This office has extensively reviewed the quality of the medical care that was provided to Robert Mader. The finished investigation included a detailed analysis of his medical records and an expert medical review by an independent out of state VA psychiatrist. The investigation revealed that Robert Mader was seen in a timely manner for his new-onset psychosis, appropriate medication changes were made and the appropriate follow up was arranged. The reviewer concluded that the discontinuation of Robert Mader’s use of Paroxetine (Paxtil) [sic] and the matter [sic] in which it was discontinued was entirely appropriate under the circumstances. The investigation failed to reveal any negligence by VA health care practitioners in rendering care to Robert Mader. Therefore, the claim is also denied on that basis[.]”¹³¹

Six months later, in March 2008, decedent’s widow filed a wrongful death suit in federal court under the FTCA.¹³² The United

126. *Id.* at *2; see also U.S. DEP’T OF JUSTICE, STANDARD FORM 95: CLAIM FOR DAMAGE, INJURY, OR DEATH (2007), available at http://www.justice.gov/civil/docs_forms/SF-95.pdf.

127. *Mader*, 2008 WL 5111047, at *2 (citation omitted).

128. See Brief of Plaintiff-Appellant at 8, *Mader*, 619 F.3d 996 (8th Cir. 2009) (No. 09-1025) (internal quotation marks omitted).

129. *Mader*, 2008 WL 5111047, at *2.

130. *Id.*

131. Brief in Opposition to Defendant’s Motion to Dismiss at 4-5, *Mader*, No. 8:08CV119 (D. Neb. 2008), ECF No. 21 (citation omitted).

132. *Mader v. United States*, 654 F.3d 794, 799 (8th Cir. 2011) (*en banc*).

States moved to dismiss the suit for lack of jurisdiction on the view that the administrative claim was incomplete because the widow had not shown representative capacity on behalf of her husband.¹³³ At the time of the motion, four circuits already had rejected the argument that proof of capacity is an element of presentment and did not treat the procedural requirement as jurisdictional.¹³⁴ Nevertheless, the district court granted the motion with prejudice.¹³⁵ The widow appealed, and a divided panel reversed, holding that in the Eighth Circuit a claimant is required to meet “minimal” presentment—which includes only the statutory requirements of written notice to the agency and a sum certain—and that proof of representative authority, a requirement added by the Attorney General’s regulation, is not jurisdictional.¹³⁶ *En banc* review was granted, and the district court’s decision was affirmed and the claim dismissed.¹³⁷

As a “claims-processing rule,”¹³⁸ the requirement that a claimant show proof that she has authority to pursue a claim on behalf of a decedent seems sound; the agency needs a basis upon which to reach a binding settlement in the face of intra-family disagreement. A presumption that a lawful widow has such authority would seem appropriate and efficient. The assets of many middle-class families are exempt from probate, and a requirement of formal documentation could require the payment of fees and increase costs unnecessarily to the claimant. Moreover, as a matter of doctrine, *Mader*’s conclusion that the proof-of-authority rule is jurisdictional—and forever bars federal suit on the underlying tort claim—is textually at odds with the statute’s setting forth of only two conditions for presentment, the Supreme Court’s distinction between rules that are jurisdictional and those that involve claims-processing, the decisions of all circuit courts that have considered the issue, and a practical approach that would be more consistent with the FTCA’s goals.

133. *Id.* at 799, 802.

134. *Mader*, 2008 WL 5111047, at *4 & n.2 (“Four circuits have held that ‘minimal notice’ creates a statutory ‘claim’ for § 2675(a) purposes.”).

135. *Mader*, 654 F.3d at 799.

136. *Id.*

137. *Id.* at 800.

138. The Court has drawn a distinction between “claim-processing rules” that are not to be treated as jurisdictional and rules that limit the court’s power to hear a case. *See Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161-63 (2010). The Court’s observation that the distinction “can be confusing in practice” finds support in the numerous FTCA cases that conflate these categories. *Id.* at 161.

The court's treatment of representative capacity as a jurisdictional condition raises a significant issue.¹³⁹ However, I focus on a different question: the lessons that *Mader* offers to Congress about the quality of mental health care at a VA hospital. The federal complaint and judicial decisions in the *Mader* case indicate that the decedent was a veteran with a history of depression and paranoia.¹⁴⁰ Information available through public sources—West, Lexis, the PACER system—do not indicate his age, race, or service history. Decedent is the proverbial everyman whose life is a data point in national statistics. It is estimated that twenty-two veterans commit suicide every day—one veteran every eighty minutes.¹⁴¹ The high rate of suicide within the military is not limited to veterans: More soldiers died from self-inflicted wounds in 2013 than in combat.¹⁴²

139. On the jurisdictional issue, I suggest that Congress clarify that proof of representative authority is a claims-processing rule; further, the different affected agencies ought to consider issuing a regulation that a lawful spouse or widow is presumptively a representative of a decedent. The federal government can use a federal definition of spouse to include same-sex couples. Inevitably, intra-family disputes will arise; joinder is available if the presence of third parties is necessary to ensure complete relief and the avoidance of duplicative payment.

140. *Mader*, 654 F.3d at 798.

141. See Lindsay I. McCarl, "To Have No Yesterday": *The Rise of Suicide Rates in the Military and Among Veterans*, 46 CREIGHTON L. REV. 393, 395 (2013) (citing MARGARET C. HARRELL & NANCY BERGLASS, CTR. FOR A NEW AM. SEC., LOSING THE BATTLE: THE CHALLENGE OF MILITARY SUICIDE 1 (2011), available at http://www.cnas.org/files/documents/publications/CNAS_LosingTheBattle_HarrellBerglass.pdf; Erik K. Shinseki, Sec'y, U.S. Dep't of Veterans Affairs, Remarks at the Suicide Prevention Conference (Jan. 11, 2010), available at http://www.va.gov/opa/speeches/2010/10_0111hold.asp); JANET KEMP & ROBERT BOSSARTE, DEP'T OF VETERAN AFFAIRS, SUICIDE DATA REPORT, 2012, at 15 (2012), available at <https://www.va.gov/opa/docs/Suicide-Data-Report-2012-final.pdf>. Other studies report a suicide rate of eighteen deaths per day, or 3.2 times the rate of the general public. See Contessa M. Wilson, Note, *Saving Money, Not Lives: Why the VA's Claims Adjudication System Denies Due Process to Veterans with Post-Traumatic Stress Disorder and How the VA Can Avoid Judicial Intervention*, 7 IND. HEALTH L. REV. 157, 158-59 (2010) (citing *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1063 (N.D. Cal. 2008) (referring to the "Katz Suicide Study," dated February 21, 2008)).

142. See *Military Suicide Victims Deserve Respect*, MORNING CALL (May 7, 2013), http://articles.mcall.com/2013-05-07/opinion/mc-gold-star-mother-gehris-20130507_1_gold-star-22-year-old-son-suicide ("I am a Gold Star mother. For those of you who do not know what that is, a Gold Star mother has a child who died in combat. There are many Gold Star mothers in the Lehigh Valley. Many of their children's names are engraved on military monuments, except for those who committed suicide. That means my son. I am very upset that he gave his life to protect the USA and that this is how he is being treated. There have been more

There also is a high rate of psychiatric disorders among soldiers returning home to civilian life,¹⁴³ and post-traumatic stress disorder is now a recognized psychiatric condition among veterans.¹⁴⁴

Medication also can heighten the risk of suicide.¹⁴⁵ Again, we know from the published decisions that the decedent received mental health treatment for an unspecified period at a VA hospital prior to 2004;¹⁴⁶ during that period he apparently was prescribed Paxil.¹⁴⁷ In May 2004, GlaxoSmithKline, the manufacturer of Paxil, issued a letter addressed to “Healthcare Professional,” stating that a Food and Drug Administration Public Health Advisory, dated March 22, 2004, “caution[s] physicians, their patients, and families about the need to closely monitor all patients . . . treated with antidepressants” such as Paxil, and that the FDA had proposed labeling changes to include a “warning recommending close observation of adult . . . patients treated” with Paxil “for worsening depression or the emergence of suicidality, particularly at the beginning of treatment or at the time of dose increases or decreases.”¹⁴⁸ Presumably, the VA hospital received the GlaxoSmithKline warning; at the least, VA healthcare

deaths among soldiers and Marines from suicide in the last year than fatalities in battle zones.”).

143. See Katherine Dubyak, *Close, but No Cigar: Recent Changes to the Stressor Verification Process for Veterans with Post-Traumatic Stress Disorder and Why the System Remains Insufficient*, 21 FED. CIR. B.J. 655, 663-65 (2012).

144. See Madeline McGrane, Note, *Post-Traumatic Stress Disorder in the Military: The Need for Legislative Improvement of Mental Health Care for Veterans of Operation Iraqi Freedom and Operation Enduring Freedom*, 24 J.L. & HEALTH 183, 185-96 (2011) (providing an overview of PTSD and the armed services).

145. See Aisling V. O’Sullivan, Comment, *Walking a Fine Line: Are SSRIs Really Depression Wonder Drugs or Threats to Patient Safety?*, 26 PACE L. REV. 549, 552-54 (2006) (summarizing studies of the linkage between medication and suicide).

146. *Mader v. United States*, 654 F.3d 794, 798 (8th Cir. 2011) (*en banc*).

147. *Mader v. United States*, No. 8:08CV119, 2008 WL 511047, at *1-2 (D. Neb. Dec. 2, 2008).

148. Letter from GlaxoSmithKline to Healthcare Professional (May 2004), available at <http://www.fda.gov/downloads/safety/medwatch/safetyinformation/safetyalertsforhumanmedicalproducts/ucm166499.pdf>. A Department of Health & Human Services letter dated June 9, 2004, provided the company with a non-exhaustive list of violations involving “false or misleading” representations; the letter emphasized that patients treated with Paxil “should be monitored . . . when discontinuing treatment” and that “abrupt cessation” was not recommended. Letter from Kay A. Chitale, Consumer Promotion Analyst, Dept. of Health & Human Servs., to P. Kaia Agarwal, Senior Dir., Regulatory Affairs, GlaxoSmithKline (June 9, 2004), available at <http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/EnforcementActivitiesbyFDA/WarningLettersandNoticeofViolationLetterstoPharmaceuticalCompanies/ucm055293.pdf>.

professionals ought to be expected to meet standards of care that include current FDA warnings. On May 28, 2004, a VA healthcare employee “instructed Mr. Mader to taper off his previously prescribed medicine of Paxil by taking ½ tablet daily for one week and then stopping entirely.”¹⁴⁹ On or about August 3, 2004, the decedent committed suicide by shooting himself in the head.¹⁵⁰ The record does not state that decedent was suicidal before he began his treatment; the record does not state whether the prescribing physician warned decedent or his wife of the possibility of suicide as a side effect; the record does not state that the prescribing physician or anyone at the hospital monitored the decedent. All we know is that the VA’s denial of the wrongful death claim, which misstates the prescribed drug’s over-the-counter name, was based on an internal investigation that determined its healthcare professionals did not deviate from the standard of care.¹⁵¹ The lawsuit never went to discovery—the suit was a procedural “victory” for the United States¹⁵²—and we are left in the dark whether other veterans received similar treatment that possibly contributed to their deaths.

Cases like *Mader* could provide policy makers with an important early warning about problems with agency practice—about the lack of communication from one agency to another, a failure to update staff about recent professional developments, insufficient client counseling, and so forth. Claims investigators are expected to expedite settlement or denial, not to consider whether systemic reform is needed. I do not have access to the internal investigative reports and do not know whether any information was communicated to the FDA or HHS about veterans who were prescribed Paxil and later committed suicide, even though the FDA was actively investigating problems associated with this and other antidepressant drugs. Nor do I know whether staff investigated whether other veterans were being treated with Paxil with similar fatal effects. Once the claim became a federal lawsuit, government lawyers defending against the suit adopted an aggressive legalistic strategy, building on misplaced jurisdictional arguments about a widow’s representative capacity; the dispute’s potential for

149. *Mader*, 2008 WL 5111047, at *1.

150. *Id.*

151. Brief in Opposition to Defendant’s Motion to Dismiss, *supra* note 131, at 4-5.

152. *Mader*, 2008 WL 5111047, at *3, *5.

improving VA care took a back seat to the goal of defeating “unmerited damages.”¹⁵³

B. Jurisdictional Exceptions: Information About Sexual Abuse in the Military

This Section turns to cases that are dismissed on jurisdictional grounds when the challenged conduct is held to be excluded from the government’s waiver of liability. As already discussed, the FTCA sets out thirteen such exclusions, and one specifically withholds jurisdiction from claims of assault and battery by federal officers.¹⁵⁴ To these textual exclusions, the Supreme Court has added a fourteenth:¹⁵⁵ claims by servicemembers for injuries that “arise out of or are in the course of activity incident to service,” a rule known eponymously as the *Feres* Doctrine¹⁵⁶ and is related to, but distinct from, the statute’s textual exclusion of claims relating to combatant activities.¹⁵⁷ Claims excluded by these exceptions cover a broad range of activity, touching almost every agency and every aspect of public life, large and small—embassy security,¹⁵⁸ military base security,¹⁵⁹ prison conditions,¹⁶⁰ border patrol,¹⁶¹ agriculture and cattle

153. See *supra* text accompanying note 141.

154. 28 U.S.C. § 2680(h) (2012). Importantly, the Court has resolved that the FTCA’s exception for assault-and-battery claims does not apply to “any cause of action arising out of a negligent or wrongful act or omission in the performance of medical . . . functions” under the Gonzalez Act, 10 U.S.C. § 1089(e) (2012), and that a suit may be maintained alleging medical battery by a Navy doctor acting with the scope of his employment. *Levin v. United States*, 133 S. Ct. 1224, 1227, 1235 (2013) (quoting 10 U.S.C. § 1089(e)).

155. See 1 LESTER S. JAYSON & ROBERT C. LONGSTRETH, *HANDLING FEDERAL TORT CLAIMS: ADMINISTRATIVE AND JUDICIAL REMEDIES* § 5A.01 (Matthew Bender & Co. 2014) (1963) (“There is no provision in the Act expressly excluding or limiting the claims of servicemen. The Supreme Court, however, has construed the Act as containing both an exclusion and a limitation with regard to such claims.”).

156. *Feres v. United States*, 340 U.S. 135, 146 (1950).

157. See 28 U.S.C. § 2680(j).

158. *Macharia v. United States*, 334 F.3d 61, 68 (D.C. Cir. 2003) (barring negligence claims involving security provided by an independent contractor’s guards at the embassy).

159. *Latchum v. United States*, 183 F. Supp. 2d 1220, 1222, 1231-32 (D. Haw. 2001), *aff’d*, 65 F. App’x 171 (9th Cir. 2003) (barring negligence claims arising out of a murder by a civilian of a servicemember while on a family vacation at an army recreational center).

160. *Bosworth v. United States*, No. CV 14-0498 DMG (SS), 2014 WL 2931164, at *8 (C.D. Cal. June 27, 2014) (barring a prisoner’s claim of sexual

herding,¹⁶² and postal service delivery.¹⁶³ In particular, the combined effect of the exception for assault and battery with the *Feres* Doctrine creates a toxic brew for claimants¹⁶⁴—servicemembers,¹⁶⁵ military spouses,¹⁶⁶ military children,¹⁶⁷ and civilians¹⁶⁸—who allege claims of sexual abuse or rape by servicemembers or service-related personnel, such as healthcare workers,¹⁶⁹ chaplains,¹⁷⁰ and military

battery by a prison correctional officer); *Saunders v. United States*, 502 F. Supp. 2d 493, 495 (E.D. Va. 2007) (barring a negligence claim arising out of the assault of a prisoner who had told the Marshals Service he “feared for his safety”).

161. *Castro v. United States*, 608 F.3d 266, 268 (5th Cir. 2010) (barring a claim that a border patrol’s negligence resulted in the erroneous deportation of a child).

162. *Herden v. United States*, 726 F.3d 1042, 1051 (8th Cir. 2013) (barring a claim that the government provided a toxic seeding plan that caused illness and death of the producers’ cattle).

163. *Kuhner v. Montauk Post Office*, No. 12-CV-2318 (JFB) (GRB), 2013 WL 1343653, at *3 (E.D.N.Y. Apr. 4, 2013) (barring a claim of mail mis-delivery).

164. *See generally* Francine Banner, *Immoral Waiver: Judicial Review of Intra-Military Sexual Assault Claims*, 17 LEWIS & CLARK L. REV. 723 (2013).

165. *See Gonzalez v. U.S. Air Force*, 88 F. App’x 371 (10th Cir. 2004) (holding the *Feres* Doctrine barred a negligence claim by an Air Force servicemember arising from a rape that occurred in 1999 in military barracks); *Zimmerman ex rel. Zimmerman v. United States*, 171 F. Supp. 2d 281, 298-99 (S.D.N.Y. 2001) (dismissing for lack of jurisdiction a claim by a military officer whose minor daughter was sexually assaulted by a fellow officer, but permitting the daughter’s claim of negligent child-abuse reporting to survive); *Shiver v. United States*, 34 F. Supp. 2d 321, 322 (D. Md. 1999) (dismissing an action “growing out of an alleged rape of the plaintiff that was committed by her then-drill sergeant while both of them were active-duty soldiers stationed at Aberdeen proving Ground”).

166. *See Cline v. United States*, 13 F. Supp. 3d 868, 875 (M.D. Tenn. 2014) (dismissing a claim by a military spouse alleging that in 2008 the military negligently failed to warn her that her servicemember husband was forcibly raping and sodomizing plaintiff’s six-year-old daughter and videotaping such acts, and that he continued to do so after he returned from deployment in Iraq).

167. *See Thigpen v. United States*, 800 F.2d 393, 398 (4th Cir. 1986) (dismissing for lack of jurisdiction a negligent supervision claim brought on behalf of girls who in 1981 were sexually abused while hospitalized for ruptured appendixes at the United States Naval Hospital in Beaufort, South Carolina).

168. *See Malone v. United States*, 61 F. Supp. 2d 1372, 1382 (S.D. Ga. 1999) (dismissing a civilian’s negligence claim arising from rape by a soldier who left the base in violation of his restricted status pending court martial for prior rape); *Nanartonis v. United States*, No. 85-4601-MA, 1986 WL 428, at *2 (D. Mass. Aug. 27, 1986) (dismissing for lack of jurisdiction a sexual harassment claim brought by a woman who alleged sexual harassment in the form of “nonconsensual touching” during temporary employment as secretary at the Veterans Administration in 1983).

169. *See Thigpen*, 800 F.2d at 393-94.

170. *See J.I. v. United States*, No. C06-5674RJB, 2007 WL 2751597, at *1 (W.D. Wash. Sept. 19, 2007) (denying without prejudice a motion to dismiss for

recruiters.¹⁷¹ In limited instances, some courts hold the matter to be within the government's waiver of immunity if plaintiff can show a "special relationship" under state law that gives rise to a duty.¹⁷²

Consider the failure-to-supervise claim at issue in *Smith v. United States*.¹⁷³ In 1996, Sarah Smith, then an army private first class, spent the summer after her sophomore year in college attending Advanced Individual Training (AIT) at Aberdeen Proving Grounds, Maryland.¹⁷⁴ On May 30, 1996—the second day of her training—Staff Sergeant Vernell Robinson Jr., the drill sergeant assigned to her platoon, allegedly entered Smith's barracks unannounced and forcibly took her off-site to compel "non-consensual intercourse and sodomy."¹⁷⁵ The complaint further alleged that throughout Smith's training, the drill sergeant repeatedly forced her off-site to engage in nonconsensual and "various sex acts," and that "other commissioned and non-commissioned officers were aware" of the drill sergeant's "predatory behavior toward [Smith] and other female AIT trainees."¹⁷⁶ The complaint also alleged that "none of the officers who were aware of [the drill sergeant's] acts ever reported them."¹⁷⁷ Smith timely presented her FTCA claim to the United States Army Claim Service "but never received a final disposition" within the statutory period and chose to

lack of jurisdiction claim that Roman Catholic priests serving as chaplains in the United States Army Chaplain Corps sexually abused plaintiff as a minor, continued to do so "for several years," and "made Plaintiff available to other employees of the Army, such as military aides and other chaplains").

171. *Verran v. United States*, 305 F. Supp. 2d 765, 766-67 (E.D. Mich. 2004) (dismissing a claim of "brutal assault and rape" by United States Marine Corps recruiter).

172. *Compare id.*, with *Mulloy v. United States*, 937 F. Supp. 1001, 1009, 1014 (D. Mass. 1996) (denying a summary judgment motion by the government of a claim of negligent hiring alleged by the estate of a service member's spouse who was raped and killed by an enlistee, and finding "it was reasonably foreseeable that a convicted rapist and multiple felon would commit another crime of violence against a member of the military community were he permitted to enlist in the Army"), and *Doe v. United States*, 838 F.2d 220, 223 (7th Cir. 1988) (permitting a claim of negligent supervision on behalf of children molested by an unknown assailant at Scott Air Force Base Day Care Center because the government "allegedly left the children alone, neglecting its voluntarily assumed duty to watch and protect them").

173. 196 F.3d 774, 775 (7th Cir. 1999).

174. *Id.* at 775-76.

175. *Id.* at 776.

176. Petition for Writ of Certiorari at app. 10, *Smith*, 196 F.3d 774 (No. 98-CV-408-WDS).

177. *Smith*, 196 F.3d at 776.

file suit in federal court.¹⁷⁸ The district court dismissed the suit, holding the claims were barred under the *Feres* Doctrine and the intentional-tort exception, and that the government did not have a special duty to protect Smith on which a negligent supervision claim could be based.¹⁷⁹ The Seventh Circuit affirmed the dismissal on jurisdictional grounds:

The allegations that the Army failed to control Staff Sergeant Robinson implicate important questions about the management of military personnel by those charged with that high responsibility. The wrongs allegedly perpetrated by Staff Sergeant Robinson upon then-Private First Class Smith were made possible by his status as her military superior. . . . Similarly, the claims that other officers failed to report Robinson's conduct implicate serious questions about the proper conduct and readiness of military units. . . . [T]he complaint clearly alleges that those superior to Staff Sergeant Robinson in the chain of command failed to prevent his abusing his military authority over Ms. Smith. This sort of allegation certainly is controlled by *Feres*.¹⁸⁰

Plaintiff filed a petition for certiorari, which the Supreme Court denied in 2000.¹⁸¹

This narrative of events comes entirely from the published and unpublished court decisions in the *Smith* case. I do not know when Smith filed her administrative claim—only that it was timely. Newspaper stories and later legislative hearings provide additional detail. Smith reported her sexual abuse to supervisors in August 1996, presumably before she filed her administrative claim. By the fall, Aberdeen Proving Ground had become synonymous with one of the worst sexual scandals in the military's history and later was referred to as the "Army's most devastating leadership failure[] since the Vietnam War."¹⁸² Coming five years after the 1991 Tailhook convention—which riveted public attention on complaints that Navy and Marine aviators had sexually assaulted eighty-three women and seven men¹⁸³—the Army is said to have acted quickly to investigate

178. *Id.*

179. *Id.* at 775-76.

180. *Id.* at 777-78.

181. See Petition for Writ of Certiorari, *supra* note 176.

182. CLAUDIA J. KENNEDY WITH MALCOM MCCONNELL, *GENERALLY SPEAKING: A MEMOIR BY THE FIRST WOMAN PROMOTED TO THREE-STAR GENERAL IN THE UNITED STATES ARMY* 169 (2001).

183. See Madeline Morris, *By Force of Arms: Rape, War, and Military Culture*, 45 DUKE L.J. 651, 657 & n.9 (1996) (citing INSPECTOR GEN., U.S. DEP'T OF DEF., TAILHOOK 91, PART 2: EVENTS OF THE 35TH ANNUAL TAILHOOK SYMPOSIUM VI-13 to VI-14 (1993)); see also Tim Weiner, *The Navy Decides Not to Appeal Dismissals of Last Tailhook Cases*, N.Y. TIMES (Feb. 12, 1994),

Aberdeen's alleged problems.¹⁸⁴ On November 7, 1996, the Army announced that charges had been brought against two drill sergeants and a captain for raping or sexually harassing about a dozen female recruits.¹⁸⁵ That same day, the Army set up a worldwide toll-free hotline to receive complaints about sexual abuse at any Army training site.¹⁸⁶ At a news conference on November 12, the Secretary of the Army said, "[W]hen we punish, the word goes out."¹⁸⁷ Throughout the fall, recruits came forward with reports of sexual abuse by drill sergeants at Aberdeen,¹⁸⁸ and eventually eleven drill sergeants were implicated.¹⁸⁹ On January 30, 1997, the Army charged Staff Sergeant Robinson with nineteen criminal counts of rape, sodomy, and indecent assault involving one male and seven female trainees.¹⁹⁰ Robinson was sentenced to a six-month prison sentence

<http://www.nytimes.com/1994/02/12/us/the-navy-decides-not-to-appeal-dismissals-of-last-tailhook-cases.html> (reporting that "the dismissal of the last three cases arising from the incident . . . means no one will ever be tried for harassing women at a bawdy aviators convention in 1991, despite the Navy's acknowledgment that lewd behavior took place").

184. See Gilbert A. Lewthwaite, *Army Heeds the Lessons of Tailhook: Quick Response Averts Suspicion of Cover-up*, BALTIMORE SUN (Nov. 18, 1996), http://articles.baltimoresun.com/1996-11-18/news/1996323087_1_aberdeen-tailhook-army-trainers ("The Army's handling of the alleged sexual harassment of trainees at an Aberdeen Proving Ground school suggests it has learned from the Navy's mistakes during the 1991 Tailhook scandal."); see also Jennifer S. Knies, *Two Steps Forward, One Step Back: Why the New UCMJ's Rape Law Missed the Mark, and How an Affirmative Consent Statute Will Put It Back on Target*, ARMY LAW., Aug. 2007, at 16 (describing the establishment of Aberdeen hotline); Michael I. Spak & Jonathan P. Tomes, *Sexual Harassment in the Military: Time for a Change of Forum?*, 47 CLEV. ST. L. REV. 335, 365-66 (1999) (describing the Tailhook and Aberdeen investigations).

185. Jackie Spinner, *In Wake of Sex Scandal, Caution Is the Rule at Aberdeen*, WASH. POST, Nov. 7, 1997, at B01, available at <http://www.washingtonpost.com/wp-srv/local/longterm/library/aberdeen/caution.htm>.

186. See Alexander N. Pickands, Note, *Reveille for Congress: A Challenge to Revise Rape Law in the Military*, 45 WM. & MARY L. REV. 2425, 2448 & n.100 (2004) (explaining that given the role of service academies to train future officers, "[i]t is logical to assume that those leaders who would prey upon their peers at the academy would continue to abuse those over whom they exert control once they graduate").

187. *United States v. Ayers*, 54 M.J. 85, 94 (C.A.A.F. 2000) (internal quotation marks omitted).

188. See Dana Michael Hollywood, *Creating a True Army of One: Four Proposals to Combat Sexual Harassment in Today's Army*, 30 HARV. J.L. & GENDER 151, 159 (2007).

189. *Id.*

190. See Scott Wilson, *"The Game" Results in a Living Casualty: Sarah Smith Joined the Army Reserve to Help Pay for College. But When She Arrived at*

and dishonorably discharged from the Army, but a rape charge in Smith's case was dropped, and she was criticized for having delayed in reporting the abuse.¹⁹¹ A drill sergeant charged early in the Army's investigation received a twenty-five year sentence in military prison and was released after serving fourteen years.¹⁹² Major Gen. Robert D. Shadley, commander of the Aberdeen training center, was the highest-ranking officer to be disciplined; he was transferred and received a reprimand, which later was challenged and removed.¹⁹³ Critics of the Aberdeen prosecutions raised concerns that the Army was scapegoating African-American servicemen—all of the drill sergeants charged in the scandal were African-American¹⁹⁴—in order “to conceal its own failure in policing mixed-gender training posts,”¹⁹⁵ and that convening authorities wanted either “to stave off

Aberdeen, She Says, She Was Raped Repeatedly by Her Drill Instructor, BALTIMORE SUN (Aug. 17, 1997), http://articles.baltimoresun.com/1997-08-17/news/1997229024_1_sarah-smith-aberdeen-army-sergeant.

191. *Id.* (stating the judge was shocked by the sentence). For a criticism of the charges, see Brian C. Hayes, *Strengthening Article 32 to Prevent Politically Motivated Prosecution: Moving Military Justice Back to the Cutting Edge*, 19 REGENT U. L. REV. 173, 189 (2006) (acknowledging a “gross breakdown in discipline at Aberdeen, as well as serious criminal behavior by some drill sergeants,” but questioning charges of rape against drill sergeants who were “at most guilty of fraternization, adultery, or disobeying orders”).

192. See Jackie Spinner, *The New Drill Sergeant*, WASH. POST (Aug. 24, 1997), <http://www.washingtonpost.com/wp-srv/local/longterm/library/aberdeen/main.htm>.

193. See Jon Tevlin, *Retired Minnesota General Not Surprised by Sex Assaults in Military*, STAR TRIB. (May 28, 2013, 8:56 AM), <http://www.startribune.com/local/209101451.html>; Philip Shenon, *General Reprimanded in Scandal at Base*, N.Y. TIMES (Sept. 11, 1997), <http://www.nytimes.com/1997/09/11/us/general-reprimanded-in-scandal-at-base.html>.

194. See Carl Rochelle, *Sergeant Accused in Aberdeen Sex Scandal Speaks Out*, CNN (June 13, 1997, 12:20 PM), <http://www.cnn.com/US/9706/13/aberdeen.pentagon/> (quoting the charged drill sergeant stating that “no one other than men of color have been charged”).

195. Scott Wilson, *Aberdeen Sergeant Gets 25 Years: Jury's Decision Fails to End Debate on Race, Sex, Power in Military*, BALTIMORE SUN (May 7, 1997), http://articles.baltimoresun.com/1997-05-07/news/1997127064_1_simpson-aberdeen-sentence; see also Elaine Sciolino, *Rape Witnesses Tell of Base Out of Control*, N.Y. TIMES (Apr. 15, 1997), <http://www.nytimes.com/1997/04/15/us/rape-witnesses-tell-of-base-out-of-control.html> (stating that the trial testimony indicated that “the strict rules governing social behavior between the sexes apparently were broken and no one was held accountable”); Martha Chamallas, *The New Gender Panic: Reflections on Sex Scandals and the Military*, 83 MINN. L. REV. 305 (1998) (analyzing sex scandals in the military); cf. Lara A. Ballard, *The Trial of Sergeant-Major McKinney: An After Action Report*, 3 GEO. J. GENDER & L. 1, 1 (2001)

criticism” or to avoid “closer scrutiny from Congress when considered for promotion or reassignment.”¹⁹⁶

Smith’s federal-tort claim, alleging a failure to supervise that led to sexual assault and rape, was not unique. In 1999, a different district court easily dismissed another servicemember’s claim, also citing the *Feres* Doctrine:

Under clear present law, the plaintiff’s FTCA claim is barred by the so-called *Feres* doctrine, which embodies a judicially-recognized exception to the FTCA where the injury complained of was visited by one member of the armed forces upon another while both were in active service, whether on or off duty at the time the injury was inflicted. . . . Given the Supreme Court’s continuing adherence to the *Feres* doctrine, which obviously binds both the Fourth Circuit and this Court, this Court has no alternative but to dismiss the FTCA claim. This is not to suggest that the FTCA claim is within Rule 11 territory, as the Court is aware that *Feres* is—and has been—under continual assault. But, it has withstood all challenges to date. Furthermore, to the extent that it could independently exercise its judgment on the issue, this Court would keep *Feres* intact and in place. The military services of this country cannot effectively be managed or deployed if subject to litigative hindsight by federal judges (there being no jury trials in FTCA cases), and, contrary to plaintiff’s assertion, military discipline would be adversely affected by allowing tort litigation under the FTCA, as officers’ and non-commissioned officers’ authority and credibility would both be open to attack outside military channels, thus undermining their authority. The resulting fear of litigation would paralyze decision-making in the one segment of our society that remains free of such paralysis, and that must remain free of it, if it is to fulfill its mission. The point needs no more discussion than that.¹⁹⁷

(discussing the 1998 conviction of Sergeant-Major McKinney, the first African-American Sergeant-Major of the Army).

196. Hayes, *supra* note 191, at 175-76.

197. Shiver v. United States, 34 F. Supp. 2d 321, 322 (D. Md. 1999); see also Henry Mark Holzer, *The Endless Ordeals of Jacqueline Ortiz: A Desert Storm Soldier’s Unsuccessful Attempt to Recover for a Sexual Attack by Her First Sergeant*, 24 N.M. L. REV. 51 (1994) (providing another example of a woman’s unsuccessful federal-tort claim resulting from sexual abuse in the Army). Contrary to the court’s suggestion in *Shiver*, the FTCA does not exclude all duty-to-supervise claims. The Supreme Court in *Sheridan v. United States*, 487 U.S. 392 (1988), held that the FTCA’s exclusion of liability for intentional torts does not encompass claims involving “foreseeably dangerous” acts that the government in some circumstances has a duty to prevent. *Id.* at 403. In this respect, the Court clarified that the earlier plurality opinion in *United States v. Shearer*, 473 U.S. 52 (1985), which some lower courts mistakenly had applied to bar relief, did not control the result. *Sheridan*, 487 U.S. at 408 (White, J., concurring).

The focus of this Article is not whether the Court ought to rethink the *Feres* Doctrine given the constraints of stare decisis.¹⁹⁸ It is well known that the *Feres* Doctrine has strong critics¹⁹⁹—notably Justice Scalia, whose dissent in *United States v. Johnson*,²⁰⁰ joined by Justice Brennan, Justice Marshall, and Justice Stevens, stated emphatically that “*Feres* was wrongly decided and heartily deserves the ‘widespread, almost universal criticism’ it has received.”²⁰¹ Lower courts feel bound to follow the doctrine,²⁰² Congress so far has declined to abrogate it,²⁰³ and some commentators vigorously defend

198. See HENRY COHEN & VANESSA K. BURROWS, CONG. RESEARCH SERV., ORDER CODE 95-717, FEDERAL TORT CLAIMS ACT 8 (2007), available at <http://www.slideshare.net/DKESOT/appendix-r-crs-report-to-congress-federal-tort-claims-act-order-code-95-717> (speculating that “[a]s for the Supreme Court, it is not beyond the realm of possibility that it could completely overrule *Feres*”).

199. See Jonathan Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 GEO. WASH. L. REV. 1, 4 (2003) (positing that *Feres* “was fundamentally flawed from its inception” and has contributed to a higher rate of malpractice and negligence in the military than in the civilian sector and to “the expansion of the military into collateral areas of governance”); Jennifer L. Zyznar, Comment, *The Feres Doctrine: “Don’t Let This Be It. Fight!”*, 46 J. MARSHALL L. REV. 607, 611-12 (2013) (“Most service member claims die in judicial trenches only to be remembered by those personally affronted by the *Feres* Doctrine, a judicially created, and almost universally criticized, ‘exception’ to the FTCA.” (footnotes omitted)).

200. 481 U.S. 681, 692 (1987) (Scalia, J., dissenting).

201. *Id.* at 700-01 (quoting *In re “Agent Orange” Prod. Liab. Litig.*, 580 F. Supp. 1242, 1246 (E.D.N.Y. 1984)). *But see* Boyle v. United Techs. Corp., 487 U.S. 500, 510 (1988) (relying on federal common law rather than the *Feres* Doctrine to recognize a government contractor defense in tort suits). See David E. Seidelson, *From Feres v. United States to Boyle v. United Technologies Corp.: An Examination of Supreme Court Jurisprudence and a Couple of Suggestions*, 32 DUQ. L. REV. 219, 259-68 (1994) (discussing Boyle); Autumn Fox & Stephen R. McAllister, *An Eagle Soaring: The Jurisprudence of Justice Antonin Scalia*, 19 CAMPBELL L. REV. 223, 275-82 (1997) (discussing Justice Scalia’s *Johnson* dissent).

202. See, e.g., PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 247 (1986) (discussing the district court’s reliance on the *Feres* Doctrine in the Agent Orange litigation).

203. Writing in 1990, commentary emphasized that Congress for forty years had declined to abrogate *Feres*. See Edwin F. Hornbrook & Eugene J. Kirschbaum, *The Feres Doctrine: Here Today—Gone Tomorrow?*, 33 A.F. L. REV. 1, 16 (1990). For some time Congress has considered whether the *Feres* bar ought to be lifted for medical malpractice suits. See, e.g., *Medical Malpractice Suits for Armed Services Personnel: Hearing on S. 2490 and H.R. 1054 Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary*, 100th Cong. (1988); see also Melissa Feldmeier, Comment, *At War with the Feres Doctrine: The Carmelo Rodriguez Military Medical Accountability Act of 2009*, 60 CATH. U. L. REV. 145 (2010) (discussing the proposed Carmelo Rodriguez Military Medical

Feres as essential to military discipline.²⁰⁴ Congress has held hearings to inquire into the doctrine;²⁰⁵ my suggestion is that those oversight efforts need to be regular and broader in focus, and ought to consider whether allegations set out in FTCA suits that do not survive jurisdictional motions require further investigation. Twenty years after Smith's summer training at Aberdeen Proving Ground, sexual abuse in the military is back in the news again—fueled by the Defense Department's annual reports to Congress that show a surge in reported and unreported claims of sexual abuse.²⁰⁶ The 2013 report indicated that in fiscal year 2012, reported assaults rose 6% to 3,374, but that the number of servicemembers who reported abuse and never filed a claim rose from 19,000 the prior year to 26,000.²⁰⁷ Numbers are even higher in the 2014 report: Reported assaults rose to 5,061, with 54% attributing the abuse to another service member.²⁰⁸ With popular culture highlighting the problem in the form

Accountability Act of 2009, which would permit service members to recover for medical and dental malpractice claims for non-combat related injuries or deaths).

204. See generally Paul Figley, *In Defense of Feres: An Unfairly Maligned Opinion*, 60 AM. U. L. REV. 393 (2010); Joan M. Bernott, *Fairness and Feres: A Critique of the Presumption of Injustice*, 44 WASH. & LEE L. REV. 51 (1987).

205. See, e.g., *The Feres Doctrine: An Examination of this Military Exception to the Federal Tort Claims Act, Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2002).

206. See Craig Whitlock, *Fresh Reports of Sexual Misconduct Undercut Pentagon's Argument for Internal Fix*, WASH. POST (Apr. 24, 2014), http://www.washingtonpost.com/world/national-security/fresh-reports-of-sexual-misconduct-undercut-pentagons-argument-for-internal-fix/2014/04/24/8c3eae20-cbce-11e3-93eb-6c0037dde2ad_story.html (discussing "fresh reports of senior commanders bungling cases or coming under investigation themselves").

207. See Helene Cooper, *Pentagon Study Finds 50% Increase in Reports of Military Sexual Assaults*, N.Y. TIMES (May 1, 2014), <http://www.nytimes.com/2014/05/02/us/military-sex-assault-report.html> (stating that the report "immediately came under fire for what critics said were significant limitations"); Courtney Kube & Jim Miklaszewski, *Pentagon's Annual Report on Sexual Assault Shows Alarming Rise*, NBC NEWS (May 6, 2013, 4:43 PM), http://usnews.nbcnews.com/_news/2013/05/06/18090415-pentagons-annual-report-on-sexual-assault-shows-alarming-rise?lite ("Embarrassingly, the report is being made public just a day after it was revealed that the Air Force's sexual-abuse prevention chief has himself been charged with sexual assault.").

208. See Craig Whitlock, *Pentagon Sees Surge in Reports of Sexual Assault Among Service Members*, WASH. POST (May 1, 2014), http://www.washingtonpost.com/world/national-security/pentagon-sees-surge-in-reports-of-sexual-assault-among-service-members/2014/05/01/0f18515e-d14a-11e3-9e25-188ebe1fa93b_story.html ("We have a long way to go in solving this problem" (quoting Defense Secretary Chuck Hagel)).

of TV dramas,²⁰⁹ documentaries,²¹⁰ self-published military memoirs,²¹¹ and articles in *Vogue*,²¹² the last year has seen an intense but unsuccessful effort among some elected representatives to remove sexual abuse claims from the chain of command and to place them under civilian review.²¹³ My point in highlighting the *Smith*

209. The TV show *House of Cards* incorporated into its plot line a brochure from a training center in South Carolina advising the victims of sexual abuse that “[i]f you are attacked, it may be advisable to submit than to resist.” See Anna Palmer, Juana Summers & Darren Samuelsohn, *When a Scandal Becomes a Cause*, POLITICO (Mar. 6, 2014, 6:28 PM), <http://www.politico.com/story/2014/03/military-sexual-assault-kirsten-gillibrand-104387.html>.

210. *The Invisible War: Filmmakers*, INVISIBLEWARMOVIE.COM (2012), <http://invisiblewarmovie.com/filmmakers.php>.

211. See ROBERT D. SHADLEY, *THE GAME: UNRAVELING A MILITARY SEX SCANDAL* (2013); see also Bryna Zumer, *Retired APG General: The Players Change, the ‘GAM’ Remains the Same*, BALTIMORE SUN (May 23, 2013, 6:05 AM), <http://www.baltimoresun.com/news/maryland/harford/aberdeen-havre-de-grace/ph-ag-military-scandal-0524-20130522,0,1253262.story> (reporting on the Aberdeen commander the recounting investigation and expressing his view that the problem has not been solved). GAM refers to “‘game a la military,’ in which drill sergeants had a contest to see who could sleep with the most trainees.” Zumer, *supra*.

212. See Mimi Swartz, *Sexual Misconduct in the Military—and Why Kirsten Gillibrand Is Pushing Reform to the Top of Her Agenda*, VOGUE (Feb. 21, 2014, 5:48 PM), <http://www.vogue.com/magazine/article/kirsten-gillibrand-calls-for-reform-after-reports-of-military-rape-and-misconduct/#1> (discussing Senator Gillibrand’s evolving recognition of the problem of sexual abuse in the military).

213. See Military Justice Improvement Act of 2013, S. 967, 113th Cong. The bill failed to overcome a filibuster. See Helene Cooper, *Senate Rejects Blocking Military Commanders from Sex Assault Cases*, N.Y. TIMES, Mar. 7, 2014, at A11, available at <http://www.nytimes.com/2014/03/07/us/politics/military-sexual-assault-legislation.html>; see also *Klay v. Panetta*, 758 F.3d 369, 370-71, 375, 377 (D.C. Cir. 2014) (dismissing a *Bivens* action against current and former Secretaries of Defense by “current or former members of the United States Navy and Marine Corps who allege that they were raped, sexually assaulted, or sexually harassed by their fellow Sailors and Marines, only to suffer retaliation from their superiors for reporting their plight”). In support of its view that judicial intervention was not warranted, the appeals court stated, “Congress [has been] no idle bystander to th[e] debate” about sexual assault in the military. *Lebron v. Rumsfeld*, 670 F.3d 540, 551 (4th Cir. 2012). The four most recent National Defense Authorization Acts have each included numerous provisions aimed at combating this scourge. See National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §§ 1701-1753, 127 Stat. 672, 950-85 (2013); National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, §§ 570-579, 126 Stat. 1632, 1752-64; National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, §§ 581-586, 125 Stat. 1298, 1430-36 (2011); Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, §§ 1601-1632, 124 Stat. 4137, 4429-36. The Consolidated Appropriations Act of 2014 appropriated \$25 million for the Department of Defense to implement a Sexual Assault Special Victims Program. See Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, § 8124, 128 Stat. 5,

case is to underscore the importance of consistent and regular follow-up, even of dismissed FTCA claims, to ensure that agency errors—in training, supervision, processing, and provision of services—are not repeated because allowed to go uncorrected.

III. OVERSIGHT AND OVERSEERS

Public accountability for government performance is said to be “a cornerstone of democratic governance.”²¹⁴ One aspect of accountability is the responsiveness of government officials to problems that require review and revision.²¹⁵ This Part offers the practical suggestion of having Congress use judicially barred FTCA suits as an oversight tool to improve agency performance. The proposal is not intended to supplant the FTCA’s tort remedy—which, in any event, is not available for broad categories of government misconduct because of the statute’s jurisdictional exceptions²¹⁶—but instead recognizes that the institutional mix of incentives can usefully include political and third-party mechanisms to motivate agency conduct.²¹⁷ I justify enhanced congressional oversight from the perspective of enriching institutional competence, encouraging deterrence, and supporting constituent service, and then suggest ways to operationalize the proposal, building on existing mediating structures that avoid trenching on legislative prerogative.

133 (2014). And Congress is currently debating further legislation on the issue. See Victims Protection Act of 2014, S. 1917, 113th Cong.; Ed O’Keefe, *Senate Easily Passes McCaskill’s Military Sexual Assault Bill*, WASH. POST (Mar. 10, 2014), <http://www.washingtonpost.com/blogs/post-politics/wp/2014/03/10/senate-easily-passes-mccaskills-military-sexual-assault-bill/>.

214. Peter J. May, *Regulatory Regimes and Accountability*, 1 REG. & GOVERNANCE 8, 11 (2007). Exactly what the cornerstone entails is open to question. See ROBERT D. BEHN, *RETHINKING DEMOCRATIC ACCOUNTABILITY* 4 (2001) (quoting authors variously calling the concept of accountability “fundamental but underdeveloped”, “murky”; a “will-o-the-wisp”; and “always changing”).

215. See, e.g., Richard Mulgan, “Accountability”: *An Ever-Expanding Concept?*, 78 PUB. ADMIN. 555, 566 (2000) (identifying accountability with responsiveness).

216. See FIGLEY, *supra* note 37, at 12-19.

217. For a typology of accountability mechanisms, see Barbara S. Romzek & Melvin J. Dubnick, *Accountability in the Public Sector: Lessons from the Challenger Tragedy*, 47 PUB. ADMIN. REV. 227, 229 (1987) (identifying internal mechanisms that are bureaucratic and professional and external mechanisms that are legal and political). See generally Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027 (2013) (discussing the role of inspectors general in the field of national security even after courts have rejected claims).

A. Leveraging FTCA Suits to Improve Congressional Activity

As is frequently noted, Congress carries out a number of different, overlapping functions. Legislators undertake policy making, engage in oversight, and offer constituent service. Inviting Congress to consider and review dismissed FTCA suits enhances each of these functions and is consistent with the design and purpose of the FTCA itself.

1. *Policy Making: Information and Institutional Competence*

The FTCA lifts the government's immunity from suit for the negligent torts of its employees but leaves broad areas of government conduct free from judicial oversight.²¹⁸ One justification for the location of this line between political discretion and judicial review draws from separation of powers and the view that Congress is the branch of government best equipped for policy making. This legislative advantage often is associated with a superior capacity to investigate problems, to gather together facts, and to adapt solutions in response to plural interests and competing preferences.²¹⁹ FTCA complaints, even if dismissed on procedural or jurisdictional grounds, offer Congress a pool of information that can enhance policy making by equipping lawmakers and their staff details and insights about agency performance that may not be forthcoming from other sources. Congress already holds hearings about particular FTCA doctrines;²²⁰ the current proposal simply enlarges the focus.

Commentators already recognize that judicial opinions offer Congress information and provide an important window into agency activity.²²¹ But it is well acknowledged that Congress does not routinely read the federal reporters, and certainly does not troll unpublished decisions, other than when advocacy groups rally around particular decisions and lobby for legislative reform.²²²

218. See FIGLEY, *supra* note 37, at 12-19.

219. See Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1882-84 (2001) (discussing the presumed superior capacity of legislators to investigate problems and devise policies).

220. See *supra* text accompanying note 205.

221. See *supra* note 41 and accompanying text.

222. Cf. Frank Burk, *Statutory Housekeeping: A Senate Perspective*, 85 GEO. L.J. 2217, 2217 (1997) (reporting that the Governance Institute's pilot project for statutory housekeeping has resulted in "varied" responses from the legislative

However clear an opinion's message—about a gap in the statute, an unintended consequence of legislative drafting, or a provision's lack of clarity—the signal is lost if it is not transmitted to Congress for follow-up action. Rep. Robert W. Kastenmeier and Michael J. Remington thus have observed:

Judges often write opinions finding that a statute is constitutional but not well drafted, in that the statutory language does not achieve ostensible policy purposes. The judge notes, unhappily, that a correction of the statute is strictly within the province of the legislature. The opinion is then shared with the litigants, and often sent for publication in the proper reporter. Congress never hears about the opinion. A failure to communicate stifles the movement of an idea at its birth.²²³

To overcome this information barrier, the Governance Institute established a pilot project, later expanded, aimed at transmitting to Congress any judicial decision that identified a statute with textual problems that seemed to require review and possible revision.²²⁴

Decisions that dismiss FTCA claims on jurisdictional or procedural grounds likewise warrant legislative attention but are even less likely to receive congressional attention. First, judicially barred federal-tort claims typically have low salience and do not attract attention from the media or the academy, which conceivably could trigger congressional focus. The decisions concern an individual, and not a class action; they do not involve constitutional issues; they usually do not set out an innovative statutory interpretation; and their procedural and jurisdictional explanation may make for dull reading that obscures what is really at stake in the case.²²⁵

Second, these decisions emit signals about agency action that are harder to decipher than an opinion identifying a one-off problem

committees involved and that “[s]ome committees make better use of the cases transmitted than others”).

223. Robert W. Kastenmeier & Michael J. Remington, *A Judicious Legislator's Lexicon to the Federal Judiciary*, in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY, *supra* note 35, at 82-83.

224. See Katzmann & Herse, *supra* note 41, at 2190.

225. Even decisions of high salience often do not attract sustained congressional attention. See Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 605 (1995) (discussing the unwillingness of Congress to overturn court decisions). Of course there are exceptions. The Office of General Counsel of the House of Representatives lists a half dozen FTCA cases on its website, although the decisions pertain largely to constitutional torts and not pure FTCA claims. See *Federal Tort Claims Act*, OFF. GEN. COUNS., <http://www.ogc.house.gov/legislation/federal-tort-claims-act.shtml> (last visited Jan. 26, 2015).

of grammar in a legislative text. Sometimes—as with the *Smith* sex-abuse case alleging inadequate training and supervision of subordinate personnel—the reader has to look closely at the facts in a number of similar cases involving the same agency or regional division of an agency to begin to see patterns or recurring themes. Similarly, suits alleging medical malpractice that are dismissed for failure to exhaust administrative remedies that involve the same federally supported hospital or attending healthcare workers potentially offer important information about agency performance that is obscured from view. These decisions offer hints, suggest clues, and provide dots that need to be connected—requiring not only the kind of factual investigation for which Congress is institutionally suited, but also Congress’s clear understanding of how to read a judicial decision so that merits issues are not conflated with jurisdiction and other procedural grounds.

Finally, the fact that the court has not ordered relief for the claimant—indeed, has barred the claimant from federal court—could mistakenly be interpreted as ratification of the agency’s action or as an indication that additional oversight is not needed. To the contrary, a case that is dismissed on procedural or jurisdictional grounds is not filtered through the lens of judicial review; the court has focused not on the merits of the agency’s performance, but only on whether the claimant has met threshold conditions needed to invoke judicial power. The FTCA immunizes a great deal of agency misconduct—intentional torts, discretionary decisions, and so forth—and for that reason the agency’s alleged misconduct may not be subject to judicial scrutiny. Once the case has been dismissed, all that remains of the allegations is the claimant’s account of his injury, which is likely to be pushed out of view and disregarded as biased and unreliable.

Consider an example: A recurring legal question in FTCA litigation is whether a claim is presented for the purpose of administrative exhaustion if the complaint states a theory of liability that was not included in the initial written statement to the agency. Initially, some courts took the view that presentment was satisfied if the agency had notice of the negligence claim;²²⁶ others did not even require that the administrative claimant specify a legal theory of

226. See, e.g., *Bush v. United States*, 703 F.2d 491, 494-95 (11th Cir. 1983).

liability.²²⁷ However, later courts have imposed strict particularity requirements on the presenting of administrative claims, holding, for example, that a negligence claim presented to the agency is not sufficient to permit a lawsuit on a theory of informed consent.²²⁸ In cases dismissed on this ground, the agency—typically the VA or a federal community medical facility—has not denied that it provided treatment without the patient’s informed consent, but the court has not reached the merits of the question.²²⁹ Quite apart from whether the courts are interpreting the statute correctly, the decisions warrant a second look: Some kind of after-action report is needed for Congress to have a better sense of how health care is being delivered at federally supported facilities. Failing to secure informed consent before providing medical treatment, if a sustained practice, seems a serious lapse in professional standards that ought to be investigated and corrected—even if particular victims of the practice are not eligible for judicially ordered damages. At least one court of appeals, denying relief on jurisdictional grounds in a suit alleging a lack of informed medical consent, acknowledged the “tragic circumstances” of the case, but held that its hands were tied given the presentment requirement that it believed only Congress could amend.²³⁰ Yet a complaint alleging a hospital’s failure to secure informed consent could signal an even deeper problem, as lawsuits pertaining to illegal medical experimentation sadly illustrate.²³¹

2. Agency Performance: Information and Deterrence

The proposal also supports efforts to deter agency misconduct and to ensure that federal employees conform to professional

227. See, e.g., *Mellor v. United States*, 484 F. Supp. 641, 642 (D. Utah 1978) (stating that an administrative claim for the purpose of presentment is not the same as a cause of action).

228. Compare *Staggs v. United States ex rel. Dep’t of Health & Human Servs.*, 425 F.3d 881, 885 (10th Cir. 2005) (holding that an administrative claim for medical malpractice does not necessarily include informed consent), with *Frantz v. United States*, 29 F.3d 222, 224-25 (5th Cir. 1994) (taking the contrary position).

229. *Staggs*, 425 F.3d at 883-85.

230. *Id.* at 885.

231. See Keri D. Brown, Comment, *An Ethical Obligation to Our Servicemembers: Meaningful Benefits for Informed Consent Violations*, 47 S. TEX. L. REV. 919 (2006) (discussing medical experiments conducted on service members without informed consent and the dismissal of FTCA cases filed on this theory); see, e.g., *United States v. Stanley*, 483 U.S. 669 (1987) (dismissing an FTCA claim on behalf of service member subjected without consent to medical experimentation involving the drug LSD).

expectations. Congressional oversight involves “whether, to what extent, and in what way Congress attempts to detect and remedy executive-branch violations of legislative goals.”²³² Ensuring that agencies stay within the range of public expectations is a feature of accountability even if the conduct is not subject to judicial sanction.²³³ These expectations cover a great deal of ground—financial regularity, fairness, abuse of power, and performance.²³⁴ Performance may be measured directly through the use of outcome standards that determine post hoc whether an agency has met program requirements.²³⁵ Performance may be measured indirectly through the use of tort suits that impose damages when service delivery or other agency conduct has not met the requisite standards.²³⁶ The FTCA makes use of this latter form of accountability measure: Relief under the FTCA consists of the payment of damage awards to injured parties.²³⁷ Tort theory assumes that basic make-whole awards not only compensate victims for injury but also motivate the tortfeasor to engage in optimal deterrence to improve performance in the future. Whether or not the government responds to financial incentives,²³⁸ incentives of this sort generally are not present in the FTCA context because judgments (other than those below \$2,500) are not charged against the agency’s budget, and the individual employee is absolutely immune from suit if the tortious conduct occurred in the course of employment.²³⁹ Additional mechanisms therefore are needed to motivate agency

232. See Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 165 (1984).

233. See BEHN, *supra* note 214, at 6 (“Certainly government does have some clear responsibilities, and we citizens expect that our government will fulfill them. We are concerned about the responsibilities, obligations, and duties of public agencies and public officials. We are concerned about how these agencies and officials carry out these responsibilities, obligations, and duties. We expect that these agencies and officials will preserve, earn, and build the public’s trust while fulfilling the public interest.”).

234. *Id.* at 6-9 (identifying these different types of expectations as informing notions of public accountability).

235. See McCubbins & Schwartz, *supra* note 232, at 166.

236. See *id.*

237. See 28 U.S.C. § 1346 (2012).

238. See *supra* note 34.

239. An exception is for judgments, awards, and settlement pertaining to anti-discrimination laws and whistleblower suits. See Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, Pub. L. No. 107-174, 116 Stat. 566; see also Anderson & Roberts, *supra* note 23, at 10.

behavior to ensure compliance with legal and professional norms. A judicially barred suit effectively escapes review on the merits, so the court cannot serve this oversight function.

In other contexts, commentators have acknowledged the importance of redundancy—using multiple and sometimes overlapping compliance methods—to encourage agency accountability.²⁴⁰ With respect to the FTCA, damage awards serve goals that differ from those of congressional oversight: The former compensates the victim for injuries and perhaps has deterrent effects that affect future conduct; congressional oversight of the sort I am proposing retrospectively assesses incidents of alleged negligence to assess whether further investigation and revision of agency conduct might be needed. The two forms of relief express different (although related) normative values. Damage awards, while reducing injury to monetized form, embrace a dignitary aspect that is personal to the injured party; congressional oversight functions collectively and aims at institutional reform (although, as the next section discusses, it also can serve individual goals associated with constituent service). Finally, redundancy is useful when there is the possibility—as in the FTCA administrative claims process—that information will be hidden by one accountability mechanism but uncovered through the use of a complementary mechanism.²⁴¹

3. *Constituent Service: Information and Private Bills*

So far I have justified the proposal as promoting accountability by monitoring performance and motivating agency improvement. The proposal can be expected to promote analogous benefits of responsiveness and deterrence for lawmakers; dismissed FTCA decisions can alert Congress to constituent concerns and encourage Congress to undertake reforms. Indeed, the proposal has a direct and positive link to Congress's role in providing old-fashioned constituent service—the “pork and potholes” of traditional politics.²⁴²

240. On the value of redundancy as an accountability mechanism, see Colin Scott, *Accountability in the Regulatory State*, 27 J.L. & Soc'y 38, 52 (2000) (referring to redundancy as the use of “overlapping (and ostensibly superfluous) accountability mechanisms [that] reduce the centrality of any one of them”).

241. *Id.* at 52-53.

242. See Joshua Bone, *Stop Ignoring Pork and Potholes: Election Law and Constituent Service*, 123 YALE L.J. 1406 (2013); see also Heinz Eulau & Paul D. Karpis, *The Puzzle of Representation: Specifying Components of Responsiveness*, 2 LEGIS. STUD. Q. 233, 241 (1977) (identifying constituent service, resource allocation, and symbolic activities as entailments of representation).

It is not unusual for legislators to serve in an “ombuds” role, intermediating relations between a constituent and an agency.²⁴³ Often this kind of constituent service takes the form of case review, which operates *ex ante*, before the agency has reached its decision. The proposal enhances the legislator’s ombuds role, but does so *ex post*, after the agency and court have dismissed the constituent’s claim. Because the dismissal bars the claim “forever,” the legislator cannot directly revisit the decision—Congress has no authority to revise a judgment once it has been entered by the court.²⁴⁴ But the proposal could encourage Congress to be proactive—to be alert to “the next case” and to ensure staff intervention before the claim is judicially barred.²⁴⁵ Moreover, the review of multiple dismissals could provide the basis for policy reform.²⁴⁶ Far from detracting from Congress’s more important substantive role in formulating policy,²⁴⁷

243. See JOHN R. JOHANNES, *TO SERVE THE PEOPLE: CONGRESS AND CONSTITUENCY SERVICE* 3 (1984) (defining the ombuds-function as an “intermediary” between the constituent and the agency).

244. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 225-30 (1995).

245. See generally Edward L. Rubin, *Bureaucratic Oppression: Its Causes and Cures*, 90 WASH. U. L. REV. 291, 345-46 (2012) (recommending a “collaborative monitor” to improve government action). It is not unusual for ombuds offices to make use of complaints—whether legally based or not—as a source of information about agency performance. For example, the Federal Trade Commission maintains a “Consumer Sentinel” database that marshals together consumer complaints that are filed through a hotline and online about debt collection. The complaints typically deal with particular collection companies or individuals and provide the FTC with an important source of information about possible legal violations and targets for investigation. Some of the complaints do not rise to the level of a legal claim, and they include no responsive materials from the collection company. Nevertheless, the FTC regards the consumer-complaint data as important for spotting trends when enforcement actions might be appropriate and has made this information available to the Consumer Financial Protection Bureau for oversight of the debt-collection industry and rule-making activity. See CONSUMER FIN. PROT. BUREAU, *FAIR DEBT COLLECTION PRACTICES ACT: CFPB ANNUAL REPORT 2014* (2014), available at http://files.consumerfinance.gov/f/201403_cfpb_fair-debt-collection-practices-act.pdf; see also CONSUMER FIN. PROT. BUREAU, *CONSUMER RESPONSE ANNUAL REPORT: JANUARY 1 – DECEMBER 31, 2013* (2014), available at <http://www.consumerfinance.gov/reports/2013-consumer-response-annual-report/> (discussing collection and review of debt-collection complaints).

246. See Bone, *supra* note 242, at 1414 (stating that case work can provide representatives “[w]ith accurate and timely information,” and “agencies rely on representatives and their casework teams to provide informed feedback on agency service provision”); see also Larry P. Ortiz et al., *Legislative Casework: Where Policy and Practice Intersect*, 31 J. SOC. & SOC. WELFARE 49, 53 (2004) (observing that casework can result in legislative reform).

247. Cf. Joseph Cooper, *Foreword: Strengthening the Congress: An Organizational Analysis*, 12 HARV. J. ON LEGIS. 307, 321 (1975) (stating the view

the proposal could inform that work, operating as a form of fire-alarm oversight that is typical of constituent service.²⁴⁸

B. Information Transmission and Second Looks

The previous Parts have referred metaphorically to dismissed FTCA cases as “early warnings” and “thirteenth chimes” to suggest their usefulness to Congress in its policy making, oversight, and constituent-service functions. To these metaphors, we can add another: “tip of the spear”—a term drawn from the Center for Law and Military Operation’s publication of military after-action reports.²⁴⁹ After-action reports, now pervasive throughout government, industry, and social psychology, are a well-known feature of military culture.²⁵⁰ An after-action report functions as an internal management tool that enables participants to review an event, to assess practices that worked well and those that did not, and to consider whether different approaches ought to be utilized to improve performance in future activities.²⁵¹ In recommending that lawyers conduct after-action reviews of trials, a team of commentators has explained:

that “time spent on constituency service . . . can seriously detract from committee work”).

248. See McCubbins & Schwartz, *supra* note 232, at 173 (discussing constituent service activities as a form of oversight).

249. See Ctr. for Law & Military Operations, *CLAMO Publishes New Tip of the Spear and Domestic Operational Law Handbook*, ARMY LAW., Oct. 2010, at 1.

250. See Victor M. Hansen, *Developing Empirical Methodologies to Study Law of War Violations*, 16 WILLAMETTE J. INT’L L. & DISP. RESOL. 342, 379 (2008) (“Perhaps one of the most useful avenues of exploration for the empirical researcher is to examine how the military itself examines its past conduct, identifies deficiencies and what steps it takes to correct those deficiencies. An important part of the military culture is this process of reviewing past actions as a means of improving future performance. A routine part of a military operation, from squad-level engagements to large-scale actions, is the After Action Review, where members of the unit examine and analyze what went well and what could be improved. The military services also examine and memorialize much of this information in a more formalized and systematic way. For example, the Army has created the Center for Army Lessons Learned. This center is based at Fort Leavenworth, Kansas. Its stated mission is to collect and analyze data from a variety of current and historical sources, including Army operations and training events and produce lessons for military commanders, staff and students.” (footnotes omitted)).

251. See *id.*; see also Wesley G. Skogan & Tracey L. Meares, *Lawful Policing*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 79 (2004) (discussing after-action reports as a managerial strategy).

An after action review . . . forces the entire trial team to review and critique the significant events leading up to trial as well as each of the trial's segments. Army generals as far back as Caesar in his "Commentaries on the Gallic War" have learned strategic and tactical lessons through after action reports. Today, state agencies and most major corporations engage in after action reviews in evaluating projects.²⁵²

After-action review thus occasions a "second look" at an entity's conduct with the goal of motivating clearheaded criticism to improve future performance.

The proposal urges Congress to take a "second look" at agency performance through the lens of dismissed FTCA cases. I do not think a new institutional mechanism is needed to operationalize the proposal, but it does require effort, focus, and political will. Lawmakers cannot be ordered to take these steps, which could include amending the FTCA (among, other things, to require agency reporting)—but their sincere commitment to the issues and to their constituents must provide the motivation. First, congressional staff, as a part of their constituent-service activities, could routinely review dismissed FTCA suits of plaintiffs within their districts. Second, Congress may enlist the General Accountability Office and the Congressional Research Office to study judicially barred suits on a systematic basis. Third, the Administrative Conference could undertake a special project that focuses on agency investigation of federal-tort claims with the possibility of improving intra- and inter-agency communication about shared institutional problems.

1. *Lawmakers and Staff*

The constituent-service function of lawmakers comfortably embraces the review of dismissed FTCA suits. Of course, congressional staff do not have unlimited resources, and they tend to be generalists, so the prospect of reviewing something that sounds as esoteric as dismissed FTCA decisions may be rejected at the starting

252. J. Ric Gass & Michael B. Brennan, *What Went Right, or Wrong: Trial "After Action Reviews,"* FOR DEFENSE, Aug. 2013, at 28, 29, available at <http://www.gasswebermullins.com/wp-content/uploads/2010/09/FTD-1308-GassBrennan.pdf> (citation omitted) (citing U.S. DEP'T OF THE ARMY, A LEADER'S GUIDE TO AFTER-ACTION REVIEWS, TRAINING CIRCULAR NO. 25-20, at 1 (1993), available at http://www.acq.osd.mil/dpap/ccap/cc/jcchb/Files/Topical/After_Action_Report/resources/tc25-20.pdf; CAL. GOV'T CODE § 8607(f) (West 2013) (mandating California Emergency Management Agency after action reviews 120 days after declared disasters); *After Action Review*, KSTOOLKIT, <http://www.kstoolkit.org/After+Action+Review> (last visited Jan. 26, 2015)).

gate.²⁵³ Congress does not routinely receive or review court decisions that dismiss FTCA suits or order relief in such cases. Nor do agencies routinely provide information about claim settlements or denials.²⁵⁴ The 1946 version of the FTCA obligated the head of every agency to “report annually to Congress all claims paid by it under” the act, “stating the name of each claimant, the amount claimed, the amount awarded, and a brief description of the claim,”²⁵⁵ but a 1965 amendment repealed the requirement, although specific agencies do make periodic reports to Congress about paid claims.²⁵⁶

On the other hand, lawmakers and staff, as public choice theorists emphasize, are oriented to constituent service,²⁵⁷ and the proposal builds on that aspect of the lawmaker’s job. Indeed, it is precisely because legislators have limited time and cannot “supervise every regulatory development” that the proposal warrants consideration; sometimes looking indirectly at a situation, mining unfamiliar sources of information, or seeing a situation when it is not primed for review offers a useful and even better way to focus attention and to gain insight into performance and outcomes.²⁵⁸ Finally, constituent service often involves congressional action on behalf of lower-income individuals, which would be consistent with the presumed universe of defeated FTCA claimants. On the other hand, the services provided would be nonpartisan in scope and impact.²⁵⁹

2. General Accountability Office

It also may be useful to enlist a third-party overseer that is perceived as neutral, independent, and nonpartisan. The Government Accountability Office (GAO) provides another pathway through

253. See Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1959 (2008) (discussing these features of congressional staff).

254. See Bermann, *supra* note 31, at 654.

255. 28 U.S.C. § 2673 (Supp. V 1946).

256. Act of Nov. 8, 1965, Pub. L. No. 89-348(1), 79 Stat. 1310. For a discussion, see Bermann, *supra* note 31, at 654.

257. See Galle & Seidenfeld, *supra* note 253, at 1959.

258. See Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 420 n.31 (2005).

259. See Bone, *supra* note 242, at 1414 n.28 (“Unsurprisingly, political scientists have determined that the likelihood of making a casework request generally decreases as education level increases, though the likelihood ticks up again for the most educated.”).

which information about dismissed FTCA claims can be communicated to Congress.²⁶⁰ The GAO “is the audit and evaluation agency for” Congress.²⁶¹ It was founded by the Budget and Accounting Act of 1921 in order to investigate the use of public funds and to make recommendations to the executive and legislative branches on how to improve the country’s financial management.²⁶² During the 1950s and 1960s, Congress expanded the GAO’s authority by calling on it to study “the economy and efficiency of government operations.”²⁶³ In the 1970s and 1980s, the GAO furthered its program evaluation mandate by diversifying its researchers to include staff from different professions.²⁶⁴ In 2004, the Government Accounting Office changed its name to the Government Accountability Office in order to reflect its expanded mandate.²⁶⁵ The GAO examines the day-to-day operations of different parts of the government but also studies larger issues that the country faces, such as the government’s overall financial health and military engagements.²⁶⁶

The GAO’s website describes its current mission as supporting “Congress in meeting its constitutional responsibilities and to help improve the performance and ensure the accountability of the federal government [and providing] Congress with timely information that is objective, fact-based, nonpartisan, nonideological, fair, and balanced.”²⁶⁷ The GAO’s structure is designed to promote neutrality in the research that its staff undertakes.²⁶⁸ While the Comptroller

260. See Bermann, *supra* note 31, at 654.

261. Nancy Kingsbury, *The Government Accountability Office and Congressional Uses of Federal Statistics*, 631 ANNALS AM. ACAD. POL. & SOC. SCI. 43, 43 (2010).

262. *Id.* at 44.

263. *Id.*

264. *Id.*

265. David M. Walker, *GAO Answers the Question: What’s in a Name?*, ROLL CALL (July 19, 2004, 12:00 AM), http://www.rollcall.com/issues/50_8/guest/6262-1.html.

266. *Id.*

267. See *About GAO*, GAO, <http://www.gao.gov/about/index.html> (last visited Jan. 26, 2015).

268. See *How the Comptroller General Is Selected*, GAO, <http://www.gao.gov/about/cgprocess.html> (last visited Jan. 26, 2015). The GAO Act of 1980 established the current procedure for appointing the Comptroller General of the United States who heads the GAO. *Id.* A congressional commission first provides the President with a list of at least three individuals to replace the outgoing Comptroller General. *Id.* The President then chooses someone from the list to be nominated, who must be approved by the Senate. *Id.* The Comptroller General of the

General authorizes parts of the research agenda, the GAO's work is mainly undertaken at the request of congressional committees or by mandates in laws or committee reports.²⁶⁹ The GAO currently issues about 1,200 reports annually.²⁷⁰ In creating its reports, the GAO relies on statistical data from many agencies, including the Census Bureau, the Bureau of Economic Analysis, the Bureau of Labor Statistics, and the National Center for Educational Statistics.²⁷¹

At the request of Congress, the GAO already has undertaken excellent analyses of paid FTCA claims by the VA on the view that that they offer a synoptic account of service delivery at medical facilities for veterans. In 1995, the GAO reported on medical malpractice claims filed against the VA explaining that they "provided opportunities for VA to identify concerns with individual providers and decrease the risk of future tort claims."²⁷² The GAO did a second study in 2011, examining "the resolution of tort claims filed against VA in the context of VA's efforts to improve the quality of veterans' care at its facilities."²⁷³ FTCA suits that were not paid—because of procedural defects, lapsed statutes of limitations, or filings in the wrong court—were not included in the analysis,²⁷⁴ and if examined likely would have highlighted deeper and broader problems.

United States is appointed for a fifteen-year term and may only be removed by Congress. *Id.*

269. *About GAO*, *supra* note 267.

270. Kingsbury, *supra* note 261, at 44.

271. *Id.* at 45-46.

272. WILLIAMSON, *supra* note 5, at 2.

273. *Id.* The GAO studies focused on claims in the period from 2005 to 2010. *Id.* at 3. Twenty-five percent of the tort claims that went to litigation were dismissed before trial; of the cases resolved through judgment, the GAO found that "the vast majority were resolved in favor of the United States." *Id.* at 8. The Office of Medical-Legal Affairs is required to review all paid claims—whether resolved administratively or through litigation—to determine whether VA practitioners delivered substandard care to veterans. *Id.* at 2. However, the GAO found that 16% of paid claims during this period had not been transmitted to OMLA for review, and that as a result, 140 healthcare "practitioners would likely have been required to be reported . . . for rendering substandard care." *Id.* at 13. The GAO emphasized that analysis of paid claims is an important part of the VA's quality-control process. *Id.* at 14. The GAO further reported that "positive changes" could result from timely review of "[w]hen allegations of substandard case are first brought to the attention of VHA management officials (either when the incident occurred or when the tort claim is filed)." *Id.* at 18.

274. *Id.* at 9 n.a.

3. Congressional Research Service

The Congressional Research Service (CRS) is another third-party overseer that could be enlisted to undertake review of dismissed FTCA claims and to report findings to Congress. In contrast to the GAO, its communications with Congress are confidential.²⁷⁵ The CRS was established in 1914 as a separate department within the Library of Congress and originally was called the Legislative Reference Service.²⁷⁶ Under the Legislative Reorganization Act of 1970, the agency acquired its current name, and its duties were expanded.²⁷⁷ The CRS serves as a think tank for Congress and prepares reports at its directive.²⁷⁸ According to the CRS website, its current mission is to serve “the Congress throughout the legislative process by providing comprehensive and reliable legislative research and analysis that are timely, objective, authoritative and confidential, thereby contributing to an informed national legislature.”²⁷⁹ CRS research covers five broad topics: American law; domestic social policy; foreign affairs, defense, and trade; government and finance; and resources, science, and industry.²⁸⁰ It is possible that the CRS already reviews dismissed FTCA cases, but the reports are not available to the public.²⁸¹ A publicly available CRS report about the FTCA focused on the broad-scale effects of judicial doctrines, including the *Feres* Doctrine, on the enforcement of the statute and did not focus in particular on case dismissals.²⁸² CRS analysis of dismissed FTCA claims as indicators

275. See *Values*, LIBR. CONGRESS, <http://www.loc.gov/crsinfo/about/values.html> (last visited Jan. 26, 2015) (emphasizing the confidentiality of congressional inquiries and communications); see also *CRS: Federal Tort Claims Act, September 2, 2008*, WIKILEAKS, https://wikileaks.org/wiki/CRS:_Federal_Tort_Claims_Act,_September_2,_2008 (last visited Jan. 26, 2015) (stating that the CRS “electronic archives are, as a matter of policy, not made available to the public,” and “CRS archives as a whole are firewalled from public access”).

276. See *History and Mission*, LIBR. CONGRESS, <http://www.loc.gov/crsinfo/about/history.html> (last visited Jan. 26, 2015).

277. *Id.*

278. *Id.*

279. *Id.*

280. See *id.*

281. See *CRS: Federal Tort Claims Act, September 2, 2008*, *supra* note 275.

282. See generally HENRY COHEN, CONG. RESEARCH SERV., 95-717A, FEDERAL TORT CLAIMS ACT: CURRENT LEGISLATIVE AND JUDICIAL ISSUES (2001), available at http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/95-717_A_12032001.pdf; see also HENRY COHEN & VANESSA K. BURROWS, CONG.

of agency performance are well within the statutory mandate and would better inform legislative discussion about national problems.

4. *Administrative Conference of the United States*

Finally, the recently rejuvenated Administrative Conference of the United States could provide Congress with an important resource in improving the procedures that agencies use to investigate, resolve, and follow up on federal-tort claims. Congress created the Administrative Conference in 1964, with enactment of the Administrative Procedure Act, and authorized its first appropriations four years later.²⁸³ The Administrative Conference's mission is defined by statute to "study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs, and make recommendations to administrative agencies, collectively or individually, and to the President, Congress, or the Judicial Conference of the United States, in connection therewith, as it considers appropriate."²⁸⁴ Although defunded in 1995, the Conference was reauthorized in 2008 with the enactment of the Regulatory Improvement Act of 2007.²⁸⁵ The proposal is consistent with the important work that the Administrative Conference carried out during its first three decades of work²⁸⁶ and with the recommendation of the Conference's legendary chair Professor Paul Verkuil to undertake "procedural audits" to improve agency practices.²⁸⁷ Most important for current purposes, the Administrative Conference played a significant role in reform of the sovereign immunity doctrine as it applies to administrative agencies, and its 1984 report and recommendations on "Administrative Handling of Monetary Claims: Tort Claims at the

RESEARCH SERV., 95-717, FEDERAL TORT CLAIMS ACT 1 (2007), available at <http://www.fas.org/sgp/crs/misc/95-717.pdf>.

283. See *History*, ADMIN. CONF. U.S., <http://www.acus.gov/history> (last visited Jan. 26, 2015).

284. 5 U.S.C. § 594(1) (2012).

285. For a history, see Gary J. Edles, *The Revival of the Administrative Conference of the United States*, 12 TEX. TECH ADMIN. L.J. 281 (2011).

286. See Sally Katzen, Commentary, *The Role of the Administrative Conference in Improving the Regulatory Process*, 8 ADMIN. L.J. AM. U. 650, 656-61 (1994) (describing the study of alternative dispute resolution, the structure of the Resolution Trust Corporation, and the use of civil penalties).

287. Jeffrey S. Lubbers, *Paul Verkuil's Projects for the Administrative Conference of the U.S. 1974-1992*, 32 CARDOZO L. REV. 2421, 2433 (2011) (internal quotation marks omitted).

Agency Level” remains a model for immediate improvement.²⁸⁸ The Conference is uniquely placed to understand the impact of procedure upon government responsiveness and public accountability,²⁸⁹ and its involvement in federal-tort oversight would ensure that the process is rigorous, objective, and nonpartisan; under its watch, learning could be shared across agencies so that mistakes are not repeated.²⁹⁰

C. Back to the Future: Judicially Barred Federal-Tort Claims and Private Bills

Finally, I suggest reinvigorating a claimant’s right to petition for a private bill whenever a claim is not cognizable under the FTCA—a result that is not foreclosed by the current statute but the practice is virtually dormant.²⁹¹ The FTCA bans Congress from considering a private bill for a claim that is cognizable under the act.²⁹² To that end, the enactment of the FTCA in 1946 oversaw the effective dismantlement of the House Claims Committee and the Senate Claims Committee, and the transfer of those duties to the

288. See Bermann, *supra* note 31, at 509 n.* (internal quotation marks omitted); see also Administrative Settlement of Tort and Other Monetary Claims Against the Government (Recommendation No. 84-7), 49 Fed. Reg. 49,837, 49,840 (Dec. 24, 1984) (codified at 1 C.F.R. § 305.84-7).

289. See Carl McGowan, *The Administrative Conference: Guardian and Guide of the Regulatory Process*, 53 GEO. WASH. L. REV. 67, 71-75 (1984) (discussing the Conference’s work in this area); see also David C. Vladeck, Commentary, *The Administrative Conference’s Role in Promoting Government Efficiency Today, Tomorrow, and Next Year*, 8 ADMIN. L.J. AM. U. 697, 699 (1994) (discussing the Conference’s ability to deal with the “nuts and bolts” of regulatory reform). *But cf.* Jeffrey D. Koelemay, *Judges: Administrative Conference Has Role to Foster Communication Among Branches*, 83 U.S. L. WK. (BNA) No. 15, at 597 (Oct. 21, 2014) (describing a recommendation made at a panel of the ABA 2014 Administrative Law Conference that the Administrative Conference take action to “facilitate better communication across rulemaking agencies”).

290. See Alan W. Heifetz, Commentary, *The Continuing Need for the Administrative Conference: Fairness, Adequacy, and Efficiency in the Administrative Process*, 8 ADMIN. L.J. AM. U. 703, 704 (1994) (urging reauthorization of the Administrative Conference as “a forum in which ideas and experiences may be shared, to the end that departments and agencies across the wide federal government spectrum may learn how best to improve their practices” so that “the mistakes of others” are not repeated).

291. See Bermann, *supra* note 31, at 523-24 (acknowledging that “what constitutes a cognizable claim under the FTCA is ambiguous,” but urging a definition of “a tort claim arising out of acts within the scope of office and also not falling within any of the FTCA exemptions”); see also *The Federal Tort Claims Act*, *supra* note 24, at 550-51.

292. See Gottlieb, *supra* note 108, at 4.

House and Senate Judiciary Committees, respectively.²⁹³ The governing principle, however, is that Congress remains politically accountable for government misconduct even when a claimed injury is beyond the court's power because immunity is not waived.²⁹⁴ The request for a private bill is initiated by the individual seeking relief.²⁹⁵ In order to operationalize the proposal, Congress, or the courts or the agencies, or some combination of actors, would need to undertake outreach so affected constituents know about this pathway to relief.

Recommending a return to private bills—given the scandals associated with the practice, a loss of faith in a shared notion of the public interest, and the state of congressional dysfunction—may raise more than a few eyebrows. As a formal matter, a private bill is a statute passed for the explicit benefit of a specific individual.²⁹⁶ It is

293. See *id.* at 4-6 & nn.8-10 (summarizing and setting forth the relevant provisions of the 1946 act).

294. In other contexts, a private bill may be enacted as “protection against the rigor of federal statutes or against harmful administrative actions or inactions.” Peter H. Shuck & Martha Joynt Kumar, *Private Bills: The Gravy Road*, in PETER H. SHUCK, *THE JUDICIARY COMMITTEES: A STUDY OF THE HOUSE AND SENATE JUDICIARY COMMITTEES* 242, 243 (1975). However, Congress is more likely to enact private legislation “when no other remedy is available, and when enactment would, in a broad sense, afford equity.” RICHARD S. BETH, *CONG. RESEARCH SERV.*, 98-628, *PRIVATE BILLS: PROCEDURE IN THE HOUSE 1* (2004). See generally WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 249 n.2 (1988) (“The U.S. Constitution has no general prohibition or limitation on special legislation. [Note, however, that the ban on bills of attainder is a prohibition of one form of special legislation.] During each Congress various ‘private bills’ are enacted; one common type consists of a waiver of immigration requirements for particular individuals, and another common type allows compensation to persons whose claims against the federal government fall outside the scope of the Federal Tort[] Claims Act and other claims statutes. Although, theoretically, federal legislation that is special in character might violate the equal protection component of the Due Process Clause of the Fifth Amendment, we know of no case so holding.”).

295. BETH, *supra* note 294, at 1.

296. See 145 *CONG. REC.* 7199 (1999) (extension of remarks by Hon. F. James Sensenbrenner, Jr.) (“Private bills deal with specific individuals, corporations, institutions, and so forth, as distinguished from public bills which deal with classes only.”); ROBERT W. COREN ET AL., *GUIDE TO THE RECORDS OF THE UNITED STATES SENATE AT THE NATIONAL ARCHIVES: 1789-1989*, at 249 (bicentennial ed. 1989) (“A private bill, in legislative terminology, is a bill to grant a pension, authorize payment of a claim, or grant another form of relief to a private individual, as opposed to public bills of general application or that apply to a class of persons.”). A private bill differs from a private member bill, which refers to a bill proposed by a member of parliament who is not a member of the government's cabinet. See Scott Proudfoot, *Private Member Bills Get a Little More Important*, HILLWATCH,

not to be confused with a public law that purports to be general and collective, but benefits only a single corporation or an unidentified individual.²⁹⁷ Their scope is far ranging.²⁹⁸ In the twentieth century, Congress enacted private bills on such matters as to “authorize[e] reimbursement to the family of a CIA agent who died while testing LSD for the agency, waiving immigration requirements so a Philadelphia woman could marry a Greek man, and granting citizenship to a 111-year-old Albanian woman so she could vote in one free election before she died.”²⁹⁹ These bills embrace an unfamiliar aspect of legislative power—that of legislative equity, or the power of a non-judicial body to afford relief to an individual who has no remedy at law.³⁰⁰ Historically, ordinary people used the technology of private bills to express grievances and to seek political change,³⁰¹ and the practice played an important role in encouraging

http://www.hillwatch.com/Publications/Bulletins/Private_Members_Bills_More_Important.aspx (last visited Jan. 26, 2015) (defining a private member bill).

297. The federal tax code, for example, is littered with so-called general provisions that nevertheless apply to only a single taxpayer. *See, e.g.*, William L. Cary, *Pressure Groups and the Revenue Code: A Requiem in Honor of the Departing Uniformity of the Tax Laws*, 68 HARV. L. REV. 745, 747-48 (1955) (discussing the “Mayer Provision,” which afforded tax treatment for one movie mogul); *Federal Tax Policy for Economic Growth and Stability: Hearings Before the Subcomm. on Tax Policy of the J. Comm. on the Economic Report*, 84th Cong. 234-38 (1955) (statements of Walter Blum & William L. Cary) (referring to a “fiction of uniformity” in the tax code despite a “patchwork of special provisions” that afford “preferences to particular kinds of taxpayers, to certain types of receipts[,] to some categories of business expenses, to certain forms of personal consumption, and even to particular kinds of savings,” and questioning the propriety of according “privileged tax treatment . . . to specific individuals . . . whose only common characteristic is access to Congress”).

298. *See* James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1893-1902 (2010) (discussing private bills in the context of admiralty torts).

299. WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 117 (3d ed. 1989).

300. H.R. COMM. ON THE JUDICIARY, SUBCOMM. ON IMMIGRATION AND CLAIMS, 107TH CONG., RULES OF PROCEDURE AND STATEMENT OF POLICY FOR PRIVATE IMMIGRATION BILLS 3 (2002); *see* BETH, *supra* note 294, at 1 (commenting that the legislature enacts private bills in the spirit of equity). As one court of appeals explains, the purpose of private legislation, “unlike litigation, is to afford relief to persons whose claims would fail under existing law.” *Gonzalez Battoon v. I.N.S.*, 791 F.2d 681, 685 (9th Cir. 1986).

301. Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 153 (1986) (explaining that through the technology of petitions and private bills, “unrepresented groups—notably women, felons, Indians, and, in some cases, slaves—represented

reform even when the efforts failed—most notably, the petition campaign of abolitionists to secure private bills of manumission.³⁰² In effect, the mechanism of petition that accompanied the request for a private bill allowed “the people” to participate in the production of law as creators and actors, and not simply as consumers or observers.³⁰³ Recovering the right to petition for a private bill when tort claims are outside the government’s grant of sovereign immunity would serve a compensatory function by rejecting retreatism as an acceptable legislative response; as important, it could enrich public accountability by encouraging a more robust sense of political responsibility.

CONCLUSION

The topic of judicially barred federal-tort suits might be seen as yet another example of the distinction between “law on the books”

themselves and voiced grievances” (footnotes omitted). Angelina Grimke, in her famous public statements about slavery, referred to the right of petition as “the only political right that women have,” without which “they are mere slaves, known only through their masters.” A. E. GRIMKE, *Letter XI: The Sphere of Woman and Man as Moral Beings the Same*, in LETTERS TO CATHERINE E. BEECHER, IN REPLY TO AN ESSAY ON SLAVERY AND ABOLITIONISM, ADDRESSED TO A. E. GRIMKE 103, 112-13 (1838).

302. See 1 WILLIAM W. FREEHLING, *THE ROAD TO DISUNION: SECESSIONISTS AT BAY 1776-1854*, at 287, 308 (1990) (referring to the “Gag Rule Controversy,” when Congress refused to accept petitions referring to abolition); Higginson, *supra* note 301, at 143-44 (reporting that Congress “adopted a series of anti-slavery ‘gag rules’ that effectively abolished the right of petition”). Quakers presented a petition asking for congressional action to stop the slave trade as early as 1790 at the First Congress. See David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*, 61 U. CHI. L. REV. 775, 792 (1994). See generally 2 H. VON HOLST, *THE CONSTITUTIONAL AND POLITICAL HISTORY OF THE UNITED STATES* 235-51 (John J. Lalor trans., Callaghan & Co. 1888); SAMUEL FLAGG BEMIS, *JOHN QUINCY ADAMS AND THE UNION* 326-51 (1956); WILLIAM LEE MILLER, *ARGUING ABOUT SLAVERY: THE GREAT BATTLE IN THE UNITED STATES CONGRESS* 144 (1996).

303. Private bills today make up a small percentage of legislative activity; at the turn of the twentieth century, the number of private bills exceeded that of public legislation. Charles E. Schamel, *Untapped Resources: Private Claims and Private Legislation in the Records of the U.S. Congress*, PROLOGUE MAG. (Spring 1995), <http://www.archives.gov/publications/prologue/1995/spring/private-claims-1.html>. “During the 101st Congress (1989-1991)[,]” Congress enacted sixteen private bills, accounting for less than 3% of all legislative activity. *Id.* By contrast, “[d]uring the [59th] Congress (1905-1907)[,]” Congress enacted 6,249 private bills, accounting for 90% of all legislative activity. *Id.*

and “law on the ground,”³⁰⁴ highlighting the gap that exists between the FTCA’s goals and its implementation through the courts. The phenomenon of compliance slack is well documented in the law,³⁰⁵ as is the role of procedure in blocking access to judicial relief.³⁰⁶ But the very nature of the FTCA, and its aim of lifting the veil of sovereign immunity, makes the topic still broader, drawing to the surface what Robert M. Cover called the “force of interpretive commitments” that hold together a “normative universe.”³⁰⁷ Judicially barred suits—claims by widows whose veteran-spouses commit suicide or servicemembers who withstand sexual abuse in defending our country—ought not to be pushed out of view as small and insignificant issues. The FTCA can be read to constitute a narrow legalist approach to public accountability that celebrates extinguishing relief on technical and unfair grounds, or it can encourage a richer sense of official responsibility among elected representatives who are entrusted by the Constitution for lawmaking and governance. In that spirit, this Article has urged that Congress consider the true lessons of judicially barred FTCA lawsuits as motivation for meaningful oversight and necessary reform.

304. See Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15 (1910); see also Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 7 (1983) (explaining the distinction).

305. See ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 11 (1970) (discussing the concept of “organizational slack”).

306. See Arthur R. Miller, *Are the Federal Courthouse Doors Closing? What’s Happened to the Federal Rules of Civil Procedure?*, 43 TEX. TECH L. REV. 587, 598-99 (2011).

307. Cover, *supra* note 304, at 7.

