MEMORANDUM FOR CLAIMS JUDGE ADVOCATES/CLAIMS ATTORNEYS

SUBJECT: Federal Tort Claims Act (FTCA) Handbook

1. This edition of the FTCA Handbook is a revision of the material originally published in July 1979 and updated periodically since. The previous edition was last updated in September 1998. This edition contains significant cases through September 1999 pertaining to the filing and processing of administrative claims under the FTCA (Title 28, United States Code, Sections 2671-2680) and related claims statutes.

2. This Handbook provides case citations covering a myriad of issues. The citations are organized in a topical manner, paralleling the steps an attorney should take in analyzing a claim. Older citations have not been removed. Shepardizing is essential.

3. If any errors are noted, including the omission of relevant cases, please use the error sheet at the end of the Handbook to bring this to our attention. Users needing further information or clarification of this material should contact their Area Action Officer or Mr. Joseph H. Rouse, Deputy Chief, Tort Claims Division, DSN: 923-7009, extension 212; or commercial: (301) 677-7009, extension 212.

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Colonel, JA
Commanding
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I. REQUIREMENTS FOR ADMINISTRATIVE FILING

A. Why is There a Requirement?

1. Effective Date of Requirement. Formerly permitted only on claims not over $2,500 (28 U.S.C. § 2672, as applicable to claims accruing prior to 18 January 1967).


3. Waiver of Administrative Filing Requirement. Administrative filing requirement not subject to waiver or avoidance. Claremont Aircraft Inc. v. U.S., 420 F.2d 896 (9th Cir. 1970); Childers v. U.S., 442 F.2d 1299 (5th Cir. 1971). See also Roscoe v. U.S., 83 F.3d 433 (table), 1996 WL 200384 (10th Cir. 1996) (administrative filing requirement may not be avoided in trespass action by pleading a Bivens action); Weisgal v. Smith, 774 F.2d 1277 (4th Cir. 1985) (plaintiff may not avoid administrative filing requirement by claiming proposed FTCA count adding U.S as a defendant relates back (see F.R.Civ.P. 15) to original suit commenced solely against prison warden); Murphy v. West, 945 F. Supp. 874 (D. Md. 1996) (plaintiff cannot avoid exhaustion of


5. Administrative Filing Location. An administrative claim must be filed with the appropriate Federal agency prior to filing suit, 28 U.S.C. § 2675(a).


7. Not Necessary for Third Party Practice. Joinder of U.S. as third party to obtain contribution or indemnity does not require filing of administrative claim prior to suit. Spawr v. U.S., 796 F.2d 279 (9th Cir. 1986) (no requirement to file administrative claim for true third party claim); Hassan v. Louisiana DOT & Development, 923 F. Supp. 890 (W.D. La. 1996) (citing Thompson v. Wheeler, 898 F.2d 406 (3rd Cir. 1990) and Jackson v. Southeastern Pa. Transportation Authority, 727 F. Supp. 965 (E.D. Pa. 1990)). See also West v. U.S., 592 F.2d 487 (8th Cir. 1979). USA v. Green, Civ. # 1:97-CV-00271 (W.D.N.Y., 18 Dec. 98), third party complaint does not lie in action by United States for clean-up under CERCLA where respondent alleges that EPA caused damage during cleaning as original action is based on occurrences prior to clean-up accordingly third complaint is not compulsory as required.

B. What Must Be Filed?

promise to continue contract is FTCA claim; Lang v. U.S., Civ. # C-1-97-713 (S.D. Ohio, 14 Apr. 98), allegation of U.S. officials conspired to intercept claimant's thoughts, dreams, and emotions by electric surveillance is not a claim as it does not tell who conspired and what harm it caused. Jama v. U.S. INS, 22 F. Supp. 2d 353 (D.C.N.J. 1998), group of claims dismissed under FTCA for failure to state sum certain except for claims containing sum for property damage. Dolan v. U.S. Army, 1999 WL 199012 (S.D. NY), letter asking DOD to contact plaintiff re his injury but without sum certain mailed one day short of two years and on same day suit filed is not a cognizable claim.

2. Examples of Written Demand.


f. Approximate or Present Amount. Where approximate or present amount of claim stated on SF 95 claim may be limited to that amount. Adams by Adams v. U.S. Dept. of Housing & Urban Dev., 807 F.2d 318 (2d Cir. 1986) (administrative claim stating "in excess of $1,000" is limited to $1,000); Fallon v. U.S., 405 F. Supp. 1320 (D. Mont. 1976) ("Approximately $1,500.00" held sum certain, but limited to that amount); Erxleben v. U.S., 668 F.2d 268 (7th Cir. 1981) ("$149.42 presently" meets sum certain requirement). But see Bradley v. U.S. by Veterans Admin., 951 F.2d 268 (10th Cir. 1991) (SF 95 stating sum "in excess of $100,000" does not meet requirement). Presentation of bills or receipts may meet requirement where SF 95 amount left blank, but recovery may be limited to this amount. Molinar v. U.S., 515 F.2d 246 (5th Cir. 1975); Mack v. USPS, 414 F. Supp. 504 (E.D. Mich. 1976); Erxleben v. U.S., 668 F.2d 268 (7th Cir. 1981). See


i. Class Action Maintenance Prerequisites. Class actions are permitted only where questions of law or fact are common to the class (F.R.Civ.P. 23(a),(b)). Harrigan v. U.S., 63 F.R.D. 402 (E.D. Pa. 1974). This is difficult in a tort action or multi-district class action litigation. McDonnell Douglas Corp. v. U.S. District Court, 523 F.2d 1083 (9th Cir. 1975); In re Northern Dist. of Calif. Dalkon Shield IUD Products, 526 F. Supp. 887 (N.D. Cal. 1981). See also In re Agent Orange Product Liability Litigation, 506 F. Supp. 762 (E.D.N.Y. 1980), later proceedings, In re Agent Orange Product Liability Litigation, 818 F.2d 145 (2d Cir. 1987).

k. Tolling by Insurer’s Claim. Filing by insurer for subrogated loss does not toll insured’s PI claim. Shelton v. U.S. 615 F.2d 713 (6th Cir. 1980). See also Ahmed v. U.S., 20 F.3d 514 (4th Cir. 1994) (Where claim filed by insurer only mentions potential PI claim and no sum for PI is named, no PI claim has been filed); Cizek v. U.S., 953 F.2d 1232 (10th Cir. 1992) (amount stated by insurer does not substitute for insured's demand, since they were not identical).


m. Failure to Provide Specific Facts. Shoemaker v. U.S., 1997 WL 96543 (S.D.N.Y.) (claim that does not state place and date is not a claim since it is so attenuated and insubstantial under Hogans v. Lavine, 415 U.S. 528 (1974)).

3. Documenting A Claim.


b. Documentation Excused. Documentation should be excused where claim is obviously subject to denial or summary judgment at trial.

(1) Feres Cases. Where Feres doctrine may control. In "Parker" type cases (Parker v. U.S., 611 F.2d 1007 (5th Cir. 1980)), initial investigation and documentation required should concern solely "incident to service" status. Pending decision on "Feres" application, documentation of liability and injuries should be delayed.

(2) Statute of Limitation Cases. Where statute of limitations (SOL) may control, similar procedures should be followed in cases where accrual date of claim is clear. In cases where accrual date is unclear, e.g., medical malpractice, full documentation of liability and injuries should be demanded, as decision on SOL is frequently delayed at trial until evidence on the merits is heard.
(3) Exclusion Cases. Where "2680" exclusions may control, documentation may sometimes not be demanded when application of exclusion is clear, e.g., "foreign country" and "combat" exclusions.

(D.C.N.J. 1998), failure to provide evidence of authority of attorney to file administrative claim is not jurisdictional.


b. Appointment Held in Abeyance. In cases where amount of claim does not justify cost of appointment, requirement may be held in abeyance provided that it is met prior to

5. Notifying Claimant of Improper Claim. Claimant should be put on written notice that failure to file for sum certain in writing by proper person within two years of accrual may result in statute of limitation barring claim. Molinar v. U.S., 515 F.2d 246 (5th Cir. 1975); Kelley v. U.S., 568 F.2d 259 (2d Cir. 1978). See also Danowski v. U.S., 924 F. Supp. 661 (D.N.J. 1996) (failure of USPS to notify claimant of defect leads to court holding that father’s claim for son’s medical bills paid by him was constructively filed). Since 1983, objective standards apply to Rule 11 sanctions, bad faith need not be shown. Accordingly, early notification should be made to claimants where claim is clearly barred, e.g., SOL, Feres, FECA, foreign country exclusion. See The Law of Sanction, Trial, May 1988; Vaccaro v. Stephens, 869 F.2d 866 (9th Cir. 1989) (frivolous claim may result in substantial penalties).

6. Amendments. Administrative claim may be amended at any time prior to final agency action, i.e., denial, final offer of settlement, even after two year SOL has run (28 C.F.R. § 14.2). Provencial v. U.S., 454 F.2d 72 (8th Cir. 1972). Agency action not final until claimant signs settlement agreement in PI case, even though payment is approved in full amount claimed. Odin v. U.S., 656 F.2d 798 (D.C. Cir. 1981). See also Wiseman v. U.S., 976 F.2d 604 (9th Cir. 1992) (issuing a check for full amount stated on SF 95 does not bar amendment when check returned and higher amount claimed). Whether an amendment will be allowed is based on the nature and timing of the amendment. Beheler v. R.T.C., No. # 94-11045 (5th Cir., Aug. 16, 1995) (location of accident on SF 95 different from location named in suit--amendment not permitted); Tilton v. U.S., Civ. #C-86-20448-SW (N.D. Cal. 1990) (addition of pain and suffering claim at trial in wrongful death case not authorized); Barrett v. U.S., 845 F. Supp. 774, (D. Kan. 1994) (addition of survival claim at trial in wrongful death case prohibited); Lopez de Robinson v. U.S., 114 F.3d 1169 (table), 1997 WL 259551 (1st Cir 1997) (claim by widow for her pain and suffering can be converted into claim of estate for decedent’s pain and suffering); Doe v. U.S., 58 F.3d 494 (9th Cir. 1995) (amendment to avoid foreign country exclusion by pleading act took place on high seas, rather than in Venezuelan waters).

a. Valid Claims Only. Only a valid claim can be amended--not one lacking a sum certain.

b. Amendment Restarts Administrative Consideration Period. Amending a claim, e.g., by including spouse's loss of
consortium or raising the amount upwards, starts the six
months period for delaying suit running over again (28 C.F.R.
1985) (claimed amount increased several days before suit
filed—in creased amount accepted by court—new claim issue
not raised).

c. Amendments in Court. Attempt to amend in court may
result in requiring new and separate administrative claim if
it is in fact a new claim. Executive Jet Aviation, Inc. v.
U.S., 860 F.2d 357 (9th Cir. 1988) (where amputation occurred
after administrative claim filing, permissibility of
amendment depends on whether amputation foreseeable). If a
new claim or an increased amount, the court will generally
prohibit amendment. Swackhammer v. U.S., 119 F.3d 7 (9th
Cir. 1997) (amendment not permitted—SOL bars sexual assualt
claim against recruiter as it accrued no later than time
plaintiff was informed that recruiter was disciplined);
1980) (amendment to increase amount denied); Reuter v. U.S.,
534 F. Supp. 731 (W.D. Pa. 1982); Val-U Const. Co. of South
to amount stated on SF 95, not to total of bills submitted);
reduced to $250,000, amount of administrative claim); Wiseman
v. U.S., Civ. #C90-12042 (W.D. Wash. 1991) (claim paid in
amount of $5,918.23 (medical bills) and $3900 property
damage, despite attorney for claimant stating he would amend
later, amendment to $250,000 rejected at trial); Tilton v.
U.S., Civ. #C-86-20448-SW (N.D. Cal. 1990) (addition of pain
and suffering claim at trial in wrongful death case not
authorized); McCann v. U.S., Civ. # 3:93-CV-1690-T (N.D.
Tex., June 9, 1995) (SF 95 only stated individual claims but
not separate claim for survivorship as required by Texas law—
adding survivorship claim at trial not permitted); Hoogeveen
(adding spouse's loss of consortium claim in court not
1988). Can be amended upward for injuries later discovered
1047 (D.R.I. 1979); U.S. v. Alexander, 238 F.2d 314 (5th Cir.
1956); Husovsky v. U.S., 590 F.2d 944 (D.C. Cir. 1978); Joyce
534 F. Supp. 762 (D. Haw. 1982). See also Michels v. U.S.,
31 F.3d 686 (8th Cir. 1994) (sustaining trial judge's
increase in claimed amount due to increased injury).
Amendment will be allowed where new claim is sufficiently embraced in original claim and agency has enough notice to investigate. Johnson v. U.S., 788 F.2d 845 (2d Cir. 1986) (administrative claim provided Postal Service sufficient notice of negligent supervision allegation); Brewer v. U.S., 864 F. Supp. 741 (N.D. Ill. 1994) (addition of count of willful and wanton permitted as count was reasonably embraced in original claim for death by asphyxiation). For example, adding informed consent count in medical malpractice trial does not constitute a new claim. Mellor v. U.S., 484 F. Supp. 641 (D. Utah 1978). See also Franz v. U.S., 29 F.3d 222 (5th Cir. 1994) (adding informed consent count at trial permitted as DVA has sufficient notice to investigate all aspects of care during administrative phase). However, the standard is not so broad as to encompass all claims. Bush v. U.S., 703 F.2d 491 (11th Cir. 1983) (plaintiff allowed to add poor post-op care, but not informed consent, as basis for suit at trial). If the Government fails to object at trial to evidence concerning allegation not made on administrative claim, it may not object to amendment. Boyce v. U.S., 942 F. Supp. 1220 (E.D. Mo. 1996). Butler v. U.S., 1998 WL 314317 (10th Cir. (Okla.)) Count of lack of informed consent cannot be raised in suit for negligent surgery as not on SF 95. Dynamic Image Technologies, Inc. v. U.S., 18 F. Supp. 2d 146 (D.P.R. 1998), permits addition of counts of infliction of emotional distress and negligent supervision at trial even though not stated in SF 95 - cites Santiago-Ramirez v. Sec'y of Dep't of Defense, 984 F.2d 16 (1st Cir. 1993) as authority. Munsell v. U.S., 14 F. Supp. 2d 214 (D.R.I. 1998), where USPS is alleged to have a snow removal plan, cannot add count at trial that hole was alongside paved surface at entrance. Alvarez v. U.S., 1999 U.S. Dist. LEXIS 11092 (S.D.N.Y.). Claimant's administrative claim of medical malpractice is not limited to certain dates and, therefore, not expanded at trial. Birchfield v. U.S., 168 F.3d 1252 (11th Cir. 1999), claim alleging osteoporosis caused by overadministration of prednisone does not preclude raising failure to timely diagnose osteoporosis for first time in court.

e. Ad Damnum Amendments at Trial. Ad damnum may be raised in amount at trial only if there is newly discovered evidence not reasonably available previously or on proof of intervening facts (28 U.S.C.§ 2675(b)). See Del Valle Rivera v. U.S., 626 F. Supp. 347 (D.P.R. 1986) (ad damnum of $500,000 reduced to $200,000--amount of administrative claim); Robinson v. U.S., 746 F. Supp. 1059 (D. Kan. 1990) (held to amount on SF 95, even though discovered later surgery may be needed); Colon v. U.S., 877 F. Supp. 57 (D.P.R. 1995) (court values injuries at $125,000, but limits
award to $50,000 amount claimed); Hogan v. U.S., 86 F.3d 1162 (table), 1996 WL 280061 (9th Cir. 1996) (damages limited to $50,000 claimed administratively and not amount raised at trial, since plaintiff did not seek additional treatment until 5 years after accident); McFarlane v. U.S., 684 F. Supp. 780 (E.D.N.Y. 1988) (cannot raise ad damnum where increase based on medical diagnosis made prior to original claim). But see Lane v. U.S., 1996 WL 426312 (S.D.N.Y.) (amendment of ad damnum from $1 million to $5 million permitted as results of future surgery unknown even if claimant knew he needed surgery at time of filing administrative claim). Amendment is allowed when evidence not reasonably available. Spivey v. U.S., 912 F.2d 80 (4th Cir. 1990) (claimant's tardive dyskensia could not have been discovered prior to filing--upward amendment permitted).

(1) Offers by Claimant's During Negotiation. Claimant offers made in administrative negotiations in an amount lesser than that stated on the claim form are not considered to be amendments downward limiting the amount of any subsequent suit.

(2) SF95 Demand Not Realistic. Since amendments upward at trial are sometimes difficult to obtain, the original administrative demand cannot and should not be a realistic appraisal. Kielwien v. U.S., 540 F.2d 676 (4th Cir. 1976), cert. denied, 429 U.S. 979 (1976). See, e.g., Lowry v. U.S., 958 F. Supp. 704 (D. Mass. 1997) (in back injury case, denying motion to increase ad damnum at trial--citing numerous cases and stating trend is for strict interpretation); Sandoval v. U.S., Civ. #C-80-1545 (N.D. Cal. 1981) (increase in ad damnum denied where claimant failed to get ophthalmologist report prior to trial); Ordahl v. U.S., 601 F. Supp. 96 (D. Mont. 1985) (recovery reduced to amount stated in claim); Low v. U.S., 795 F.2d 166 (5th Cir. 1986) (admin. claim filed for $1,275,000, requires judgment of $3,500,000 to be reduced to amount of claim); Martinez v. U.S., 780 F.2d 525 (5th Cir. 1986) (limited at trial to amount on claim form); Schubach v. U.S., 657 F. Supp. 348 (D. Me. 1987) (limited to amount on claim form even though claimant was unaware he could claim for pain and suffering); Vice v. U.S., 662 F. Supp. 1175 (W.D. Tenn. 1987) (amendment from $300,000 to $1,000,000 permitted at trial as


C. Where Must the Claim be Filed?


2. Multi-Agency Claim. Where more than one Federal agency is involved, each should be notified, plus informing each of the other's role (28 C.F.R. § 14.2).

a. Problems From Failure to Notify. Failure to so notify may result in one agency denying claim while administrative negotiations are proceeding with another.

b. Six Months. Result could be requirement to file suit within six months of denial.

c. Avoidance by Withdrawal. Can be avoided by withdrawal of denial action.

d. Claimant Must be Notified of Lead Agency. One agency cannot deny claim for another unless the other agency notifies the claimant in writing that the lead agency is acting on behalf of other agency. Raddatz v. U.S., 750 F.2d 791 (9th Cir. 1984).

3. Primary Agency. Where agencies are aware of multi-agency claim, one agency should be agreed upon to be primary or designation should be made by Civil Division, Department of Justice.


D. When Must the Claim be Filed? Cato v. U.S., 70 F.3d 1103 (9th Cir. 1995) (claim of enslavement and continuing disrespect of African Americans does not fall under FTCA, even if continuing violations doctrine avoids 2-year SOL, since there is no jurisdiction over these allegations).


   c. Is Limitation Jurisdictional or Includes Equitable Tolling? Formerly, courts agreed that the two year filing requirement from the accrual of the claim was jurisdictional and not subject to waiver. Casias v. U.S., 532 F.2d 1339 (10th Cir. 1976); Caton v. U.S., 495 F.2d 635 (9th Cir. 1974); Mann v. U.S., 399 F.2d 672 (9th Cir. 1968); United Missouri Bank South v. U.S., 423 F. Supp. 571 (W.D. Mo. 1976); Pugh v. FmHA, 846 F. Supp. 60 (M.D. Fla. 1994), aff'd without opinion, 74 F.3d 1251 (11th Cir. 1995) (table); Bailey v. U.S., 642 F.2d 344 (9th Cir. 1981). Since the U.S.
five relevant factors in assessing equitable tolling claims, which are: (1) lack of actual notice of the filing requirements; (2) lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to defendant; and (5) a plaintiff's reasonableness in remaining ignorant of the notice requirement. The First Circuit's Kelley decision also notes that the cases in which equitable tolling is most often invoked are where affirmative misconduct by the party against whom it is employed is present, e.g., the U.S. Many courts have held that even if equitable tolling was applicable, the plaintiff failed to show its entitlement to relief from the two year time bar. See, e.g., Hoosier Bancorp of Indiana Inc. v. Rasmussen, 90 F.3d 180 (7th Cir. 1996) (using 6 month paragraph in denying Bivens claim does not extend SOL for constitutional suit and does not constitute equitable tolling); Johnson v. U.S., 78 F.3d 579 (4th Cir.1996) (future potential of U.S. to become involved in suit against W. Va. National Guard is not basis for equitable tolling--National Guard member never requested representation); Lambert v. U.S., 56 F.3d 296 (5th Cir. 1995) (suit dismissed for failure to properly serve--suit refiled same day, but dismissed again for failure to comply with 6-months SOL--doctrine of equitable tolling not applicable as adequate remedy under federal rules); Justice v. U.S., 6 F.3d 1474 (11th Cir. 1993) (equitable tolling not permitted in second VA suit where first suit, though timely filed, was dismissed without prejudice due to lack of due diligence); First Alabama Bank v. U.S., 961 F.2d 1226 (11th Cir. 1993) (no equitable tolling, since claimant did not rely on IRS agent's misrepresentation concerning need to file claim); Sule v. The Warden, MCC New York, 1995 WL 115694 (S.D.N.Y.) (equitable tolling does not apply to suit of prisoner for overcrowded conditions, since SOL runs from date of injury, not from date of discovery of cause of action); McKewin v. U.S., Civ. 91-131-CIV-5-F (E.D.N.C. 1992) (claim for brain damage at 1982 birth filed in 1990--parents know of cause in 1987--no basis for equitable tolling); Muth v. U.S., 1 F.3d 246 (4th Cir. 1993) (no equitable tolling for claim filed in 1991, where claimant wrote COE before 1988 acknowledging contamination of land). Cf. Oropallo v. U.S., 994 F.2d 25 (1st Cir. 1993) (in taxpayer refund suit filed more than 3 years after tax paid, holds that no equitable tolling can be applied to 3 year limit based on belief that Irwin v. Veterans Administration, 498 U.S. 89 (1990) was modified by Lambf, Pleva, Lipkind, Prupis & Pettigrew v. Gilbertson, 501 U.S. 350, 111 S.Ct. 2773 (1991), holding that equitable tolling could not be invoked where claim was barred prior to Irwin); Million v. Frank, 47 F.3d 385 (10th Cir. 1995) (equitable tolling not permitted in Title VII action where plaintiff fails to read

Jones-Booker v. U.S., 16 F. Supp. 2d 52 (D. Mass. 1998), where federal employee is unable to timely file a FECA appeal due to his inability to communicate as his property interest is protected by due process. Perez v. U.S., 167 F.3d 913 (5th Cir. 1999), equitable tolling granted where Texas NG fails to send SF 95 in response to attorney's letter demanding redress for injury and fails to forward letter to Army Claims. Berlin v. U.S., 9 F.2d 648 (S.D. W. Va. 1997), Government claims paralegal tells claimant's attorney he can't file suit until 6 months expires does not provide basis for equitable tolling where SF 95 contains no sum certain; Kieffer v. Vilk, 8 F. Supp. 2d 387 (D.N.Y. 1998), letter to Postal Inspection Service did not contain sum certain. Neither state nor federal suit corrects the deficiency-note state suit filed before two years but improperly removed.

Stanfill v. U.S., 43 F. Supp. 2d 1999 WL 183766 (M.D. Ala.), equitable tolling permitted where plaintiff takes voluntary dismissal to file FECA claim at urging of US and the FECA proceedings are then held up by CPO. Parker denial issued prior to FECA filing and suit refiled after six months ran; Barr v. U.S., 1999 WL 314634 (10th Cir. (Okla.)), equitable tolling not permitted where suit is refiled more than six months from date of decree). St. John v. U.S., 1999 U.S. Dist. LEXIS 10631 (S.D. Fla. 24 June 99), where plaintiff files claim 12 years after he was told his bladder was injured during colon cancer surgery, equitable tolling cannot be based on fact that his ureter, not his bladder, was injured.

2. Acknowledgment of Filing Date. Filing date is acknowledged by letter to claimant since it determines when six-month period for filing suit expires. This is usually required by agency regulation.


a. Infancy. This includes infancy. Pittman v. U.S., 341 F.2d 739 (9th Cir. 1965), cert. denied, 382 U.S. 941 (1965); Zavala v. U.S., 876 F.2d 780 (9th Cir. 1989) (following Pittman); Smith v. U.S., 588 F.2d 1209 (8th Cir. 1978); Simon v. U.S., 244 F.2d 703 (5th Cir. 1957); Childers v. U.S., 316 F. Supp. 539 (S.D. Tex. 1970), aff'd, 442 F.2d 1299 (5th Cir. 1971); Mann v. U.S., 399 F. 2d 672 (9th Cir. 1968); U.S. v. Glenn, 231 F.2d 884 (9th Cir. 1956), cert. denied, 352 U.S.


4. Medical Malpractice.


5. Court Decisions. Courts have expanded definition by various theories.


b. Credible Explanation. Sanders v. U.S. Department of the Army Surgeon General, 551 F.2d 458 (D.C. Cir. 1977); Reilly v. U.S., 513 F.2d 147 (8th Cir. 1975); Jordan v. U.S., 503 F.2d 620 (6th Cir. 1974); Brown v. U.S., 353 F.2d 578 (9th Cir. 1965). See also Gabbard v. U.S., 892 F.2d 82 (table), 1989 WL 150592 (9th Cir. 1989) (plaintiff told injury at birth may have been caused by pressure on umbilical cord--plaintiff need not seek another explanation).


not aware of role of FBI); Snorgrass v. U.S., 567 F. Supp. 33
(E.D.N.Y. 1983) (ignorance of DEA agents role in customs
search not fraudulent concealment); Nahsonhoya v. U.S., Civ.
abuse claims where school notified parents of possible abuse,
even though teacher's subsequent confession not made public).
1998) SOL runs when claimant first became aware that her
medical records appeared in press, not when she received
1998) Suit for administration of LSD by CIA agent in Paris in
1952 is time-barred as plaintiff was aware of CIA LSD test
program in 1977 and did not file until 1981 – destruction of
records in 1974 did not effect its ability to investigate.

g. Emotional Injury. Suppressed recollection may toll SOL.
1990) (plaintiff brings suit at age 26 for abuse by father
until late teens--recollection brought on by treatment-
discovery rule applied). But see Baily v. U.S., 763 F. Supp
802 (E.D. Pa.), aff’d without opinion, 950 F.2d 721 (3rd Cir.
1991) (childhood sexual molestation does not extend SOL under
Pennsylvania law, even where memory of act is repressed or
where victim does not associate injury with act). However,
where tortious act remembered, SOL begins to run at date of
tortious act, not when cause or impact of injury is realized.
to run when assault occurred, not when therapy resulted in
sexual abuse victim becoming aware of cause of her injury);
K.E.S. v. U.S., 38 F.3d 1027 (8th Cir. 1994) (claim accrues
at time of sexual advances, not when victim realizes impact
of psychological harm); Hinkley v. Dept. of Army, Civ # H-94-
1735 (S.D. Tex., Jan. 19, 1995) (claim filed 13 months after
sexual assault is time barred--distinguishes Simmons v. U.S.,
805 F.2d 1363 (9th Cir. 1986)).

h. Trivial Injury. Goodhand v. U.S., 46 F.3d 209 (7th Cir.
1994) (claim filed 5 years after 4° tear at birth based on
lack of knowledge of full extent of injury--barred by SOL).

W. Va. 1996) (continuous tort doctrine applies to IRS
harassment claim due audits every year since 1973--plaintiff
is attorney who represents clients in suits against IRS).
But see Cato v. U.S., 70 F.3d 1103 (9th Cir. 1995) (claim of
enslavement and continuing disrespect of African Americans
does not fall under FTCA, even if continuing violations
doctrine avoids 2-year SOL, since there is no jurisdiction
over these allegations).
6. Kubrick Decision. In November 1979, the Supreme Court held that accrual of medical malpractice claim need not await discovery, of all elements of a cause of action, i.e., that act was negligent. Kubrick v. U.S., 444 U.S. 111 (1979). Rather, plaintiff must only know of existence and probable cause of injury. How far has Kubrick overruled the cases in 5 above?


sexual relationship with counselor first occurs, but when claimant advised by psychiatrist that the relationship caused her emotional injury); Nicolazzo v. U.S., 786 F.2d 454 (1st Cir. 1986) (veteran had ear problem from helicopter crash--SOL starts running when skull fracture diagnosed nine years later); Moreno v. U.S., Civ. # 86-0555 (D. Haw. 1987) (brain damaged at birth in 1977--claims filed 1983); Dearing v. U.S., 835 F.2d 226 (9th Cir. 1987) (baby brain damaged at birth by failure to promptly resuscitate, files three years after birth); Nemmers v. U.S., 870 F.2d 426 (7th Cir. 1989) (parents did not have knowledge of negligence until reading similar case in newspaper--uses objective test); McDonald v. U.S., 843 F.2d 247 (6th Cir. 1988) (surgeon's post-op assurances that healing may take 3-5 years tolls SOL); Colleen v. U.S., 843 F.2d 329 (9th Cir. 1987) (SOL tolled until brain damage in newborn discovered almost one year after birth); Gould v. U.S., 684 F. Supp. 508 (N.D. Ill. 1988) (born 1970, claim filed 1984--not mother's subjective belief, but her acquisition of medical records, started SOL); Weaver v. U.S., Civ. # SA-87-CA-562 (W.D. Tex. 1990) (SOL tolled until learned of HIV positive, even though negligence was in failure to diagnose timely and creating need for colon surgery); Osborn v. U.S., 918 F.2d 724 (8th Cir. 1990) (claim accrued when physician told mother seizures related to DPT shots, not when another physician earlier told mother to stop pertussis shots); Miller v. U.S., 932 F.2d 301 (4th Cir. 1991) (where decedent knew of alleged delay in diagnosing breast cancer in 1984, SOL started in 1984 under Va. law and wrongful death claim filed in 1988 within two years of death was time barred); Hance v. U.S., 773 F. Supp. 551 (W.D.N.Y. 1991) (brain damaged at birth on April 23, 1982--SOL tolled until saw attorney in Sept. 1987); Muensterman v. U.S., 787 F. Supp 499 (D. Md. 1992) (parents informed injury due to improperly conducted blood test, but not of failure to perform timely C-section--SOL starts when damage due to intrauterine stroke diagnosed, not when told of improper blood test); Willis v. Ortho Pharmaceutical, Inc., Civ. # 84-CV-742, 3 & 85-CV-542 (N.D.N.Y. 1992) (knowledge of general risks of IUD does not toll SOL until told that ongoing PID is associated with IUD); Sloaten v. U.S., 990 F.2d 1038 (8th Cir. 1993) (SOL starts when board decided that oil and mineral rights had not been converted by U.S.); Rice by and Through Rice v. U.S., 889 F. Supp. 1466 (N.D. Okla. 1995) (mothers knowledge that daughter delivered at 43 weeks when taken to civilian hospital for breathing problems due to swallowing meconium and spend first 40 days of life there does not start SOL running); Sanborn v. U.S., 764 F.2d 637 (9th Cir. 1985) (in action alleging swine flu death where coroner did not conduct autopsy and said no Guillain-Barre Syndrome, SOL starts when survivor discovers cause of death);


However, there is no need to file a wrongful death claim where personal injury claim already filed as both are based on the same injury. Brown v. U.S., 838 F.2d 1157 (11th Cir. 1988); Nelson v. U.S., 541 F. Supp. 816 (M.D.N.C. 1982). Green v. U.S., 1998 U.S. App. Lexis 31014 (9th Cir., Calif.), failure to file wrongful death claim within two years of air crash is not excused by fact that NTSB report not available until eight months after crash.


9. Damage to Land and Property. SOL on damage to property begins when damage is first noticeable. Blue Dolphin, Inc. v. U.S., 666 F. Supp. 1538 (S.D. Fla. 1987) (SOL on damage to boat began to run when boat returned to owner’s possession, even though it was still constructively seized by U.S.). The same rule applies to land damage, such as erosion. Heezen v. Aurora County, 157 N.W.2d 26 (S.D. 1968); Cravens v. U.S., 163 F. Supp. 309 (W.D. Ark. 1958); Rygg v. U.S., 334 F. Supp. 219 (D.N.D. 1971); Konecny v. U.S., 388 F.2d 59 (8th Cir. 1967). See also Bayou des Familles Development Corp., 130 F.3d 1034 (Fed. Cir. 1997) (SOL starts to run when COE denies wetlands permit to develop marshes, not when court remedies exhausted); Miller v. United States, Civ. # C/A 5:93-1673-6 (D.S.C., Sept. 26, 1996), aff’d, 125 F.3d 848 (table), 1997 WL 592854 (4th Cir. 1997) (where plaintiff knew of erosion damage to her land caused by adjacent U.S. Air Force Base as early as 1973, claim is time barred though erosion continues). Often land damage claims are plead as nuisance claims, and the type of nuisance created by the wrongful government conduct has an effect upon the statute of limitation. If a permanent nuisance, the damage is permanent when inflicted and the SOL begins to run when the damage is first noticed, but if a temporary nuisance, the harm is deemed to be continuing, so the SOL never runs. Prescott v. United States, 105 F.3d 666 (table), 1996 WL 747922 (9th Cir. 1996) (U.S. removal of diversion dam in 1976 started SOL running, since removal created permanent nuisance); Bartleson v. U.S., 96 F.3d 1270 (9th Cir. 1996) (even though property had been shelled from adjacent Camp Roberts for years, shelling had been intensified in the last two years prior to filing of claim for permanent nuisance--claim timely filed); Huffman v. U.S., 82 F.3d 703 (6th Cir. 1996) (addition to inn built next to loading dock—whether 2 years SOL
had run turns on whether noise nuisance was permanent, that is, structure was properly constructed and/or operated, meaning that such noise was normal, thereby barring claim or temporary, that is, post office was improperly constructed and/or operated, meaning noise occurred only occasionally, making the violation continuous, thereby not barring the claim); Rapf v. Suffolk County of New York, 755 F.2d 282 (2d Cir. 1985) (SOL continues to run, since groin causing beach to wash away is considered continuing public nuisance under New York law). Inverse condemnation (taking) under Tucker Act SOL accrues when damage is complete. U.S. v. Dickinson, 331 U.S. 745, 67 S.Ct. 1382 (1947). Donavan v. Gober, 5 F. Supp. 2d 142 (W.D.N.Y. 1998) SOL starts when Federal salary is guaranteed the first time as to claim for infliction of emotional distress. Dzrura v. U.S., 168 F.3d 581 (1st Cir. 1999), claim for seizure of painting by IRS for unpaid taxes is filed more than two years from failure to sell at auction - SOL barred as not a continuing violation.


15. Lack of Knowledge of U.S. Involvement. A plaintiff's lack of knowledge of federal government involvement normally does not toll the SOL. See Gould v. U.S. Dept. of HHS, 905 F.2d 738 (4th Cir. 1990), cert. denied, 498 U.S. 1025 (1991) (plaintiff did not learn physicians in private clinic were PHS employees-SOL not tolled); Zeleznik v. U.S., 770 F.2d 20 (1985), cert. denied, 475 U.S. 1108 (1986) (SOL not tolled even though plaintiff made diligent inquiry and did not learn of U.S. involvement); Dyniewiez v. U.S., 743 F.2d 484 (9th Cir. 1984) (parents drown in flood, but did not learn MPs controlled road--SOL not tolled); Steele v. U.S., 599 F.2d 823 (7th Cir. 1979) (injured while
installing runway lights, but did not learn of FAA involvement—SOL not tolled). See also paragraph ID2d, supra, for additional cases. Whittlesey v. Cole, 142 F.3d 340 1998 WL 177351 (6th Cir. (Tenn.)). Where plaintiff was not notified that Navy doctor was a contractor until over one year after death (Tenn. Has one year SOL in medical malpractice cases), claim against U.S. not timely filed as SOL ran from date of death.


E. Who May File?

1. Injury Claim. In injury cases, the injured party or agent or legal representative (28 C.F.R. § 14.3(a)). Separate claims must be filed separately. Lee v. U.S., 980 F.2d 1337 (10th Cir. 1992) (parents claim filed beyond SOL is separate and cannot relate back to timely filed claim for child's injuries). A person may be considered injured when their injury is cognizable at state law, such as when there is a reasonable medical probability that cigarette smoking asbestos worker will develop cancer and die from it is sufficient to establish cause of action. Gideon v. Johns-Manville Sales Corp., 761 F.2d 1120 (5th Cir. 1985).

2. Death Claim. In death cases, the person authorized by state law (28 C.F.R. § 14.3(c)). Thus, a claim by the estate or the
survivors or both may be filed depending on state law in the
state where the negligence occurred (28 U.S.C. § 2672). Van
Keener v. Morgan, 647 F.2d 691 (6th Cir. 1981) (negligence of one
parent may be imputed to other parent, and thus bar recovery by
either for death of child). Some states' WD statute make a
viable fetus a person for legal purposes. Espadero v. Feld, 649
F. Supp. 1480 (D. Colo. 1986) (interprets state death statute as
including viable fetus as a person); Volk v. Baldazo, 651 P.2d 11
(Idaho 1982) (citing a number of cases re viable fetus as a
person); Wade v. U.S., 745 F. Supp. 1573 (D. Haw. 1990) (can sue
in Hawaii for death of viable fetus, even though fetus
stillborn). However, many states will not permit a wrongful death
claim for a non-viable fetus. In Re Air Crash Disaster at
aff’d, 917 F.2d 24 (table), 1990 WL 163940 (6th Cir. 1990)
(Michigan law). See also Reese v. U.S., 930 F. Supp. 1537 (S.D.
Ga. 1995) (mother of deceased motorist has standing to bring
wrongful death action on behalf of deceased's unborn fetus); Aki
jurisdictions which permit claim for death of non-viable fetus,
that is, Georgia, Missouri and Rhode Island). Becker v. U.S.,
__F.3d __, 1998WL598548 (9th Cir. (AK)) daughter of deceased is
not proper claimant as she was adopted at birth by her
grandmother.

3. Indemnity and Contribution Claim. Indemnity and contribution
claims are valid if permitted by state law, since U.S. is liable
as private person (28 U.S.C. §§ 46(b), 2674). U.S. v. Yellow Cab
Co., 340 U.S. 543 (1951); Rayonier Inc. v. U.S., 352 U.S. 315
(1957); Travelers Insurance Co. v. U.S., 283 F. Supp. 14 (S.D.
Tex. 1968); Williams v. U.S., 352 F.2d 477 (5th Cir. 1965);
on a contribution or indemnity claim must have final judgment
entered against it before it may file an administrative claim.
Johns-Manville Sales Corp. v. U.S., 690 F.2d 721 (9th Cir. 1982).
also Robinson v Alaska Properties and Inv. Inc., 878 F. Supp.
1318 (D. Alaska 1995) (FDIC cannot be joined as third party
defendant under Alaska's equitable apportionment act, since
defendant did not state claim under the FTCA).

4. Assignees Barred. Assignees are barred by Anti-Assignment
See Cadwalder v. U.S., 45 F.3d 297 (9th Cir. 1995) (purchaser of
fire damaged ranch is not proper claimant, since he was assigned
claim by former owner); Hornbeck Offshore Operators v. Ocean
precludes assignment of in rem claim on subfreight's owed by
U.S); Bernert Towboat Co. v. USS Chandler (DDG 996), 666 F. Supp.
5. Volunteer Barred. Volunteer is not a proper claimant as he is not an "injured" party, e.g., rich uncle who pays medical bills, employer who pays full salary.


7. Subrogated Claim. Subrogated claims are separate and should be filed, processed and paid as such. Robinson v. U.S., 408 F.
42

8. Intergovernmental Claim.

a. Not Reimbursable Except by Statute. Since U.S. does not
reimburse itself for loss of its own property,
intergovernmental claims are not payable, except where
authorized by statute. 25 Comp. Gen. 49 (1945); 9 Comp. Gen.
263 (1930); 6 Comp. Gen. 171 (1926); 22 Comp. Gen. 390
(1916); Comp. Dec. 74 (1899).

b. Army Damage to GSA Vehicle. Claims for damage or loss by
Army personnel to GSA vehicles on loan are payable as an
expense out of O&M funds (41 Comp. Gen. 199 (1961); 40 U.S.C.
§ 491(d)), for U.S. Postal Service claims (39 U.S.C. § 411)
payable by USARCS only.

9. FECA Bar. U.S. employees are not proper claimants when
covered by the Federal Employees Compensation Act (FECA) (5
1997) (FECA is exclusive remedy for employees shot and
injured/killed by fellow employee while on job at Fort Knox);
(claim based on negligent hiring and retention for wrongful death
of ATF agent who was shot by his supervisor falls under FECA--
cites Bruni v. U.S., 964 F.2d 76 (1st Cir. 1992)). FECA applies
to new employees not yet formally entered. TerKeurst v. U.S.,
549 F. Supp. 455 (W.D. Mich. 1982). Also includes D.C.
Mason v. D.C., 395 A.2d 399 (D.C. 1978)), DC employees who are
entitled to workmen compensation under DC law are not entitled in
FECA as 5 U.S.C. 8101(1)(D) and 8139 are superseded, see D.C.
Code 1-633.2(a)(7)(18)(10). FECA applies to injuries and death,

a. FECA Exclusive Remedy. FECA is an exclusive remedy (5
U.S.C. § 8116(c)); Johansen v. U.S., 343 U.S. 427 (1952);
Smith v. Rivest, 96 F. Supp. 379 (E.D. Wis. 1975). But see
Daly v. U.S., 946 F.2d 1467 (9th Cir. 1991) (VA can be held
liable for failure of VA physician to inform VA employee of
results of PE--FECA exclusivity not discussed). Neither the
Westfall Act (nor its predecessor, the Driver's Act), 28
U.S.C. § 2679(b), change the exclusivity of FECA. Vantrease

b. Definition of Employee. “Employee” is defined very broadly and may include volunteers, e.g., in hospital summer employees, interns, ROTC cadets and Civil Air Patrol (CAP).


e. Bar Extends to LHWCA Covered Employees. FECA type bar extends to employees covered by Longshoremen and Harbor Workers' Compensation Act, e.g., nonappropriated fund employees (33 U.S.C. § 901-950; 5 U.S.C. § 8171). U.S. v. Forfari, 268 F.2d 29 (9th Cir. 1959), cert. denied, 361 U.S. 44
45


f. DOL Decision on FECA Determinative. The Secretary of Labor has final say on applicability of FECA. See Swafford v. U.S., 998 F.2d 837 (10th Cir. 1993) (Secretary of Labor has final say on FECA benefits in sexual harassment case); Doe v. U.S., Civ. #95-CV-0549C (W.D.N.Y., Feb. 9, 1996) (college student training in phlebotomy at VA hospital pricks herself with HIV+ tainted needle—case held in abeyance until DOL rules as incident occurred prior to her signing employment contract and VA filed FECA claim for her); Eure v. USPS, 711 F. Supp. 1365 (S.D. Miss. 1989) (Secretary of Labor must decide whether timely filed under FECA prior to FTCA dismissal. FECA determination final and employee bound by provision of benefits. Czerkies v. U.S. Dept. of Labor, 73 F.3d 1435 (7th Cir. 1996) (Department of Labor decision in FECA is final and conclusive—not subject to review provided due process standard has been met); Gill v. U.S., 641 F.2d 195 (5th Cir. 1981) (determination by FECA on coverage bars court applying FTCA); William v. U.S., Civ. # 91-3844 (S.D. NY 1991) (denial of benefits by DOL is final and binding in court re: FTCA). See also Cobia v. U.S., 384 F.2d 711 (10th Cir. 1967), cert. denied, 390 U.S. 986 (1968); Soderman v. U.S. Civil Service Commission, 313 F.2d 694 (9th Cir. 1963). Contra Martin v. U.S., 566 F.2d 895 (4th Cir. 1977); U.S. v. Udy, 381 F.2d 455 (10th Cir. 1967). White v. U.S., 143 F.3d 232 (5th Cir. 1998) DAC injured in accident on-post while going home must apply for FECA—reverses Bailey v. U.S., 451 F.2d 963 (5th Cir. 1971).

Federal employee, even though surgery was furnished on basis that employee was military dependent; Somma v. U.S., 283 F.2d 149 (3rd Cir. 1960) (failure to properly read x-rays on required physical results in delayed diagnosis of non-job related TB falls under FECA); Wilder v. U.S., 873 F.2d 285 (11th Cir. 1989) (FECA coverage for medical malpractice on NAFI employee injured on job, even though treatment furnished as military dependent). But see Daly v. U.S., 916 F.2d 1467 (9th Cir. 1991) (U.S. held liable under FTCA for failure to inform employee of abnormal test results—FECA not raised); Wright v. U.S., 717 F.2d 254 (6th Cir. 1983) (no coverage for medical malpractice for VA hospital employee re rupture of tubal pregnancy).


v. U.S., 733 F.2d 174 (1st Cir. 1984) (Feres bars suit from non AD reservist who did not report for six months AD, since JAG reservist told him he was mistakenly ordered to AD); Eisenhart v. U.S., Civ. 81-73051 (9th Cir. 1980) (Feres bar includes auxiliary Coast Guardsman on reserve duty on another reservist's privately owned boat); Tobin v. Pryce, 963 F. Supp. 880 (D. Neb. 1997) (derogatory treatment of Jewish NG officer during 2 week ADT in Germany falls under Feres); Barry v. Stevenson, 965 F. Supp. 1220 (E.D. Wis. 1997) (national guardsman on two weeks training injured passenger in vehicle accident--suit against driver barred under Westfall Act, since driver was in scope of employment); Velez v. U.S. ex rel. Dept. of Army, 891 F. Supp. 61 (D.P.R. 1995) (member of Puerto Rico NG performing official duties without orders is arrested at Fort Buchanan--Feres bars false arrest claim); Hassenfratz v. Garner, 911 F. Supp. 235 (S.D. Miss. 1995) (civilian technician with Miss. ARNG filed suit for being terminated for cause--Feres applies); Townsend v. Seuver, 791 F. Supp. 227 (D. Minn. 1992) (member Minn. NG barred from suing state civilian employees for racial harassment); Patterson v. U.S., Civ. IP 83-900C (S.D. Ind. 1983) ( reservist voluntarily riding in jeep at summer camp barred under Feres). Feres also applies to AD reservist involved in off-post accidents. Green v. Hall, 881 F. Supp. 451 (D. Or. 1995) ( reservist on weekend training, killed in off-post accident with civilian truck while going to breakfast--Feres bars claim for negligent supervision of driver who was ill); Bielema v. Biester, 880 F. Supp. 555 (N.D. Ill. 1995) ( Feres bars claim by two week reservist involved in off post, off duty accident--Parker distinguished). Feres also applies when injury incurred on AD, but negligent treatment not rendered while plaintiff on AD. Jackson v. U.S., 110 F.3d 1484 (9th Cir. 1997); Quintana v. U.S., 997 F.2d 711 (10th Cir. 1993) (medical treatment at USAF MTF for ADT injury after return to civilian status-- Feres barred); Bloss v. U.S., 545 F. Supp. 102 (N.D.N.Y. 1982) (full-time recruiter for N.Y. Navy Reserve--claim for medical malpractice falls under Feres, even though he was not in pay status at time of treatment); Lied v. U.S., Civ. 82-0322 (M.D. Pa. 1982). A § 709 employee’s suit may not be barred. See Neal v. Alabama National Guard, 1997 WL 1114910 (M.D. Ala.) (709 employee’s suit against fellow 709 employee for racial harassment is not necessarily barred by Feres, even though harassment occurred in a duty status--cites many cases on hybrid status of 709 employees). Hupp v. U.S. Dept. of the Army, 144 F.3d 1144 (8th Cir. 1998) Title VII applies to Iowa NG sergeant's application for AGR position but Feres bars claim. Gregory v. Widnall, 153 F.3d 1071 (9th Cir. 1998) Title VIII applies to National Guard Technicians except when they challenge personnel actions integrally related to


c. Goverment Contractor Defense. Feres may extend to third party claims for indemnity and to claims against U.S. contractor by service member particularly where “government contractor” defense is viable under State law. See, generally, Brown v. Caterpillar Tractor, 696 F.2d 246 (3rd Cir. 1982), appeal after remand, 741 F.2d 646 (3rd Cir. 1984); Ramsey v. Henry, 577 F.2d 1163 (4th Cir. 1978); Donham v. U.S., 536 F.2d 765 (8th Cir. 1976); Carter v. City of Cheyenne, 649 F.2d 827 (10th Cir. 1981); Laswell v. Brown,
contracts); Ramey v. Martin-Baker Aircraft Co., 656 F. Supp. 984 (D. Md. 1987) (government contractor defense bars injury claim by civilian mechanic on Navy base--good collection of cites); Crossan v. Electron Tube Division, 693 F. Supp. 528 (E.D. Mich. 1986) (government contractor defense applies). However, the government contractor defense does not apply in all circumstances where products are made according to government plans, especially where plaintiff's claims involve something other than a design defect. Chapman V. Westinghouse Electric Corporation., 914 F.2d 267 (9th Cir. 1990) (no Government contractor defense when Navy member slips on contractor maintained loading dock at U.S. installation); Mitchell v. Lone Star Ammunition, Inc., 913 F.2d 242 (5th Cir. 1990) (government contractor defense does not apply when contractor knows of defect in mortar shells, but U.S. does not); Trevino v. General Dynamics Corp., 865 F.2d 1474 (5th Cir. 1989) (Varig does not require application of Government contractor defense where contractor has final say); Shaw v. Grumman Aerospace Corp., 778 F.2d 736 (11th Cir. 1985) (crash into ocean after launch from flight deck--no government contractor defense); Gray v. Lockheed Aeronautical Systems Co., 125 F.3d 1371 (11th Cir. 1997), aff'd, 880 F. Supp. 1559 (W.D. Ga. 1995) (crash of aircraft seconds after launching from carrier--Government contractor defense denied as ailerons were defectively manufactured).

d. AD Military Personnel. Feris bars suits involving AD military personnel incident to service. See U.S. v. Johnson, 481 U.S. 681, 107 S.Ct. 2063 (1987) (Coast Guard pilot killed because of FAA controllers' negligence while the pilot was conducting search operation at sea--Feres barred); Belton v. Dow Chemical Co., 103 F.3d 137 (table), 1996 WL 674150 (9th Cir. 1996) (claim for injury from Agent Orange is Feres barred); Stephenson v. Stone, 21 F.3d 159 (7th Cir 1994) (accused soldier shot another soldier who was going to testify against him--Feres barred); Jackson v. Reigle, 17 F.3d 280 (9th Cir. 1994) (claim based on USAF investigation into homosexual lifestyle of USAF officer who was assigned to Ballistic Missile office is Feres barred--differentiates Lutz, infra); Blakey v. U.S. Iowa, 991 F.2d 148 (4th Cir. 1993) (Feres applies to death of sailor due to explosion on high seas); Washington v. U.S., 12 F.3d 1111 (table), 1993 WL 471790 (9th Cir. 1993) (acquisition of AIDS based on Navy's failure to issue "no sex" order to sailor--Feres barred); Kitowski v. U.S., 931 F.2d 1526 (11th Cir. 1991) (Feres applies to deliberate drowning of Navy trainee by instructors during training); Smith v. U.S., 877 F.2d 40 (11th Cir. 1989) (Feres applies to death of Challenger astronaut); Dozier v. U.S., 869 F.2d 1165 (8th Cir. 1989) (failure to warn of plot to murder--Feres applies); LeCrone v. U.S. Navy, 958 F. Supp. 54

reserves was racially motivated is barred under Feres—proper forum is Board for Correction of Military Records); Geyen v. Marsh, 587 F. Supp. 539 (W.D. La. 1984) (ABCMS decision on character of discharge for service in 1969-1972 does not effect Feres or revive FTCA—here decision by ABCMS was adverse); Hopkins v. U.S., 567 F. Supp. 491 (E.D.N.Y. 1983) (service member commits suicide at home while awaiting orders placing him on TDRL for psychiatric reasons—held Feres applies). But see Adams v. U.S., 728 F.2d 736 (5th Cir. 1984) (service member who remained at home while awaiting appeal of BCD not under Feres for care obtained at PHS facility). Jiminez v. U.S., 158 F.3d 1228 (11th Cir. 1998), medical malpractice alleged on sailor who had received BCD which had not been affirmed—Feres applies.

f. Medical Malpractice on Service Members. The Feres bar includes medical malpractice on service members. Jones v. U.S., 112 F.3d 299 (7th Cir. 1997) (soldier’s claim for improper surgery at Letterman AMC while he was at Olympic tryout is Feres barred); Catshell v. U.S., 75 F.3d 426 (8th Cir. 1996) (reverses district court holding that Feres not applicable to sailors claim for delayed diagnoses of lymphoma); Schoemer v. U.S., 59 F.3d 26 (5th Cir. 1995) (Feres bars claim for failure to diagnose acromegaly during MEPS exam upon entry into NG from RA); Hayes v. U.S. on Behalf of Dept. of Army, 44 F.3d 377 (5th Cir. 1995) (Feres applies to hernia operation, even though hernia not caused by military service); Major v. U.S., 835 F.2d 641 (6th Cir. 1987); Persons v. U.S., 925 F.2d 292 (9th Cir. 1991) (Feres applies to suicide of sailor who previously attempted suicide, but was not admitted); Irvin v. U.S., 845 F.2d 126 (6th Cir. 1988) (Feres bars claim for negligent prenatal care to female soldier—follows Atkinson v. U.S., 825 F.2d 202 (9th Cir. 1987), cert. denied, 485 U.S. 987 (1988)); Madsen v. U.S., 841 F.2d 1011 (10th Cir. 1987) (medical malpractice in military hospital while on terminal leave—Feres applies); Del Rio v. U.S., 833 F.2d 282 (11th Cir. 1987) (negligent prenatal care to service woman, personal injury claim by mother barred, but not to child); Rayner v. U.S., 760 F.2d 1217 (11th Cir. 1985) (fact that service member “volunteered” to undergo myelogram does not remove Feres bar); West v. U.S., 744 F.2d 1317 (7th Cir. 1984) (Feres bars recovery for birth defects allegedly resulting from Army mistyping father's blood); Scales v. U.S., 685 F.2d 970 (5th Cir. 1982) (Feres includes injuries to service member mother caused by negligent delivery and extends to child's injuries, e.g., wrongful birth and wrongful life); Hawe v. U.S., 670 F.2d 652 (6th Cir. 1982); Davis v. U.S., 667 F.2d 822 (9th Cir. 1982) (negligent medical care bar under Feres not affected by 10 U.S.C. § 1089); L.J.B. v. U.S., 1997 WL 162076 (E. D. La.)

g. Off-Duty, On-Base Conduct. Feres applies to off duty, but on-base activity. Hale v. U.S., 452 F.2d 668 (6th Cir. 1971); Flowers v. U.S., 764 F.2d 759 (11th Cir. 1985) (airman on-post returning to quarters from an off-post personal

bouncer not in charge, i.e., on military duty—distinguishes Mariano); Johnson v. U.S., 704 F.2d 1431 (9th Cir. 1983); 
POV after closing party at club—not Feres barred).

i. Soldiers Employed by Contractors. Feres bars applies to 
soldiers working for private contractor off-duty, but on-
post. Miller v. U.S., 643 F.2d 481 (8th Cir. 1980); Seals v. 

j. Base Recreational Areas. Feres applies to on base 
recreational areas and activities. Chambers v. U.S. 357 F.2d 
224 (8th Cir. 1966); Knight v. U.S., 361 F. Supp. 708 (W.D. 
Tenn. 1972), aff’d, 480 F.2d 927 (6th Cir. 1973); Watkins v. 
F.2d 1149 (2d Cir. 1976); Richardson v. U.S., 226 F. Supp. 49 
(E.D. Va. 1964); Parker v. U.S., 611 F.2d 1007 (5th Cir. 
includes military flying clubs. Walls v. U.S., 832 F.2d 93 
(7th Cir. 1987) (active duty soldier who was passenger was 
injured in crash of flying club plane piloted by active duty 
Warrant Officer—Feres applied); Woodside v. U.S., 606 F.2d 
134 (6th Cir. 1979); Eckles v. U.S., 471 F. Supp. 108 (M.D. 
see Dreier v. U.S., 106 F.3d 844 (9th Cir. 1996) (soldier on 
afternoon off on recreational outing with other soldiers 
drowns in downhill channel at Fort Lewis water treatment 
facility—Feres not applicable). Denham v. U.S., 646 F. 
Supp. 1021 (W.D. Tex. 1986); Klepper v. U.S., Civ. # 80-1728 
(D. Kan. 1984) (Feres does not bar claim for soldier injured 
while swimming at COE reservoir designated as Army 
recreational area); Brown v. U.S., 99 F. Supp. 685 (S.D. 
W.Va. 1951).

k. Proceeding Off-Base. Feres also applies to persons 
proceeding off-base. Stewart v. U.S., 90 F.3d 102 (4th Cir. 
1996) (Feres applies to on post collision where soldier is on 
1994), aff’d, 121 F.3d 707 (table), 1997 WL 415316 (6th Cir. 
1996) (Feres barred negligent supervision claim for injuries 
to two sailors who are involved in one car crash off-post 
following unit party); Stewart v. U.S., 90 F.3d 102 (4th Cir. 
aff’d, 539 F.2d 955 (3d Cir. 1976); Coffey v. U.S., 324 F. 
614 (D. Colo. 1964); Mason v. U.S., 568 F.2d 1135 (5th Cir. 
(Warner v. U.S., 720 F.2d 837 (5th Cir. 1983) limits Parker 
to “furloughs” such as in Brooks v. U.S., 337 U.S. 49 (1949)


n. Returning to Duty. *Feres* applies to persons returning to duty. Morey v. U.S., 903 F.2d 880 (1st Cir. 1990) (sailor falls off pier as he is boarding ship on return from pass); Pierce v. U.S., 813 F.2d 349 (11th Cir. 1987) (Feres not applied to accident just off-post to soldier who had been home for several minutes and was returning to duty); Shoen v.

Soldier on way to work collides with USPS vehicle off-post—Feres applies.


q. Void Enlistments. Feres includes void enlistments, i.e., failure to discover service disqualification on induction physicals where applicant is nevertheless enlisted or induced. Healy v. U.S., 192 F. Supp. 325 (S.D.N.Y. 1961); Knoch v. U.S., 316 F.2d 532 (9th Cir. 1963); Southard v.


s. Foreign Service Member. Feres extends to foreign service members. Daberkow v. U.S., 581 F.2d 785 (9th Cir. 1978); Aketpe v. U.S., 925 F. Supp. 731 (N.D. Fla. 1996) (claims by Turkish service members injured and killed by U.S. Navy missile during NATO training exercise off Turkish coast are Feres barred); In Re Agent Orange Product Liability Litigation, 506 F. Supp. 762 (E.D.N.Y.) (claims by Australian serviceman for Agent Orange injuries are Feres barred). But see Whitley v. U.S., Civ. # 3:94-cv-64 JTC (N.D. Ga., 19 Feb. 1997) (members of British Army rugby team are not Feres barred when U.S. Army van overturns on way back to Fort Benning after playing "third half" at Atlanta nightclub to celebrate victory over civilian rugby club, aff'd 170 F.3d 1061 (11th Cir. 1999)


v. Mateo, 360 U.S. 564 (1959)); Chatman v. Commodore D.E. Hernandez, USN, 805 F.2d 453 (1st Cir. 1986) (sailor cannot sue CO for court-martiaing him nor can he bring action under 42 U.S.C. § 1983); Stauber v. Cline, 837 F.2d 395 (9th Cir. 1988) (NG technician barred from suing fellow employees for libel and intentional infliction of emotional distress); Tobin v. Pryce, 983 F. Supp. 880 (D. Neb. 1997) (Feres barred Bivens action by Nebraska National Guardsman who on active duty training in Germany was subjected to derogatory statements and acts by superiors during privately arranged and financed visit to former Nazi concentration camp, where Army director of operations and training authorized visit for professional development purposes and Army took disciplinary action against persons who made derogatory statements or performed defamatory acts); Norris v. Lehman, 845 F.2d 283 (11th Cir. 1988) (no Bivens action for decertifying Junior ROTC instructor); Udell v. Adjutant General’s Dept. of State of Texas, 878 F. Supp. 991 (S.D. Tex. 1995) (Feres bars claim for wrongful termination under Texas Whistleblowers Act--cites Chappell v. Wallace, 462 U.S. 296 (1983)). Mackey v. Milan, 154 F.3d 648 (6th Cir. 1998), sexual harrassment of female officer by male superior officer is Feres barred.


cc. Delayed Entry Program. Feres bars action by person enrolled in delayed entry program for failure to report.
Bauer v. U.S., Civ. #C-78-1049 WHO (N.D. Cal., 7 August 1979) (Feres barred action for false arrest and imprisonment of AWOL person who enlisted under delayed entry program under alleged condition she would be automatically discharged if her husband did not receive change of specialty).

dd. ROTC Cadets. See also Morse v. West, 1989 U.S. App. Lexis 446 (19th Cir. (Colo.)), aff'd 1999WL11287 (10th Cir., Colo.), (sexual harassment by another ROTC cadet held Feres barred); Wake v. U.S., 89 F.3d 53 (2nd Cir. 1996) (inactive reservist who is member of senior Naval ROTC is injured while traveling in a van driven by a U.S. Marine on trip back to college after undergoing pre-commissioning physical--Feres applies); Brown v. U.S., 151 F.3d 800 (8th Cir. 1998), ROTC Cadet-reservist injured in PT training alleges negligent treatment at Army hospital--Feres barred--cites Wake v. U.S., 89 F.3d at 58-62.

II. PROCESSING OF AN ADMINISTRATIVE CLAIM

A. When Must Suit be filed?

1. Suit Optional After Six Months. Suit permissible at option of claimant any time after six months has expired from date of filing proper claim (28 U.S.C. § 2675(a)). McKenith v. U.S., 771 F. Supp. 670 (D.N.J. 1991) (filing of suit after expiration of six months from date of filing admin. claim constitutes final action and precludes refiling admin. claim). See also Arigo v. U.S., 980 F.2d 1159 (8th Cir. 1992) (suit filed 8 months after claimant wrote DVA that he was withdrawing claim and filing suit is time barred, since his letter constituted a "final denial"). But see Hyatt v. U.S., 546 F. Supp. 96 (E.D.N.Y. 1997) (where plaintiff first files suit, then files administrative claim which is denied, but does not refile suit, but dies not refile suit, equitable tolling of six months is granted since U.S. entered into discovery with plaintiff without raising issue).

3. What is a “Final Denial”? Term “final denial” includes a final settlement offer. Jerves v. U.S., 96 F.2d 517 (9th Cir. 1992) (settlement offer by U.S. in attempt to negotiate does not constitute final denial and thereby permit suit within six months of filing administrative claim); Wiseman v. U.S., 976 F.2d 604 (9th Cir. 1992) (issuing a check for full amount stated on SF 95 does not constitute final action when check returned and reconsideration requested). Plamondon v. U.S. Post Office by and through the U.S.A., 1997 WL 724417 (M.D. Fla.) (USPS denies claim even though claimant alleges there was a settlement agreement, no equitable tolling permitted where suit filed 9 months later.

F.3d 157 (5th Cir. 1998). Final action by USPS sent by regular mail is insufficient to toll 6-months filing period due to requirement of 28 USC 2401(b) to send notice by certified or registered mail—so held even though claimant actually received notice. Zumazama v. U.S., 1998 WL 560757 (9th Cir., Calif.), applies equitable tolling where Navy unintentionally leads new attorney to believe final denial not previously denied when it had been and attorney missing filing date. Winter v. U.S., Civ. # 97-1484 PHX-PGR (D. Ariz., 18 Mar. 1999), denial notice informed claimant that request for reconsideration must be sent to VA General Counsel, but was received by District Counsel—suit not timely filed despite fact VA General Counsel acted on reconsideration request.


7. Filing of Suit Constitutes Final Action. Some cases hold that a claimant’s filing of a suit after six months has expired constitutes final action on a claim. Arigo v. U.S., 980 F.2d 1159 (8th Cir. 1992) (suit filed 8 months after claimant wrote DVA that he was withdrawing claim and filing suit is time barred.
as his letter constituted a “final denial”); McKenith v. U.S., 771 F. Supp. 670 (D.N.J. 1991) (filing of suit after expiration of six months from date of filing admin. claim constitutes final action and precludes refiling admin. claim). See also Benge v. U.S., 17 F.3d 1286 (10th Cir. 1994) (court refuses to apply doctrine of relation back to the refiling of a previously dismissed suit after original 6 months has run); Rainey v. U.S., Civ. # 91-2656-415 (W.D. Tenn. 1993) (premature filing of suit is mooted by administrative denial of claim simultaneously filed). However, some courts allow a claimant to refile their suit, when dismissed without prejudice initially, if the agency has never formally denied the claim. Pascale v. U.S., 998 F.2d 186 (3rd Cir. 1993) (suit can be refiled if suit dismissed without prejudice, even though filed after six months, when agency has not finally denied claim); Parker v. U.S., 935 F.2d 176 (9th Cir. 1991) (administrative claim can be refiled if suit is dismissed without prejudice if no final action has been taken by agency); Hannon v. USPS, 701 F. Supp. 386 (E.D.N.Y. 1988). See also Gilles v. U.S., 906 F.2d 1386 (10th Cir. 1990) (even though first complaint dismissed and second complaint did not refer to first complaint, second complaint considered timely filed under doctrine of relation back).

doctrine (see F.R.Civ.P. 15) is not applicable. Benge v. U.S., 17 F.3d 1286 (10th Cir. 1994) (court refuses to apply doctrine of relation back to the refiling of a previously dismissed suit after original 6 months has run); Allen v. VA, 749 F.2d 1386 (9th Cir. 1984) (where agency sued rather than U.S., complaint must be amended not later than six months after denial of administrative claims): Stewart v. U.S., 620 F.2d 740 (9th Cir. 1980) (same); Calderan v. U.S. Dept. of Agriculture, 756 F. Supp. 181 (D.N.J. 1990) (28 days past six months--must sue United States if suing Federal agency--doctrine of relation back not applicable); Nelson v. USPS, 650 F. Supp. 411 (W.D. Mich. 1986) (same, but involving USPS as wrong party). But see McGuckin v. U.S., 918 F.2d 811 (9th Cir. 1990) (applies relation back to naming U.S. as party); Jenssen v. USPS, 763 F. Supp. 976 (N.D. Ill. 1991) (suing postal employee and USPS does not constitute suit against U.S.--can add new party provided conditions of Rule 15(c) are met). King v. U.S., Civ #TH-98-128-C-M/F (S.D. Ind. 16 Mar 99) complaint naming Bureau of Prisons as defendant is dismissed, complaint named U.S. is filed one month after 6 months runs--court had no jurisdiction. Roman v. Townsend, F. Supp. 2d, 1999 WL 2(5574(D.P.R.) suit filed against individuals not U.S. more than 6 months from date of denial is dismissed as time barred and

9. Pleading Final Denial. Complaint must allege administrative claim filed and finally denied. Altman v. Connally, 456 F.2d 1114 (2d Cir. 1972); McCloskey v. USPS, 534 F. Supp. 667 (E.D. Pa. 1982); (FRCP 8(a) (1)).

10. Proper Service is Required. Suit must be served on both U.S. Attorney and Attorney General or no jurisdiction. Peters v. U.S., 9 F.3d 344 (5th Cir. 1993) (failure to complete proper service is basis for dismissal even though SOL has run); McGregor v. U.S., 933 F.2d 156 (2nd Cir. 1991) (failure to serve Attorney General within six months bars suit, and filing second suit to remedy error is not permitted--distinguishing Zankel v. U.S., 921 F.2d 432 (2nd Cir. 1990)); Watts v. Pinckney, 752 F.2d 406 (9th Cir. 1985); Allgeier v. U.S., 909 F.2d 871 (6th Cir. 1990) (relation back not permitted where U.S. Atty. served four days after six months had run); Williams v. U.S., 558 F. Supp. 66 (E.D.N.C. 1983) (same). See also Lambert v. U.S., 44 F.3d 296 (5th Cir. 1995) (suit dismissed for failure to properly serve--suit refiled same day, but dismissed again for failure to comply with 6 months SOL); Hunt v. Dept. of Air Force, a Div. of the U.S.A., 29 F.3d 583 (11th Cir. 1994) (naming USAF rather than U.S. as defendant is not fatal, but failure to serve U.S. within 120 days is fatal).

not start running of 6 months--suit must be refiled after 6 months of filing claims or after final denial); Watkins v. Arlington County, 1997 WL 40878 (D.C. Cir.) (suit filed several months before claim is denied is dismissed); Farlaineo v. U.S., 108 F.3d 1388 (table), 1997 WL 139768 (10th Cir. 1997) (suit filed prior to expiration of six month administrative consideration period is a nullity and must be refiled after administrative denial); Plyler v. U.S., 900 F.2d 41 (4th Cir. 1990) (suit filed before six months must be dismissed, since court has no jurisdiction, even though six months has run by time of dismissal); Allen v. USPS, 1997 WL 30203 (E.D. La.) (suit filed May 17, 1996--administrative claim filed May 20, 1996 and denied August 7, 1996--no suit filed after denial of administrative claim--court has no jurisdiction over May 17, 1996 action); Bueno-Watson v. U.S., Civ. # S-92-961 DFL PAN (E.D. Cal., 2 July 1992) (requirement in 28 C.F.R. § 14.9 stating that request for reconsideration precludes filing suit for 6 months is valid under McNeil v U.S., 508 U.S. 106, 113 S.Ct. 1980 (1993), which holds that 28 U.S.C. § 2675 must be strictly construed); Dye v. U.S., Civ. # SA-96-CA-0285 (W.D. Tex., 21 Feb. 1997) (suit filed two days prior to running of six month period for processing administrative claim is premature); McMahon v. Aguilera, Civ. # W-95-CA-087 (W.D. Tex., Nov. 2, 1995) (exhaustion of administrative remedies after premature filing does not mean that original filing is not subject to dismissal for failure to meet requirements in 28 U.S.C. § 2675(a)'s requirements); Hagy v. U.S., Civ. # C95-1719D (W.D. Wash., 30 Apr. 1996) (suit dismissed since filed less than 1 month after filing administrative claim); Brennan v. Ranerly, Civ. # 96-0651 (E.D. La. 13 May 1996) (suit against U.S. employee acting within scope filed same day as administrative claim filed is dismissed); Barsi v. U.S., 1996 WL 207761 (N.D. Cal.) (suit filed on 17 July is dismissed, since claims filed on 29 or 30 January and 6 months had not run); Moore v. U.S. Coast Guard, 1996 WL 137 640 (E.D. La.) (administrative claim filed after suit instituted, suit dismissed as premature). See also Walley v. U.S., 366 F. Supp. 268 (E.D. Pa. 1973); Schaefer v. Hills, 416 F. Supp. 428 (S.D. Ohio 1976); Mack v. U.S. Postal Service (USPS), 414 F. Supp. 504 (E.D. Mich. 1976); Cooper v. U.S., 498 F. Supp. 116 (W.D.N.Y. 1980). But see Celestine v. VA Hospital, 746 F.2d 1360 (8th Cir. 1984) (suit filed prematurely improperly dismissed where administrative claim filed and denied while suit pending and District Court not notified); Bond v. U.S., 934 F. Supp. 351 (C.D. Cal. 1996) (permits filing of suit prior to expiration of six month regulatory period imposed when reconsideration is requested--McNeil distinguished--cites Warren v. U.S. Dept. of the Interior, BLM, 724 F.2d 776 (9th Cir. 1984)). If premature suit dismissed, complaint must be refiled within six months of date of denial of administrative claim. Reynolds v. U.S., 748 F.2d 291 (5th Cir. 1984); Larague v. U.S., 750 F. Supp. 181 (E.

B. What is Proper Basis for a Claim?

1. Definition of Tort.


(2) Negligence Not a Constitutional Tort. A negligence claim under the FTCA may not be plead as a Bivens constitutional tort claim, if no constitutional rights


(4) Employee Relation Remedial Schemes. Constitutional tort claims by a federal employee against other federal employees may be barred by statutory schemes concerning employee relations. Federal constitutional tort claims concerning racial discrimination are barred by Title VII. Brown v. General Service Admin., 425 U.S. 820, 96 S.Ct. 1961 (1976); Kizas v. Webster, 707 F.2d 524 (D.C. Cir. 1983). Federal constitutional tort suits are barred in regard to retaliatory personnel practices, since Civil Service procedures are exclusive remedy for retaliatory personnel practices. Bush v. Lucas, 462 U.S. 367 (1983). See also Rivera v. U.S., 924 F.2d 948 (9th Cir. 1991) (Bush v. Lucas applied to whistle blower); Bryant v. Cheney, 924 F.2d 525 (4th Cir. 1991) (Bush v. Lucas applies to Bivens action by Federal civil service worker); American Postal Workers Union v. USPS, 940 F.2d 704 (D.C. Cir. 1991) (class action for retaliatory dismissal does not lie under Federal Tort Claims Act--civil service remedy exclusive); Kotarski v. Cooper, 866 F.2d 311 (9th Cir. 1989) (fact that probationary civil servant has only limited benefits does not avoid Bush v. Lucas); Brothers v. Custis, 886 F.2d 1282 (10th Cir. 1989) (Bush v. Lucas extends to probationary employee, e.g., part-time contract surgeon even though remedy is limited); Maxey v. Kadrovach, 890 F.2d 73 (8th Cir. 1989)
Boretos v. The U.S. Naval Observatory, Civ. # 92-1073-LFO (D.D.C., 6 Jan. 1993), aff’d, 1993 WL 267491 (D.C. Cir. 1993) (Federal employee's emotional distress due to being pressured by supervisor is barred by Bush v. Lucas); Castella v. Long, 701 F. Supp. 578 (N.D. Tex. 1988) (AAFES employee subject to benefit scheme--no suit allowed under Bush v. Lucas); Liles v. U.S., 638 F. Supp. 963 (D.D.C. 1986) (dismissal following arrest for indecent acts--must exhaust administrative remedies under MSPB appeal procedure); Francisco v. Schmidt, 575 F. Supp. 1200 (E.D. Wis. 1983) (civil service probationary employee cannot file Bivens tort action, even in absence of Civil Service procedural remedy). The Civil Service Reform Act (CSRA) has also been held to bar federal constitutional tort suits. Spagnola v. Mathis, 859 F.2d 223 (D.C. Cir. 1988) (Federal employees statutory civil rights claim against superiors foreclosed by Civil Service Reform Act); Neverez v. U.S., 957 F. Supp. 884 (W.D. Tex. 1997) (suit for defamation dismissed under Westfall Act--no remedy under CSRA); Saul v. U.S., 928 F.2d 829 (9th Cir. 1991) (CSRA preempts both constitutional tort against Federal employee's superior and common law claims against United States arising from personnel action the definition of which is broadly construed to include search); Mittleman v. U.S. Treasury, 773 F. Supp. 442 (D.D.C. 1991) (former United States employee's claim for inaccuracies in her medical records falls exclusively under CSRA); Morales v. Department of Army, 947 F.2d 766 (5th Cir. 1991) (alleged mistreatment of assistant fire chief falls under CSRA); Gergick v. Austin, 997 F.2d 1237 (8th Cir. 1993) (successful Whistleblower Protection Act claimant has no claim under FTCA, since he is limited by Civil Service Reform Act); Grisham v. U.S., 103 F.3d 24 (5th Cir. 1997) (termination under Whistleblower Protection Act (WPA) falls under CSRA and is not a basis for FTCA claim); Steele v. U.S., 19 F.3d 531 (10th Cir. 1994) (CSRA is exclusive remedy for claim for dismissal of USAF civil servant); Blaney v. U.S., 34 F.3d 508 (7th Cir. 1994) (failure of USAF to abide by terms of agreement settling employment dispute is excluded from FTCA by CSRA); Roth v. U.S., 952 F.2d 611 (1st Cir. 1991) (CSRA preempts FTCA even where no remedy for slander); Rishel v. Hibner, 859 F. Supp. 1046 (E.D. Mich. 1994) (Army employee's claim based on improper actions of supervisors, including claim for emotional distress is barred by CSRA); Taylor v. U.S., Civ. # CV-94-H-1061-NE (N.D. Ala., 29 Aug. 1994) (alleged forced resignation of Army employee is barred by CSRA and FECA, since they are the exclusive remedies); Greenlaw v. Garrett, 43 F.3d 462 (9th Cir. 1994) (appeal to court of


(6) Veterans Benefits. Veterans benefits scheme bars recovery for constitutional tort. Deloria v. Veterans Admin., 927 F.2d 1009 (9th Cir. 1991) (must exhaust administrative remedies for Veteran Affairs claim for benefits); El Amin v. U.S. Veterans Administration, 760
F. Supp. 747 (N.D. Ind. 1991) (cannot cast demand for
review of denial of veterans benefits in guise of
constitutional tort); Morozsan v. U.S., 849 F. Supp. 617
(N.D. Ind. 1994) (VA procedures for processing disability
benefits meet standards and are not unconstitutional).
garnishment of federal salary to repay VA home loan
falls under due process and is not a state law claim.

(7) Social Security. Social Security review scheme bars
1987) (claim for Social Security benefits not reviewable
under FTCA due to limited language in Social Security
Act).

(8) Military Records. Military records review system
bars recovery for constitutional tort. Moore v.
Secretary of the Army, 627 F. Supp. 1538 (D. Conn. 1986)
(no cause of action based on allegation that ABCMR
decision is in error).

(9) Violation of Federal Statute. A mere violation of
federal statute is insufficient to constitute a
constitutional tort. Lamont v. Haig, 539 F. Supp. 552
(D.S.D. 1982) (violation of Posse Comitatus Act causing
illegal confinement does not create cause of action);
Coast evacuation of Japanese-Americans); Founding Church
of Scientology v. Director FBI, 459 F. Supp. 748 (D.D.C.
1978).

(10) Constitutional Tort. Cases defining what is
required for a constitutional tort. Friedman v. Young,
702 F. Supp. 433 (S.D.N.Y. 1988) (pat down search must
shock conscience to be Constitutional tort); Morales v.
Ramirez, 906 F.2d 784 (1st Cir. 1990) (defines
constitutional tort arising out of malicious prosecution-
does include slanted investigation). Constitutional tort
found to be stated. Engle v. Mecke, 24 F.3d 133 (10th
Cir. 1994) (Federal employee recovers judgment from
Federal policeman who was arrested him); Stadt v. Univ.
(injection of plutonium in 1946 as part of U.S. nuclear
program into civilian scleroderma patient constitutes
U.S. Constitutional tort in violation of 5th Amendment--
cites In re Cincinnati Radiation Litigation, 874 F. Supp.
796 (S.D. Ohio 1995)); In re Cincinnati Radiation
physician supervising federally funded human nuclear
radiation experiment conducted in civilian hospital can


(12) Feres. Feres may bar a constitutional tort action. Chappell v. Wallace, 462 U.S. 296 (1983) (Feres bars a Bivens action). See also U.S. v. Stanley, 483 U.S. 681 (1987) (Chappell approach applies to all activities performed incident to “service” and not merely to activities performed within the officer/subordinate relationship); Bowen v. Oistead, 125 F.3d 800 (9th Cir. 1997) (Feres bars constitutional tort suit against

c. Types of Torts. Not limited to traditional common law torts where other torts permitted by state law—not excluded unless enumerated in 28 U.S.C. § 2680.


refuses to recognize wrongful life claim); Vu v. Meese, 755 F. Supp. 1374 (E.D. La. 1991) ($§ 2680(h) does not bar claim for emotional distress on basis that it is part of claim for extended detention of vessels). But see Hart v. U.S., 894 F.2d 1539 (11th Cir. 1990) (letter notifying widow as to determination of deceased airman's status not basis for emotional distress cause of action under Florida law); Johnson v. U.S., 816 F. Supp. 1519 (N.D. Ala. 1993) (no cause of action for prisoner being forced to live in cell with prisoner who has AIDS, since Alabama does not recognize emotional distress claim).


(b) Negligent Infliction of Emotional Distress.


Bystanders. Requirements for bystander recovery. In re Air Crash at Dallas/Ft. Worth Airport on 2 August 1985, 856 F.2d 28 (5th Cir. 1988) (reviews bystander requirements). See also Gross v. U.S., 676 F.2d 295 (8th Cir. 1982). Cases allowing recovery by bystanders for emotional distress. Sesma v. Cueto, 181 Cal. Rptr. 12 (Cal. App. 1982) (mother's emotional injury at stillbirth based on Dillon v. Legg, 441 P.2d 912 (Cal. 1968)); Thing v. La Chusa, 257 Cal. Rptr. 865, 771 P.2d 814 (Cal. 1989) (adds requirement of awareness to that of presence); Marlene F. v. Psychiatric Medical Clinic Inc., 770 P.2d 278 (Calif. 1989) (mother allowed to recover for emotional injuries from finding out daughter had been sexually molested by therapist); In re Air Crash Disaster Near Cerritas, Cal, 967 F.2d 1421 (9th Cir. 1992), further proceedings, 973 F.2d 1490 (9th Cir. 1992) (witnessing husband and two children trapped in burning home after plane crashed into it is basis for emotional distress claim as placed in fear for own safety); Walker v. Clark Equipment Co., 320 N.W.2d 561 (Iowa 1982) (product liability psychic injury case); Woodill v. Parke Davis and Co., 402 N.E.2d 194 (Ill. 1980) (same as Walker); Marzolf v. Hoover, 596 F. Supp. 596 (D. Mont. 1984) (bystander case--close relative witnesses injury to child); Ochoa v. Superior Court of Santa Clara County, 703 P.2d 1 (Cal. 1985); Hahn v. Sterling Drug Inc., 805 F.2d 1480 (11th Cir. 1986) (Georgia follows impact rule in absence of willful act); Lejeune v. Rayne Branch Hospital., 556 So.2d 559 (La. 1990) (wife's emotional distress for viewing rat bites on husband who is patient in hospital--cause of action permitted). But see In re Air Crash Disaster Near New Orleans, Louisiana on 9 July 1982, 764 F.2d 1082 (5th Cir. 1985) (homeowner in area of air crash who suffered no physical injury or property damage not entitled to damages for mental injury); Harper v. Illinois Central Gulf RR, 808 F.2d 1139 (5th Cir. 1987) (train wreck causes spread of hazardous fumes--no emotional injury unless in zone of danger or for property damage unless witnessed same); Wilder v. City of Keene., 557 A.2d. 636 (N.H. 1989) (no recovery for parents who saw son one hour after accident); Burris v. Grange Mutual Cos., 545 N.E.2d. 83 (Ohio 1989) (no recovery for mother who later learned of son's death in auto accident); Nesom v. Tri Hawk Intern., 985 F.2d 208 (5th Cir. 1993) (discusses abandonment of "zone of danger" rule by La.
Sup. Court, but states that fear of developing disease in future does not create action for emotional distress; Martin by and through Martin v. U.S., 984 F.2d 1033 (9th Cir. 1993) (neither older sister of 6-year-old or mother have emotional distress action); Doe v. U.S., 976 F.2d 1071 (7th Cir. 1992) (no cause of action for seduction, i.e., emotional distress permitted for parents of child sexually abused at USAF day care center); Mortise v. U.S., 102 F.3d 697 (2nd Cir. 1997) (wife who witnessed assault upon husband by National Guard on training exercise does not have claim for negligent infliction of emotional distress, since he did not suffer serious bodily injury); Garber v. U.S., 578 F.2d 414 (D.C. Cir. 1977) (no recovery for emotional distress without impact); Soldinger v. U.S., 247 F. Supp. 559 (E.D. Va. 1965) (same). MR (Vega Alta) v. Caribe General Elec. Products, 31 F. Supp. 2d 226 (D.PR 1998) failure of EPA to follow federal regulations during CERCLA clean up is not at FTCA tort.


Seizure of property without notice constitutes conversion. Love v. U.S., 871 F.2d 1488 (9th Cir. 1989) (selling collateral without notice constitutes a conversion, as well as breach of contract); Arcoren v. Peters, 811 F.2d 392 (8th Cir. 1987) (seizure and sale of cattle of FmHA without notice or hearing violates due process and constitutes conversion). But see Love v. U.S., 844 F. Supp. 616 (D. Mont. 1994) (FmHA's disposition of debtor farmers' collateral without required notice is not a conversion under Montana law).

However, a law or regulation is considered sufficient notice. Burton-Bey v. U.S., 100 F.3d 967 (table), 1996 WL 654457 (10th Cir. 1996) (seizures of inmate's properly purchased Dallas Cowboys cap under newly published prison regulation is not conversion). For a conversion to occur the plaintiff must have a ownership interest in the thing being converted. Koppie v. U.S., 1 F.3d 651 (7th Cir. 1993) (alleged improper registration of aircraft does not constitute a conversion, since it does not determine ownership); CHoPP Computer Corp. v. U.S., 5 F.3d 1344 (9th Cir. 1993) (U.S. levies on a stock account on which an injunction has been placed--no conversion--injunction holder had no property interest in the account). Bazuaye v. U.S., F. Supp. 2d, 1999 WL 166996 (D.D.C.) No conversion as plaintiff did not own release bond at time it was seized by USPS under a forfeiture statute.

(12) Trade Secrets. Wrongful misuse of trade secrets is tort under New York law and, therefore, falls under FTCA. Kramer v. Secretary, U.S. Dept. of Army, 653 F.2d 726 (2d Cir. 1980).


(next-of-kin has right of possession of body under D.C. law); Davis v. U.S. Dept. of Army, 602 F. Supp. 355 (D. Md. 1985) (wrongful disposal of fetus not actionable under D.C. law). Even if tort stated, may still be barred by discretionary function exclusion. Sabow v. U.S., 93 F.3d 1444 (9th Cir. 1996) (inadequate investigation of death and mishandling of corpse of active duty member falls under discretionary function exclusion). Some states allow tort for mishandling corpse to proceed either as a distinct tort or plead as an emotional distress claim or both. Lacy v. Cooper Hospital University Medical Center, 745 F. Supp. 1029 (D.N.J. 1990) (separate tort for mishandling corpse--permitted as emotional distress claim under N.J. law where it is alleged that intern performed pericardiocentesis on corpse); Perry v. Saint Francis Hosp. & Medical Center, Inc., 865 F. Supp. 724 (D. Kan. 1994) (long bones of corpse removed to obtain marrow for organ transplant patient--widow has cause of action for conversion and claim for emotional distress if more than ordinary negligence can be shown). Shults v. U.S., 995 F. Supp. 1270 (D. Kan. 1998). Retention of organs at autopsy without permission of family does constitute intentional infliction of emotional distress - in any event no property interest in dead body under Miss. law. Riley v. St. Louis County of Missouri, 153 F.3d 627 (8th Cir. 1998), suit against county and funeral home for photographing body of young suicide victim and displaying photo in public.


0478-D (D. Me. 1988) (legal assistance discloses sexual misconduct of client's husband based on her agreement that he could tell husband's company-held no written consent required). Some states would allow a legal malpractice claim to proceed as an emotional distress claim. Pinkham v. Burgess, 933 F.2d 1066 (1st Cir. 1991) (gross mishandling of civil law suit can give rise to tort of negligent infliction of emotional distress, even though lawsuit could not have been successfully pursued).

(17) Professional Negligence. General Dynamics Corp. v. U.S., 139 F.3d 1280, (9th Cir. 1998) reversed on other grounds ___ F.3d ___ 1998 WL 136209 (9th Cir.). (improper audit is a tort for professional negligence under California law), rev'd on other grounds, ___ F.3d ___, 1998 WL 136209 (9th Cir. 1998).


(22) Nuisance. Bartleson v. U.S., 96 F.3d 1270 (9th Cir. 1996) (shelling from adjacent Camp Roberts for a period of two years constituted a permanent nuisance, since Army cannot assure that shelling will not continue).

(23) Negligent Entrustment. McGuire v. Wright, Civ. 96-50931 (5th Cir., 23 March 1998). Failure of NAFI to make certain that driver of rental vehicle was insured does not constitute negligent entrustment.

d. FTCA Liability for Violating Federal Regulations. FTCA claim cannot arise from violation or failure to follow Federal rule or regulation unless State law recognizes private cause of action. Cases where no cause of action for
violation of government rule or regulation, because not actionable under state law. See U.S. v. Varig Airlines, 467 U.S. 797, 104 S.Ct. 2755 (1984); Johnson v. Sawyer, 47 F.3d 716 (5th Cir. 1995) (en banc) (violation of IRS statute prohibiting public dissemination of tax information does not constitute a tort under Texas law); Myers v. U.S., 17 F.3d 890 (6th Cir. 1994) (miner's death based on failure of Mine Health and Safety Administration's failure to enforce its regulations does not constitute a tort under Tennessee law); Hardaway v. U.S. Army Corps of Engineers, 980 F.2d 1415 (11th Cir. 1992) (failure to investigate financial worth of contract and require posting of Miller Act bond in violation of COE regulation is not a state tort); Sheridan v. U.S., 969 F.2d 72 (4th Cir. 1992) (Navy regulation on firearms is not basis for claim arising from shooting by off-duty drunken sailor); Westbay Steel Inc. v. U.S., 970 F.2d 648 (9th Cir. 1992) (contracting officer's failure to require surety to post bond as required by Miller Act is not a tort under the FTCA); Kugel v. U.S., 947 F.2d 1504 (D.C. Cir. 1991) (violation of internal FBI procedure does not constitute a state tort or create a public duty); Fazi v. U.S., 935 F.2d 535 (2d Cir. 1991) (USPS regulation concerning security guard to accompany contract mail carrier does not create a state tort under N.Y. law); Freedman v. U.S., 694 F.2d 1202 (9th Cir. 1985) (violation of U.S. Air Force Base regulation controlling temperature on hot water heater in quarters does not create cause of action, but Washington statute governing warranty of habitability does); Santiago-Ramirez v Secretary of Defense, 62 F.3d 445 (1st Cir. 1995) (questioning AAFES employee for removing packages through customer entrance in violation of regulation and then firing her does not create cause of action for intentional infliction of emotional distress); Employers Insurance of Wausau v. U.S., 1993 WL 337524 (N.D. Ill.) (recovery of EPA ordered cleanup costs based on EPA's misinterpretation of governing statute is not a state tort); Sheridan v. U.S., 969 F.2d 72 (4th Cir. 1992), aff'g, 773 F. Supp. 786 (D. Md. 1991) (violation of Navy firearms regulation not a tort under Md. Law); Gist v. U.S., 1991 WL 270289 (D. Kansas) (hiring of bulk mail contractor in violation of USPS procurement manual does not give bulk subcontractor cause of action for violation of statute); Love v. U.S. Dept. of Agriculture, 647 F. Supp. 141 (D. Mont. 1986) (suit cannot be based on failure of FmHA to enforce its regulation to protect Government's security interest). See also U.S. Gold and Silver Investments Inc. v. U.S. ex rel. Director U.S. Mint, 885 F.2d 620 (9th Cir. 1989) (suit for appropriation of trade cannot be brought under Lanham Act, since not a state tort); Art Metal-USA Inc. v. U.S., 753 F.2d 1151 (D.C. Cir. 1985); Love v. U.S., 656 F. Supp. 847 (D. Mont. 1987); Consolidated Aluminum Corp. v. C.F. Bean Corp.,
639 F. Supp. 1173 (W.D. La. 1986) (U.S. not liable for
rupture of gas line by dredging company dredging channel for
U.S., even though Corps reserved rights concerning safety);
of USAF to approve independent contractor plan in accordance
with USAF regulations not actionable); Moody v. U.S., 774
F.2d 150 (6th Cir. 1985) (FmHA inspection on home); Collins
v. U.S., 621 F.2d 832 (6th Cir. 1980); Zabala Clemente v.
U.S., 567 F.2d 1140 (1st Cir. 1977), cert. denied, 435 U.S.
1006 (1978) (aircraft inspection); United Scottish Ins. Co.
v. U.S., 614 F.2d 188 (9th Cir. 1979) (same); Gelley v. Astra
Pharmaceutical Products Inc., 610 F.2d 558 (8th Cir. 1979)
(medical drug inspection); Bernitsky v. U.S., 620 F.2d 948
(3d Cir. 1980) (mine inspection); In re Franklin National
(bank inspection); Carroll v. U.S., 488 F. Supp. 757 (D.
Idaho 1980) (mine inspection); Loge v. U.S., 662 F.2d 1268
(8th Cir. 1981) (drug licensing); Market Ins. Co. v. U.S.,
415 F.2d 459 (5th Cir. 1969) (safety inspection); Fisher v.
U.S., 441 F.2d 188 (3d Cir. 1971); Roberson v. U.S. v.
Merritt-Chapman & Scott Corp., 382 F.2d 714 (9th Cir. 1967);
packing inspection); LeSuer v. U.S., 617 F.2d 1197 (5th Cir.
1980) (safety inspection); Taylor v. U.S., 521 F. Supp. 185
(W.D. Ky. 1981) (mine inspection); Continental Casualty v.
engine); Schell v. National Flood Insurers Assn., 520 F.
Supp. 150 (D. Colo. 1981) (notice to public re availability of
flood insurance); Key v. U.S., 513 F. Supp. 756 (N.D. Ala.
1981) (mining practice); Raymer v. U.S., 660 F.2d 1136 (6th
Cir. 1981) (mine inspection); Vanderberg v. Carter, 523 F.
Supp. 279 (N.D. Ga. 1981) (denial of CHAMPUS benefits);
safety regulations); Baer v. U.S., 511 F. Supp. 94 (N.D. Ohio
1980) (Federal regulations on herbicide); Jennings v. U.S.,
construction projects); Tuepker v. FmHA, 558 F. Supp. 375
(W.D. Mo. 1982) (disapproval of FmHA emergency loan); Petty
v. U.S., 679 F.2d 719 (8th Cir. 1982) (state law, not Swine
Flu Act, establishes standard for informed consent); Watson v.
Marsh, 689 F.2d 604 (5th Cir. 1982) (defective machine in
GOCO plant); Sellfors v. U.S., 697 F.2d 1362 (11th Cir. 1983)
(federally financed project at municipal airport to rid birds
not sufficient to hold U.S. when plane ingested birds);
(regulating flame retardant garments); Gary Sheet & Tin
Employees Federal Credit Union v. U.S., 605 F. Supp. 916
(N.D. Ind. 1985) (audit of Credit Union does not create duty
to regulate and control credit unions). But see Routh v.
U.S., 941 F.2d 853 (9th Cir. 1991) (safety provisions of road
tort where FAA imposed civil penalties because FAA admittedly misinterpreted its own regulations.


2. Must be Caused by U.S. Employee. Mendrada v. Crown Mortgage Co., 955 F.2d 1132 (11th Cir. 1992) (Federal Home Loan Mortgage Company is not a federal agency for purposes of FTCA--cites military case); Polcari v. J.F. Kennedy Center, 712 F. Supp. 230 (D.D.C. 1989) (Kennedy Center is Federal agency due to substantial oversight and funding); Brandes v. U.S., 783 F.2d 895 (9th Cir. 1986) (fiancee of VA employee was not Federal employee while driving daughter in U.S. vehicle from prospective house purchase).


103). See also Kramer v. U.S., 843 F. Supp. 1066 (E.D. Va. 1994) (failure of CHAMPUS partners at Langley AFB clinic to diagnose condition which led to leg amputation is not under FTCA, since they were not U.S. employees); Sorahan v. U.S., 1997 WL 573403 (N.D. Ill.) (Dr. Peterson dismissed from FTCA suit since he was independent contractor whose sponge was not removed from patient during hystectomy); Hanna v. Naegle, Civ. # 93-1421M (D.N.M., 30 Aug. 1996) (CHAMPUS partner held to be independent contractor); Bunevitch v. U.S., Civ. # C-91-0728-L(J) (W.D. Ky., July 19, 1994) (contract radiologist is held to be an independent contractor in suit for misinterpretation of mammogram); Rodriguez v. Sarabyn, 129 F.3d 760 (5th Cir. 1997) (clinical psychologist hired on a purchase order to provide family counseling to ATF victims of Waco raid is an independent contractor); Richerson v. U.S., 104 F.3d 361 (table), 1996 WL 733136 (6th Cir. 1996) (University of Michigan Medical School anesthesiologist is an independent contractor, but immune under state immunity statute); Robb v. U.S., 80 F.3d 884 (4th Cir. 1996) (USAF contracted with contractor to set up a "stand alone" OP clinic, which failed to diagnose lung cancer--both OP physician and contract radiologist were independent contractors); Pickett v. U.S., 724 F. Supp. 390 (D.S.C. 1989) (ER physician not U.S. employee); Eames v. U.S., Civ. # C-92-1822 MHP (N.D. Cal., 29 Dec. 1993) (U.S. not liable for error in reading x-ray by contract radiologist at Naval Hospital); Lilly v. Fieldstone, M.D., 876 F.2d 857 (10th Cir. 1989) (civilian urologist performing surgery in Army hospital an independent contractor, not a civilian employee--soldier not Feres barred); Sneed v. U.S., Civ. #91-0613-FMS (N.D. Cal. 1992) (contract radiologist at Oakland Naval Hospital is independent contractor); Carrillo v. U.S., 5 F.3d 1302 (9th Cir. 1993) (contract pediatrician is not U.S. employee in case where he failed to diagnose child abuse); Leone v. U.S., 910 F.2d 46 (2d Cir. 1990) (private physician is not U.S. employee when conducting FAA pilot licensing exam); Limo v. U.S., 852 F. Supp. (D.D.C. 1994) (contract neuroradiologist at WRAMC is not U.S. employee--distinguishes Spinnard v. U.S., CIV. # 85-0502 (D.D.C., 30 Jan. 1994)); Taylor v. U.S., Civ. #88-H-5396-NE (N.D. Ala. 1989) (contractor in Army hospital ER not a Federal agency); Broussard v. U.S., Civ. # 91-CA-074 (W.D. Tex. 1992) (physician employed by Emergency Medical Services, Inc. to work in ER of Army hospital is independent contractor); McDonald v. U.S., 807 F. Supp. 775 (M.D. Ga. 1992) (physician employed by National Emergency Services and working in ER at Moody AFB is independent contractor--cites similar case involving Eisenhower Army Medical Center); Spritzer v. U.S., 1988 WL 363944 (S.D. Ga. 1988)). However, even where a physician’s contract states he/she is an independent contractor, this is not
Contra B & A Marine v. American Foreign Shopping, 23 F.3d 709 (2d Cir. 1994). Some courts have held the government liable on an apparent agency theory, even though the physician was a contractor. See, e.g., Gamble v. U.S. v. Univ. Anesthesiologists Inc., 648 F. Supp. 438 (N.D. Ohio 1986) (U.S. equitably estopped from denying that contract anesthesiologist was U.S. employee despite nature of contractual arrangement); Utterback v. U.S., 668 F. Supp. 602 (W.D. Ky. 1987) (U.S. liable for actions of contract anesthesiologist at VA Hospital estopped to deny apparent authority--distinguishes Lurch v. U.S., 719 F.2d 333 (10th Cir. 1983) involving scarce services contract between VA and surgeon). See also Apparent Agency, Trial Magazine (1988) (19 states have adopted doctrine making a hospital liable for acts of staff doctors who are independent contractors, not employees). Further, the U.S. can be held liable if it breaches some independent duty. Ayers v. U.S., 750 F.2d 449 (5th Cir. 1985) (administration of second spinal anesthetic by supervisory anesthesiologist provided VA Hospital at University Texas Medical School under contract does not release VA whose liable for negligent conduct of fourth year anesthesiology VA resident--held jointly liable). However, sometimes the context renders the physician a federal employee. Tivoli v. U.S., Civ. # 93-Civ. 5817 (CLB)(MDF) (D.D.C. 1993)(Georgetown radiologists hired under non-personal service contract held to be employees of NIH); aff'd Civ. # 98-6012, 6022 (2d Cir., 25 Sep. 98); Perry v. U.S., 936 F. Supp. 867 (S.D. Ala. 1996) (Kessler AFB surgical resident on one month burn training rotation at South Alabama Medical Center is U.S. employee and not borrowed servant or independent contractor--cites Brilliant v. Royal, 582 So.2d 512 (Ala. 1991) in which contract surgeon at Lyster Army Hospital held to be independent contractor); Brown v. Health Services, Inc., 971 F. Supp. 518 (D. Del. 1996) (HHS certification under 42 U.S.C. § 254(c), a Federal grant program, that private physician at HHS is a Federal employee is upheld); Costa v. U.S. Dept. of Veteran's Affairs, 845 F. Supp. 64 (D.R.I. 1994) (civilian resident's temporarily serving at DVA hospital are considered to be employees of U.S. based on DOJ certification); Ritchie v. U.S., Civ. #89-587-A (W.D. Okla. 1991) (CHAMPUS partner hired to staff USAF
hospital OB-Gyn clinic is a U.S. employee); Ezekiel v. Michel, 66 F.3d 894 (7th Cir. 1995) (U. of Chicago resident performing rotation in VA hospital under 38 U.S.C. § 7405 is U.S. employee, even though not compensated by U.S); Quilico v. Kaplan, 749 F.2d 480 (7th Cir. 1984) (VA physician hired under 38 U.S.C. § 4114 is immune from individual suit under 38 U.S.C. § 4116); Bird v. U.S., 949 F.2d 1078 (10th Cir. 1991) (contract CNRA is U.S. employee in IHS Hospital in Oklahoma); Shumaker v. U.S., 714 F. Supp. 154 (M.D. N.C. 1988) (NHSC physician working in civilian clinic is U.S. employee). Also, under state law, a person may have more than one employer. Ward v. Gordon, 999 F.2d 1399 (9th Cir. 1993) (Army physician performing residency at civilian hospital is considered a U.S. employee, since a servant can have two masters); Jones v. Servella, 1996 WL 554513 (D.C.) (physician employed by National Health Service Corps assigned to provide student Medical Services at Galludet College is an employee of both U.S. and Galludet); Palmer v. Flagman, 93 F.3d 196 (5th Cir. 1996) (USAF physician completing residency in private hospital is an employee of both the US and private hospital under Texas law). See also Starnes v. U.S., Civ. # SA-96-CA-529 (S.D. Tex., June 30, 1997) (Army resident in training at civilian hospital is a borrowed servant of that hospital, even though training agreement provides that he is a servant of U.S. under the FTCA). But see Ross v. U.S., Civ. #88-cv-00571 (W.D.N.Y. 1992) (DVA resident in training at Douglas v. U.S., Civ. # 3:94CV-528-S (W.D. Ky., 18 March 1998) (contract gynecologist and radiologist are solely liable for the delay in treating breast cancer at Fort Knox Army hospital. Starnes v. U.S., 139 F.3d 540 (5th Cir. 1998) Military physician in residency training agreement at civilian hospital is not a borrowed servant but a U.S. employee; Linlieus v. U.S., 142 F.3d 271 (5th Cir. 1998) CHAMPUS partner employed at Darnall Army Community Hospital is not U.S. employee. Davis v. U.S., 1998 WL 401640 (E.D. Pa.) (Navy vails to inform claimant of fact that tortfeasors were independent contractors within state SOL period – no fraudulent concealment and no estoppel. Mangual v. U.S., Civ. # 93 CV5683 (E.D.N.Y., 10 Nov. 1998), civilian contractor physician is solely responsible for C-section even though military obstetrician assisted in operation; Lewis v. U.S., 1998WL544969 (N.D. Calif), civilian physician who partially removed tonsils at Oakland Naval Hospital is an independent contractor. Proctor v. U.S., Civ #95-C-1017-E (N.D. Okla 3 Jan 1997) contract radiologist is Federal employee at Indian Health Services Hospital under 25 USC 1680c(d). Core v. National Emergency Services, Civ #98-257 La App 3d (rev (3 Mar 99)) 1999 La App Lexis 480, Emergency room physician for NES is not a U.S. employee while failing to diagnose a torsion testicle at Fort Polk. Cruz v. U.S., Civ. 97-0094-
CIV-GOLD (S.D. Fla., 6 April 1998) physician not a U.S. employee under FSHCAA, 42 U.S.C. 233(b) but of a trust which supplied physicians to clinic.

rolled up carpet behind drop cloth, which was allegedly against clothing rack, in portion of base exchange being renovated by contractor does not warrant dismissal of U.S. on independent contractor defense since U.S. employee clothing racks may have been to close dropcloth); but see, 986 F. Supp. 859, 1997 WL 748738 (D. Del.) which holds contractor completely liable under indemnity clause. Additionally, the U.S. may have a duty under state law to supervise the contractor or have a non-delegable duty under state law. Dickerson, Inc. v. U.S., 875 F.2d 1577 (11th Cir. 1989)(duty to supervise disposition of PCB waste by contractor); Librera v. U.S., 718 F. Supp. 110 (D. Mass. 1989) (where U.S. is aware of icy conditions, U.S. can be held jointly liable, even though clean up delegated to independent contractor). Carter v. U.S., 1998WL744009 (S.D.N.Y.), U.S. not liable where toilet paper holder fell and injured plaintiff in contractor maintained bathroom. Means v. U.S., 176 F.3d 1376 (11th Cir. 1999) Where plaintiff is injured by flash bang devise when county police break into her home so federal agents can search, control test application precludes county agents from being U.S. employees.


g. Volunteer Workers. "U.S. employee" does include volunteer workers, e.g., Red Cross volunteers in Army medical treatment facilities. McNicholas v. U.S., 226 F. Supp. 965 (N.D. Ill. 1964). See 5 U.S.C. § 3111 (c) and 10 U.S.C. § 1588. See also Pervez v. U.S., 1991 WL 53852 (E.D. Pa. 1991) (Officials of steel company who participate in effort to entrap smuggler at request of U.S. Customs are employees of U.S. for purposes of removal and substitution in false arrest suit); Murphy v. Mayfield, 860 F. Supp. 340 (N.D. Tex. 1994) (includes as a U.S. employee a VISTA volunteer hired under 42 U.S.C. § 5055(f)(3)); Billings v. U.S., 57 F.3d 797 (9th Cir. 1995) (Marilyn Quayle, while inspecting 1992 San Francisco earthquake damage on FEMA invitational orders is U.S. employee). But see Marcello v. Brandywine Hospital, 47 F.3d 618 (3rd Cir. 1995) ("U.S. employee" does not include Red Cross regarding HIV positive blood supplied to civilian hospital, since Red Cross, while federal instrumentality, does not have sovereign immunity); Rayzor v. United States, 937 F. Supp. 115 (D.P.R. 1996), aff'd, 121 F.3d 695 (table), 1997 WL 414100 (1st Cir. 1997) (Naval Officer’s daughter who was assaulted by baby-sitter obtained from Red Cross list at Naval Air Station--Red Cross not a Federal agency).


crashes his own plane while under control of Navy flying club member and maintained by flying club is Feres barred; See also Walls v. U.S., 832 F.2d 93 (7th Cir. 1987)


(9) Hunt Club. Hass v. U.S., 518 F.2d 1138 (4th Cir. 1975). Contra Scott v. U.S., 337 F.2d 471 (5th Cir. 1964) (hunt club was a private association which should be distinguished from NAFI hunt club). Rod and gun clubs, yachting clubs, flying clubs, daycare centers, can be either NAFI or private association. See also Witt v. U.S., 462 F.2d 1261 (2d Cir. 1972) (prisoner of Disciplinary Barracks (DB) who volunteered to shovel manure at Post Stable, a private association is injured while being transported by a Stable employee-held Stable employee is agent of D.B). Thrift shops, wives' clubs are invariably private associations.

k. NAFI Claims. In order to encourage participation, claims are paid which arise from the use of certain types of NAFI property, i.e., flying clubs, golf clubs, and craft shops, even though user is not an employee as defined by FTCA. Such claims are not paid under FTCA, but Chapter 12, AR 27-20, and from NAFI funds. They do not fall under FTCA as the operator of the equipment is not within scope, e.g., member of flying club. This now includes Family Child Care Providers.


m. Delayed Entry Program. Smith v. U.S., 688 F.2d 476 (7th Cir. 1982) (excludes delayed entry EM driving his POV); Heredia v. U.S., 887 F. Supp. 77 (S.D.N.Y. 1995) (Delayed Entry Program Marine Corps poolee injures another poolee who voluntarily accompanied him while driving recruiter’s car on a recruiting mission assigned by recruiter--passenger is not Feres barred, since he was not performing mission and poolee driver is U.S. employee).

n. Indian Tribes. Shaffer v. U.S., Civ. # S-94-1287 GEB/GGH (E.D. Cal., Mar. 22, 1995) (suit against Indian tribe constitutes suit against U.S. under FTCA). Cheromiah v. U.S., Civ #97-1418 MV/RVP (D.N. Mex. 29 June 99) suit against Indian Health Service Hospital falls under FTCA but tribal not New Mexico law applies e.g. N. Mex. Medical malpractice cap is not applicable.


685 F.2d 1178 (9th Cir. 1982) (service member, pet-owner
fails to comply with base regulation requiring restraint of
dog--held scope); Simmons v. U.S., 805 F.2d 1363 (9th Cir.
1986) (Indian Health Service counselor within scope when he
engaged in sexual intercourse with patient, even where off
1986) (Federal Fish and Wildlife officer is within scope
while posing as a dentist during official investigation);
Worsham v. U.S., 828 F.2d 1525 (11th Cir. 1987) (U.S. drug
and alcohol counselor who engaged in sex with patient was
within scope and not properly supervised, but no compensable
tort, since sex was voluntary); Washington v. U.S., 868 F.2d
332 (9th Cir. 1989) (priming POV carburetor with open spray
can--held scope); Vollendorf v. U.S., 951 F.2d 215 (9th Cir.
1991) (active duty service member is in scope when he leaves
malaria pills accessible to his grandchild); Haas v. Barto,
829 F. Supp. 729 (M.D. Pa. 1993) (scope certification of
Attorney General upheld where one federal employee pulled out
steps from under another employee causing fall); Cordoza v.
conversation with wife of Fish and Wildlife Service employee
about his alleged crimes-tape of conversation used in
criminal investigation--FWS agent who made recording is
within scope); Alburow v. U.S., Civ. # C95-5061JKA (W.D.
Wash., Oct. 20, 1995) (INS examiner who displayed overt
sexual behavior during interview with applicant--in scope);
Red Elk on Behalf of Red Elk v. U.S., 62 F.3d 1102 (8th Cir.
1995) (police officer arrested 13 year old for violating
curfew and raped her in back seat of police car--in scope);
Harris v. Walker, 89 F.3d 833 (table), 1996 WL 354018 (6th
Cir. 1996) (conduct of surveillance by fellow employees is
within scope when ordered by supervisor); Coleman v. U.S.,
91 F.3d 820 (6th Cir. 1996) (USPS employee was in scope when she
filed criminal complaint against supervisor); Wilson v.
Drake, 87 F.3d 1073 (9th Cir. 1996) (supervisor in scope when he
allegedly used physical force to preclude subordinate from
leaving his office); Cassell v. Norris, 103 F.3d 61 (8th Cir.
1996) (Social Security Administration employees were within
scope when they wrote letters to high officials complaining
about job related performance of Administrative Law Judge);
Pearson v. Friend, 103 F.3d 133 (table), 1996 WL 694398 (7th
Cir. 1996) (National Biological Service (NBS) employee was
within scope of employment when he made defamatory remarks
concerning objectivity of DVM and biologist who were trying
to preclude the killing of a sick flock of ducks); Reynolds
Service Special Agent was within scope where he entered
plaintiff's property and arrested plaintiff's son for hunting
ducks without a valid permit--case dismissed, since
investigation was permitted by U.S. law); Carpenter v.
Laxton, 96 F.3d 1448 (table), 1996 WL 49099 (6th Cir. 1996) (National Park Service rangers engaging in arrest attempt at request of local sheriff are within scope); McGovern v. Thomas, 1996 WL 478698 (N.D. Cal.) (IRS agent assisting in IRS auction allegedly assaults person who is videotaping IRS agent’s pov--held within scope); Wilson v. Drake, 87 F.3d 1072 (9th Cir. 1996) (supervisor allegedly barring subordinates egress from his office and forcibly precluding subordinate from turning on tape recorder is within scope); Cerri v. U.S., 80 F. Supp. 831 (N.D. Cal. 1948) (MP hits innocent bystander--held scope). Contra U.S. v. Jasper, 222 F.2d 632 (4th Cir. 1955). Cases holding outside scope. See, e.g., McNally v. Dewitt, 961 F. Supp. 1041 (W.D. Ky. 1997) (U.S. Marshal not in scope when arresting McNally for state crime); Williams v. Morgan, 723 F. Supp. 1532 (D.D.C. 1989) (DOJ non-scope in "horseplay" case under Westfall Act); Meridian Center Logistics Inc. v. U.S., 939 F.2d 740 (9th Cir. 1991) (Attorney General's certification of scope re FBI agent reversed re contacts with foreign countries); Tilton v. Dougherty, 493 A.2d 442 (N.H. 1985) (official immunity not applicable to NG physician conducting physical exam); Travelers Insurance Co. v. SCM Corp., 600 F. Supp. 493 (D.D.C. 1984) (coffeemaker owned by U.S. employees causing fire in leased building subjects employees to individual suit); Dretar v. Smith, 752 F.2d 1015 (5th Cir. 1985) (permits individual suit in State court against Federal supervisor who shoved Federal employee and struck her with door); Focke v. U.S., 597 F. Supp. 1325 (D. Kan. 1982), aff'd, Civ. #82-1511 (10th Cir. 1985) (social work associate who was not counselor was outside scope in engaging in sexual activity with wife and daughter of a VA mental patient); U.S. v. Campbell, 172 F.2d 500 (5th Cir. 1949), cert. denied, 337 U.S. 957 (1949) (sailor running to catch troop train knocked down bystander--held not scope); Wynn v. U.S., 200 F. Supp. 457 (E.D.N.Y. 1961) (Posse Comitatus Act--held not scope); Sanchez v. U.S., 177 F.2d 452 (10th Cir. 1949) (U.S. security guard volunteers to help in search of lost girl--held not scope); Guzman v. U.S., Civ. # 75-658 (D.P.R.) (service member brings back grenade from Vietnam after five years causes death and injuries--held not scope); Witt v. U.S., 319 F.2d 704 (9th Cir. 1963); Tilden v. U.S., 365 F.2d 148 (7th Cir. 1966) (driving pov when co said he was not to do so--held not scope); Bates v. U.S., 701 F.2d 737 (8th Cir. 1983) (Game Warden murders and rapes while on duty--held not scope); Kirby v. U.S., Civ. # 78-1060 (D.S.C. 1979) (off-duty NCO who drives injured civilians to hospital allegedly at request of off-duty officer--not within scope); Piper v. U.S., 887 F.2d 861 (8th Cir. 1989) (airman let dog run loose when base required control--not within scope), Brotko v. U.S., 727 F. Supp. 78 (D.R.I. 1989) (same as Piper);
duty Naval police officer who stops at scene of off-post accident and fails to preclude second accident by not securing scene was not in scope and had no duty to do so); Mobley v. Cody, 1996 WL 250655 (D. Md.) (postal employee at request of USPS IG wiretaps her supervisor concerning sexual harassment--employee was not in scope when she utilized wiretap evidence in criminal prosecution); Voytas v. U.S., 256 F.2d 786 (7th Cir. 1958) (soldier steals explosives--held not scope). Accord Gordon v. U.S., 180 F. Supp. 591 (Ct. Cl. 1960). But see Williams v. U.S., 352 F.2d 477 (5th Cir. 1965). Sometimes the question of whether person is within scope can not be settled on summary judgment. Nichols v. U.S., 796 F.2d 361 (10th Cir. 1986) (issue of fact as to whether Job Corps enrollee acting within scope when he bit finger of contract security guard who had him in custody). Sometimes apparent authority has been held to be an issue in determining scope of employment. Westfork v. U.S., Civ. S-95-1360 WBS/JFM (E.D. Calif., 8 May 1998). Marine Corps Captain is within scope when storing MRE rations in his on-post quarters garage. His wife gave some to neighboring children who started fire with matches from MRE. See also Westbord v. U.S., Civ. #S-97-1360 WBS/SFM (E.D. Calif., 13 Oct. 98). Tabasz v. Mlynyczaf, 149 _F.3d_ 361, 1998 WL 371983 (7th Cir., Ill.) (libelous complaints against supervisors made outside of channels on DOL stationary on duty time are within scope. Schroder v. Sandoval, Civ. # A97CA896SS (W.D. Tex., 9 Sep. 98), Physicians Assistant who re-examines prisoner after complaint to the warden, is not in scope when he rams in finger and says "[t]his is for complaining." Webb v. U.S., Civ. #97-0283-B (W.D. Va., 3 Nov. 98), FSHCAA Clinic physician not in scope when he allegedly examines patient's body not incident to care sought and offers rendezvous in his apartment. Primeau v. U.S., 149 F.3d 897 (8th Cir. 1998), BIA policeman who uses his authority to pick up stranded motorist and later rapes her is within scope; Primeau v. U.S., 181 F.3d 876 (8th Cir. 1999) en banc court held policeman not in-scope and reverses prior 8th Circuit decision. Mackey v. Milan, 154 F.3d 648 (6th Cir. 1998), superior officers' sexual harassment of female officer is within scope under Ohio law by virtue of fact that the alleged harassment occurred because of their being placed in charge of her. Bergeron v. Henderson, 47 F. Supp. 2d 61 (D. Maine 1999) letter carrier files suit against her post master and supervisor for sexual harassment--held to be in rape; Hoffman v. U.S., 1999 WL 417830 (4th Cir (NC)) coworkers were acting in scope of employment when they defended themselves during persona vendetta by plaintiff.

b. Frolic and Detour. Scope is presumed when in official vehicle: must be rebutted to be overcome. Cases holding
scope. Lawrence v. Dunbar, 919 F.2d 1525 (11th Cir. 1990) (DEA agent on way home from Christmas party in a GOV on 24 hour duty dispatch--within scope); Stephenson v. U.S., 771 F.2d 1105 (7th Cir. 1985) (Marine recruiter returning GOV after drinking bout is within scope); Gutierrez De Martinez v. DEA, 111 F.3d 1148 (4th Cir. 1997) (male DEA agent escorting female DEA agent back to hotel dinner is in scope, even though going in wrong direction and partially intoxicated); Parada v. U.S., CIV. # 95-CV-2204 (D.D.C., 4 Feb. 1997) (fact that DEA agent was drinking on duty did not remove him from scope of employment); Nieves-Rios v. U.S., Civ. # 93-1885 ccc (D.P.R., March 13, 1995) (two week reservist drives GOV home on last duty day, changes clothes, washes GOV in private car wash and is returning to post at time of accident--held scope); U.S. v. Baker, 265 F.2d 123 (D.C. Cir. 1959) (getting haircut held in scope); McConville v. U.S., 197 F.2d 680 (2d Cir. 1952) (on return route from bar--held scope); Malicote v. McDowell, 479 F. Supp. 63 (E.D. Tenn. 1979) (intentionally running over two goats--held scope); Atnip v. U.S., 245 F. Supp. 386 (E.D. Tenn. 1965) (rural mail carrier deviates to pick up eggs--held scope); Lowe v. U.S., 83 F. Supp. 128 (W.D. Mo. 1949) (returning to route after deviation--scope). Cases holding not scope. Snodgrass v. Jones, 957 F.2d 482 (7th Cir. 1992) (FBI agent driving home in GOV about 6-7 hours after dinner, followed by 4-5 hours in bar, and 30-90 minute side trip--not held in scope); Dallas v. U.S., 692 F.2d 756 (Table) (5th Cir. 1982) (full time recruiter going to sister's house for change of clothing--not scope); Del Rio v. U.S., Civ. # 88-0414-CIV (S.D. Fla. 1989) (stops at mother's house while en route from MEPS to Homestead AFB--not scope); Western National Mutual Insurance Co. v. U.S., 964 F. Supp. 295 (D. Minn. 1997) (Off-duty U.S. Marshal not in scope when picking up daughter); Snodgrass v. Jones, 755 F. Supp. 826 (C.D. Ill. 1991) (en route to domicile as authorized, but 5 hours expired since duty--held frolic, not detour); Guthrie v. U.S., 392 F.2d 858 (7th Cir. 1968) (recruiter deviates from route--held not scope); King v. U.S., 178 F.2d 320 (5th Cir. 1949) (drunken cadet in training plane without authority--held not scope); W.D. Pruden v. U.S., 399 F. Supp. 22 (E.D.N.C. 1973) (out drinking while on call--held not scope); Pacific Freight Lines v. U.S., 239 F.2d 191 (9th Cir. 1956) (complete deviation--not scope); Blythe v. Tarko, 188 F. Supp. 83 (N.D. W.Va. 1960) (returning from getting mail--not scope); Spradley v. U.S., 119 F. Supp. 292 (D. N.Mex. 1954) (assisting motorist by getting parts--not scope); Rosa v. U.S., 119 F. Supp. 623 (D. Haw. 1954) (returning from bar--not scope). Accord Greenwood v. U.S., 97 F. Supp. 996 (D. Ky. 1951). However, where the trip serves more than one purpose and one of the purposes is within the scope of

scope); Satterwhite v. Bocelato, 130 F. Supp. 825 (E.D.N.C.
(leave route same as TDY route--held scope); Wilkinson v.
Gray, 523 F. Supp. 372 (E.D. Va. 1981) (work to motel--held
scope); Robbins v. U.S., 722 F.2d 387 (8th Cir. 1984)
(returning from TDY directly from Scott AFB to Offut AFB--
held scope--distinguished Bissell v. McElligott, 369 F.2d 115
(8th Cir. 1966) where TDY return orders permitted leave);
proceedings, 754 F. Supp 1023 (D. Del. 1991) (within scope
while driving drunk from Army club to motel). Cases holding
not scope. U.S. v. Romitti, 363 F.2d 662 (9th Cir. 1966)
(choice of POV was employee's--held not scope); Owen v. U.S.,
258 F. Supp. 121 (E.D.N.C. 1966) (leave route same as TDY
1309 (M.D. Pa. 1980) (going to NCO Club for meal at midnight--
held not scope); Allen v. U.S., 1997 WL 587761 (E.D. La.)
(postal inspector drives home from airport in GOV after
returning from TDY--accident occurs later that night--no
scope); Lee v. U.S., Civ. # 83-5470 (C.D. Cal. 1984) (goes
partying on day off--returning to motel--held not scope);
Hartzell v. U.S., 786 F.2d 964 (9th Cir. 1986) (Air Force
Specialist not in scope while using POV when returning from
TDY in leave status); Kirchhoffner v. U.S., 765 F. Supp. 598
(D.N.D. 1991) (50 miles from motel at midnight with .20%
Blood alcohol--held not in scope).

d. PCS Travel (POV cases). Cases holding scope. Blesy v.
completed--held scope--New York law); Berrettoni v. U.S., 436
F.2d 1372 (9th Cir. 1970) (delay en route completed--held
scope--Montana law); Hallberg v. Hilburn, 434 F.2d 90 (5th
Cir. 1970) (delay en route completed--held scope--Texas law);
Platis v. U.S., 409 F.2d 1009 (10th Cir. 1969) (leave route
and PCS route identical--held scope--Utah law); Cooner v.
U.S., 276 F.2d 220 (4th Cir. 1960) (delay en route completed--
held scope--New York law); O'Brien v. U.S., 236 F. Supp. 792
(D. Me. 1964) (starting delay en route--held scope--New York
law); Courtright v. Pittman, 264 F. Supp. 114 (D. Colo. 1967)
(held scope); Hinson v. U.S., 257 F.2d 178 (5th Cir. 1958)
(held scope--California law); U.S. v. Farmer, 400 F.2d 107
(8th Cir. 1968) (completed six months AD--held scope--Iowa
law); U.S. v. Culp, 346 F.2d 35 (5th Cir. 1965) held scope--
Texas law); U.S. v. Mraz, 255 F.2d 115 (10th Cir. 1958) (held
scope--New Mexico law); U.S. v. Kennedy, 230 F.2d 674 (9th
Cir. 1956) (held scope--Washington law); Johnson v. Franklin,
U.S., 772 F. Supp. 1268 (S.D. Fla. 1991) (sailor driving U-
Haul on DITY move is within scope, even given one day delay
en route). Cases holding not scope. Garrett Freightlines
Inc. v. U.S., 529 F.2d 26 (9th Cir. 1976) (held not scope--
Idaho law); McSwain v. U.S., 422 F.2d 1086 (9th Cir. 1970)
(leave and PCS routes different--held not scope--Colorado
law); U.S. v. McRoberts, 409 F.2d 195 (9th Cir. 1969) delay
en route--held not scope--California law); Forcht v. Buckley,
Civ. #82-292 (going to annual training--held not scope--
Indiana law); James v. U.S., 467 F.2d 832 (4th Cir. 1972)
(returning from annual training--held not scope--North
Carolina law); Stone v. U.S., 408 F.2d 995 (5th Cir. 1969)
(POV not authorized, uses anyway--held not scope--Florida
law); Bissell v. McElligott, 369 F.2d 115 (8th Cir. 1966)
(delay en route beginning--held not scope--Missouri law);
Chapin v. U.S., 258 F.2d 465 (9th Cir. 1958) (held not scope--
California law); Badger State Mutual Casualty Co. v. U.S.,
383 F. Supp. 226 (E.D. Wis. 1974) (starting delay en route--
held not scope--Tennessee law); Dettmering v. U.S., 308 F.
Supp. 1185 (N.D. Ga. 1969) (starting delay en route--held not
scope); Jozwiak v. U.S., 123 F. Supp. 65 (S.D. Ohio 1954);
Cobb v. Kumm, 367 F.2d 132 (7th Cir. 1966) (no POV
authorized--held not scope--Illinois law); McCall v. U.S.,
338 F.2d 589 (9th Cir. 1964) (held not scope--Washington
law); U.S. v. Sharpe, 189 F.2d 239 (4th Cir. 1951) (beginning
leave--no travel allowance--held not scope--South Carolina
law); U.S. v. Eleazer, 177 F.2d 914 (4th Cir. 1949)
(beg inning delay en route--held not scope--North Carolina
(starting delay en route--held not scope); North Carolina
(delay en route--held not scope--North Carolina law); Provost
leave, but not on direct route--held not scope); Kimball v.
669 (N.D. Miss. 1969) (starting delay en route--held not
scope--North Carolina law); Gupton v. U.S., 799 F.2d 941 (4th
Cir. 1986) (Marine making second trip on self-help PCS move--
not within scope); Griffin v. U.S., Civ. #91-878WD (W.D.
Wash. 1992) (sailor in rented car on delay en route to home
during PCS move not in scope). Chadwick v. Blanton, Civ. #
his POV home from 2-week ADT is within scope.

e. Negligent Entrustment and Authorizing Official Beyond His
Authority. See, generally, Federal Crop Insurance Corp. v.
Merrill, 332 U.S. 380 (1947); Barron v. U.S. v. Maitland
538 F.2d 346 (Ct. Cl. 1976). Cases holding scope. Waddell
(Department of Navy civilian moving his gear from one ship to
another in his pickup truck is within scope when he backs
f. Using POV Without Express Authority. Cases holding scope. U.S. v. Hopper, 214 F.2d 129 (6th Cir. 1954) (used POV for TDY when U.S. vehicle available--held scope); Taber v. Maine, 49 F.3d 598 (2d Cir. 1995) (sailor driving POV returning to duty on base after drinking spree is involved in off-base accident--court sets aside Guam law and uses Calif. law to hold in scope). Cases holding not in scope. Walsh v. U.S., 31 F.3d 696 (10th Cir. 1994) (National Guardsman driving POV en route to weekend drill is not in scope); Green v. Hall, 8 F.3d 695 (9th Cir. 1993) (Army reservist went off post in POV for coffee or breakfast--not within scope--MRE rations available); Harris v. U.S., 718 F.2d 654 (4th Cir. 1983) (EM directed to use POV by military officer to take injured to hospital in civilian accident--not scope); Frazier v. U.S., 412 F.2d 22 (6th Cir. 1969) (driving POV to look for home at new duty station--not scope); Paly v. U.S., 221 F.2d 958 (4th Cir. 1955) (used POV on TDY for funeral detail--held not scope); Bisel v. U.S., Civ. # 2:94-CV-44 (W.D. Mich., 12 Feb. 1996), aff'd, 121 F.3d 702 (table), 1997 WL 415316 (6th Cir. 1997) (sailor who leaves service sponsored beer party at Long Beach Naval Station is not in scope when he leaves party and goes off base to purchase beer to consume in quarters and gets in accident returning to on-base quarters--court states
g. To and From Work. Cases holding scope. Combs v. U.S., 884 F.2d 578 (6th Cir. 1989) (reservist within scope while driving POW home from weekend training where travel reimbursed); Borrego v. U.S., 790 F.2d 5 (1st Cir. 1986) (Federal employee permitted to keep GOV home as he frequently went on field inspections--held scope); Pitt v. Matala, 890 F. Supp. 89 (N.D.N.Y. 1995) (soldier who drove POW to PT, returned home to change and then was involved in accident while going to work is within scope); Simpson v. U.S., 484 F. Supp. 387 (W.D. Pa. 1980) (field recruiter going home--held scope); Daugherty v. U.S., 427 F. Supp. 222 (W.D. Pa. 1977) (recruiter on field duty does not violate home-to-work statute--(5 U.S.C. § 78) (AR 58-1)). See also Konradi v. U.S., 919 F.2d 1207 (7th Cir. 1990) (although commuting to work is usually not scope, USPS regulation requiring rural mail carriers (RMC) to use own vehicle and alleged local USPS policy requiring RMC to take most direct route to work and to use seatbelt precluded summary judgment). Cases holding not scope. Davies v. U.S., 542 F.2d 1361 (9th Cir. 1976) (officer taking work home--held not scope); Proietti v. Levi, 530 F.2d 836 (9th Cir. 1976) (going home in POW held not scope); Guadagno v. U.S., Civ. # 4:96-CV-60 (W.D. Mich., 26 Sept. 1997) (postal worker not in scope when returning from work even though she received FECA benefits and partial mileage); Coto Orbeta v. U.S., 770 F. Supp 54 (D.P.R. 1991) (soldier takes official vehicle home when wife fails to pick him up when she gets in accident--not scope, but U.S. could be liable for failure to maintain brakes); Smith v. U.S., 762 F. Supp. 1511 (D.D.C. 1991) (authorized use of government vehicle to and from work--not in scope after 5 hour stopover in club for drinks); Bach v. U.S., 92 F. Supp. 715 (S.D.N.Y. 1950) (same); Perez v. U.S., 368 F.2d 320 (1st Cir. 1966).


i. Medical Residents in Civilian Training. Ward v. Children's Orthopedic Hospital, 999 F.2d 1399 (9th Cir. 1993) (Army resident training in civilian hospital is Federal employee, but not within scope despite Washington's borrowed servant rule); Palmer v. Flaggman, 93 F.3d 196 (5th Cir. 1996) (USAF physician completing residency in private hospital is an employee of both the US and private hospital under Texas law).

4. Private Person Analogy. Under the FTCA, the U.S. is liable as a private person would be liable. See, e.g., Rayonier v. U.S., 352 U.S. 315 (1957); Indian Towing Co. v. U.S., 350 U.S. 61 (1955); Bruns v. National Credit Union Administration, 122 F.3d 1251 (9th Cir. 1997) (Failure to follow Federal Credit Union Act procedures for dismissal of employees does not constitute a state tort); Sea Air Shuttle Corp. v. U.S., 112 F.3d 532 (1st Cir. 1997) (actions of Secretary of Transportation and FAA were not conduct for which private person would be liable); Anderson v. U.S., 55 F.3d 1379 (9th Cir. 1995) (violation of California Fire Code constitutes state tort under FTCA where fire escaped from U.S. controlled burn in National Forest); McMann v. Northern Pueblos Enterprises Inc., 594 F.2d 784 (10th Cir. 1979); Estate of Warner v. U.S., 743 F. Supp. 551 (N.D. Ill. 1990) (standard to be applied to "hot pursuit" chase by Federal officer same as applies to local police); Zeller v. U.S., 467 F. Supp. 487 (E.D.N.Y. 1979). FTCA creates no new torts, but allows only those actionable against private person under State law. Essig v. U.S., 675 F. Supp. 84 (E.D.N.Y. 1987). See also Love v. U.S., 60 F.3d 642 (9th Cir. 1995) (no state tort where FmHA failed to


(a) Interpretation of Duty. Common law duty subject to misinterpretation in many cases particularly where it varies from one state to another, e.g., duty to protect public from assaults. Compare Gibson v. U.S., 457 F.2d 1391 (3d Cir. 1977); (one Job Corps Center student assaults another--United States under no duty,
even though there was a knowledge of prior misconduct) with Bryson v. U.S., 463 F. Supp. 908 (E.D. Pa. 1978) (one service member with prior history of misconduct assaults another service member). Another example, is where there is duty to students to protect from injuries, e.g., dependent schools, or youth activities. Compare Bryant v. U.S., 565 F.2d 650 (10th Cir. 1977) (three runaways from Indian School lost parts of legs from frostbite-duty found) (Query: Was U.S. in loco parentis under State law?) and Doe v. Scott, 652 F. Supp. 549 (S.D.N.Y. 1987) (special duty to protect children in West Point day care center) with Sanchez v. U.S., 506 F.2d 702 (10th Cir. 1974) (drunken student causes auto death--no duty).

(b) Good Samaritan Doctrine. Duty can arise under Good Samaritan Doctrine. Sheehan v. U.S., 822 F. Supp. 13 (D.D.C. 1993) (doctrine applies to fall of handcuffed arrestee entering police station supervised by officer); Irving v. U.S., 942 F. Supp. 1483 (D.N.H. 1996) (failure to properly inspect by OSHA and note blatant safety violation falls under New Hampshire Good Samaritan doctrine). But see Piechowicz v. U.S., 885 F.2d 1207 (4th Cir. 1989) (no duty under Witness Protection Act where no request for protection made); Guccione v. U.S., 847 F.2d 1031 (2d Cir. 1988) (fact that injured party was under FBI surveillance does not create duty to protect him); Atlantic American Life Insurance Co. v. U.S., Civ. # 1:95-cv-2947-WBH (N.D. Ga., 2 Dec. 1996) (plaintiff’s action under Doctrine since its sales rights at Fort Benning were temporarily suspended--Georgia requires physical harm and provision of service by defendant--neither was present). Appley Brothers v. U.S., 163 F.3d 1164 (8th Cir. 1999), USDA assumed duty to inspect grain warehouse and insure adequate quantity of acceptable grain was available to insure contracts were met.

(ii) Rescue. Rescue cases are more frequent, e.g., MAST program. Huber v. U.S., 838 F.2d 398 (9th Cir. 1988) (once Coast Guard participates in rescue must complete proper action); Frank v. U.S., 250 F.2d 178 (3d Cir. 1957), cert. denied, 356 U.S. 962 (1958) (Coast Guard helicopter rescue--liability imposed). See also Korpi v. U.S., 961 F. Supp. 1335 (N.D. Cal. 1997) (Coast Guard's rescue efforts to save boat were not negligent). If a duty is assumed by mounting a rescue, the discretionary function exclusion might still apply. Kiehn v. U.S., 984 F.2d 1100 (10th Cir. 1993) (manner of conducting rescue is discretionary concerning use of backboard for fallen climber in national park). However, the Coast Guard's decision not to mount a search or rescue may well not be actionable. Bunting v. U.S., 884 F.2d 1143 (9th Cir. 1989) (Coast Guard's failure to go to pilot's aid not actionable under State's Good Samaritan statute--also applied to Coast Guard physician emergency care); Daley v. U.S., 499 F. Supp. 1005 (D. Mass. 1980) (no duty for Coast Guard to search); Kurowsky v. U.S., 660 F. Supp. 442 (S.D.N.Y. 1986) (Coast Guard's decision not to engage in risky rescue is not actionable).


(ii) State Statutes. Duty to independent contractor employees can be imposed by State statute. For example:


(B) Illinois Structural Work Act. The court in Lulich v. Sherwin Williams Co., 792 F. Supp. 1106 (N.D. Ill. 1992) defined the elements required for owner to be "in charge" and liable under Ill. Structural Work Act. See also Damnjanovic v. U.S., 9 F.3d 1270 (7th Cir. 1993) (where roofer fell due to lack of safety belt, safety provisions and right to stop may place U.S. in control under this statute). The U.S. must be "in charge" for liability under this statute. J.S. Alberici Const. Co. v. U.S., 64 F.3d 430 (8th Cir. 1995) (Illinois Structural Work Act not applicable to claim for injuries of independent contractor employees caused by lifting heavy object, since
U.S. not in control of worksite); Connors v. U.S., 917 F.2d 307 (7th Cir. 1990) (U.S. employee not in charge as required by Ill. Structural Work Act leads to no U.S. liability re foreman's fall from ladder); Savic v. U.S., 918 F.2d 696 (7th Cir. 1990) (same holding as Connors re another fall at construction site); Fulton v. U.S., 772 F. Supp. 1074 (N.D. Ill. 1991) (COE not "in charge" as required by Ill. Structural Work Act).


(E) Florida non-delegable duty doctrine. Dickerson Inc. v. U.S., 875 F.2d 1577 (11th Cir. 1989) (Florida non-delegable duty statute applied to PCB disposal)

However, if the state statute in question is a strict liability statute, no duty arises, since it is preempted by the FTCA. Roditis v. U.S., 122 F.3d 108 (2nd Cir. 1997) (U.S. is not liable under N.Y. strict liability law imposing non-delegable duty); Maltais v. U.S., 546 F. Supp. 96 (N.D.N.Y. 1982), aff'd mem., 729 F.2d 1442 (2d Cir. 1983) (New York Labor Law Section 200 is strict liability statute not applicable to FTCA); Vasquez v. U.S., 1994 WL 268242 (S.D.N.Y.) (N.Y. Labor Law not applicable to fall by employee of subcontractor from shaky ladder during remodeling—no vicarious liability); Moshetto v. United States, 961 F. Supp. 92 (S.D.N.Y. 1997) (U.S. is

1995) (claim for fall from warehouse roof by employee of independent contractor discussed under § 2680(a)--applicability of Restatement not discussed--on appeal, 9th Circuit reinstated claim that government safety inspectors knew of safety violations and failed to correct them based on Yanez v. U.S., 63 F.3d 870 (9th Cir. 1995)); Bloom v. Waste Management Inc., 615 F. Supp. 1002 (E.D. Pa. 1985) (bulldozer operator at COE worksite electrocuted by overhanging wire, no duty to warn, since U.S. has no superior knowledge). One typical imposition of duty upon the U.S. towards the employees of an independent contractor is for inherently dangerous activities. Murdock v. Employers Ins. of Wausau, 917 F.2d 1065 (8th Cir. 1990) (non-delegable duty under Nebraska law re collapse of excavation trench near BLM canal); McCall v. Dept. of Energy, 914 F.2d 191 (9th Cir. 1990) (non-delegable duty under Montana law re electrical workers fall when his safety belt failed); McMillian v. U.S., 112 F.3d 1040 (9th Cir. 1997) (cutting snags in national forest is inherently dangerous--Montana’s non-delagability doctrine applies to tree cutting contract where there are snags--U.S. is 45% liable when stood near a snag being cut). But see Phinney v. U.S., 15 F.3d 208 (1st. Cir. 1994) (contract for resurfacing road on Army installation does not involve inherently dangerous activity giving rise to non-delegable duty doctrine under N.H. law); Moffitt v. U.S., 995 F.2d 232 (table), 1993 WL 195386 (9th Cir. 1993) (electrocution of employee of independent contractor in a cherry picker repairing telephone lines at Schofield Barracks not subject to non-delegable duty doctrine, since work not inherently dangerous); Richardson v. U.S., 775 F. Supp. 1372 (W.D. Ark. 1991) (tree being felled by contract employee falls and kills him--U.S. not liable distinguishes McMichael v. U.S., 856 F.2d 1026 (8th Cir. 1988 Ark.) and Aslakson v. U.S., 790 F.2d 688 (8th Cir. 1986)); Allen v. U.S., Civ. #81–101 (W.D. Ark. 1986) (removing pipe at coffer dam site is not inherently dangerous--distinguishes McMichael v. U.S., 751 F.2d 303 (8th Cir. 1985)); Moreschi v. U.S., Civ. No. 93-1370 (W.D. Pa., Nov. 28, 1995), aff’d without opinion, 96 F.3d 1433 (table)(3d Cir. 1996) (construction worker at lock site is impaled upon rebar--U.S. not liable under peculiar risk doctrine). However, if Restatement would impose absolute liability, it is not actionable under FTCA.
Emelwon Inc. v. U.S., 391 F.2d 9 (5th Cir. 1968).
Harmon v. U.S., 1998 WL 30708 (N.D. Ill.) operator
of refueling track injured by jet blast is owed duty
under both Restatement Sections 343 and 414.

(iv) Safety Inspections. Safety inspection can be
imposed by self-imposed safety inspection.
Dickerson v. Holloway, 685 F. Supp. 1555 (M.D. Fla.
1987), aff’d, 875 F.2d 1577 (11th Cir. 1989)
(cradle-to-grave under CERCLA and State regulations
regarding PCB waste disposal); Bowman v. U.S., 65
F.3d 856 (10th Cir. 1995), aff’g, 821 F. Supp. (D.
Wyoming 1993) (construction contract employee who
injured hand on table saw with no safety guard which
did not meet contract standards). But see Cazales
1997) (subcontractor employee electrocuted sues VA
over safety supervision—held primary safety
responsibility in prime contractor precluded suit);
Roscoe v. U.S., Civ. # TH 92-49 C (N.D. Ind., 12
Oct. 1993) ( incidental safety briefings and presence
on job of U.S. representative does not create a duty
under Indiana law). Bean Harison Corp. v. Tennessee
Gas Pipeline Co., 1998 WL 113935 (E.D. La.) (COE
liable for injuries caused by pipeline explosions
from contract dredge as COE imposed mandatory safety
controls on contractor). Wallace v. U.S., 991 F.
Supp. 1285 (D.N.M. 1996) Contractor employee killed
in gas-line explosion--claim based on U.S. failure
to inspect, barred by 2680(a). Harmon v. U.S., 8 F.
Supp. 2d 757 (N.D. Ill., 1998), where contract fuel
driver is waived into area by T-line personnel to
refuel plane whose engines are still running, U.S.
is liable under Restatement Section 343.

(d) Dram Shop. Dram Shop action was unknown at common
law. See, e.g., Corrigan v. U.S., 815 F.2d 954 (4th
Cir. 1987) (no statutory or common law dram shop law in
Virginia as basis for liability of Army enlisted club);
Murray v. U.S., 382 F.2d 284 (9th Cir. 1967) (no
California statute at time); Simmons v. U.S., 626 F.2d
985 (3d Cir. 1982) (no North Carolina statute or common
1996) (Navy enlisted man gets drunk at Navy mess and
drives into accident scene off base--no liability under
Virginia law, since no Virginia dram shop). Dram Shop
duty arises from statute. Swift v. U.S., 866 F.2d 507
(1st Cir. 1989) (Massachusetts prohibition against
serving alcohol to person who has been drunk within
last six months applies to NCO Club); Gonzales v. U.S.,

(e) Protection from Intoxicated Persons. Government responsibility to protect other people from intoxicated
persons. Other laws, besides Dram Shop laws, may well impose upon the government a duty to protect the public from intoxicated persons. Doggett v. U.S., 875 F.2d 684 (9th Cir. 1989) (base regulation requiring guards to prevent intoxicated drivers from leaving base creates duty to off-base motorist). But see Beatty v. U.S., 983 F.2d 908 (8th Cir. 1993) (permitting intoxicated airman to drive past gate guards and strike bicyclist on public highway creates no liability); Crider v. U.S., 885 F.2d 294 (5th Cir. 1989) (park rangers under no duty under Texas law to restrain intoxicated driver from driving); Louie v. U.S., 776 F.2d 819 (9th Cir. 1985) (DWI soldier turned over to MPs by civilian police, drives again and kills victim--no duty under Washington law).

(D. Ariz. 1998), no duty to prevent servicemember from driving where he was noticeably drunk in on-base social setting.


(h) Duty of Landlord to Tenant. A landlord may have duty to provide adequate security or prevent violent acts. Washington v. Resolution Trust Co., 68 F.3d 934 (5th Cir. 1995) (Under Texas law, where landlord maintains control of premises, duty exists to protect tenants from foreseeable violent criminal acts); Choy v. 1st Columbia Management Inc., 676 F. Supp. 28 (D. Mass. 1987) (where tenant assaulted must show entry was through door with faulty lock--duty to provide adequate security). However, a landlord may not have other types of duties to warn depending on the circumstances. See Brooks v. U.S., 712 F. Supp. 667 (N.D. Ill. 1989) (U.S. as landlord did not warn of lead paint hazard, since it had no knowledge of its existence); Parker Land and Cattle Co. Ins. v. U.S., 796 F. Supp. 477 (D. Wyo. 1992) (no duty to warn holder of grazing permit on federal land of danger of brucellosis in wild elk); Duff v. U.S., 829 F. Supp. 299 (D.N.D. 1992) (U.S. not responsible for injuries due to contractor generated varnish fumes to occupant of military housing). Nuridden v. U.S., Civ. #2 96-1203-12 (D.D.C., 16 Apr. 1998) Navy as landlord assumed duty to ensure water heater thermostat set at 120° through inspection, U.S. is liable for burns to 17-month-old child where temperature is at 170°.

(j) Public Duty Doctrine. Duty to public as a whole, but not to a specific individual. If the duty is a public duty, no cause of action exists. Pezzimenti v. U.S., 114 F.3d 1195 (table), 1997 WL 289400 (9th Cir 1997) (U.S. civilian security has no duty to intervene under public duty doctrine in altercation outside gate at Pearl Harbor Naval Station); Grange Insurance Association v. U.S., Civ. #C86-77E (W.D. Wash. 1989) (Department of Agriculture not liable for failing to warn of brucellosis); Sheridan v. U.S., 773 F. Supp. 786 (D. Md. 1991) (U.S. owed no duty to protect public from harm at the hands of drunk sailor shooting his private firearm); Kazanoff v. U.S., 753 F. Supp. 1056 (E.D.N.Y. 1990) (mail carrier who has key to locked apartment building inadvertently allows murderer to enter--no special relationship or duty); Kugel v. U.S., 947 F.2d 1504 (D.C. Cir. 1991) (leak in violation of FBI internal procedures does not constitute a cause of action based on public duty); Taylor v. Phelen, 799 F. Supp. 1094 (D. Kan. 1992) (failure to timely investigate and arrest criminal who had been previously reported falls under public duty doctrine--cites cases in support); King v. Bureau of Indian Affairs, 108 F.3d 338 (table), 1997 WL 75543 (9th Cir. 1997) (BIA policeman under no duty to arrest Crazy Bull based on his prior record--duty to general public, not to King); Cameron v. Janssen Bros. Nurseries Ltd., 7 F.3d 821 (9th Cir. 1993) (USDA independent contractor fails to check root stock after fumigation in violation of USDA rule--no claim based on public duty doctrine, since no statutory intent or reliance on monitoring); Stratmeyer v. U.S., 67 F.3d 1340 (7th Cir. 1995) (USDA
veterinarian owed duty to public, not individual, where misdiagnosis of brucellosis alleged); Wyler v. Korean Air Line Co. Ltd., 928 F.2d 1167 (D.C. Cir. 1991) (USAF tracking system does not create duty to warn); Shelton v. U.S., Civ. # 97-cv-84 (M.D. La., 17 Dec. 1997) (FBI investigated U.S. Marshal for child molestation, but charges not brought despite airtight case—Marshal resigned but continued molestation—U.S. has no duty to children molested). See also Schweiker v. Hansen, 450 U.S. 785 (1981); Jacobo v. U.S., 853 F.2d 640 (9th Cir. 1988). But see Florida Auto Auction of Orlando, Inc. v. U.S., 74 F.3d 498 (4th Cir. 1996) (statute requiring Customs Service to input vehicle titles prior to export does impose duty to auction house to preclude exportation based on bill of sale). However, if there is a special relationship between the defendant and the plaintiff, the public duty doctrine does not apply, but the discretionary function exclusion may. Merced v. City of New York, 856 F. Supp. 826 (S.D.N.Y. 1994) (failure of N.Y. police acting as DEA agent to furnish protection to assault victim is discretionary, even though special relationship existed). Sellers v. U.S., Civ. # CV 496-68 (S.D. Ga., 21 May 98) (Georgia statute immunizes Army doctor for negligently diagnosing chlamydia in child abuse case).

(k) Duty to Inform of Results of Employment Physical. The U.S. may have a duty to disclose results of pre-employment physical. Daly v. U.S., 946 F.2d 1467 (9th Cir. 1991) (chest X-ray on pre-employment physical showed premonitory signs of sarcadosis—duty to inform found—citing other cases, including Betesh v. U.S., 400 F. Supp. 238 (D. Md. 1974)).


(p) Duty in Medical Malpractice Cases. The medical defendant must have a duty to the plaintiff for the U.S. to be liable. See, e.g., Howes v. U.S., 887 F.2d 729 (6th Cir. 1989) (no physician patient relationship--no breach of confidentiality where psychiatrist blows

(2) Negligence. Negligent act or omission is required, which can arise from negligence per se or res ipsa among other legal causes. Cases finding no negligent act or omission by the defendant. Stuart v. U.S., 23 F.3d 1483 (9th Cir. 1994) (high-speed chase by Border Patrol resulting in death and injuries was not negligent--California statutes immunizing peace officers does not apply); Mendiola v. U.S., 994 F.2d 409 (7th Cir. 1993) (Army recruiter rear ends car which has just been struck by another car from opposing lane--ruled unavoidable accident); Dotson v. U.S., 1995 WL 871178 (E.D. Mich.) (failure to prevent slip on ice at Naval armory by failure to clear previous night's ice storm by 7:45 a.m. is not actionable under Michigan law); Walsh v. U.S., Civ. # CV-N-93-349-PHA (D. Nev., Aug. 14, 1995) (fall in post office reported one week later--photo shows insignificant tear in entrance mat not sufficient to be unreasonably dangerous); Denney v. U.S. Postal Service, 916 F. Supp. 1084 (D. Kan. 1996) (irregularity 1 to 2-inches deep, 8 to 10 inches long, and 3 to 4 inches at its widest point running along seam in sidewalk is a minor defect and not actionable); Vaughn v. U.S., 982 F. Supp. 489 (N.D. Ohio 1997) (U.S. not liable for fall on sidewalk where there is less than a 2 inch deviation); Heller v. U.S., 99 F.3d 1143 (table), 1996 WL 607138 (8th Cir. 1996) (while U.S. was aware of patch of ice at entrance to post office, it was too small to present an unreasonable risk of harm); Wood v. U.S., 106 F.3d 395 (table), 1997 WL 42711 (4th Cir. 1997) (slip and fall on wet pavement in entrance to U.S. Post Office while leaving during heavy rain--U.S. not liable); Nieves v. U.S., 980 F. Supp. 1295 (N.D. Ill. 1997) (U.S. not liable for fall at entrance to post office, it was too small to present an unreasonable risk of harm); Wood v. U.S., 106 F.3d 395 (table), 1997 WL 42711 (4th Cir. 1997) (slip and fall on wet pavement in entrance to U.S. Post Office while leaving during heavy rain--U.S. not liable); Nieves v. U.S., 980 F. Supp. 1295 (N.D. Ill. 1997) (U.S. not liable for fall at entrance to post office in water which accumulated from rainfall); Faircloth v. U.S., 837 F. Supp. 123 (E.D.N.C. 1993) (slip and fall on a wet floor on a rainy day in Post Office lobby not compensable, since there was adequate lighting); Walker v. U.S., Civ. # 89-3234-RDR (D. Kan., Sept. 19, 1994), aff'd, 48 F.3d
1233 (table), 1995 WL 87122 (10th Cir. 1995) (no negligence shown in $91 claim for lost or damaged property seized in a search of Federal prisoner’s cell); Jones v. U.S., Civ. # 4:94-CV-140 (JRE) (M.D. Ga., 15 Apr. 1997) (U.S. prevails by using photogramtry expert in fatal crash into pole at Ft. Benning); Freeman v. U.S., 704 F.2d 154 (5th Cir. 1983) (failure to use mats on terrazzo floor on wet day not negligence); Spagnolia v. U.S., 598 F. Supp. 683 (W.D.N.Y. 1984) (same as Freeman); Palmer v. U.S., Civ. # 93-54 (E.D. Ky., 16 Aug. 1996) (release by DVA of violent mental patient to group home when DVA knew he would not remain due to long history--U.S. liable for murder of three family members of ex-wife). Whether an action or inaction is reasonable is judged by the standards prevailing at the time the act took place. Western Greenhouses v. U.S., 878 F. Supp. 916 (N.D. Tex. 1995) (dumping TCE at USAF base in early 70s was not negligent under standards at time).


F. Supp. 831 (N.D. Cal. 1948) (hitting bystander when shooting at trespasser); U.S. v. Praylou, 208 F.2d 291 (4th Cir. 1953), cert. denied, 347 U.S. 934 (1954) (operation of aircraft); Davenport v. U.S., 241 F. Supp. 792 (D.S.C. 1965) (running stop sign at direction of MP); Peck v. U.S., 470 F. Supp. 1003 (S.D.N.Y. 1979) (failure by FBI to prevent beating in Selma March) (proximate cause ignored); Beesley v. U.S., 364 F.2d 194 (10th Cir. 1966); Michael v. U.S., 338 F.2d 219 (6th Cir. 1964); U.S. v. Wells, 337 F.2d 615 (5th Cir. 1964). But see Coumou v. U.S., 107 F.3d 290 (5th Cir. 1997) (where Coast Guard turned vessel over to Haitian police when contraband was discovered, it was not negligence per se for failure to comply with federal extradition law or criminal statute, but claim could be based on failure to notify Haitian police that plaintiff was captain who cooperated in search); Moody v. U.S., 774 F.2d 150 (6th Cir. 1985) (FHA improperly inspected new house not negligence per se because of Federal statute requiring inspection); Evans v. U.S., 824 F. Supp. 93 (S.D. Miss. 1993) (postal patron falls through glass window at entrance to Post Office--safety glass requirement not applicable). However, the invocation of negligence per se is measured against state law, not local law. Seaberg v. U.S., 448 F.2d 391 (9th Cir. 1971) (city ordnance required full stop for ambulances, state code only required slowing down—not negligence per se).


(complaint of neck pain not sufficient basis for liability for stroke related death where physician made thorough neurological exam, even though not recorded); East v. U.S., Civ. # B-87-3092 (D. Md. 1990) (failure to perform thyroid function test not violative of standards of care); Doe v. Cutter Biological, Civ. # 87-0232 (D. Haw. 1989) (AIDS acquired from transfusion prior to 1984 at TAMC--no liability based on Kozup v. Georgetown University, 663 F. Supp. 1048 (D.D.C. 1987), aff’d in relevant part, 851 F.2d 437 (D.C. Cir. 1988)); Lamping v. U.S., Civ. #85-CV-10423-BC (E.D. Mich. 1987) (failure to diagnose Teflon dressing as source of bleeding--held for U.S); Clay v. U.S., Civ. # H-77-483 (S.D. Tex., 20 Mar. 1979) (Army doctor not negligent in prescribing Prednisone therapy for patient suspected of having chronic active hepatitis where evidence supported that diagnosis, even though diagnosis was somewhat uncertain). An interesting decision held that if the claimant could show on remand that there was a negligent referral, the United States could be held liable for the negligence of a civilian hospital and physician. The referral (so called) was under CHAMPUS and did not constitute a referral at all. Rise v. U.S., 630 F.2d 1068 (5th Cir. 1980). Note however, Army hospital commanders can transfer patients to civilian hospitals for care paid for out of their operating budget. Gardner v. U.S. Ireland Army Hospital, Civ. # 3:97 CV-571H (W.D. Ky., 19 April 1999), in failure to diagnose cancer, expert opinion that earlier symptoms could have been related to tumor and may have resulted in a different outcome does not constitute negligence.

(f) Comparative Negligence. Currently, a plaintiff’s negligence will not totally bar recovery, especially if it is less than or equal to 50% of the injury’s cause, but will reduce it. See, e.g., Soto v. U.S., 11 F.3d 15 (1st Cir. 1993) (U.S. is 10 percent negligent, since U.S. driver failed to brake when plaintiff was running stop sign--recovery was $250,000 for injured plaintiff); Allstate Insurance Co. v. U.S., 973 F. Supp. 759 (M.D. Tenn. 1997) (speeding plaintiff is more than 50% negligent when he strikes left turning USPS vehicle--no recovery); Estate of Daniel Gonzales v. U.S., 1997 WL 214865 (E.D. Pa.) (14 year old decedent on motorbike comes out of one-way street and turns in front of USPS trailer on 4 lane, 2 way street--U.S. held 60% liable--judgment of $510,000); Cooper v. U.S., 897 F. Supp. 306 (E.D. Tex. 1995) (plaintiff northbound turned left; postal driver southbound turned right--
U.S. 66 2/3% liable as postal driver had yield sign); In re Greenwood Air Crash, 924 F. Supp. 1518 (S.D. Ind. 1995) (mid-air collision of two aircraft--liability proportioned as follows: 70% to plane which violated right-of-way, 25% to U.S. aircraft controller for failure to warn of plane’s location); Torres v. U.S., 953 F. Supp. 1019 (N.D. Ill. 1997) (award of $40,000 to postal patron who tripped on nail protruding less than 3/16 inch out of staircase--reduced to $30,000 due to plaintiff’s negligence); Gibbs v. U.S., 886 F. Supp. 239 (N.D.N.Y. 1995) (postal truck entering alley without stopping is struck in the right rear by bicyclist on sidewalk--view of both is blocked by parked truck--U.S. is 80% liable); Soto v. U.S., 11 F.3d 15 (1st Cir. 1993) (U.S. is 10 percent negligent as U.S. driver failed to brake as plaintiff was running stop sign--recovery was $250,000 for injured plaintiff); Jackson v. U.S., 933 F. Supp. 273 (D. Mass. 1997) (experienced pilot who flies into icing condition known to him exceeds that of air traffic controller who did not relly other icing reports--U.S. not liable under West Virginia law); Baldwin v. U.S., 929 F. Supp. 1270 (E.D. Mo. 1996) (plaintiff stopped suddenly in merge lane and was rear ended by COE vehicle--U.S. 90% liable); Yeary v. U.S., 754 F. Supp. 546 (E.D. Mich. 1991) (pedestrian crossing wide street intersection where there were no crossing lines held 40% negligent when she walked into postal vehicle she did not observe); Richardson v. U.S., 835 F. Supp. 1236 (E.D. Wash. 1993) (drunken driver who had right-of-way collides with second vehicle of 19 to 25 vehicle convoy--awarded 50% of his damages); Locco v. U.S., 1993 WL 97256 (S.D.N.Y.) (fall due to catching heel in expansion joint in West Point Chapel steps--50% recovery); DeVeau v. U.S., 833 F. Supp. 139 (N.D.N.Y. 1993) (constant patron slips on vinyl between two rugs at entrance of post office on rainy day--U.S. 85 percent liable); Loy v. U.S., Civ. # S-93-1178-DFL (E.D. Cal., 2 Sept. 1994) (driver of forklift and purchaser assisting in unloading are equally liable for injury caused by teetering box); Phillips v. U.S., 1996 WL 407237 (N.D. Miss.) (truck driver slips debris while leaving lunchroom--plaintiff’s negligence reduces award); Mittiga v. U.S., 945 F. Supp. 476 (N.D.N.Y. 1996) (U.S. vehicle collides with pedestrian that is crossing the street in a commercial area in middle of the block--neither driver nor pedestrian are paying attention--U.S. 60% liable and pedestrian 40%).

Jackson v. U.S., 156 F.3d 230 (9th Cir. 1998), pilot's negligence flying single engine light plane in area
subject to icing conditions exceeds that of FAA comptroller who failed to warn pilot of specific icing conditions. Duffy v. U.S., 1999 U.S. Dist. LEXIS 7590 (S.D. NY 19 May 99) Postal patron trips over 1.7 inch rise in sidewalk around rounding sharp corner breaks - judgement $125,000 minus 33 percent. Masek v. U.S., 1999 U.S. Dist. LEXIS 10690 (N.D. Ill, 1 July 1999), in intersection collision plaintiff's damages reduced by 20 percent due to his negligence, U.S. recovers nothing as its negligence exceeds 50 percent. Halek v. U.S., __ F.3d __, 1999 WL 312332 (7th Cir., Ill), upholds attribution of 20 percent negligence to plaintiff, an electrician who reaches into a cage designed to preclude catching fingers between pulley and cable while elevator he was repairing was moving. U.S. moved for dismissal on grounds that plaintiff's negligence exceeded that of U.S.

plaintiff assumes risk of fall when he fails to inspect sole of rented bowling shoes which were issued with sticky material on bottom.

(3) Proximate Cause Necessary.

(a) Proximate Cause Required. Fact of negligence does not mean there is proximate cause. Cases finding no proximate cause: Magee v. U.S., 121 F.3d 1 (1st Cir. 1997) (plaintiff failed to show how VA's allegedly negligent treatment of mental patient caused mental patient to rear-end plaintiff's automobile); Anderson v. U.S., 82 F.3d 417 (table), 1996 WL 185762 (6th Cir. 1996) (slip on water in post office customer service area near entrance—judgment for U.S.); Essex v. U.S., 123 F.3d 1060 (table), 1997 WL 560014 (4th Cir. 1997) (fall in post office as patron stepped off mat on drizzly day—no causation); Fairchild v. U.S., 1996 WL 197692 (N.D. Ill.) (failure by park rangers to identify heat stroke earlier was not negligent--treatment for heat exhaustion was proper); Cosenza v. U.S., Civ. # CV-930450 (VVP) (E.D.N.Y., July 30, 1997) (no recovery for aggravation of preexisting back and knee injuries allegedly due to rearender by car driven by FBI agent); Remo v. U.S. F.A.A., 852 F. Supp. 356 (E. Pa. 1994) (no proximate cause where FAA comptroller failed to control movements of two small aircraft); Budden v. U.S., 15 F.3d 1444 (8th Cir. 1994) (improper weather briefing before take off is remote, not proximate cause, where pilot continues course after encountering difficult weather); Corriveau v. U.S., 832 F. Supp. 19 (D. Mass. 1993) (death following second accident is not related to accident with postal vehicle about 2 months previously); Martin v. U.S., 934 F. Supp. 159 (E.D. Pa. 1996) (residents of village abutting Navy facility fail to prove TCE contamination emanated from Navy facility); McGrath v. U.S., Civ. # 96-78-M (D.N.H., 6 Mar. 1997) (Failure of FAA to require that all jumpers be listed on permit did not cause midair collision between plane and parachutist); Lawson v. U.S., 1996 WL 875077 (N.D. Ohio) (method of operation of flashing light and foghorn on breakwater did not cause collision with breakwater); Ayala v. U.S., 49 F.3d 607 (10th Cir. 1995), aff’g, 846 F. Supp 1431 (D. Colo. 1993) (incorrect technical advice by U.S. does not create liability for mine explosion, since proximate cause was intervening negligence of suppliers and miners); Phillips v. U.S., Civ. # 3:95cv773 (E.D. Va., May 14, 1996) (drunk driver speeding with no headlights hits 2.5-ton GOV with loaded trailer as GOV crosses highway
in front of him--U.S. not liable); Garza v. U.S., 809
F.2d 1170 (5th Cir. 1987) (airman stole dud which
injured 13-year-old who found it--not foreseeable or
actionable--distinguishes Williams v. U.S., 352 F.2d
477 (5th Cir. 1965) (where soldier was issued ordnance
which he neglected to return); Estate of Largent v.
U.S., 910 F.2d 497 (8th Cir. 1990) (pilot taking off in
fully loaded plane without de-icing equipment on snowy
morning caused crash); Castro v. U.S., Civ. # 92-1525
(DRD)(D.P.R., Nov. 29, 1995) (plaintiff crosses two
lanes of traffic to enter flow of congested traffic in
front of oncoming emergency vehicle--plaintiff is cause
of accident); Goodman v. U.S., 916 F. Supp. 362
(S.D.N.Y. 1996) (trip and fall over crowd control
barrier at national monument--no proximate cause, since
not demonstrated that U.S. was aware of improper
placement of barrier); Hunter v. U.S., 1997 WL 163513
(M.D. Fla.) (crash of experimental aircraft caused by
adding fuel tanks and entering into wake turbulence
after being warned by controller, and not by acts of
controller); Daecrispin v. U.S., 964 F. Supp. 659
(E.D.N.Y. 1997) (failure of proof that crack on
basketball court was significant enough to cause fall
of player); Washington v. U.S. Dept. of HUD, 1997 WL
21389 (W.D. Tex.) (where plaintiff was aware of
criminal conditions at HUD housing project and entered
assailant’s apartment voluntarily, HUD’s failure to
correct conditions is not the proximate cause of the
(trip on curb in Philadelphia’s National Historic Area
caused by pedestrian’s failure to watch step); Beckford
inch brown unreflectorized wire between two posts
caused bicyclist’s fall and not failure to have light
on bike); Stuart v. U.S. Government, 797 F. Supp. 800
(C.D. Cal. 1992) (smuggler hotly pursued by Border
Patrol collides with third-party--no proximate cause,
since Calif. pursuit law was being followed); Gross v.
prisoner on way to sick call unassisted slips on
cleared sidewalk during blizzard--no liability); Pence
(convicted step-mother solely liable for immersion burn
on 5 year old where she sets water temperature at 140
degrees in Government quarters); Kelly v. U.S., 805 F.
Supp. 14 (E.D. La. 1992) (absence of guardrail and
nonskid material did not cause fall on stairs);
(air controller's weather report did not cause missed

Cases finding proximate cause. Watkins, 589 F.2d 214 (5th Cir. 1979) (Valium ingestion causing auto
1999), motorist fleeing military police after traffic incident on Navy base is shot by civilian police due to Navy base radio call "I have officer down" establishes proximate cause.


(A) Other Lost Chance Cases. Other cases dealing lost chance of survival include: Kramer v. Lewisville Memorial Hospital, 858 SW.2d 397 (Tex. 1993) (no loss of chance in WD case for cervical cancer); Hurley v. U.S., 923 F.2d 1091 (4th Cir. 1991) (holds Md. law rejects loss of chance re cardiac arrest in long term heart problem patient—states Hicks rule has been misinterpreted and should be preponderance, not substantial possibility); Bell v. U.S., 854 F.2d 881 (6th Cir. 1988) (Michigan has loss of chance, i.e., less
than 50% in failing to diagnose abdominal aneurysm); McBride v. U.S., 462 F.2d 72 (9th Cir. 1972) (42-year-old Navy pilot recently retired while on flight status died in hospital parking lot just after having misread EKG--court held 20 percent chance of survival, enough to establish proximate cause--this in accordance with rule in Hicks v. U.S., 368 F.2d 626 (4th Cir. 1966) wherein the court held that reasonable medical probability of survival was not the test, but used the test of substantial possibility of survival); Boody v. U.S., 706 F. Supp. 1458 (D. Kan. 1989) (permits loss of chance in lung cancer, but applies 5-year past morbid life expectancy to premorbid, i.e., to permit 15 percent recovery); Bowen v. U.S., Civ. #86-0382 (D. Haw. 1987) (lost chance adopted in lung cancer case); Richmond Co. Hospital v. Dickerson, 356 S.E.2d 548 (Ga. 1987) (lost chance adopted in death due to failure to timely perform surgery); McKellips v. St. Francis Hosp., 741 P.2d 467 (Okla. 1987) (lost chance adopted in death by heart attack after premature release from ER); Blackmon v. Langley, 737 S.W.2d 455 (Ark. 1987) (lost chance adopted in failure to timely diagnose lung cancer). But see Dumas v. Cooney, 1 Cal. Rptr.2d 584 (1991) (causation in medical malpractice cannot be based on loss of chance of survival); Weimer v. Hetrick, 525 A.2d 643 (Md. 1987) (lost chance not applicable in death of newborn due to failure to perform C-section); Kroll v. U.S., 694 F. Supp. 1210 (D. Md. 1988) (interprets recent Maryland cases as not adopting loss of chance-held failure to treat impending strokes as actionable); Thomas v. Corso, 265 Md. 84, 288 A.2d 379 (1972) (holds that Hicks is not a lost chance case); McKain v. Bisson, 12 F.3d 692 (7th Cir. 1993) (loss of chance under Indiana law not recognized in heart attack case). But see Mayhue v. Sparkman, 653 N.E.2d 1384 (Ind. 1995). Some recent cases adopting loss of chance. Wellen v. DePaul Health Center, 828 S.W.2d 681 (Mo. 1992); Aasheim v. Hamberger, 690 P.2d 824 (Mont. 1985); Perry v. Las Vegas Medical Center, 805 P.2d 589 (Nev. 1991); Evans v. Dollinger, 471 A.2d 405 (N.J. 1984). The cases do not necessarily reach the same result even on analogous facts. Compare Webb v. U.S., 446 F.2d 760 (5th Cir. 1971), cert. denied, 405 U.S. 1072 (1972) (decedent was summarily ejected from emergency room in Georgia when she showed up

(B) Proportional Damages in Lost Chance Cases. Boody v. U.S., 706 F. Supp. 1458 (D. Kan. 1989) (listing three methods of determining damages in loss of chance cases: 1) award based on assessment of all the evidence; 2) full compensation even though plaintiff had less than even chance of survival or care; and 3) multiply percentage of living or surviving for fixed period of time and award for percent of chance lost); Short v. U.S., 908 F. Supp. 227 (D. Vt. 1995) (loss of chance is 30 percent in delayed diagnosis of prostate cancer—award is total value times 30 percent). Hebert v. U.S. 1998 WL 171668 (E.D. La.) Delay in treatment of Wegener's granulomatosis of 8 days, ruling that treatment earlier, e.g., 2 days later, would have had 30 percent chance of saving kidney—awards $5,000 to unemployed male in early 50s. Smith v. U.S., Civ. # 97-CV-73380-DT (E.D. Mich., 18 Dec. 98), delay in diagnosis results in 20 percent loss of chance and award of $376,649 as earlier detection of cervical cancer would have resulted in hysterectomy rather than radiation.


(iii) Cases Finding Causation in Medical Malpractice Cases. See, e.g., Metzen v. U.S., 19 F.3d 795 (2d Cir. 1994) (failure to place hypertensive patient on cholesterol diet is basis for disability in death by heart attack); Newmann v. U.S., 938 F.2d 1258 (11th Cir. 1991) (vestibular damage from gentamicin—probably cause established—

(iv) Cases Finding No Causation in Medical Malpractice Cases. See, e.g., Jones v. U.S., 127 F.3d 1154 (9th Cir. 1997), aff'g, 933 F. Supp. 894 (N.D. Cal. 1996) (failure of both Army gynecologist and Army dentist to explain to female Army sergeant that antibiotics would reduce efficacy of birth control pills was not cause of her pregnancy, since start of pregnancy occurred before she started taking the antibiotics--District Court rejected plaintiff's expert testimony based on standard in Daubert v. Merrell Dow Pharmaceuticals Inc. v. U.S., 509 U.S. 579, 116 S.Ct. 189 (1995)); Miner v. U.S., 94 F.3d 1127 (8th Cir. 1996) (mild pervasive development disorder in newborn not caused by foiled midforceps delivery, but by blows to abdomen by husband or car accident during pregnancy); Halley v. United States, 97 F.3d 1456 (table), 1996 WL 499085 (8th Cir. 1996) (no causal connection between injury due to rear end collision and death from congestive heart failure two years later); Kipp v. U.S., 88 F.2d 681 (8th Cir. 1996), aff'g, 880 F. Supp 681 (D Neb. 1995) (in January 1985, prior to effective AIDS test, decedent must prove that she would not have obtained AIDS if proper prescreening of donor had been conducted which she failed to do--negligence per se is not basis for liability); Ulczycki v. U.S., 89 F.3d 839 (table), 1996 WL 328782 (7th Cir. 1996) (wrongful death allegedly due to acute mesenteric ischemia not caused by failure to perform angiogram during first hospitalization or delay of surgery over weekend); Henry v. U.S., 89 F.3d 850 (table), 1996 WL 355568 (10th Cir. 1996) (failure to obtain history of headaches in 10-year-old who died from brain tumor does not constitute negligence); Champagne v. U.S., 40 F.3d 946 (8th Cir. 1994) (Indian Health Service failure to treat caused young man's suicide, but parents barred from recovery as father's conduct was a contributing cause); Campbell v. U.S., 907 F.2d 1188 (7th Cir. 1990) (fact that stroke occurred during operation for carotid endarterectomy does not establish negligence); Mann
v. U.S., 904 F.2d 1 (2d Cir. 1990) (VA could allow unlicensed intern to perform surgery under staff supervision--no liability); Lemaire v. U.S., 826 F.2d 949 (10th Cir. 1987) (failure to timely diagnose impending stroke--held for U.S.); Waffen v. U.S., 799 F.2d 911 (4th Cir. 1986) (seven months delay in diagnosing moderately differentiated lung cancer--no proximate cause of reduction in life expectancy); Imm v. U.S., 912 F.2d 469 (table), 1990 WL 124496 (9th Cir. 1990) (failure to deliver vaginally not cause, since no indication to do so); Campbell v. U.S., 907 F.2d 1188 (7th Cir. 1990) (fact that stroke occurred during operation for carotid endarterectomy does not establish negligence); Zwicky v. U.S., Civ. # 95-8103 JGD (C.D. Cal. 21 Oct. 1997) (Swine Flu shot in 1976 did not cause plaintiff’s myraid of medical symptoms); Luther v. U.S., Civ. # 93-263J (W.D. Pa., 29 July 1996) (detailed opinion finding brain damage occurred ante-partum, not during labor and post-partum); Wilson v. U.S., Civ. # CV194-199 (S.D. Ga., 31 July 1996) (attack on visitor in ladies restroom by schizophrenic mental patient is not compensable, since mental patient was fully aware of his act and not symptomatic); Fairchild v. U.S., 1996 WL 197692 (N.D. Ill.) (failure by park rangers to identify heat stroke earlier was not negligent--treatment for heat exhaustion was proper); McKenna v. U.S., Civ. # 1:88CV4683 (N.D. Ohio, Aug. 9, 1995) (failure to prove that mother received thalidomide during treatment of pregnancy at U.S. Army dispensary in Germany); Bellamy v. U.S., 888 F. Supp. 760 (S.D. W.Va. 1995) (4-5 month delay in diagnosing malignant lymphoma which was 16 cm in size at diagnosis--no liability, since mode of treatment identical); Jordan v. U.S., Civ. # A1-92-231 (D.N.D., Jan. 25, 1995) (no loss of chance of survival where patient not transported from accident scene, since irreversible damage already present); Doe v. U.S., Civ. # 3:94cv882 (E.D. Va., Nov. 17, 1995) (mental patient’s allegation of sexual contact with therapist are based on false recollection implanted by others); Negron v. U.S., Civ. # 4:93cv2270-DJS (E.D. Mo., Jan. 4, 1995) (failure to treat HIV+ during kidney transplant in early 1986 had no effect on subsequent death from cardiac arrest secondary to HIV+); Bullock v. U.S., Civ. # C 93-20995 EAI (N.D. Cal., May 22, 1995) (in suit where there is medical opinion in support of medical claim, judge rules he has right to consider allegation despite lack of

(v) Informed Consent. The causation requirement also applies to informed consent actions. Hutchinson v. U.S., 841 F.2d 966 (9th Cir. 1988) (failure to warn that Predisone may cause aseptic neurosis must be material); Valdiviez v. U.S., # 91-5777 (5th Cir. 1992) (in 1984, prior to HIV testing, reasonable person would have chosen heart surgery requiring transfusion over threat of AIDS); Bankert by Bankert v. U.S., 937 F. Supp. 1169 (D. Md. 1996) (refusal of patient’s request for C-Section due to USAF policy leaving it in the sole discretion of the physician is treatment without informed consent); Cooper v. U.S., 903 F. Supp. 953 (D.S.C. 1995) (failed to obtain written consent prior to extraction of wisdom tooth--not required under South Carolina law--additionally, no evidence patient would have refused treatment if informed of possibility of nerve damage); Sanders v. U.S., 1995 WL 144585 (E.D. La.), aff’d, 77 F.3d 478 (table) (5th Cir. 1996) (informed consent included loss of taste due to stapedectomy surgery--no proximate cause); Pettingill v. U.S., 867 F. Supp. 380 (E.D. Va. 1994) (failure to comply with Virginia statute requiring written consent to perform sterilization does not create cause of action, since purpose of statute is to protect physician); Hanna v. U.S., 845 F. Supp. 1390 (E.D. Cal. 1994) (suit for facial paralysis following parotoidectomy fails as USAF physician fully informed patient of risk and offered alternative modes of treatment); Parkins v. U.S., 834 F. Supp. 569 (D. Conn. 1993) (failure to explain either risk of paralysis or alternative treatment with increased rate of morbidity but lower risk of paralysis--U.S. liable); Campbell v. U.S., Civ. # 82-0236 (D. Haw. 1988) (informed consent to perform hysterectomy on gravid female need not include ovarian prolapse risk); Rosario v. U.S., 824 F. Supp. 268 (D. Mass. 1993) (no liability for total paralysis which followed arteriogram--informed


b. Exclusions From FTCA. Subject to exclusions listed in 28 U.S.C. § 2680 and by other statute. First of which is 28 U.S.C. § 2680(a) (1st Clause), that is, claims based on
execution of statute or regulation (valid or not) provided due care is used. For cases, see IB1d.

c. Discretionary Function. Excludes claims arising out of the exercise or performance of, or failure to exercise or perform, discretionary function whether or not discretion is abused (2d clause, 28 U.S.C. § 2680(a)). USF&G v. U.S., 837 F.2d 116 (3d Cir. 1988) (Government conduct not discretionary if it violates Constitution, statute or applicable regulation). Moreover, while a government program may be discretionary, not every act in carrying it out is. Prescott v. U.S., 959 F.2d 793 (9th Cir. 1992) (nuclear tests in general fall under exclusion but not every act in carrying out program). Montague v. Mary Lou Keener, Civ. #97-1603 (CKK) (D.D.C., 21 Nov. 97), denial of an FTCA claim is discretionary.

(1) Nature of Discretionary Function Exclusion. Discretionary functions exclusions may apply at any level where decisions are made. Question is whether government policy making is reflected in decision. However, if decision is contrary to statute, regulation, or policy, discretionary function exclusions not applicable. Gaubert v. U.S., 499 U.S. 315, 111 S.Ct. 1267 (1991) (discretionary function exclusion covers only acts that are discretionary in nature, acts that involve elements of judgment or choice—discretionary conduct is not confined to the policy or planning level, since day-to-day management requires judgment as to permissible courses of action—clarifies Berkovitz); Berkovitz v. U.S., 486 U.S. 531, 108 S.Ct. 1954 (1988) (discretionary function exclusion applies to judgment or choice based on public policy— if polio vaccine released in absence of required test § 2680(a) does not apply); Staton v. U.S., 685 F.2d 117 (4th Cir. 1982) (ranger shoots hunting dogs in U.S. Park— not discretionary as against Park Service policy); Hurst v. U.S., 739 F. Supp. 1377 (D.S.D. 1990) (failure of COE District Engineer to issue prohibitory order as required by Federal Regulation not discretionary); In re Sabin Oral Polio Vaccine Product Liability Lit., 984 F.2d 124 (4th Cir. 1993) (no discretion involved in whether techniques used by foreign manufacturer met standard). The burden of proving the applicability of the discretionary function exclusion is on the government. Prescott v. U.S., 973 F.2d 696 (9th Cir. 1992) (burden of proving applicability of exclusion to Nevada test site workers is on U.S.). In Re: Orthopedic Bone Screw Products Liability Litigation, Civ. # 97-9196-5202 (E.D. Pa., 3 Nov. 98) FDA's 510(k) clearance of certain brands of pedicles is discretionary.
- listing under FDA clearance of polio vaccine in Berkowitz supra.


(b) Sale or Distribution of Government Property. Sale and/or distribution of government property falls under discretionary function exclusion. Dahelite v. U.S., 346 U.S. 15 (1953) (failure to warn of explosive properties of fertilizer is discretionary); Boruski v. U.S., 803 F.2d 1421 (7th Cir. 1986) (furnishing of flu vaccine to city is exempt); In re All Maine Asbestos Litigation, 581 F. Supp. 963 (D. Me. 1984) (selling asbestos without warning is discretionary); Stewart v. U.S., 486 F. Supp. 178 (C.D. Ill. 1980); Ford v. American Motors Corp., 770 F.2d 465 (5th Cir. 1985) (Postal Service decision to sell jeeps as surplus without warning of propensity to turn over is discretionary); Myslakowski v. U.S., 806 F.2d 94 (6th
Cir. 1986) (failure to warn re tip over propensities of surplus Postal Service jeep discretionary—follows Varig); Tindall by Tindall v. U.S., 961 F.2d 53 (5th Cir. 1990) (distribution of explosives by BATF without warning label falls under § 2680(a)); Jurzec v. American Motors Corp. v. U.S., 856 F.2d 1116 (8th Cir. 1988) (sale of jeep with insufficient roll bar warning exempt); Grammatico v. U.S., 932 F. Supp. 1120 (C.D. Ill 1996), aff’d, 109 F.3d 1198 (7th Cir. 1997) (sale of surplus radial mill on “as is/where is” basis is discretionary by Defense Reutilization Management Office because it was not hazardous). But see Merklin v. U.S., 788 F.2d 172 (3d Cir. 1986) (U.S. as supplier of radioactive ore may have duty to warn unknowledgeable user).


discretionary as would have required costly study); Sanders v. S.C. Public Service Authority, 856 F. Supp. 1066 (D.S.C. 1994) (COE decision to increase flow through diversionary canals on Cooper River is discretionary); Manns v. U.S., 945 F. Supp. 1349 (D. Or. 1996) (where boat hit sandbar, COE had broad discretion under title 33 U.S.C. when and where to dredge); National Union Fire Ins. Co. v. U.S., 115 F.3d 1415 (9th Cir. 1997) (COE decision to delay repairs on breakwater that later failed is discretionary). But see Bell v. U.S., 127 F.3d 1226 (9th Cir. 1997) (exclusion not applicable where Bureau of Reclamation assumes responsibility for covering pipeline at state reservoir and 14 year old diver strikes embankment 30"-40" below surface); Kennewick Irrigation District v. U.S., 880 F.2d 1018 (9th Cir. 1989) (design and construction of irrigation trench is not discretionary); Alabama Electric Co-op Inc. v. U.S., 769 F.2d 1524 (11th Cir. 1985) (COE dredging project designed not in accordance with standard—causes current to erode land does not fall within discretionary function—cites a number of cases pro and con); Hurst v. U.S., 882 F.2d 306 (8th Cir. 1989) (COE must stop jetty project where its own regulations require same for permit violation). Devito v. U.S., CIV # 95-CV-2349 (J.S.) (E.D.N.Y., 30 Mar 98) COE design of Long Island south shore beach restoration is discretionary. Kerr Marina v. Oceanview Farms, Civ. #7:97-CV-120-F(3), COE design of lagoon for hog farm from which hog waste ran into New River is discretionary.


(h) Decision to Ban Goods. The Government’s decision to ban certain goods may fall within the discretionary function exclusion. Jayvee Brand Inc. v. U.S., 721 F.2d 385 (D.C. Cir. 1983) (ban on Tris treated garments is excepted). But see Fisher Bros. Sales Inc. v. U.S., 17 F.3d 647 (3rd Cir. 1994) (decision of FDA Commissioner to bar entry to Chilean grapes was not discretionary if based on negligent FDA lab tests for cyanide).

(i) Decision to Warn About Danger. Government decisions to warn persons about particular dangers may fall within the discretionary function exclusion. Grunnet v. U.S., 730 F.2d 573 (9th Cir. 1984) (State Dept. fail to warn Congressman Ryan re Jonestown discretionary); Begay v. U.S., 768 F.2d 1059 (9th Cir. 1985) (decision by USPHS not to warn uranium miners of known hazard is discretionary); Barnson v. U.S., 816 F.2d 549 (10th Cir. 1987) (decision not to warn uranium miners of danger despite USPS research project is political, therefore, discretionary and not actionable); Hagy v. U.S., 976 F. Supp. 1373 (W.D. Wash 1997) (failure of NIH to warn of possibility of acquiring Creutzfeldt-Jakob Disease from taking human growth hormone is discretionary); King v. U.S. Forest Service, 649 F. Supp. 20 (N.D. Cal. 1986) (failure of U.S. Forest Service to warn of dangers of rafting when water is high); Bacon v. U.S., 810 F.2d 827 (8th Cir. 1987) (HUD clean up of dioxin in local roads--failure to warn clean up crew is discretionary); Lockett v. U.S., 714 F. Supp. 848 (E.D. Mich. 1989) (EPA has no duty to warn neighborhood re PCB test sample at local plant); Lacock v. U.S., 106 F.3d 408 (table), 1997 WL 22463 (9th Cir. 1997) (no duty to warn about veteran diagnosed as being potentially dangerous to others).
But see Andrulonas v. U.S., 924 F.2d 1210 (2d Cir. 1991) (failure to warn bacteriologist of danger of working with rabies viruses is not discretionary); W.O. & A.N. Miller Companies v. United States, 963 F. Supp. 1231 (D.D.C. 1997) (failure to warn of buried chemicals not discretionary, but method of disposal is discretionary). Safeco Ins. Co. v. U.S., Civ. #S-95-2226 LKK/PAN (E.D. Cal., 25 Sep. 98), where contract provides that Forest Service will provide daily report on fire hazard danger to Government contractor clearing branch in National Forest, failure to do so is not discretionary; Lambert v. U.S., Civ. #97-5057 (D.S.D. 16 Sep 98), where contractor temporarily fills potholds on Indian reservation road under reconstruction, United States is not responsible to inspect and ward where traffic causes temporary till of gravel to ridge and create danger; Brewer v. U.S., Civ. # 92-1013-PHX-MS (D. Ariz. 5 Oct. 98), failure to warn of presence of logging trucks of Forest Service logging road is discretionary. Knockel ex rel Knockel v. U.S., 49 F. Supp.2d 1155 (D. Ariz. 1998) failure to follow directives concerning food handling and permittee inspections is not discretionary in injury claim for mauling by problem bear.


(k) Immigration. The decision to allow a person to enter this country is discretionary. Flammia v. U.S., 739 F.2d 202 (5th Cir. 1984) (decision to permit Cuban criminals to enter U.S. under Mariel boat lift--discretionary).

follows Griffin v. U.S., 500 F.2d 519 (3d Cir. 1974) re
duty to test oral polio vaccine).

(m) Delays and Non-Issuance. Delays and non-issuance
of licenses is discretionary. Wendler v. U.S., 782
F.2d 853 (10th Cir. 1985) (delay in reissuing suspended
pilot’s license not actionable); Heller v. U.S., 803
F.2d 1558 (11th Cir. 1986) (denial of pilot’s medical
certificate by FAA is exempt). Bessey v. U.S., Civ. #
97-CV-1790 (E.D. Va., 18 Mar. 1998) (decision as to
when and how to issue security clearance to defense
contractor employee is discretionary - cites Chesna v.

(n) Audits. Decisions concerning when to conduct an
audit are discretionary. Gary Sheet & Tin Employees
Federal Credit Union v. U.S., 605 F. Supp. 916 (N.D.
Ind. 1985) (Federal audit of Credit Union does not
create duty to regulate and control).

(o) Investigation and Enforcement. Investigation and
enforcement decisions are discretionary. Nankervis v.
U.S., 127 F.3d 1102 (table), 1997 WL 650828 (6th Cir.
1997) (Social Security Administration’s failure to
properly investigate employee for sexual assault in
1983 does not provide basis for claiming U.S. caused
murder by same employee in 1992); Kline v. Republic of
which U.S. must investigate death of American tourist
in El Salvador is discretionary); Bradley v. U.S., 615
and prosecuting VA employee regarding drug dealing is
discretionary); Sottile v. U.S., 608 F. Supp. 1040
(D.D.C. 1985) (decision by FAA to investigate whether a
flight instructor is properly certified is
discretionary); Cunningham v. U.S., 625 F. Supp. 1016
(D. Mont. 1985) (OSHA inspection does not form basis
for cause of action in death due to equipment failure);
(failure to investigate pension fund as required by
Federal law is discretionary); Employers Insurance of
decision to name Wausau “potentially responsible
person” is not proper subject for FTCA claim); Crumpton
report of Army officer’s suicide and fraudulent travel
vouchers is discretionary. Crenshaw v. U.S., 959 F.
Supp. 399 (S.D. Tex. 1997) (NASA sting operation into
contracting practices falls under exclusion, even
though it includes misrepresentation); U.S. v. Skipper,
781 F. Supp. 1106 (E.D.N.C. 1992) (method of CERCLA response is discretionary). But see Ayala v. U.S., 980 F.2d 1342 (10th Cir. 1992) (incorrect technical advice by Federal mine inspector as to how to correct methane warning system is not discretionary function barred—on remand, held proximate cause was the effective intervening negligence of suppliers and miners—see Ayala v. U.S., 846 F. Supp. 1431 (D. Colo. 1993), aff'd, 49 F.3d 607 (10th Cir. 1995)).


examiner is exempt). Green v. U.S., 8 F. Supp. 2d 983 (W.D. Mich. 1998), decision to award loan to another applicant despite allegation that claimant was first on list was discretionary.


(x) Hiring, Training and Retention of Employees. Hiring, training and retention of employees may fall within discretionary function. Attallah v. U.S., 758 F. Supp. 81 (D.P.R. 1991) (discretionary function applied to hiring and training of customs agents who rob and murder courier); Footman v. U.S., Civ. # 92-
0474-CIV-ORL-18 (M.D. Fla., 28 Sept. 1993) (drowning in NASA swim lake of 7-year-old allegedly due to having untrained and unskilled lifeguards falls under discretionary function exclusion); Tonelli v. U.S., 60 F.3d 492 (8th Cir. 1995) (claims for peeking at adult mail by postal worker while mail was in a sealed post office box—claims based on negligent hiring excluded by § 2680(a)); Dobbins v. U.S., Civ. # CIV-S-95-117 DFL PAN (E.D. Cal., 12 Feb. 1997) (decision to hire and retain air traffic controller is discretionary); Big Owl v. United States, 961 F. Supp. 1304 (D.S.D. 1997) (failure to notify teacher that she would not be rehired as prescribed in school pamphlets is discretionary).

(y) Security. Decision whether to provide security to contractor is discretionary. Fazi v. U.S., 935 F.2d 535 (2d Cir. 1991) (whether to protect contract mail carrier with security guard is discretionary).

(z) Advertising. Government decision on whether to advertise is discretionary. Powers v. U.S., 996 F.2d 1121 (11th Cir. 1993) (failure of FEMA to advertise availability of national flood insurance is discretionary and falls within exclusion).

checkpoint by INS border patrol not in conformance with Agency handbook is not discretionary).


(2) Nature and Quality of Decision. Nature and quality of decision, i.e., subject matter of same and does it involve day-to-day routine. See Flammia, supra. Examples below.

(a) Treatment by Mental Health Professionals. See generally, Magee v. U.S., 121 F.3d 1 (1st Cir. 1997) (VA decision to help schizophrenic mental patient on prolixin obtain driver's license is a policy judgment within the discretionary function exclusion); Lacock v. U.S., 1997 WL 22263 (9th Cir.) (Montana law requiring mental health personnel to warn third party of dangerous propensities of patient did not apply since no threat of harm made by patient); Naisbitt v. U.S., 611 F.2d 1350 (10th Cir. 1980) (reviews many cases); Johnson v. U.S., 576 F.2d 606 (5th Cir. 1978); Hendry v. U.S., 418 F.2d 774 (2d Cir. 1969) (reviews many cases); Fahey v. U.S., 153 F. Supp. 878 (S.D.N.Y. 1957). See also Fraser v. U.S., 83 F.3d 591 (2d Cir. 1996) (VA had no duty to control psychiatric outpatient who later stabbed to death plaintiff’s decedent); Rousey v. U.S., 115 F.3d 394 (6th Cir. 1997), aff’g, 921 F. Supp. 155 (E.D. Ky. 1996) (no duty to warn Rousey or anyone else, since VA mental patient was reasonably determined not to be harmful—shooting of four occupants of car including his wife three weeks after discharge from 28 day VA psychiatric program falls under exclusion); Leedy v. Hartnett, 510 F. Supp. 1125 (M.D. Pa. 1981) (release of VA mental patient); Sellers v. U.S., 870 F.2d 1098 (6th Cir. 1989) (no duty to warn

(b) Parolees and Informants. The government’s method of controlling parolees, informants and witnesses falls within the discretionary function exclusion. Bergman v. U.S., 689 F.2d 789 (8th Cir. 1982) (no duty to supervise criminal in Federal Witness Program); Weissich v. U.S., Civ. # C-88-3583 RHS (N.D. Cal. 1992), aff'd, 4 F.3d 810 (9th Cir. 1993) (method of controlling parolee who committed murder while on parole is discretionary); Vaughn v. U.S., 933 F. Supp. 660 (E.D. Ky. 1996) Aff'd Civ. #96-6336 (6th Cir., 16 Dec 1996) (failure of FBI to supervise informant who shoots Harry Vaughn at party falls under exclusion). However, some courts have held that the discretionary function exclusion does not bar suits concerning the control of informants and parolees. Payton v. U.S., 679 F.2d 475 (5th Cir. 1982) (release of Whisenhant, a homicidal psychotic, on parole not excluded); Liuzzo v. U.S., 508 F. Supp. 923 (E.D. Mich. 1981) (FBI permitting informant to accompany KKK not cause of assault resulting in his death Selma voting rights march--not excluded); Ochran v. U.S., 117 F.2d 495 (11th Cir. 1997) (where AUSA voluntarily assumes duty to protect government witness, her failure to inform of available remedies against intimidation and harassment by ex-boyfriend who she is testifying against is not discretionary). In any event, the U.S.' decision to revoke a person's parole is discretionary. Wilson v. U.S., 767 F. Supp. 551 (S.D.N.Y. 1991).

personal property not returned after riot in which warden ordered all cells cleared – falls under 2680(a).


(e) Duty to Prisoners. Assignment of prisoners to particular prisons or cells falls within the discretionary function exclusion. Ross v. U.S., 641 F. Supp. 368 (D.D.C. 1986) (negligent transfer of prisoner to Marion--exempt); Calderon v. U.S., 923 F. Supp. 127 (N.D. Ill. 1996), aff’d, 123 F.3d 946 (7th Cir. 1997) (failure to remove cellmate who attacked Calderon falls under exclusion despite fact that Calderon has furnished criminal information on cellmate’s relative); Bailor v. Salvation Army, 51 F.3d 678 (7th Cir. 1995) (decision to place prisoner in halfway house is discretionary, even though prisoner leaves and rapes and assaults plaintiff); Libretti v. U.S., Civ. # 94-1543 PHX PGR (SLV) (D. Ariz., 12 Sept. 1996) (method and implementation of prison shake-down is discretionary); Caudle v. U.S., Civ. # TH 93-210-C-M/G (S.D. Ind., Feb. 24, 1995), aff’d, 72 F.3d 132 (table), 1995 WL 730817 (7th Cir 1995) (decision to place prisoner in cell block housing assaultive prisoners where he was later attacked is discretionary). The U.S. may also have no duty to warn of threats by prisoners. Barrett v. U.S., 845 F. Supp. 774 (D. Kan. 1994) (failure to investigate death threats to prisoner who was murdered, may have
been negligent, but did not cause prisoner’s death). Dewer v. Vecera, 139 F.3d 1190 (8th Cir. 1998)
Intoxicated prisoner at fair at Jefferson Memorial who
is released by police later is struck by car and killed
- release is discretionary. Dykstra v. U.S. Bureau of
Prisoners, 140 F.3d 791, (8th Cir. 1995) Failure to
advise youthful appearing who was subsequently sexually
assaulted about protective custody is discretionary.
Muhammed v. U.S., 6 F. Supp. 2d 582 (N.D. Tex. 1998),
18 U.S.C. 4042, which imposes duty on Bureau of Prisons
to provide suitable quarters creates a private duty
under FTCA to paraparetic prisoner. Cohen v. U.S., 151
F.2d 1338 (11th Cir. 1998), placing prisoner in minimum
security facility is discretionary--reverses award to
prisoner beaten by fellow inmate. Snow v. U.S., Civ. #
58-CV-0161-PE (S.D. Ill., 12 Jan 99), where inmate is
knocked unconscious and mutilated while walking in
prison compound, method of controlling prisoners is
responding to prisoner generated fire which resulted in
claimant inhaling smoke while locked in cell doesn't
fall under 2680(c).

(f) Protection From Harm. The decision whether to
protect an individual from potential harm may fall
within the discretionary function exclusion. Weissach
v. U.S., 4 F.3d 810 (9th Cir. 1993) (U.S. Probationary
Service regulations do not create a duty to warn ex
District Attorney of threat by prisoner to kill him);
Simmons v. U.S., 626 F.2d 985 (3d Cir. 1982) (no duty
to protect individual because of his own request--duty
is to public); Bates v. U.S., 517 F. Supp. 1350 (W.D.
Mo. 1981), aff’d, 701 F.2d 737 (8th Cir. 1983) (murder
of three teenagers and assault of another by on-duty MP
using service revolver, U.S. held not liable based on
Missouri law); Sellers v. U.S., 870 F.2d 1098 (6th Cir.
1989) (no duty to warn general public of violent
propensities of OP mental patient released on lithium);
of tailing kidnapper is discretionary); Manderville v.
under Hawaii statute requiring assistance to those in
trouble to do more under circumstances to call police
to scene of bar fight in Navy Club); Zielinski v. U.S.,
89 F.3d 831 (table), 1996 WL 329492 (4th Cir. 1996)
(Army reservist who is under a bar letter gains access
to Navy base by presenting Army ID and kidnaps and
assaults plaintiff--degree and nature of security is
discretionary). But see Ochran v. U.S., 117 F.2d 495 (11th Cir. 1997) (where AUSA voluntarily assumes duty to protect government witness, her failure to inform of available remedies against intimidation and harassment by ex-boyfriend who she is testifying against is not discretionary); Red Lake Band of Chippewa Indians v. U.S., 800 F.2d 1187 (D.C. Cir. 1986), later appeal, 936 F.2d 1320 (D.C. Cir. 1991) (FBI removal of all law enforcement officers from hostage situation is not exempt—on later appeal, U.S. held not liable because injury resulting from riot would have occurred even if officers had not been pulled out); Peterson v. U.S., Civ. # H-80-1357 (S.D. Tex. 1982) (use of untrained mental health counselor creates liability based on special relationship with patient under Texas law). Further, the decision to protect people is not discretionary when mandated by Congress. Knop v. U.S., Civ. # 4:95CV01416 ERW (E.D. Mo., 23 Sept. 1996) (NPS plan to carry out congressional mandate to protect park visitors not followed—discretionary function exclusion not applicable). Aoah v. U.S., Civ. # 96-CV-1061-B (D. Wyo., 13 Feb 1998) (FBI agent's order not to render aid at shooting scene is not under exclusion as he was without authority to give order to local police. Gager v. U.S., 149 F.3d 918, (9th Cir., Nev. 1998) (decision not to train postal employees to detect mail bomb is discretionary.

of strange telephone noises and concluding erroneously
that it was wire tapping is discretionary); Golden v.
(decision to continue investigation and suspend
clearance of whistleblowing DAC is discretionary);
(extensive body search by Customs of two U.S. citizens
returning from vacation in Jamaica is discretionary);
Heinze v. U.S., Civ. # 94-913-JE (D. Or., Jan. 20,
1995) (planning by ATF of sting operation is
discretionary—forseeability of high speed leads to
common law negligence); Doherty v. U.S., 905 F. Supp.
54 (D. Mass. 1995) (exclusion applies to search by
federal agents of wrong residence to find perpetrators
of armored car robbery); Clark v. Buchko, Civ. # 94-755
(CSF) (D.N.J., Jan. 11, 1995) (Buchko, a deputy
sheriff, utilized by FBI for bank robbery investigation
arrests third parties—plaintiff argues that U.S.
liable on basis that FBI did not follow FBI manual on
arrest—exclusion applies); Sabow v. U.S., 93 F.3d 1444
(9th Cir. 1996) (nature and manner of NIS and JAG
investigation into suicide of U.S. Marine officer are
discretionary—case remanded as discretionary function
exclusion does not bar claim for intentional infliction
of emotional distress concerning conduct of general and
other military personnel during meeting with family);
of conducting CID investigation is discretionary—cites
aff’d sub nom., Pooler v. U.S., 787 F.2d 868 (3d Cir.),
cert. denied, 479 U.S. 849 (1986); Kelly v. U.S., 737
F. Supp. 711 (D. Mass. 1990) (DEA decision whether to
investigate leak is discretionary). Sellers v. U.S.,
__ F.3d __, 133838 (8th Cir. (No)) exclusion applicable
to arrest and release of intoxicated man near busy
intersection near National Park Service Fair is
discretionary; Chandler v. U.S., 875 F. Supp. 1250
(N.D. Tex. 1994) (presenting false evidence to AUSA who
then unsuccessfully prosecutes two GSA employees does
not fall under exclusion). Johnson v. U.S., 47 F.
Supp. 2d 1075 (S.D. Ind. 1999), where suspect flees
into friend's house to avoid arrest, U.S. Marshal's use
of teargas is discretionary. O'Ferrell v. U.S., 32 F.
Supp. 2d, 1293 (M.d. ala. 1998) failure of proof that
FBI was deliberately misleading in obtaining warrant in
mail bombing case—method of investigating is
discretionary.

(h) Mentally Disturbed Persons. U.S. may have no duty
to control mentally disturbed persons. Abernathy v.


lobby of Post office with light blue-grey tile-no
liability; Manill v. U.S., 14 F. Supp.2d 1215,
(D.R.I. 1998), no duty of USPS to remove snow during
snowstorm — storm in progress rule applies in
connecticut, Rhode Island, New York, West Birginia,
Ohio, Michigan, among others.

(A) State or Local Building Code Applicability.
Cooks v. U.S., 815 F.2d 34 (7th Cir. 1987)
(standard applied to municipality re sidewalks
applied to U.S. 1/2 inch difference in slab levels
835 (S.D. Cal. 1997) (exception applies to design
of ramp and how to fence (some portions of fence
less in height than building code) where
pedestrian thrown over guard rail). Shansky v.
U.S., Civ # 96-12268-RCL (D. Mass. 27 Mar 98)
Failure to meet building standards in
recontractory Trading Pact and home at National
Historic site is discretionary. Roggendorf v.
U.S., 1998WL704350 (N.D. Ill.), U.S. not liable
for natural accumulation of water near Post Office
door during rainstorm, aff'd 1999WL265363 (7th
Cir. Ill.).

(B) Security. Decision to provide security and
the amount of security falls within the
discretionary function exclusion. Haygan v. U.S.,
for lack of security in on-post parking lot from
which car is stolen); Hacking v. U.S., Civ. # 86-
186-Col (M.D. Ga. 1987) (visitor shot at Fort
Benning swimming pool—amount of security is
discretionary and not actionable); Turner v. U.S.,
473 F. Supp. 317 (D.D.C. 1979) (too few guards);
Hughes v. United States, 110 F.3d 765 (11th Cir.
1997) (postal patron shot in post office parking
lot at 10:45 P.M.—location of post office in high
crime area nature and type of security is
discretionary); Leslie v. U.S., 986 F. Supp. 900
(D.N.J. 1997) (robber murders three postal patrons
in course of robbing post office with no security —
exception applies — distinguishes Chachere v.
U.S., 1990 WL 120618 (E.D. La.) where security was
inadequate). Pierro v. U.S., Civ # 96-0495-T
(W.D. Okla.) (amount of security in post office to
preclude attacks in parking lot is discretionary).
99), where robber targets U.S. Post office which
has no security and kills all witnesses,
Postmaster's decision not to provide security is discretionary.

(C) Trespassers. U.S. has no duty to trespasser except to refrain from willfully and wantonly injuring them. Landen v. U.S., # 85-4438 (5th Cir. 1985) (no duty to trespasser in impact area except to mark same as impact area); Vickery v. U.S., Civ. # CV 191-089 (S.D. Ga., 13 Apr. 1982) (no recovery for plaintiff trespassing in artillery impact area, since Army did not inflict injury either willfully or wantonly as required by Georgia law to sustain a finding of liability). In California, a landowner owes a duty of reasonable care to everyone, including trespassers. Murphy v. U.S. Dept. of the Navy, Civ. # 87-0195-JLI(CM) (S.D. Cal. 1991) (Navy did not breach duty of reasonable care to trespassers imposed under California law, since aerial gunnery range was clearly marked by warning signs).

discretionary); Adams v. U.S., Civ. # 86-98 (E.D. Ky. 1988) (amount and placement of signs discretionary in quad diving case); Ross v. U.S., 910 F.2d 1422 (7th Cir. 1990) (no duty to warn 12 year old drowning victim of danger of COE maintained breakwater); Arizona Maintenance Co. v. U.S., 864 F.2d 1497 (9th Cir. 1989) (seismic blasting by Dept. of Interior must conform to industry standard for discretionary function exclusion to apply); Graves v. U.S., 872 F.2d 133 (6th Cir. 1989) (after U.S. closes lock, nature of warning is discretionary); Self v. Fritts, Civ. # CV-F-88-680REC (N.D. Cal. 1989) (no duty to warn re danger of outdoor toilet door opening directly on road); Caplan v. U.S., 877 F.2d 1314 (6th Cir. 1989) (U.S. under duty to warn "cutting" contractor re hazard of dead tree where previously treated with herbicide); Weiss v. U.S., 889 F.2d 937 (10th Cir. 1989) (marking of cable car cable in National Forest is discretionary); Ayer v. U.S., 902 F.2d 1038 (1st Cir. 1990) (design of missile capsule discretionary--need not be made safe for visitors); Zumwalt v. U.S., 928 F.2d 950 (10th Cir. 1991) (failure to mark cave entrance--marking of trail which was laid out by U.S. Forest Service falls under exclusion where design was to maintain natural look); Cole v. U.S. Army Corps of Engineers, Civ. # 88-1549 (W.D. La. 1991) (17-year-old quad from diving into uneven bottom of shallow water--no duty); Aldrich Enterprises v. U.S., 938 F.2d 1134 (10th Cir. 1991) (U.S. as landowner had no knowledge that lessee's lake would overflow onto adjoining land); Richardson v. U.S., 943 F.2d 1108 (9th Cir. 1991) (decision not to place ground on power lines is discretionary); Johnson v. U.S. Dept. of Interior, 949 F.2d 332 (10th Cir. 1991) (Park Service decision as to when and how to rescue mountain climber is discretionary); Breland, By and Through Breland v. U.S., 791 F. Supp. 1128 (S.D. Miss. 1992) (safeguarding a LAW rocket dud in impact area is discretionary); Harris v. U.S., Civ. # 91 CV 0595 (SJ) (E.D.N.Y., 5 Oct. 1992) (method and time of repairing basketball court in Gateway National Recreational Area is discretionary, since it involves judgment as to the use of limited funds); Buffington v. U.S., 820 F. Supp. 333 (W.D. Mich. 1992) (drowning from breakwater due to high waves--design and operation of breakwater is discretionary); Koenig v. Army COE, Civ. # 5:93:cv:22 (W.D. Mich., 2 July 1993) (drowning from breakwater--wording of sign is discretionary--
injury which occurred when batter in unsponsored softball game tripped on 8-10 inch hole to batter's box); Tippett v. U.S., 108 F.3d 1194 (10th Cir. 1997) (exclusion applies to snowmobiles trying to pass moose as he had observed other snowmobilers do); Cooper v. U.S., Civ. # 95-3094-CV-S-4 (W.D. Mo., Aug. 22, 1995) (exclusion applies to claim for burns caused by geyser in Yellowstone where allegation was that warning sign was improperly placed); Wright v. U.S., 82 F.3d 419 (table), 1996 WL 172119 (6th Cir. 1996) (decision to cut trees in wilderness near trails is under exclusion); McMullen v. U.S., 956 F. Supp. 1068 (D. Kan. 1996) (method of safeguarding impact area at Fort Riley is discretionary); Blackburn v. U.S., 100 F.3d 1426 (9th Cir. 1996) (sign on bridge in Yosemite are adequate warning to quadriplegic diving case--California Resort Act is not applicable); Ward v. U.S., Civ. # 96-589-J (LSP) (S.D. Cal., 19 Sept. 1996) (discretionary function applies to fall into bonfire during fire ring at Camp Pendleton recreation area); Aragon v. United States, 950 F. Supp. 321 (D.N.M. 1996) (discretionary function applies to TCE pollution of acquifer from AFB closed in 1967); Schroeeder v. U.S., 1996 WL 754090 (N.D. Cal.) (discretionary function applies to placement of signs on snowmobile course in national forest when two snowmobilers died due to colliding with truck parked in hotel lot); Wilson v. U.S., 940 F. Supp. 286 (D. Or. 1996) (28 U.S.C. § 2680(a) applies to National Forest service decision not to remove floating wood debris from lake for fear of disturbing habitat) Negligent emergency rescue by NPS employee following car accident in Sequoia National Park falls under exclusion--cites Kiehn v. U.S., 984 F.2d 1160 (10th Cir. 1993)); Bowman v. U.S., 820 F.2d 1393 (4th Cir. 1987) (decision not to place guard rails on Blue Ridge Parkway, a scenic route, falls under § 2680(a)); Juan v. U.S., Civ. # C-89-4231-SBA (N.D. Cal. 1992) (issuance of climbing permit in Hawaii Volcano National Park is discretionary); Layton v. U.S., 984 F.2d 1496 (8th Cir. 1993), cert. denied, 510 U.S. 877 (1993) (decision to select contractors and delegate safety responsibility for tree cutting in National Forest is discretionary); Kiehn v. U.S., 984 F.2d 1100 (10th Cir. 1993) (no duty to warn commercial guide of danger from unstable sandstone rock in National Park). These cases have found discretionary function exclusion inapplicable.  Duke v.
Department of Agriculture, 131 F.3d 1407 (10th Cir. 1997) (discretionary function exclusion inapplicable where Forest Service gave no reason, not even budgetary ones, for its failure to either post warning signs or prohibit camping where they knew that state had cut road into hillside causing slope which large boulders would roll down—cites Third Circuit's decision in Gotha v. U.S., 115 F.3d 176 (3rd Cir. 1997) with approval); Faber v. U.S., 56 F.3d 1122 (9th Cir. 1995) (Forest Service failed to post warning signs despite policy to do so re danger of diving from falls is not discretionary); Boyd v. U.S. ex rel. U.S. Army COE, 881 F.2d 895 (10th Cir. 1989) (decision to permit swimming and boating in same area is actionable and not barred by § 2680 (a)); Van Orden v. U.S., 85 F.3d 639 (table), 1996 WL 256585 (9th Cir. 1996) (Forest Service' failure to place safety warnings in timber sale contract does not fall under exclusion--purchaser felled boundary line tree injuring adjoining property owner); Coe v. U.S., 502 F. Supp. 881 (D. Or. 1980) (BLM failed to institute measures which would have minimized fire damage on Federal Lands); Caraballo v. U.S., 830 F.2d 19 (2d Cir. 1987) (quad case from diving in three feet of water in National Park--duty to warn superseded by unforeseeable act); Starret v. U.S., 847 F.2d 539 (9th Cir. 1988) (failure to develop SOP to preclude ground water pollution from demil operation is not barred by § 2680(a)); Lindgren v. U.S., 665 F.2d 987 (9th Cir. 1982) (failure to warn water skiers of fluctuating water levels); Prescott v. U.S., 724 F. Supp. 792 (D. Nev. 1989) (must use objective standards to protect persons employed at Nevada test site); Roberts v. U.S., 724 F. Supp. 778 (D. Nev. 1989); Summers v. U.S., 905 F.2d 1212 (9th Cir. 1990) (National Forest Services procedures requiring safety review not followed re beach fires and warning thereof--discretionary bar n/a); Williams v. U.S., Civ. # 91-007-S (E.D. Okla., 11 Dec. 1992), on remand from, 957 F.2d 742 (10th Cir 1992)(method of releasing water from lock and design of warning system for fisherman are not discretionary); Ortiz v. U.S., 885 F. Supp. 363 (D.P.R. 1995) (boater who went ashore at Navy maneuver area explodes simulation handed to him by 17 year old son--Navy held liable (70%) for lax enforcement into maneuver area--total award $162,000); Terry v. U.S., Civ. # 92-CV-1685 (N.D.N.Y., June 29, 1995) (exclusion not applicable to injuries to campers caused by slack cable not
constructed according to self-imposed safety requirements); Will v. U.S., 60 F.3d 656 (9th Cir. 1995) (at Forest Service request, Government contractor moves another contractor's road grader without owner's permission to area where it is vandalized--U.S. has duty under state law to warn owner). Nyazie v. Kennedy, 1998 WL32601 (E.D. Pa.) (failure to hand brochure warning of danger of Potomac to injured party's family even though such handouts were customary avoids the discretionary function exclusion. Alef v. U.S. Dept. of Interior, 990 F. Supp. 932 (W.D. Mich. 1997) No duty to warn of danger of diving from sand dune into National Forest Service Lake in quadriplegic diving case. Pearson v. U.S., 9 F.3d 1553, 1993 W.L. 438760 (9th Cir. (Aug)) Decision not to fence wild burros and to provide food and water near U.S. 95 is discretionary; Shively v. U.S., 5 F.3d 540, 1993 WL 312758 (9th Cir. (Calif.)) Decision by Forest Service not post signs on land where it is seen grazing permit is discretionary. Reetz v. U.S., Civ. # 1:97-CV-1036 (S.D. Mich., 1 April 1999), method of marking roads in National Forest for Off the Road Vehicle use is discretionary where driver goes onto public highway and collides on blind curve; Kahan v. U.S., Civ. # 96-01168BMK (D. Haw., 4 May 1999), movable barrier with warning signs is sufficient notice to preclude visitors from walking on beach close to lava flow and steam plane. Weingarten v. U.S., Civ. # 97--393-B (D.N.H., 11 Feb 99), failure to place guard rails at top of crevasse on slope of Mount Washington is discretionary. Gould v. U.S., 160 F.3d 1194 (8th Cir. 1998) where sledder is injured by flying over 6 feet off terrace above COE dams, duty to warn exists as COE ranger had superior knowledge; Caudill v. Dep't of Army, Civ. Action # 98-112 (E.D. Ky., 6 Nov. 1998) no duty to warn where decedent was killed by hitting a downed tree with his boat in COE lake with numerous downed trees. Miller v. U.S., 163 F.3d 591 (9th cir. Or. 1998) where multiple forest fires escape onto private land, method of Forest Service fighting fires is discretionary; Reed v. Avis Rent-a-Car, 29 F. Supp. 2d 121 (N.D. Calif., 1999) BLM is not responsible for sleeping camper being run over by a participant in a performance festival on BLM land based on issue of a permit; Whalen v. U.S., 29 F. Supp. 2d 1093 (D. S. Dak. 1998) where plaintiff walks a short distance from car and falls to death.
off cliff in mountain table in national park, placement of warning signs is discretionary.


(1) Waste and Surplus Property Disposal. Waste and surplus property disposal may be within discretionary function exclusion. Andrews v. U.S., 121 F.3d 1435

(m) RUS Laws. Landowners duty to warn may be abated by State law, i.e., recreational use statute (RUS), exempting United States. A state's RUS statute may exempt the U.S., as it would a private landowner from a duty to warn. Simpson v. U.S., 652 F.2d 831 (9th Cir. 1981) (state statute applies to Federal land as U.S. FTCA liability is coextensive with that of private individual under State law). Accord Proud v. U.S., 723 F.2d 705 (9th Cir.), cert. denied, 467 U.S. 1252 (1984) (no RUS statute—U.S. has liability); Mackey v. U.S., Civ. # 79-221-C (E.D. Okla. 1980) (plaintiff jumps in 3 feet of water at COE project—no RUS—failure to warn and U.S. held liable).

(i) State RUS Decisions. The following state RUS laws have been construed by the courts.

(A) Alabama. RUS applicable. Russell v. TVA, 564 F. Supp. 1043 (N.D. Ala. 1983) (Alabama RUS applies to spillway at dam—not considered to be willful or malicious failure to guard—danger was open and obvious); Bowen v. U.S., Civ. # CV88-H-


(C) Arkansas. RUS not applicable. Roten v. U.S., 850 F. Supp. 786 (W.D. Ark. 1994) Failure of National Park Service to warn of prior falls from cliff and post more signs is not malicious and RUS applies; Mandel v. U.S., 793 F.2d 964 (8th Cir. 1986) RUS not applicable where rangers failed to advise of submerged rocks as swimming hole he recommended was not in Park. Stephens v. U.S., Civ. # LR-C-96-5 (E.D. Ark., 21 May 1998) 15-year-old who is injured in impact when he tossed grenade on ground is a trespasser and Ark. RUS excludes claim (boy was preparing for hunting) as no malice - was partially fenced and warning signs posted.


from rocks in National Forest); Spires v. U.S., 805 F.2d 832 (9th Cir. 1986) (no duty under California RUS to warn jogger of ditch which appeared overnight on beach); Toomey v. U.S., 714 F. Supp. 426 (E.D. Cal. 1989) (RUS applied to fence near off-road vehicle area); Chidester v. U.S., 646 F. Supp. 189 (C.D. Cal. 1986) (Cal. RUS applies to land leased to county to dive into creek); Mattice v. U.S. Dept. of Interior, 969 F.2d 818 (9th Cir. 1992), aff’d, 752 F. Supp. 905 (N.D. Cal. 1990) (car driven through redwood guardrail and off cliff in National Park—Cal RUS applies—§ 2680(a) also applies to retention of guardrail through which car crashed); Mansion v. U.S., 946 F.2d 1115 (9th Cir. 1991) (injury caused by fall at old timer’s picnic at Alameda Naval Air Station is excluded by Cal. RUS); Hammon v. U.S., 801 F. Supp. 323 (E.D. Cal. 1992) (Cal. RUS applied even though camping fee charged for another part of national forest); Ravell v. U.S., 22 F.3d 960 (9th Cir. 1994) (Cal. RUS applied to fall over ground hooks used to tie down USAF planes at show on air base); Grippo v. U.S., 911 F. Supp. 437 (D. Nev. 1995) (Cal. RUS applies to injuries sustained by trespasser who falls in pool of scalding water in National Forest). Newman v. U.S., 86 F.3d 1163 (9th Cir. 1996) (burn injuries to child who enters hot geothermal pool in the Inyo National Forest falls under exclusion); Chester v. U.S., 94 F. 3d 650 (table), 1996 WL 467685 (9th Cir. 1996) (claim for injury on tank at Naval air show precluded by RUS—payment for special seating is not fee, since it is not connected with viewing tank). But see Rost v. U.S., 803 F.2d 448 (9th Cir. 1986) (Cal. RUS does not bar claim for free swinging gate); Termini v. U.S., 963 F.2d 1264 (9th Cir. 1992) (Forest Service spar road along main canyon road which dead ended without warning sign does not fall under Cal. RUS); Donaldson v. U.S., 653 F.2d 414 (9th Cir. 1981) (California law—public expressly invited); Thompson v. U.S., 592 F.2d 1104 (9th Cir. 1979) (California law—fee paid); Coryell v. U.S., 847 F. Supp. 148 (C.D. Cal. 1994) (Cal. RUS not applied to fall due to gap in metal ramp at Miramar Air Show); Soto v. U.S., 748 F. Supp. 727 (C.D. Cal. 1990) (Cal. RUS not applicable to quad diving case in natural pool on so-called undeveloped area used by hundreds—duty to warn). Casas v. U.S., 19 F. Supp.2d 1104 (C.D.
Calif., 1998), civilian trips and falls on Marine Corps base while going to sign up for race - RUS applies.


beach). Kennedy v. U.S., Civ. # 97-15857 (9th Cir., 22 June 1999), family member who is injured in a fall on surging dock in Hickam AFB Harbor is barred by Hawaii RUS. Howard v. U.S., 171 F.3d 1064 (9th Cir. 1999), paying a fee for private sailing course at Hickam AFB Harbor is a fee negating application of Hawaii RUS - court distinguishes between "fee" and "consideration" in many jurisdictions.


(O) Kansas. RUS applicable. Klepper v. City of Milford, Kansas v. U.S., 825 F.2d 1440 (10th Cir. 1987) (Kansas RUS applies to quad diving case at
COE lake); Jensen v. COE, Civ. # 86-1686-K (D. Kan. 1987) (faulty road design in COE recreational area barred by Kansas RUS and § 2680(a)).

(P) Kentucky. RUS applicable. Sublett v. U.S., 688 S.W.2d 328 (Ky. 1985) (Kentucky RUS applies to COE recreational use areas).


(U) Missouri. RUS applicable. Wilson v. U.S., 989 F.2d 953 (8th Cir. 1993) (Mo. RUS applied to electrocution death of 13 year old Boy Scout who was climbing irrigation pipe held by two other Scouts--$2.00 fee paid for lodging to U.S. Army does not bar application of RUS). See also Will v. U.S., 656 F. Supp. 776 (E.D. Mo. 1987) (17 year old becomes quadriplegic diving from tree into BLM lake--no cause of action under Missouri law since
Restatement (Second) of Torts, §342 (1969) applies). Gould v. U.S., 904 F. Supp. 1176, 1998 WL 87415 (W.D. Mo.) (sledgers at COE lake become airborne and are injured when leaving terraced bank - considered licensees and are excluded as danger is open and obvious.


(X) New Mexico. RUS applicable. Maldonado v. U.S., 893 F.2d 267 (10th Cir. 1990) (diving case falls under New Mexico RUS re: duty to warn).


(Z) North Dakota. RUS applicable. Umpleby v. U.S., 806 F.2d 812 (8th Cir. 1986) (negligent road design at COE reservoir--no duty to warn under North Dakota RUS).


Natural Resources Co., 857 F. Supp. 766 (D. Or. 1994) (motorcyclist injured by running into cable strung by Oregon National Guard--claim barred by Oregon RUS.


(ii) Fees. RUS may not be applicable if fee is paid. Graves v. U.S. Coast Guard, 692 F.2d 71 (9th Cir. 1982) (RUS does not apply to U.S. where fee

(iii) Willful and Wanton Conduct. RUS statute generally covers only simple negligence, not willful or wanton conduct. Miller v. U.S., 597 F.2d 614 (7th Cir. 1979); Stephens v. U.S., 472 F. Supp. 998 (C.D. Ill. 1979) (same as Miller); Davis v. U.S., 716 F.2d 418 (7th Cir. 1983) (court again holds U.S. liable for willful and wanton conduct as in Miller in failing to warn divers); Roten v. U.S., 850 F. Supp. 786 (W.D. Ark. 1994) (National Park Service knowledge of prior falls from cliff does establish malice required to negate application of Arkansas);
Collard v. U.S., 691 F. Supp. 256 (D. Haw. 1988) (Hawaii RUS willfulness clause applied to large log near Marine Corps beach); Russell v. TVA, 564 F. Supp. 1043 (N.D. Ala. 1983) (Alabama RUS applies to spillway at dam—not considered to be a willful or malicious failure to guard—danger was open and obvious).


(2) Applicability to Customs Service. Exclusion applies to seizure and detention of property by Customs and Border Patrol officials. Ysasi v. Rivkind, 856 F.2d 1520 (Fed. Cir. 1988) (Border Patrol seizes vehicle transporting aliens within exclusion); Millan v. U.S., 1994 WL 510455 (D.P.R.) (Seizure of winning lottery tickets by Customs falls under exclusion); Reuben v. U.S. Customs Service, Civ. # 3-94-381 (D. Minn., May 13, 1994) (claim for emotional distress based on inspection of herbal medicine in sealed leather pouches of belt being worn--exclusion applies); Locks v. Three Unidentified Customs Service Agents, 759 F. Supp. 1131 (E.D. Pa. 1990) (boring holes in metal sculpture to inspect does not raise to the level of a 4th amendment constitutional

Acosts v. U.S., 1998 WL 351837 (E.D. La.) (claim for damage to molds during customs inspection falls under exclusion).


exclusion applies, but implied contract remains as issue).

(7) Prisoners. U.S. must prove property is returned to prisoner. Sellers v. U.S., 97 F.3d 1454 (table), 1996 WL 525426 (7th Cir. 1996) (U.S. must prove that 41 books seized and inventoried from prisoner were, in fact, returned to him); Riley v. U.S., 938 F. Supp. 708 (D. Kan. 1996) (prisoner signed forms releasing inventoried property to him without indicating any discrepancies--no basis for claim).


(admiralty jurisdiction upstream removed by dam which spans river). But see Jones v. Duke Power Co., 501 F. Supp. 713 (W.D.N.C. 1980) (adopts divergent view that once body of water is navigable, it will be considered as such even though no longer so--also, it gives excellent summary of entire body of law). Particular bodies held to be navigable. Mullenix v. U.S., 984 F.2d 101 (4th Cir. 1993) (Potomac River is navigable even though wholly in Maryland and used for recreational traffic); Finneseth v. Carter, 712 F.2d 1041 (6th Cir. 1983) (COE dam straddling two states held navigable); U.S. v. DeFelice, 641 F.2d 1169 (5th Cir. 1981) (holds privately owned artificial canal navigable, since subject to ebb and flow).

years); Corbett v. U.S., 1997 WL 215699 (E.D.N.Y.) (no equitable tolling under SIA since attorney had duty to file suit even though Navy took 7 months to determine SIA applied); Bovell v. U.S. DOD, 735 F.2d 755 (3d Cir. 1984) (does not toll SIA); Raziano v. U.S., 999 F.2d (11th Cir. 1993) (equitable tolling under SIA Act not permitted where negotiation with Coast Guard ran past 2 year filing limit). Contra McCormick v. U.S., 680 F.2d 345 (5th Cir. 1982) (obstacle in navigable water placed by COE does not fall under FTCA where COE held administrative claim until two year filing requirement under SIA expired); Northern Metal Co. v. U.S., 350 F.2d 833 (3rd Cir 1965).


In re Ohio River Disaster Litigation, 862 F.2d 133 (6th Cir. 1989) (discretionary function applies to failure to contain ice flow on Ohio River); Graves v. U.S., 872 F.2d 888 (5th Cir. 1990) (discretionary function bars SIAA suit for contribution by vessel owner re: asbestos exposure by seaman); In re Lloyd's Leasing Ltd., 764 F. Supp. 1114 (S.D. Tex. 1990) (when and how to dredge channel is at COE discretion and falls under exclusion in SIAA suit); Cassens v. St. Louis River Cruise Lines, 44 F.3d 508 (7th Cir. 1995) (discretionary function exclusion applies to certification by Coast Guard of vessel with defective hand rails); Baldassaro v. U.S., 64 F.3d 206 (5th Cir. 1995) (exclusion applies to injury to seaman caused by fall from bank of U.S. vessel when detachable sea rail separated); Tew v. U.S., 86 F.2d 1003 (10th Cir. 1996) (neither COE or Coast Guard has duty to remove private party's unauthorized understructure in wrongful death suit—Wreck Removal Statute, 33 U.S.C. § 403c et seq is discretionary); Good v. Ohio Edison, 1996 WL 652593 (N.D. Ohio) (where boat collides with an unlit concrete and steel platform on Lake Erie—USCG has discretion regarding inspection); O'Barry v. U.S., 915 F. Supp. 345 (S.D. Fla. 1995) (method of preventing environmental activists from reaching underwater explosion is discretionary). But see Sutton v. Earles, 26 F.3d 903 (9th Cir. 1994) (Non-discretionary duty to warn of presence of buoy in areas where Navy permitted pleasure boats); Dinger v. Hornbeck Offshore Services, Inc., 968 F. Supp. 957 (S.D.N.Y. 1997) (discretionary function exclusion not applicable to Coast Guard inspection of vessel where inspector did not know of requirement for relief valve). The discretionary function exclusion also applies to the Public Vessels Act. U.S. Fire Ins. Co. v. U.S., 806 F.2d 1529 (11th Cir. 1985). Good v. Ohio Edison, __F.3d__, 1998 WL 404256 (6th Cir., Ohio) (nonmandatory inspection by Coast Guard of light on tower falls under discretionary function. Also holds 3d party plaintiff must show victims relied on CG's inspection. Pennisi v. U.S., Civ. # C9700530 SBA (N.D. Calif., 14 August 1998) discretionary function does not apply to dumping of 1000 pound Navy mine fished up by trawler outside designated dumping area. Theriot v. U.S., Civ. # 97-30982 (5th Cir., 1 Dec 98, method of warning public of sill or weir
to divert water to keep channel from silting is discretionary.


(9) Limitation of Liability Statute. Limitation of liability applies to vessel of U.S., including privately owned Coast Guard auxiliary boat. Dick v. U.S., 671 F.2d 724 (2d Cir. 1982). Negligence of captain or master is insufficient to deny limitation of liability. Petition of Kristie Leigh Enterprises, Inc., 72 F.3d 479 (5th Cir. 1996) (tug owners petition for limitation of liability cannot be denied for failure to discover Captain’s similar past navigational errors). Limitation value is value after collision. In re Petition of Banker's Trust Co., 569 F. Supp. 386 (E.D. Pa. 1983). The limitation of liability statute is not applicable to non-navigable waterways not open to commerce. In Matter of Fields, 967 F. Supp. 969 (M.D. Tenn. 1997) (due to fact that lake created by dam is not navigable and open to commerce, limitation of liability statute is not applicable to marina fire). In re Maer, 146 F.3d 440 (6th Cir. 1998) (fact that owner was operating ship does not deprive LOLA jurisdiction in absence of showing fault.

(10) Feres and Admiralty Cases. Feres doctrine applicable in admiralty. Potts v. U.S., 723 F.2d 20 (6th Cir. 1983); Cusanelli v. Klaver, 698 F.2d 82 (2d Cir. 1983); Charland v. U.S., 615 F.2d 508 (9th Cir. 1980); Beaucoudray v. U.S., 490 F.2d 86 (5th Cir. 1974).


civilian driving ATV is enemy force and points guns--
allegations of assault and intentional infliction of
economic distress are one and the same--on appeal, court
held that question of assault is not reached, since there is
no tort of negligent infliction of economic distress--
tentional infliction not plead).

(1) Assault or Battery (A or B).

(a) Apprehension. The A or B includes placing in
apprehension by mere words. U.S. v. Hambleton, 185
F.2d 564 (9th Cir. 1950). The A or B exclusion also
includes intentional assaults with vehicles. Martinez
applied as assault with GOV intentional); Brooks v.
national park shoots plaintiff's dog, then allegedly
waves gun in air - no assault as he did not point gun
at plaintiff..

(b) Battery. A or B exclusion includes torts which
constitute battery alone. Lambertson v. U.S., 528 F.2d
441 (2d Cir. 1976); Blatchford v. Geurra, 548 F. Supp.
1241 (W.D. La. 1987) (lack of intent due to
intoxication in shooting-still a battery).

(c) Emotional Distress. However, an A or B could be
actionable as intentional or negligent infliction of
emotional distress where recognized by local law.
Truman v. U.S., 26 F.3d 592 (9th Cir. 1994) (sexual
harassment including gestures towards crotch of
Commissary contract stocker is not excluded as it
constitutes emotional distress); Jones v. FBI, 139 F.

(d) Medical Care. A or B exclusion does not apply to
1975); Fontenelle v. U.S., 327 F. Supp. 801 (S.D.N.Y.
See also Kelly v. U.S., Civ. # 91-01-CIV-3-BR
(E.D.N.C., 27 Aug. 1992), aff'd, 4 F.3d 985 (table),
1993 WL 321581 (4th Cir. 1993) (no assault in
performing tubal ligation as proper consent was
obtained). But see Bembenista v. U.S., 866 F.2d 493
(D.C. Cir. 1989) (sexual molestation of patient by
medical technician assigned to her care not barred by
exclusion due to high duty of care applicable);

and length thereof justified in FBI drug bust relative to 15 year old male and 12 year old female).


(h) Sexual Assault. A sexual assault by a U.S. government employee may fall within the A or B exclusion. Gay v. U.S., 739 F.2d 275 (D. Md. 1990) (no
16-year-old patient is not an assault. Olds v. U.S., Civ. # 96-2682 (W.D. La., 10 Feb 1989), due to special relationship between rape victim or gym employees, U.S. is responsible by failing to follow mandatory SOP award of $89,170. Leleux v. U.S., Civ. #97-1125 (W.D. La., 5 August 1998), affirmed 178 F.3d 750 (5th Cir. 1999), consensual sex between recruiter and recruit constitutes battery and 2680(h) exclusion cannot be circumvented by plea of negligent hiring, retention and supervision.


(E.D.N.Y. 1996) (assault of security guard by IRS employee with known violent propensities is under exclusion based on Sheridan).


(m) Artful Pleading. A or B exclusion may not be evaded by artful leading. Hayslip v. U.S., Civ. # 94-6908-CIV-DAVIS (S.D. Fla., May 11, 1995) (postman throws rock-throwing child to ground falls under exclusion--negligence allegation is artful pleading).


defense of federal criminal action for fraud based on negligent DCAA audit barred by discretionary function exclusion--auditor negligence did not cause damage: discretionary decision to prosecute did); Gray v. Bell, 712 F.2d 490 (D.C. Cir. 1983) (indictment of former Acting Director of FBI not actionable); Hohri v. U.S., 586 F. Supp. 769 (D.D.C. 1984) (WWII West Coast evacuation of Japanese-Americans not actionable); Wilkins v. May, 872 F.2d 190 (7th Cir. 1989) (original arrest by local police continues when FBI takes over--arrest is defined as a continuing event); Kaiser v. U.S., 761 F. Supp. 150 (D.D.C. 1991) (questioning claimant to get statement when claimant was trying to get emergency care for her wounded dog is not an arrest); Matthews v. U.S., 805 F. Supp. 712 (E.D. Wis. 1992) (claim for conspiracy to entrap which led to Federal indictment is excluded); Enterprise Electronics Corp. v. U.S., 825 F. Supp. 983 (M.D. Ala. 1992) (exclusion applies to negligent DCAA audit which led to several suits against Government contractor); Employer Ins. of Wassau v. U.S., 1993 WL 61406 (N.D. Ill. 1993) (EPA CERCLA enforcement action falls under exclusion); Sutton v. U.S., 819 F.2d 1289 (5th Cir. 1987) (discusses interplay between § 2680(a) and § 2680(h) re decision of postal inspector to investigate and prosecute); U.S. v. Articles of Drug v. Midwest Pharmaceuticals Inc., 825 F.2d 1238 (8th Cir. 1987) (applied to decision to seize drugs and prosecute pharmaceutical company); McElroy v. U.S., 861 F. Supp. 585 (W.D. Tex. 1994) (forcible arrest of occupants from other side of duplex during drug bust is discretionary and use of law enforcement exception in § 2680(h) is not permitted as discretionary function exclusion in § 2680(a) predominates--cites Sutton v. U.S., 819 F.2d 1289 (5th Cir. 1987). But see Chandler v. U.S., 875 F. Supp. 1250 (N.D. Tex. 1994) (GSA investigator presents false evidence to AUSA who prosecutes unsuccessfully for perjury--two GSA employees recover $5,000 each). See also Maldanado v. Pharo, 940 F. Supp. 51 (S.D.N.Y. 1996) (suit of malicious prosecution permitted, but not for abuse of process, where claimant was not arrested and charges for possession of controlled substances were dropped). Of course even if exclusion not applicable, causation must be shown. Exclusion bars suit based on criminal complaint which lead to arrest. See, e.g., Rourke v. U.S., 744 F. Supp. 100 (E.D. Pa. 1988) (decision to file criminal complaint is discretionary and suit precluded, however must establish proximate cause for arrest).

(a) Medical Care. This exclusion applies to Medical Care. Johnson v. U.S., 547 F.2d 688 (D.C. Cir. 1976);


(cause of action where arrest is based on owner's refusal to return airplane logs they remove with permission—owners do not have cause of action for infliction of emotional distress); Hyatt v. U.S., 546 F. Supp. 96 (E.D.N.Y. 1997) ($297,000 award for 99 days imprisonment based solely on identification of DEA agent who had seen suspect for one hour some 9 years previously and plaintiff did not match available identification record); Adee > v. U.S., 782 F. Supp 688 (D. Mass. 1982) (detention and search of returning alien not based on reasonable suspicion of drug smuggling—award of $215,000); Kennedy v. U.S., 585 F. Supp. 1119 (D.S.C. 1984) (MPs had inadequate description—no probable cause). Of course, even if the arrest is valid, excessive force cannot be used. Morales v. U.S., 961 F. Supp 633 (S.D.N.Y. 1997) (DEA agent’s arrest of DOT employee attempting to tow an illegally parked vehicle may have involved excessive force). Also, there is no set amount of time that constitutes an unreasonable detention. Applewhite v. U.S. Air Force, 995 F.2d 997 (10th Cir. 1993) (wife of airman arrested in off-base drug bust along with husband and transported to base and held 3 hours while local police are being requested to take over her investigation—held arrest is reasonable and not violative of Posse Comitatus Act); Daniel v. Taylor, 808 F.2d 1401 (11th Cir. 1986) (two hours, 45 minutes executing search warrant does not constitute unreasonable detention). If an unreasonable detention occurs, damages will be awarded. Rhoden v. Department of Justice, 121 F.3d 716 (table), 1997 WL 408876 (9th Cir. 1997) ($4,500 award for unreasonable detention of 4 days is adequate). Arrests for petty offenses are also governed by state law. See M.C. Bassiouni, Charles Thomas, Citizen's Arrest (1977) (compendium of State laws on citizen's arrest and shoplifters statutes). U.S. v. Mullen, 178 F.3d 334 (5th Cir. 1999), MPs have authority to arrest and interrogate civilians they observe breaking into POV on post by virtue of citizen's arrest under Texas law—cites Kennedy v. U.S., 585 F. Supp. 1119, (E.S.C. 1984) and U.S. v. Banks, 539 F.2d 14 (9th Cir.) cert. Denied 429 U.S. 1028 (1976).

(d) Valid Warrant. Liability does not exist when arrest is based on execution of a facially valid and judicially authorized search warrant in a case of mistaken identity. Mesa v. U.S., 837 F. Supp. 1210 (S.D. Fla. 1993), aff'd, 123 F.3d 1435 (11th Cir. 1997) (DEA arrested wrong Pedro Pablo Mesa on a facially

(e) Service Members. Service members held on or ordered to AD under duress may be subject to exclusion as well as being barred by Feres (see cases listed IE.10n).


Agriculture, 508 F. Supp. 237 (S.D.N.Y. 1981) (erroneous determination meat was adulterated). But see National Carriers Inc. v. U.S., 755 F.2d 675 (8th Cir. 1985) (exclusion does not apply to Federal meat inspector's erroneous determination that contaminated and uncontaminated beef need not be separated). Cases holding misrepresentation exclusion not applicable. Mundy v. U.S., 983 F.2d 950 (9th Cir. 1993) (misrepresentation exclusion not applicable where contract employee lost security clearance as his favorable FBI report was placed in his wife's personnel file); Appley Bros. v. U.S., 7 F.3d 720 (8th Cir. 1993) (exclusion is not applicable where U.S. closes grain warehouse without discovering violation); Guild v. U.S., 685 F.2d 324 (9th Cir. 1982) (Dept. of Agriculture plans for community built dam failed--held not misrepresentation as performing operational task). Lemke by Lemke v. City of Port Jervis, 991 F. Supp. 261 (S.D. N.Y. 1998) Misrepresentation exclusion not applicable where U.S. assumes responsibility to inspect house prior to making loan and fails to inform borrower of obvious lead pipe plumbing.


misrepresentation since only bare conclusion stated); Matthews, supra, 456 F.2d 395; Builders Corp. of America v. U.S., 259 F.2d 766 (9th Cir. 1958) (building housing project by military post on CO's representations of full occupancy which were not carried out); Park v. U.S., 517 F. Supp. 970 (D. Or. 1981) (FHA inspection faulty--holds no misrepresentation); Brown v. U.S., 193 F. Supp. 692 (N.D. Fla. 1961) (surplus bombs sold "as is," one exploded--no misrepresentation no matter how characterized). JBP Acquisitions LP v. U.S., Civ. # 1:98-CV-149-RWS (N.D. Ga., 22 Feb 1999), purchasers of foreclosed property at auction are not informed by Resolution Trust Co., that property is being condemned for Olympic Games -- exception applies.


to family member who was burned); Jimenez Nieves v. U.S., 618 F. Supp. 66 (D.P.R. 1985) (due to error in records U.S. dishonors social security check--exclusion applies to damage to reputation, but not to actual emotional injuries).


k. Combat Activities. Combat activities of military or naval forces or the Coast Guard (28 U.S.C. § 2680(j)).


(3) High Seas. Includes High Seas: Blumenthal v. U.S., 306 F.2d 16 (3d Cir. 1962) (plane over Sea of Japan);


m. Agencies Sueable in Own Name. Agencies which can be sued in their own name. TVA (28 U.S.C. § 2680(i)) (16 U.S.C. §§ 831 et. seq.), Panama Canal Commission (28 U.S.C. § 2680(m)); (22 U.S.C. § 3671), Federal Land Banks, intermediate credit banks, and banks for cooperatives (12 U.S.C. §§ 641 et. seq.) (28 U.S.C. § 2680(h)), are excluded as all can be sued in their own name. See, e.g., Springer v. Bryant., 897 F.2d 1085 (11th Cir. 1990) (wrongful death statute in Alabama is punitive--suit against TVA barred); Husted v. U.S., 667 F. Supp. 831 (S.D. Fla. 1985) (accident claim barred under FTCA, since they arose from Panama Canal Commission and barred against company by one year SOL); McClain v. Panama Canal Commission, 834 F.2d 452 (5th Cir. 1987) (Commission has no jurisdiction over wrongful death claim in excess of $500,000); Segarra Ocasio v. Banco Regional De Bayamon, 581 F. Supp. 1255 (D.P.R. 1984) ("Sue and be sued" clause of FDIC Act does provide for remedy outside FTCA). See also Federal Express Co. v. U.S. Postal Service, 959 F. Supp. 832 (W.D. Tenn. 1997) (USPS can sued directly for false advertising under "sue and be sued" clause in Postal Reform Act). Claims against the Army arising in Canal Zone are no longer cognizable under FTCA, since Zone no longer exists by virtue of treaty effective 1 October 1979. Such claims now cognizable under the Foreign and Military Claims Acts.

conversion does not preclude simultaneous suit under Tucker Act); Teagarden v. U.S., __ Fed. Cl. __ 1998 WL787352 (Fed Cl) taking action for loss of timber by fire allegedly due to Forest Service directing priorities elsewhere is brought after loss of FTCA suit due to 2680(a)--court has jurisdiction but adopts District Court decision.

o. Flood Control Immunity. Damage from flood and flood waters (33 U.S.C. § 702c (Act of 15 May 1928, 45 Stat. 535, as amended by the act of 22 June 1936, 49 Stat. 1570). Section 702c flood control immunity may bar a suit if government is actively managing dam, reservoirs or flood waters. See, e.g., Boudreaux v. U.S., 53 F.3d 81 (5th Cir. 1995) (Coast Guard auxiliary acting as agent of COE to provide water safety on flood control lake injures claimant with his anchor during rescue attempt--immunity applies--court broadly construes James, infra, as meaning management of project even though flood waters not involved); Reese v. South Florida Water Management Dist., 59 F.3d 1128 (11th Cir. 1995) (fisherman drowns from release of waters from lock on water control device--immunity applies); Fryman v. U.S., 901 F.2d 79 (7th Cir. Ill. 1990), cert. denied 498 U.S. 920 (1990), (Section 702c applies to quad diving case from sandbar in COE reservoir); Mocklin v. Orleans Levee District v. Luhr Bros. Inc., 877 F.2d 427 (5th Cir. 1989) (Section 702c applies to child drowning in dredged flotation channel); McCarthy v. U.S., 850 F.2d 558 (9th Cir. 1988) (Section 702c immunity applies to quad diving case, since water level was controlled and fluctuated); Dawson v. U.S., 894 F.2d 70 (3d Cir. 1990) (Section 702c applies to drowning in swimming area of flood control lake); Dewitt Bank & Trust Co. v. U.S., Civ. # 88-2355 (8th Cir. 1989) (Section 702c applies to quadriplegic diving case at COE Recreational Site); Zavadil v. U.S., Civ. # 89-1813 (8th Cir. 1990) (quad diving case barred where dive into submerged concrete boat ramp from pier); Crowley Marine Services, Inc. v. Fed. Nav. Ltd., 924 F. Supp. 1030 (E.D. Wash 1995) (flood control immunity does not apply to CERCLA claims, but it precludes FTCA suit, even though release of water contained hazardous substances); Powers v. U.S., 787 F. Supp 1397 (M.D. Ala. 1992) (Section 702c bars claims based on failure to inform of availability of insurance under National Flood Control Act); Dawson v. U.S., Civ. # 86-739 (W.D. Pa. 1989) (Section 702c applies since water monitored daily); Minor v. U.S., No. 94-30493 (5th Cir., 17 Jan. 1995) ( flood control immunity applies to child drowning in a stilling basin at Morganza Spillway). Accord Henderson v. U.S., 965 F.2d 1488 (8th Cir. 1992). However, the immunity does not apply in all situations where the government is managing water projects. The operation and setting of the water level must be in furtherance of flood
control. Bailey v. U.S. Dept. of Army Corps of Engineers, 35 F.3d 1118 (7th Cir. 1994) (in order to apply immunity, U.S. must show that flood control operations, e.g., water level, played a role in causing quadriplegia in diving case--many cases are compared); Cantrell v. U.S. Dept. of Army Corps of Engineers, 89 F.3d 269 (6th Cir. 1996) (stranded fisherman's barge driven by Corps employee strikes newly exposed shoreline due to annual drawdown of lake--immunity does not apply as Corps not fisherman was driving boat); E. Ritter & Co. v. Dept. of Army COE, 874 F.2d 1236 (8th Cir. 1989) (Section 702c inapplicable to failure to maintain drainage ditch causing inundated crop); Boyd v. U.S. ex rel. U.S. Army COE, 881 F.2d 895 (10th Cir. 1989) (Section 702c not applicable to injury to swimmer struck by boat propeller); Arkansas River Co. v. U.S., 840 F. Supp. 1103 (N.D. Miss. 1993) (claim for barges damaged in lock on Mississippi not excluded by 33 U.S.C. § 702c); Pueblo de Conchiti v. U.S., 647 F. Supp. 538 (D.N.M. 1986) (dam used for more than flood control--Section 702c does not bar action for failure to repair causing flood). Accord Clay v. U.S., 647 F. Supp. 110 (S.D. Miss. 1986). Central Green Co., v. U.S., __ F.3d __, Civ. #97-17321 (9th cir., 6 Oct 98), release of water from irrigation canal allegedly damaging pistachio farm falls under exclusion as canal is part of Central Valley Flood Control Project.


(4) Indemnity From Flood Control Beneficiary. In many flood control projects an examination of the authorizing statute will reveal that the non-Federal beneficiary of such project is required to hold and save harmless the United States from damages due to the construction operation and maintenance of the project. This provision usually not found in multi-beneficiary projects. Further, the local beneficiary is not required to hold and save harmless damage due to the fault and negligence of the United States or its contractors (§ 9, P.L. 93-251, 88 Stat. 12, Act of 7 March 1974). See Smith v. U.S., 497 F.2d 500 (5th Cir. 1974) (hold harmless clause required indemnification even though U.S. was negligent). But see Butler v. U.S., 726 F.2d 1057 (5th Cir. 1984) (hold harmless clause by county not upheld where COE prevented county from filling in or posting warning signs on off-shore borrow pit).
q. Federal Disaster Relief Act of 1954, 42 U.S.C. § 5173, contains a requirement that the local beneficiary (State or local jurisdiction) hold the United States harmless and assume all claims out of removal of debris or wreckage from public and private property. Agreements setting forth such procedures are worked out on each occasion, e.g., emergency snow removal. See IIB5v for case cites.


(prosecutor immune where release of confidential information exposed claimant and family to possible harm).


5. Another Non-Judicial Authorization May Be Applicable. FTCA is exclusive negligence remedy. See IIB5a(2) below. See, e.g., Segarra Ocasio v. Banco Regional De Bayamon, 581 F. Supp. 1255 (D.P.R. 1984) ("Sue and be sued" clause of FDIC Act does provide for remedy outside FTCA). Several are:


(1) Negligence Outside U.S. Applies to negligence cases outside United States, i.e., in foreign countries. Poindexter v. U.S., 777 F.2d 231 (5th Cir. 1985) (negligence requirement contained in the regulation is valid, even though not in statute). However, a claim against a foreign country can be maintained only if the foreign country has waived sovereign immunity. McNamara v. U.S., Civ. # 2:94cv277 (E.D. Va., 23 June 1994) (slip and fall in Navy swimming pool in Panama--efforts to file claim under Panama Canal Treaty and Foreign Relations Act fail, since no waiver of sovereign immunity). Even with the Military Claims Act, a suit against the individual defendants for negligence occurring in a foreign country is not allowable. U.S. v. Smith, 499 U.S. 160, 111 S.Ct. 1180 (1991) (suit by parents for negligence in delivery of their child in Army hospital in Italy--U.S. substituted for individual physician and case dismissed under foreign country exclusion). Accord Miller v. U.S., 73 F.3d 878 (9th Cir. 1995) (suit for death of soldier in Japan in military hospital).


(4) Real Property. Real property used under lease, express, or implied (e.g., maneuvers) generally considered under AR 405-15 first, particularly where lease or use permit involved. See, e.g., Borquez v. U.S., 773 F.2d 1050 (9th Cir. 1985) (where maintenance and operation of U.S. dam turned over to local beneficiary, U.S. not liable). P.L. 85-804 and Executive Order 1078, 14 November 1958, (Sec. XVII ASPR) may also be used where claim is contractual (express or implied) in nature and formal contracting procedures were not followed, e.g., supplies or services obtained in emergency.


(10) Single Service Authority. One service processes claims from all services arising in a foreign country in which single service directives are in effect. These directives apply only to the Military Claims Act, Foreign Claims Act and NATO-SOFA. They do not apply to personnel claims (31 U.S.C. §§ 240-43) which are handled by the respective service of the service member claimant.

(11) Damages Limitation. Damages limited by AR 27-20 (28 February 1990) (now superseded) to those authorized by the Death on the High Seas Act (DOHSA) (46 U.S.C. § 688). For leading cases, see Miles v. Apex Marine Corp., 498 U.S. 19, 111 S.Ct. 317 (1990) (discusses Gaudet and Moragne, and distinguishes Jones Act wrongful death actions); Moragne v. States Marine Lines Inc., 398 U.S. 375, 90 S.Ct. 1772 (1970); Sea Land Services Inc. v. Gaudet, 414 U.S. 573 (1974). See also Oldham v. Korean Airlines, Ltd., 127 F.3d 43 (D.C. Cir. 1997) (discussion of wrongful death damages under DOHSA, including whether sister can recover for loss of support or loss of guidance, training and advice, loss of inheritance and whether survivors would have been financial independent after age 18); Fox v. U.S., 1996 WL 440681 (N.D. Cal.) (Navy held liable for negligent rescue of pleasure craft and its passengers who were entitled to damages under general maritime law--only first mate of vessel was entitled to DOHSA recovery); Horsley v. Mobil Oil Corp., 1993 WL 255134 (D. Mass.) (Miles applies to PI as well as WD cases--non-pecuniary loss of spouse and children are not payable). Accord Michels v. Petroleum Helicopter, 995 F.2d 82 (5th Cir. 1993). Only dependents may recover under DOHSA. In the Matter of P & E Boat Rentals Inc., 872 F.2d 642 (5th Cir. 1989) (dependent defined as "where contributions are made for the purpose and have the result of, maintaining or helping to maintain the dependent in his customary standard of living"); Kline v. Maritime CP Inc., 791 F. Supp. 455 (D. Del 1992) (partial


(1) Effective Date. FTCA amended to include National Guardsman on Federally funded training duty for cases arising on or after 29 December 1981. However, amendment does not immunize state where state has waived sovereign immunity. U.S. v. State of Hawaii, 832 F.2d 116 (9th Cir. 1987). Application of National Guard Claims Act now limited to claims not based on negligence, e.g., non-combat activity, property and mail claims. 32 U.S.C. § 334 has been rescinded--now under 10 U.S.C. § 1089. (See IIB5a(4)-(6) above).

(2) National Guardsmen Are State Employees. National Guardsmen not in active Federal Service are not U.S. employees under FTCA, but state employees. Maryland for use of Levin v. U.S., 381 U.S. 41, 85 S.Ct. 1293 (1965); Storer Broadcasting Co. v. U.S., 251 F.2d 268 (5th Cir. 264


(b) National Guard Claims Act Coverage and Finality. National Guard Claims Act has same coverage and finality as Military Claims Act. Decision of agency is final and conclusive. Rhodes v. U.S., 760 F.2d 1180 (11th Cir. 1985) (determination that Army National Guardsman driving U.S. sedan on four hour trip to register for civilian courses is not covered by Act is final and not subject to judicial review); County Commissioner of Morgan County West Virginia, Civ. #
c. Tucker Act (28 U.S.C. §§ 1346a, 1491). Exclusive jurisdiction over a taking as opposed to a tort is vested in the United States Court of Federal Claims (formerly the United States Claims Court (1982-1992) and the United States Court of Claims (1855-1982)). This includes inverse condemnation as opposed to consequential damages. The Tucker Act also includes contract claims, either express or implied-in-fact, against federal appropriated fund agencies, since it acts as a waiver of sovereign immunity. Research Triangle Institute v. Board of Governors of the Federal Reserve System, 132 F.3d 895 (4th Cir. 1997) (Tucker Act not applicable to a non-appropriated fund agency). Miller v. Auto Craft Shop, 13 F. Supp.2d 1220 (M.D. Ala. 1997), failure to properly repair soldier's auto at Auto Craft Shop, a NAFI, falls under Little Tucker, granting court jurisdiction not available in tort, that is, Feres bar under FTCA and nonreviewability of MCA.


(2) Court of Federal Claims. Court of Federal Claims has exclusive jurisdiction over $10,000 for claims based on express or implied contract. See, e.g., O’Ferrell v. US., 968 F. Supp. 1519 (M.D. Ala. 1997) (claim for $500,000 FBI reward in mail bombing case is a breach of contract under jurisdiction of U.S. Court of Federal Claims); Advanced Materials, Inc. v. U.S., 955 F. Supp. 58 (E.D. La. 1997) (claim against DCAA for negligent
audit falls under contract’s “disputes” clause vesting jurisdiction in either Court of Federal Claims under the Tucker Act or the Armed Services Board of Contract Appeal under the Contracts Disputes Act); Burkins v. U.S., 112 F.3d 444 (10th Cir. 1997) (Court of Federal Claims has exclusive jurisdiction over backpay claim in amount of $170,000 denied by ABCMR); McAbee Construction Co. v. U.S., 97 F.3d 1531 (Fed. Cir. 1996) (adding additional dredging spoil to land on which COE has easement causing diminished value is a Court of Federal Claims case); Winchell v. U.S. Dept. of Agriculture, 790 F. Supp 214 (D. Mont. 1989) (bad faith in refusal to continue lending falls under exclusive jurisdiction of U.S. Claims Court—not an FTCA matter); Hall v. U.S., CIV. # 410-88C (Cl. Ct. Cl. 1990) (sale of ($167,550 aircraft engine by mistake as surplus for price of $15 is revocable as void ab initio); Wolf v. U.S., 855 F. Supp. 337 (D. Kan. 1994) (failure of FmHA to carry out provisions of mortgage contract constitutes a contract claim under Tucker Act); Chabal v. Reagan, 822 F.2d 349 (3d Cir. 1987) (back pay claim over $10,000 under exclusive jurisdiction of U.S. Court of Federal Claims); Blanchard v. St. Paul Fire & Marine Insurance Co., 341 F.2d 351 (5th Cir. 1965), cert. denied, 382 U.S. 829 (1965); Claxton v. SBA, 525 F. Supp. 777 (S.D. Ga. 1982) (contract for sale of land); Schell v. National Flood Insurers Association, 520 F. Supp. 150 (D. Colo. 1981); Brewer v. HUD, 508 F. Supp. 72 (S.D. Ohio 1980) (sale of HUD owned house-broker’s cross claim against government solely within Court of Federal Claims jurisdiction). Federal District courts have concurrent jurisdiction under the Little Tucker Act when suit is for $10,000 or less, 28 U.S.C. § 1346(a) (2). Gardner v. Harris, 391 F.2d 885 (5th Cir. 1968). However, if a separate statute authorizes suit, suit may be brought under that statute as well. Navarro v. U.S., 586 F. Supp. 799 (D.V.I. 1984) ($10,000 limit not imposed where Small Business Act permitted suit with no limit). In order for a court to have jurisdiction under the Tucker Act, the plaintiff must be a party to the contract. Mortise v. United States, 102 F.3d 653 (2nd Cir. 1996) (agreement by National Guard to hold county harmless from third party liability does make not injured party a third party beneficiary of contract, since only county was beneficiary). However, non-contract claims are not cognizable under the Tucker Act. Coleman American Moving Services v. Weinberger, 716 F. Supp. 1405 (M.D. Ala. 1989) (claim for make up tonnage during suspension not under Tucker Act); A-B Cattle Co. v. U.S., 621 F.2d 1099 (Cl. Ct. Cl. 1980) (declaration of taking under 40 U.S. § 258a is not a contract); Martin v. U.S., 649 F.2d 701
(9th Cir. 1981) (holds failure to repair house U.S. sold is tort).


other site, even though plaintiff built a facility to store it at great expense--neither a taking nor a tort); Owen v. U.S., Civ. # 73-851 (Ct. Cl. 1990) (channel not undercut by dredging for Tombigbee project, but by other forces--U.S. not liable for washing away house); Palm v. U.S., 835 F. Supp. 512 (N.D. Cal. 1993) (claims for emotional distress due to projectile explosions and low overflight at adjacent USAF base lie in tort, not taking); Worman v. U.S., 98 F.3d 1360 (table), 1996 WL 593938 (Fed. Cir. 1996) (Customs service seizure of tools and gun which they lost was not a 5th Amendment taking, since property was not seized for public use). Sometimes it is both a taking and a tort. Baez v. U.S., 976 F. Supp. 102 (D.P.R. 1997) (refusal of SBA to convey title to property on which plaintiff made $7,000 deposit and spent time and money cleaning is both a taking and a tort). Del Rio Drilling Programs Inc. v. U.S., 146 F.3d (Fed. Cir. 1998) (Tucker Act taking exists even if U.S. officials acts unauthorized but within scope; Thune v. U.S., __Fed. Cl.__, 1998 WL 293755 (Fed. Cl.) controlled burn escapes and destroys its personal property due to unanticipated wind shift - not taking). Bell South Telecommunications v. U.S., 991 F. Supp. 920 (E.D. Tenn. 1996) (Bell South contract at Oak Ridge is taken over by U.S. West. Bell South alleges U.S. West converted its equipment with U.S. assistance - case is one in contract - not tort. Warr v. U.S., Civ. # CY-98-3014-AAM (E.D. Wash, 3 Aug 98), where suit for loss of water rights turns on contractual duty to supply water, suit is a taking, not a tort.

(6) Federal Child Care Provider Program (FCCP). AR 215-1 obligates Army to pay for torts of FCCP. Lee v. U.S., 124 F.3d 1291 (Fed. Cir.), on rehearing, 129 F.3d 1482 (Fed. Cir. 1997) (AR 215-1 provides insurance for FCC provider--however, no liability in child abuse case since provider signed express agreement that insurance did not cover assaults).


(1) Applicability. Applies to property of Federal employees and service members only--no subrogees.

(2) Feres. Feres bars property claims. See IE.10z above.

. Includes property of immediate household).
(4) Incident to Service. Must arise incident to service, e.g., in quarters or office, while being shipped under orders or otherwise incident to performance of duties.

(5) Contributory Negligence. Contributory negligence bars claim regardless of local law.


(1) Coverage. Covers claims not payable under other authorities as they arose out-of-scope.

(2) Limitations on Coverage. Limited to use of U.S. vehicle any place and other U.S. property on U.S. installation.

(3) Subrogated Claims. Excludes subrogated claims and those covered by insurance whether used or not.

(4) Limitations on Recovery. $1,000 limit per claimant and then only for actual out-of-pocket expenses.


f. Article 139, Uniform Code of Military Justice (19 U.S.C. § 939) (32 C.F.R. § 536.25). Covers claims for property damaged or stolen by willful acts of service members or, if unidentified, his unit can be assessed out of their pay. SOL is Navy-30 days, Army-90 days, Air Force-90 days. Oral or written complaint allowable.


(1) Coverage. Covers all negligent and willful acts of U.S. service members in foreign countries, both in-and-
out-of-scope. However, there is no requirement that a Foreign Claims Act program be established because of a military operation in a foreign country. McFarland v. Cheney, 971 F.2d 766 (table), 1992 WL 168006 (D.C. Cir. 1992) (refusal to establish Foreign Claims Act program for Operation Just Cause is not subject to judicial review).

(2) Claimant Eligibility. Only persons normally resident in a foreign country can claim. U.S. citizens can claim under Military Claims Act

(3) Settlement. Claims for in-scope acts settled where there is a treaty by host country under cost sharing formula, e.g., IIB5h(2) below.

(4) Law of Place. Law of place of tort applies in determination of liability and damages.


h. NATO-SOFA. NATO-SOFA and similar agreements (Article VII, UST & OIA Pt. 2; 10 U.S.C. § 2734). See, e.g., Dancy v. Department of Army, 897 F. Supp. 612 (D.D.C. 1996) (ex-Army employee’s claim for destruction of car is under SOFA as exclusive remedy, since he is resident of Germany).

(1) In Scope. Must arise from “in-scope” act of service member of Sending State. Scope determined by Sending State-arbitration permitted.

(2) Cost Sharing Formula. Cost sharing formula-usually 75 percent (Sending State) and 25 percent (Receiving State).

(4) Claims in U.S. In United States, such claims fall under FTCA and must be against U.S. (Robertson v. U.S., 294 F.2d 920 (D.C. Cir. 1961)). See also Brown v. Minister of Defence of United Kingdoms, 685 F. Supp. 1035 (E.D. Va. 1988) (injury on docked British ship under FTCA--must file administrative claim); Lowry v. Commonwealth of Canada, 917 F. Supp. 290 (D. Vt. 1996) (suit must be against U.S. for Canadian helicopter overflight regardless of whether aircraft was on a NATO mission); Krumins v. Atkinson, 1996 WL 432477 (E.D. Pa.) (sole remedy against member of British Navy serving as NATO liaison officer is under FTCA, thereby barred by SOL where no timely demand made--claim accrues when accident occurs, not when plaintiff discovers remedy is under FTCA); In re Agent Orange Product Liability Litigation, 506 F. Supp. 762 (E.D.N.Y. 1980) (Australian servicemembers filing for Agent Orange injuries fall under FTCA and are Feres barred--Court cites Daberkow v. U.S., 581 F.2d 785 (9th Cir. 1978) in which German pilot training in Arizona was Feres barred); Aketpe v. U.S., 925 F. Supp. 731 (M.D. Fla. 1996) (Turkish service members both injured and killed by U.S. Navy missile off Turkish coast fall under FTCA, but are excluded by nonjusticiable political question doctrine--court discusses but does not rule on Feres bar); Whitley v. U.S., Civ. # 3:94-cv-64 JTC (N.D. Ga. 1997) (British military rugby team accident does not fall under SOFA, since deceased British Army lieutenant's death was not incident to service).

(5) Similar Agreements. Similar nonreciprocal agreement with other countries applicable only in those countries, e.g., Korea, Japan, Philippines. Taiwan has reciprocal agreement.


j. Oyster Growers. Claims arising from dredging operations, or the like, in making navigational or other improvements by the Army Corps of Engineers can be filed in the Court of Federal Claims under 28 U.S.C. § 1497. Vujnovich v. Great Lakes Dredge & Dock Co., Civ. # 87-4489 (E.D. La. 1988) (where amount is over $10,000, U.S. Court of Federal Claims has exclusive jurisdiction).


m. Meritorious Claims Act (31 U.S.C. § 1367). The Comptroller General may submit a claim to Congress not payable by any agency appropriation if he considers deserving, e.g., contains elements of legal liability or equity to make it deserving. Sometimes used for paying AR 405-15 claims for use and occupancy of real estate where normal acquisition procedures were not complied with and claim is not otherwise payable.

n. Quiet Title Act (28 U.S.C. § 2409c). Under exclusive jurisdiction of District court—sounds in tort and does not fall under Tucker Act. Quiet Title Act applies to actions in ejectment for possession of property. McClellan v. Kimball, 623 F.2d 83 (9th Cir. 1980) (applied to suit for ejectment against U.S. Forest Service supervisor); U.S. v. Santos, 878 F. Supp. 1358 (D. Guam 1995) (U.S. obtains ejectment injunction in suit under Act). Quiet Title Act also applies to Government action restricting access to property. Schultz v. Dept. of Army, U.S., 10 F.3d 649 (4th Cir. 1993) (where Army restricts historic routes across Ft. Wainwright, right to use modern route exists); Wright v. Gregg, 685 F.2d 340 (9th Cir. 1982) (applied to efforts of BLM to close entrance to bridge). Quiet Title Act also can be used to challenge liens on real estate. Robinson v. U.S., 920 F.2d 1157 (3d Cir. 1991) (IRS imposed lien without sending notice of deficiency—jurisdiction proper under Quiet Title Act); Egbert v. U.S., 752 F. Supp. 1010 (D. Wyo. 1990) (taxpayer can challenge IRS tax lien by filing action under Quiet Title Act). Quiet Title Act has further been held to apply to loss
of pay. Harrell v. U.S., 13 F.3d 232 (7th. Cir. 1993) (Quiet Title Act can be used to challenge loss of future wages, but here suit dismissed as frivolous); Arford v. U.S., 934 F.2d 229 (9th Cir. 1991) (Quiet Title Act applies to transfer of retired pay by USAF Finance Office to IRS to pay back taxes). The Quiet Title Act has a 12 year statute of limitations. Richmond, Fredericksburg and Potomac R. Co. v. U.S., 945 F.2d 765 (4th Cir. 1991) (1938 quitclaim to railroad for exclusive use for railroad purposes sufficient to trigger 12 year SOL); Tadlock v. U.S., 774 F. Supp. 1035 (S.D. Miss. 1990) (12 year SOL bars suit). The Quiet Title Act’s 12 year SOL may be subject to equitable tolling. Fadem v. U.S., 52 F.3d 202 (9th Cir. 1995), remanded, ___ U.S. ___, 117 S.Ct. 1103, original opinion reinstated, 113 F.3d 167 (9th Cir. 1997) (equitable tolling of 12-year SOL in Act permitted as BLM did not inform landowner of results of survey). However, the U.S.’ bringing of a condemnation suit will moot a quiet title action. Cadorette v. U.S., 988 F.2d 215 (1st Cir. 1993). Rosette Inc. v. U.S., 141 F.3d 1394 (10th Cir. 1998) (Rosette, lessee of geothermal power seeks declaratory judgment against BLM for trying to control Rosette’s use of the power – Quiet Title applies. Lombard v. U.S., 28 F. Supp. 2d 44 (D. Mass. 1998) where claimants visited Cape Cod National Seashore in 1960’s, they were not entitled to equitable tolling where Quiet Title Act suit in 1998.


r. Contract Disputes Act (41 U.S.C. §§ 601-13). Contractual claims must be brought in either court of Federal Claims or appropriate Board of Contract Appeal. See Trevino v. General Dynamics Corp., 865 F.2d 1474 (5th Cir. 1989) (when contractor has indemnity claim, indemnity claim for damages arising out of injuries caused by contractor design of submarine diving system have to be brought in forums allowed by Contract Disputes Act). § 605 requires a written decision by contracting officer and notice to claimant required for all claims under contract.


t. Employee Suggestion Program. Kroll v. U.S., 58 F.3d 1087 (6th Cir. 1995) (employee suggestion program operations are not grievable nor subject to review under the FTCA--remedy is under collective bargaining agreement). See also Hayes v. U.S., 20 Ct Cl 1. 150 (1990) (same as Kroll), aff’d, 928 F.2d 411 (Fed. Cir. 1991); Weber v. Department of Army, 9 F.3d 97 (Fed. Cir. 1993) (failure to recognize employee suggestion is not a personnel action within jurisdiction of Merit Systems Protection Board).


z. Indian Tribal Court. Louis v. U.S., 969 F. Supp. 456 (D.N.M. 1997) (judgment in Acomom Tribal Court in medical malpractice action against Indian Health Service is not recognized by U.S. District Court).


cc. Family Child Care Provider (FCCP) Program. By regulation, AR 215-1, Army has assumed a contractual duty to pay for torts of FCCP. Lee v. U.S., 124 F.3d 1291 (Fed. Cir. 1997), modified on rehearing, 129 F.3d 1462 (Fed. Cir. 1997) (U.S. has contractual obligation to pay for torts, but torts arising from criminal acts are not within coverage).

Gober, 120 F.3d 1239 (Fed Cir. 1997) (RCA does not create a presumption of service connection where soldier was on troop ship anchored in Nagasaki harbor for a single day, November 2, 1945).

EE. Title VII. Title VII preempts FTCA emotional distress claims based on sexual harassment in the workplace. Pfau v. Reed, 125 F.3d 927 (5th Cir. 1997) (DCAA auditor sexually harassed at work could not maintain action for intentional infliction of emotional distress under FTCA, since Title VII preempts such claim). Moreover, Title VII is the remedy for workplace harassment where a government agency is not involved. Rivera v. Heyman, 982 F. Supp. 932 (S.D.N.Y. 1997) (employment discrimination falls under Title VII, since Smithsonian Institution is not a federal agency) Wilds v. U.S. Postmaster General, 989 F. Supp. 178 (D. Conn. 1997) FTCA suit for negligent processing of drug test permitted in addition to Title VII suit. Hupp v. U.S. Dept. of the Army, 144 F.3d 1144 (8th Cir. 1998) (Title VII applies to Iowa NG sergeant applying for AGR position but Feres bars claims.


C. What Damages Are Payable?

1. State law Controls Payable Damages.

a. Which State Law Controls, e.g., impact or comparative impairment rule is applied whenever applicable. Richards v. U.S., 369 U.S. 1 (1962); Westerman v. Sears, Roebuck & Co., 577 F.2d 873 (5th Cir. 1978); In re Air Crash Disaster Near Chicago on 25 May 1979, 644 F.2d 594 (7th Cir. 1981), further proceedings, 701 F.2d 1189 (7th Cir. 1983); Costello v. U.S., 1997 WL 383278 (N.D. Ill.) (lists five factors in choice of law determination: (1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of judicial tasks; (4) advancement of forum government's interests; and (5) application of the better rule of law--citing with approval Hanker v. Royal Indemnity Co., 204 N.W.2d 897 (Wis. 1973) which was based on Lefler, Choice Influencing Consideration in Conflict Law, 41 N.Y. U. L. Rev. 267 (1966)); In re Air Crash at Washington, D.C. on 13 January 1982, 559 F. Supp. 333 (D.D.C. 1983); In re Pago Pago Air Crash of 30 January 1974, 525 F. Supp. 1007 (C.D. Cal. 1981); Guillory v. U.S., 699 F.2d 781 (5th Cir. 1983) (negligence in Texas--Louisiana law on damages applies, since
Texas citizen and employee is plaintiff). Pramba-Cortes v. American Airlines, Inc., 177 F.2d 1272 (11th Cir. 1999)
Florida law on damages applies to aircrash in Columbia even though claimant resides in Columbia.

$1,000,000 cap in medical malpractice cases did not preclude award of $2,500,000 for physical impairment and disfigurement additional in case of brain damaged infant); (21) Florida. Laws of Florida (Chapter 86-160) ($450,000). See South v. Dept. of Insurance, Civ. #69-551 (Sup. Ct. Fla. 1987) (cap of $450,000 held unconstitutional--most of statute held constitutional); (22) Hawaii ($375,000); (23) Maryland ($350,000). See Franklin v. Mazda Motor Corp., 704 F. Supp. 1325 (D. Md. 1989) (Maryland $550,000 cap upheld); Bartucco v. Wright, 746 F. Supp. 604 (D. Md. 1990) (Md. cap applies separately to each survivor in WD case); U.S. v. Streidell, 620 A.2d 905 (Md. 1993) (Maryland cap of $350,000 does not apply to wrongful death action); (24) Minnesota ($400,000); (25) New Hampshire ($875,000); (26) Washington (variable). See Sofie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989) (Washington non-economic cap unconstitutional); (27) Utah ($300,000); (28) Virgin Islands. See Davis v. Omitowoju, 883 F.2d 1155 (3d Cir. 1989) (Virgin Islands cap of $250,000 non-economic upheld); have all enacted caps; (29) Nevada. See Aguilar v. U.S., 920 F.2d 1475 (9th Cir. 1990) (Neva
to FTCA case from Indian Health Service Hospital; Feighery v. York Hospital, 38 F. Supp. 2d 142 (D. Me. 1999), Maine's cap for nonpecuniary damages of $150,000 does not include child's loss of care, nurture and guidance in wrongful death case; Rivera v. U.S., 1999WL316835 (2d Cir. N.Y.), uphold award for noneconomic loss as plaintiff met serious injury threshold under New York law. Johns v. U.S., 1998WL151282 (E.D. La.) La. medmal cap of $500,000 applies to U.S. and includes all claims arising from one death.

2. Only One Payment to Each Claimant. Advance payment is permitted by 10 U.S.C. § 2736 for claims under 10 U.S.C. § 2733 and 32 U.S.C. § 715. But see Sutton v. Earles, 26 F.3d 903 (9th Cir. 1994) (fact that injured plaintiff died while case was on
appeal does preclude award for last future earnings and medical bills).


c. Applicability to Total Off-Set. May be applicable to
total off-set rule. Culver v. Slater Boat Co., 722 F.2d 114
(5th Cir. 1984), cert. denied sub nom., Reederei v. Byrd, 467
U.S. 1252 (1984); Scott v. U.S., 884 F.2d 1280 (9th Cir.
1989).

d. Certain Verdicts. Some verdicts give appearance of being
punitive despite prohibition against. Murff v. U.S., 598 F.
Supp. 290 (E.D. Tex. 1984) ($700,000 to parents of deceased
unmarried 19-year-old); Lewis v. U.S., 718 F. Supp. 1525
(M.D. Ga. 1988) ($428,119.22 to parents of deceased 13-year-
old, even though Georgia death statute has been ruled
punitive).

4. No Separate Attorneys Fee. Attorneys fee not permitted as
separate claim (28 U.S.C. §§ 2412, 2678). Only permitted where
express statutory language allows same. See Hercules Inc. v.
$9,000,000 attorney fees and costs from settling Agent Orange
claim is not compensable as an implied-in-fact contract); U.S. v.
Worley, 281 U.S. 339 (1930); In re Kenneth Turner, 14 F.3d 637
(D.C. Cir. 1994) (Pentagon policeman who successfully contested
DOJ nonscope in hot pursuit case is entitled to costs, but not
attorney fees); Hull v. U.S., 971 F.2d 1499 (10th Cir. 1992)
(where guardian ad litem performs attorney services, fees not
deductible as costs); Shannon v. HUD, 577 F.2d 854 (3d Cir. 1978)
citing cases); Dyer v. Walters, 646 F. Supp. 791 (E.D. Mo. 1986)
(statutory limit of $10 for attorney fees under Veterans Benefit
Law does not violate due process or First Amendment right). For
discussion of application of Equal Access to Justice Act (28
353 (6th Cir. 1988) (attorney fees payable under EAJA when U.S.
or losing party acts in bad faith under common law principles);
excludes torts (28 U.S.C. § 2412d(1)(A)). See, e.g., Lucerelli
Act does not permit payment of attorney fees separate from FTCA
award); Campbell v. U.S., 835 F.2d 193 (9th Cir. 1987) (EAJA
attorney fees not applicable to FTCA); Sanchez v. Rowe, 870 F.2d
291 (5th Cir. 1989) (cannot collect EAJA attorney fees where
elect remedy in tort). State law authorizing attorney fees as
additional damages to prevailing party not applicable under FTCA
by virtue of either private person analogy or Equal Access to
Justice Act (EAJA). Anderson v. U.S., 127 F.3d 1190 (9th Cir.
1997); Joe v. U.S., 772 F.2d 1535 (11th Cir. 1985). Accord
Johnson v. U.S., 780 F.2d 902 (11th Cir. 1986). Conversely,
state laws which attempt to limit fees are preempted, since FTCA
sets cap on maximum allowable attorney's fee in FTCA cases.
Jackson v. U.S., 881 F.2d 707 (9th Cir. 1989) (attorney fees not
limited by California statute). There are cases which deal with
computation of the FTCA attorney fee in a structured settlement situation. Godwin v. Schramm, 731 F.2d 153 (3d Cir. 1984), cert. denied sub nom., Behrend v. Goodwin, 469 U.S. 882 (1984)) (in structured settlement, undecided whether fee limitation is 20 percent of cost to U.S.); Wyatt v. U.S., 783 F.2d 45 (6th Cir. 1986) (attorney's fee is 20 percent of the present value of the structure--here 20 percent of the cost where structure is up front cash and periodic pay annuity).


costs). Kirkland v. U.S., 1998WL895658 (N.D. Ill.), $14,654.56 ordered to be deducted from prior award of $275,000 as it represents CHAMPUS bill paid by U.S. from federal treasury funds.


40 percent negligent for failure to report to ophthalmologist in a timely manner as instructed by ER doctor.

13. Loss of Use.


14. Lost Earnings.

a. Lost Wages. A person must work if able after their injury. Margreiter v. New Hotel Monteleone, 509 F. Supp. 264 (E.D. La. 1979). Proof of lost wages should be supported by more than being absent from work, e.g., medical testimony. Taylor v. Pre-Fab Transit Co., 616 F.2d 374 (8th Cir. 1980). See also Reising v. U.S., 60 F.3d 1241 (7th Cir. 1995) (failure of proof of future lost profits where 56 year old insurance broker injured back in collision, but continued to work); Byrd v. U.S., 945 F. Supp. 1073 (S. D. Miss. 1996) (failure of proof where disability is related to delayed back injury, although Alabama law permits loss of earnings to be based on percentage of disability); Lariscy v. U.S., 655 F. Supp. 1053 (D.D.C. 1987) (no future earning loss where injured party suffered only headaches and fear of driving). Of course, the trier of fact is free to reject such testimony. Leefe v. Air Logistics Inc., 876 F.2d 409 (5th Cir. 1989) (rejects economists testimony and awards no future

b. Incapacitated Claimant. In the case of incapacitated claimant who is awarded medical expenses and future lost wages, a determination should be made as to whether the awards are duplicative, e.g., does the medical expense award cover living expenses. Flannery for Flannery v. U.S., 718 F.2d 108 (4th Cir. 1983).


d. Lost Profits. Lost business profits are not lost earnings unless shown to result from injury. Reising v. U.S., 60 F.3d 1241 (7th Cir. 1995) (failure of proof of future lost profits where 56 year old insurance broker
injured back in collision, but continued to work); Metz v. United Tech., 754 F.2d 63 (2d Cir. 1985); Midwest Knitting Mills Inc. v. U.S., 950 F.2d 1225 (7th Cir. 1991) (lost profits not payable in absence of personal injury for tort of negligent supervision). See also Schuler v. U.S., 675 F. Supp. 1088 (W.D. Mich. 1987) (excellent discussion of loss to partnership due to death).


h. Enhancement by Future Training. Waldorf v. Shuta, 896 F.2d 723 (3rd Cir. 1990) (no evidence that 24-year-old high school dropout was going to train to be an attorney--award for loss of earnings as attorney improper--cites other cases).


15. Inflation. Inflation and present value depends on local law--varies within each circuit except in 5th Circuit--see below.


interest rate). Nonetheless, the court may follow the state rule. Wilson v. U.S., 613 F. Supp. 1322 (E.D.N.Y. 1985) (states total setoff rule adopted in Metz v. United Tech., 754 F.2d 63 (2d Cir. 1985)); Childs v. U.S., 923 F. Supp. 1570 (S.D. Ga. 1996) (by using Georgia wrongful death statutory discount rate of 5% and inflation of 6%—arrives at award of $1,083,000 for death of unborn fetus). However, an inflation factor may be used in computing a damage award only if general inflationary trends linked to specific components of income. Vesey v. U.S., 626 F.2d 627 (9th Cir. 1980).

e. Generally. For general review, see Doca v. Marina Mercante Nicaraguense, S.A., 634 F.2d 30 (2d Cir. 1980).

f. Discount Applicable to Pain and Suffering


b. Delays in Treatment. Should be limited to pain and suffering caused by negligent delay in treatment and not to condition itself. See Grant v. Brandt, 796 F.2d 351 (10th Cir. 1986) (medical bills over $15,000--total award of $15,000 upheld--six month delay in symptoms following collision); Isaac v. U.S., 490 F. Supp. 613 (S.D.N.Y. 1979).


f. Comparative Awards. Krys v. Lufthansa German Airlines, 119 F.3d 1515 (11th Cir. 1997) ($1.8 million for 47 year old who suffered increased heart damage due to refusal of pilot to land early); Eiland v. Westinghouse Elec. Corp., 58 F.3d 176 (5th Cir. 1995) (in case of electrician extensively burned from arcing circuit breaker who returned to full-time employment within 21 months--$5,000,000 in non-economic damages reduced to $3,000,000); Salas v. U.S., 974 F.Supp 202 (W.D.N.Y. 1997) ($90,000 for pain and suffering where high school teacher is permanently work disabled from minor soft tissue accident); In re Air Crash Disaster at Charlotte, N.C., 982 F. Supp. 1115 (D.S.C. 1997) ($550,000 for pain, suffering and disfigurement to flight attendant for third degree burns on 10-11% of body, plus $478,000 lost earnings); Tisdel v. Barber, 968 F. Supp. 957 (S.D.N.Y. 1997) ($25,000 verdict inadequate award for truck driver who slipped on ice and injured back where past medical expenses were $31,361.34 and no award made for pain); Elliott By And Through Elliott
$2,500,000 in personal injury claim of semi-comatose
quadriplegic); Consorti v. Armstrong World Industries, Inc.,
64 F.3d 781 (2d Cir. 1995) (pain and suffering award reduced
to $5 million in asbestos case cites numerous awards); Noble
(videotape taken surreptitiously shows claimant performing
acts she testified she could not perform due to shoulder
injury--$25,000 award of which $15,000 is for pain and
suffering); Brannon v. U.S., Civ. # 94-30-B (E.D. Okla., June
14, 1995) ($673,845.99 award to 55 year old unemployed food
service worker for broken ankle includes $524,000 for pain
and suffering); Machesney v. Larry Bruni, M.D., P.C., 905 F.
Supp. 1122 (D.D.C. 1995) ($4,100,000 award remitted to
$2,100,000 for mental suffering where physician erroneously
informed patient he was HIV positive); Stratis v. Eastern Air
Lines Inc., 682 F.2d 406 (2d Cir. 1982); Ouachita National
Bank v. Tosco Corp., 686 F.2d 1291 (8th Cir. 1982) (judge
reduces jury award of $2,215,320.60 for nursing service to
$228,082.25 and $500,000 loss of consortium to $250,000);
Shaw v. U.S., 741 F.2d 1202 (9th Cir. 1984) (where $4,700,000
awarded for future medical expenses and home care and
$4,600,000 for pain and suffering on appeal); Marks v. Mobil
Oil Corp., 562 F. Supp. 759 (E.D. Pa. 1983) ($3,500,000 for
pain and suffering to college student with spastic paraplegia
and global brain damage and awareness of his plight); Blevins
v. Cessna Aircraft Co., 728 F.2d 1576 (10th Cir. 1984) ($1.3
million pain and suffering for broken ribs and cartilage—not
1984) ($1.5 million for pain and suffering to minor
paraplegic); Robbins v. U.S., 593 F. Supp. 634 (E.D. Mo.
1984) (registered nurse undergoes above-the-knee amputation
and retains badly damaged other leg following vehicle
accident--lost wages $13,000 and medicals $63,000 receives
$1,750,000 or about $1,700,000 pain and suffering--contrast
with Guerry v. U.S., Civ. # 84-CIV-2632 (PKL) or (1984 WL
1134) (S.D.N.Y. 1984), in which 76-year-old male in poor
health is so badly burned he can no longer ambulate and
receives $40,000 total award all for pain and suffering (case
not appealed) and Duty v. U.S. Dept. of Interior, 735 F.2d
1012 (6th Cir. 1984) (remanded for low damages, i.e.,
$17,517.80 (half for pain and suffering) for spinal fusion to
adult female)); Dogan v. Hardy, 587 F. Supp. 967 (N.D. Miss.
1984) ($600,000 award to 85-year-old female for unspecified
injuries which require custodial care); Haley v. Pan American
World Airways Inc., 746 F.2d 311 (5th Cir. 1984) (reduces
parent's award for mental anguish from $350,000 each to
$200,000 (Louisiana law)); Wurdemann v. U.S., Civ. #82-Z-1639
(D. Colo. 1984) ($980,000 pain and suffering for rectal-
vaginal fistula followed six surgeries); Gonzalez v. U.S.,
600 F. Supp. 1390 (W.D. Tex. 1985) ($250,000 pain and suffering for one-hour delay in diagnosing appendicitis); Dixon v. International Harvester Co., 754 F.2d 573 (5th Cir. 1985) ($2.8 million for loss of testicles, complete avulsion of femoral artery and vein, avulsion of skin on penis and abdomen to naval and severing of femoral nerve while pinned in tractor--not excessive); Dabney v. Montgomery Ward & Co. Inc., 761 F.2d 494 (8th Cir. 1985) ($2 million pain and suffering not excessive for second and third degree burns to 36 percent of upper body); Wells v. Ortho Pharmaceutical Corp., 615 F. Supp. 262 (N.D. Ga. 1985) ($3 million pain and suffering for birth defect from spermicide); Trevino v. U.S., 804 F.2d 1512 (9th Cir. 1986) ($2 million pain and suffering reduced to $1 million on appeal); Reilly v. U.S., 863 F.2d 149 (1st Cir. 1988) ($1 million for child brain damaged at birth); Moreno v. U.S., Civ. # 86-0555 (D. Haw. 1987) ($2 million for child brain damaged at birth); Zerangue v. Delta Towers Ltd., 820 F.2d 130 (5th Cir. 1987) (sexually assaulted four times after being forced into abandoned house--$228,000 reduced to $200,000); Brown v. McBro Planning and Dev. Co., 660 F. Supp. 1333 (D.V.I. 1987) (chipped patella in slip and fall--$1 million reduced to $200,000 by trial judge--further reduced to $235,000); Gumbs v. Pueblo International Inc., 823 F.2d 768 (3d Cir. 1987) (sprained coccyx in slip and fall, $900,000--reduced to $525,000 by trial judge--further reduced to $235,000); Couch v. St. Croix Marine Inc., 667 F. Supp. 223 (D.V.I. 1987) (broken wrist, dislocation left lunate to carpal bone--$400,000 reduced to $150,000); Kwasny v. U.S., 823 F.2d 194 (7th Cir. 1987) (perforated windpipe during operation, pre-death pain and suffering--$350,000 reduced to $175,000); Snead v. U.S., 595 F. Supp. 658 (D.D.C. 1984) (pre-death pain and suffering in 38-year-old female with lung cancer--$773,000); Williams v. Martin Marietta Alumina Inc., 817 F.2d 1030 (3d Cir. 1987) ($550,000 for soft tissue back injury, $330,000 for pain and suffering reduced to $100,000--cites other awards); Edwards v. U.S., Civ. # Y-86-3695 (D. Md. 1988) ($500,000 to breast cancer victim who was terminal at time of trial); Cardillo v. U.S., 622 F. Supp. 1331 (D. Conn. 1984), (swine flu death after six years of slowly progressing polyneuritis--$5 million); Villar v. Wilco Truck Rentals, 627 F. Supp. 389 (M.D. La. 1986) ($1 million verdict clearly excessive for concussion and traumatic amputation of arm); Laaperi v. Sears, Roebuck & Co. Inc., 787 F.2d 726 (1st Cir. 1986) ($750,000 verdict excessive for 1st and 2d degree burns over 12 percent of body of 13-year-old girl); Hope v. Seahorse Inc., 651 F. Supp. 976 (S.D. Tex. 1986) ($1 million for lung cancer death of 41-year-old recently married father of small child); De Centeno v. Gulf Fleet Crews Inc., 798 F.2d 138 (5th Cir. 1986) ($776,000 verdict of which $459,000 was pain and suffering for failure to treat diabetes resulting in
death remanded as excessive); Zeno v. Great Atlantic & Pacific Tea Co., 803 F.2d 178 (5th Cir. 1986) ($95,000 verdict with medicals of $807 for two fractures—not excessive, but with strong dissent); Neyer v. U.S., 845 F.2d 641 (6th Cir. 1988) ($1 million pain and suffering for broken leg and 12% burns—not excessive, but cannot recover for both loss of consortium and loss of services); Nairn v. National Railroad Passenger Corp., 837 F.2d 565 (2d Cir. 1988) ($400,000 pain and suffering for 15% back—excessive, cites other cases); Sharpe v. City of Lewisburg, Tennessee, 677 F. Supp. 1362 (M.D. Tenn. 1988) ($100,000 pain and suffering for man who lived only a few minutes after shooting—excessive); Miller v. U.S., 901 F.2d 894 (10th Cir. 1990) ($1.5 million pain and suffering for 17-year-old coma victim); McCarthy v. U.S., 870 F.2d 1499 (9th Cir. 1989) ($2 million reduced to $1 million); Washington v. U.S., Civ. # 83-2332-RS (C.D. Cal. 1990) ($2 million for third degree burns to child); Larson v. U.S., Civ. # EP-85-CA-304-H (W.D. Tex. 1990) ($1.5 million to scoliosis quad); Heitzenrater v. U.S., 930 F.2d 33 (10th Cir. 1991) ($2 million reduced to $1 million); O'Bryan v. U.S., Civ. # 89-2374-2 (D. Mass. 1991) ($160,000 for pain caused by ruptured ectopic pregnancy); Wade v. U.S., Civ. # 83-00226-HMF (D. Haw. 1991) ($500,000 for pain caused by stillborn twins—no wrongful death for stillbirth in Hawaii); Belardinelli v. Carroll, 773 F. Supp. 657 (D. Del 1991) ($500,000 to injured 70-year-old male and $250,000 to wife for loss of consortium for broken ankle and patella remitted to $100,000 and $50,000 respectively); Toole v. McClintock, 778 F. Supp. 1543 (M.D. Ala. 1991) (award of $250,000 reduced to $150,000 in silicone implant case); Musick v. U.S., 781 F. Supp. 445 (W.D. Va. 1991) ($120,000 for bodily injury and $100,000 for pain and suffering in head injury case); Maylie v. National RR Passenger Corp., 791 F. Supp. 477 (E.D. Pa. 1992) ($2 million pain and suffering award reduced to $500,000 for back injury requiring two surgeries and capable of light work); Doe v. U.S., 976 F.2d 1070 (7th Cir. 1992) ($25,000 award to 2-year-old sexually abused in USAF day care center is adequate); Robison v. U.S., Civ. # CIV-91-1339-C (W.D. Okla. 1992) ($200,000 award including disfigurement in jaw realignment surgery resulting in doubtful reflex sympathetic dystrophy); Scala v. Moore McCormack Lines, 965 F.2d 680 (2d Cir. 1993) ($1.5 million reduced to $750,000 for torn up knee and ruptured disc in case of 33-year-old stevedore); Schneider v. National RR Passenger Corp., 987 F.2d 132 (2d Cir. 1993) ($1,250,000 not excessive for post traumatic stress disorder following brutal attack on railroad ticket agent); Stutzman v. CRST, Inc., 997 F.2d 291 (7th Cir. 1993) ($600,000 pain and suffering for traumatic aggravation of congenital spondylolisthesis in low back); Sales v. Republic of Uganda, 828 F. Supp. 1032
(S.D.N.Y. 1993) ($1.2 million award for 32-year-old construction worker who crushed both heels in fall from ladder not excessive); Datskow v. Teledyne Continental Motors, 826 F. Supp. 677 (W.D.N.Y. 1993) ($107,000,000 pain and suffering of 4 decedents who died within minutes of air crash); Allred v. Maersk Line, LTD, 826 F. Supp. 965 (E.D. Va. 1993) (fall from ladder results in broken arm and 20-30 disability in arm--$1 million award with no specials reduced to $500,000); Sheehan v. U.S., 822 F. Supp. 13 (D.D.C. 1993) ($15,000 fractured orbit of eye resulting in effect on vision and memory); Withrow v. Cornwell, 845 F. Supp. 784 (D. Kan. 1994) (no award for pain and suffering despite award of $734.00 for some of medical bills); Anthony v. G.M.D. Airline Services Inc., 17 F.2d 490 (1st Cir. 1994) (remittur order where pilot received $566,765 for pain and suffering and medical bills totaled $1,385); Hodgen v. Forest Oil Corp., 862 F. Supp. 1552 (W.D. La. 1994) (paraplegic oil worker awarded $1.5 million general damages); Foster v. U.S., 858 F. Supp. 1157 (M.D. Fla. 1994) ($10 awarded to woman who bends to retrieve mail from mailbox as postal truck pulls away and strikes her head); Estate of Zarif by Jones v. Korean Airlines, 836 F. Supp. 1340 (E.D. Mich. 1993) ($1 million pre-death pain and suffering KAL Flight 007 crash); Hamilton v. U.S., Civ. #93-150-Civ-J-20 (M.D. Fla., Sept. 2, 1994) ($3.5 million to contract employees for 2nd and 3rd degree electrical burns over 66 percent of body surface); Taylor v. National RR Corp. Passenger, 868 F. Supp. 479 (E.D.N.Y. 1994) ($275,000 reduced to $175,000 for soft tissue injury resulting from escalator fall to 75 year old with extensive preexisting problems--cites numerous cases); Smith v. U.S. Dept. of Veterans Affairs, 865 F. Supp. 433 (N.D. Ohio 1994) ($1,000 per day for 12.6 year life expectancy totaling $4.6 million in case for failure to diagnose spinal abscess in VA mental patient who became a quadriplegic); Gautreax v. Scarlock Marine, Inc., 84 F.3d 776 (5th Cir. 1996) ($300,000 for pain and suffering for loss of eyeball is not excessive); Capella v. Moresca, 921 F. Supp. 84 (D. Conn. 1995) (back injury due to police brutality remitted from $180,000 to $150,000 based on comparative awards); White v. WalMart Stores, Inc., 921 F. Supp. 1046 (W.D.N.Y. 1996) ($1,000 for pain and suffering where plaintiff broke first metatarsal bone in foot is not excessively low); Davis v. U.S., 1996 WL 426421 (E.D. Mich.) (19 year old rear-seat passenger strikes both knees on front seat alleged torn loose in rear end collision--no non-economic damages permitted); Velasquez v. U.S., Civ. #95-00768 ACK (D. Haw., June 19, 1996) ($600,000 award for surgery that was too extensive and resulted in life of pain until suicide 10 years later); Adams v. U.S., 964 F. Supp. 510 (D. Mass. 1997) (award in soft tissue back claim limited to $26,625 by use of IME and neighbor testimony);
remaining testicle due to failure to timely diagnose torsion; LaMarca v. U.S., 31 F. Supp. 2d 111 (E.D.N.Y. 1998), $375,000 for pain and suffering in wrongful death of 64-year-old male after four months hospitalization after fall from bed and broken hip, Konkel v. Bob Evans Farms, Inc., 165 F.3d 275 (4th Cir. 1999) $1 million award reduced to $25,000 where customer drank cleaning detergent in hot water poured by waitress; Smith v. K Mart Corp, 177 F.3d 18 (1st Cir. 1999) upholds $500,000 award to woman who was hit on head by falling 8.5 cooler and suffered soft-tissue injury with continuing serious sequelae but remits to $100,000, $250,000 award to husband who witnessed incident. Goldstein v. U.S., 9 F. Supp. 2d 173 (E.D.N.Y. 1998) fractures to knee, ankle, and humerus bring total award of $965,000 including $680,000 for P&S - decision contains numerous comparable awards for each fracture. Jackson v. U.S., civ. # A-96-Ca-491-AA (W.D. Tex., 20 Aug. 98) $2,247,280 for brachial plexus injury to newborn of which $1,950,000 is for general damages.


h. Nature of Loss of Enjoyment of Life Damages. Loss of enjoyment of life is sometimes included as part of pain and suffering and is sometimes not a separate element. See,

i. Eggshell Skull. Eggshell skull theory or "you take your victim as you find him" at common law has ramifications. Vosburg v. Putney, 50 N.W. 403 (Wis. 1891)). Includes psychological, and not only physical, injuries. Thomas v. U.S., 327 F.2d 379 (7th Cir. 1964); Mizell v. State, 398 So.2d 1136 (La. App. 1980). Includes aggravation by subsequent treatment, even though negligent. Butzow v. Wausau Memorial Hosp., 537 F.2d 349 (Wis. 1971); Baruk v. U.S., Civ. # 93-11862-RGS (D. Mass., Mar. 13, 1996) (veteran disabled with Crohn's Disease develops RSD in right arm from injection of hydrochloric acid solution--$350,000 for pain and suffering). However, causation of hypochondrial neurosis should be viewed with skepticism and damages should be adjusted for the possibility that the preexisting condition would have resulted in harm even in absence of a tort. Stoleson v. U.S., 708 F.2d 1217 (7th Cir. 1983).


tables for black males which contains shorter life expectancy). Tables may be outweighed by other probative evidence. Cook v. American R.S. Co., 53 F.3d 733 (6th Cir. 1995) (admission of evidence concerning serious alcoholism was proper as to work life expectancy); Buschbaum v. Hale, 182 N.E.2d 93 (Ind. 1932); Garton v. Powers, 233 N.W.2d 373 (Mich. 1930); McCluskey v. U.S., 562 F. Supp. 515 (S.D.N.Y. 1983). Of course, the trier of fact is free to reject such evidence. Smith v. U.S. Dept. of Veterans Affairs, 865 F. Supp. 433 (N.D. Ohio 1994) (court refuses to reduce life expectancy based on medical evidence as this would benefit tortfeasor); Crane v. Crest Tankersline, 47 F.3d 292 (8th Cir. 1995) (prejudicial error to admit into evidence slide rule "Future Damage Calculator"). Crespo v. U.S., Cv. 498-127 (S.D. Ga., 5 March 1999) U.S. admits negligence but presents evidence that newborn had only several hours of life-award $150,000 only for intangible value of life.


a. Easement Cases. Karlson v. U.S., 82 F.2d 330 (8th Cir. 1936) (value is difference before and after imposition of easement).


21. Overhead. Overhead must be factually related to the actual repair work and represent reasonable charges for it to be compensable. U.S. v. Peavey Barge Lines, 590 F. Supp. 319 (C.D. Ill. 1983), aff'd, 748 F.2d 395 (7th Cir. 1984); Department of Water and Power v. U.S., 131 F. Supp. 329 (S.D. Cal. 1955); State Road Dept. of Fla. v. U.S., 85 F. Supp. 489 (N.D. Fla. 1949). General rule is that presentation of proof that overhead charge is in accordance with agency's regulations or standard policy is


(3) Permitted. Full cost of raising child permitted: Wisconsin (Marciriak v. Landberg, 450 N.W. 2d 243 (Wis. 1990)).

b. Damaged Child.


(3) Future Earnings Award. Saunders by and Through Saunders v. U.S., 64 F.3d 482 (9th Cir. 1995) (lost future earnings award to damaged child permitted in wrongful life case, i.e., mother counseled before becoming pregnant that her septate uterus would not preclude normal child).

24. Future Medical Care.


parental consortium—excellent discussion lists many cases, not majority rule.

26. Money Damages. FTCA plaintiff may only recover money damages. *Wright v. U.S.*, 902 F. Supp. 486 (S.D.N.Y. 1995) (demand for return of vehicles seized by IRS not cognizable under either FTCA or Tucker Act as demand is not a claim for money damages). Money damages are only payable if sovereign immunity waived. *Dept. of Army v. FLRA*, 56 F.3d 273 (D.C. Cir. 1995) (order by FLRA to Army to pay money damages, i.e., bank penalties as paycheck was late is improper, since no waiver of sovereign immunity).


c. Attorneys Fees Incurred in Improperly Brought Criminal Case. The rule is that the recovery of attorney fees for improperly brought criminal prosecutions is barred absent a statute authorizing such recovery. General Dynamics Corp. v. U.S., 139 F.3d 1280, (9th Cir. 1998) reversed on other grounds, ___ F.3d ____, 1998WL136209 (9th Cir.) (recovery of $25,880,752 attorneys fees expended in defending criminal charge based on unprofessional DCAA audit not allowable because decision to prosecute discretionary) with Resolution Trust Corp. v. Miramon, 935 F. Supp. 838 (E.D. La. 1996) (recovery under FTCA of attorneys fees expended in defense of criminal action by RTC is denied under 28 U.S.C. § 2412 as fee shifting).

27. Value of Loss of Trade Secret. Elements are established Rohm & Haas Co. v. ADCO Chemical Co., 689 F.2d 424 (3d Cir. 1982).


a. Resulting From Death. Walters v. Mintec/International, 758 F.2d 73 (3d Cir. 1985) ($250,000 to each of minor children reduced to $25,000--had not seen father in seven years); Poyser v. U.S., 602 F. Supp. 436 (D. Mass. 1984) ($500,000 to mother for loss of 15-year-old son); Winbourne v. Eastern Air Lines Inc., 758 F.2d 1016 (5th Cir. 1984) ($500,000 for loss of wife and $150,000 for each of two daughters); Grandstaff v. City of Borger, Texas, 767 F.2d 161 (5th Cir. 1985) ($200,000 to father of 31-year-old decedent); Pregent v. Pan American World Airways Inc., 762 F.2d 1245 (5th Cir. 1985) ($150,000 to each parent of 35-year-old flight attendant); In re Air Crash Disaster Near New Orleans, La. on 9 July 1982, 767 F.2d 1151 (5th Cir. 1985) (widower receives $500,000 for loss of wife and $150,000 for each of three children); Cavnara v. Quality Control Parking, 696 S.W.2d 549 (Tex. 1985) ($300,000 to one child and $150,000 to each of the others for loss of mother); Gutierrez v. Exxon
Corp., 764 F.2d 399 (5th Cir. 1985) ($1,150,000 to parents of adult child); Gulf States Utilities Co. v. Reed, 659 S.W.2d 849 (Tex. App. 1983) ($1 million to parents of minor child); Johnson v. U.S., 780 F.2d 902 (11th Cir. 1986) ($2 million to parents of 21-month-old infant who died from medical overdose is excessive); Wheat v. U.S., 860 F.2d 1256 (5th Cir. 1988) ($6.7 million for cancer death of 42-year-old woman leaving husband and two children (one adult)—reduced to $5.5 million on appeal); Phipps v. U.S., Civ. # A-87-CA-125 (W.D. Tex. 1989) ($2.2 million for 38-year-old housewife); Mark v. Pan American World Airways Inc., 785 F.2d 539 (5th Cir. 1986) ($250,000 to each of four minors for loss of parents); Morales v. U.S., 642 F. Supp. 269 (D.P.R. 1986) ($48,000 to widow and $6,000 to each daughter and $0 to grandchildren including conscious pain and suffering in death case); Nowell v. Universal Electric Co., 792 F.2d 1310 (5th Cir. 1986) (evidence of remarriage permitted under Mississippi law—cites New York cases); Morrissey v. Welsh Co., 821 F.2d 1294 (8th Cir. 1987) ($6.5 million to parents of daughter not excessive under Missouri law—cites numerous cases); Rodriguez v. U.S., 823 F.2d 735 (3d Cir. 1987) ($500,000 for lost companionship etc., of deceased husband not excessive under New Jersey law); Stanford v. Leaf River Forest Products Inc., 661 F. Supp. 678 (S.D. Miss. 1986) ($375,000 or $1.7 million total to widow and three children for loss of society—reduced to $1,060,000 total); Morgan Guaranty Trust Co. of New York v. Texas-Gulf Aviation Inc., 669 F. Supp. 81 (S.D.N.Y. 1987) ($866,000 for loss of society reduced to $250,000 where six out of eight children have left home—cites cases); Schuler v. U.S., 675 F. Supp. 1088 (W.D. Mich. 1987) ($750,000 to widow of 41-year-old decedent and $200,000 each to children, ages 18 and 16, $200,000 to widow of 6-year-old decedent and $50,000 each to 5 adult children); DaSilva v. American Brands Inc., 845 F.2d 356 (1st Cir. 1988) ($1.5 Million to widow and four children not excessive); Williams v. U.S., 681 F. Supp. 763 (N.D. Fla. 1988) ($900,000 to each parent—consistent with Florida awards); Larsen v. Delta Air Lines Inc., 692 F. Supp. 914 (S.D. Tex. 1988) ($3 million for death of 32-year-old engineer, of which $1.8 was for emotional loss); Peck v. Garfield, 862 F.2d 1 (1st Cir. 1988) ($300,000 mental anguish to widow of 80-year-old male); Ruiz-Rodriguez v. Colberg-Comas, 882 F.2d 15 (1st Cir. 1989) (son's anguish over father's death does not rise to compensable level under Puerto Rican law); Transco Leasing v. U.S., 896 F.2d 1435 (5th Cir. 1990) ($500,000 for mother's loss of only daughter reduced to $250,00 under LA law); Grayson v. U.S., 748 F. Supp. 854 (S.D. Fla. 1990) (mental anguish for loss of wife and two small children over $2 million—cites many awards); Valenzuela v. U.S., Civ. # EP-88-CA-200-H (W.D. Tex. 1991) ($250,000 to parents of 28-year-old...

b. Resulting from Personal Injury. Wells v. Ortho Pharmaceutical Corp., 615 F. Supp. 262 (N.D. Ga. 1985) ($500,000 to mother of child damaged before birth by spermicide); Ingraham v. Bonds v. U.S., 808 F.2d 1075 (5th Cir. 1987) ($750,000 for mother's loss of child's society); Trevino v. U.S., 804 F.2d 1512 (9th Cir. 1986) ($400,000 for loss of love and companionship and injury to child relationship--reduced to $100,000); Dearing v. U.S., 835 F.2d 226 (9th Cir. 1987) ($300,000 to parents not excessive). Colleen v. U.S., 843 F.2d 329 (9th Cir. 1987) ($300,000 to parents of damaged child not excessive); Jenkins v. McLean Hotels Inc., 859 F.2d 598 (8th Cir. 1988) ($600,000 to 9-month-old male for 12 inch cut to thigh--not excessive); Robichaud v. Theis, 858 F.2d 392 (8th Cir. 1988) ($450,000 for 8 percent permanent partial disability to back caused by 5 mph rearend--not excessive); Meader v. U.S., 881 F.2d 1056 (11th Cir. 1989) ($6 million for adult quadriplegic from medical malpractice); Yako v. U.S., 891 F.2d 738 (9th Cir. 1989) (loss of filial consortium--Alaska law--$300,000); Chenault v. U.S., Civ. #88-00590ACk (D. Haw. 1990) ($500,000 for each parent). Masaki v. General Motors Corp., 780 P.2d 566 (Haw. 1989) ($1 million for each parent by including negligent infliction of emotional distress, not from witnessing the event, but for caring for victim); Raucci v. Town of Rotterdam., 902 F.2d 1050 (2d Cir. 1990) (no emotional anguish in N.Y. death case--$250,000 reduced to $100,000 for death of 6 year old); DeLeon Lopez v.
Corporacion Insular de Seguras, 742 F. Supp. 44 (D.P.R. 1990) (award of $800,000 reduced to $110,000 where grandfather witnessed switching of twins in hospital nursery); Reilly v. U.S., Civ. #856748P (D.R.I. 1990) (no mental anguish damages to parents of brain damaged at birth child); Heltzenrater v. U.S, 930 F.2d 33 (table), 1991 WL 35198 (10th Cir. 1991) ($750,000 award reduced to $100,000, since mental anguish not permitted in Colorado—award in guise of loss of consortium to wife); Bolden v. SEPTA, 820 F. Supp. 949 (E.D. Pa. 1993) ($350,000 award for emotional injury not excessive where employee was forced to take unconstitutional drug test); Mitchell v. Globe Intern Pub Co., 817 F. Supp. 72 (W.D. Ark. 1993) ($650,000 award for publishing photo of elderly newspaper carrier without permission was excessive—remittur of $500,000 appropriate); Gough v. Natural Gas Pipeline Co. of America, 996 F.2d 763 (5th Cir. 1993) (award of $1,444,599 for emotional injury to captain of vessel which struck pipeline reduced to $600,000); Marchica v. Long Island R. Co., 31 F.2d 1197 (2nd Cir. 1994) (award of $55,000 for fear of AIDS based on accidental stick by hypodermic needle); Pineda v. U.S., Civ. # 89-00239DAE (D. Haw., 12 May 1997), later proceedings, Civ. # 89-00239DAE (D. Haw., July 11, 1997) ($ 800,000 to mother and $ 500,000 to father of damaged child). Jones v. U.S., 9 F. Supp. 2d 1119 (N. Neb. 1998) excellent discussion and listing of comparable awards by federal courts on emotional loss.


30. Toxic Torts

a. Increased Risk of Developing Disease.


e. Cleanup Costs as Property Damage. Are cleanup costs property damage?


f. Use of Discretionary Function Exclusion. Cases falling under the discretionary function exclusion. Andrews v. U.S., 121 F.3d 1435 (11th Cir. 1997) (Navy's pre-CERCLA/RCRA delegation of responsibility to comply with waste disposal regulations and negligent failure to supervise waste disposal independent contractor falls within the discretionary function exclusion--distinguishing Dickerson, Inc. v. United States, 875 F.2d 1577 (11th Cir. 1989)); Daigle v. Shell Oil Co., 972 F.2d 1527 (10th Cir. 1992) (method of cleaning pond at Rocky Mountain Arsenal is discretionary); Employers Ins. of Wausau v. U.S., 27 F.3d 245 (7th Cir. 1994) (EPA decision to use CERCLA is discretionary); Wells v. U.S., 851 F.2d 1471 (D.C. Cir. 1988) (EPA decision not to clean up polluted


31. Setoff. Common law right exists, but not applied to current officer's pay. See Smith v. Jackson, 246 U.S. 388 (1918); McCarl Comptroller General v. Cox, 8 F.2d 669 (D.C. Cir. 1925); McCarl v. Pence, 18 F.2d 809 (D.C. Cir. 1927); 26 Comp. Gen. 907. See also U.S. v. Tafoya, 803 F.2d 140 (5th Cir. 1986) (withholding under Federal Debt Collection Act of Army retired pay not authorized for public defender services, since it is "current pay" not "retirement pay"). Attorney fees awarded under 26 U.S.C. § 7430 are not subject to setoff. Marre v. U.S., 117 F.3d 297 (9th Cir. 1997) (attorney fees awarded under 26 U.S.C. § 7430 may not be setoff under 31 U.S.C. § 3728, since these are "on top" of award to plaintiff).

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35. AIDS Phobia. Trischler v. DiMenna, 609 N.Y.S.2d 1002 (Sup. Ct. Westchester 1994) (recovery for fear of contracting AIDS permitted where reasonable basis exists--minority rule--includes citations of other cases and law reviews).


37. Loss of Parental Nurture and Guidance. Key factor is age of child--more for infants. Moldausky v. Simmons Airlines, Inc., 14 F. Supp. 2d 533 (S.D.N.Y. 1998) noncustodial parent dies in air crash - court reduces $200,000 to $100,000 for 20-year-old daughter. $300,000 to $150,000 for 12-year-old daughter; and $550,000 to $250,000 for 16-year-old developmentally delayed son.
D. What is the Effect of Joint Tortfeasors? Schrab v. Catterson, 967 F.2d 928 (3rd. Cir. 1992) (denial without prejudice of motion to substitute under Westfall Act cannot be appealed); Pelletier v. Fed Home Loan Bank of San Francisco, 968 F.2d 865 (9th Cir. 1992) (denial without prejudice of motion to substitute under Westfall Act can be appealed).


(2) DOJ Certification. After removal, the DOJ will issue a certification, if requested, concerning whether the federal employees actions or inactions were within the scope of their employment. Sullivan v. Freeman, 944 F.2d 334 (7th Cir. 1991) (public defender is not immune under Westfall Act, even though a Federal employee, because Attorney General was not requested to certify). In issuing the certification, the Attorney General is not required to assume the facts plead are true. Deane v. Light, 970 F. Supp. 465 (E.D. Va. 1997) (citing Melo v. Hafer, 13 F.3d 736 (3rd Cir. 1994) and Kimbro v. Velten, 30 F.3d 1501 (D.C. Cir. 1994), cert. denied., 515 U.S. 1145, 115 S.Ct. 2584 (1995)). Courts are split on whether the certification, once made, can be withdrawn. Jamison v. Wiley, 14 F.3d 222 (4th. Cir. 1994) (DOJ can withdraw scope certification and district court can hold evidentiary hearing on whether scope should be granted); Jackson v. Neuger, 783 F. Supp. 558 (D. Colo. 1992) (Attorney General certification of scope may not be withdrawn in sexual assault by psychologist case). The AG’s certification is binding as to removal, but is subject to judicial review as to scope determination and substitution of U.S. as defendant. Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 115 S.Ct. 2227 (1995) (Attorney General’s certification of scope conclusive only as to removal, but not as to substitution). The certification is sufficient to meet the government’s prima facie burden of proving scope of employment. Maron v. U.S., 126 F.3d 317 (4th Cir. 1997). The burden is on the plaintiff to disprove DOJ's scope certification, and only if the plaintiff produces persuasive evidence refuting the certification is the government required to produce evidence to support the certification. Maron; Rogers v. Management Technology, Inc., 123 F.3d 34 (1st Cir. 1997); Kimbro v. Velten, 30 F.3d 1501 (D.C. Cir. 1994), cert. denied., 515 U.S. 1145, 115 S.Ct. 2584 (1995)). However, a plaintiff's failure to object to substitution of U.S. for its employees may waive right to have scope reviewed. D'Huyvetter & Swichkow, P.C. v. Gladrey & Garcia, Civ. 328
The court may order discovery before ruling on the scope issue. Arbour v. Jenkins., 903 F.2d 416 (6th Cir. 1990) (Westfall Act is subject to discovery and judicial review). This would likely happen when the AG's certification is deemed insufficient. Wood v. U.S., 991 F.2d 915 (1st Cir. 1992), reaaff’d, 995 F.2d 1122 (1st Cir. 1993) (Attorney General may not issue scope certificate that simply denies sexual assault occurred); Jackson v. U.S., 751 F. Supp. 910 (D. Colo. 1990) (suit remanded to state court as scope certificate did not allege sexual misconduct within scope of psychotherapist's employment). The court may also order a hearing on the scope issue. Melo v. Hafer, 13 F.3d 736 (3d. Cir. 1994) (while a decision on scope is up to the judge, a hearing must be held whenever there is a genuine dispute of fact); Arthur v. U.S. By and Through Veterans Admin., 45 F.3d 292 (9th Cir. 1995) (court must hear facts on scope before acting in suit by patient against psychiatrist for sexual abuse). Timberline Northwest Inc. v. Hill, 1998 AL 123119 (9TH Cir., Mont.) (DOJ certification of scope does not preclude RICO claim based on allegation that Forest Service employee stole its fire hose clamp invention. Lyons v. Brown, 158 F.3d 605 (1st Cir. Me. 1998), sexual harassment which covers period of time, scope can be decided on an act-by-act basis.


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(4) Federal Employees Outside Scope. If the federal employee was not acting within the scope of their employment, the suit will continue against the employee. Guadagno v. U.S., Civ. # 4:96-CV-60 (W.D. Mich., 26 Sept. 1997) (post office employee involved in fatal accident on way home from work while on indefinite assignment to vacant postmaster job because of special program not in scope—DOJ non-scope despite U.S. coverage of employee’s injuries under FECA); Kassel v. U.S. VA, 709 F. Supp. 1194 (D.N.H. 1989) (not dismissed under Westfall Act for Privacy Act suit); Williams v. Morgan, 723 F. Supp. 1532 (D.D.C. 1989) (DOJ non-scope in "horseplay" case under Westfall Act); Meridian Center Logistics Inc. v. U.S., 939 F.2d 740 (9th Cir. 1991) (Attorney General's certification of scope re FBI agent reversed re contacts with foreign countries). See also Tilton v. Dougherty, 493 A.2d 442 (N.H. 1985) (official immunity not applicable to NG physician conducting physical exam). The denial of a substitution motion is interlocutory and unappealable. Schrab v. Catterson, 967 F.2d 928 (3rd. Cir. 1992) (denial without prejudice of motion to substitute under Westfall Act cannot be appealed); Pelletier v. Fed Home Loan Bank of San Francisco, 968 F.2d 865 (9th Cir. 1992) (denial without prejudice of motion to substitute under Westfall Act can be appealed).

(5) Analysis of Federal Employee’s Actions. Whether an employee’s actions are within scope or not is analyzed on an act-by-act basis. Nadler v. Mann, 951 F.2d 301 (11th Cir. 1992) (AUSA within scope when arranging meeting between FBI and public office under U.S. v. Smith, 499 U.S. 160, 111 S.Ct. 1180 (1991), but not for leak to press).
b. Healthcare Personnel Immunity. § 1089 and VA immunity covers health care personnel, including rotating residents, medical students on reciprocal training. Abraham v. U.S., 932 F.2d 900 (11th Cir. 1991) (Army and Navy residents in training as residents at civilian hospital are not borrowed servants under Florida law because hospital did not exercise complete dominion); Quilico v. Kaplan, 749 F.2d 480 (7th Cir. 1984) (VA "temporary" physician is immune); Green v. U.S., 709 F.2d 1158 (7th Cir. 1983) (USAF surgeon immune while on fellowship in civilian hospital--not a borrowed servant); Jackson v. Kelly, 557 F.2d 735 (10th Cir. 1977). Such immunity may not be available to contract employees. Walker v. U.S., 549 F. Supp. 973 (W.D. Okla. 1982) (civilian urologist hired under personal services contract is not immune). Nor may it apply when the government physician is working in a civilian hospital. Burchfield v. Regents of Univ. of Colorado, 516 F. Supp. 1301 (D. Colo. 1981) (Rocky Mountain Arsenal physician not entitled to § 1089 immunity while detailed to University of Colorado Medical Center); Afonso v. City of Boston, 587 F. Supp. 1342 (D. Mass. 1984) (AF physician held not immune, but loaned servant while in civilian residency); Apple v. Jewish Hosp. & Med. Ctr., 829 F.2d 326 (2d Cir. 1987) (PHS physician working in civilian hospital--case removed to U.S. court--U.S. pays $199,000 and civilian hospital pays $889,000); Ward v. Gordon, 999 F.2d 1399 (9th Cir. 1993) (Army resident training in civilian hospital is both a borrowed servant and loaned servant under Washington law--this permits suit against both the U.S. and the civilian hospital). Nor may such immunity be absolute. Lojuk v. Johnson, 770 F.2d 619 (7th Cir. 1985) (in view of statutory indemnification, § 4116(c) does not give absolute immunity). Even if immunity applies, another remedy may also be applicable. Heller v. U.S., 776 F.2d 92 (3d Cir. 1985) (can sue AF physician in Philippines where malpractice occurred or proceed under 10 U.S.C. § 2733 (Military Claims Act)).


(2) State Court Suits. It may allow, however, suits in state court. Anderson v. O'Donoghue, 677 P.2d 648 (Okla. 1983) ($ 1089(f) permits suit in State court and does not require removal to Federal court).

(3) Certain Statutory Exclusions Not Waived. Passage of 10 U.S.C. § 1089 does not "waive" the Feres doctrine.


c. Miscellaneous Immunities.

Supp.2d 1053 (W.D. Mich, 1998) postal supervisor is in scope when he reported assault by postal employee.


(3) Testimony. U.S. witnesses cannot be compelled to testify in State proceeding as to information obtained in official capacity. See U.S. ex rel Touhy v. Ragen, 340 U.S. 462 (1951). See also Boron Oil Co. v. Downie, 873 F.2d 67 (4th Cir. 1989) (quashing subpoena of EPA employee to order testimony concerning official investigation). Shanks v. Allied Signal Inc., 169 F.3d 988 (5th cir. 1999) under Texas law, testimony given in NTSB hearing is immune as the hearing is quasi-judicial and cannot provide basis for tort of slander.


2. Indemnity or Contribution.

a. Generally. U.S. may seek indemnity or contribution where it is allowed by state law and private defendants may do likewise. See, e.g., Rudelson v. U.S., 602 F.2d 1326 (9th Cir. 1979) (under Hawaii law, U.S. may seek indemnity, but contractor may require jury determination on his share); GAF Corp. v. U.S., 1996 WL 422491 (D.D.C.) (no indemnity permitted against U.S. by settling part in asbestos shipyard cases arising in California, Florida, Hawaii, Massachusetts and New York); Owen v. U.S., 713 F.2d 1461 (9th Cir. 1983)

c. Proportional Fault. Some states have statutes which allow defendants only to pay the amount of their proportional fault. Martin By and Through Martin v. U.S., 984 F.2d 1033 (9th Cir. 1993) (Calif. Fair Share Responsibility Act applicable to rapist where U.S. bore certain responsibility for kidnapping of 6-year-old in day care); Mittiga v. U.S., 945 F. Supp. 476 (N.D.N.Y. 1996) (under N.Y. C.P.L.R. § 1471 (McKinney 1991), U.S. held 60% liable where GOV struck pedestrian). However, such laws may have some effect on contribution or indemnity. See, e.g., Yanez v. U.S., 1996 WL 310120 (N.D. Cal.) (U.S. cannot third party joint tortfeasor who settles on a proportional basis under Col. Civ. Code § 877.6 without informing U.S). Krieser v. Hobbs, 166 F.3d 736 (5th Cir. 1999), distinguishes between pro tanto recovery (modified joint and several) and proportional fault—lists cases from many states. Romero v. Witherspoon, 7 F. Supp. 2d 808 (W.D. La. 1998) nonsettling contract physician not entitled to contribution from settling Army hospital under La. Law. Will v. U.S., 1998 WL 448858 (9th Cir. Wash) where Forest Service employee and contract logger move Will's road grader to place where it is vandalized, under RCW4.22.070(1) vandals cannot be held at fault nor can logger as he is not a party.

d. Indemnity. Indemnity may not be sought prior to final judgment and then administrative filing requirement must be met. Johns-Manville Sales Corp. v. U.S., 690 F.2d 721 (9th Cir. 1982); Barron v. U.S., 654 F.2d 644 (9th Cir. 1981).


5. Pendent Jurisdiction.

a. Nature of Pendent Jurisdiction. Pendent jurisdiction permits suit in Federal court where joint tortfeasor would

b. Employer Immunity. Exceptions to immunity of employer should be reviewed.


Miss. 1981) (hold-harmless clause must clearly require indemnitor to cover U.S. negligence to be valid particularly in emergency situations). In such suits, several liability may be applicable. See Denson v. U.S., 104 F.3d 365 (table), 1996 WL 740821 (9th Cir. 1996) (in construction site accident, several liability applied--U.S. 20%, contractor 60% and plaintiff 20%).

McCoy v. U.S., Civ # 92-113-COL (M.D. Ga., April 5, 1994) (contract mess hall attendant is statutory employee of U.S.);


N.W.2d 833 (Iowa 1979), Mroz v. U.S., Civ. #93-411 (S.D. Ill. 1994), Ogina and Reeves); GEICO v. U.S., 400 F.2d 172 (10th Cir. 1968); Reeves v. Miller, 418 So.2d 1050 (Fla. App. 1982) (Automobile Insurance Cases 24644). See also New Hampshire Insurance Co. v. U.S., 92 F.3d 1193 (table), 1996 WL 436509 (9th Cir. 1996) (judgment against U.S. in the amounts of $2.1 million and $1 million in case where Navy employee was driving POV in scope--U.S. recovers policy limits plus interest and $1.9 million punitive damages where insurer tried to conceal that U.S. was an additional named insured) But see Awbrey v. U.S., 1997 WL 166108 (S.D. Ind.) FTCA exclusion clause upheld in United Farm bureau policy as being unambiguous despite 4 contrary cases and public policy argument); Decker v. Lawrence, 1994 WL 91329 (W.D. Wis.)

b. Rental Cars. Damages to rented car should be paid by DFAS processing TDY voucher for U.S. employee who rented car and waived deductible (JTR M 4405(c)); JTR C 2101(c). May be filed by either the employee or by rental company. Abrams v. Tranzo, 1997WL72179 (11th Cir., Fla.) Tranzo, a USAF officer, had an accident in a rental car while on TDY. U.S. as renter of car cannot recover from USAA, Trunza's insurer, as a covered person.


10. Medical Care Recovery Act. Allows the U.S. to recover when it has expended money for medical expenses. USAA v. Perry, 102 F.3d 144 (5th Cir. 1996) (USAA medical payment is collectible under FMCRA, since it is no-fault); U.S. v. Blue Cross/Blue Shield of Alabama, 999 F.2d 1542 (11th Cir. 1993) (Medigap (supplemental policy) is recoverable by U.S. for care furnished
VA recovery reduced 25% amount would have been needed to hire attorney to pursue action.


E. How is a Claim Investigated?

1. Agency Procedure. By agency involved according to its own regulations and procedures.

2. Specificity of Allegations. Success, particularly in medical malpractice cases, depends upon cooperation by claimant in making specific allegations known.

   a. Substantiated. See I B.3 above for cases stating that failure to substantiate or document renders claim a nullity.

   b. Administrative Settlements May Not Be Coerced. Administrative settlements, however, are a voluntary process and may not be coerced.


      (2) Claimant Notification of U.S. Physician Contact. Where physician is U.S. employee, claimant should be notified of contact where care is provided for injury complained of. Hippocratic Oath does not serve as an absolute bar to disclosure--oath is waived only for physical condition placed in issue. Green v. Bloodworth., 501 A. 2d. 1257 (Del. Super. 1985); Moses v. McWilliams., 549 A. 2d. 950 (Pa. Super. 1988); Coralluzza v. Faes., 450 So. 2d. 859 (Fla. App. 1984).


c. Joint Investigation. A joint investigation should be encouraged.

d. Subpoena. An agency has authority to subpoena upon application to a District Court, but the procedure is not used (5 U.S.C. § 304).

3. Avoid Formal Discovery. Formal discovery by deposition should be avoided as it is costly. It is routinely opposed by the Attorney General.

4. Discoverable Items Can be Released Administratively. Anything which is discoverable under the Federal Rules may be released administratively. This includes the names of expert witnesses. Requests under FOIA should be processed on this basis. McClellan Ecological Seepage Situation v. Garlucci, 835 F.2d 1282 (9th Cir. 1987) (requests under FOIA for information to be utilized in a tort claim cannot be denied on the basis that there is a commercial interest). Hernandez v. U.S., 1998 WL 230200 (E.D. La.) (both USPS accident report and USPS driver's personnel file must be released to plaintiff.

5. Admissions. Murrey v. U.S., 73 F.3d 1448 (7th Cir. 1996) (reversible error not to admit into testimony admission of Secretary of DVA that poor care contributed to death of patient--while not judicial admission, the statement had evidentiary value).

6. Privacy Act. The Privacy Act may prohibit the release of medical records of patients involved in incidents similar to one being claimed.

7. Rule 408. Rule 408 provides evidence of conduct or statements made in compromise negotiations is not admissible at trial. See Ramada Development Co. v. Rauch, 644 F.2d 1097 (5th Cir. 1981) (excludes architects report). See also Admissibility of Compromise, 72 A.L.R. Fed. 592.


9. Pretrial IME. May be enforced even though claim is still in administrative stage by Fed.R.Civ.P. 35. See Martin v. Reynolds Metals Corp., 297 F.2d 49 (9th Cir. 1961) (used to perpetuate evidence); Vaughn v. Commercial Union Insurance Co. of New York, 263 So.2d 50 (La. 1972) (outlines procedural steps).


11. Rule 11 Sanctions. Sanctions may be applied in favor of the U.S. Napier v. Thirty of More Unidentified Federal Agents, 855 F.2d 1080 (3d Cir. 1988); Christen v. Ward, 916 F.2d 1462 (10th Cir. 1990) (sanctions imposed on claimant who keeps adding judges and U.S.A. as defendants in suit originally commenced in 1972); Domingos v. U.S., 883 F. Supp. 16 (E.D.N.C. 1993), aff'd, 35 F.3d 555 (table), 1994 WL 445700 (4th Cir. 1994) (action dismissed as a sanction for counsel's dilatory behavior in presenting proof or expert testimony that a cause of action exists); Saunders v. Bush, 15 F.3d 64 (5th Cir. 1994) (sanctions properly imposed where plaintiff was warned about filing frivolous FTCA claim and then filed again); Lillie v. U.S., 40 F.3d 1105 (10th Cir. 1994) (failure to provide proof of lessor's

F. What are the Advantages of an Administrative Settlement?

1. Faster. Much faster, including larger claims.

2. Authority to Settle. Each Armed Service and the VA have $200,000 authority. Chief, Tort Branch, Civil Division and U.S. Attorneys have $1,000,000 (28 C.F.R. Part 0, Subpart Y). Amounts above that must be approved at DOJ for settlement made either by agency or during pretrial.

3. Avoid Court Docket Congestion. Avoids congested court docket. When suit filed, agency loses authority to settle.

4. Trial Preparation Costly and Time Consuming. Trial preparation is both costly and time consuming for both sides.

5. Attorney Fee Structure. Twenty percent fee for administrative settlements is paid as part of one check to claimant and attorney by GAO when payment is made. Twenty-five percent fee paid by court is in separate check and is sometimes lowered by judge (28 U.S.C. §2678), e.g., filed suit just to increase attorney fees. Doss v. U.S., 659 F.2d 863 (8th Cir. 1981). But see Robak v. U.S., 658 F.2d 471 (7th Cir. 1981) (where limit of less than 25 percent--overturned); Frazier v. U.S., 550 F. Supp. 203 (W.D. Okla. 1982) (where fee is within statutory limits, judge is not required by statute to set fee).

6. No Jury Trials. There is no jury in FTCA cases, but judge may call an advisory jury (28 U.S.C. § 2402).


   a. Tax Benefits. Structured settlements are in use in administrative claims settlements and may provide tax free

b. Reversionary Trust. Such settlements permit a reversionary trust to U.S. where the injured party's life expectancy is uncertain and future costs are overwhelming which is tax free including the monthly payment to family. Hull v. U.S., Civ. # 88-C-1645-E (N.D. Okla., Mar. 8, 1996) (discusses tax free nature of reversionary trust including monthly payment to family). A district court has inherent authority to order a reversionary trust for damaged child. Hull v. U.S., 971 F.2d 1499 (10th Cir. 1992); Hill v. U.S., 81 F.3d 118 (10th Cir. 1996) (reversionary trust may be ordered by court in same manner as provided under Colorado Health Care Availability Act for future care costs, but not for future lost earnings or purchase of home); Deasy v. U.S., 99 F.3d 354 (10th Cir. 1996) (award of $ 3,993,371 reversionary trust for future medical expenses upheld). See also Hull v. U.S., 53 F.3d 1125 (10th Cir. 1995) (guardian ad litem fees are proper costs where guardian ad litem is acting for child beneficiary--parents have no authority to challenge reversion of trust). But see Hill v. U.S., 864 F. Supp. 1030 (D. Colo. 1994), rev’d as to denial of reversionary trust for life care costs only, 81 F.3d 118 81 F.3d 118 (10th Cir. 1996) (court refuses to order reversionary trust as Hull v. U.S., 971 F.2d 1499 (10th Cir. 1992) is exception not the rule); Pineda v. U.S., Civ. # 89-000239DAE (D. Haw, 12 May 1997), later proceedings, Civ. # 89-00239DAE (D. Haw., July 11, 1997) (court refuses to order reversionary trust since it is in best interest of child’s guardian to keep liquidity of cash award); Wyatt v. U.S., 939 F. Supp. 1402 (E.D. Mo. 1996) (structuring of $ 2 million future medical expenses required under Mo. R.S. § 538.202, but there is no basis for instituting a reversionary trust). See also Wyatt v. U.S., 944 F. Supp. 803 (E.D. Mo. 1996).

c. Unknown Future Costs. In cases where future costs are unknown, settlement of the injured parties' claim may be delayed until costs can be predicted, e.g., brain damaged newborn's claim can be delayed until age 6. This would be difficult if case is in suit. Nemmers v. U.S., 795 F.2d 628 (7th Cir. 1986) (court can appoint guardian ad litem or purchase annuity to protect child's interests); Reilly v. U.S., 863 F.2d 149 (1st Cir. 1988) (while court rejects a medical reversionary trust, future medical expenses are placed in a trust in name of injured party and will revert to U.S. if not utilized by certain age); Little v. U.S., Civ. #88-00591-DAE (D. Haw 1990) ($3.7 million future medical put
in trust); Wheeler Tarpeh Doe v. U.S., 771 F. Supp. 426 (D.D.C. 1991) (judge requires parties to develop plan, e.g., annuities, trust or other to avoid the windfall of future medical costs to parents in event of early demise of brain damaged child).


party to the action); Reynosa v. U.S., Civ. # 93-1784 H (BTM) (S.D. Cal., Dec. 20, 1994) (court enforces settlement in excess of $10,000 on claim of rape, which AUSA attempted to withdraw based on later discovered allegations of fraud, even though settlement had already been sent to GAO for payment); Gess v. U.S., 909 F. Supp. 126 (M.D. Ala. 1996) (letter from claims office to unrepresented claimant stating authority of agency was only $25,000 which resulted in $25,000 settlement--set aside due to fraud in inducement). Cf. Weldon v. U.S., 70 F.3d 1 (2d Cir. 1995) (judgment obtained by U.S. can be reconsidered where fraud is alleged, even though no explicit waiver of immunity in FTCA). If settlement agreement is breached and amount involved is over $10,000, jurisdiction lies in the U.S. Court of Federal Claims, not the U.S. District courts. A.G. Edwards v. U.S., Civ. # 92-0434 (JHG) (D.D.C., Oct. 29, 1993), aff'd, 1994 WL 541250 (D.C. Cir. 1994) (enforcement of settlement agreement over $10,000 is not under jurisdiction of U.S. District court, since it is a breach of a government contract which under the Tucker Act may be sued upon in the Court of Federal Claims). If a minor is injured and there are multiple claims, extra care must be taken because parent’s claim may be legally distinct from child's or a court approval of the settlement is required. Reo v. U.S., 98 F.3d 354 (3rd. Cir. 1996) (settlement of administrative claim of 3 year old for $2,500 by USPS in 1994 is not binding, since not approved by N.J. court--action by child at age 19 permitted); Schwarder v. U.S., 974 F.2d 1118 (9th Cir. 1992) (Children’s wrongful death action not barred by prior administrative settlement of parent’s claim, since they have separate cause of action under California Wrongful death statute). Plaintiff’s release of another defendant involved in the same incident may also release U.S., but any such release is subject to interpretations under contract principles. Thompson v. Wheeler., 898 F.2d 406 (3rd Cir. 1990) (interpretation of release by other vehicle--does release include right of contribution from U.S. for GOV passenger's claim?); Combs v. U.S., 768 F. Supp. 584 (E.D. Ky. 1991) (release by plaintiff of Army reservist's POV insurer did not release); Bazuaye v. U.S., 1995 WL 519995 (S.D.N.Y.) (general release for one suit is binding in another suit for property loss arising out of same transaction). Bienville Parish Police Jury v. U.S. Postal Serv., 8 F. Supp. 2d 563 (W.D. La., 1998), where injured party recovers from rural mail carrier's POV policy and gives general release with no reservation of rights, claimant also can recover from USPS. Massie v. U.S., 166 F.3d 1164 (Fed. Cir. 1999) where life insurance company fails, payment of annuities where release in MCA does not state that U.S. cannot guarantee payments. Kee v. U.S. 168 F.3d 1133 (9th Cir. 1999) release of Government driver upon collection of her liability insurance does not release United States as employee (Government driver) is immune under 28 USC 2679.
9. Agency Must Deal With Claimant's Attorney. While claimant is not required to be represented by an attorney, once one is retained, agency must deal with the attorney.

10. Admissibility of Efforts to Settle. *Bradbury v. Phillips Petroleum Co.*, 815 F.2d 1356 (10th Cir. 1987) (barred by Rule 408, however, settlements in companion cases may be admissible to show incident in question was not result of accident or mistake).

G. What Methods of Negotiation are Used?

1. Variation in Method of Negotiation. Wide variation between agencies.

2. Face-to-Face Negotiation Cost Comparison. Cost of negotiating face-to-face by claims attorneys from one central office should be compared to costs of trying cases.

3. Compliance With Local Practice. Efforts should be made to comply with local practices in regard to negotiation, e.g., who makes first offer.

4. Claimant May Offer Less Then Claimed Amount. Fact that claimant makes offer less than amount claimed does not limit his ad damnum to the new amount if he later files suit.

5. Tolling of Limitation Period During Negotiation. The two year statute of limitations is tolled indefinitely during negotiations.

   a. Claimant Does not Have to File Suit After Six Months. The claimant is not required to file suit merely because six months since his administrative filing date have expired. *McAllister v. U.S. by U.S. Dept. of Agriculture*, 925 F.2d 541 (5th Cir. 1991).

   b. Six Months to File Suit After Denial. He has six months after final agency action, i.e., denial or final offer.


6. Reconsideration. Final agency actions may be reconsidered by the agency upon written request by a claimant (28 C.F.R. § 14.9).

   a. Tolls Statute of Limitation. Such a request gives the agency another six months to make final disposition thus the
six months statute of limitations may be tolled by such a request. But requesting party must be informed by agency that request is being reconsidered to toll six months statute of limitations. Woirhaye v. U.S., 609 F.2d 1303 (9th Cir. 1979).

b. Same Individual. A settlement may be reconsidered by the approving authority who made it upon request by the claimant for any reason even though payment has been made, provided he is the same individual who originally paid the claim.

c. Setting Aside Settlement. A successor settlement authority can set a settlement aside only on the basis of fraud, collusion, new and material evidence, or manifest error of fact.


7. Higher Agency Authority Helpful on Quantum Disputes. If authority with monetary jurisdiction over the claim cannot effect a settlement solely because of difference of opinion as to quantum, he should be required to forward case to higher agency authority for further settlement efforts.

8. AG Approval of Tentative Settlements Beyond Agency Monetary Jurisdiction. On cases beyond monetary jurisdiction of agency, a tentative settlement is arrived at and case forwarded to Attorney General for approval. The required preparation of a detailed legal memorandum, takes three to six months for final action and issuance of check.

10. Offer of Judgment. If claimant refuses fair offer of settlement when claim is in administrative phase and files suit, the claimant may be subject to the same offer under Rule 68, Federal Rules of Civil Procedure. If claimant again refuses the offer and wins a judgment less than the offer, the court can award costs to the defendant. Delta Air Lines v. August., 450 U.S. 346 (1981). See also Offer of Judgment Under Rule 68, Drage for the Defense, Aug. 1990.

H. What are Payment Procedures?

1. Payment of $2,500 or Under Claims. Payment made by agency funds when amount is $2,500 or less. Processing time for mailing of check is several days to a week.

2. Payment of Larger Amounts. Payments over $2,500 are processed by Financial management Service Department of Treasury. Processing time is longer-usually from 4 to 6 weeks. Payment may be made in foreign currency converted as of date of award. Rose Hall Ltd. v. Chase Manhattan Overseas Banking Corp., 566 F. Supp. 1558 (D. Del. 1983); In re Good Hope Chemical Corp., 747 F.2d 806 (1st Cir. 1984) (American law where breach of contract occurred requires conversion rate for currency to be date of breach); Gathercrest Ltd. v. First American Bank & Trust, 649 F. Supp. 106 (M.D. Fla. 1985) (if obligation arises under Foreign law, judgment date determines exchange rate, if it arises under U.S. law, breach date determines exchange rate). See also Hicks v. Guinness, 269 U.S. 71 (1925) and Die Deutsche Bank Filiale Nurnberg v. Humphrey, 272 U.S. 517, 47 S.Ct. 166 (1926).

3. Congressional Approval No Longer Needed. Payments over $100,000 no longer need to be processed by Congress, since 31 U.S.C. § 724a was amended in 1978.

4. Payment of NAFI Claims. NAFI claims are paid out of NAFI funds. Civil Works claims are paid out of Civil Works Funds only if $2,500 or under.

5. Expedited Payments. Payments can be expedited provided a request is for hardship or emergency reasons. Hand carrying file is the best method to achieve this.

6. Death of Plaintiff. Settlement cannot be set aside where plaintiff dies between settlement and issuance of check. However, EAJA does not require additional attorney fees for additional trial. Reed by and Through Reed v. U.S., 891 F.2d 878 (11th Cir. 1990); Davis by Davis v. Jellico Community Hospital Inc., 912 F.2d 129 (6th Cir. 1990) (plaintiff dies one month after $25 million judgment--no basis to set aside).