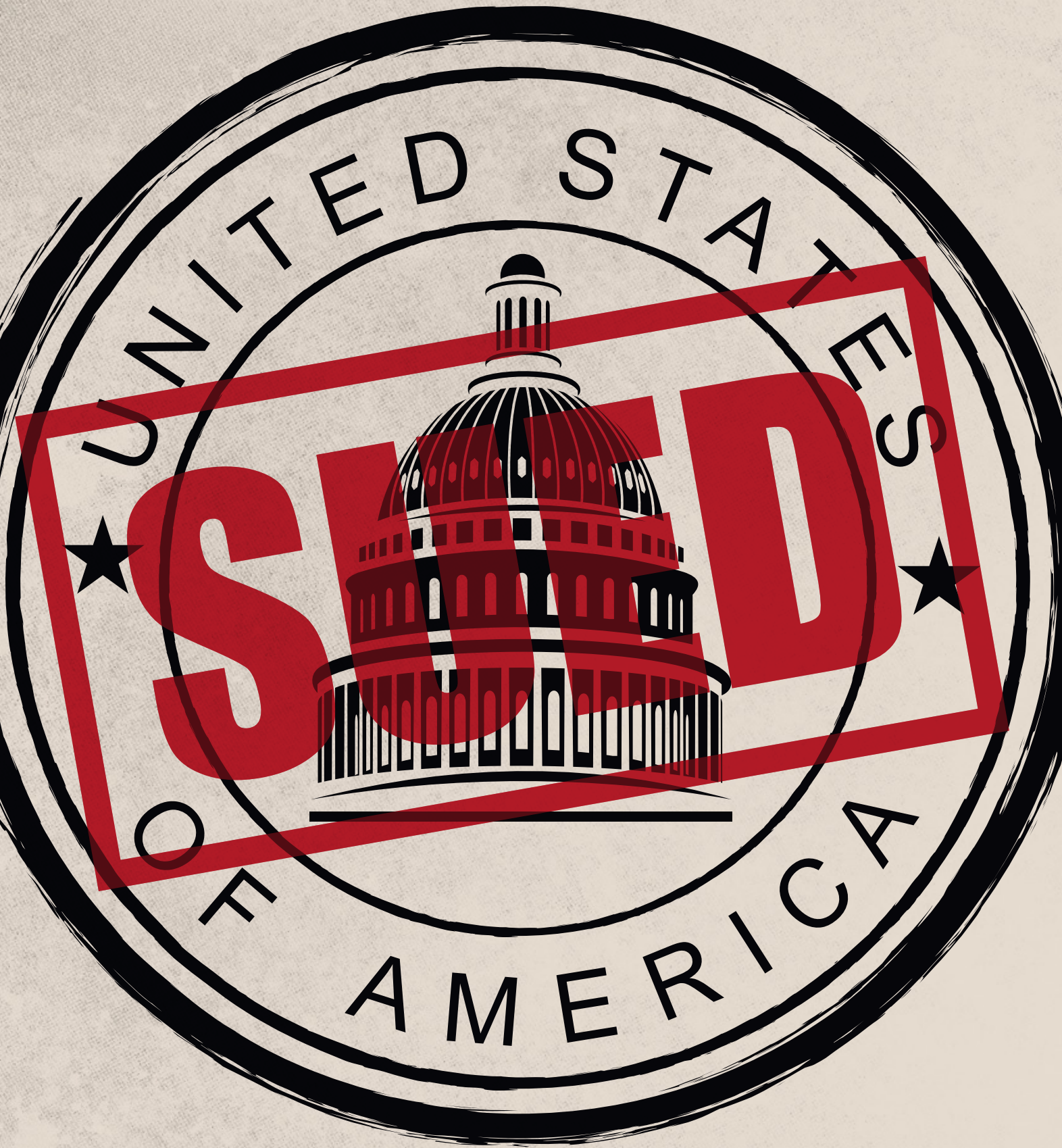
UNITED STATES
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Drafting a Tort Complaint Against the Federal Government and Its Contractors and the Limitations on the Independent Contractor and Discretionary Function Exceptions

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Sovereign immunity normally precludes suing governments—except to the extent that the sovereign agrees to be sued.[1] The Federal Tort Claims Act (FTCA)[2] is a waiver of sovereign immunity. The FTCA allows one to sue the United States for tort claims, as though the United States was a private person, and in accordance with the laws where the act or omission occurred.[3]

It is impressive that our society allows its government to be subject to civil liability. And it makes sense—many aspects of our daily lives are run by the government (e.g., roads, postage, some hospitals, prisons, parks), and potential civil liability is the only strong incentive to make sure that those functions are handled responsibly. But having the right to sue the United States does not mean it is easy to do so. The United States routinely argues that cases against it are barred under two exceptions to the FTCA—the "independent contractor exception"[4] and the "discretionary function exception."[5] However, in many cases, these exceptions simply do not apply.

The government may argue that these exceptions are broad and preclude most claims, but these exceptions should be narrowly construed. Courts, applying the proper analysis, will dismiss challenges, or reverse dismissals, where plaintiffs can allege direct negligence on the part of a federal employee relating to safety, and a resulting injury.

Two cases are frequently addressed in this article—*Edison v. United States*,[6] discussing the independent contractor exception, and *Whisnant v. United States*,[7] discussing the discretionary function exception. Both are cases from the U.S. Court of Appeals for the Ninth Circuit, and, as such, rely primarily on Ninth Circuit authority. Furthermore, the Ninth Circuit has expressed its narrow view of the exceptions to the FTCA, while other circuits have not. Prior to relying on these cases, be sure to see how they have been discussed in your circuit, or if there is contrary authority.

Why sue the United States? There are three strong reasons to sue the United States. First, individuals injured as a result of governmental neglect need to be taken care of. Second, it is important to keep our government in check. The FTCA is a statute created by the legislature to hold the United States accountable for the misdeeds of its agents, and it helps to ensure that federal employees properly carry out governmental duties.[8] Third, from a practical perspective, it is generally easier to collect judgments against the United States than it is from private parties.

This article identifies hazards and benefits of FTCA claims; briefly sets forth the prefiling requirements for bringing an FTCA action; clarifies the governing case law on the two oft-cited exceptions to the FTCA; and provides guidance for complaint-drafting that avoids implicating those exceptions.

Hopefully, at the end of this article, a practitioner will know when and how to bring a viable tort claim against the United States.

What's Problematic About Suing the United States?

Fee Caps

Attorney's fees are limited to 25 percent in FTCA actions that are litigated in court and 20 percent for claims settled before litigation commences.[9] Charging a higher fee is a federal misdemeanor carrying a fine and imprisonment.[10] If you are suing the United States and other defendants, I recommend that your fee agreement state that you will be entitled to a cap of 25 percent for funds received from the United States during or after litigation. The fee agreement should separately state your contingency fee as against other (nongovernmental) defendants.

Having an Adversary With Unlimited Resources

Since the assistant U.S. attorneys (AUSAs) are salaried employees, the United States will not likely factor litigation costs into settlement (and it is highly unlikely that the government will settle a nuisance value case). And the federal government will have unlimited funds for experts and to fly in witnesses. As a result, cost may be a more significant factor for you and your client than for the federal government. But if your case is strong, a jury will see that you are representing an individual against the forces of the government, and as the case progresses to trial, the United States will be aware that a jury may be sympathetic to your cause.

Prefiling Requirements

Prior to commencing suit, a party is obligated to present his or her claim to the appropriate federal agency. Prefiling requirements make lawyers feel uneasy. It's an additional civil procedure, with severe ramifications resulting from noncompliance. That said, prefiling requirements for the FTCA are extremely easy to handle. There are three things a practitioner needs to know—(1) be timely, (2) fill out the easy-to-complete Standard 95 Tort Form, and (3) make sure that your claim is for an amount as large as you would seek in the litigation. The steps are outlined below.

How to File an Administrative Claim.

The federal government has streamlined the process to file an administrative claim. And the process, unlike that for constitutional claims or state-court processes, is quite easy. First, figure out the agency you are suing and find out where it is headquartered. Second, complete the two-page Standard Form 95, which is available online.[11] Third, make sure that your "amount of claim" is for an amount that you will eventually include in the prayer for relief in the civil action, as your claim to tort damages in the federal action will be limited to what you put in your administrative claim (absent a change of circumstances).[12]

When to File the Administrative Claim.

The time requirements to submit a claim are fairly reasonable when compared to those of most municipalities. Under the FTCA, an injured party has up to two years to submit a claim to the agency responsible for the injury.[13] But you should be a month early to be safe—the code states that the action is barred unless "presented in writing to the appropriate federal agency within two years after such claim."[14] However there is no provision defining when a document is "presented" to the agency. If the agency can claim that it is backlogged and did not receive the claim for weeks after it was mailed, and after the two-year period lapsed, it could argue that the claim is barred (yes—we have faced this argument, but were able to prove that the documents were in fact received by the agency within two years of the occurrence). To be safe, when possible, submit the claim to the agency within one year and 10 months from its occurrence.

Even though the statute states that a claim submitted after the passage of the two-year deadline is "forever barred,"[15] a court can still have jurisdiction to hear the claim, under the doctrine of "equitable tolling" upon a showing of "extraordinary circumstances."[16] Such circumstances usually involve some governmental act that contributed to the delay in filing.[17]

When To File the District Court Action.

After the agency denies the claim (and, in our experience, it likely will), the party has six months from the date of the agency's mailing of the denial to sue in federal court. But there is no reason to wait that long. There is a significant possibility that the agency will reject the claim, and you can prepare your complaint while waiting for the denial. If the denial never arrives, the claim is deemed "denied" six months after you mailed the claim to the agency.[18] Once the claim has been denied, file the civil action as quickly as you can.

Drafting Your Complaint to Survive a Motion to Dismiss

Any FTCA complaint needs to be drafted with care to avoid the application of the exceptions to the FTCA. The first of the two most-cited exceptions to the FTCA is the independent contractor exception, which precludes claims against the United States based on injuries resulting from the negligence of the United States' contractors. In essence, it bars claims premised on vicarious liability. The second is the discretionary function exception, which precludes judicial "second-guessing" of decisions that are, by their nature, discretionary.

AUSAs may argue that the court lacks jurisdiction to hear your claim because of these exceptions. And these exceptions are jurisdictional in nature, which means that there is no obligation under the Federal Rule of Procedure 12 for the United States to bring them collectively (so you may be subject to two rounds of dispositive motions in the pleading stage instead of one). But your complaint should survive as long as you (1) identify a specific duty held by a federal employee that was breached, and (2) that duty relates to the safety of the public. For example, in the *Edison v. United States* case, discussed below, the plaintiffs were able to point to a breach of a common-law duty of the landowner (the United States) to warn invitees against known harms—a duty clearly related to public safety. Accordingly, the claims were allowed to proceed.[19]

The Independent Contractor Exception (and *Edison v. United States*)

Gone is the time when government employees exclusively handled governmental duties. Private companies can bid to perform almost any service. In today's era of privatization, the federal government contracts out many tasks related to their governmental duties. Under 28 U.S.C. § 2671,[20] commonly referred to as "the independent contractor exception," the United States can only be liable for the acts or omissions of its own employees and cannot be vicariously liable for the acts or omissions of its contractors. However, the United States can be liable for the negligent acts of federal employees working alongside contractors or whose duties overlap those of the private contractors.

On May 20, 2016, the Ninth Circuit published its decision in *Edison v. United States*, where the court "ascertaine[d] the boundaries of the United States' liability when it has delegated some, but not all, of its legal duties to an independent contractor."[21] In *Edison*, the

plaintiffs were inmates at Taft Correctional Institution, a federal prison, and alleged that they contracted a severe form of valley fever, a fungal infection, as a result of their incarceration. The United States owned Taft, but had contracted a private contractor, Management & Training Corp. (MTC), to operate the facility. Under the contract, the United States retained control over changes to the buildings on the premises. In addition to claims against MTC, the plaintiffs asserted claims against the United States based on failure to warn, failure to modify structures, and failure to develop and implement an adequate protection policy in response to a rise in infections at the prison.

The district court determined that the plaintiffs' claims arose exclusively from the management of the prison and were essentially based on the alleged misconduct of the private contractor. Accordingly, the court held that the plaintiffs' claims were barred by the independent contractor exception. But the circuit court reversed, and allowed plaintiffs to proceed on all asserted grounds. The circuit court stated that "the independent contractor exception is not a complete bar to liability any time the United States employs a contractor. Some duties of care are non-delegable; others are retained by the government, if not delegated" and "our precedents do not hold that the United States is absolved of all liability, no matter what the injury complained of or its cause, any time it hires an independent contractor."[22] The court clarified that the plaintiffs were not seeking to hold the United States vicariously liable for the contractor's actions, but were instead seeking to hold the United States directly liable.[23] Accordingly, jurisdiction was present.

The Ninth Circuit enumerated a three-step inquiry to determine whether the United States is liable for its own acts or omissions: (1) whether state law would impose a duty of care on a private individual in a similar situation; (2) looking to the contract and the parties' actions, whether the United States retained some portion of that duty for which it could be directly liable,[24] and, (3) even if the government delegated all its duties to the independent contractor, whether, under the applicable state law, non-delegable duties were imposed on the government.[25]

The Discretionary Function Exception

The other frequently cited exception to the FTCA's waiver of sovereign immunity is 28 U.S.C.S. § 2680(a), the "discretionary function exception," which precludes liability under the FTCA for claims based upon the exercise, nonperformance, or performance of a discretionary function or duty, whether the discretion involved be abused.[26] The exception embodies Congress' intent "to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."[27] "In other words, 'if judicial review would encroach upon the type of balancing done by an agency, then the [discretionary function] exception applies."[28]

The U.S. Supreme Court enumerated a two-pronged test, commonly referred to as the *Gaubert/Berkovitz* test, to determine if the discretionary function application applies[29] (and the government has the burden of establishing both prongs[30]). First, a court determines whether a particular act is governed by a statute, policy, or regulation or, alternatively, whether it was an act in which the applicable statutes and regulations conferred discretionary authority on the agency. If the act at issue is not discretionary, then the exception does not apply.[31] Second, even if the agency's conduct is not mandated by statute or regulation, FTCA plaintiffs can still prevail under the second part of the inquiry, which examines whether the government actions at issue "are of the nature and quality that Congress intended to shield from tort liability."[32] To evaluate this step, a court must determine whether the challenged governmental actions are "susceptible to policy analysis" and involve a decision grounded in social, economic, and political policy.[33]

There are many opinions interpreting what "a decision grounded in social, economic, and political policy" means. In the Ninth Circuit, the court made a distinction between claims based on design and those based on implementation, noting (1) "[t]hat the design of a course of government action is shielded by the discretionary function exception, whereas the implementation of that course of action is not,"[34] and (2) "matters of scientific and professional judgment—particularly judgments concerning safety—are rarely considered to be susceptible to social, economic, or political policy."[35]

But the contours of this exception are quite difficult to understand and there is no clear circuit court consensus on its breadth or application. Courts have acknowledged its subjective quality and inconsistent application.[36] The federal government will likely argue that, in essence, every decision is "discretionary" to some extent and that claims arising from injuries allegedly stemming from decisions are never actionable. But these arguments undermine the legislative intent of the FTCA, which was to make the government assume the obligation to pay damages for the misfeasance of employees carrying out its work.[37] Courts should be hesitant not to let exceptions to the FTCA swallow up the act itself.[38]

There is little consensus among district courts as to what types of claims are barred by this exception. Consider a simple "failure to warn" claim about a known hazard—some circuit courts hold that such a claim is not barred,[39] while others hold that they are.[40] And some fashion out a middle ground, precluding a failure to warn claim if the type of warning required more than "garden variety" remedial steps.[41] A rule could be deduced that if the type of warning required is sophisticated, and not just a garden-variety warning, then a failure to warn claim might be barred by the discretionary function exception.[42] But it is not likely that there is a consistent rule to be derived. The second prong of the *Gaubert/Berkovitz* test is ambiguous and open to subjective interpretation, and will likely continue to generate inconsistent rulings until there is clarification or adoption of a new rule.

Accordingly, a practitioner should review the applicable circuit court case law; identify the types of decisions that the court has determined are, or are not, covered; and draft the complaint accordingly. However, many tort cases will involve an allegation of a public hazard. Decisions related to a public hazard on federally owned property should not invoke the discretionary function exception.[43,44] The government may, in an attempt to invoke the discretionary function exception, recast these claims as being related to a budgetary decision. But decisions related to the availability of funds, and how to use them, are not the type of decisions within the scope of the discretionary function exception.[45]

Drafting and Arguing Tips

The following guidelines should assist in drafting a FTCA complaint that should defeat a Federal Rule of Civil Procedure Rule 12 motion:

- Separately list your causes of action against the United States. Don't lump together causes of action against the United States with those of contractors. You want to be able to point to the

United States' direct negligence and to show how that breach contributed to the injury.

- Clearly identify the applicable duty, under appropriate state law that a private person is subject to, and the United States is similarly subject to. Clearly identify the direct negligence alleged against the United States, separate from that alleged against any private contractors.
- If there is a potentially non-delegable duty, such as a duty to control a particular risk, separately allege that duty.
- Do not assert claims under vicarious liability.
- Avoid arguing that the United States asserted substantial oversight and control to assert liability—the standard is very difficult to meet. A plaintiff must show that the United States "had authority to control the detailed physical performance of the contractor and exercised substantial supervision over its day-to-day activities."[46]
- Assert failure to warn claims, but don't call attention to anything sophisticated about the type of warning that should have been made (the more sophisticated the warning, the more discretion the government will have in whether to employ it, and the more likely that the claim will be barred by the discretionary function exception).
- Be prepared to inform the court that exceptions to the FTCA are to be construed narrowly[47] and that attempts to broaden the exceptions' application are not grounded in good law.[48]
- If you have an option of applicable forums, research each circuit court's decisions on the exceptions prior to filing.[49]

Conclusion

Congress enacted the FTCA to enable people to bring tort claims against the government, as a means to both incentivize responsible safety measures for governmental tasks and to protect injured parties from bearing the entirety of costs resulting from injuries arising from negligence of federal employees. These guidelines should help a practitioner in holding the government to task, and avoid the erroneous application of narrow exceptions—which, if incorrectly adopted, would divest the FTCA of its purpose. FTCA cases carry compulsory prefiling requirements that are easily handled. FTCA cases carry fee caps limiting compensation for a civil case to 25 percent of any recovery. But FTCA claims can bring prompt relief to those injured when governmental services are negligently performed. FTCA cases also promote responsibility in the undertaking of governmental duties (the negligent performance of which can produce great injuries and, at times, harm the most defenseless members of society). The fact that the government is a targeted defendant, or one of the potential defendants, should not scare away potential claimants or practitioners. Bringing FTCA claims can be lucrative and rewarding work that benefits the common good. ⊙

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Endnotes

[1]*Dalehite v. United States*, 346 U.S. 15, 30 (1953) (*citing Feres v. United States*, 340 U.S. 135 (1950)).

[2]The Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2410, 2671-80, *et seq*. (2016).

[3]*Autery v. United States*, 424 F.3d 944, 956 (9th Cir. 2005).

[4]28 U.S.C. § 2671 (2016) (defining "employee of the government").

[5]28 U.S.C. § 2680 (2016).

[6]*Edison v. United States*, 822 F.3d 510, 510 (9th Cir. 2016).

[7]*Whisnant v. United States*, 400 F.3d 1177, 1180-81 (9th Cir. 2005).

[8]With inmate cases, practitioners may "caption-flip"—taking the criminal caption of a case like *United States v. Edison* and flip-flopping the parties' names to make it the FTCA case of *Edison v. United States*.

[9]28 U.S.C. § 2678 (2016) provides: "No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to § 1346(b) of this title or any settlement made pursuant to § 2677 of this title or in excess of 20 per centum of any award, compromise, or settlement made pursuant to § 2672 of this title. Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both."

[10]*Id.* (and this would be a pretty embarrassing reason to be in custody).

[11]Standard Form 95 can be downloaded at www.wallachlegal.com/resources and also is available at www.justice.gov/sites/default/files/civil/legacy/2011/11/01/SF-95.pdf.

[12]28 U.S.C. § 2675(b) (2016) (stating an "[a]ction under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.").

[13]28 U.S.C. § 2401(b) (2016) (stating "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.").

[14]28 U.S.C. § 2401.

[15]*Id.*

[16]*United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1631 (2015).

[17]*See id.* at 1629-30.

[18]28 U.S.C. § 2675 (2016) (stating "[a]n action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection

shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.").

[19]*Edison v. United States*, 822 F.3d 510, 510, 2016 U.S. App. LEXIS 9250, at *23 (9th Cir. 2016).

[20]*See* 28 U.S.C. § 2671 (2016) (defining "Employee of the government").

[21]*Edison*, 822 F.3d 510, 2016 U.S. App. LEXIS 9250, at *13.

[22]*Id*. at *5, 13.

[23]*Id.* at *17-18.

[24]Ten decisions have frequently been cited in independent contractor exception cases. These can be divided into two categories—those where the United States delegated all duties at issue to a contractor (in which case jurisdiction is not present as to the government) and those where the United States retained one or more, the breaches of which allegedly contributed to the injury (in which case jurisdiction lies). A chart of these cases can be accessed at www.wallachlegal.com/resources. The holdings of these cases are completely in line with the court's three-part test in enumerated *Edison*. In these four cases, the United States retained one or more duties at issue: *Logue v. United States*, 412 U.S. 521, 533 (1973) (remanding to determine liability of federal marshal who, after being ordered to transport decedent to a mental health facility, chose instead to house him at a city jail, where he committed suicide); *Noel v. United States*, 893 F. Supp. 1410, 1422 (N.D. Cal. 1995) (denying summary judgment and holding that the government's delegation of a duty to operate concessions at an air show may not have encompassed a delegation of a duty to warn of known harms); *McGarry v. United States*, 370 F. Supp. 525, 545 (D. Nev. 1973) (stating "[the] plaintiffs' claims against the United States are predicated solely upon the negligence of employees of the United States. The fact that someone else might be charged with absolute liability, or the fact that an independent contractor might have been negligent, does not absolve the United States from liability under the FTCA if its employees were also negligent."); and *Suro v. United States*, 107 F. Supp. 2d 206, 208 (E.D.N.Y. 2000) (holding that the United States, which owned a building managed by a contractor, could be liable for injuries from lead-paint ingestion if the United States was aware that an infant resided there and did not inform the contractor). Conversely, in these six cases, the plaintiffs were *not* able to identify a specific duty retained by the United States and, therefore, the independent contractor exception barred the courts' exercise of jurisdiction. *Autery v. United States*, 424 F.3d 944, 959 (9th Cir. 2005) (holding that because the United States contracted with companies for the express purpose of controlling wildfires, the United States could not be liable for damages resulting from one); *Laurence v. Dep't of the Navy*, 59 F.3d 112, 114 (9th Cir. 1995) (determining that because the United States contracted with a private firm to build a project, and that private firm made a decision to use contaminated soil for backfill, the United States could not be liable for resultant damages); *Letnes v. United States*, 820 F.2d 1517, 1519 (9th. Cir. 1987) (reasoning that because a pilot who had contracted with the forest service was an independent contractor, and employees of the forest service were not alleged to have breached a duty, the United States could not be liable for his death); *Arora v. United States*, 144 F. App'x 627, 628 (9th Cir. 2005) (stating that the United States could not be liable to a federal inmate housed in a city jail, and treated at a county hospital, who brought a claim alleging inadequate medical care); *Monroe v. United States Marshals*, No. 95-35716, 1996 U.S. App. LEXIS 30007, at *1-8 (9th Cir. 1996) (unpublished) (stating that the United States could not be liable to a federal inmate housed at city jail who alleged negligence on part of city jailors); and *ABF Freight Sys. Inc. v. United States*, No. C 10-05188, 2013 WL 3244804, at *1-12 (N.D. CA 2013) (unpublished) (holding that a plaintiff who slipped outside a federal building managed by a private contractor could not maintain an action against the United States as there was no evidence that a federal employee was negligent).

[25]In *Edison*, because the United States was subject to duties arising under premises liability, such as failure to warn and failure to protect against hazards on owned land (bolstered by California's recognition of a special relationship between jailors and inmates mandating that jailors protect inmates against known harms; *see, e.g.*, *Giraldo v. Dep't of Corr. & Rehab*., 85 Cal. Rptr. 3d 371, 371 (Cal. Ct. App. 2008)), the first step was satisfied. Because the United States could not have delegated its duty to warn (the private contractor had no obligations to the inmates prior to their arrival at the site) and retained other duties (such as control over structural changes), the second step was satisfied. Because liability was present under the first two steps, the Court did not analyze the third step or identify any duties as non-delegable. But the court still provided a footnote describing one such non-delegable type of duty, stating as follows: "[t]he Ninth Circuit has previously applied this principle to hold the United States liable under the FTCA". An example is the line of FTCA cases applying the "peculiar risk" doctrine to hold the government directly liable for its failure to act, despite its delegation of safety procedures to an independent contractor. *See Myers v. United States*, 652 F.3d 1021, 1034 (9th Cir. 2011); *Yanez v. United States*, 63 F.3d 870, 872 n.1 (9th Cir. 1995) ("Under the FTCA, the United States may not be held vicariously liable. However, [peculiar risk] liability has been construed as creating direct liability for the government's non-delegable duty to ensure that the contractor employs proper safety procedures." (*citing McCall v. United States*, 914 F.2d 191, 194 (9th Cir. 1990); *McGarry v. United States*, 549 F.2d 587, 590 (9th Cir. 1976))). *Edison*, 822 F.3d 510 at n.4.

[26]*Valdez v. United States*, 56 F.3d 1177, 1179 (9th Cir. 1995).

[27]*O'Toole v. United States*, 295 F.3d 1029, 1033 (9th Cir. 2002) (*citing United States v. S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U.S. 797 (1984)).

[28]*Id.* (*citing Begay v. United States*, 768 F.2d 1059, 1064 (9th Cir. 1985)).

[29]*Gaubert/Berkovitz* refers to the Supreme Court decisions *U.S. v. Gaubert*, 499 U.S. 315, 322-25 (1991) and *Berkovitz v. U.S.*, 486 U.S. 531, 536-37 (1988).

[30]*O'Toole*, 295 F.3d at 1033-34 (*citing Marly's Bear Medicine v. U.S. ex rel Sec'y. of the Dept. of Interior*, 241 F. 3d. 1208, 1213 (9th Cir. 2001)).

[31]*Whisnant v. United States*, 400 F. 3d 1177, 1181 (9th Cir. 2005).

[32]*O'Toole,* 295 F.3d at 1033-34 (*citing U.S. v. Varig*, 467 U.S. 797, 814 (1984)).

[33]*Id.*

[34]*Whisnant*, 400 F .3d at 1181.

[35]*Id.*

[36]*O'Toole*, 295 F.3d at 1036 (stating "[w]hile there is unquestionably an element of subjective characterization to the second part of the discretionary function exception analysis, we believe the O'Tooles have the better argument."); *Figueroa v. United States*, 64 F. Supp.

2d 1125, 1130 (D. Utah 1999) (stating "the discretionary function exception has traveled a serpentine path. The case reporters are cluttered with contradictory decisions. Cases that most would agree are factually similar often result in different applications of the discretionary function exception.").

[37]*Dalehite*, 346 U.S. at 25.

[38]*Whisnant*, 400 F.3d at 1183 (stating "[m]ore recently, in *O'Toole v. United States*, 295 F.3d 1029 (9th Cir. 2002), we held that the discretionary function exception did not apply to a claim for private property damage resulting from the government's failure to maintain an irrigation ditch on its own property. *See O'Toole,* 295 F.3d at 1037. Elaborating on *ARA Leisure Servs. v. United States*, 831 F.2d 193, 195 (9th Cir. 1987), we explained: 'The danger that the discretionary function exception will swallow the FTCA is especially great where the government takes on the role of a private landowner….'").

[39]Consider these cases where failure to warn claims were not barred by the discretionary function exception:
In re Joint E. & S. Dist. N.Y. Asbestos Litig., 897 F.2d 626, 637 (2d Cir. 1990) (holding that plaintiffs' failure to warn claims alleging that they had been exposed to asbestos while working for the military during World War II were not barred); *Denham v. United States*, 834 F.2d 518, 523 (5th Cir. 1987) (holding that a failure to warn claim against the army arising out of an injury at a swimming area resulting from detached buoys was not barred); *Caplan v. United States*, 877 F.2d 1314, 1315 (6th Cir. 1989) (holding that a failure to warn claim against the government arising out of an injury from a fallen tree that the government had injected with a herbicide was not barred); *Mandel v. United States*, 793 F.2d 964, 968 (8th Cir. 1986) (holding that a paralytic's failure to warn claim against the National Park Service related to warnings about underground rocks was not barred); *Whisnant v. United States*, 400 F.3d 1177, 1181 (9th Cir. 2005) (holding that a failure to warn claim arising from illness from mold at a government-owned commissary was not barred); *Figueroa v. United States*, 64 F. Supp. 2d 1125, 1133 (D. Utah 1999) (determining that a decedent's family's failure to warn claim against the Forest Service relating to a rock hazard was not barred); and *W.C. & A.N. Miller Cos. v. United States*, 963 F. Supp. 1231, 1243 (D.D.C. 1997) (holding that plaintiff's failure to warn claim arising out of buried munitions was not barred).

[40]Consider these cases where failure to warn claims were barred by the discretionary function exception: *Sánchez v. United States,* 671 F.3d 86, 102 (1st Cir. 2012) (holding that failure to warn claims against the Navy, by residents of Vieques Island alleging that military exercises resulted in toxins in the water, and that the Navy allowed residents to enter, graze cattle, and fish in polluted areas, were barred, because the Navy engaged in both choice and judgment as to who had permission to be in the areas involved and what was said about that access); *Dunaway v. United States*, 136 F. Supp. 2d 576, 580, 586 (E.D. La. 1999) (holding that a failure to warn claim by a plaintiff whose motorboat hit an underwater sandbar in a canal built and maintained by the government was barred, stating "[b]ecause the United States has no duty to ensure the safe navigation of any waterway, or to establish aids to navigation, it enjoys discretion as to whether and how it will establish such aids" and "the decision to mark the sandbar, dredge the canal, or do nothing involves considerations of the amount of commercial traffic on the waterway relative to the potential expense of dealing with the sandbar."); *Maas v. United States*, 94 F.3d 291, 297 (7th Cir. 1996) (holding that a failure to warn claim asserted by former serviceman who developed cancer after cleaning up a plane containing nuclear weapons, was barred, stating "[d]eciding whether health risks justify the cost of a notification program, and balancing the cost and the effectiveness of a type of warning, are discretionary decisions covered by [the discretionary function exception]."); and *Monzon v. United States*, 253 F.3d 567, 573 (11th Cir. 2001) (holding that a failure to warn claim by a decedent's family alleging that warnings should have been posted regarding riptides was barred).

[41]*S.R.P. v. United States*, 676 F.3d 329, 336-38 (3d Cir. 2012) (holding that the discretionary function exception barred action based on decision of National Park Service to not provide additional warnings related to barracuda bites, but stating "[w]e acknowledge that if the discretionary function exception is given an overly broad construction, it could easily swallow the FTCA's general waiver of sovereign immunity and frustrate the purpose of the statute. Accordingly, we have held that where the government is aware of a specific risk and responding to that risk would only require the government to take garden-variety remedial steps, the discretionary function exception does not apply.").

[42]But such a rule would not be consistent with the U.S. District Court of the District of Columbia's decision in *W.C. & A.N. Miller Cos*., 963 F. Supp. 1231, 1244 (D.D.C. 1997) (holding that a failure to warn claim related to buried munitions was not barred by the discretionary function exception).

[43]*See, e.g.*, *Whisnant v. United States*, 400 F.3d 1177, 1183 (9th Cir. 2005) (stating "[c]leaning up mold involves professional and scientific judgment, not decisions of social, economic, or political policy. Indeed, the crux of our holdings on this issue is that a failure to adhere to accepted professional standards is not susceptible to a policy analysis…. Because removing an obvious health hazard is a matter of safety and not policy, the government's alleged failure to control the accumulation of toxic mold in the … commissary cannot be protected under the discretionary function exception.").

[44]Additionally, in another case alleging claims nearly identical to those alleged in *Edison*, a district court found that decisions related to responding to a rise in valley fever infections at a federal prison were not protected by the discretionary function exception. *Panah v. United States*, 2:09-cv-06535 (Dkt. 31) (ORDER RE: MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT (Aug, 11, 2011), *available at* http://www.wallachlegal.com/resources (last visited Dec. 5, 2016)). The court stated: Defendant's position that declining to take any preventive measures to protect Plaintiff was a policy choice involving considerations of security and orderly running of the prison is equally unpersuasive. Defendant's duty to prevent or control further influx of cocci at Taft "is not a policy choice of the type the discretionary function exception shields." *Whisnant,* 400 F .3d at 1183. Rather, it "involves professional and scientific judgment, not decisions of social, economic, or political policy." *Id.* Indeed, consistent with the rationale in *Whisnant*, because controlling the cocci disease at Taft was a matter of safety, as opposed to policy, Defendant's failure to take preventive measures cannot be protected under the discretionary function exception. *Id.*; *see also ARA Leisure Servs.,* 831 F.2d at 195 (stating that the decision to maintain a road in a safe condition was not grounded in social, economic, or political policies).

[45]In *Whisnant*, 400 F.3d at 1183, the government argued that the discretionary function exception applied because implementing

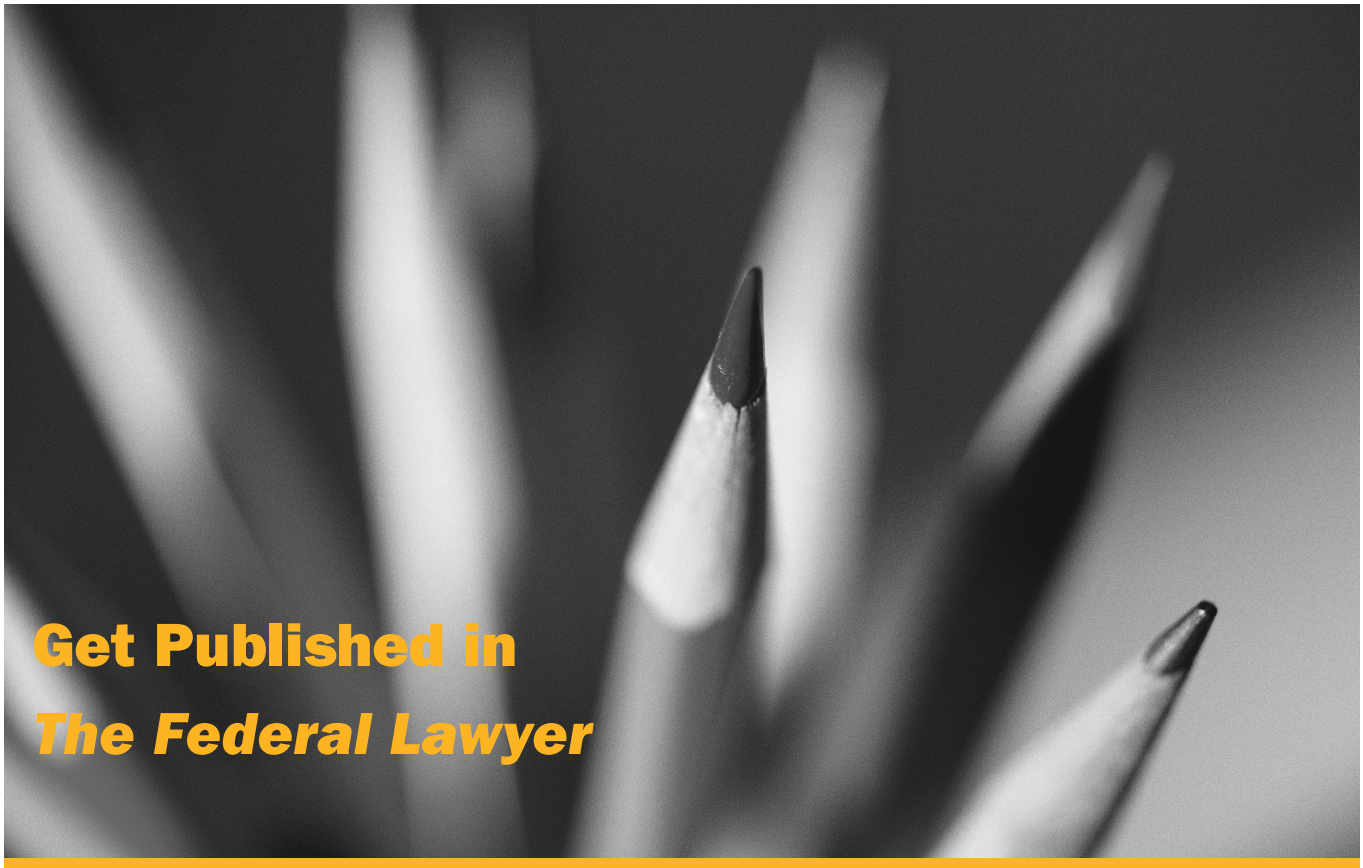
health and safety regulations would require employees "to balance the agency's goal of occupational safety against such resource constraints as costs and funding." Rejecting that argument, the court stated "to permit the government to use the mere presence of budgetary concerns to shield allegedly negligent conduct from suit under the FTCA … would permit the discretionary function exception to all but swallow up the [FTCA]." *Id.* at 1184 (quoting *ARA Leisure Servs*., 831 F.2d at 196); *see also O'Toole*, 295 F.3d at 1037 (9th Cir. 2002) ("Were we to view inadequate funding alone as sufficient to gamer the protection of the discretionary function exception, we would read the rule too narrowly and the exception too broadly. Instead, in order to effectuate Congress's intent to compensate individuals harmed by government negligence, the FTCA, as a remedial statute, should be construed liberally, and its exceptions should be read narrowly.").

[46]*See Laurence v. Dep't of the Navy*, 59 F.3d 112, 113 (9th Cir. 1995) (*citing United States v. Orleans*, 425 U.S. 807, 814-15 (1976); *Letnes v. United States*, 820 F.2d 1517, 1519 (9th. Cir. 1987)).

[47]*Whisnant*, 400 F.3d at 1184 ("[i]n order to effectuate Congress's intent to compensate individuals harmed by government negligence, the FTCA, as a remedial statute, should be construed liberally, and its exceptions should be read narrowly.").

[48]For example, in support of broad construction of the exceptions, the United States may cite to a decision from the U.S. Court of Appeals for the Fourth Circuit, *Robb v. United States*, 80 F.3d 884, 887 (4th Cir. 1996), and footnotes in two opinions from Florida district courts, *DelValle v. Sanchez*, 170 F. Supp. 2d 1254, 1268, n.1 (S.D. Fla. 2001); *Cruz v. United States*, 70 F. Supp. 2d 1290, 1292, n.2 (S.D. Fla. 1998). But in *Robb*, the Fourth Circuit merely mentioned that the independent contractor exception "has been" construed broadly, and cited one instance where it was described as a "broad" exception. *Robb*, 80 F.3d at 887 (*citing Lurch v. United States*, 719 F.2d 333, 338 (10th Cir. 1983) (stating "[t]he broad independent contractor exemption is itself controlling in this case")). Subsequently, in *Delvalle* and *Cruz*, a district court twice cited *Robb* (in footnotes) as authority for the premise that the exception should be broadly construed—even though the *Robb* and *Lurch* Courts never made that finding.

[49]The subjective nature of the Gaubert/*Berkovitz* test has led to conflicting circuit court rulings. *See Whisnant*, 400 F.3d 1177 (holding that a failure to warn claim arising from mold at a naval commissary was not precluded by the discretionary function exception), *but cf. Sánchez v. United States*, 671 F.3d 86, 86 (1st Cir. 2012) (holding that a failure to warn claim arising from military exercises that polluted water is barred by discretionary function exception).



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