Entity Liability Under the Federal Tort Claims Act: An Analysis and a Proposal for Changes in the Law

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This article examines and criticizes the doctrine of sovereign immunity and the Federal Tort Claims Act. The article identifies and scrutinizes the current exemptions to the FTCA, and concludes that in most situations principles of compensation and deterrence require government tort liability. The author proposes a general rule of exclusive government liability for the torts of government agents and recommends standards of liability.

Introduction

In 1946, the United States Congress embraced the general principle of governmental responsibility for the torts of its officers and agents by enacting the Federal Tort Claims Act (FTCA). The FTCA reverses the sovereign immunity doctrine, allowing government liability for certain government employee torts. Although the FTCA apparently recognizes federal government responsibility for damage that the government tortiously causes, the FTCA includes many exceptions that significantly undercut its general waiver of immunity. Indeed, these exemptions to immunity are so pervasive that immunity rather than responsibility remains the general rule.

As a result of the FTCA's numerous exemptions, many victims of government torts receive no compensation solely because the

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federal government is the tortfeasor. As a philosophical matter, the particular tortfeasor's status as a government entity or a private person should not determine the availability of compensation for the victim. Nonetheless, compelling public interests in shielding from liability particular government activities or the conduct of particular government employees justifies sovereign immunity in certain situations. The availability of alternative remedies also supports some exemptions. Absent these special considerations, however, sovereign responsibility rather than sovereign immunity should be the general rule.

This article examines and criticizes sovereign immunity under the Federal Tort Claims Act. Part I examines and discards possible justifications for sovereign immunity. Part II criticizes the current exemptions to liability under the FTCA. Part III proposes a general rule of exclusive sovereign responsibility and recommends standards of liability for the torts of government employees. The proposed standards of liability vary depending upon whether the particular government activity is discretionary and whether it has a close analog to private sector conduct.

I. Sovereign Immunity

Under the sovereign immunity doctrine, governments are immune from law suits that are based on their sovereign conduct, unless the government consents to suit.[1] This doctrine, imported from monarchial England, was adopted by colonial American common law and remained undisturbed by the American Revolution.[2] Although the United States Constitution does not address sovereign immunity,[3] the Supreme Court embraced the doctrine at an early date.[4] Indeed, the federal government's im-

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[1] *See* B. Schwartz, Administrative Law §§ 198-200, at 563-68 (1976) [hereinafter cited as Schwartz].

[2] *See* Restatement (Second) of Torts § 895A comment a & § 895B comment b (1979); W. Prosser, Handbook of the Law of Torts 970-71 (4th ed. 1971) [hereinafter cited as Prosser]; Schwartz, *supra* note 1, at § 198, at 563.

[3] W. Gellhorn, C. Byse & P. Strauss, Administrative Law 1055-56 (7th ed. 1979) [hereinafter cited as Gellhorn, Byse & Strauss].

[4] *See, e.g.*, Gibbons v. United States, 75 U.S. (8 Wall.) 769 (1868) (federal government not liable when its agent breached a contract for sale with a grain dealer by refusing to accept grain when tendered in accordance with the contract's terms). *See also* Gellhorn, Byse & Strauss, *supra* note 3, at 1055-56. *See generally* Boger, Gittenstein & Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis*, 54 N.C.L. Rev. 497,

munity to suit unfortunately remains an important feature of the common law today.[5] Not until it passed the Federal Tort Claims Act in 1946 did the federal government consent to suit in tort.[6] The FTCA provides government consent to liability for torts that arise from sovereign acts or omissions by the government or its agencies.[7] The FTCA, however, contains numerous exceptions that significantly undermine its general waiver of immunity.[8]

Several justifications traditionally support the doctrine of sovereign immunity. Among these justifications are the notion that any suit would be procedurally antithetical to the government's sovereignty;[9] the theory that, substantively, the sovereign can do no wrong;[10] the admonition of Justice Holmes that there can be no legal right against the law-making authority;[11] and practical considerations of public fiscal solvency and separation of powers.[12] Although each of these rationales apparently supports the doctrine, none is valid in modern America.

The first justification, that suing the government is antitheti-

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508 (1976) ("[For] various reasons the American Colonies, after fighting to overthrow the English Monarchy, did not reject sovereign immunity, however inconsistent such a course seemed with republican philosophy."); Engdahl, *Immunity and Accountability for Positive Government Wrongs*, 44 U. COLO. L. REV. 1, 2-21 (1972).

[5] *See* RESTATEMENT (SECOND) OF TORTS § 895A (1) (1979), which provides: "Except to the extent that the United States consents to both suit and to tort liability, it and its agencies are immune to the liability."

[6] *See id.* § 798A, at 393-95 (Special Note on Governmental Immunity) [hereinafter cited as Special Note]. The Administrative Procedure Act (APA), 5 U.S.C. §§ 501-706 (1976), permits suits against the federal government for nonmonetary relief only. *Id.* §§ 702-03. For a discussion of the APA, see K. DAVIS, ADMINISTRATIVE LAW TEXT 220 (6th ed. 1977) [hereinafter cited as DAVIS].

[7] 78 U.S.C. §§ 1346 (granting federal trial courts jurisdiction to hear cases in which the federal government is a defendant); 1402 (specifying the appropriate venue for suits brought against the United States); 1504 (granting the Court of Claims final jurisdiction over tort claims against the United States); 2110 (specifying 90 day appeals period to Court of Claims for tort claims against the federal government); 2401 (setting statute of limitations for tort claims against the United States); 2402 (specifying that no jury trial will be granted in tort claims cases unless requested by a party to the action); 2411 (interest); 2412 (costs); and 2671-2680 (tort claims procedure) (1976).

[8] *See* 28 U.S.C. § 2680 (1976); text accompanying notes 55-178 *infra*.

[9] *See* text accompanying notes 13-23 *infra*.

[10] *See* text accompanying notes 24-27 *infra*.

[11] *See* text accompanying notes 28-30 *infra*.

[12] *See* text accompanying notes 31-38 *infra*.

cal to the government's sovereignty, is founded on the idea that the judicial system is an integral part of the sovereign itself. Since the sovereign creates and supports the judicial system, it is illogical for the sovereign to, in essence, use this system to sue itself.[13] Likewise, the government body charged with enforcement of judicial decrees, the executive branch, is part of the sovereign. Suit against the government thus involves the procedurally illogical consequence that the sovereign sues itself in its own courts. Further, the sovereign is in the odd position of enforcing any resulting judgments against itself.[14]

Perhaps this rationale made sense in monarchial England, where the King truly performed all judicial and executive functions exclusively.[15] Since the English King's authority extended to all aspects of government, suing him would have been procedurally problematical.[16]

The United States, however, does not have a monarchial form of government. The United States Constitution provides for separation of powers[17] and presumes that all power rests in the people rather than in the government.[18] The separation of powers doctrine allocates theoretically discrete functions of government among the judicial, legislative, and executive branches.[19] Since the judicial branch is constitutionally responsible for the courts,[20] it is not *procedurally* illogical for courts to entertain suits against the government,[21] although the separation of pow-

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[13] *See generally* RESTATEMENT (SECOND) OF TORTS § 895A comment a (1979).

[14] *See generally* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 29.3 (1956) [hereinafter cited as HARPER & JAMES]; Special Note, *supra* note 6, at 395.

[15] *See* HARPER & JAMES, *supra* note 14, at § 29.2; PROSSER, *supra* note 2, at 970-71.

[16] *See* HARPER & JAMES, *supra* note 14, at § 29.2.

[17] U.S. CONST. art. II, § 2, vests the executive power in the President; and U.S. CONST. art. III, § 1, vests the judicial power in the courts. As Chief Justice Taft explained: "Our Federal Constitution . . . divide[s] the governmental power into three branches . . . and in carrying out that constitutional division into three branches it is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President. . . ." Hampton & Co. v. United States, 270 U.S. 394, 404 (1928).

[18] U.S. CONST. preamble.

[19] *See* note 17 *supra*.

[20] U.S. CONST. art. III, § 1.

[21] The federal constitutional limitation of federal court subject matter jurisdiction to specified types of cases provides some support for the procedural justification for immunity. *See, e.g.*, U.S. CONST. art. III, § 2, cl. 1 ("The judicial power shall extend to all cases . . . arising under this Constitution, the

ers doctrine may preclude *substantive* judicial scrutiny into certain activities of the other governmental branches. Further, the discreteness of the executive branch forecloses the theoretical illogic of enforcing judicial decrees against the government, since the executive branch and the sovereign are not coextensive.

The basic democratic premise, that all power ultimately rests with the people, also undermines the analogy to the English monarchy. The United States Constitution presumes that the government's power derives from the people and not from the government itself.[22] The people, in ratifying the Constitution and electing the President and Congress, delegate to the various branches of government the power to make and enforce laws.[23] It is neither illogical nor impractical for these organs of the people to entertain suits against the sovereign and to enforce resulting decrees. The structure and basic premise of the American political system, therefore, do not support the procedural justification for sovereign immunity.

The second justification for sovereign immunity is that as a substantive matter, the sovereign can do no wrong.[24] The basis of this justification is the English monarchical view that the King is the inherent authority for and source of all law.[25] Since the sovereign had the exclusive authority to define the law, by definition his acts as a sovereign could not be unlawful.

This justification also has no application to modern America because our constitutional system rests the power to make laws in the people, not the sovereign.[26] The inherent authority theory

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Laws of the United States, and Treaties. . . ."). This support is undercut, however, by the specific provision of article III for federal court jurisdiction "over controversies to which the United States shall be a Party. . . ." U.S. CONST. art. III, § 2, cl. 1.

[22] *See* note 18 *supra*. *See also* J. NOWAK, R. ROTUNDA & J.N. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 112 (1978) [hereinafter cited as NOWAK, ROTUNDA & YOUNG].

[23] NOWAK, ROTUNDA & YOUNG, *supra* note 22, at 126-27.

[24] *See* Special Note, *supra* note 6, at 393-94. *See generally* Borchard, *Governmental Responsibility in Tort: VII*, 28 COLUM. L. REV. 577, 734 (1928); Borchard, *Governmental Responsibility in Tort*, 26 YALE L.J. 1, 129, 229 (1924-25); Davis, *Tort Liability of Governmental Units*, 40 MINN. L. REV. 751 (1956); Engdahl, *supra* note 4; Jaffee, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963); James, *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610 (1955).

[25] HARPER & JAMES, *supra* note 14, at § 29.2.

[26] NOWAK, ROTUNDA & YOUNG, *supra* note 22, at 112, 126-27 (1978).

is directly antithetical to this democratic premise. Indeed, the American people and courts have always recognized that the government and its agents can do wrong. After all, "[t]he United States is a government of laws and not men."[27]

A third justification is found in Justice Holmes' statement that "a sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can no legal right as against the authority that makes the law on which the right depends."[28] Unlike the second justification, Holmes' theory focuses on government's law-making power rather than on inherent sovereign authority. Certainly, the United States government has the authority to make law.[29] This power is unique and exclusive with respect to federal public law matters, although individuals may create private law that does not conflict with public law.[30]

However, Justice Holmes' conclusion that the government is immune from suit because it has law-making authority has no logical basis. Certainly, the sovereign's power to make law logically implies both the power to bind itself and the power to exempt itself. Indeed, the government's unique possession of the law-making power should also impose an obligation to exercise that power responsibly. If the government creates rights and duties for its citizens, it should not hold itself harmless from those rights and duties. Thus, the law-making authority theory does not logically compel sovereign immunity.

Two practical considerations may also justify sovereign immunity. First, government liability for its torts could fiscally disable the government.[31] Second, judicial scrutiny of the government's

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[27] MASS. CONST. art. XXX (1978). John Adams drafted this famous quotation. *See* 15 A.B.A. J. 747 (1975).

[28] Kawananokoa v. Polybank, 205 U.S. 349, 353 (1907).

[29] U.S. CONST. art. I, § 8, cl. 18.

[30] Private individuals, for example, are free to make binding contracts and to buy or sell property when the transaction does not interfere with public policy. *See, e.g.*, Ritter v. Mutual Life Ins. Co., 169 U.S. 139 (1898) (while a life insurance policy may normally be the subject of a contract, a policy that pays a sum when an insured commits suicide is void as against public policy); Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) (installment sales contract for household furnishings, which provided that title would remain in the seller until the sum of the monthly payments equalled the stated value of the items, was unenforceable as contrary to public policy).

[31] Special Note, *supra* note 6, at 393-94.

conduct violates separation of powers.[32] While these considerations may justify limiting the available remedies against the government in certain situations, they do not justify absolute immunity.

It is doubtful that government liability would bankrupt the government. Government can effectively spread its costs among the citizenry through taxation.[33] In addition, like any private entity, the government can insure against liability, thus lessening the fiscal drain of liability and maintaining incentives to avoid liability. Indeed, the FTCA, which permits limited governmental tort liability, has not caused a disabling fiscal drain.

The separation of powers argument also does not withstand close scrutiny. Admittedly, separation of powers concerns limit judicial interference with legislative and executive activities in order to prevent distraction of government officials from their proper tasks.[34] This principle encourages members of the legislative and executive branches to perform duties aggressively, free from the fear of judicial censure or reversal.[35] These considerations, however, do not justify complete governmental immunity. Narrower measures ensure the separation of powers and still permit recognition of government's responsibility for its actions. For example, the 1976 amendments to the Administrative Procedure Act (APA),[36] which waive government immunity from actions for non-monetary remedies,[37] have not infringed separation of powers. The FTCA also permits tort actions for money damages in certain situations.[38] While the separation of powers principle mandates judicial restraint in reviewing executive and legislative conduct, it does not justify absolute immunity.

Despite the absence of convincing justification, sovereign im-

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[32] GELLHORN, BYSE & STRAUSS, *supra* note 3, at 1056.

[33] U.S. CONST. art. I, § 8, cl. 1 gives the federal government the power to collect taxes. *See* SCHWARTZ, *supra* note 1, at § 201; Special Note, *supra* note 6, at 394.

[34] Government employees cannot adequately perform their appointed duties if they must deal with burdensome litigation. *See* Littel v. Martin, 445 F.2d 1207, 1214 (4th Cir. 1971).

[35] "The rationale for sovereign immunity essentially boils down to substantial bothersome interference with the operation of government." *Id.*

[36] 5 U.S.C. §§ 551-706 (1976).

[37] Pub. L. No. 94-574, 90 Stat. 2721 (amending 5 U.S.C. § 702). The 1976 amendments to §§ 702-703 of the Administrative Procedure Act are discussed in Davis, *supra* note 6, at 220.

[38] 28 U.S.C. §§ 1346(b), 2674 (1976).

munity remains the general rule with respect to a wide spectrum of government torts. This lack of justification, coupled with the victim's need for compensation and the government's ability to spread the cost of tortious injury through taxation and insurance, make sovereign immunity unfair and inequitable. Government responsibility should be the rule, except where compelling reasons mandate narrowly drawn exceptions.

II. THE FEDERAL TORT CLAIMS ACT

The Federal Tort Claims Act of 1946[39] statutorily waives the sovereign immunity of the federal government. The FTCA provides that the United States government shall be liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances . . . ."[40] Thus, the government may be vicariously liable for torts committed by its employees in the course of their employment.[41]

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[39] Pub. L. No. 601, 60 Stat. 842 (codified at 28 U.S.C. §§ 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, and 2671-2680 (1976 & Supp. III 1979)). For detailed analysis of the FTCA's enactment, see Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 GEO. L.J. 1 (1946) [hereinafter cited as Gottlieb]. Gottlieb states that before the FTCA's adoption, victims of governmental tortfeasors had no judicial recourse except to sue the tortfeasor in his private capacity. Since the tortfeasor was typically judgment proof, the victim then had "to take the judgment to the Claims Committee [of Congress] in an effort to have a private bill passed providing for payment by the United States as an act of grace." *Id.* at 9. Gottlieb estimated that more than 2,000 private claims bills were introduced in Congress in 1942. *Id.* at 4. For other discussion of the FTCA, *see* GELLHORN, BYSE & STRAUSS, *supra* note 3, at 1102-14; SCHWARTZ, *supra* note 1, § 198, at 563-66; D. SCHWARTZ & S. JACOBY, LITIGATION WITH THE FEDERAL GOVERNMENT 195-225 (1970) (hereinafter cited as SCHWARTZ & JACOBY).

[40] 28 U.S.C. § 2674 (1976). The FTCA waives sovereign immunity without regard to the amount of the claim, for claims of

> money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant, in accordance with the law of the place where the act or omission occurred.

Id. § 1346(b). However, the government is not liable for pre-judgment interest or for punitive damages. *Id.* § 2674.

[41] *Id.* § 1346(b). For most torts, the government is jointly liable with its employee-tortfeasor under the principles of respondeat superior. *See, e.g.*, United States v. Yellow Cab Co., 240 U.S. 543 (1951). However, the government is

The FTCA contains a number of significant exceptions that substantially undercut its broad waiver of immunity. There are three basic types of exceptions: specific exceptions for certain government operations;[42] exceptions for particular torts;[43] and exceptions based on the nature of certain government activities.[44] While the employee-tortfeasor may be liable,[45] sovereign immunity bars government liability where any of these exceptions applies.[46]

By enacting the FTCA, Congress adopted the general notion of sovereign responsibility.[47] However, retention of sovereign immunity in specified instances may be justified on two grounds. In some instances, effective government activity demands immunity from judicial intervention.[48] For example, the government's need to wage war without judicial interference clearly justifies immunity[49] from damages for injuries that occur during certain war-time military activities.[50] In other situations, the existence of adequate alternative remedies justifies government immunity. For example, the government is not liable under the FTCA for admiralty claims where an adequate admiralty remedy exists.[51]

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exclusively liable for damages caused by the operation of any motor vehicle by a government employee acting within the scope of his employment. 28 U.S.C. § 2679(b) (1976).

[42] *See* notes 55-107 and accompanying text *infra*.

[43] *See* notes 108-156 and accompanying text *infra*.

[44] *See* notes 157-158 and accompanying text *infra*.

[45] Some government officials, such as judges, members of Congress, and prosecutors, possess personal immunity from liability. Neither the government nor the official may be liable for torts committed by these officials. *See* notes 204-206 and accompanying text *infra*.

[46] 28 U.S.C. § 2680 (1976 & Supp. III 1979).

[47] *See* SCHWARTZ & JACOBY, *supra* note 39, at 195-225 for a general discussion of government liability under the FTCA. *See also* L. JAYSON, HANDLING FEDERAL TORT CLAIMS §§ 201-19 (1964) [hereinafter cited as JAYSON].

[48] Gottlieb, *supra* note 39, at 40.

[49] *Id.* at 50-53. *See also* SCHWARTZ & JACOBY, *supra* note 39, at 207.

[50] 28 U.S.C. § 2680(j) (1976 and Supp. III 1979), discussed at notes 76-84 and accompanying text *infra*.

[51] 28 U.S.C. § 2680(d) (1976). This exception excludes "any claim for which a remedy is provided [by other statutes] . . . relating to claims or suits in admiralty against the United States." *Id.* This exception is justified because it establishes that the admiralty remedy is exclusive when it applies, but not otherwise. *See* Gottlieb, *supra* note 39, at 46. If admiralty law does not compensate claimants, this exception does not bar them from suing the government. *See, e.g.*, Repsholdt v. United States, 256 F.2d 765 (7th Cir. 1958) (admiralty

The government also is not liable where another entity, such as the Tennessee Valley Authority[52] or the Panama Canal Company,[53] is responsible and liable for the tortious conduct from which the suit arises.[54] Since another solvent entity may be liable, these exceptions permit compensation for tort victims while protecting the government from unnecessary judicial intervention. However, in other situations the justification for the FTCA's retention of immunity is less clear. These exceptions must be carefully scrutinized to determine whether sufficient reason exists to retain sovereign immunity.

A. Exceptions For Specific Government Activities

1. Postal Claims

The FTCA exempts the government from liability for "any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter."[55] The substantial public reliance on the government's monopoly postal service warrants careful scrutiny of this exception. The transaction of modern business depends upon efficient postal service. Further, people often entrust valuable items to the mails.[56] The harm that postal

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remedy is exclusive); Ira S. Bushey & Sons, Inc. v. United States, 276 F. Supp. 518 (S.D.N.Y. 1976) (when the admiralty remedy does not apply, exception here does not apply), *aff'd,* 398 F.2d 167 (2d Cir. 1967).

[52] 28 U.S.C. § 2680(h) (1976). *See, e.g.,* Painter v. Tennessee Valley Auth., 476 F.2d 943 (5th Cir. 1973) (TVA can be sued). *See also* Gottlieb, *supra* note 39, at 9 n.29.

[53] 28 U.S.C. § 2680(m). *See, e.g.,* Luckenbach S.S. Co. v. Panama Canal Co., 236 F. Supp. 866 (D. Canal Zone 1965) (company can be sued), *aff'd,* 380 F.2d 31 (5th Cir. 1967). *See also* Gottlieb, *supra* note 39, at 49.

[54] The government is also immune from any claim arising from the activities of a federal land bank, a federal intermediate credit bank, or a bank for cooperatives. 28 U.S.C. § 2680(n) (1976). "Torts by these agencies are unaffected by the Tort Claims Act and suits in respect of such torts continue to be brought against the corporation, and may not under the Act be brought against the United States." SCHWARTZ & JACOBY, *supra* note 39, at 299.

[55] 28 U.S.C. § 2680(b) (1976). Fortunately, this exception has been narrowly construed. *See, e.g.,* Birnbaum v. United States, 588 F.2d 319 (2d Cir. 1978) (United States held liable for violations of privacy where CIA opened letters mailed to Americans from Soviet Union).

[56] Typical large claim cases involve the shipment of valuable gems. *See, e.g.,* Baumgold Bros. v. Allan M. Fox Co., 375 F. Supp. 807 (D. Ohio 1973) (diamonds); Marine Ins. Co. v. United States, 410 F.2d 764, 187 Ct. Cl. 621 (1969) (emeralds).

negligence causes may greatly exceed the value of items that are lost or mishandled.[57]

It is difficult to determine whether the postal service carries on the type of essential activity for which the government should be shielded from liability.[58] The existence of an adequate private remedy for postal torts may, however, justify this exception. Low-cost private postal insurance is readily available. This insurance places the burden of valuing mailed items on mailing parties, who are most capable of valuation. In addition, compensation through insurance claims mechanisms does not intrude on government operations as much as compensation through conventional litigation.

While insurance offers a non-intrusive method of compensation, the burden of obtaining it currently falls on the individual users of the postal service. Thus, some victims of postal negligence lack an adequate remedy.[59] More importantly, government immunity does not deter negligence. It is possible, however, to

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[57] For example, improper delivery harms a creditor awaiting payment of debts or an intended recipient of a legal notice. In addition to the costs of tracing the misplaced correspondence, legal proceedings may be delayed and debtors may be subject to late payment penalties.

[58] Gottlieb, *supra* note 39, states: "[C]ertain functions of the government should operate unhampered from threat or burden of lawsuits . . . . Failure of a mail carrier to deliver a letter properly addressed is clearly a tort." *Id.* at 45. *See* S. REP. No. 1400, 79th Cong., 2d Sess. 33 (1946). *Cf.* Threat v. United States, 77 Ct. Cl. 645 (1933) (court of claims has no jurisdiction to hear cases involving mail delivery), *cert. denied,* 290 U.S. 626 (1933).

[59] The Postal Service is authorized by statute to settle claims exempted under the FTCA. 39 U.S.C. § 409(c) (1976) provides that the FTCA "shall apply to tort claims arising out of activities of the Postal Service." *Id.* § 2603 provides specific authority to settle parcel damage claims that are excluded under the FTCA. Section 2603 states: "When the Postal Service finds a claim for damage to persons or property resulting from the operation of the Postal Service to be a proper charge against the United States, and it is not cognizable under section 2672 of title 28, it may adjust and settle the claim." The Postal Service has established an administrative claims procedure by regulation at 39 C.F.R. §§ 912.1-912.14 (1980). That procedure applies both to claims brought under the FTCA and to claims excepted from liability. *See id.* §§ 912.2(a) (FTCA liability) and 912.2(b) (FTCA exemptions from liability) (1980). While the settlement authority may compensate some injured parties, the statutes and regulations lack standards to guide the Postal Service in settling claims. Thus, the Postal Service may arbitrarily deny claims. *Cf.* Marine Ins. Co. v. United States, 410 F.2d 764, Ct. Cl. 621 (1969) (reviewing court upheld government refusal to settle with private insurer of gems that were lost by the Postal Service).

retain the advantages of insurance without sacrificing the principles of compensation and deterrence. Mandating government-funded postal insurance could accommodate both the government's interest in unhampered postal operations and the interests of victims of government negligence. Given this readily apparent alternative, the exception for postal service torts is not justified.

2. Tax or Customs Duty Claims

The FTCA also excepts the government from liability for "any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by an officer of customs or excise or any other law enforcement officer."[60] This exception precludes government liability for two distinct activities: collection of revenue and detention of property.

Although alternative remedies for tort victims exist in this area,[61] they do not justify this exception to government liability. Available remedies are limited to administrative and judicial review of the validity of particular assessments or detentions of property.[62] Thus, for example, if the government's revenue agents wrongfully assess taxes through application of a revenue statute or regulation, the taxpayer's only remedy is administrative and judicial review that attempts to correct the government's mistake.[63]

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[60] 28 U.S.C. § 2680(c) (1976). *See, e.g.,* American Ass'n of Commodity Traders v. Department of Treasury, 598 F.2d 1233 (1st Cir. 1979) (government not liable where IRS failed to process application for tax-exempt status).

[61] *See, e.g.,* Mack v. Alexander, 575 F.2d 488 (5th Cir. 1978) (dismissal of suit that alleged violation of plaintiff's constitutional rights and damage to plaintiff's reputation where IRS attempted to levy on plaintiff's bank account); Morris v. United States, 521 F.2d 872 (9th Cir. 1975) (dismissal of suit that alleged loss of credit purportedly caused by IRS telling plaintiff's creditors of plaintiff's tax liability).

[62] The Anti-Injunction Act, 26 U.S.C. § 7421 (1976 & Supp. III 1979), bars lawsuits that seek to restrain collection or assessment of taxes. *See* Bob Jones Univ. v. Simon, 416 U.S. 725 (1974) (act broadly construed to include issues of a university's tax-exempt status). An exception to the FTCA prohibits damages. 28 U.S.C. § 2680(c) (1976).

[63] For example, in American Ass'n of Commodity Traders v. Department of Treasury, 598 F.2d 1233 (1st Cir. 1979), the court held that this exception barred a taxpayer's action for damages against the IRS for wrongfully delaying the processing of an application for tax exempt status for over ten years.

Judicial and administrative review are particularly inadequate remedies for government negligence in seizing and detaining property.[64] Although a reviewing court may order the return of wrongfully detained property,[65] neither a pre-seizure injunction against wrongful seizure[66] nor post-seizure[67] damages for wrongful detention are available. Thus, where the government wrongfully seizes perishable goods, their owner has virtually no remedy. In private law, by contrast, pre-seizure judicial hearings minimize the chance of erroneous seizure of property,[68] and post-seizure damages actions are available.[69]

The theory that revenue collection and property detention are essential government activities that should be immune from ju-

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[64] *See, e.g.*, Mack v. Alexander, 575 F.2d 488 (5th Cir. 1978) (where IRS attempted to levy on plaintiff's bank account plaintiff could not recover for damage to reputation or infringement on constitutional rights); Morris v. United States, 521 F.2d 872 (9th Cir. 1975) (plaintiff denied recovery where IRS told creditors of plaintiff's tax liability, thereby causing plaintiff to lose credit).

[65] *See, e.g.*, Otten v. United States, 210 F. Supp. 729 (S.D.N.Y. 1962) (court had no jurisdiction to return records detained by FBI pursuant to an investigation). *Cf.* A-Mark, Inc. v. United States Secret Serv., 593 F.2d 849 (9th Cir. 1978) (damages available against government for negligent handling of a silver coin).

[66] The Anti-Injunction Act, 26 U.S.C. § 7421 (1976 & Supp. III 1979), bars suits for injunctive relief.

[67] An FTCA exception prohibits damages. 28 U.S.C. § 2680(c) (1976). *But cf., e.g.*, A-Mark, Inc. v. United States Secret Serv., 593 F.2d 849 (9th Cir. 1978) (when government negligently handles property, damages are available, and 28 U.S.C. § 2680(c) does not bar the recovery). Thus, a plaintiff who establishes negligence on the part of the government in handling wrongfully detained property may recover damages.

[68] *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67 (1972) (a prejudgment procedure that did not afford a debtor the right to a hearing before a replevin action violated due process); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (wage attachment procedure that did not provide a pre-attachment hearing struck down).

[69] *See, e.g.*, Guzman v. Western State Bank of Devils Lake, 540 F.2d 948 (8th Cir. 1976) (plaintiff granted compensatory and punitive damages under 42 U.S.C. § 1983 (1976 & Supp. III 1979), when plaintiff's creditor seized plaintiff's mobile home and car pursuant to an unconstitutional prejudgment attachment statute). Replevin can also provide post-seizure specific relief. Replevin is an action for the wrongful detention or continued possession of chattels once properly held. *See* D. LOUISELL & G. HAZARD, CASES AND MATERIALS ON PLEADING AND PROCEDURE 122-23 (4th ed. 1979) (discussion of provisional remedies). *See also* CAL. CIV. PROC. CODE §§ 512.010-515.030 (West Cum. Supp. 1982).

dicial intrustion may justify government immunity in this area. Certainly, the government has a compelling interest in unhampered revenue collection. Similarly, the government must be able to seize and detain property summarily in emergency situations.[70] Thus, the necessity of some government seizures justifies government immunity from pre-seizure injunctive relief. These considerations do not, however, justify government immunity from damages for wrongful seizure. Imposing liability would not inhibit these actitivies; it would merely reduce the amount of revenue maintained by the government. Indeed, government immunity leaves the negligent government employee as the only potential defendant in a damages claim for wrongful detention.[71] Personal liability of employees who are charged with implementing revenue and health laws may severely inhibit their vigorous implementation. In contrast, by removing the threat of personal liability from government employees, exclusive government liability would encourage vigorous protection of the public health and aggressive collection of revenue.

3. Quarantine Claims

Sovereign immunity also bars "any claim for damages caused by the imposition or establishment of a quarantine by the United States."[72] Under this exception, the government is not liable for damages that a shipper or property owner incurs be-

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[70] For example, the federal government is authorized to seize, *inter alia*, wool products not in conformity with law, 15 U.S.C. § 68e (1976), fur products not in compliance with law, *id.* § 69g; misbranded hazardous substances, *id.* § 1265; and unfit poultry, 21 U.S.C. § 467d (1976). Absent a statute, when an emergency exists, due process is not denied if summary action is required to abate injury. *See* North Am. Cold Storage Co. v. Chicago, 211 U.S. 306 (1908) (opportunity to be heard not required before summary destruction of food in cold storage that is unfit for human consumption). *See generally* SCHWARTZ, *supra* note 1, at § 74, at 210-12, and authorities cited therein.

[71] Occasionally, liability for wrongful detention of property or assessment of tax revenues is imposed against a negligent governmental employee. 28 U.S.C. § 2680(c) (1976) bars only suits against the government. However, remedies against the government employee are not an adequate alternative to government liability. Individual employees are usually unable to satisfy judgments against them. *See* Statement of Asst. Attorney General Barbara Allan Babcock (June 15, 1978), *quoted in* GELLHORN, BYSE & STRAUSS, *supra* note 3, at 1125 n.5.

[72] 28 U.S.C. § 2680(f) (1976).

cause of a negligently imposed or implemented quarantine.[73]

At first glance, this exception seems justified by the need for vigorous and unhampered government action in emergency situations that affect the public health.[74] However, government immunity for negligent quarantines does not serve this goal. Exempting the government from liability for quarantine damages places liability solely on government employees who implement quarantines. Since the government is less affected by fear of liability,[75] exclusive entity liability would better promote the aggressive enforcement of health laws.

4. Wartime Combat Claims

The FTCA denies government liability for "any claim arising out of the combat activities of the military, or naval forces, or the Coast Guard during time of war."[76] Despite this exception, limited remedies do exist for persons who are injured by the government's wartime military activities. Military personnel who are injured in the course of duty receive government medical care and monetary compensation.[77] Military dependents also receive these benefits when service personnel are injured or killed during war.[78] Similarly, limited statutory remedies are available

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[73] *See* Gottlieb, *supra* note 39, at 47. Typical quarantine claims arise from negligent quarantine of diseased animals. *See, e.g.,* Rey v. United States, 484 F.2d 45 (5th Cir. 1973) (diseased hogs); Saxton v. United States, 456 F.2d 1105 (8th Cir. 1972) (diseased cattle).

[74] *See* North Am. Cold Storage Co. v. Chicago, 211 U.S. 306 (1908) (in an emergency government may summarily destroy unfit poultry without a hearing).

[75] *See* Berman, *Integrating Governmental and Officer Tort Liability,* 77 COLUM. L. REV. 1175, 1187 (1975).

[76] 28 U.S.C. § 2680(j) (1976 & Supp. III 1979). This exception precludes liability for injuries, death, or property damages occurring during a war. *See* Feres v. United States, 340 U.S. 135 (1950) (under the FTCA the United States is not liable for injuries to soldiers that are sustained while on active duty and that result from the negligence of other armed services personnel). This exception does not bar claims arising from military activities during peacetime. *See, e.g.,* United States v. Brown, 348 U.S. 110 (1954) (veteran may sue the federal government under the FTCA for negligent treatment by Veterans' Administration Hospital).

[77] *See* 10 U.S.C. §§ 1071-88 (1976 & Supp. III 1979) (medical and dental care). For an example of military compensation schemes, see organization and compensation system of the Air Force. *Id.* §§ 8201-9201.

[78] *See id.* § 1076(6): "[A] dependent of a member or former member who is or was at the time of his death, entitled to retired or retainer pay, or

to nonmilitary persons. Congress has statutorily authorized the military to administratively settle meritorious claims that the FTCA otherwise bars.[79] These statutes authorize settlements of up to $25,000 for personal injury, death, or property damage caused by military employees during *noncombat* activities.[80]

However, these statutory remedies are exclusive. The FTCA bars both military and nonmilitary persons from suing the government.[81] The statutory remedies for military personnel, which are similar to private sector worker compensation schemes, are an adequate alternative to litigation. The statutory remedies for private persons, however, are inadequate for two reasons. First, a settlement under these statutes is final and conclusive.[82] Claims may, therefore, be arbitrarily denied with no opportunity for judicial review. Second, the settlement provisions authorize compensation for nonmilitary persons only for injuries that are caused by the military's *noncombat* activities.[83] Thus, the settlement provisions do not adequately compensate nonmilitary plaintiffs who are injured during military combat operations.

The need to shield military operations from judicial interference justifies the military combat operations exemption.[84] However, although suits by private plaintiffs would burden the military's resources, they would not interfere with military operations. Actions arise after an injury has occurred and thus would not hamper military decision-making. Further, to recover, a private plaintiff would bear the heavy burden of proving that the government's wartime military activities were negligent. A plaintiff could only rarely sustain this burden, given the extreme pressures under which wartime decisions must be made and implemented. Under these circumstances, most decisions will be

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equivalent pay, may, upon request, be given . . . medical and dental care . . . in facilities of the uniformed services. . . ."

[79] 10 U.S.C. §§ 2731-37 (1976). *See* JAYSON, *supra* note 47, §§ 4.01-.09.

[80] 10 U.S.C. § 2734(a)(1)(2) & (3) (1976). The statutes also authorize settlement of claims against military personnel of foreign countries who cause harm in the United States, 10 U.S.C. § 2734(b)(2) (1976 & Supp. III 1979), and of claims that arise from the use of governmental property that is not otherwise covered under the title. 10 U.S.C. § 2737 (1976) (e.g., civilian actions).

[81] 28 U.S.C. § 2860(j) (1976 & Supp. III 1979).

[82] 10 U.S.C. § 2735 (1976).

[83] 10 U.S.C. § 2734 (1976 & Supp. III 1979).

[84] Gottlieb, *supra* note 39, at 50-53; SCHWARTZ & JACOBY, *supra* note 39, at § 13.108.2, at 207.

reasonable under the law of negligence.[85] However, where military operations unreasonably cause injury, private plaintiffs should be able to prove the government's liability and recover damages.

5. Trading With The Enemy Claims

Courts have rarely interpreted the Trading With the Enemy Act,[86] enacted in 1917. The Act authorizes the boycott of persons or companies who illegally transact business with American enemies during wartime.[87] Under the FTCA, the government is not liable for "any claims arising out of an act or omission . . . in administering the provisions of [the Trading With the Enemy Act]. . . ."[88] Thus, businesses have no remedy against the government for losses that they suffer due to an erroneous boycott under the Act.[89]

The government's need to wage war effectively provides some justification for this exception. Pre-boycott judicial hearings could interfere with the government's ability to prevent business interference with war efforts. However, it less clear that post-boycott judicial review and compensation for erroneously imposed boycotts would create significant interference. A claims commission could review challenged boycotts after the threat of undue interference with war operations has passed. This type of claims system would adequately compensate injured businesses while insulating war operations from judicial interference. Given this alterntive, broad governmental immunity for wartime boycotts is not justified.

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[85] The negligence standard of liability is defined by what the reasonable person would do under the circumstances. PROSSER, *supra* note 2, at 150.

[86] 50 U.S.C. §§ 1-44 (1976 & Supp. III 1979).

[87] *Id.* § 5(b). *See, e.g.,* Gubbins v. United States, 192 F.2d 411 (D.C. Cir. 1951) (no recovery under the FTCA when President included plaintiff's business in a listing of blocked nationals pursuant to the Trading with the Enemy Act).

[88] 28 U.S.C. § 2680(e) (1976).

[89] *See, e.g.,* Gubbins v. United States, 192 F.2d 411 (D.C. Cir. 1951) (under the FTCA, libel action will not lie where President compiled a listing of blocked nationals, including plaintiff's business concern). *See also* Gottlieb, *supra* note 39, at 47. Gottlieb suggests that the exception under 28 U.S.C. § 2680(e) would include those persons negligently or wrongfully classified as alien enemies. *Id.*

6. Fiscal and Monetary Regulation Claims

The government is not liable for "any claim for damages caused by the fiscal operations of the treasury or by the regulation of the monetary system."[90] The drafters of this exception justifiably were concerned with government accountability for the substantial economic consequences that flow from fiscal and monetary policies.[91] These consequences include increased unemployment that results from government anti-inflation policies, increased inflation caused by government policies to stimulate a recessionary economy, and disparate effects on industries such as housing, when the government tinkers with interest rates and the money supply. Monetary liability for these consequences could be staggering. Thus, the potential for enormous damage awards is a persuasive argument for government immunity.

The difficulty and perhaps impossibility of determining a standard of government liability also support this exception. Arguably, no basis of liability exists for the consequences of economic regulation because these consequences result from economic policy rather than government negligence. For example, the standard by which to judge the Federal Reserve Board's conduct in carrying out economic policy is far from clear. Economists disagree sharply over whether monetary policy, regulation of the money supply, or fiscal policy, balancing the government's budget, or both, most effectively combat inflation.[92] If economists cannot agree upon what is prudent behavior, a standard of reasonable conduct seems impossible to define. Certainly, the judicial system is not the proper forum in which to judge the prudence of economic policies.

A strict liability standard for damage caused by economic policy would resolve the problem of determining which standard of liability is appropriate.[93] However, strict liability could bankrupt

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[90] 28 U.S.C. § 2680(i) (1976). *But see* Lake Franklin Nat'l Bank Securities Litigation, 445 F. Supp. 723 (S.D.N.Y. 1978) (exemption does not apply to bank examinations or regulations of banks in general).

[91] *See* Gottlieb, *supra* note 39, at 50. *See also* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.11 (1958). Davis notes that "if the Federal Reserve Board is negligent in adjusting interest rates, thereby causing excessive inflation or excessive deflation, making the government liable to all who suffer business losses as a result would be out of the question." *Id.* at 484.

[92] *See generally* R. DORNBUSCH & S. FISCHER, MACROECONOMICS 391 (1978) [hereinafter cited as DORNBUSCH & FISCHER].

[93] An interesting French case required the French government to compen-

the government. Further, compensating the economic sectors that an economic policy injures could undermine the goal of the policy itself. For example, where policies aimed at reducing inflationary demand result in tight money supply and high interest rates, compensating affected persons would merely subsidize the money supply and defeat the policy.

A final reason for rejecting tort liability for economic regulation is the difficulty of determining the appropriate remedy. Monetary damages are undesirable because they could bankrupt the government. In contrast, transfer payments[94] respond directly to detrimental economic consequences without requiring litigation or proof of government fault. Unemployment insurance benefits are a good example of reasonable compensation. Job creation programs and government efforts to fight inflation are also reasonable responses to governmentally created economic problems. In the short run, economic policies may bestow windfall benefits on some sectors of the economy and thrust economic hardship on other sectors. However, in the long run, all sectors arguably benefit from government efforts to combat economic fluctuations. Transfer programs can provide temporary assistance to sectors of the economy that are disproportionately injured by policies designed to aid all Americans. While these programs do not provide individual compensation for specific losses, they may be all that can reasonably be expected of government.

7. Foreign Claims

The FTCA exempts the government from liability for "any claim arising in a foreign country."[95] The courts have broadly interpreted this exception to apply to American military hospi-

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sate a manufacturer of a cream substitute that was driven out of business by a law forbidding production and sale of its product. *See Conclusions in Societ des Produits Lafiers "La Fleurett,"* Jan. 14, 1938; B. SCHWARTZ, FRENCH ADMINISTRATIVE LAW AND THE COMMON LAW WORLD 198-200 (1954). *Cf.* United States v. Carolene Prods., 304 U.S. 144 (1938) (regulation that prohibited sale of filled milk could be constitutional if supported by any conceivable legislative justification).

[94] Through transfer payments the government effects a redistribution of wealth between economic sectors. Examples include welfare payments, unemployment compensation, and loan subsidies. *See generally* DORNBUSCH & FISCHER, *supra* note 89, at 31.

[95] 28 U.S.C. § 2680(k) (1976).

tals and American embassies that are located in foreign countries.[96] While statutes provide benefits to federal employees who are injured in other countries,[97] this FTCA exception denies compensation to private citizens who are injured by United States government activities in foreign countries.

One rationale for this exception is that the FTCA's waiver of sovereign immunity does not extend to foreign countries.[98] A related argument is that the government's consent to liability is limited to claims based on American law. Therefore, the government does not consent to liability that arises under foreign laws.[99] However, these objections to government liability are easily resolved. The government's power to consent to suit includes the power to designate American courts to hear claims against it that arise in foreign countries.[100] Further, Congress could easily require that federal law apply to these claims.

A third rationale for this exception is that legislative, diplomatic, or administrative approaches apply better to claims that arise in foreign countries.[101] American governmental activities in foreign countries typically include military, diplomatic, and economic operations that are carried out pursuant to treaties or similar agreements. These agreements frequently contain detailed provisions for the responsibility of the American government for its employees' acts.[102] In addition, the Secretary of

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[96] *See* SCHWARTZ & JACOBY, *supra* note 39, at 207, and cases cited therein.

[97] *See, e.g.*, 5 U.S.C. § 8116 (1976) (limiting federal employee compensation in other countries).

[98] *See* United States v. Spelar, 338 U.S. 217 (1949) (FTCA does not authorize an action against the United States for wrongful death that occurred at a Newfoundland air base).

[99] *See* Meredith v. United States, 330 F.2d 9 (9th Cir. 1964) (plaintiff could not recover for claim arising in Thailand because Congress is unwilling to subject the United States to liabilities that depend on the laws of foreign powers), *cert. denied*, 378 U.S. 867 (1964).

[100] *See* note 29 and accompanying text *supra*.

[101] *See* Meredith v. United States, 330 F.2d 9 (9th Cir. 1964), *cert. denied*, 379 U.S. 867 (1964), in which the court states

> [Congress intended] that claims for property damage, personal injury, or death arising out of the activities of our military and civilian personnel abroad are to be dealt with by administrative or diplomatic means, or by special legislation, as may be appropriate, rather than by litigation under the Federal Tort Claims Act.

330 F.2d at 11.

[102] *See, e.g.*, Agreement on Indemnification for Losses Arising from Ammunition Shipments, Oct. 27, 1966, United States-Great Britain, 17 U.S.T. 2186,

State may settle claims by non-Americans for personal injury or death caused by United States government employees in foreign countries.[103] Congress has also authorized the military to settle claims for personal injury, death, or real property damage arising from non-combat military activites in foreign countries.[104] The settlement statute also authorizes the Secretary of Defense to pay a "pro rata share" of damage claims that are adjudicated in foreign countries, when the tortious conduct of a civil or military government employee causes the damage, and a treaty to which the United States is a party authorizes foreign adjudication.[105]

These settlement statutes provide some compensation for many claims that are exempted under the FTCA. However, unreasonable limits on recoverable damages[106] and the absence of appeal procedures result in inadequate compensation for many claimants. To be sure, judicial review of high level foreign policy decisions is undesirable. However, another FTCA exception prevents claims for these activities.[107] Further, most foreign claims arise from the negligence of low level employees. Government liability for these claims would not interfere with the conduct of

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T.I.A.S. No. 6154 (United States to compensate personal injury and property damage arising from shipment of ammunition through Great Britain); Exchange of Notes on Settlement of Claims, Nov. 17, 1949-Jan. 24, 1950, United States-Canada, 3 U.S.T. 539, T.I.A.S. No. 2412 (United States to compensate Canadian property owners for damage due to smelter).

[103] 31 U.S.C.A. § 224a (West Supp. 1981). All settlements under this statute are limited to a maximum of $1500 and are final and conclusive. *Id.* Government employees may not recover under this statute. *Id.*

[104] 10 U.S.C. § 2734 (1976 & Supp. III 1979). Settlements under this section are limited to $25,000, *id.* § 2734(a), unless the cabinet officer involved considers that a claim that exceeds $25,000 is meritorious and would otherwise be covered by this section. In such a case, the secretary "may pay the claimant $25,000 and certify the excess to Congress as a legal claim for payment from appropriation made by Congress therefor, together with a brief statement of the claim, the amount claimed, the amount allowed and the amount paid." *Id.* 2734(d).

[105] *Id.* § 2734(a).

[106] Settlements for non-Americans injured by government employees in foreign countries are limited to $1500, 31 U.S.C.A. § 224a (West Supp. 1981), while non-Americans injured by military activities may recover up to $25,000 without congressional approval. 10 U.S.C. § 2734(a) & (d) (1976 & Supp. III 1979).

[107] *See* notes 166-175 and accompanying text *infra* for a discussion of the discretionary function exemption.

foreign affairs.

B. Government Immunity For Specific Torts

1. General Provisions

With certain exceptions for law enforcement officers,[108] the government is not liable for the intentional torts of federal employees. Specifically, it is not liable for "any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."[109] This exception immunizes the government from responsibility for "malicious and willful torts" as well as for negligent misrepresentations.[110] Several arguments support this exception. First, governmental immunity for these torts is consistent with the FTCA's general rule that the government should be liable just as a private person would be in like circumstances.[111] A private employer is not liable for these torts under the respondeat superior principle in private law.[112] Second, the deterrence purpose of tort law arguably suggests that employees should bear personal responsibility for malicious and willful conduct.[113] However, at least with respect to negligent misrepresentations by government employees, these justifications do not withstand close scrutiny.

A recent effort to amend the FTCA suggests that government liability may be expanded without undercutting the goal of deterrence. In 1978, with Justice Department approval, Senator Howard Metzenbaum proposed a bill to eliminate the FTCA exception for most intentional torts.[114] Under this proposal, the government would bear exclusive responsibility for all employee torts except libel, slander, misrepresentation, deceit, and inter-

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[108] *See* notes 120-130 and accompanying text *infra*.

[109] 28 U.S.C. § 2680(h) (1976).

[110] Gottlieb, *supra* note 39, at 49-50. Gottlieb notes that "in fact the great majority of claims are expected to cover traumatic injuries sustained through operation of public vehicles and private property damage. . . ." *Id.* at 50 n.177. This would mean that the torts mentioned in section 2680(h) would not be expected to occur as frequently as auto accidents.

[111] *See* note 40 and accompanying text *supra*.

[112] *See* PROSSER, *supra* note 2, at §§ 69-70, at 458-67.

[113] *See* Berman, *supra* note 75, at 1196-97.

[114] S. 3314, 95th Cong., 2d Sess., 124 CONG. REC. 21,361-64 (July 18, 1978) [hereinafter cited as Metzenbaum Bill].

ference with contract rights. The government would be liable for all constitutional torts, including those based on the five excluded torts.[115] The amendment also proposed an administrative system to discipline employee tortfeasors.[116] Thus, the Metzenbaum proposal would compensate tort victims while deterring government employee torts.[117]

While the Metzenbaum Bill effectively accommodated the goals of compensation and deterrence with respect to most torts, it excluded libel, slander, deceit, misrepresentation, and interference with contract rights.[118] The employee tortfeasor would remain personally liable for these torts. The bill provided no reason for the exclusion of these torts. It seems that it could achieve the goals of compensation and deterrence just as effectively with respect to these torts as with those for which it did provide for government liability.[119]

2. Special Provisions for Law Enforcement Officers

In 1974, Congress amended the FTCA to permit government liability for certain intentional torts committed by law enforcement officers.[120] This amendment makes the government liable for the torts of "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" that are committed by officers authorized to conduct searches and seizures, and make arrests under federal law.[121] Congress adopted this amendment in reaction to citizen reports of abuse by officers enforcing federal narcotics laws.[122] The government is liable when

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[115] *Id.* at §§ 1-12, at 21,361-63.

[116] *Id.* at § 13, at 21,363-64.

[117] The Metzenbaum Bill excludes the tortious acts of two groups of people from exclusive government liability. These include former government employees, against whom administrative discipline is not effective since they no longer work for the government, and Presidential appointees, who should be held personally liable and are most likely to be solvent defendants. *Id.* These provisions effectively give more weight to the deterrent function of tort liability than to its compensation goal. Both deterrence and compensation could be served by imposing entity liability for the torts of these employees and allowing the government to seek indemnity from the former employee or Presidential appointee.

[118] Metzenbaum Bill, *supra* note 114, at § 9(b), at 21,362.

[119] *See* notes 114-115 and accompanying text *supra*.

[120] Pub. L. No. 93-253 (1974) (codified at 28 U.S.C. § 2680(h) (1976)).

[121] *Id.*

[122] S. REP. No. 588, 93d Cong., 1st Sess. 2 (1974), *reprinted in* 1974 U.S.

law enforcement officers[123] commit the listed torts "within the scope of their employment or under color of federal law."[124] However, government immunity still exists for the torts of libel, slander, misrepresentation, deceit, and interference with contract rights that are committed by law enforcement officers.[125]

The amendment's legislative history discusses only the need to compensate victims of law enforcement abuse.[126] Apparently, Congress did not consider using personal financial responsibility as a deterrent to tortious conduct. Arguably, neither deterrence nor retribution results if the officers escape liability because the government pays for their wrongs. Law enforcement officers, however, should be treated differently from other federal employees because they have legal authority to use force to enforce federal laws. Law enforcement officers are more likely than other employees to commit the torts of assault, battery, or false arrest. Furthermore, administrative discipline of officers effectively deters law enforcement misconduct.

It is unclear why the 1974 FTCA amendments include malicious prosecution committed by a law enforcement officer as a tort for which the government assumes responsibility.[127] Malicious prosecution consists of filing criminal or civil charges without probable cause and in bad faith.[128] Normally, prosecutors rather than law enforcement officers file criminal charges. However, federal prosecutors probably do not fall within the FTCA's definition of law enforcement officer. The definition of law enforcement officer focuses on authority to search and arrest, functions which prosecutors do not perform.[129] Thus, the FTCA

CODE CONG. & AD. NEWS 2789-92 [hereinafter cited as SENATE REPORT]. *See* Boger, Gittenstein & Verkuil, *supra* note 4, at 500-01 (review and analysis of amendments).

[123] The definition of "law enforcement officer" includes "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of federal law." 28 U.S.C. § 2680(h) (1976).

[124] *Id.*

[125] *Id.*

[126] SENATE REPORT, *supra* note 122, at 2791.

[127] 28 U.S.C. § 2680(h) (1976).

[128] RESTATEMENT (SECOND) OF TORTS § 653 (1977), indicates that the tort of malicious prosecution contains two elements: (1) "filing of criminal charges without probable cause and primarily for a purpose other than bringing an offender to justice" and (2) "the proceedings terminate in the defendant's favor." *Id.*

[129] 28 U.S.C. § 2680(h) (1976). *See* note 123 *supra*.

amendments authorize government liability for a tort that cannot occur within the scope of a law enforcement officer's duties. When prosecutors commit malicious prosecution the government is not liable because prosecutors are not law enforcement officials. Further, prosecutors are absolutely immune from personal liability for malicious prosecution under the traditional doctrine of prosecutorial immunity.[130] Congress certainly did not intend to alter prosecutorial immunity when it reacted to police officer search and seizure abuses. Thus, the current scheme in fact immunizes the government from liability for malicious prosecution.

3. Misrepresentation

Both the FTCA[131] and Senator Metzenbaum's proposed amendment[132] exclude liability for misrepresentation for all government employees. No distinction is drawn between intentional misrepresentation and negligent misrepresentation;[133] the government is apparently immune from liability for both.[134] A closely related issue is whether the government should be estopped to deny an agent's acts when a recipient of erroneous governmental information detrimentally relies on that information.[135]

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[130] RESTATEMENT (SECOND) OF TORTS § 656 (1977). Private prosecutors, interestingly enough, are not immune from liability. *See id.* § 653. Section 656 balances the policies of "societal interest in efficient enforcement of the criminal law" and the "individual interest in being protected against unjustified and oppressive litigation of criminal charges." *Id.*

[131] 28 U.S.C. § 2680(h) (1976).

[132] Metzenbaum Bill, *supra* note 114, at § 9(b), at 21,362.

[133] There is some evidence that the omission of negligent misrepresentation was accidental. *See* Boger, Gittenstein & Verkuil, *supra* note 4, at 542.

[134] *See, e.g.,* United States v. Neustadt, 366 U.S. 696 (1961) (negligently excessive government appraisal of home not actionable under FTCA); Fitch v. United States, 513 F.2d 1013 (6th Cir. 1975) (wrongful induction into armed forces due to misrepresentation of government agent not actionable under FTCA).

[135] The doctrine of equitable estoppel precludes a party from taking a particular legal position because of some legally recognized impediment or bar. The doctrine has two branches. First, it encompasses definite misrepresentations of fact that are made with reason to believe that another will rely upon the misrepresentation, when the other party does rely upon them in changing his position to his detriment. Second, it encompasses a failure to act, where one party knowingly allows another party to incur a detriment without informing the other of his mistake. *See* PROSSER, *supra* note 2, at 691-92.

In the well known case of *Federal Crop Insurance Corp. v. Merrill,*[136] the United States Supreme Court rejected application of the estoppel doctrine to the federal government.[137] In *Merrill,* federal agents erroneously advised farmers that a certain type of wheat was eligible for federal crop insurance against losses due to drought. Relying on this advice, the farmers purchased the federal insurance. After a drought destroyed their crops, the government rejected their claim for benefits on the ground that federal regulations excluded that type of wheat from insurance coverage. The Court declined to apply the estoppel doctrine to the government and denied government liability under the FTCA's exception for misrepresentation.[138]

Several possible explanations support the *Merrill* result. First, the farmers should themselves have known the content of federal regulations and thus had no right to rely on the federal agents' representations.[139] Second, the doctrine of sovereign immunity protects the government from estoppel. Finally, application of the estoppel doctrine could bind the government to promises by government agents that exceed the scope of their statutorily delegated authority.

However, none of these explanations is persuasive. Government agents should know the law as well as, if not better than, citizens who seek their advice. Where uniquely governmental activities are involved, the public necessarily relies upon guidance from government agents. Further, the sovereign immunity rationale merely begs the question. If the government can waive sovereign immunity, it can also bind itself to its agents' representations.[140]

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[136] 332 U.S. 380 (1947). For a further discussion of this case see SCHWARTZ, *supra* note 1, at § 51, at 132-34.

[137] Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 383-84 (1947). The court noted that "[i]t is too late in the day to urge that the Government is just another private litigant, for purposes of charging it with liability, whenever it takes over a business theretofore conducted by private enterprise or engages in competition with private ventures." *Id.* at 383.

[138] *Id.* at 384.

[139] *See* SCHWARTZ, *supra* note 1, at § 51, at 132-34. The *Merrill* court found support for this rationale in the words of Justice Holmes: "Men must turn square corners when they deal with the government." Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 385 (quoting Rock Island, Ark., & La. R.R. v. United States, 254 U.S. 141, 143 (1920)).

[140] Many unjust results have been reached because the government refuses to be bound by the estoppel doctrine. *See* SCHWARTZ, *supra* note 1, at § 51, at

Another argument for not estopping the government arises from the fear of government agent corruption. Citizen bribes might encourage agents to approve improper benefits or obligate the government to make unauthorized expenditures. The recipient of a promise induced by a bribe could then sue to enforce the promise, claiming that the government was estopped to deny the promise's validity. However, while corruption of government employees is a legitimate concern, it is not a typical cause of employee misrepresentations. Rather, human error probably causes most misrepresentations. Further, traditional tort law doctrines effectively limit the government's potential liability. The proponent of an estoppel or tortious misrepresentation theory must prove reasonable reliance on the government agent's representation.[141] The reasonable reliance requirement precludes liability for promises that are obviously excessive or improperly induced. In addition, the requirement may impose on the plaintiff a duty of reasonable inquiry to ascertain the government agent's actual authority to make particular representations.[142] When the party's actual reliance is unreasonable, the estoppel doctrine does not apply and there can be no liability for tortious misrepresentations. The proximate cause requirement also prevents government liability for remote consequences of government mistakes.[143] For example, the government would not be liable when an agent's mistaken road directions resulted in the loss of a business deal.

Several alternative proposals would neutralize the impact of judicial reluctance to estop the government. For example, "good

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134. Professor Schwartz gives the following examples:

> The result is decisions as harsh as that in *Merrill*, where individuals act because they have been given administrative advice and are penalized because of their reliance. Typical cases involve suspension of a broker from trading for nonregistration, even though he was misled by pronouncement of the agency and registered as soon as he discovered his obligation; a broker subjected to Security and Exchange Commission disciplinary proceedings though he had been told by S.E.C. representatives that what he contemplated doing was not a breach of the law; an army colonel who was held not entitled to social security benefits though he failed to file for them because the Social Security Office had led him not to. . . ."

Id. (footnotes omitted).

[141] *See* PROSSER, *supra* note 2, at 692.

[142] *See generally* RESTATEMENT (SECOND) OF TORTS § 894 comment d (1977).

[143] *See* PROSSER, *supra* note 2, at 732.

faith reliance statutes" could prohibit penalizing persons who rely in good faith on the erroneous advice of government agents.[144] These statutes, however, are only useful when a penalty or other sanction, such as suspension of a license, is involved. These statutes would not permit damage awards or bind the government to its agents' representations.[145] Another proposal is to use administrative declaratory orders that bind the agency to positions on which citizens can safely rely.[146] Declaratory relief, however, helps only those people who anticipate later government repudiation of its agents' advice.[147] For more trusting people, such as the farmers in *Merrill,* declaratory relief is of no help.

The government should be estopped to deny its responsibility in those instances where money damages are neither appropriate nor necessary. For example, when government benefits are denied because the plaintiffs relied on erroneous advice, the proper remedy is to grant the benefits. When the government suspends a license because of unlawful behavior, but an agent advised the licensee that the conduct would be lawful, the appropriate remedy is reinstatement of the license.

In many cases, compensating the victims of government misrepresentations can occur without applying the estoppel doctrine. Where a penalty or other sanction is involved, good faith reliance statutes adequately compensate the plaintiff by preventing the government from imposing the sanction.[148] In other situations, money damages for tortious misrepresentation[149] can provide adequate relief. This alternative would avoid

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[144] *See* SCHWARTZ, *supra* note 1, at § 52, at 136-37.

[145] *See id.*

[146] *See id.* § 53, at 137-40. *See* City Line Open Hearth, Inc., 141 N.L.R.B. 799 (1963) (APA declaratory order envisages that final adjudication will be binding upon the parties).

[147] In addition, declaratory relief under the APA is limited to "on the record" proceedings. Whether to allow declaratory orders is within particular agencies' discretion. 5 U.S.C. § 554(e) (1976). *See also* SCHWARTZ, *supra* note 2, at § 53, at 138-39, for a discussion of the limitations of declaratory orders.

[148] *See* notes 144-145 and accompanying text *supra.*

[149] *See* RESTATEMENT (SECOND) OF TORTS § 552 (1977). The elements of a negligent misrepresentation cause of action include:

> (1) The supplying of false information to others in the course of business or trade;
>
> (2) Justifiable reliance upon the false information by another person;

requiring the government to violate statutes in order to honor the agent's misrepresentations.[150] Additionally, the tort alternative, unlike the estoppel theory, does not involve enforcing representations that may injure third parties.[151] Since many statutory limits on agents' authority are designed to protect the regulated parties, estopping application of these regulations may injure innocent people. In these situations, money damages would provide needed compensation while permitting the government to enforce the misrepresented statute or regulation.

A final consideration under either the tort or the estoppel theory is whether entity or personal liability for employee misrepresentations best serves the deterrent function of tort law.[152] The argument for employee responsibility is strongest with respect to intentionally misleading advice.[153] Similarly, the greater the employee's official authority, the more justified is personal responsibility.[154] Citizens are more likely to justifiably rely on a high official's advice than on a subordinate's advice. Unfortunately, however, individual employees are rarely solvent enough to fully

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> (3) Failure by the supplier of the information to exercise reasonable care in ascertaining and communicating to others the falsity of the information; and
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> (4) Damages sustained by the person who relied on the misrepresentation.

Id.

[150] *See* Schwartz, *supra* note 1, at § 51, at 135.

[151] *See id.*, at § 52, at 136-37, discussing the Portal-to-Portal Act of 1947 (codified at 29 U.S.C. § 259 (1976)). This act provides that employers are not liable for failure to pay wages required by specific statutes if the failure to pay is based on good faith reliance upon rulings of designated Labor Department officials. This act may thus permit monetary injury to employees who are paid lower wages than otherwise should be paid without providing them with any legal recourse.

[152] These issues are thoroughly discussed in Bermann, *supra* note 75, at 1190-1203. Bermann discusses both exclusive officer and exclusive governmental liability models as well as non-exclusive models that include indemnification.

[153] For an analogous situation involving slander see Barr v. Matteo, 360 U.S. 564 (1959) (defendant, acting Director of Rent Stabilization, Office of Housing Expedition, issued a press release attacking plaintiff's conduct in the agency; plaintiff sued defendant for defamation but defendant was protected by an absolute privilege provided by his office).

[154] GELLHORN, BYSE & STRAUSS, *supra* note 3, at 416 n.5. The authors "think it important to note that the more responsible the individual giving the advice, the more reasonable the reliance and the greater the injustice in not permitting the application of the estoppel defense." *Id.*

compensate injured citizens.[155] Personal employee liability, therefore, will neither provide compensation nor ensure employee responsibility. On the other hand, exclusive government liability can better afford compensation, and administrative disciplinary procedures can more effectively deter employee misconduct.

Thus, the government should assume responsibility for employee misrepresentations. Amendment of the FTCA to waive sovereign immunity for at least negligent misrepresentation is essential. Plaintiffs should receive compensation if they detrimentally rely on erroneous advice that a government agent has negligently given. The appropriate remedy in most cases will be money damages. But when money damages are not adequate or necessary, traditional estoppel principles should apply to bind the government to its agents' representations.[156]

C. *The Due Care Defense and Discretionary Functions*

The FTCA's broadest exception to government liability is defined by the nature of the governmental activity involved. This exception immunizes both government execution of statutes and regulations that takes place with due care, and discretionary governmental functions.[157] The exemption for execution of stat-

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[155] *See* note 71 *supra*.

[156] A few recent cases have applied estoppel principles to bind the government. *See, e.g.*, United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655 (1973) (factory charged with polluting river entitled to show that it relied on government regulations not specifically proscribing its conduct); United States v. Wharton, 514 F.2d 406 (9th Cir. 1975) (misrepresentation by government official that there was no way to gain title to land when it was still possible to do so estops the government where a serious injustice would otherwise result); United States v. Lazy F.C. Ranch, 481 F.2d 985 (9th Cir. 1973) (government estopped to enforce acreage reserve and conservation reserve contracts because of government failure to advise partner of improprieties in contracts).

[157] 28 U.S.C. § 2680(a) (1976) exempts the federal government from liability for

> any claim based upon an act or omission of an employee of the government, exercising due care, in the execution of a statute or regulation, whether or not such statute be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion be abused.

utes with due care is designed "to prevent litigants from utilizing a suit in tort under the Act as a means of testing the constitutionality or legality of laws or regulations. . . ."[158] It thus precludes money damages for the non-negligent implementation of an invalid statute or regulation that causes injury.[159] The discretionary function exemption immunizes even negligent and intentional discretionary conduct in order to "maintain essential flexibility of executive decision-making, free from financial liability for every error of judgment."[160]

1. Execution of Statutes and Regulations with Due Care

This exception, often referred to as the "due care defense,"[161] immunizes only non-negligent conduct in the execution of statutes and regulations.[162] It prohibits the use of tort suits to test the validity of executive actions.[163] While courts regularly review the acts of government agencies,[164] they cannot award money damages for injuries that are caused by invalid administrative action. Thus, if the implementation of an unconstitutional flood control regulation damages property, this exception prevents the property owner from seeking monetary damages from the government. However, such denial of recovery is unfair to persons who are injured by the government's illegal acts. Further, the government has no legitimate need to conduct the activity since

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Id.

[158] Jayson, *Application of the Discretionary Function Exception*, 24 FED. B.J. 153, 154 (1964).

[159] *See* Gottlieb, *supra* note 39, at 41 n.133.

[160] *See* Boger, Gittenstein & Verkuil, *supra* note 4, at 532.

[161] *Id.* at 525-32.

[162] In Hatahley v. United States, 351 U.S. 173 (1956), the government was held liable for harm caused by its agent's *negligent* conduct. The Court stated that

> the first portion of [28 U.S.C. § 2680(a)] cannot apply here, since the government's agents were not exercising due care in their enforcement of the federal law. 'Due care' implies at least some minimal concern for the rights of others. Here, the agents proceeded with complete disregard for the property rights of the petitioners.

Id. at 181. For discussion of this case, see Boger, Gittenstein & Verkuil, *supra* note 4, at 526-27.

[163] Jayson, *supra* note 158, at 154.

[164] *See generally* GELLHORN, BYSE & STRAUSS, *supra* note 3, at 915-53, discussing methods for obtaining judicial review.

only illegal or unconstitutional activity can engender liability.[165] Permitting subsequent tort actions would not prevent agencies from undertaking valid government projects; it would merely require them to pay for the harm they improperly cause.

2. The Discretionary Function Exemption

This exemption, which immunizes from liability all discretionary governmental acts and omissions,[166] applies even to abuses of governmental discretion. Frequently, this exception overlaps with the more specific exemptions to the FTCA[167] and with the "due care defense."[168] While the precise scope of the exemption is unclear,[169] its purpose is to bar claims that arise from planning, judgment, and policy decisions of government agencies.[170] The exemption draws a broad distinction between immune "planning" decisions and non-immune "operational" decisions.[171] For example, a decision to erect a building is a planning decision and is therefore immune. Conversely, the failure to install a handrail on the steps of the building is operational and is not immune.[172]

In determining whether a particular decision is planning or operational in nature, courts look primarily to the level of government that made the decision. Decisions made at high levels of government that are responsible for planning and policy-mak-

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[165] For discussion of this issue, see Davis, *supra* note 6, at 488.

[166] 28 U.S.C. § 2680(a) (1976). *See, e.g.*, James, *The Federal Tort Claims Act and the "Discretionary Function" Exception: The Sluggish Retreat of an Ancient Immunity,* 10 U. FLA. L. REV. 184 (1957). *See also* GELLHORN, BYSE & STRAUSS, *supra* note 3, at 1106-08; Boger, Gittenstein & Verkuil, *supra* note 4, at 528-30.

[167] *See, e.g.*, American Ass'n of Commodity Traders v. Department of Treasury, 598 F.2d 1233 (1st Cir. 1979) (discretionary function exception, and exception for the assessment and collection of taxes and customs duties).

[168] Gottlieb, *supra* note 39, at 41 n.133.

[169] *See* GELLHORN, BYSE & STRAUSS, *supra* note 3, at 1107.

[170] *See* Boger, Gittenstein & Verkuil, *supra* note 4, at 532.

[171] *See, e.g.*, Estrada v. Hills, 401 F. Supp. 429, 436 (N.D. Ill. 1975) (damages resulting from government officials' violation of certain regulations, statutes, and ordinances with respect to maintenance of vacant government-owned building); SCHWARTZ & JACOBY, *supra* note 39, at § 13.107, at 204.

[172] American Exch. Bank v. United States, 257 F.2d 938 (7th Cir. 1958). *See also* Bulloch v. United States, 133 F. Supp. 885 (D. Utah 1953) (whether, when, and where to conduct atomic bomb test is a matter of discretion, but negligence in the course of the test is not).

ing are normally planning level decisions. On the other hand, decisions made at low levels of government that exercise little discretionary power are normally considered operational. Thus, the Supreme Court denied government liability for the explosion of a ship carrying a foreign aid shipment of fertilizer because the relevant decision originated at a high level of government.[173] In later decisions, however, the Court has held the government liable for acts such as the negligent failure to maintain a beacon light[174] and fire fighting.[175]

The FTCA's immunization of high level decisions, while permitting liability for the low level implementation of those decisions is problematical. The distinction between high level and low level decisions makes little sense. High level officials possess the greatest authority over government activities, and thus are responsible for controlling the implementation of discretionary decisions. Imposing government liability for the actions of these controllers, therefore, is at least as likely to discourage government negligence as is liability for the conduct of lower level workers. Liability for higher level activity would encourage senior officials to take greater care in formulating policy and in directing their subordinates' implementation of plans.[176] Conversely, relieving both lower level employees and senior officials of possible personal liability would encourage more effective implementation of policies. At the same time, internal employee discipline procedures could deter negligence. Thus, the current exemption actually undercuts the deterrent function of the tort law and fails to prevent the undue interference with government operations that burdensome tort litigation may present.

A further consideration undermines the viability of the discretionary function exemption. No other remedies are available for the often serious injuries resulting from the exercise and imple-

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[173] Dalehite v. United States, 346 U.S. 15 (1953). The Court immunized the United States for an explosion in a Texas city that killed hundreds of people, wounded thousands, and caused extensive property damage. The explosion occurred during the loading of a ship that was to carry ammonium nitrate to France as part of the foreign aid program.

[174] Indian Towing Co. v. United States, 350 U.S. 61 (1955).

[175] Rayonier, Inc. v. United States, 352 U.S. 315 (1957).

[176] The private law doctrine of respondeat superior, for example, is based in part on the theory that holding superiors liable for the torts of subordinate employees will encourage more careful direction and supervision of employees. *See* PROSSER, *supra* note 2, at §§ 69-70, at 458-67.

mentation of discretion. Even where discretionary decisions cause extreme and unreasonable risk to life, health, and property,[177] the exemption bars all monetary relief.[178] The fact that the officials are subject to some degree of popular control arguably provides an adequate check on their conduct. Our democratic political process, however, is no alternative to tort liability. While the political process may encourage the government to discontinue unpopular operations, it does not provide monetary redress for past wrongs. The discretionary function exemption is unjustifiable and unreasonably denies victims necessary relief. At the same time, it neither shields government from undue interference nor deters government negligence.

III. Proposal

The preceding discussion demonstrates that, with few exceptions, the government should be liable for damage that it negligently causes. Generally, a rule of government responsibility should replace sovereign immunity. However, two issues remain unresolved: first, should the government, the employee, or both be liable for tortious injury? Second, what is the appropriate standard of liability?

The proposed solution to these problems is simple. First, where there is liability, the government should be exclusively liable and the employee as a general rule should be immune from liability. Exclusive government liability serves the compensatory purpose of tort law better than does employee liability because

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[177] *E.g.*, the government decision to conduct nuclear weapons testing, *see* Comment, *Government Liability for Nuclear Testing Under the Federal Tort Claims Act*, 15 U.C. Davis L. Rev. 1003 (1982), and to create sonic booms, *see* Laird v. Nelins, 406 U.S. 797 (1972) (government may not be held liable under the FTCA on a strict liability theory for sonic boom damage caused by military planes).

[178] *See* Schwartz & Jacoby, *supra* note 39, at § 13.107.4, at 204, discussing several decisions that were held discretionary and therefore immune from government liability. These include United States v. Faneca, 332 F.2d 872 (5th Cir. 1964) (superior's decision to give psychiatric rather than traditional treatment), *cert. denied*, 380 U.S. 971 (1965); Blaber v. United States, 332 F.2d 629 (2d Cir. 1964) (Atomic Energy Commision decision on the extent of its supervision of a contractor's safety procedure); Mahler v. United States, 306 F.2d 713 (3d Cir.) (formulation and approval of a highway project), *cert. denied*, 371 U.S. 923 (1962); and Goddard v. District of Columbia Redevelopment Land Agency, 287 F.2d 343 (D.C. Cir.) (decision on when to institute condemnation), *cert. denied*, 366 U.S. 910 (1961).

individual employees are often judgment proof.[179] Further, holding the employee liable frustrates the important goal of encouraging employee initiative and efficiency, since burdensome litigation and the fear of liability may unduly inhibit employee performance.[180] Holding the government exclusively liable, on the other hand, does not involve these drawbacks. Since the official is not personally liable, fear of liability will not inhibit the performance of his duties. Further, as the current waiver of immunity under the Administrative Procedures Act demonstrates,[181] the official's conduct can be probed after the fact without unduly interrupting office efficiency.

Internal government employee discipline procedures best deter employee negligence since these procedures do not unduly inhibit initiative and efficiency.[182] Indeed, this is the general approach of the Metzenbaum Bill, which is currently under congressional consideration.[183] Although the bill excepts certain torts[184] and completely immunizes the conduct of certain officials,[185] it would establish a basic rule of exclusive government tort liability and create new administrative employee discipline procedures.[186]

Second, establishing a standard of liability is also not difficult. Where the government activity involves the exercise of discretionary authority, the appropriate standard should require the reasonable exercise of that discretion. Where the activity does

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[179] As former Attorney General Griffin Bell stated, "Plaintiffs rarely recover substantial sums from individual employees. Judges and juries are reluctant to award sums sufficient to exert a substantial deterrent effect in suits against public employees." GELLHORN, BYSE & STRAUSS, *supra* note 3, at 1112.

[180] Former Attorney General Griffin Bell agrees. He states that "[t]he prospects of 'long and probing' discovery process and 'adverse publicity in the press' will unduly inhibit officer initiative." *Id.*

[181] *See* text accompanying note 37 *supra*.

[182] Former Attorney General Griffin Bell stated that "the prospects of disciplinary action and/or criminal prosecution will adequately serve deterrent purposes." GELLHORN, BYSE & STRAUSS, *supra* note 3, at 1112.

[183] Metzenbaum Bill, *supra* note 114.

[184] The Metzenbaum Bill excludes libel, slander, misrepresentation, deceit, and interference with contract rights from government liability. *Id.* at § 9(b), at 21,362.

[185] The conduct of members of Congress, judges, and prosecutors would be completely immunized under the Metzenbaum Bill. Metzenbaum Bill, *supra* note 114, at § 3(b), at 21,361.

[186] *Id.* at § 13, at 21,363-64. *See also* GELLHORN, BYSE & STRAUSS, *supra* note 3, at 1111-13.

not involve the exercise of discretionary authority, the appropriate standard depends upon whether there is a close counterpart or analogy to the specific activity or tort in the private sector. If there is, the private law standard should apply. Where there is no counterpart or analogy because the activity or tort is uniquely governmental, liability should depend upon what a reasonable government employee would do under the circumstances.

A. Standard of Liability For Discretionary Activities

Statutes grant administrative officials considerable discretion in exercising their official duties. The appropriate standard for measuring the conduct of these officials should be the "reasonable administrator exercising discretionary authority."[187] The standard of liability for the activities of these officials should be different than that for the conduct of government employees who act without discretion. In exercising discretion, these officials must take factors not present in the private sector into consideration. These officials must exercise discretion within and pursuant to statutorily delegated authority. The standard of liability must take these official duties into account. Thus, an administrative official must consider the scope of his authority, the statutory mandate under which he operates, and the public interest when he balances the benefits of a particular course of conduct against potential harms to the public.

This standard of liability appropriately balances the goal of compensation against the need to maintain effective governmental operation, since it permits liability only for unreasonable discretionary decisions. The proposed standard calls for judicial inquiry into whether the administrator considered the proper factors in choosing a particular course of conduct. The court must also scrutinize the official's substantive balancing of these factors. The court should find liability only if the official clearly

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[187] A statute incorporating this standard would state:

> The United States shall be liable for property loss or damage, personal injury, or death which directly results from a discretionary decision by an administrative official who has the authority to and does exercise judgment, or makes policy, or who fulfills a planning role, when that official acted or failed to act consistent with the standard expected of a reasonable administrator exercising discretionary authority.

acts unreasonably in either respect. Since the standard immunizes all reasonable discretionary conduct, it does not unduly inhibit the vigorous exercise of discretionary authority. Further, because the government has no legitimate interest in immunizing unreasonable decision-making, the standard properly discourages conduct of this sort by permitting liability.

This standard of liability is similar to the Supreme Court's approach to federal official liability for constitutional torts. In *Butz v. Economou,*[188] the Supreme Court stated that federal officials who exercise discretionary authority are subject to personal liability if they act "unreasonably and in bad faith."[189] In *Butz,* the head of a commodities future company sued officials of the Department of Agriculture for damages, alleging that they had instituted unauthorized proceedings against the company in violation of the due process clause and first amendment. The district court dismissed the complaint on the ground that the officials were entitled to absolute immunity for the performance of discretionary acts within the scope of their authority.[190] The Supreme Court held that, although federal officials could not be liable for mere mistakes of judgment,[191] "federal executive officials exercising discretion are entitled to . . . qualified immunity . . . subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of public business."[192] In rejecting absolute immunity, the Court balanced the goals of compensation and deterrence against the "need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."[193] Although *Butz* did not involve the standard of entity liability, the same factors color each consideration: the need to compensate, the need to deter, and the need to encourage vigorous exercise of official discretion.[194]

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[188] 438 U.S. 478 (1978).

[189] *Id.* at 497-98, *quoting* Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974).

[190] Butz v. Economou, 438 U.S. 478, 480 (1978).

[191] *Id.* at 507.

[192] *Id.*

[193] *Id.* at 506.

[194] Exclusive governmental liability rather than employee liability best furthers these goals. *See* text accompanying notes 179-186 *supra.*

A similar reasonableness standard applies to determine the personal liability of state and local officials in civil rights cases brought under 42 U.S.C. § 1983 (1976). In Scheuer v. Rhodes, 416 U.S. 232 (1974), the Supreme Court held

The proposed standard is also consistent with a recent trend toward increased judicial scrutiny of administrative discretion in the non-tort context. In *Citizens to Preserve Overton Park v. Volpe,*[195] for instance, the Supreme Court held that judicial review of the Secretary of Transportation's decision to approve federal funding for the construction of a highway through a city park was appropriate under the Administrative Procedure Act (APA).[196] The Secretary of Transportation could authorize federal funding to construct highways through public parks only if there were no feasible and prudent alternatives.[197] The petitioners in *Overton Park* contended that the Secretary had exceeded his authority in approving the highway project. The Supreme Court held that reviewing courts must determine where administrative decisions are "based on a consideration of the relevant factors, and that [there must not have been] clear errors of judgment."[198] Further, the court held that agency decisions must be reasonable and within the scope of statutorily delegated authority.[199]

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that state and local officials enjoy only a qualified personal immunity from liability for any injury that they cause in the scope of their employment. In *Scheuer,* representatives of the estates of students killed at Kent State University sued under § 1983 for damages against the Governor of Ohio, certain national guard officers, and others. The plaintiffs alleged that the officials had intentionally and recklessly caused the unnecessary deployment of the national guard and ordered the guard to perform illegal acts that ultimately deprived the decedents of their lives without due process of law. Remanding for further consideration, the Supreme Court said:

> [I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in the light of all the circumstances, coupled with good faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

416 U.S. at 247-48.

[195] 401 U.S. 402 (1971).

[196] *Id.* at 410-11. The Court held that judicial review was appropriate under 5 U.S.C. § 701 (1976).

[197] *See* Department of Transportation Act of 1966 § 4(f) (codified at 49 U.S.C. § 1653(f) (1976)); Federal Aid to Highways Act of 1968 § 18(a) (codified at 23 U.S.C. § 138 (1976)).

[198] Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

[199] *Id.* The Court also required that the agency disclose the substance of its

Courts have also used a similar standard to scrutinize agency decisions not to act.[200] Thus, courts are increasingly recognizing the legitimacy of and need for judicial review of administrative conduct. Certainly, this trend demonstrates that judicial scrutiny does not inhibit proper administrative activity. Therefore, the appropriate standard of liabilty posits a reasonable administrator who considers all relevant factors and exercises reasonable judgment.

Consistent with this trend toward increased judicial scrutiny of administrative decisions is a recently developed judicial definition of abuse of discretion under the APA. In *Littell v. Morton*,[201] the Fourth Circuit held that it was appropriate under the APA to review administrative action to determine whether the agency has abused its discretion.[202] An attorney sought judicial review of the Secretary of Interior's decision to disallow a compensation claim for professional services that he had rendered to an American Indian tribe. The court held that an administrative decision constitutes an abuse of discretion under the APA "if it [is] made without a rational explanation, inexplicably depart[s] from established policies, or rest[s] . . . on other 'considerations that Congress could not have intended to make relevant.' "[203] *Littell* demonstrates that absolute immunity for discretionary decisions is not necessary to insure that the senior official can perform effectively.

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proceeding either by preparing formal findings that explained its decision or allowing "administrative officials who participated in the decision to give testimony explaining their action." *Id.* at 420. The Court held that disclosure was necessary to facilitate judicial review of the administrative decision.

Similarly, the Freedom of Information Act, 5 U.S.C. § 552 (1976), which requires agencies to disclose certain information upon the request of private citizens in certain situations, would aid the private tort plaintiff litigating under the proposed liability standard in gathering evidence of unreasonable exercise of discretion.

[200] *See, e.g.*, Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971) (refusal of Secretary of Agriculture to suspend federal regulation of pesticides subjected to judicial review). For a discussion of prosecutorial discretion and the choice not to enforce, see DAVIS, *supra* note 6, at 469-71.

[201] 445 F.2d 1207 (4th Cir. 1971).

[202] *Id.* at 1211. The court concluded that limited judicial review to determine whether an abuse of administrative discretion occurred was appropriate under 5 U.S.C. § 706 (1976).

[203] Littell v. Morton, 445 F.2d 1207, 1211 (4th Cir. 1971), *quoting* Wong Wing Hang v. Immigration and Naturalization Serv., 360 F.2d 715, 719 (2d Cir. 1966).

The government should, however, remain immune for the negligence of members of Congress, judges, and prosecutors.[204] These officials perform extremely valuable and uniquely governmental functions. Absolute immunity is necessary to protect their conduct from any inhibiting effect of judicial scrutiny.[205] Governmental immunity for the unintentional torts of these officials is consistent with the absolute immunity that the officials personally possess. The essential and highly personalized nature of the work that these officials perform justifies their personal immunity. Although entity liability arguably would not unduly interfere with the activity of these officials, the highly judgmental nature of their duties requires that their performance be completely free from judicial scrutiny.[206]

However, government liability for the intentional torts of these officials is not subject to the same criticism.[207] Liability for bad faith or malicious conduct does not require judicial scrutiny of any official discretion. Thus, the government should be responsible for intentional torts that these officials commit, even though the officials themselves are personally immune.[208] This proposal attempts to balance two strongly conflicting policies. On the one hand, essential governmental processes must be shielded from judicial interference. On the other hand, the claims of intentional tort victims compel compensation. The proposed basis of governmental liability accommodates these goals by making the government exclusively liable while retaining the personal immunity of the official.

B. Standard of Liability For Non-Discretionary Activities

Those acts of governmental employees that do not involve of-

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[204] *See* RESTATEMENT (SECOND) OF TORTS § 585 (immunity of judicial officers); *id.* § 586 (prosecutorial immunity); *id.* § 590 (congressional immunity).

[205] *See* Butz v. Economou, 438 U.S. 478, 508-09 (1978) (absolute immunity for judges, prosecutors, and witnesses is necessary to assure that they can perform their duties without harassment or intimidation); Yasselli v. Goff, 275 U.S. 503 (1927) (extending immunity to federal prosecutors), *aff'g* 12 F.2d 396 (2d Cir. 1926); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1872) (judicial immunity essential to proper functioning of judges).

[206] *See* DAVIS, *supra* note 6, at § 25.16, at 498-500.

[207] *See generally* GELLHORN, BYSE & STRAUSS, *supra* note 3, at 1027-28.

[208] *See* DAVIS, *supra* note 6, at § 25.16, at 498-500, discussing situations in which the government is liable for the intentional acts of judges. *See also* 28 U.S.C. § 2513 (1976).

ficial judgment are broadly considered non-discretionary activities.[209] Non-discretionary activities are of two general types: activities that are inherently governmental and activities that are analogous to private sector activities. The standard of government liability should vary slightly, depending upon which of these two types of activities is involved.

As a general proposition, where government activity has a close counterpart or analogy in the private sector, the private law standard of liability should apply. This proposed standard of liability is consistent with the FTCA's directive that the government is liable in the same manner as a private party in like circumstances.[210] Under the proposed standard, governmental liability for acts that are not uniquely governmental would be determined by the substantive law of the jurisdiction where the tortious conduct occurred. Thus, the various standards of tort liability, including negligence, strict liability, and absolute liability would apply to governmental torts in the same manner as they apply to private tortfeasors.[211]

Private law standards of liability should apply to the specific employee torts that are currently exempted from the FTCA.[212] Liability should be imposed under this standard for all employee torts, including intentional torts and tortious misrepresentation. However, where private law would not impose vicarious liability for intentional torts outside the scope of employment, the government should likewise be held immune. Similarly, where the act is not inherently governmental, liability for most of the specific governmental activities currently exempted under the FTCA[213] should be imposed based on analogy to private law.

Private law analogies are readily available for many of these non-discretionary activities. For example, postal service claims, customs and revenue claims, and foreign claims that are based on the non-discretionary acts of government employees, should be judged under private law standards of liability. This article

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[209] *See* notes 171-172 and accompanying text *supra*.

[210] 28 U.S.C. § 2674 (1976). *See* Rayonier, Inc. v. United States, 352 U.S. 315, 318 (1957) (United States liable for Forest Service firefighter's negligence that damaged plaintiff's property); Indian Towing Co. v. United States, 350 U.S. 61, 65-68 (1955) (United States liable to barge charterer under FTCA for cargo damage caused by Coast Guard's negligent operation of lighthouse).

[211] *See* SCHWARTZ & JACOBY, *supra* note 39, at §§ 13.113-.116, at 211-16.

[212] *See* notes 108-156 and accompanying text *supra*.

[213] *See* notes 55-107 and accompanying text *supra*.

has proposed alternative methods of compensation for some of the exempted governmental activities. For example, a system of government-funded postal insurance could compensate victims of postal negligence.[214] If adopted, this insurance system would be the exclusive remedy and preclude governmental liability in tort. Such an exclusive system is consistent with the proposed standards of liability since insurance is a legitimate private law alternative to tort liability. Therefore, where adequate alternatives to tort liability already exist, as in the case of admiralty[215] and government corporation claims,[216] these alternatives should continue to be the exclusive remedies.

Some government activities have no reasonable analogy in private law. Immunity should continue for some of these activities, but not for others. For these uniquely governmental activities, the law should fashion a standard of "governmental negligence." The premise of this standard of governmental negligence would be the reasonableness of the government employee's behavior. While government negligence would bear some resemblance to private law negligence, a new cause of action based on the uniqueness of the governmental activity would be created. Thus, the governmental negligence standard would require inquiry into statutes, regulations, and administrative interpretations under which government employees operate to define reasonable government behavior.[217] This standard constitutes a middle ground between governmental immunity and absolute liability. It accommodates the competing interests of non-interference with governmental operations and compensation for victims of government negligence.

Under the proposed government negligence standard, some activities would remain immune from tort liability. For example, government immunity for fiscal and monetary regulation claims should generally continue under the proposed standard since, in most cases, judicial inquiry cannot possibly determine the appropriate standard of reasonable behavior.[218] However, where

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[214] *See* note 59 and accompanying text *supra*.

[215] *See* note 51 and accompanying text *supra*.

[216] *See* notes 52-54 and accompanying text *supra*.

[217] However, under this proposed standard, reasonableness is not synonymous with legality or lawfulness. Liability should be imposed for some lawful activities but not for some unlawful activities. *See* DAVIS, *supra* note 6, at 496-97.

[218] *See* notes 90-92 and accompanying text *supra*.

governmental guidelines indicate a clear standard for a particular fiscal or monetary regulation, liability could be imposed by conduct that deviates unreasonably from that standard.

Conclusion

The sovereign immunity doctrine, as inherited from monarchical England, has few justifications in modern America. American constitutional philosophy, which is based on the separation of powers and which rests ultimate power in the people, demands a responsible and accountable government. Clearly, compelling factors may justify judicial non-interference with certain narrowly defined governmental activities. Immunity is also justified where alternative remedies adequately compensate victims of government torts. However, as a general rule, the government should be liable for the tortious injuries that it causes.

This article has examined the doctrine of sovereign immunity and its retention under numerous exceptions to the FTCA. In most instances, the need for judicial restraint or the existence of alternative remedies do not justify these exceptions to government liability. In some instances, the exceptions may actually impede the vigorous performance of governmental activities by placing the full burden of tort liability on government employees.

This article proposes a basic rule of exclusive government liability for its employees' torts. Where government conduct is clearly analogous to private conduct, private tort law standards should apply. However, the article proposes slightly different standards of liability for torts arising from uniquely governmental activities or the exercise of discretionary governmental powers. These standards would consider the behavior of reasonable government officials in like circumstances. These standards would compensate victims of government torts without exposing government operations to undue judicial interference.