

1999

The Burden of Proving Jurisdiction Under the Federal Tort Claims Act: A Uniform Approach to Allocation

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Cover Page Footnote

Trial Attorney, U.S. Department of Justice, Civil Division, Torts Branch, Environmental Torts Section. B.A. 1989, Stanford University; J.D. 1996, Tulane Law School. The views expressed herein are ours alone, and are not necessarily those of the U.S. Department of Justice. Comments are welcome at ugo.collela@usdoj.gov. * Trial Attorney, U.S. Department of Justice, Civil Division, Torts Branch, Environmental Torts Section. B.A. 1983, Purdue University; J.D. 1986, Indiana University School of Law. The views expressed herein are ours alone, and are not necessarily those of the U.S. Department of Justice. Comments are welcome at adum.bain@usdoj.gov.

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Ugo Colella & Adam Bain***

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INTRODUCTION

BURDENS of proof matter. Ours is an adversarial system in which parties to civil litigation are responsible for gathering facts and presenting those facts to a judge or jury for resolution. The burden of proof mechanism, whether created by statute or by courts, facilitates the orderly presentation of evidence to a court and, ultimately, to a trier of fact. At least that is the theory, for it is clear that the practical task of allocating the burden of proof in civil litigation has vexed courts and commentators for some time now. Perhaps driven by the inequities of foisting onto one party the obligation to prove facts often in the opposing party's control, courts have created a variety of burden-shifting schemes in which the plaintiff and the defendant carry different burdens at different stages of civil litigation.¹

1. See, e.g., *United States v. Ursery*, 518 U.S. 267, 289 (1996) (discussing the shifting of burden of proof in civil forfeiture); *Seminole Tribe v. Florida*, 517 U.S. 44, 50

Commentators have also struggled to articulate coherent and principled approaches to allocating the burden of proof in a number of civil contexts.² The view that emerges from the decisions and the commentary is that attempts to formulate a comprehensive rule for allocating

(1996) (discussing the circumstances under which the burden shifts to the state when dealing with the Indian Gaming Regulatory Act); *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995) (examining when the burden of proof shifts regarding peremptory challenges based on race); *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 621-22 (1993) (indicating when the burden of production shifts to the employer in ERISA cases); *County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991) (discussing the shift of the burden of production to the government when an arrested individual does not receive probable cause determination within 48 hours); *Hunter v. Underwood*, 471 U.S. 222, 228 (1985) (discussing the shifting burden when there is a violation of Equal Protection Clause challenges); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973) (explaining which party carries the burden of proof in a Title VII action); *Kastigar v. United States*, 406 U.S. 441, 461-62 (1972) (holding that under the federal immunity statute, the burden of production shifts to the government when the defendant testifies under a grant of immunity); *Boehms v. Crowell*, 139 F.3d 452, 457-58 (5th Cir. 1998) (discussing the burden-shifting framework for an Age Discrimination in Employment Act plaintiff), *cert. denied*, 119 S. Ct. 866 (1999); *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711, 712 (7th Cir. 1997) (explaining the establishment of a prima facie case under the burden-shifting approach in the context of the Family and Medical Leave Act); *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1183-84 (6th Cir. 1996) (examining the burdens of production of employers and employees under the Americans with Disabilities Act).

2. See, e.g., Ronald J. Allen, *Presumptions, Inferences and Burden of Proof in Federal Civil Actions—An Anatomy of Unnecessary Ambiguity and a Proposal for Reform*, 76 Nw. U. L. Rev. 892 (1982) (addressing the interplay between allocating the burdens of persuasion and production and evidentiary presumptions); Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 Am. U. L. Rev. 1 (1997) (discussing the proper method of allocating the burden of proving qualified immunity in civil rights cases); Neil B. Cohen, *Confidence in Probability: Burdens of Persuasion in a World of Imperfect Knowledge*, 60 N.Y.U. L. Rev. 385 (1985) (addressing the role of probabilistic judgments in assessing evidence and the burden of persuasion); Roger B. Dworkin, *Easy Cases, Bad Law, and Burdens of Proof*, 25 Vand. L. Rev. 1151 (1972) (discussing the different formulations for allocating burdens of proof and presumptions and proposing the elimination of burdens of proof in civil litigation); Richard D. Friedman, *Dealing with Evidentiary Deficiency*, 18 Cardozo L. Rev. 1961 (1997) (addressing the problem of allocating burdens of proof when evidence is missing); Bruce L. Hay & Kathryn E. Spier, *Burdens of Proof in Civil Litigation: An Economic Perspective*, 26 J. Legal Stud. 413 (1997) (discussing the law-and-economics view of burdens of proof); Jerome A. Hoffman & William A. Schroeder, *Burdens of Proof*, 38 Ala. L. Rev. 31 (1986) (presenting the different conceptions of burdens of proof); Thomas R. Lee, *Pleading and Proof: The Economics of Legal Burdens*, 1997 B.Y.U. L. Rev. 1 (presenting a cost model for burden allocation); Leo P. Martinez, *Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases*, 39 Hastings L.J. 239 (1988) (discussing the burden of proof in the tax context); John T. McNaughton, *Burden of Production of Evidence: A Function of a Burden of Persuasion*, 68 Harv. L. Rev. 1382 (1955) (arguing that the burden of production is derivative of the burden of persuasion); Chris W. Sanchirico, *The Burden of Proof in Civil Litigation: A Simple Model of Mechanism Design*, 17 Int'l Rev. L. & Econ. 431 (1997) (providing an economic analysis of allocating the burden of proof); Marshall S. Sprung, Note, *Taking Sides: The Burden of Proof Switch in Dolan v. City of Tigard*, 71 N.Y.U. L. Rev. 1301 (1996) (discussing the burden of proof in the context of takings law).

the burden of proof—one applicable to every cause of action or defense—are destined for failure.³

Nonetheless, although fashioning a universal allocation rule has proved difficult, the tools for designing a burden-of-proof rule specific to a cause of action, defense, or particular statute are well-known and generally agreed upon. Primary among these tools is the understanding that the burden of proof is comprised of two distinct elements: the burden of production and the burden of persuasion.⁴ Historically, the burden of production has been characterized as the obligation imposed on a party to present a court with enough evidence to avoid a directed verdict; it is, quite simply, the burden of showing that the case should go forward.⁵ The burden of persuasion, on the other hand, has been described as the burden of proving to a trier of fact that the evidence, construed in light of applicable legal principles, compels a particular result.⁶ Whereas the burden of production often shifts from party to party, the burden of persuasion remains with the same party throughout the trial process.⁷

Analyses of burden-of-proof allocation have largely focused on substantive causes of action and defenses. So, for example, it is well-established that a plaintiff generally has the burden of proving the elements of negligence, and a defendant has the burden of proving affirmative defenses such as comparative negligence.⁸ By contrast, relatively little attention has been devoted to constructing a scheme for allocating the burden of proving federal subject matter jurisdiction. Perhaps that is because the issue seems well-settled. It is axiomatic that federal courts are courts of limited jurisdiction and that a party seeking to invoke the power of an Article III court bears the burden of demonstrating that either the Constitution or some act of

3. See, e.g., Dworkin, *supra* note 2, at 1152 (recognizing that attempts to formulate general rules for allocating the burden of proof “have been unable to remove the fog, despite substantial efforts at clarification”).

4. See, e.g., 2 McCormick on Evidence § 336, at 568 (John W. Strong ed., 4th ed., 1992) [hereinafter McCormick on Evidence] (discussing the burden of production and the burden of persuasion as two distinct elements); James B. Thayer, A Preliminary Treatise on Evidence 355 (1898) (examining several ways that the phrase “burden of proof” is used in legal discussion). Professor McNaughton was not persuaded by the burden of production/burden of persuasion distinction. See McNaughton, *supra* note 2, at 1382, 1390-91. And Professor Dworkin has noted the negative consequences that come about when the burden of production/burden of persuasion distinction is used. See Dworkin, *supra* note 2, at 1157-64, 1178-81. We shall have more to say about these views later. See *infra* Part II.A-B (arguing that, in the context of prescribing a burden-of-proof rule for federal subject matter jurisdiction in the FTCA context, the burden of production/burden of persuasion distinction has important practical benefits and avoids the problems that have plagued burden-of-proof allocation generally).

5. See 2 McCormick on Evidence, *supra* note 4, § 336, at 568-69.

6. See *id.* at 569.

7. See *id.* at 568-69.

8. See, e.g., W. Page Keeton et al., Prosser and Keeton on the Law of Torts §§ 38, 65, at 239, 451 (5th ed. 1984) [hereinafter Prosser & Keeton] (discussing the plaintiff's and the defendant's respective burdens in litigation).

Congress opens the federal courthouse doors to a claim.⁹ Yet, as ubiquitous as this principle may be, it has not been consistently applied, with some courts turning the principle on its head and imposing on the non-jurisdiction-seeking party the ultimate burden of proving (the negative proposition) that federal subject matter jurisdiction is lacking.¹⁰

The Federal Tort Claims Act ("FTCA") is a statute in which this type of burden-shifting has occurred. The FTCA waives the United States' immunity in tort, holding the United States liable for the acts or omissions of federal employees acting within the scope of their employment.¹¹ The Act's waiver of immunity, however, does not provide Article III courts with a jurisdictional blank check, in which courts may exercise jurisdiction over any tort suit brought against the federal government. Rather, the FTCA imposes on plaintiffs a series of conditions that must be met before a federal district court may exercise subject matter jurisdiction over an FTCA claim. Thus, for example, an FTCA plaintiff must first present her tort claim to the appropriate federal agency for possible settlement within two years after the claim accrues.¹² Failure to meet this administrative-exhaustion and statute-of-limitations requirement deprives a federal district court of jurisdiction to consider the tort suit.¹³ In addition, the FTCA contains a number of exceptions to federal subject matter jurisdiction, immunizing the United States from certain types of tort actions. The United States cannot be sued for discretionary conduct that implicates federal policy, for the acts of independent contractors, for its misrepresentations, or for other specified torts.¹⁴ All of these exceptions are con-

9. See *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); Charles A. Wright, *The Law of Federal Courts* 22-23 (5th ed. 1994) [hereinafter Wright, *Federal Courts*].

10. See, e.g., *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 896 (5th Cir. 1998) (interpreting the Federal Sovereign Immunities Act and holding that a foreign sovereign bears the ultimate burden of proving subject matter jurisdiction is lacking); *Prescott v. United States*, 973 F.2d 696, 701-702 (9th Cir. 1992) (interpreting the Federal Tort Claims Act and holding that the United States bears the ultimate burden of proving an exception to Congress's limited waiver of sovereign immunity); *Schmidt v. United States*, 933 F.2d 639, 640 (8th Cir. 1991) (imposing on the United States the burden of proving a plaintiff has not complied with the FTCA's statute of limitations); *Carlyle v. United States*, 674 F.2d 554, 556 (6th Cir. 1982) (holding that the United States bears the burden of proving an exception to federal subject matter jurisdiction); *Stewart v. United States*, 199 F.2d 517, 520 (7th Cir. 1952) (same).

11. See 28 U.S.C. §§ 1346(b), 2674 (1994).

12. See *id.* §§ 2401(b), 2675(a).

13. See *McNeil v. United States*, 508 U.S. 106, 110-13 (1993) (holding that failure to meet the exhaustion requirement represents a jurisdictional bar to suit); *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979) (holding that failure to meet the two-year limitations period represents a failure to meet a condition of the FTCA's waiver of sovereign immunity).

14. See 28 U.S.C. § 2671 (excluding independent contractors with the United States from the term "Federal Agency"); *id.* § 2680(a) (discussing the discretionary

gressionally imposed conditions on the FTCA's waiver of sovereign immunity.

Whether the United States or the plaintiff bears the burden of proving the existence or nonexistence of the FTCA's jurisdictional conditions has produced a confusing array of approaches to allocation.¹⁵ Are the jurisdictional conditions affirmative defenses, imposing on the United States the burden of proving a lack of subject matter jurisdiction? Or, are they pure jurisdictional conditions, imposing on the FTCA plaintiff the burden of demonstrating that a federal court has jurisdiction to entertain the FTCA suit? To complicate matters further, courts have manipulated the burden of proving the FTCA's jurisdictional conditions through the procedural vehicle of "Rule 12(b)(1) conversion." Rule 12(b)(1) of the Federal Rules of Civil Procedure permits the government to move to dismiss an FTCA action for lack of subject matter jurisdiction.¹⁶ The plaintiff bears the burden of proving subject matter jurisdiction in the Rule 12(b)(1) context.¹⁷ Rule 12(b)(1) motions, however, are routinely—and mistakenly—converted into Rule 56 motions for summary judgment, imposing on the United States the burden of proving that there is no genuine dispute as to any material fact regarding jurisdiction.¹⁸ Plainly, the Rule 56 burden of proof is at odds with that governing Rule 12(b)(1).

These questions are not theoretical musings about the structure of the FTCA or idle inquiries into the nuances of the Federal Rules of Civil Procedure. Instead, we raise these issues because their resolution carries significant, real-world consequences for those suing the United States, for those defending the United States, and for the courts themselves, who must adjudicate the rights, remedies, and defenses available to FTCA plaintiffs and the federal government. Plainly, who bears the burden of proving jurisdiction may fundamentally affect the course of discovery. Parties enter the discovery process with a set of expectations about the type and quantity of evidence they need to prove a cause of action or defense. The allocation of the

function exception); *id.* § 2680(h) (explaining the misrepresentation exception and other specified tort exceptions).

15. Compare *Prescott v. United States*, 973 F.2d 696, 702 (9th Cir. 1992) (holding that the government bears the ultimate burden of proof on the discretionary function exception), and *Schmidt v. United States*, 933 F.2d 639, 640 (8th Cir. 1991) (imposing on the United States the burden of proving that a plaintiff has not complied with the FTCA's statute of limitations), with *Aragon v. United States*, 146 F.3d 819, 823 (10th Cir. 1998) (holding that the plaintiff bears the burden of proof on the discretionary function exception), and *Crawford v. United States*, 796 F.2d 924, 929 (7th Cir. 1986) (holding that the plaintiff bears the burden of proof with respect to the FTCA's statute of limitations), and *Drazan v. United States*, 762 F.2d 56, 60 (7th Cir. 1985) (same).

16. See Fed. R. Civ. P. 12(b)(1).

17. See *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977).

18. See Fed. R. Civ. P. 56.

burden of proof directs parties to devote their resources to discovering enough facts to either avoid a dismissal, obtain a dismissal, or ultimately prevail at trial. At the same time, allocation rules give courts decision-making heuristics (procedural road maps, if you will) that can be used to wade through sometimes complex bodies of evidence.

Much has been written about the substantive requirements of the jurisdictional conditions of the FTCA. Commentators have paid particular attention to administrative exhaustion,¹⁹ the Act's statute of limitations,²⁰ and the discretionary function exception.²¹ Although

19. See, e.g., Philip H. Corboy, *Shielding the Plaintiff's Achilles' Heel: Tort Claim Notices to Governmental Entities*, 28 DePaul L. Rev. 609 (1979) (analyzing the development of statutory pre-suit notice requirements); Michaelle F. Pitard, *Procedural Aspects of the Federal Tort Claims Act*, 21 Loy. L. Rev. 899 (1975) (discussing the application of the FTCA); Rollin A. Van Broekhoven, *The Federal Tort Claims Act and Administrative Claims*, 20 Baylor L. Rev. 336 (1968) (pointing out changes affecting the prospective claimant under the FTCA and the problem areas which exist); Donald N. Zillman, *Presenting a Claim Under the Federal Tort Claims Act*, 43 La. L. Rev. 961 (1983) (discussing the FTCA's application and presentation requirements); Daniel M. Katlein, Comment, *Administrative Claims and the Substitution of the United States as Defendant Under the Federal Drivers Act: The Catch 22 of the Federal Tort Claims Act?*, 29 Emory L.J. 755 (1980) (discussing the interaction between the Federal Drivers Act and the administrative requirement for FTCA actions); Note, *Claim Requirements of the Federal Tort Claims Act: Minimal Notice or Substantial Documentation?*, 81 Mich. L. Rev. 1641 (1983) (explaining the administrative requirements of the FTCA); Note, *Federal Tort Claims Act: Notice of Claim Requirement*, 67 Minn. L. Rev. 513 (1982) (examining the notice requirement under the FTCA).

20. See, e.g., Ugo Colella, *The Case for Borrowing a Limitations Period for Deemed-Denial Suits Brought Pursuant to the Federal Tort Claims Act*, 35 San Diego L. Rev. 391 (1998) (discussing the statute of limitations requirements of the FTCA); Carl T. Grasso, *The Statute of Limitations as Applied to Medical Malpractice Actions Brought Under the Federal Tort Claims Act*, 117 Mil. L. Rev. 1 (1987) (same); Richard Parker & Ugo Colella, *Revisiting Equitable Tolling and the Federal Tort Claims Act: The Impact of Brockamp and Beggerly*, 29 Seton Hall L. Rev. 885 (1999) (same); Richard Parker, *Is the Doctrine of Equitable Tolling Applicable to the Limitations Periods in the Federal Tort Claims Act?*, 135 Mil. L. Rev. 1 (1992) (explaining the equitable tolling and the FTCA); Kent Sinclair & Charles A. Szypszak, *Limitations of Action Under the FTCA: A Synthesis and Proposal*, 28 Harv. J. on Legis. 1 (1991) (proposing an amendment of the FTCA's statute of limitations); Carl M. Wagner, *United States v. Kubrick: Scope and Application*, 120 Mil. L. Rev. 139 (1988) (proposing a change to the FTCA accrual method).

21. See, e.g., John W. Bagby & Gary L. Gittings, *The Elusive Discretionary Function Exception from Government Tort Liability: The Narrowing Scope of Federal Liability*, 30 Am. Bus. L.J. 223 (1992) (proposing a new model for analyzing the discretionary function exception to the FTCA); David S. Fishback & Gail Killefer, *The Discretionary Function Exception to the Federal Tort Claims Act: Dalehite to Varig to Berkovitz*, 25 Idaho L. Rev. 291 (1989) (discussing the discretionary function exception to the FTCA); Grover Glenn Hankins, *The Federal Tort Claims Act: A Smooth Stone for the Sling*, 31 Gonz. L. Rev. 27 (1995/96) (same); William P. Kratzke, *The Supreme Court's Recent Overhaul of the Discretionary Function Exception to the Federal Tort Claims Act*, 7 Admin. L.J. Am. U. 1, 5, 55-57 (1993) (discussing the courts' role in construing the discretionary function exception pursuant to the objectives of tort law); Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Governmental Liability in Tort*, 38 UCLA L. Rev. 871, 875-84 (1991) (tracing the development of the discretionary function exception); Daniel E. Matthews, *Federal Tort Claims Act—The Proper Scope of the Discretionary Function Ex-*

some have nibbled at the edges,²² no commentator has addressed the *ex ante*, normative question of who should bear the burden of proving the FTCA's jurisdictional conditions. Because the conditions attached to the Act's waiver of sovereign immunity all operate to preclude the exercise of federal subject matter jurisdiction, courts should apply one general rule for allocating the burden of proof. Yet, courts have inconsistently allocated the burden of proof for FTCA jurisdictional issues—sometimes imposing it on plaintiffs, sometimes on the United States.²³ In the process, courts have rendered non-uniform an area of FTCA law that ought to be driven by one approach to allocation.

This Article proposes a uniform rule for allocating the burden of proving the jurisdictional conditions of the FTCA, a rule rooted in the well-established distinction between the burden of production and the burden of persuasion. Consistent with “waiver-of-sovereign-immunity” principles and general principles governing federal subject matter jurisdiction, the rule begins with the presumption that a federal court does not have jurisdiction over a tort suit brought against the United States. This “no-jurisdiction presumption” may be rebutted if the allegations in the complaint, taken as a whole, suggest that the plaintiff's suit is jurisdictionally viable. If the plaintiff overcomes the

ception, 6 Am. U. L. Rev. 22 (1957) (discussing the difficulties the federal courts have had in construing the discretionary function exception); Cornelius J. Peck, *The Federal Tort Claims Act—A Proposed Construction of the Discretionary Function Exception*, 31 Wash. L. Rev. 207, 225-31 (1956) (proposing that for the discretionary function exception to apply the government must prove that the employee (1) was authorized to, and did, direct the act or omission, (2) was authorized to encounter the risk involved, and (3) was in furtherance of a governmental objective); Bruce A. Peterson & Mark E. Van Der Weide, *Susceptible to Faulty Analysis: United States v. Gaubert and the Resurrection of Federal Sovereign Immunity*, 72 Notre Dame L. Rev. 447, 448 (1997) (discussing the effects of *Gaubert* on the discretionary function exception); John M. Rogers, *A Fresh Look at Agency “Discretion”*, 57 Tul. L. Rev. 776, 834-35 (1983) (suggesting that when agency action is challenged in tort suits, interpreting the term “discretionary” should vary depending on the particular tort immunity context); Richard H. Seamon, *Causation and the Discretionary Function Exception to the Federal Tort Claims Act*, 30 U.C. Davis L. Rev. 691, 748-56 (1997) (proposing an “influence” test to determine whether the plaintiff's harm is based upon a discretionary decision); Donald N. Zillman, *Protecting Discretion: Judicial Interpretation of the Discretionary Function Exception to the Federal Tort Claims Act*, 47 Me. L. Rev. 366, 367 (1995) (assessing discretionary function law under the FTCA fifty years after its enactment); Note, *The Discretionary Function Exception of the Federal Tort Claims Act*, 66 Harv. L. Rev. 488, 489 (1953) (indicating the inherent difficulty in applying the discretionary function exception, delineating “most important factors,” and suggesting possible analyses).

22. See Hankins, *supra* note 21, at 51-52 (reviewing case law that imposes the burden of proving the discretionary function exception on the United States, but not commenting on whether such allocation is appropriate); Seamon, *supra* note 21, at 701-02 n.25 (recognizing the divergent views of who bears the burden of proof in discretionary function cases, but providing no analysis of who *should* bear the burden).

23. See *infra* Part III.B-C (discussing the different approaches to allocation in cases involving the FTCA's statute of limitations and discretionary function exception, respectively).

no-jurisdiction presumption, the United States thereafter bears the burden of producing evidence that amounts to a *prima facie* case that the plaintiff has failed to meet one of the Act's jurisdictional conditions. The government carries the burden of production because it can best promote a timely resolution of the jurisdictional question. The government must focus the factual and legal issues it believes compel a dismissal for lack of subject matter jurisdiction. Once the United States meets its burden of production, the ultimate burden of persuasion rests with the plaintiff. The rule proposed here never imposes on the United States the burden of persuading a federal court that it lacks subject matter jurisdiction over an FTCA suit.

Part I of this Article discusses the threshold problem of Rule 12(b)(1) conversion. This part concludes that none of the reasons supporting Rule 12(b)(1) conversion is a viable justification for the practice in FTCA cases. Consistent with a recent Supreme Court decision,²⁴ this part argues that the United States is entitled to a Rule 12(b)(1) jurisdictional determination at the earliest stage of FTCA litigation. Only within this procedural context can the burden of proof be appropriately allocated between the United States and FTCA plaintiffs. Part II presents the allocation rule that should govern suits brought pursuant to the FTCA and suggests that the rule accounts for the policy considerations implicated when the government raises a jurisdictional condition as a bar to suit. Part III addresses potential criticisms of the allocation rule and concludes that none of the critiques has merit. Finally, part IV applies the rule to selected jurisdictional conditions of the FTCA. This part points out that some courts have mistakenly imposed on the United States the ultimate burden of persuasion in cases involving the Act's statute of limitations and discretionary function exception. In applying the rule to the most commonly litigated jurisdictional conditions, part IV concludes that the United States should only bear the burden of production when raising a condition as a jurisdictional bar to suit. The ultimate burden of persuasion on jurisdictional issues must always remain with the FTCA plaintiff.

I. THE PROCEDURAL CONTEXT FIRST: MANIPULATING THE BURDEN OF PROOF THROUGH THE FEDERAL RULES OF CIVIL PROCEDURE

A. *Introduction: The Interplay Between Rule 12(b)(1) and Rule 56*

Any discussion of the burden of proof applicable to the FTCA's jurisdictional conditions must first consider the procedural context within which burden allocation arises. This is because some courts have applied the Federal Rules of Civil Procedure in a manner that

24. See *Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003, 1012-15 (1998).

fundamentally affects the burden of proving federal subject matter jurisdiction in FTCA cases. Accordingly, because the Federal Rules of Civil Procedure govern FTCA suits against the United States, this section first looks to the application of those rules to determine whether burden-of-proof allocation comports both with basic principles of federal civil procedure and the jurisdictional scheme of the FTCA.

After a plaintiff files suit against the United States, the United States—like any other defendant—may use a number of procedural devices to resolve the suit short of trial. Rule 12(b)(1) of the Federal Rules of Civil Procedure permits dismissal for lack of subject matter jurisdiction;²⁵ Rule 12(b)(6) permits dismissal for failure to state a claim upon which relief could be granted;²⁶ and Rule 56 entitles a party to summary judgment if there are no disputed issues of material fact and the party is entitled to judgment as a matter of law.²⁷ Under Rule 12(b)(6), a ruling against the plaintiff results in dismissal of the complaint, and under Rule 56, a ruling against the plaintiff results in judgment for the defendant on the merits of the plaintiff's claim.²⁸ Under Rule 12(b)(1), a ruling against the plaintiff means that she has failed to plead or prove federal jurisdiction; it is not a judgment on the merits.²⁹

A party moving under Rule 12(b)(1) or Rule 12(b)(6) can mount a facial or factual attack on the court's jurisdiction. A facial attack is just that—a challenge to the face of the complaint. For example, in the FTCA context, the United States can seek a Rule 12(b)(1) dismissal because the plaintiff's complaint fails to allege compliance with the Act's administrative-claim requirement.³⁰ Rule 12(b)(1) and Rule 12(b)(6) facial attacks are treated similarly, with courts assuming that the allegations in the complaint are true and then determining whether the plaintiff has properly alleged jurisdiction or stated a claim for relief.³¹ A factual attack, however, is treated quite differently.

25. See Fed. R. Civ. P. 12(b)(1).

26. See Fed. R. Civ. P. 12(b)(6).

27. See Fed. R. Civ. P. 56.

28. See, e.g., *Kunkes v. United States*, 78 F.3d 1549, 1550 n.2 (Fed. Cir. 1996) (“Unlike a Rule 12(b)(6) motion, a summary judgment motion does not simply test the sufficiency of the complaint; it involves an examination of the material outside the complaint, and determines whether on the undisputed facts presented in that material, the movant is entitled to judgment as a matter of law.”); *Jama v. United States Immigration & Naturalization Serv.*, 22 F. Supp. 2d 353, 361 (D.N.J. 1998) (stating that a complaint must be dismissed under 12(b)(6) if the court finds “beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief”).

29. See, e.g., *Steel Co.*, 118 S. Ct. at 1012-13 (“[When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.”).

30. See *infra* Part IV.A.1.

31. See, e.g., *Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir. 1981) (stating that a motion to dismiss for lack of subject matter jurisdiction can be on the face of the complaint).

When making a factual challenge, the United States argues that matters outside of the pleadings compel dismissal or a judgment in its favor. Under Rule 12(b)(1), the court considers matters outside of the pleadings to determine whether it has jurisdiction to hear the case. Under Rule 12(b)(6), when the court considers matters outside of the pleadings, the court converts the motion to a motion for summary judgment under Rule 56 to determine whether the facts are undisputed and, if so, whether the moving party is entitled to judgment as a matter of law.

The interplay between factual attacks under Rule 12(b)(1) and Rule 56 lies at the center of the burden-of-proof problems that arise in FTCA litigation. In ruling on a Rule 56 motion, a federal district court—which consults matters outside of the pleadings—indulges all reasonable inferences in favor of the nonmoving party.³² The party moving for summary judgment bears the burden of proving that there are no disputed issues of material fact.³³ By contrast, when the government makes a factual attack under Rule 12(b)(1), it challenges the non-moving party's right to invoke federal subject matter jurisdiction. The party claiming federal jurisdiction has the burden of proving the right to be in federal court.³⁴ A court, in ruling on a factual attack under Rule 12(b)(1), consults matters outside of the pleadings, but, in contrast to the standards governing Rule 56, does not give the benefit of the doubt to the nonmoving party.³⁵ Rather, the court may weigh conflicting evidence to determine whether the plaintiff has met her burden of proving that federal subject matter jurisdiction is proper.³⁶

32. See, e.g., *Thomas v. IBM*, 48 F.3d 478, 484 (10th Cir. 1995) (“We examine the factual record and reasonable inferences therefrom in the light most favorable to [the party opposing] summary judgment.”).

33. See, e.g., *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (stating that “a party seeking summary judgment always bears the initial responsibility of . . . demonstrat[ing] the absence of a genuine issue of material fact”).

34. See, e.g., *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977) (“[T]he plaintiff will have the burden of proof that jurisdiction does in fact exist.”).

35. See *Land v. Dollar*, 330 U.S. 731, 735 & n.4 (1947); *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988). In *Dreier v. United States*, however, the court stated: [A]lthough dismissal pursuant to the *Feres* doctrine properly should be labeled a dismissal for lack of jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), where the district court has properly considered items outside the complaint in considering a motion to dismiss, the standard we apply upon *de novo* review of the record is similar to the summary judgment standard 106 F.3d 844, 847 (9th Cir. 1997).

36. See, e.g., *Thornhill Publ'g Co. v. General Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979) (“Where the jurisdictional issue is separable from the merits of the case, the judge may consider the evidence presented with respect to the jurisdictional issue and rule on that issue, resolving factual disputes if necessary.”); *Mortensen*, 549 F.2d at 891 (stating that “the trial court is free to weigh the evidence” and that the plaintiff has the burden of proof that jurisdiction is proper); *Sinclair v. Spatocco*, 452 F.2d 1213, 1213 (9th Cir. 1971) (“The trial court has discretion to determine the jurisdictional facts itself.”); *Appelt v. Whitty*, 286 F.2d 135, 137 (7th Cir. 1961) (“Disputed issues of jurisdictional fact may be heard and determined by the Trial Court.”).

The different treatment extended to Rule 12(b)(1) and Rule 56 explains in large part why Rule 56 judgments are rulings on the merits of the underlying claim, whereas Rule 12(b)(1) rulings are not.

Unfortunately, courts often convert Rule 12(b)(1) motions into Rule 56 motions for summary judgment. This practice of "Rule 12(b)(1) conversion" has significant consequences in the FTCA context because, consistent with Rule 56 standards, the United States, as the moving party, bears the burden of proving that there is no genuine dispute as to any material fact regarding jurisdiction.³⁷ This conflicts with the plaintiff's burden of proving subject matter jurisdiction before the case can proceed to the merits. Accordingly, before presenting the allocation rule that should govern FTCA jurisdictional determinations, this section first takes a closer look at this practice of conversion to determine whether it lays the proper procedural foundation for burden allocation in FTCA cases.

B. *The Shaky Pillars Supporting Rule 12(b)(1) Conversion in FTCA Actions*

Courts have justified Rule 12(b)(1) conversion on the ground that Rule 56 standards should apply if the jurisdictional issues are "intertwined" with the underlying merits of the legal claim.³⁸ Although every circuit court that has considered the question has endorsed the intertwined standard in FTCA actions,³⁹ no court has paused to consider the threshold question of whether Rule 12(b)(1) conversion is even appropriate in FTCA litigation. Indeed, neither the text of Rule 12(b)(1) nor the Committee Notes endorse the practice of converting a Rule 12(b)(1) motion into a Rule 56 motion for summary judgment. Courts that have converted Rule 12(b)(1) motions into Rule 56 motions have used the standard applicable to Rule 12(b)(6) motions to dismiss for failure to state a cognizable claim.⁴⁰ The Committee Notes

37. See *infra* Part I.C.

38. See generally 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1350 (Supp. 1998) ("[U]pon a challenge to the court's jurisdiction by a party, the court should conduct a careful inquiry and make a conclusive determination whether it has subject matter jurisdiction or not, or at least defer the inquiry if it is intertwined with the merits of the case.").

39. See, e.g., *Bell v. United States*, 127 F.3d 1226, 1228 (10th Cir. 1997) (applying the intertwined standard); *Tippett v. United States*, 108 F.3d 1194, 1196 (10th Cir. 1997) (same); *Bennett v. United States*, 102 F.3d 486, 488 n.1 (11th Cir. 1996) (same); *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995) (same); *Davis v. United States*, 961 F.2d 53, 56 n.4 (5th Cir. 1991) (same); *Redmon ex rel. Redmon v. United States*, 934 F.2d 1151, 1155 (10th Cir. 1991) (same); *Lawrence v. Dunbar*, 919 F.2d 1525, 1528-30 (11th Cir. 1990) (same); *Tindall ex rel. Tindall, Jr. v. United States*, 901 F.2d 53, 55 n.5 (5th Cir. 1990) (per curiam) (same); *Rosales v. United States*, 824 F.2d 799, 802-03 (9th Cir. 1987) (same); *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983) (same); *Leslie v. United States*, 986 F. Supp. 900, 904 (D.N.J. 1997) (same); *Fanoele v. United States*, 975 F. Supp. 1394, 1397 (D. Kan. 1997) (same); *Franklin Sav. Corp. v. United States*, 970 F. Supp. 855, 860-61 (D. Kan. 1997) (same).

40. Rule 12(b) states, in part:

accompanying Rule 12 clearly state that when courts consider matters outside of the pleadings in the Rule 12(b)(6) context, the standard governing motions for summary judgment should be applied.⁴¹ There is no mention in the text of the Rule or the Committee Notes, however, of a similar treatment for Rule 12(b)(1) motions.⁴²

Nor could there be such similar treatment, lest Congress intended to upset centuries of well-established principles of federal civil procedure. Prior to the enactment of the Federal Rules of Civil Procedure in 1937, federal courts followed a fairly well-developed scheme for adjudicating motions to dismiss for lack of subject matter jurisdiction. Time and again, the Supreme Court instructed lower courts to make jurisdictional determinations in civil cases as soon as practicable, reversing district court decisions when jurisdictional determinations were unjustifiably postponed⁴³ or when lower courts overlooked the issue of subject matter jurisdiction altogether.⁴⁴ These early cases

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Fed. R. Civ. P. 12(b) (emphasis added).

41. See Fed. R. Civ. P. 12 advisory committee's note.

42. See, e.g., *Atkinson v. United States*, 825 F.2d 202, 204 n.2 (9th Cir. 1987) ("When a court determines that the United States is immune from liability under the FTCA, the proper disposition is a dismissal for lack of subject matter jurisdiction, not a grant of summary judgment."); *Crawford v. United States*, 796 F.2d 924, 927-29 (7th Cir. 1986) (holding that there is no support for Rule 12(b)(1) conversion in the Committee Notes); *Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co.*, 469 F.2d 416, 417 (5th Cir. 1972) ("[I]t is clear, under the last sentence in Rule 12(b), that the only motion under this Rule which can be treated as a motion for summary judgment when outside matters are considered is that numbered (6), failure to state a claim upon which relief can be granted.").

43. See, e.g., *Morris v. Gilmer*, 129 U.S. 315, 325 (1889) (stating that if the record before the court establishes that the court does not have jurisdiction, the court's "duty is to proceed no further"); *Blacklock v. Small*, 127 U.S. 96, 105 (1888) (stating that the lower court should not have dismissed the case on the merits, but rather for lack of subject matter jurisdiction); *Hartog v. Memory*, 116 U.S. 588, 591 (1886) (holding that as soon as a court is presented with evidence that it lacks subject matter jurisdiction, the court "may stop all further proceedings and dismiss the suit"); *Williams v. Nottawa*, 104 U.S. 209, 211 (1881) (holding that where jurisdiction of a court is called into question, the court must "stop all further proceedings").

44. See, e.g., *Morris*, 129 U.S. at 325-26 (reversing the lower court's decision denying a motion to dismiss for lack of subject matter jurisdiction where evidence showed lack of diversity); *Metcalf v. Watertown*, 128 U.S. 586, 587-90 (1888) (holding that a verdict for the plaintiff should be reversed because the lower court was without subject matter jurisdiction); *King Bridge Co. v. Otoe County*, 120 U.S. 225, 226 (1887) (declining to address a non-jurisdictional issue on appeal where the record showed that the lower court was without subject matter jurisdiction); *Little v. Giles*, 118 U.S. 596, 602-03 (1886) (reversing a lower court's denial of a petition for remand where federal subject matter jurisdiction arose through the collusion of parties); *Farmington v. Pillsbury*, 114 U.S. 138, 145-46 (1885) (reversing a verdict for the plaintiff and remanding to the lower court with instructions to dismiss for lack of subject matter

never suggested that the non-jurisdiction-seeking party ever bears the burden of proving a lack of subject matter jurisdiction, or that the jurisdiction-seeking party was entitled to any favorable procedural presumptions.

Nonetheless, Rule 12(b)(1) conversion based upon the intertwined standard is so woven into the fabric of FTCA litigation that the practice is accepted with little or no analysis. Yet, because of the important burden-shifting consequences of Rule 12(b)(1) conversion and because of the importance of determining as soon as practicable the federal district court's very power to hear a case, analytical silence cannot be accepted. Courts should make jurisdictional determinations pursuant to the traditional procedural standards of Rule 12(b)(1). In light of the well-established historical practice of making jurisdictional determinations at the earliest stage of civil litigation, and in light of the codification of that practice in Rule 12(b)(1), it is somewhat surprising that courts would postpone jurisdictional determinations under any circumstances or afford jurisdiction-seeking parties any favorable presumptions. Indeed, in FTCA cases, the intertwined standard is a potent tool in a plaintiff's litigation arsenal, for the standard permits a plaintiff to proceed to the merits of her FTCA claim even when the United States makes a strong, pre-trial evidentiary showing that subject matter jurisdiction is lacking.

The reasons for using the intertwined standard for converting a Rule 12(b)(1) motion into a Rule 56 motion for summary judgment comprise the analytical pillars of the standard. There are four such pillars. One would think that four pillars constitute a strong analytical foundation, but these pillars fall, like a house of cards, under close scrutiny.⁴⁵ Indeed, an examination of the four rationales reveals that none of them supports Rule 12(b)(1) conversion for FTCA jurisdictional challenges.

First, courts have been loath to deprive a plaintiff of having a jury decide the merits of her legal claim, reasoning that a Rule 12(b)(1)

jurisdiction); *Mansfield, Coldwater & Lake Michigan Ry. Co. v. Swan*, 111 U.S. 379, 381-82 (1884) (reversing a jury verdict for the plaintiff where the case was improperly removed by the defendant to federal court); *Grace v. American Cent. Ins. Co.*, 109 U.S. 278, 283-85 (1883) (reversing the judgment of the lower court and remanding for a determination of whether subject matter jurisdiction existed); *Williams*, 104 U.S. at 211-12 (reversing jury verdict and remanding with directions to dismiss for want of subject matter jurisdiction where evidence showed collusion between plaintiffs seeking to meet the amount-in-controversy requirement); *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 125, 125-26 (1804) (reversing a jury verdict for the defendant where diversity jurisdiction not established); *Bingham v. Cabot*, 3 U.S. (3 Dall.) 382, 383 (1798) (vacating a jury verdict for the plaintiff where diversity jurisdiction was not established).

45. A discussion of whether Rule 12(b)(1) conversion is *ever* appropriate is beyond the scope of this Article. We assume, solely for purposes of this Article, that the four pillars are viable exceptions to the general rule that jurisdictional determinations should be made at the earliest practicable time in civil litigation.

jurisdictional determination that involved the resolution of merits issues improperly invades the province of the jury.⁴⁶ The intertwined standard, therefore, serves as a kind of jurisprudential buffer between judge and jury, ensuring that each carries out its designated role in the judicial process. In the FTCA context, however, the need for such a “buffer” would seem to disappear altogether because the judge in an FTCA action determines both jurisdiction and the merits of the underlying tort claim; there is no right to a jury trial.⁴⁷ Thus, a judge deciding an FTCA jurisdictional issue that implicates merits questions would not be overstepping any historically-drawn lines for judicial decision-making.

Second, courts have converted Rule 12(b)(1) motions into Rule 56 motions for summary judgment out of fear that the doctrine of res judicata would deprive a party of a full adjudication on the merits of her claim if adjudicated as part of a jurisdictional determination.⁴⁸ In its most basic sense, the doctrine of res judicata prevents a party from relitigating a final judgment issued by a court of competent jurisdiction.⁴⁹ Under the FTCA, however, there is little danger that a court’s determination of a merits issue in deciding a threshold jurisdictional question will unduly prejudice the plaintiff in subsequent litigation. Once an FTCA action is dismissed for lack of subject matter jurisdic-

46. See, e.g., *Thornhill Publ’g Co. v. General Tel. & Elecs. Corp.*, 594 F.2d 730, 735 (9th Cir. 1979) (acknowledging that “where the jurisdictional issue and the substantive issues are so intermeshed that the question of jurisdiction is dependent on decision of the merits, a party is entitled to have the jurisdictional issue submitted to the jury”); *Marks Food Corp. v. Barbara Ann Baking Co.*, 274 F.2d 934, 936 (9th Cir. 1959) (noting that “any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care”); *Rhoades v. United States*, 950 F. Supp. 623, 629 (D. Del. 1996) (interpreting the FTCA).

47. See 28 U.S.C. § 2402 (1994) (“Any action against the United States under section 1346 shall be tried by the court without a jury . . .”). See generally *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981) (“When Congress has waived the sovereign immunity of the United States, it has almost always conditioned that waiver upon a plaintiff’s relinquishing any claim to a jury trial.”). In a clear misunderstanding of the FTCA, one district court declined to make a Rule 12(b)(1) determination because the court feared that the plaintiff would have to present the jurisdictional issue to the judge and the merits to a “jury.” See *Rhoades*, 950 F. Supp. at 629. The district court went on to deny pre-trial relief because a “jury” could reasonably resolve merits issues in favor of the FTCA plaintiff. See *id.* at 631. The *Rhoades* court ignored 28 U.S.C. § 2402, which provides that FTCA actions are tried by judges, not juries.

48. See, e.g., *Exchange Nat’l Bank v. Touche Ross & Co.*, 544 F.2d 1126, 1130-31 (2d Cir. 1976) (noting that judgments under 12(b)(1) may deprive a party of judgment on the merits of the case); *Jama v. United States Immigration & Naturalization Serv.*, 22 F. Supp. 2d 353, 361 (D.N.J. 1998) (stating that a dismissal under 12(b)(1) is not given res judicata effect as to the merits of the case); *Rhoades*, 950 F. Supp. at 629 (“[W]hen the jurisdictional issues are inextricably intertwined with the merits of the cause of action, courts have not dismissed federal claims on rule 12(b)(1) motions . . .”); *Barnson v. United States*, 531 F. Supp. 614, 618-19 (D. Utah 1982) (implying that a 12(b)(1) motion provides less protection for a plaintiff than a judgment on the merits).

49. See *Black’s Law Dictionary* 1305 (6th ed. 1990).

tion, the plaintiff's right to tort recovery against the United States is foreclosed. The plaintiff cannot proceed in state court because state courts do not have jurisdiction over the United States.⁵⁰ Nor can the plaintiff proceed in federal court because the FTCA is the only statute that subjects the United States to tort liability.⁵¹

Moreover, the court can give a plaintiff the opportunity to fully litigate merits issues that are essential to a jurisdictional determination at a preliminary stage after sufficient discovery. In fact, courts are permitted to hold full evidentiary hearings on jurisdictional issues, including witness testimony subject to cross-examination.⁵² If courts conclusively determine merits issues at the jurisdictional stage, the plaintiff suffers no prejudice and loses no rights. If the court finds that it does not have jurisdiction, the court saves itself and the parties from litigating all of the merits issues which are not part of the jurisdictional determination. If the court finds that it does have jurisdiction and decides some of the merits issues in the process, the court either promotes settlement of the case or streamlines the ultimate trial. Rule 12(b)(1) front-loads the process and shifts the jurisdictional determination to the earliest stage of the proceeding. This result should surprise no one because such front-loading is the clear import of Rule 12(b)(1) and the historical practice that preceded the Rule's introduction into the Federal Rules of Civil Procedure.⁵³ In FTCA cases, Rule 12(b)(1) surely does not serve as a sword used to emasculate a plaintiff's rights.

Third, courts have reasoned that a Rule 12(b)(1) conversion is appropriate when the same federal statute confers federal subject matter jurisdiction and provides the plaintiff with substantive rights.⁵⁴ This organic interconnectedness requires applying summary judgment

50. See 28 U.S.C. § 1346(b) (stating that federal district courts have "exclusive jurisdiction" over tort claims brought against the United States).

51. Of course, after an adverse final judgment has been entered, an FTCA plaintiff can seek to re-open her FTCA action through Rule 60(b) of the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 60(b) (providing for post-judgment relief if the moving party meets any one of six criteria). If a case is re-opened pursuant to Rule 60(b), the doctrine of res judicata has no impact on the "new" case. See *Weldon v. United States*, 70 F.3d 1, 5 (2d Cir. 1995).

52. See, e.g., *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995) (holding that district court proceedings under Rule 12(b)(1) may weigh evidence in order to arrive at a jurisdictional determination); *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982) (holding that, where jurisdictional facts are disputed, the court "may . . . go beyond the allegations of the complaint and in an evidentiary hearing determine if there are facts to support the jurisdictional allegations").

53. See, e.g., *Ford v. American Motors Corp.*, 770 F.2d 465, 468 (5th Cir. 1985) (affirming the district court's Rule 12(b)(1) dismissal in an FTCA action and concluding "[t]he merits and the jurisdictional issue were not so intermeshed as to prevent the separate consideration and decision of the jurisdiction question, albeit that decision is based in large measure on facts relevant to the merits." (citation omitted)).

54. See, e.g., *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891-92 (3d Cir. 1977) (interpreting the Sherman Act); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 608-12 (9th Cir. 1976) (same).

standards because an element essential to the merits of a claim is precisely the same element implicated in the jurisdictional determination. Courts have concluded that because the FTCA confers jurisdiction on federal district courts and, at the same time, gives plaintiffs the right to assert a tort claim against the United States, the jurisdictional and merits issues are necessarily intertwined.⁵⁵ The argument represents a fundamental misunderstanding of the FTCA's liability scheme. Unlike federal statutes that have come under the intertwined umbrella,⁵⁶ the FTCA on its face does not prescribe the substantive elements of a FTCA claim. Rather, state law governs the particulars of the underlying tort claim,⁵⁷ and the FTCA itself prescribes the jurisdictional prerequisites to suit in federal district court. Of course, as a practical matter, jurisdictional issues may sometimes overlap with merits issues in the FTCA context. But, this does not result in any undue prejudice to the FTCA plaintiff. The plaintiff still has a full opportunity to litigate the issue before the only fact-finder the plaintiff will ever have, the court. Thus, at its core, the argument for Rule 12(b)(1) conversion where the same statute confers jurisdiction and substantive rights really is not an independent reason for conversion at all.

The final reason for using the intertwined standard is the efficiency rationale, a justification that courts have not explicitly suggested, but one that no doubt drives Rule 12(b)(1) conversions in many instances.⁵⁸ The practice of Rule 12(b)(1) conversion is efficient, so the argument goes, because, rather than try the jurisdictional issues separately from the merits issues, the overlap of the two makes it prudent to determine the jurisdictional and merits questions in one adjudication—at the time of trial when the court decides the merits. In the FTCA context, Rule 12(b)(1) conversion requires courts to assume jurisdiction over the FTCA claim pending a determination of the merits of the action, a jurisdictional assumption that some courts have

55. See, e.g., *Tippett v. United States*, 108 F.3d 1194, 1196 (10th Cir. 1997) (“[R]esolution of the jurisdictional issue in this case was intertwined with the merits.” (citation omitted)); *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995) (noting that, under the FTCA, the jurisdictional and merits issues are intertwined); *Cizek v. United States*, 953 F.2d 1232, 1233 (10th Cir. 1992) (same); *Leslie v. United States*, 986 F. Supp. 900, 904 (D.N.J. 1997) (same); *Fanoele v. United States*, 975 F. Supp. 1394, 1397 (D. Kan. 1997) (same); *Franklin Sav. Corp. v. United States*, 970 F. Supp. 855, 860-61 (D. Kan. 1997) (same); *Cupit v. United States*, 964 F. Supp. 1104, 1107 (W.D. La. 1997) (same); *Rhoades v. United States*, 950 F. Supp. 623, 628-29 (D. Del. 1996) (same).

56. See *supra* note 55.

57. See 28 U.S.C. § 1346(b) (1994) (holding the United States liable for the tort to the same extent as a private person within the locality in which the tortious act or omission occurred).

58. See, e.g., *Williamson v. Tucker*, 645 F.2d 404, 415 (5th Cir. 1981) (“Judicial economy is best promoted when the existence of a federal right is directly reached and, where no claim is found to exist, the case is dismissed on the merits.”).

stated explicitly in their opinions.⁵⁹ Assuming jurisdiction over a FTCA claim in this manner is tantamount to infecting FTCA litigation with the constitutionally bizarre doctrine of “hypothetical jurisdiction.”

The doctrine of hypothetical jurisdiction suffers from at least two doctrinal deficiencies. To begin with, the doctrine is fundamentally inconsistent with the constitutionally based principle that federal courts are courts of limited jurisdiction. There is a well-established presumption that federal district courts lack subject matter jurisdiction unless a plaintiff affirmatively shows otherwise.⁶⁰ When a federal district court assumes jurisdiction to decide the merits of a case, that court proceeds as if a plaintiff does not bear any burden whatsoever to establish that she is entitled to a federal forum. The doctrine of hypothetical jurisdiction logically cannot be squared with the limited-jurisdiction principle because the doctrine relieves a plaintiff of the burden of proving subject matter jurisdiction.

Moreover, the doctrine of hypothetical jurisdiction violates the separation of powers doctrine because it permits the judiciary to assert jurisdiction over a case for efficiency purposes, rather than for constitutional or statutory reasons. In cases implicating a federal statute, such as the FTCA, a federal court is bound by congressionally defined limits of jurisdiction. The principle of hypothetical jurisdiction is a judicially created rule of efficiency that simply cannot trump legislatively created conditions governing federal subject matter jurisdiction.⁶¹ Hypothetical jurisdiction, therefore, cannot survive a separation-of-powers analysis, regardless of one’s theory of the separation doctrine.⁶²

59. See *Rhoades*, 950 F. Supp. at 629; *Barnson v. United States*, 531 F. Supp. 614, 619 (D. Utah 1982). See generally *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990) (stating that where jurisdictional issues are intertwined with merits issues, courts should assume jurisdiction and proceed to decide the merits); *Carmichael v. United Techs. Corp.*, 835 F.2d 109, 114 (5th Cir. 1988) (“Ordinarily, when a Rule 12(b)(1) jurisdictional challenge attacks the merits of the underlying claim, the proper procedure is to find jurisdiction and then treat the challenge on the merits as a motion for summary judgment.”); *Williamson*, 645 F.2d at 415-16 (indulging a Rule 12(b)(1) conversion and assuming jurisdiction in a securities case).

60. See *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

61. See *Steel Co. v. Citizens for a Better Env’t*, 118 S. Ct. 1003, 1016 (1998).

62. As Professor Werhan has pointed out, the Supreme Court has endorsed essentially two theories of the separation of powers—formalism and functionalism. See Keith Werhan, *Normalizing the Separation of Powers*, 70 Tul. L. Rev. 2681, 2681-83 (1996). For a formalist, governmental functions should be strictly separated so that the powers of each branch of government are clearly demarcated. See *Bowsher v. Synar*, 478 U.S. 714, 722 (1986). A violation of the separation of powers occurs, for example, when actors within one branch of government step out of their narrowly defined category and carry out functions reserved for another branch of government. See *INS v. Chadha*, 462 U.S. 919, 955-56 (1983). By contrast, the functionalist focuses less on rigid categories of governmental functions and more on the pragmatic, real-world problem of efficient government operation. See Werhan, *supra*, at 2685. Functionalism sanctions innovative action when such action prevents one branch from in-

If lacking a sound doctrinal basis is not reason enough to reject the concept of hypothetical jurisdiction, the Supreme Court has recently rejected the principle outright. In *Steel Co. v. Citizens for a Better Environment*,⁶³ the Supreme Court decided the question of whether the merits of a statutory cause of action could be decided before the jurisdictional issue of the plaintiff's Article III standing. The Court concluded that jurisdiction must be decided first:

Much more than legal niceties are at stake here. The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*.⁶⁴

In reaching this conclusion, the Court disapproved the practice among some lower courts of assuming jurisdiction where a merits question was considered easy.⁶⁵ "We decline to endorse such an approach," reasoned the Court, "because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers."⁶⁶ The Court stated that assuming jurisdiction to proceed to a merits question "produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning."⁶⁷

Steel Co. has already cut a deep and wide path through federal law, with courts now emphasizing the importance of deciding subject matter jurisdiction before anything else.⁶⁸ The question, then, is whether

terfering with another branch's "constitutionally assigned functions." *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977).

Hypothetical jurisdiction is not supportable under either theory. For the formalist, assuming jurisdiction to proceed to merits questions offends the separation of powers because an Article III court is defining the limits of its own jurisdiction, a job reserved for the Congress. Nor does the doctrine of hypothetical jurisdiction find refuge in the functionalist camp; for assuming jurisdiction is not an attempt to protect the judiciary from encroachments from either the Executive or Legislative branches. Rather, the doctrine is a judge-made tool for promoting judicial efficiency.

63. 118 S. Ct. 1003.

64. *Id.* at 1016 (citations omitted).

65. *See id.* at 1012.

66. *Id.*

67. *Id.* at 1016 (citations omitted).

68. *See* *Gold v. Local 7 United Food & Commercial Workers Union*, 159 F.3d 1307, 1310 (10th Cir. 1998) ("Although *Steel* addresses standing in the context of a federal question claim, its rationale must certainly apply—with even greater force—to questions of supplemental jurisdiction, which implicate additional concerns of federalism and comity."); *Williams v. General Elec. Capital Auto Lease, Inc.*, 159 F.3d 266, 268 (7th Cir. 1998) ("Before we discuss either the facts or the law relevant to [the] appeal, however, we must discuss two issues related to our appellate jurisdiction." (citation omitted)); *McCarty Farms, Inc. v. Surface Transp. Bd.*, 158 F.3d 1294, 1298 (D.C. Cir. 1998) (rejecting the prior practice of assuming jurisdiction and holding that

Steel Co. instructs courts to refrain from converting Rule 12(b)(1) motions into Rule 56 motions for summary judgment in FTCA cases. Although the Supreme Court's decision in *Steel Co.* did not address the propriety of Rule 12(b)(1) conversion, the decision certainly casts serious doubt on justifying the intertwined standard for reasons of judicial efficiency. In the wake of *Steel Co.*, courts are already beginning to rescue Rule 12(b)(1) from its previous second-class treatment.⁶⁹ In the end, postponing a Rule 12(b)(1) jurisdictional determination for purposes of efficiency amounts to an endorsement of

Steel Co. stands for the proposition that "we must resolve all jurisdictional questions before proceeding to the merits"; *United States v. Webb*, 157 F.3d 451, 453 (6th Cir. 1998) (declining to endorse the prior practice of assuming the appellate jurisdiction even though appellant did not comply with Fed. R. App. P. 3(c)); *Iglesias v. Mutual Life Ins. Co.*, 156 F.3d 237, 241 (1st Cir. 1998) (deciding first whether counterclaims may be heard under the doctrine of supplemental jurisdiction or by some independent jurisdictional basis); *Starr v. Mandanici*, 152 F.3d 741, 747 (8th Cir. 1998) ("If Mandanici does not have standing, then this court does not have jurisdiction to decide any other issues raised on appeal." (citation omitted)); *Johnson v. Horn*, 150 F.3d 276, 287 (3d Cir. 1998) (holding that *Steel Co.* stands for the proposition that federal courts are prohibited "from deciding on the merits any case over which they lack subject matter jurisdiction" (citation omitted)); *Legal Aid Soc'y v. Legal Services Corp.*, 145 F.3d 1017, 1030 (9th Cir.) (holding that, after *Steel Co.*, courts "must 'spend . . . time and energy puzzling over the correct answer to an intractable jurisdictional matter,' even if we think that the substantive merits are easily disposed of by well-settled law" (citation omitted)), *cert. denied*, 119 S. Ct. 539 (1998); *Hardemon v. City of Boston*, 144 F.3d 24, 25-26 (1st Cir. 1998) (declining "to test the outer limits of the Court's tolerance" and deciding the amount-in-controversy jurisdictional question first even though the City "easily prevails on the merits" (citation omitted)); *East Bay Mun. Util. Dist. v. United States Dep't of Commerce*, 142 F.3d 479, 482 (D.C. Cir. 1998) ("Nonetheless, the more cautious approach is first to tackle the government's theory on the limits of the immunity waiver."); *Fidelity Partners, Inc. v. First Trust Co.*, 142 F.3d 560, 565 (2d Cir. 1998) (holding that the court is obliged to consider the mootness issue before anything else); *Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368, 1372 n.4 (11th Cir. 1998) (rejecting the argument that subject matter jurisdiction should not be decided first because the jurisdictional issues are difficult and complex); *Ramcor Servs. Group, Inc. v. United States*, 41 Fed. Cl. 264, 266 (1998) ("[T]he court had intended to apply the principle of hypothetical jurisdiction and decide this case without addressing the [difficult] jurisdictional question. . . . However, the Supreme Court has recently rejected the principle of hypothetical jurisdiction, *see Steel Co.* . . . , thereby requiring the court to address an important jurisdictional question . . ." (citation omitted)). *But cf. Ruhrgas v. Marathon Oil Co.*, 119 S. Ct. 1563 (1999) (holding that it is permissible for courts on some cases to decide questions of personal jurisdiction before questions of subject matter jurisdiction).

69. *See, e.g., Cook v. Winfrey*, 141 F.3d 322, 325 (7th Cir. 1998) (holding that the district court erred in addressing a Rule 12(b)(6) motion before a Rule 12(b)(1) motion); *Jackson v. Travelers Ins. Co.*, 26 F. Supp. 2d 1153, 1156 (S.D. Iowa 1998) ("Defendants' 12(b)(1) defense must be addressed at the outset [*i.e.*, before the Rule 12(b)(6) motion] because jurisdictional issues, whether raised *sua sponte* or by motion, are a barrier to a court's further consideration of the substantive issues in a case." (footnote omitted)); *Hayden v. New York Stock Exch.*, 4 F. Supp. 2d 335, 337 (S.D.N.Y. 1998) (deciding a Rule 12(b)(1) motion before a Rule 12(b)(6) motion "to preserve the prohibition against advisory opinions as a meaningful limitation upon the power of the federal judiciary").

the doctrine of hypothetical jurisdiction, and the Supreme Court in *Steel Co.* suggested that the concept violates the separation of powers.

C. *Why Rule 12(b)(1) Offers the Appropriate Methodology for Determining Subject Matter Jurisdiction and Burden Allocation*

If there is no principled basis to convert a Rule 12(b)(1) motion to a Rule 56 motion, courts should not convert the motion for conversion's sake; that would be, as Justice Scalia has colorfully put it, a judicial "drive-by" jurisdiction.⁷⁰ Jurisdictional determinations were designed for Rule 12(b)(1) treatment so that federal district courts can enjoy wide latitude to hear evidence or engage in any other fact-finding that convinces them that subject matter jurisdiction is present or is lacking. Rule 56, by contrast, with its evidentiary presumptions and its requirement that the non-moving party only show a genuine issue of material fact, circumscribes the court's power to determine jurisdiction at an early stage in the proceedings. Therefore, it is simply incorrect to minimize (or, more accurately, to trivialize) the differences between Rule 12(b)(1) and Rule 56.

Most importantly, with respect to the issues raised in this Article, Rule 12(b)(1) conversion dramatically changes the burden-of-proof dynamics in the FTCA context.⁷¹ In effect, Rule 12(b)(1) conversion lessens the burden, making it easier for a FTCA plaintiff to avoid an adverse jurisdictional ruling and proceed to the merits of her tort action. Instead of having to prove by a preponderance of the evidence that the federal court has jurisdiction, under Rule 56, the plaintiff need only prove that there is an issue of material fact on a jurisdictional matter, and the district judge is required to indulge all reasonable inferences in favor of the plaintiff.⁷² In fact, under Rule 56, the burden is on the *government* to show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.

Finally, rather than promoting efficiency, Rule 12(b)(1) conversion actually wastes scarce judicial resources because it permits FTCA plaintiffs—who might lose a Rule 12(b)(1) jurisdictional determination—to avoid summary judgment by offering a court just enough evidence to raise a factual issue. Suppose a FTCA plaintiff sues the United States on the ground that the United States negligently contaminated her groundwater. The government, contending that the

70. *Steel Co.*, 118 S. Ct. at 1011.

71. See, e.g., *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995) (holding that distinguishing between Rule 12(b)(1) and Rule 56 has "procedural ramifications," one of which includes the differing burdens of proof); *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991) ("When subject matter jurisdiction is challenged under Rule 12(b)(1), the plaintiff must bear the burden of persuasion. On the other hand, under Rule 12(b)(6) the defendant has the burden of showing no claim has been stated." (citation omitted)).

72. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

plaintiff's claim is barred by the FTCA's two-year statute of limitations, moves to dismiss the case for lack of subject matter jurisdiction under Rule 12(b)(1).⁷³ Assume the court decides to convert the motion to Rule 56, reasoning that the FTCA provides for both jurisdiction and substantive rights and that the merits are intertwined with the jurisdictional determination. Now, suppose the limitations issue turns on whether the plaintiff knew of the contamination more than two years before she filed her administrative claim with the relevant federal agency. The United States then offers an affidavit from a government official which states that he told the plaintiff that the groundwater was contaminated more than two years before she filed the claim. The government also submits a phone record showing that the official called the plaintiff on a certain date. In response to the motion, the plaintiff files an affidavit, saying that she was not informed of the contamination at that time.

Under Rule 56, the court's hands are tied. The plaintiff's affidavit, unless incompetent,⁷⁴ raises an issue of material fact regarding whether the plaintiff knew of the contamination more than two years before filing her claim. The case must proceed to trial, and the parties will present evidence on all of the issues,⁷⁵ including statute of limitations, negligence, causation, and damages. If the court proceeds under Rule 12(b)(1), however, there might be a very different, more efficient, outcome. Under Rule 12(b)(1), the court can weigh the evidence and decide whether the government official or the plaintiff is correct on the crucial fact of notice. If the court finds that the government official's testimony is more credible, it will dismiss the case without wasting any resources involved in determining negligence, causation, and damages.

By proceeding under Rule 56, a federal district court may conclude, *at the end of the trial*, that it did not have jurisdiction to adjudicate the FTCA claim in the first place. There are several reported cases in

73. See 28 U.S.C. § 2401(b) (1994); *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979). For a more detailed discussion of why the FTCA's statute of limitations is jurisdictional, see *infra* Part IV.B.1.

74. One of the only ways the United States could get around the plaintiff's affidavit is to argue that it represents an attempt to create a "sham" issue of fact. See, e.g., *Franks v. Nimmo*, 796 F.2d 1230, 1237 (10th Cir. 1986) (stating that when an affidavit is proffered at the summary judgment stage and that affidavit contradicts prior deposition testimony, courts should "disregard [the] contrary affidavit [if the affidavit] . . . constitutes an attempt to create a sham fact issue").

75. Of course, a court can bifurcate the trial and hear the statute-of-limitations issue first. However, district courts rarely bifurcate FTCA actions because witnesses who must testify on the limitations questions must also testify on merits issues, so that it would be self-evidently inefficient to call a witness for limitations purposes, hold that the suit is timely, and have to re-call that same witness for merits issues. See, e.g., *Marks Food Corp. v. Barbara Ann Baking Co.*, 274 F.2d 934, 936 (9th Cir. 1959) ("It seems to us that a safe practice would be never to separate the subject matter jurisdiction issue for separate trial in cases where the factual merits of the case must be considered in deciding the separated issue.").

which the court concluded that it lacked jurisdiction over an FTCA claim after conducting a complete trial on the merits of an FTCA plaintiff's claims.⁷⁶ This is a patent waste of resources; the plaintiff, the United States, and the court have all squandered their time and money by dealing with issues that ultimately had no bearing on the outcome of the case. Not only is the inefficiency of this scheme self-evident, but it also turns on its head the notion that federal courts are courts of limited jurisdiction.

D. *Conclusions*

We have attempted to unravel the underpinnings of the intertwined standard to determine whether converting a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction into a Rule 56 motion for summary judgment is appropriate in the FTCA context. This Article undertakes this important task at the outset because Rule 12(b)(1) conversion, if accepted, fundamentally affects how one allocates the burden proving jurisdiction in FTCA cases. None of the reasons that support applying the intertwined standard in other contexts are persuasive justifications for importing the standard into FTCA litigation. If there is no sound justification for Rule 12(b)(1) conversion, then courts should not do it.

In short, Rule 12(b)(1) requires a federal district court—before exposing the parties to time-consuming and expensive discovery on non-jurisdictional matters—to hear evidence on the jurisdictional issue, make credibility determinations (if necessary), and decide as early as possible whether Congress has consented to suit under the facts and circumstances presented. Any other conclusion produces the anomalous and inefficient result that a district court may conclude, only after an adjudication of the merits, that it lacked jurisdiction over the FTCA claim in the first instance. Therefore, when the United States brings a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, district courts should remain within the 12(b)(1) framework, for it is only within that crucible that the burden of proving the FTCA jurisdictional conditions can be properly allocated.

76. See, e.g., *Scruggs v. United States*, 959 F. Supp. 1537, 1548 (S.D. Fla. 1997) (finding the discretionary function exception applicable after trial); *O'Neill v. United States*, 927 F. Supp. 599, 607 (E.D.N.Y. 1996) (finding the independent contractor exception applicable after trial); *Prescott v. United States*, 858 F. Supp. 1461, 1471 (D. Nev. 1994) (finding the discretionary function exception applicable after trial and appeal).

II. A UNIFORM RULE FOR ALLOCATING THE BURDEN OF PROVING THE JURISDICTIONAL CONDITIONS OF THE FTCA

A. *The Rule: Distinguishing Between the Burden of Persuasion and the Burden of Production*

We now turn to the burden-of-proof rule that should govern motions to dismiss FTCA suits for lack of subject matter jurisdiction. We propose that the burden of proving the jurisdictional conditions of the Act should be allocated according to the following scheme:

1. The plaintiff has the burden of alleging facts that give rise to federal subject matter jurisdiction.
2. The United States bears the burden of producing evidence that amounts to a *prima facie* case that the FTCA claim is jurisdictionally barred.
3. The plaintiff carries the ultimate burden of persuading a federal district court that it has subject matter jurisdiction over an FTCA claim.

Prong 1 is simply a rule of pleading for a plaintiff to initially overcome a presumption that federal courts lack subject matter jurisdiction, so we shall refer to Prong 1 as establishing a “no-jurisdiction presumption.”⁷⁷ This is *not*, however, the traditional evidentiary presumption that has troubled commentators since the nineteenth century.⁷⁸ Ordinarily, the debate surrounding presumptions centers on whether a presumption is enduring or may be extinguished with the introduction of evidence in a substantive cause of action. In 1898, for example, Professor Thayer described a presumption as a “bursting bubble,” which disappears from a case once evidence is produced that rebuts the presumption.⁷⁹ Justice Lamm of the Missouri Supreme Court later described a “presumption” as follows: “Presumptions . . . may be looked on as the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts.”⁸⁰ This Article does not engage in a discussion of whether bats and bursting bubbles should be incorporated into a burden-allocation scheme for the FTCA. Happily, the presumption proposed here operates much more simply and can be described much less poetically.

In the context of proving the existence of subject matter jurisdiction, the no-jurisdiction presumption requires federal courts to infer

77. See *infra* Part II.B.2.

78. See, e.g., 2 McCormick on Evidence, *supra* note 4, § 344, at 460-76 (attempting to reconcile discrepant uses of the term “presumption”); Prosser & Keeton, *supra* note 8, § 38, at 240 & n.14 (discussing the lingering disagreement over the meaning of the word “presumption”).

79. See Thayer, *supra* note 4, at 346.

80. Mackowik v. Kansas City, St. Joseph & Council Bluffs R.R., Co., 94 S.W. 256, 262 (Mo. 1906) (quoting an unnamed attorney).

that subject matter jurisdiction is lacking unless a plaintiff's allegations successfully rebut the presumption. The no-jurisdiction presumption can be overcome if the face of an FTCA complaint reveals that the cause of action is jurisdictionally viable, thereby complying with Rule 8(a)(1) of the Federal Rules of Civil Procedure.⁸¹ A plaintiff need not allege that each and every jurisdictional condition has been satisfied. That is to say, the proposed allocation rule does not require FTCA plaintiffs to provide a laundry list of affirmative allegations that addresses all of the jurisdictional conditions found within the Act. Often the reality is that plaintiffs are not quite sure whether a tort claim is barred, for example, by the discretionary function exception or whether the claim accrued more than two years before an administrative claim was filed with the appropriate federal agency.⁸² On the other hand, an FTCA plaintiff can affirmatively plead compliance with the FTCA's mandatory administrative-exhaustion scheme because she will know whether she has filed an administrative claim with the relevant federal agency.⁸³

Construed in this manner, the no-jurisdiction presumption in Prong 1 is unlike many presumptions, which come into legal existence only when a party produces evidence or law that entitles that party to a presumption.⁸⁴ This is because of the uniqueness of the no-jurisdiction presumption: it prevents Article III courts from acting unconstitutionally, that is, without a statutory or constitutional basis for adjudicating the rights and liabilities of the parties. At the same time, the no-jurisdiction presumption enures to the benefit of the non-jurisdiction-seeking party. The jurisdiction-seeking party must overcome a presumption even though the party that opposes a finding of jurisdiction has not presented the court with any facts entitling it to the presumption; it exists by operation of law because the FTCA plaintiff seeks to invoke federal subject matter jurisdiction.

An Article III court's inquiry into subject matter jurisdiction by no means ends if an FTCA plaintiff overcomes the no-jurisdiction presumption. A party surely cannot plead her way into federal court; the pleadings must stand the test of proof. The United States, of course, may challenge the plaintiff's assertion of jurisdiction. Prong 2 of the allocation rule shifts the burden of production to the United States when the government asserts a factual attack to the plaintiff's allegation of federal subject matter jurisdiction. Specifically, the United States is required to produce evidence that makes a *prima facie* case

81. See Fed. R. Civ. P. 8(a)(1) ("A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . .").

82. See 28 U.S.C. §§ 2401(b), 2680(a) (1994).

83. See *id.* § 2675(a).

84. See, e.g., *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510 n.3 (1993) (discussing the burden allocation scheme for Title VII discriminatory treatment cases).

that the plaintiff's claim is barred by one of the Act's jurisdictional conditions. The government makes out a prima facie case if there is a logical connection between the elements of the jurisdictional condition and the evidence produced by the government.⁸⁵ Allocating the burden of proof in this manner reflects the realities of motion practice in the federal courts. Indeed, the United States is not likely to file a cursory motion to dismiss that simply states, without supporting evidence, that a plaintiff's tort claim is jurisdictionally defective in fact. The government has every incentive to produce as much evidence as possible to persuade the trier of fact (the court) that the claim is jurisdictionally barred.⁸⁶

Finally, if an FTCA plaintiff overcomes the no-jurisdiction presumption and the United States meets its burden of producing evidence that the plaintiff has failed to meet a jurisdictional condition of the FTCA, Prong 3 imposes on the plaintiff the ultimate burden of persuading the federal district court that it has subject matter jurisdiction over the tort claim. Prong 3 is simply a logical extension of Prong 1. Because Article III courts presume that they do not have jurisdiction, it follows that, in the last analysis, the plaintiff must prove by a preponderance of the evidence that subject matter jurisdiction is proper. When the United States has satisfied its burden of production, an FTCA plaintiff will be faced with a prima facie case that her claim should be dismissed for lack of subject matter jurisdiction. In this situation, the plaintiff will have two choices. First, the plaintiff may challenge the probity of the evidence the government produced. The plaintiff might, for example, argue that the facts produced by the United States do not compel a conclusion that the claim is jurisdictionally barred. Second, the plaintiff may wish to produce her own evidence suggesting that the claim is jurisdictionally viable. Although the plaintiff may want to produce her own evidence, Prong 3 of the proposed rule does not impose that requirement on the plaintiff as a matter of law. The risk of non-persuasion is on the plaintiff, and she must make the judgment call of whether to challenge the United States' evidence, produce her own evidence, or proceed using both methods of attacking the government's position.

Distinguishing between the burden of production and the burden of persuasion is the central feature of the proposed allocation rule.

85. See, e.g., *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311-12 (1996) (adopting a similar construction for cases arising under the Age Discrimination in Employment Act); 2 McCormick on Evidence, *supra* note 4, § 338, at 433 ("The evidence must be such that a reasonable person could draw from it the inference of the existence of the particular fact to be proved . . .").

86. Cf. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981) ("[A]lthough the defendant does not bear a formal burden of persuasion, the defendant nevertheless retains an incentive to persuade the trier of fact that the employment decision was lawful. Thus, the defendant normally will attempt to prove the factual basis for its explanation.").

Neither the text of the FTCA nor its legislative history, however, prescribe this type of burden-allocation scheme for the jurisdictional conditions of the Act. At the same time, Congress enacted the FTCA against a background of common-law principles governing burden-of-proof allocation, and well-settled principles of statutory construction require courts to look to this background to ascertain congressional intent.⁸⁷ The critical question, therefore, is whether the allocation scheme is consistent with the purposes of the FTCA and the common-law rules of burden allocation in existence at the time the FTCA was enacted. Accordingly, the next section locates the meaning of the burdens of persuasion and production at common law and discusses how the rule accounts for the policies implicated when allocating the burden of proving the FTCA's jurisdictional conditions.

B. *The Rule Justified*

1. The Burden of Persuasion and the Burden of Production Defined at Common Law

Like many other phrases in our legal lexicon, *onus probandi*, Latin for "burden of proof," has assumed many—perhaps too many—meanings. The uncertainty surrounding the burden-of-proof concept has plagued the law of evidence for some time now, prompting Professor Thayer to comment more than a century ago that "the student of that subject needs to reflect carefully on these ambiguities, to perceive the bearing of them, and to have a clear mind about . . . the burden of proof"⁸⁸ Yet, after more than a century of careful reflection and numerous attempts at academic mind clearing, commentators have yet to agree upon the theoretical and policy bases of the burden of proof or the method for allocating it.⁸⁹ Professor McCormick has offered a five-part allocation rule;⁹⁰ Professor Greenleaf proposed allocating

87. See, e.g., *Molzof v. United States*, 502 U.S. 301, 308 (1992) (noting that no basis exists "for assuming that Congress was unaware of established tort definitions when it enacted the Tort Claims Act"); *Logue v. United States*, 412 U.S. 521, 526-28 (1973) (arguing for adherence to Congress's choice not to leave to the states the determination of for whose negligence the government is liable); *Reo v. United States Postal Serv.*, 98 F.3d 73, 77 (3d Cir. 1996) (stating that in adopting the FTCA, "Congress was legislating against the background of the 'ancient precept of Anglo-American jurisprudence'" (quoting *Dacanay v. Mendoza*, 573 F.2d 1075, 1079 (9th Cir. 1978))).

88. Thayer, *supra* note 4, at 354.

89. See *supra* note 2.

90. See 2 McCormick on Evidence, *supra* note 4, § 337, at 432. Professor McCormick has said:

In summary, there is no key principle governing the apportionment of the burdens of proof. Their allocation, either initially or ultimately, will depend upon the weight that is given to any one or more of several factors, including: (1) the natural tendency to place the burdens on the party desiring change, (2) special policy considerations such as those disfavoring certain defenses, (3) convenience, (4) fairness, and (5) the judicial estimate of the probabilities.

the burden of proof according to whether proof of a negative or proof of the affirmative is required,⁹¹ and Professors Hay, Spier, and Sanchirico have offered a law and economics model of burden allocation for civil litigation.⁹²

This section does not attempt to wade through the minefield of theoretical constructs that have been the subject of academic commentary. Nor do we seek to add yet another formulation of what the burden of proof is or should be, for it is clear to us that burden-of-proof "theory," much like conflict-of-law doctrine, has been a "veritable playpen"⁹³ for commentators seeking to impose a uniform theoretical framework on burden allocation in *all* of civil litigation. On a conceptual level, courts and everyday practitioners know very well what the burden of proof means and how it should be allocated in a particular legal and factual context. For example, plaintiffs bear the burden of proving their causes of action and defendants bear the burden of proving affirmative defenses.⁹⁴ In those cases in which it appears "unfair" (from either a policy or evidentiary standpoint) to impose the ultimate burden of proof on one of the parties, courts will normally shift at least some part of the burden of proof onto the other party.⁹⁵

This latter practice of shifting part of the burden of proof is the key to unlocking the burden-of-proof problems that arise when a jurisdictional condition of the FTCA is raised as a reason for dismissing an FTCA claim. In general, attempts to resolve the burden-allocation conundrum have largely focused on splicing the burden of proof into two distinct, yet critically important categories: the burden of persuasion and the burden of production. The burden of persuasion is perhaps most commonly associated with the notion that a party bears the "burden of proof." The burden of persuasion is simply the burden of persuading a trier of fact that the law and the disputed facts together compel a particular conclusion.⁹⁶ The burden of persuasion does not shift; it remains on the party who carries that burden at the beginning of the case.⁹⁷ On the other hand, although one party generally will

Id. (citation omitted).

91. See 1 Simon Greenleaf, *A Treatise on the Law of Evidence* § 74, at 113 n.(a) (15th ed. 1892).

92. See Hay & Spier, *supra* note 2; Sanchirico, *supra* note 2.

93. Paul v. National Life, 352 S.E.2d 550, 551 (W. Va. 1986).

94. See generally Prosser & Keeton, *supra* note 8, §§ 38, 65, at 239, 451 (discussing the basic principles of tort burdens).

95. See *supra* note 1.

96. See 2 McCormick on Evidence, *supra* note 4, § 336, at 425.

97. See *id.* § 336, at 426 ("[The burden of persuasion] does not shift from party to party during the course of the trial simply because it need not be allocated until it is time for a decision.").

shoulder both the burdens of persuasion and production,⁹⁸ the burden of production does sometimes shift from party to party. Unlike the burden of persuasion, the burden of production is much more limited in its effect. A party bearing the burden of production need not prove that the facts as a whole compel some conclusion, but rather that the facts produced, *if undisputed*, require a particular legal result.⁹⁹ The burden of production asks whether the party who bears that burden is entitled to have the trier of fact decide the ultimate issue in the case.¹⁰⁰

Historically, the distinction between the burden of persuasion and the burden of production was a means of allocating decision-making power between the judge and the jury.¹⁰¹ The burden of production, for example, was thought to concern a party's duty to a judge, namely, to produce evidence that satisfies the judge that a particular fact exists.¹⁰² By contrast, the burden of persuasion was viewed as a tool for the jury, who must decide who wins if the evidence is in a state of equipoise.¹⁰³ Notwithstanding its historical roots, however, distinguishing between the burdens of persuasion and production is just as useful a guide for burden allocation in cases tried by a court; precisely the same considerations of persuasion and production arise when a judge is the trier of fact.¹⁰⁴

The twin burdens of persuasion and production are not modern inventions but are deeply rooted in the common law. Distinguishing between them dates back to at least the early nineteenth century, when Chief Justice Shaw of the Massachusetts Supreme Court first introduced the distinction in the 1832 case of *Powers v. Russell*.¹⁰⁵ Professor Thayer later explained the importance of dividing the burden of proof into considerations of persuasion and production, emphasizing the different consequences associated with failing to meet a burden of persuasion versus a burden of production.¹⁰⁶ Other late nineteenth century and early twentieth century commentators, reviewing English and American decisions, joined Professor Thayer in

98. See *id.* § 337, at 427 ("In most cases, the party who has the burden of pleading a fact will have the burdens of producing evidence and of persuading the jury of its existence as well." (citation omitted)).

99. See *id.* § 336, at 425 ("The burden of producing evidence on an issue means the liability to an adverse ruling (generally a finding or directed verdict) if evidence on the issue has not been produced.").

100. See Sprung, *supra* note 2, at 1305 ("Today, the burden of production asks whether a party has proved the existence or nonexistence of a fact sufficient to bring the dispute before the trier of fact.").

101. See 2 McCormick on Evidence, *supra* note 4, § 336, at 425.

102. See *id.*

103. See *id.* at 425 & n.4.

104. See *id.* at 425-26.

105. 30 Mass. (13 Pick.) 69, 76 (1832).

106. See Thayer, *supra* note 4, at 355.

this understanding of the burden of proof.¹⁰⁷ Indeed, by 1946—the year the FTCA was enacted—the common law was firmly grounded in the view that the burden of proof consisted of a non-shifting burden of persuasion that was established at the beginning of a case and a shifting burden of production that arose later in a case.¹⁰⁸

Under what circumstances are the burdens of persuasion and production shifted? Although there are no hard-and-fast rules of thumb that govern burden-shifting in all circumstances, there appears to be general agreement over a few basic principles. The burden of persuasion normally remains with the party who must plead an issue, except when another party controls information that, in fairness, puts that party in a better position to prove the issue in question.¹⁰⁹ This principle finds its most celebrated expression in the famous (or, more accurately, infamous) case of *Summers v. Tice*.¹¹⁰ There, the California Supreme Court shifted the ultimate burden of proving causation onto two negligent defendants, each of whom fired a bullet in the plaintiff's direction, because the plaintiff was unable to prove which defendant's bullet actually struck him. According to the *Summers* court:

When we consider the relative position of the parties and the results that would flow if plaintiff was required to pin the injury on one of the defendants only, a requirement that the burden of proof on that subject be shifted to defendants becomes manifest. They are both wrongdoers—both negligent toward plaintiff. They brought about a

107. See, e.g., W.M. Best, *The Principles of the Law of Evidence*, § 265 (3d Am. ed. 1908) (stating that the term burden of proof “fails to convey a precise idea”); 1 Greenleaf, *supra* note 91, § 74, at 113, n.(a) (arguing that “it is by no means safe to infer that because the party has the burden of meeting the *prima facie* case, . . . he must have the preponderance of the evidence”); 9 John H. Wigmore, *Evidence in Trials at Common Law* §§ 2486–2487, at 287-99 (James H. Chadbourne rev. ed. 1981) (identifying and distinguishing between the two meanings of burden of proof).

108. See *Webre Steib Co. v. Commissioner*, 324 U.S. 164, 170-71 (1945); *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U.S. 104, 110-11 (1941); *Brosnan v. Brosnan*, 263 U.S. 345, 349 (1923); *Hill v. Smith*, 260 U.S. 592, 594-95 (1923); see also *Director, Office of Workers' Compensation Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 276 (1994) (interpreting the term “burden of proof” in the Administrative Procedures Act, which was passed in 1946, and concluding that the term referred to the burden of persuasion).

109. See, e.g., 2 McCormick on Evidence, *supra* note 4, § 337, at 429 (“A doctrine often repeated by the courts is that where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue.”); Hay & Spier, *supra* note 2, at 419 (arguing that a party in control of information should bear the burden of proof to minimize costs to parties).

The classic exception to this general principle is the burden of proof applicable to the defense of contributory negligence. The burden of persuasion is on the defendant because the defendant must plead the issue as an affirmative defense. However, because the plaintiff is in the best position to know whether her actions in some way contributed to her damage, the plaintiff may have the burden of “producing evidence and persuasion with regard to that issue.” 2 McCormick on Evidence, *supra* note 4, § 337, at 428.

110. 199 P.2d 1 (Cal. 1948).

situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can.¹¹¹

A *Summers*-type shift in the burden of persuasion, therefore, may be appropriate if imposing a burden of persuasion on an injured plaintiff would make it difficult, if not impossible, for that party to prevail because the tortfeasor possesses the critical evidence. The burden of production, by contrast, traditionally shifts depending on the ebb and flow of the evidence, representing a sort of evidentiary tennis match in which adversaries present a court or trier of fact with competing versions of the facts that purportedly compel a particular legal result.¹¹² Unlike a shift in the burden of persuasion for policy reasons—as in *Summers*—the burden of production shifts because it gives courts a relatively rigorous evidentiary framework within which to determine the rights and liabilities of the parties.¹¹³

2. The Rule and the Policies Implicated when Allocating the Burden of Proving the FTCA's Jurisdictional Conditions

Because a non-shifting burden of persuasion and a shifting burden of production were fixtures of the common law at the time the FTCA was enacted, courts should conclude that importing the distinction into the FTCA does not offend congressional intent. At the same time, the twin burdens should not be allocated in a jurisprudential vacuum; allocation depends upon the policies implicated in any given legal context. Neither courts nor commentators have identified the policies that circumscribe the burden of proving the FTCA's jurisdictional conditions. There are three. First, jurisdictional determinations are made in the Rule 12(b)(1) context and early in a case, so an allocation rule should promote an expeditious and efficient resolution of the jurisdictional question.¹¹⁴ Second, because all FTCA actions must be brought in federal court,¹¹⁵ an allocation rule should account for the well-established principle that federal courts are courts of limited ju-

111. *Id.* at 4.

112. *See, e.g.*, 2 McCormick on Evidence, *supra* note 4, § 338, at 437 (outlining three stages before the burden shifts from the plaintiff to the defendant and vice versa).

113. *See id.*; Allen, *supra* note 2, at 896 (“Thus, in order to expedite trials, the burden of production in some classes of cases may be placed on one party if the means of proving the issue are normally within his or her knowledge.” (citation omitted)); *see also* Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 255-56 (1981) (“Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff’s prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.”); St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 516 (1993) (reiterating the statement from *Burdine*).

114. *See* Fed. R. Civ. P. 12(b)(1); Steel Co. v. Citizens for a Better Env’t, 118 S. Ct. 1003, 1012-16 (1998).

115. *See* 28 U.S.C. § 1346(b)(1) (1994 & Supp. II 1996) (investing federal district courts with “exclusive jurisdiction” over FTCA actions).

risdiction.¹¹⁶ And third, the FTCA waives the United States' sovereign immunity and must be strictly construed.¹¹⁷

The allocation rule prescribed for the FTCA's jurisdictional conditions accounts for each of these policy objectives. Perhaps the most notable aspect of the proposed rule is that it subscribes to a different burden-shifting scheme when a party is in a relatively better position to raise an issue. Rather than shifting the burden of persuasion, the rule proposed here shifts the burden of production onto the United States because (1) it is in the best position to raise a jurisdictional condition as a bar to suit and (2) it will likely possess information relevant to the condition. There is surely nothing exceptional about this proposition. Because federal courts must make jurisdictional determinations as soon as practicable, they have a keen interest in fashioning their procedures so that the jurisdictional question is resolved as expeditiously and fairly as possible. Otherwise, the court and the parties may be set adrift on a sea of limitless factual and legal possibilities whose resolution may unduly tax judicial resources that are better used for determining the merits of the underlying claim. Indeed, in the FTCA context, the factual issues surrounding a jurisdictional condition can be daunting, involving questions of governmental practices dating back many years.¹¹⁸ Because the United States will have to take its best shot and produce evidence of a jurisdictional defect, the jurisdictional inquiry contemplated here will not be a procedural black hole, engulfing the court and the parties in an open-ended process with no definable rules for production and persuasion.

As such, requiring the United States to bear the burden of production on FTCA jurisdictional questions promotes judicial economy. To move for a dismissal, the United States (like any other litigant) must have a good faith evidentiary basis for doing so.¹¹⁹ That means that the government possesses information suggesting that an FTCA claim is jurisdictionally defective in fact. It makes perfect sense, then, to impose a burden of production on the government—to do otherwise puts the FTCA plaintiff in the anomalous position of shouldering a burden of persuasion within an evidentiary vacuum. The plaintiff, and the court, should know precisely why the government believes an

116. See *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (authorities cited therein).

117. See *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992); *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979); *United States v. King*, 395 U.S. 1, 4-5 (1969); *United States v. Sherwood*, 312 U.S. 584, 586-88 (1941).

118. See, e.g., *Kirchmann v. United States*, 8 F.3d 1273, 1274 (8th Cir. 1993) (involving claims concerning an Atlas missile facility, which was constructed in 1959); *In re Consolidated United States Atmospheric Testing Litig.*, 820 F.2d 982, 984 (9th Cir. 1987) (discussing claims involving nuclear weapons tests from the closing days of World War II to the Partial Nuclear Test Ban Treaty in 1963).

119. See Fed. R. Civ. P. 11.

FTCA claim should be dismissed for lack of subject matter jurisdiction.¹²⁰

Proving subject matter jurisdiction in FTCA actions does not raise the same type of proof problems that were presented in *Summers* or that have compelled commentators to require a shift in the burden of persuasion. The plaintiff in *Summers* was unable to prove causation even after the defendants disclosed evidence critical to the causation question; the plaintiff was unable to show that either of the defendants more probably than not caused him damage.¹²¹ By contrast, once the United States produces evidence that makes out a prima facie case that an FTCA claim is jurisdictionally barred, the plaintiff will have access to the evidence supporting the United States' contention. The plaintiff would thereafter be in just as good a position as the United States to prove or disprove, by a preponderance of the evidence, the applicability of any jurisdictional condition that the United States may raise.

Moreover, shifting only the burden of production to the government fits hand-in-glove with burden allocation with respect to subject matter jurisdiction generally and with the FTCA's jurisdictional conditions in particular. Subject matter jurisdiction surely is not a procedural nicety; it has constitutional dimensions because it concerns a federal court's very power to adjudicate the rights and liabilities of the parties to a civil controversy.¹²² Unlike state courts, federal courts are courts of limited jurisdiction.¹²³ Article III, Section 1 of the Constitu-

120. See, e.g., *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255-56 (1981) ("Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext."); *Gilbert v. David*, 235 U.S. 561, 567 (1915) ("[I]t is the duty of the [party challenging the assertion of jurisdiction] to bring the matter to the attention of the court, in some proper way, where the facts are known upon which a want of jurisdiction appears."); *Sternberg Dredging Co. v. Moran Towing & Transp. Co.*, 196 F.2d 1002, 1006 (2d Cir. 1952) ("It is often a controlling factor in deciding where to throw the burden of producing evidence—and obviously it ought to be—that the proper party to charge is he who alone could discover the truth." (citation omitted)); see also *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 516 (1993) (reiterating the statement from *Burdine*).

121. See *Summers v. Tice*, 199 P.2d 1, 3-4 (Cal. 1948); see also *supra* note 109 (presenting views of some commentators on the burden of proof imposed on a party in control of critical information).

122. See Erwin Chemerinsky, *Federal Jurisdiction* § 5.1, at 247-28 (2d ed. 1994); Jack H. Friedenthal et al., *Civil Procedure* § 2.2, at 12 (2d ed. 1993); Wright, *Federal Courts*, *supra* note 9, § 1, at 2.

123. See *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); Wright, *Federal Courts*, *supra* note 9, § 7, at 22. To be sure, some states adopt the federal scheme for allocating the burden of proving jurisdiction, imposing it on the jurisdiction-seeking party. See, e.g., *Manufacturers' Lease Plans, Inc. v. Alverson Draughon College*, 565 P.2d 864, 865-66 (Ariz. 1977) (stating that the party asserting jurisdiction has the burden establishing it); *Inselberg v. Inselberg*, 128 Cal. Rptr. 578, 581 (Ct. App. 1976) (stating that the plaintiff must establish jurisdiction); *Greenly v. Davis*, 486 A.2d 669, 670 (Del. 1984) (same); *Trerotola v. Cotter*, 601 A.2d 60, 64 n.2

tion grants Congress the power to create inferior federal courts, and with that power comes the authority to expand or restrict the jurisdiction of those courts.¹²⁴ Because the plaintiff in FTCA cases is seeking to open a federal forum for her claim, an Article III court simply cannot adjudicate her claim unless she has made a showing to the court that jurisdiction is proper. This, in its most basic form, explains why a plaintiff bears a non-shifting burden of persuasion on the jurisdictional question.¹²⁵

At the same time, one can readily see the connection between the limited-jurisdiction principle and waivers of sovereign immunity. Historically, government entities were immune from suit pursuant to the doctrine of sovereign immunity. Captured by Blackstone's oft-quoted phrase, "the King can do no wrong,"¹²⁶ the doctrine is grounded in the normative principle that a sovereign that confers rights on its citizens cannot be sued by a citizen who enjoys those rights. Justice Holmes captured it best when he said: "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 be no legal right as against the authority that makes the law on which the right depends."¹²⁷ Because, in modern parlance, a citizen cannot bite the hand that feeds her, the doctrine of sovereign immunity prevents courts from holding the United States liable for the tortious conduct of its employees; Article III courts lack jurisdiction over the United States unless Congress consents to suit.

From a legal process standpoint, the doctrine of sovereign immunity is intimately connected to federal subject matter jurisdiction; indeed the sovereign-immunity defense would be a toothless one without a jurisdictional component. Without a statute abrogating a sovereign's immunity, suits brought against sovereign entities—like the United States—are dismissed for lack of subject matter jurisdiction.¹²⁸ Withholding federal subject matter jurisdiction is the legal tool for enforcing the normative principle that citizens cannot use rights created by a

(D.C. 1991) (same); *Kohn v. La Manufacture Francaise Des Pneumatiques Michelin*, 476 N.W.2d 184, 187 (Minn. Ct. App. 1991) (same); *State ex rel. Anaya v. Columbia Research Corp.*, 583 P.2d 468, 469 (N.M. 1978) (same); *State ex rel. Sweere v. Crookham*, 609 P.2d 361, 363 (Or. 1980) (same). If it can be said that federal *and* state courts impose the burden of proving jurisdiction in the same manner, then the allocation scheme we propose here has even greater support.

124. U.S. Const. art. III, § 1.

125. See *Kokkonen*, 511 U.S. at 377 (citing authorities); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936).

126. 2 William Blackstone, *Commentaries* *239.

127. *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907).

128. See, e.g., *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (stating that a sovereign "is immune from suit save as it consents to be sued"); *Minnesota v. United States*, 305 U.S. 382, 388-89 (1939) (finding that when Congress has not conferred jurisdiction, suits against the United States must be dismissed); *Kansas v. United States*, 204 U.S. 331, 342 (1907) (noting that the United States cannot be sued without its consent).

sovereign against that same entity. Of course, it has always been recognized that Congress can waive the United States' immunity from suit. It did so, for example, in 1887 with the passage of the Tucker Act, which waived the United States' immunity with respect to contract claims.¹²⁹ When Congress waives the United States' sovereign immunity, it does so by providing (as it must) a statute that defines the parameters of federal subject matter jurisdiction. Absent congressional consent, Article III courts violate the separation of powers by exercising jurisdiction over the United States.¹³⁰ Congress controls the purse strings and is therefore the only branch of government that may open the Treasury's coffers for judgments entered against the federal government.¹³¹ Article III courts, therefore, should not be permitted to exercise jurisdiction over the United States unless Congress has specifically and unequivocally given Article III courts the jurisdictional green light.

But Congress often sets limits on the waiver of sovereign immunity, and those limits prevent Article III courts from exercising jurisdiction over the United States when Congress has determined that certain conduct of government officials or particular theories of recovery should not be adjudicated in an Article III court. Stated another way, when Congress waives the United States' sovereign immunity and imposes certain conditions on that waiver, a plaintiff who fails to meet one of the conditions returns Article III courts to the status quo ante—no jurisdiction over the United States. Accordingly, because an FTCA plaintiff seeks to alter the status quo, that plaintiff should logically bear the burden of ultimately persuading a federal district court that it has jurisdiction over an FTCA claim.¹³²

129. See 28 U.S.C. § 1491 (1994) ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States.").

130. See, e.g., *United States v. Mitchell*, 445 U.S. 535, 538 (1980) ("In the absence of clear congressional consent . . . 'there is no jurisdiction in the Court of Claims more than in any other court to entertain suits against the United States.'" (internal quotations omitted)); *United States v. King*, 395 U.S. 1, 4-5 (1969) ("[T]he Court of Claims' jurisdiction to grant relief depends wholly upon the extent to which the United States has waived its sovereign immunity to suit and that such a waiver . . . [is] unequivocally expressed.").

131. See *Office of Personnel Management v. Richmond*, 496 U.S. 414, 429 (1990) ("The provisions of the [FTCA] . . . also provide a strong indication of Congress' general approach to claims based on governmental misconduct, and suggest that it has considered and rejected the possibility of an additional exercise of its appropriation power to fund claims similar to those advanced here.").

132. See, e.g., *United States v. Clarke*, 33 U.S. (8 Pet.) 436, 444 (1834) ("As the United States are [sic] not suable of common right, the party who institutes such suit must bring his case within the authority of some act of congress, or the court cannot exercise jurisdiction over it."); *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995) (stating essentially the same principle in the FTCA context); *Gould v. United States Dep't of Health & Human Servs.*, 905 F.2d 738, 741 (4th Cir. 1990) (en banc) ("The terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit."); *Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir.

Not so, the critic would say. Imposing on FTCA plaintiffs the burden of overcoming a no-jurisdiction presumption sufficiently accounts for the limited-jurisdiction doctrine because it requires plaintiffs to make some showing that subject matter jurisdiction is proper. Once a plaintiff makes that showing, the plaintiff has satisfied her burden of proof. This is especially appropriate, so the argument goes, when the United States moves to dismiss a case and controls information critical to the jurisdictional condition that is the subject of the motion to dismiss. Accordingly, fairness dictates that the United States, seeking to extinguish an FTCA plaintiff's right to tort recovery, should bear the ultimate burden of persuading a federal district court that the tort claim should be dismissed for lack of subject matter jurisdiction. This argument, however, must fail.

Although some courts have endorsed this rationale for burden allocation in the FTCA context,¹³³ the argument is inconsistent with basic rules of federal pleading. It is well-settled in the federal system that the party who bears the burden of pleading an issue also carries the twin burdens of persuasion and production.¹³⁴ Suggesting that an FTCA plaintiff, who must merely plead subject matter jurisdiction to overcome the no-jurisdiction presumption, thereafter bears no burden of proof whatsoever undermines this principle. Moreover, imposing

1983) ("The party who sues the United States bears the burden of pointing to such an unequivocal waiver of immunity."); *Cole v. United States*, 657 F.2d 107, 109 (7th Cir. 1981) (same); *Thompson/Center Arms Co. v. Baker*, 686 F. Supp. 38, 40 (D.N.H. 1988) (same). See generally 2 McCormick on Evidence, *supra* note 4, § 337, at 428 (stating that party seeking to change the status quo is the party who should logically carry the burden of persuasion).

133. See, e.g., *Prescott v. United States*, 973 F.2d 696, 701-02 (9th Cir. 1992) (holding that the United States bears the ultimate burden of proving the applicability of the discretionary function exception); *Carlyle v. United States Dep't of the Army*, 674 F.2d 554, 556 (6th Cir. 1982) (same); *Angle v. United States*, 931 F. Supp. 1386, 1390 (W.D. Mich. 1994) (same), *aff'd*, 89 F.3d 832 (6th Cir. 1996). We shall have more to say about the *Prescott* line of cases later. See *infra* Part IV.C.1 (arguing that *Prescott* wrongly decided the burden-of-proof question).

134. See 2 McCormick on Evidence, *supra* note 4, § 337, at 427 ("The pleadings therefore provide the common guide for apportioning the burdens of proof."); *id.* at 428 ("The burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion.").

To be sure, Professor McCormick cautions that "looking for the burden of pleading is not a foolproof guide to the allocation of the burdens of proof." *Id.* As an example, Professor McCormick points to the problem of contributory negligence, which the defendant ordinarily must prove. In federal court, however, "where jurisdiction is based upon diversity of citizenship, the applicable substantive law may place the burdens of producing evidence and persuasion with regard to that issue on the plaintiff." *Id.* But because subject matter jurisdiction is a federal question, federal rules of pleading control. Those pleading rules—Rule 8(a)(1)—plainly and unequivocally place the burden of pleading the issue on the jurisdiction-seeking party. See Fed. R. Civ. P. 8(a)(1). Therefore, Professor McCormick's concern with respect to the limited persuasiveness of the burden-of-pleading rationale for burden allocation is inapplicable in the FTCA context.

only a burden of pleading compliance with the Act's jurisdictional conditions does not sufficiently vindicate the principle that federal courts are courts of limited jurisdiction. The principle means little if an FTCA plaintiff can plead her way into federal court and then foist upon the United States the ultimate burden of proving that she should not be there. That gets it backward.

For this reason, the justification for imposing the ultimate burden of proving federal subject matter jurisdiction cannot be reduced to an access-to-information rationale. Our rule recognizes this by shifting *only* the burden of production to the party most likely to possess information on jurisdictional issues, the United States. Plaintiffs must always carry the ultimate burden of persuasion because federal courts are not presumptively open; indeed, they are, and always have been, presumptively closed. There is no principled justification for concluding that the affirmative duty to prove an entitlement to a federal forum somehow changes depending on who controls the evidence relevant to a jurisdictional determination.¹³⁵

One may argue that, as the party seeking a dismissal, the government is the party desiring change and should therefore carry the burden of persuasion. Moreover, because the defense of sovereign immunity is a relic of the past, the United States should carry the burden of persuasion in all cases in which it raises sovereign immunity as a basis for a jurisdictional dismissal. Accordingly, the argument would conclude, the reality of burden allocation is in keeping with Professor

135. Professors Hay and Spier have posed the following hypothetical that may cast doubt on our suggestion that a shifting burden of production puts the plaintiff in just as good a position as the United States to prove the applicability or non-applicability of a jurisdictional condition:

Suppose, for example, that the defendant has exclusive possession of relevant evidence. Giving the plaintiff the burden of proof may lead her to demand, and sift through, piles of information that may or may not contain useful evidence—generating costs that might be avoided if the defendant were given the burden of proof. [Footnote omitted.] Determining the parties' relative costs thus requires the court to decide who initially possesses what evidence and how costly and effective the discovery process is.

Hay & Spier, *supra* note 2, at 419. This hypothetical problem poses no problem under the allocation rule that we propose. The government is required to make a *prima facie* case that an FTCA claim is jurisdictionally barred, thereby giving plaintiffs a specific basis from which to conduct discovery to disprove the government's case. If the plaintiff must "sift through piles of information that may or may not contain useful evidence" (something the government must also do), that is no reason to shift the entire burden of proof to the government. The plaintiff need only ask the court for more time. But even if we assume that Professors Hay and Spier's hypothetical conclusion is correct, we fail to see how shifting the entire burden of proof to the United States will eliminate costs that might otherwise be avoided. It seems to us that the costs to the plaintiff are the same, regardless of whether she or the government bears the burden of persuasion. The plaintiff is likely to devote the same amount of time defeating the government's suggestion that subject matter jurisdiction is lacking as proving that federal subject matter jurisdiction exists. Therefore, the costs to the parties seem rather an unhelpful guide to burden allocation in the FTCA context.

McCormick's suggestion that the burden of proof should be placed "on the party desiring change" and that burden allocation can also turn on "special policy considerations such as those disfavoring certain defenses."¹³⁶ The argument is not persuasive.

Although the United States, in some sense, is the party "desiring change" (i.e., a dismissal for lack of subject matter jurisdiction), the argument loses the forest for the tree; it overlooks the critical point that the plaintiff is really the party desiring change—opening an otherwise closed federal forum to hear a tort claim—and therefore should carry the ultimate burden of persuasion. In addition, although the plaintiff may initially overcome the no-jurisdiction presumption by filing a complaint that is not facially defective, the plaintiff's ultimate burden of proving the basis for subject matter jurisdiction should not disappear. Indeed, precisely the opposite is true: Because the allocation rule prescribes a presumption that can be overcome relatively easily through a well-pleaded complaint—a result compelled by Rule 8(a)(1) of the Federal Rules of Civil Procedure—an FTCA plaintiff cannot be permitted to remain in federal court on the basis of the pleadings alone. Such a construction of federal subject matter jurisdiction invites mischief.

Professor McCormick's suggestion that burden allocation should turn on whether a particular defense is disfavored has no place in the FTCA jurisdictional scheme. Over the years and in some quarters, the defense of sovereign immunity has fallen in disrepute and may have caused courts to factor their distaste for the defense into their allocation rules.¹³⁷ Whatever the merits of Professor McCormick's suggestion with respect to garden-variety issues like contributory negligence, the "disfavored defense" rationale for burden allocation is inappropriate in the context of allocating the burden of proving subject matter jurisdiction. An Article III court violates the separation of powers by labeling a congressionally imposed jurisdictional condition as a "disfavored" defense. A jurisdictional condition can never succumb to judicial disapproval because it is that condition itself that breathes jurisdictional life into an Article III court. Thus, even if an FTCA jurisdictional condition is deemed "disfavored," such a characterization cannot play any role in allocating the burden of proving a congressionally mandated condition on federal subject matter jurisdiction.

136. 2 McCormick on Evidence, *supra* note 4, § 337, at 432.

137. *See, e.g.*, Friedenthal et al., *supra* note 122, § 2.10, at 53-54 ("Congress has waived immunity in a number of statutes and in recent years the defense of sovereign immunity has been viewed with increasing disfavor. Thus, the federal courts now are somewhat more inclined to find that consent has been granted" (citation omitted)).

3. Examples from the FTCA

Allocating the burden of proving subject matter jurisdiction in the manner proposed here is not without support in the FTCA context. For instance, in *Ochran v. United States*,¹³⁸ the Eleventh Circuit, although not explicitly deciding the burden-of-proof issue with respect to the Act's jurisdictional conditions, recognized the distinction between the burden of persuasion and the burden of production. The *Ochran* court concluded that when the United States raises the discretionary function exception, the government should at least bear the burden of production.¹³⁹ Similarly, although not couched in the language of burden of persuasion versus burden of production, the FTCA's scope-of-employment cases clearly contemplate a burden allocation scheme similar to the one we have prescribed for the FTCA's other jurisdictional conditions. The Act protects federal employees from being sued in federal court for actions taken while in the scope of their federal employment.¹⁴⁰ If the Attorney General certifies that the employee was acting within the scope of her employment, the federal employee is absolutely immune from suit; the United States becomes the proper party defendant.¹⁴¹ If the plaintiff pleads that a federal employee was acting outside the scope of her employment (i.e., overcoming the Prong 1 no-jurisdiction presumption), the burden of producing evidence that the employee was in fact acting within the scope of her employment shifts to the United States, who plainly is in the best position to produce evidence on that issue; certification by the Attorney General is prima facie evidence of a scope-of-employment finding (Prong 2). If the Attorney General certifies the federal employee, the burden shifts back to the plaintiff to ultimately prove that the employee was not acting within the scope of her employment; that is, that subject matter jurisdiction is proper (Prong 3). This method of allocating the burden of proof in scope-of-employment cases has been endorsed by an overwhelming majority of federal circuit courts.¹⁴²

138. 117 F.3d 495 (11th Cir. 1997).

139. See *id.* at 504 n.4.

140. See 28 U.S.C. § 2679(d)(1) (1994).

141. See *Kimbrow v. Velten*, 30 F.3d 1501, 1504 (D.C. Cir. 1994).

142. See, e.g., *Maron v. United States*, 126 F.3d 317, 323 (4th Cir. 1997) (stating that the plaintiff must bear the burden of proof "to refute the certification of scope of employment issued by the Attorney General and to prove by a preponderance of the evidence that the defendants were not acting within the scope of their employment"); *Rogers v. Management Tech., Inc.*, 123 F.3d 34, 37 (1st Cir. 1997) (stating that where a plaintiff asserts that a defendant acted outside the scope of employment despite the Attorney General's certification to the contrary, the burden of proof is on the plaintiff); *Gutierrez de Martinez v. Drug Enforcement Admin.*, 111 F.3d 1148, 1154-55 & n.5 (4th Cir. 1997) (same); *Flohr v. Mackovjak*, 84 F.3d 386, 390 (11th Cir. 1996) (same); *Heuton v. Anderson*, 75 F.3d 357, 361 (8th Cir. 1996) (same); *Williams v. United States*, 71 F.3d 502, 505-06 (5th Cir. 1995) (same); *Billings v. United States*, 57 F.3d 797, 799-800 (9th Cir. 1995) (same); *Kimbrow*, 30 F.3d at 1504-06 (same); *Melo v.*

C. A Brief Word on Quantum

Perhaps the most difficult question concerns the quantum of evidence required to meet the no-jurisdiction presumption and the burdens of persuasion and production we have recommended for FTCA plaintiffs and the United States. We shall not attempt here to provide detailed and comprehensive quantum rules; federal district courts are in the best position to make those decisions on a case-by-case basis. Indeed, because the FTCA itself does not prescribe a burden allocation scheme, much less the evidentiary requirements for such a scheme, the quantum of evidence necessary to adjudicate the three-part rule should be left to the sound discretion of the trial court. With that said, though, we offer some general guidelines for putting teeth into the proposed allocation rule and save for later a discussion of the quantum of evidence required for some of the most commonly litigated jurisdictional conditions in the FTCA.¹⁴³

Overcoming the no-jurisdiction presumption requires federal district courts to evaluate the complaint as a whole to determine whether the plaintiff's FTCA complaint is jurisdictionally viable. Courts should pay particular attention to the exceptions in 28 U.S.C. § 2680(h). Section 2680(h) specifically precludes subject matter jurisdiction if the plaintiff alleges assault, battery, false imprisonment, or other well-known tort theories.¹⁴⁴ Of course, FTCA plaintiffs, for the most part, will not use those words to describe their causes of action. Rather, the plaintiff may allege facts that ostensibly amount to pleading one of the § 2680(h) exceptions. If a court concludes that the allegations in the complaint, in effect, assert a theory proscribed by § 2680(h), the court should conclude that the plaintiff has not overcome the no-jurisdiction presumption.

The United States meets its burden of production only if it produces sufficient competent evidence showing that the plaintiff's FTCA claim is jurisdictionally defective. The government may produce direct or circumstantial evidence; a scintilla of evidence, however, will not do. The decision-making heuristic here is whether, in light of the evidence presented by the government, a court could find that the condition has not been met. Federal district courts may wish to view this exercise as if they were deciding a motion for directed verdict.¹⁴⁵ Put another

Hafer, 13 F.3d 736, 742-48 (3d Cir. 1994) (same); Green v. Hall, 8 F.3d 695, 698 (9th Cir. 1993) (same); Arbour v. Jenkins, 1993 WL 342872, at *2 (6th Cir. Sept. 8, 1993) (per curiam) (same); Schrob v. Catterson, 967 F.2d 929, 935-36 (3d Cir. 1992) (same); Brown v. Armstrong, 949 F.2d 1007, 1011-12 (8th Cir. 1991) (same); Hamrick v. Franklin, 931 F.2d 1209, 1211 (7th Cir. 1991) (same); S.J. & W. Ranch, Inc. v. Lehminen, 913 F.2d 1538, 1540-42 (11th Cir. 1990) (same), *amended by* 924 F.2d 1555 (11th Cir. 1991).

143. See *infra* Part IV (discussing the administrative exhaustion, statute of limitations, discretionary function, and independent contractor conditions).

144. 28 U.S.C. § 2680(h).

145. See Fed. R. Civ. P. 52.

way, if the evidence produced by the government would not entitle it to a favorable judgment, a federal district court should conclude that the government has failed to meet its burden, thereby entitling the plaintiff to a decision in its favor. Courts should not make credibility determinations when deciding whether the United States has met its burden of production.¹⁴⁶

Finally, an FTCA plaintiff meets her burden of persuasion if the evidence, taken as a whole and viewed in light of controlling legal principles, more probably than not compels a conclusion that subject matter jurisdiction is proper. In many instances, determining whether a plaintiff has satisfied Prong 3 requires the district court to weigh the plaintiff's facts and the government's facts against the legal principles that control the jurisdictional determination. Repair to precedent is usually the most effective means for determining which party has the better of the argument. If the case is one of first impression, the court should look to the policies underlying the jurisdictional condition and determine whether the evidence presented by the plaintiff balanced against the evidence presented by the government entitles the plaintiff to proceed with her FTCA suit.

D. *Conclusions*

The distinction between a burden of persuasion and a burden of production paves a viable middle ground for allocating the burden of proving the FTCA's jurisdictional conditions. Not only were the twin burdens commonly understood at common law as two sides of the same burden-of-proof coin, but, more importantly, they harmonize well with the competing policies at stake when deciding how to allocate the burden of proving subject matter jurisdiction in FTCA cases. Distinguishing the burden of persuasion from the burden of production protects the well-settled principle that a jurisdiction-seeking party bears the burden of proving subject matter jurisdiction and, at the same time, protects FTCA plaintiffs from the untenable situation of having to produce evidence on each of the jurisdictional conditions to gain access to federal court. The principal benefit of imposing the burden of production on the government is that jurisdictional facts and legal issues are narrowed down to their critical components, giving all parties and the court a tangible and specific jurisdictional issue to adjudicate. Likewise, the United States suffers little hardship in having to produce evidence that an FTCA claim is jurisdictionally barred. Once the United States makes a sufficient evidentiary showing, the plaintiff must then proceed to satisfy her ultimate burden of

146. See, e.g., *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993) ("In the nature of things, the determination that a [party] has met its burden of production . . . can involve no credibility assessment.").

proving that subject matter jurisdiction over the United States is proper.

III. CRITIQUES OF THE ALLOCATION RULE

Of course, criticisms may be leveled against the proposed three-part allocation rule for the FTCA's jurisdictional conditions. The first comes from Professor Roger Dworkin, who has attacked the burden-of-proof concept as a judicial tool for advancing policy judgments that should be made by legislatures. Second, Professor John McNaughton has argued that the distinction between a burden of persuasion and a burden of production is illusory, thereby suggesting that the proposed rule draws a distinction where none exists. And third, one might argue that the proposed burden allocation scheme is inconsistent with other schemes that have been devised for waiver-of-sovereign-immunity statutes. As we now show, the arguments do not undermine the viability of the allocation rule we have proposed.

A. *Professor Dworkin's Critique of the Burden-of-Proof Concept*

Although the rule proposed here properly accounts for the policy concerns implicated in fashioning burden-of-proof rules generally and the FTCA in particular, this Article assumes that formulating rules for burden allocation in the jurisdictional context is a worthwhile enterprise. Not so, says Professor Roger Dworkin, perhaps one of the most outspoken critics of the burden-of-proof concept. Professor Dworkin has given a tongue-lashing to the concept of burdens of proof, arguing that shifting the burden of proof—especially manipulating the burden of persuasion—operates as a mask for substantive legal change.¹⁴⁷ This occurs, argues Professor Dworkin, because allocation of a burden of production or burden of persuasion becomes “outcome determinative.”¹⁴⁸ This is undesirable because such manipulation distorts the process of effecting legal change by cutting fact-finders out of the process of advancing the law or by cloaking courts with policymaking authority that ill-suits them.¹⁴⁹ In Dworkin's eyes, these problems are insurmountable and require the wholesale abandonment of the burden-of-proof concept.¹⁵⁰

Professor Dworkin is undoubtedly correct that manipulating the burden of proof as a smokescreen for substantive legal change “hinders progress and confuses judges, lawyers, and the law.”¹⁵¹ Such manipulation permits courts to cloak their policy judgments in burden-of-proof language. Dworkin is also correct in his observation that legal

147. See Dworkin, *supra* note 2, at 1174-75.

148. *Id.* at 1172.

149. See *id.* at 1178-81.

150. See *id.*

151. *Id.* at 1175.

change should proceed along legitimate lines and not by judicial legislation through burden-of-proof manipulation. Although penned years before the burden-of-proof confusion arose in the FTCA context, Professor Dworkin's view explains, perhaps better than any other, the inconsistency that now permeates the law regarding allocating the burden of proving the FTCA's jurisdictional conditions. Indeed, a good argument can be made that courts that have manipulated the burden of proof—either by Rule 12(b)(1) conversion or by holding that the United States bears the ultimate burden of proving that federal subject matter jurisdiction is lacking—have done so precisely because they wish to open the federal courthouse doors a bit wider than Congress did when it enacted the FTCA.

The rule proposed here, though, rescues current doctrine from the jurisprudential abyss described by Professor Dworkin, but does so without abandoning the burden-of-proof concept altogether. The rule crafted here anchors allocation to the policy judgments made by Congress when it enacted the FTCA and does not cut those policy judgments loose—through burden-of-proof manipulation—from the deliberative process that gave them birth. The FTCA must be interpreted against the broader landscape of federal-courts and common-law doctrines accepted at the time the Act was passed. Because Congress did not provide in the text of the statute or in its legislative history any exception from well-accepted practices of burden allocation in the jurisdictional context, those allocation rules should be (at the very least) a preliminary guide for fashioning burden-of-proof rules. By assigning the burden of persuasion to the plaintiff and imposing the burden of production on the United States, the proposed rule is in keeping with the limited-jurisdiction and the waiver-of-sovereign-immunity principles that underlie the FTCA. As such, the proposed rule does not equip Article III courts with a tool for sidestepping congressional intent; quite the contrary, it binds them to that intent.

To be sure, one may argue that the rule proposed here falls into the Dworkin trap of manipulating the burden of proof to achieve substantive legal change, namely, that a greater number of meritorious tort claims against the United States would never get a hearing in federal court. The critic would argue that this rule narrows the waiver of sovereign immunity even more than Congress intended. This would be so because the rule imposes on the FTCA plaintiff the burden of persuading a federal district court that jurisdiction over the United States is proper even though the United States is the party moving for dismissal and may retain exclusive control over information relevant to a jurisdictional condition (e.g., the discretionary function exception). The argument, however, fails.

The critical flaw in the argument is that it assumes that Congress somehow intended to deviate from well-settled principles of burden-of-proof allocation with respect to subject matter jurisdiction. Of

course, absent an explicit statement in the text or legislative history of the FTCA, courts must assume that Congress intended to incorporate into the Act the prevailing method of allocating the burden of proving subject matter jurisdiction.¹⁵² As this Article notes, the mere fact that the United States may be in the best position to provide evidence of the applicability or non-applicability of a jurisdictional condition is no reason to shift the ultimate burden of persuasion onto the United States. Rather, a shifting burden of production is an effective tool for efficiently adjudicating the question of whether subject matter jurisdiction exists.¹⁵³ Imposing on the United States the burden of producing evidence that it controls and that sheds light on a jurisdictional condition cures the inefficiency of imposing that burden on FTCA plaintiffs. At the same time, the rule preserves the well-established principle that federal courts are courts of limited jurisdiction, requiring plaintiffs to prove that they are entitled to a federal forum.

Finally, Professor Dworkin thinks the burden of persuasion and the burden of production are useless aids to decision-making. He argues that “the burden of persuasion has no procedural effect and that the burden of producing evidence performs an unnecessary function with an inappropriate procedural effect.”¹⁵⁴ As to the burden of persuasion, Professor Dworkin asserts that it only matters “when the fact finder’s mind is in a state of complete equilibrium” and that such a mind set is rarely, if ever, present in the run of cases.¹⁵⁵ With respect to the burden of production, Professor Dworkin contends that “[t]he burden of producing evidence . . . force[s] a party to gamble on the sufficiency of his evidence and impose[s] the sanction of defeat for a wrong guess regardless of the probability that his position on the merits is correct. Present law provides no second chances.”¹⁵⁶ Again, we disagree with this analysis insofar as it applies to the burden of proving subject matter jurisdiction in the FTCA context.

Professor Dworkin is correct that the allocation of the burden of persuasion should, theoretically, only make a difference when there is an equilibrium in the evidence. Under a preponderance of the evidence standard, the party with the weightier evidence should prevail regardless of which party bears the ultimate burden of persuasion. As true as this may be in theory, however, as a practical matter it is not true, especially in the FTCA context. Indeed, cases have turned on which party carries the ultimate burden of proof.¹⁵⁷ In addition, the

152. See *Molzof v. United States*, 502 U.S. 301, 307-08 (1992); *Logue v. United States*, 412 U.S. 521, 526-28 (1973); *Reo v. United States Postal Serv.*, 98 F.3d 73, 77 (3d Cir. 1996).

153. See *supra* Part II.B.2.

154. Dworkin, *supra* note 2, at 1179.

155. *Id.* at 1164; see also *id.* at 1165-67 (discussing other situations when the burden of persuasion matters).

156. *Id.* at 1159.

157. In *Prescott v. United States*, the court stated:

burden of persuasion is useful if only because it orients the parties' fact gathering and the court's fact-finding. Otherwise, a party risks losing a motion for directed verdict, where the court must decide whether the non-moving party has "failed to carry an essential burden of proof."¹⁵⁸

We likewise cannot agree with Professor Dworkin's analysis of the burden of production. The proposed rule does not require the United States to "gamble" and suffer a defeat because it has made a "wrong guess" about the probity of the evidence produced. Because the burden of production is allocated according to who is in the best position to focus the issues and produce evidence on the jurisdictional condition, the government will not be offering a court or the opposing party a "guess" as to what is the best evidence for its position. To the contrary, the United States will know quite well how relevant the information produced is to the jurisdictional condition in issue. On the other hand, if the government is guessing, then the Federal Rules of Civil Procedure provide a remedy for that as well, albeit a bitter one.¹⁵⁹

B. *Professor McNaughton: The Illusory Distinction Between a Burden of Persuasion and a Burden of Production*

Professor John McNaughton argued in an influential paper published in 1955 that distinguishing between a burden of persuasion and a burden of production is an attempt to draw a distinction between two concepts that are identical in their operation.¹⁶⁰ In particular, Professor McNaughton asserted that the burden to produce evidence is no different from the burden to persuade because the "'duty of bringing forward evidence' . . . is a derivative function of the burden of persuasion."¹⁶¹ This is so, according to Professor McNaughton, because "[p]ersuasion—or belief, or probability—is the basic ingredient

Th[e] question turns on the allocation of the burden of proving (or disproving) the applicability of the discretionary function exception. If the plaintiffs bear the burden of disproving the applicability of the discretionary function exception, then the government would be entitled to summary judgment if plaintiffs fail to come forth with sufficient evidence to establish that there are genuine issues of material fact on the discretionary function issue. However, if the government bears the burden of proving the applicability of the exception, then the government would be entitled to summary judgment if it has adduced sufficient evidence to establish that no genuine issues of material fact remain for trial with respect to the discretionary function exception. 973 F.2d 696, 700-01 (9th Cir. 1992). *See also, e.g.,* Schmidt v. United States, 933 F.2d 639, 640 (8th Cir. 1991) (holding that the district court's allocation of the burden of proof was dispositive).

158. Fed. R. Civ. P. 52 advisory committee's note.

159. *See* Fed. R. Civ. P. 11 (requiring signed pleading attesting to the accuracy and soundness of the arguments presented).

160. *See* McNaughton, *supra* note 2.

161. *Id.* at 1382.

of both burden of production and burden of persuasion.”¹⁶² Accordingly, we suspect that Professor McNaughton would conclude that the allocation rule proposed here proves his point because Prong 2 of the rule requires the government to make a prima facie case for lack of jurisdiction. “Making a prima facie case” plainly contemplates persuasion, so that Prong 2 is doctrinally deficient in the manner described by Professor McNaughton.

We agree with Professor McNaughton’s prescient observation, but only so far as it goes.¹⁶³ Allocation rules are designed for more than mere academic banter. The primary reason to distinguish the burden of persuasion from the burden of production is to promote the more efficient adjudication of disputes. Burden allocation defines the procedural rules of the game, so that courts, plaintiffs, and defendants will know who must present what, how much, and when. In addition, allocation rules also help frame the discovery process, guiding parties in their accumulation of evidence. This is especially true in the jurisdictional context, where courts and litigants become involved in a Rule 12(b)(1) fact-finding process, in which judges are permitted to resolve evidentiary conflicts early in a case. The proposed allocation rule goes a long way towards focusing factual and legal issues down to their essential components, so that courts and litigants need not endure a needlessly protracted process of determining subject matter jurisdiction. Finally, burden-shifting schemes of the sort we propose for FTCA cases are strewn throughout the law,¹⁶⁴ suggesting that, despite any doctrinal defects in distinguishing between burdens of persuasion and production, there is at least some practical value to them.

C. *Other Waiver-of-Sovereign-Immunity Statutes: The Foreign Sovereign Immunities Act*

In 1976, Congress enacted the Foreign Sovereign Immunities Act (“FSIA”),¹⁶⁵ assigning to the judiciary the decision of whether a foreign state is entitled to sovereign immunity. Like the FTCA, the FSIA is a limited waiver of sovereign immunity, investing district courts with subject matter jurisdiction only if one of several statutory

162. *Id.* at 1390-91.

163. There is one point made by Professor McNaughton that does not necessarily apply in the context of allocating the burden of proving subject matter jurisdiction. One of the reasons behind Professor McNaughton’s suggestion that the distinction between the burden of persuasion and the burden of production is illusory is that parties come to civil litigation at an evidentiary equilibrium. *See* McNaughton, *supra* note 2, at 1385, 1390. This is not a technically accurate description of the relative position of the parties with respect to subject matter jurisdiction: The jurisdiction-seeking party comes to federal court with a no-jurisdiction presumption against her. Of course, under the allocation rule we have proposed, once that presumption is overcome, it disappears. It is only at that point that one says that the United States and FTCA plaintiffs are at some sort of “equilibrium.”

164. *See supra* note 1.

165. *See* 28 U.S.C. §§ 1602-1611 (1994).

exceptions applies.¹⁶⁶ A number of courts have concluded that the party seeking the protection of sovereign immunity (a foreign state) has the ultimate burden of proving that federal district courts lack subject matter jurisdiction over the FSIA claim.¹⁶⁷ The allocation of the burden of proof, however, was not judge-made. Rather, courts have simply relied on an explicit statement from a House Report accompanying the FSIA, which states:

[S]ince sovereign immunity is an affirmative defense which must be specially pleaded, the burden will remain on the foreign state to produce evidence in support of its claim of immunity. Thus, [1] evidence must be produced to establish that a foreign state or one of its subdivisions, agencies or instrumentalities is the defendant in the suit and that the plaintiff's claim relates to a public act of the foreign state—that is, an act not within the exceptions in sections 1605-1607. [2] Once the foreign state has produced such prima facie evidence of immunity, the burden of going forward would shift to the plaintiff to produce evidence establishing that the foreign state is not entitled to immunity. [3] The ultimate burden of proving immunity would rest with the foreign state.¹⁶⁸

One may argue that the burden-allocation scheme we advocate is inconsistent with the burden allocation scheme applicable to the FSIA, a statute, like the FTCA that provides for a waiver of sovereign immunity. In FSIA cases, and unlike the burden-allocation rule we have proposed for the FTCA, the plaintiff, seeking to establish that a federal district court has subject matter jurisdiction over a claim involving a foreign sovereign, does not bear the ultimate burden of proving federal subject matter jurisdiction. Rather, the foreign sovereign bears the burden of persuading the court that it lacks jurisdiction.¹⁶⁹ The FSIA, the argument goes, should be persuasive evidence

166. *See id.* §§ 1605–1607; *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486–88 (1983).

167. *See, e.g., Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 896 (5th Cir. 1998) (stating that the foreign entity who was seeking immunity “bore the ultimate burden of persuasion”); *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 533 (5th Cir. 1992) (stating that although the defendant “retains the ultimate burden of proof of immunity,” foreign agencies are accorded a presumption of independent status); *Stena Rederi AB v. Comision de Contratos del Comité Ejecutivo General del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana, S.C.*, 923 F.2d 380, 390 & n.14 (5th Cir. 1991) (“[T]he party seeking immunity [under the FSIA] bears the ultimate burden of proving the nonapplicability of the exceptions raised by its opponent.”); *Forsythe v. Saudi Arabian Airlines Corp.*, 885 F.2d 285, 289 n.6 (5th Cir. 1989) (stating that the party claiming immunity retains the ultimate burden of persuasion at all times); *Meadows v. Dominican Republic*, 817 F.2d 517, 522–23 (9th Cir. 1987) (same); *Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1002 (D.C. Cir. 1985) (same); *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1378 (5th Cir. 1980) (same).

168. H.R. Rep. No. 94-1487, at 17 (1976), *reprinted in* 1976 U.S.C.A.A.N. 6604, 6616.

169. *See id.*, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6616.

of a congressional intent to impose the burden of proving sovereign immunity on the entity seeking immunity.

The FSIA, however, is not a persuasive analog for cases arising under the FTCA. There is, to be sure, some superficial appeal to the contention that the FSIA scheme should be imported into the FTCA context. The FSIA was patterned, at least to some extent, after the FTCA¹⁷⁰ and both statutes were born in response to the doctrine of sovereign immunity. Yet, we have resisted configuring a burden of proof rule that would be applicable to all waiver-of-immunity statutes because, first, such grand attempts to articulate broad-based allocation rules have failed¹⁷¹ and, second, waiver statutes often contain unique qualities that may give rise to differing rules for burden allocation. The FSIA is a perfect example of the latter concern. One would scarcely assume that in passing such sweeping legislation, Congress would prescribe an inflexible burden-allocation rule, not in the text of the statute, but in a House Report accompanying the legislation. Because this scheme was articulated thirty years after the FTCA was passed, courts should not look to the FSIA for a resolution of the allocation problems presented by the FTCA.

Unlike the FSIA, Congress has not explicitly prescribed a method of burden allocation in the text of or in the legislative history accompanying the FTCA. That Congress chose to prescribe a specific allocation scheme for FSIA cases is critical to an understanding of why burden allocation should be different in the FTCA context. Because Congress retains the exclusive constitutional authority to define the parameters of federal subject matter jurisdiction, it necessarily retains the power to prescribe the burden of proof applicable to establishing that jurisdiction. The 1976 Congress obviously intended FSIA cases to deviate from the limited-jurisdiction principle. It is a giant leap indeed, however, to conclude that that same intent can be ascribed to the 1946 Congress. Absent an explicit congressional directive to diverge from the traditional rule that the jurisdiction-seeking party bears the ultimate burden of proving subject matter jurisdiction, well-settled principles of statutory construction require courts to apply an allocation rule consistent with the statute under review and consistent with well-understood common-law principles in effect at the time the statute was enacted. This method of statutory construction is precisely what underlies the burden of proof rule proposed here for FTCA cases.

170. See, e.g., *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270, 274 (3d Cir. 1980) (“[T]he granting of sovereign immunity to foreign governments in the courts of the United States is most inconsistent with the action of the Government of the United States in subjecting itself to suit in these same courts in both contract *and tort*” (quoting the “Tate Letter,” the contents of which later became the foundation for the FSIA) (emphasis added)).

171. See *supra* notes 2-3 and accompanying text.

IV. APPLYING THE ALLOCATION RULE TO SELECTED JURISDICTIONAL CONDITIONS OF THE FTCA

This part analyzes how the proposed allocation rule we have proposed guides FTCA jurisdictional determinations. The FTCA contains a number of conditions that must be met before a plaintiff may proceed against the United States in federal district court. The FTCA plaintiff must comply with two separate limitations periods, one of two years and one of six months;¹⁷² must comply with a mandatory administrative settlement process;¹⁷³ and cannot proceed on a variety of legal theories specifically proscribed by the language of the FTCA or by court decisions.¹⁷⁴

To be sure, these aspects of the FTCA have acquired different labels, and these labels have taken on a jurisprudential life of their own, often steering the burden-of-proof inquiry toward anomalous conclusions. For instance, courts have described the statute of limitations as a "condition," administrative exhaustion as a "requirement," and § 2680 as providing "exceptions" to the waiver of sovereign immunity.¹⁷⁵ Some courts have labeled the FTCA statute of limitations and the § 2680 exceptions as "affirmative defenses," so that one would expect the government to bear the burden of proving them.¹⁷⁶ This practice of manipulating burden-of-proof allocation by attaching certain labels to these jurisdictional conditions is unprincipled and unjustified. Whether a term of the FTCA is a condition, requirement,

172. See 28 U.S.C. § 2401(b) (1994).

173. See *id.* § 2675(a).

174. Some of the jurisdictional conditions are specifically listed in 28 U.S.C. § 2680, such as the discretionary function and misrepresentation exceptions. See *id.* § 2680(a) (discretionary function); *id.* § 2680(h) (misrepresentation). Other jurisdictional conditions are found in various parts of the FTCA, such as the independent contractor exception and the exception for claims with no analogous private liability. See *id.* § 1346(b) (analogous private liability); *id.* § 2674 (analogous private liability). In addition, the Supreme Court has held that the government is not liable under the FTCA for injuries to service men and women that are "incident to [military] service," even though there is no statutory exception so stating. See *Feres v. United States*, 340 U.S. 135, 146 (1950).

175. See, e.g., *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (holding that Act's statute of limitations is a condition of the waiver of immunity); *Wujick v. Dale & Dale, Inc.*, 43 F.3d 790, 793 (3d Cir. 1994) (referring to FTCA administrative-exhaustion as a requirement for subject matter jurisdiction); *Baird v. United States*, 653 F.2d 437, 440 (10th Cir. 1981) (describing the conditions in 28 U.S.C. § 2680 as exceptions).

176. See, e.g., *Prescott v. United States*, 973 F.2d 696, 702 (9th Cir. 1992) (holding that the United States bears the ultimate burden of proving the applicability of the exception); *Schmidt v. United States*, 933 F.2d 639, 640 (8th Cir. 1991) (describing the Act's six-month limitations period as an affirmative defense and imposing the ultimate burden of proof on the government); *Carlyle v. United States Dep't of the Army*, 674 F.2d 554, 556 (6th Cir. 1982) (holding that the United States bears the ultimate burden of proving the applicability of the exception); *Angle v. United States*, 931 F. Supp. 1386, 1390 (W.D. Mich. 1994) (same), *aff'd*, 89 F.3d 832 (6th Cir. 1996); *Allen v. United States*, 527 F. Supp. 476, 486 (D. Utah 1981) (describing the discretionary function exception as an affirmative defense).

exception, or affirmative defense depends not on some principled reason for so labeling the term, but instead on how the court wishes to construct the evidentiary framework. Indeed, one can certainly toy with the provisions of the FTCA and construct a number of creative interpretations of the statute. So, for example, the statute of limitations could just as easily be characterized as an "exception" to the FTCA because it "excepts" claims that are filed outside of the prescribed limitations periods. So, too, with claims that have not been presented to a federal agency for possible settlement; they are "excepted" from the liability scheme of the FTCA. Regardless of the label, these provisions of the FTCA each set limits on the scope of the FTCA's waiver of sovereign immunity, and those limits define and circumscribe federal subject matter jurisdiction. Pigeonholing these limits into legally loaded linguistic categories obscures, if not emasculates, the jurisdiction-limiting function of these provisions of the statute.

It is important now to examine more closely the fit between the rule and certain jurisdictional conditions within the Act. There are a number of jurisdictional conditions in the FTCA, of course, but we focus on the administrative exhaustion requirement, the statute-of-limitations condition, the discretionary function exception, and the independent contractor exception. Our reasons for doing so are quite simple: These conditions are the most frequently litigated jurisdictional conditions of the FTCA. As this part demonstrates, our allocation rule is faithful to the policies underlying burdens of proof and is consistent with the text and legislative intent of the FTCA.

A. *Administrative Exhaustion*

In 1966, Congress amended the FTCA to conform to the practice among many states of imposing on tort plaintiffs suing a sovereign entity a mandatory, administrative-settlement process.¹⁷⁷ Before filing suit in federal district court, FTCA plaintiffs must first present their tort claims to the appropriate federal agency for possible settlement.¹⁷⁸ Failure to do so deprives a federal district court of jurisdic-

177. See H.R. Rep. No. 89-1532, at 7 (1966); S. Rep. No. 89-1327, at 3-4 (1966).

178. Section 2675(a) provides:

An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section.

28 U.S.C. § 2675(a) (1994).

tion to adjudicate the FTCA suit.¹⁷⁹ In addition, the FTCA imposes on claimants a mandatory, six-month "no suit" period, in which the relevant agency is invested with primary jurisdiction over the FTCA claim.¹⁸⁰ If a claimant files suit before the six-month period expires, a federal district court cannot exercise jurisdiction over the claim.¹⁸¹ An FTCA claimant has exhausted her administrative remedies either when she receives a formal denial of the claim or when six months pass without the agency having granted or denied the claim. In the latter case, absent a formal written denial from the agency, the claimant may deem the claim denied by filing suit or by providing the agency notice (short of filing suit) that she is exercising the deeming option.¹⁸² The purposes of the FTCA's administrative-exhaustion scheme are to reduce court congestion, avoid unnecessary litigation, and provide a dispute resolution scheme fair to plaintiffs, federal agencies, and the United States.¹⁸³

Who should bear the burden of proving that administrative remedies have been exhausted? With one exception federal circuit courts have not decided the question.¹⁸⁴ Three issues present themselves. The first is whether the FTCA claimant presented an administrative claim to the appropriate federal agency. Assuming a claim has been presented to the appropriate federal agency, the second issue is whether the substance of the claim comports with the Act's minimal-notice requirements. And the third issue is whether the FTCA claimant received a formal denial of the claim or deemed the claim denied more than six months after the claim was properly presented to the appropriate federal agency. A jurisdictional dismissal may be premised upon any one or more of these exhaustion requirements. Accordingly, this section separately discusses how the burden of proof should be allocated for each of these requirements.

179. See *McNeil v. United States*, 508 U.S. 106, 110-13 (1993).

180. See 28 U.S.C. § 2675(a).

181. See, e.g., *Jerves v. United States*, 966 F.2d 517, 519 (9th Cir. 1992) (dismissing the claim for lack of subject matter jurisdiction for failure to meet jurisdictional requirements of 2675(a)); *Caton v. United States*, 495 F.2d 635, 638-39 (9th Cir. 1974) (same).

182. See 28 U.S.C. § 2675(a).

183. See H.R. Rep. 89-1532, at 3, 6-8, 10 (1966); S. Rep. No. 89-1327, at 3, 5-6, 11 (1966).

184. See *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 210, 214 (2d Cir. 1987) (interpreting the administrative-claim requirement and holding that "[t]he burden is on the plaintiff to both plead and prove compliance with statutory requirements"). A handful of district courts have followed *In re "Agent Orange."* See *Marchese v. United States*, 781 F. Supp. 241, 245 (S.D.N.Y. 1991); *Commercial Union Ins. Co. v. United States*, No. 97-3406, 1998 WL 637379, at *5 (E.D. La. Sept. 16, 1998); *Blackman v. Department of the Navy Military Sealift Command*, No. 94-3797, 1995 WL 468253, at *1 (E.D. La. July 27, 1995).

1. Agency Receipt of the Claim

Courts have held that an FTCA administrative claim has been “presented” to a federal agency when the agency “receives” the claim.¹⁸⁵ If a plaintiff does not plead that she has filed an administrative claim with the appropriate federal agency, that plaintiff cannot overcome the no-jurisdiction presumption of Prong 1.¹⁸⁶ If the plaintiff does plead administrative exhaustion, the United States would bear the Prong 2 burden of production and provide the court with competent evidence that an administrative claim was not received by the appropriate agency. The federal government may meet its burden of production, for example, by securing affidavits from relevant personnel within the agency to which the plaintiff allegedly sent her claim. If the United States presents affidavits or other competent evidence suggesting that an administrative claim was not received, then the plaintiff would carry the ultimate burden of proving that a claim had in fact been presented to the appropriate federal agency (Prong 3).

This method of allocating the burden of proof is fair. With respect to the facially defective complaint, the rule proposed here produces the same results achieved in the diversity jurisdiction context, where a plaintiff who fails to allege the proper jurisdictional amount runs the

185. See *Drazan v. United States*, 762 F.2d 56, 58 (7th Cir. 1985); *Bailey v. United States*, 642 F.2d 344, 347 (9th Cir. 1981); *Bellecourt v. United States*, 784 F. Supp. 623, 627 & n.3 (D. Minn. 1992); *Crack v. United States*, 694 F. Supp. 1244, 1246-47 (E.D. Va. 1988); *Murray v. United States*, 604 F. Supp. 444, 445 (E.D. Pa. 1985); *Barlow v. Avco Corp.*, 527 F. Supp. 269, 273 (E.D. Va. 1981); *Kirby v. United States*, 479 F. Supp. 863, 867 (D.S.C. 1979); *Steele v. United States*, 390 F. Supp. 1109, 1111-12 (S.D. Cal. 1975). Courts that have addressed the question have looked to the applicable regulations and rubber stamped the language in the regulations that defines “presented” as agency receipt of the claim. See, e.g., *Drazan*, 762 F.2d at 58 (citing 28 C.F.R. § 14.2 and 38 C.F.R. § 14.604(b) and stating that “mailing is not presenting; there must be receipt”); *Bailey*, 642 F.2d at 346 (citing 28 C.F.R. § 14.2) (stating that a claim is presented when it has been received by the federal agency).

186. See, e.g., *In re “Agent Orange”*, 818 F.2d at 214 (holding that an FTCA plaintiff must plead compliance with the administrative claim requirement); *Erleben v. United States*, 668 F.2d 268, 270 (7th Cir. 1981) (stating that an FTCA plaintiff must plead that it submitted a claim to the appropriate federal agency), *abrogated on other grounds*, *Kanar v. United States*, 118 F.3d 527, 531 (7th Cir. 1997); *Gillespie v. Civiletti*, 629 F.2d 637, 640 (9th Cir. 1980) (same); *Bruce v. United States*, 621 F.2d 914, 918 (8th Cir. 1980) (same); *Altman v. Connally*, 456 F.2d 1114, 1116 (2d Cir. 1972) (same); *Clayton v. Pazcoquin*, 529 F. Supp. 245, 248-49 (W.D. Pa. 1981) (same); *Knouff v. United States*, 74 F.R.D. 555, 557 (W.D. Pa. 1977) (same); 2 Lester S. Jayson, *Handling Federal Tort Claims: Administrative & Judicial Remedies* § 301.02[2], at 16-9 (1992). There is nothing mysterious or sinister about why courts impose such a pleading requirement on FTCA plaintiffs: The plaintiff will know very well whether she has filed a claim with a federal agency. With respect to other jurisdictional conditions, the complaint may survive a facial attack if it does not mention the jurisdictional condition, provided, of course, the face of the complaint does not reveal that the condition precludes federal subject matter jurisdiction as a matter of law. See *infra* Part IV.B-D (discussing the statute of limitations, the discretionary function exception, and the independent contractor exception, respectively).

risk of dismissal if the defendant challenges jurisdiction and the plaintiff fails to produce evidence that her damages exceed the statutory amount.¹⁸⁷ Assuming the plaintiff cures the facial defect, imposing the burden of production on the United States is a straightforward recognition of the fact that the United States is in the relatively best position to show that a claim was not received. And imposing the ultimate burden of persuasion on the FTCA plaintiff brings us back to the recognition that the burden of persuading a federal court that it has subject matter jurisdiction rests with the plaintiff, and that burden never shifts.

Now consider a more complex example. Suppose an FTCA plaintiff submits an administrative claim to the *wrong* federal agency. Although the text of the Act does not specifically address this issue, Department of Justice regulations require federal agencies that receive claims that do not belong to them to “transfer [the claim] forthwith to the appropriate agency, if the proper agency can be identified from the claim, and advise the claimant of the transfer.”¹⁸⁸ The regulations further provide that “[i]f transfer is not feasible the claim shall be returned to the claimant.”¹⁸⁹ Given these regulations—and judicial insistence that the government strictly adhere to them¹⁹⁰—the government must produce evidence that (1) the appropriate agency did not receive the claim, (2) transfer of the claim was not feasible, and (3) the claim was returned to the claimant. If the claim was not received by the “appropriate agency,” but the government fails to offer competent evidence that transfer of the claim was infeasible or that the claim was returned to the plaintiff, the government will not have met its Prong 2 burden of production.¹⁹¹ To meet her burden of persuasion, the plaintiff will have to prove that, even though her claim was sent to the

187. See, e.g., *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936) (“If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof.”).

188. 28 C.F.R. § 14.2(b)(1) (1998).

189. *Id.*

190. See, e.g., *Hart v. Department of Labor ex rel. United States*, 116 F.3d 1338, 1341 (10th Cir. 1997) (“[W]e hold that if the agency fails promptly to comply with the transfer regulation and, as a result, a timely filed, but misdirected claim does not reach the proper agency within the limitations period, the claim may be considered timely filed.”); *Greene v. United States*, 872 F.2d 236, 237 (8th Cir. 1989) (same); *Bukala v. United States*, 854 F.2d 201, 203 (7th Cir. 1988) (same).

191. See, e.g., *Greene*, 872 F.2d at 237 (holding that failure to transfer or return a claim rendered the claim constructively, and timely, filed with the appropriate agency). Compare *Bukala*, 854 F.2d at 204 (rejecting the government’s argument that a claim was time-barred where the “wrong” agency made no attempt to transfer the claim and did not return the claim to the claimant), with *Hart*, 116 F.3d at 1341 (“If . . . a claimant waits until the eleventh hour to file and, despite notification of the appropriate agency, the filing is misdirected, there is no compelling reason for allowing constructive filing.”), and *Lotrionte v. United States*, 560 F. Supp. 41, 43 (S.D.N.Y.) (same), *aff’d*, 742 F.2d 1436 (2d Cir. 1983).

wrong agency, she eventually provided the appropriate agency with her administrative claim.

2. Minimal Notice Requirements

The fact that a plaintiff presents an administrative claim to the appropriate federal agency does not mean that the plaintiff, *ipso facto*, has complied with the FTCA's administrative-exhaustion requirement. The claim must contain information sufficient to place the agency on notice that the plaintiff is presenting a tort claim for possible settlement. In particular, the plaintiff must describe, at least generally, the facts surrounding the alleged injury to person or property and supply the agency with a so-called "sum certain" claim for damages.¹⁹² The minimal notice requirements are critical to the administrative-settlement scheme of the FTCA because they provide agencies a foundation upon which to investigate and possibly settle a claim.¹⁹³ Failure to comply with these conditions deprives a federal district court of jurisdiction over the FTCA suit.¹⁹⁴

If the government concludes that the minimal-requirements aspect of administrative exhaustion renders a plaintiff's FTCA claim jurisdictionally defective, the burden of production would lie with the United States. By pleading that she has filed an administrative claim with the appropriate federal agency, the plaintiff will have overcome the no-

192. *See, e.g.*, *Bowden v. United States*, 106 F.3d 433, 441 (D.C. Cir. 1997) (holding that before initiating suit, a claimant must file, with the agency, a written statement sufficiently describing the injury and a sum-certain damages claim); *Orlando Helicopter Airways v. United States*, 75 F.3d 622, 625-26 (11th Cir. 1996) (holding that providing the government with insufficient information to indicate the nature of a claim is inadequate notice and fails the FTCA's jurisdictional requirement); *Manko v. United States*, 830 F.2d 831, 840 (8th Cir. 1987) (stating that the plaintiff's administrative claim failed to provide adequate notice because neither all facts nor a specific amount of money were stated); *Keene Corp. v. United States*, 700 F.2d 836, 842 (2d Cir. 1983) (noting that a plaintiff's "laundry list of potential variables" to render the government liable is not adequate notice); *Adams v. United States*, 615 F.2d 284, 289 (5th Cir.) (requiring a claimant to "give[] the agency written notice of his or her claim sufficient to enable the agency to investigate and place value on their claim"), *clarified*, 622 F.2d 197 (5th Cir. 1980) (*per curiam*); *Caidin v. United States*, 564 F.2d 284, 287 (9th Cir. 1977) ("[T]he sum certain requirement demands more than mere general notice to the government of the approximate amount of a claim.").

193. *See, e.g.*, *Coska v. United States*, 114 F.3d 319, 322 (1st Cir. 1997) (stating that the purpose of the sum certain requirement is to allow the government to investigate and determine the feasibility of settlement); *Johnson v. United States*, 788 F.2d 845, 848-49 (2d Cir. 1986) (positing that minimal notice requirements allow the government to investigate, evaluate, and consider settlement of a claim); *Tidd v. United States*, 786 F.2d 1565, 1568 (11th Cir. 1986) (same); *Molinar v. United States*, 515 F.2d 246, 249 (5th Cir. 1975) (same).

194. *See, e.g.*, *McNeil v. United States*, 508 U.S. 106, 110-13 (1993) (affirming the dismissal of the petitioner's suit because the plaintiff failed to institute the action within the proper statutory requirement); *Price v. United States*, 69 F.3d 46, 54 (5th Cir. 1995) (remanding for entry of an order of dismissal because district court lacked jurisdiction due to plaintiff's non-compliance with minimal notice requirements), *amended on reh'g*, 81 F.3d 520 (5th Cir. 1996).

jurisdiction presumption of Prong 1. At that point, the government must come forward with evidence suggesting that, even though a claim has been filed, the subsequent suit is jurisdictionally defective because the plaintiff failed to provide the agency notice of a “sum certain” damage amount or the facts and circumstances that gave rise to the claim. The reason the United States bears the burden of production should be obvious—the government is arguing lack of notice on the basis of information it possesses and therefore is in the best position to raise the issue and provide the court with the evidentiary basis for that assertion. For example, the United States can produce the administrative claim that was received by the agency and argue from that document that key ingredients (like a sum certain) were missing. If the government makes a *prima facie* case, the plaintiff bears the ultimate burden of persuading the court that the agency received minimal notice of the tort claim. Whether the United States meets its burden of production or whether the plaintiff satisfies her burden of persuasion will largely turn on precedent governing what is and what is not sufficient notice of a tort claim.¹⁹⁵

3. The Final Denial

The third and final requirement for administrative-exhaustion is that the claim must be finally denied at the administrative level. The FTCA provides that administrative remedies have been exhausted only when a claim is “finally denied” by the relevant federal agency.¹⁹⁶ A final denial is defined in 28 U.S.C. § 2675(a) and in the legislative history of the FTCA as occurring under one of two circumstances.¹⁹⁷ First, it occurs when the claim is formally denied in writing by the agency. Second, it occurs when, after six months have passed since the agency received the claim, the claimant takes some action to deem the claim denied. How does the allocation rule operate when a plaintiff submits an administrative claim to the appropriate agency, but files suit in federal court before the expiration of six months? In such a situation, to overcome the no-jurisdiction presumption of Prong 1, the plaintiff must plead that the agency has formally denied her administrative claim in writing. Otherwise, the suit must be dismissed as premature.

195. See, e.g., *Orlando Helicopter Airways*, 75 F.3d at 625 (holding that word “tort” need not appear in notice of claim); *Bradley v. United States*, 951 F.2d 268, 271 (10th Cir. 1991) (holding that a request for damages “in excess of \$100,000” was not sufficient notice); *Tidd*, 786 F.2d at 1567-68 n.6 (holding that attaching medical bills and repair estimates to a claim may be sufficient notice); *Burkins v. United States*, 865 F. Supp. 1480, 1491 (D. Colo. 1994) (holding that failure to specify a sum certain in the original claim and vagueness as to the sum in the amended claim resulted in insufficient notice).

196. 28 U.S.C. § 2675(a) (1994).

197. See *id.*; H.R. Rep. 89-1532, at 8 (1966); S. Rep. No. 89-1327, at 5 (1966).

Assume now that the plaintiff's complaint states that her claim was finally denied in writing by the agency. Here, the plaintiff will have overcome the no-jurisdiction presumption, and the burden of producing evidence to contradict the plaintiff's allegation would rest with the United States. Because the agency to which the claim was allegedly submitted is an arm of the federal government, the United States would be in the best position to raise the issue and produce evidence suggesting that the claim was never finally denied in writing by certified or registered mail. The claim may still be pending; the claim may not have been denied in writing, but denied orally; or the denial may not have been sent by certified or registered mail. Regardless of the reason, the federal government is best positioned to produce evidence on the subject; it must therefore bear the Prong 2 burden of production. If the United States satisfies Prong 2, the plaintiff would thereafter bear the burden of persuading the federal district court that the denial was indeed "final," perhaps by providing the court additional evidence on the finality issue.¹⁹⁸

With respect to final denials that occur via the "deeming option" of the FTCA, the government would shoulder the burden of production even though the plaintiff is in the best position to know whether she has exercised the option. The statute states in part: "The failure of an agency to make final disposition of a claim within six months after it is filed shall, *at the option of the claimant any time thereafter*, be deemed a final denial of the claim for purposes of this section."¹⁹⁹ The language of the deeming option in 28 U.S.C. § 2675(a) makes it obvious that the FTCA plaintiff is in the best position to prove that she has exercised the option. Nevertheless, the allocation rule proposed here imposes the burden of production on the government because it is raising the issue by arguing that the deeming option does not invest the court with subject matter jurisdiction. In practice, the government will most likely argue that the plaintiff exercised the option prematurely, that is, by filing suit less than six months from the date on which the administrative claim was received by the appropriate fed-

198. See, e.g., *Graham v. United States*, 96 F.3d 446, 448 (9th Cir. 1996) ("We conclude that, where the agency knows the claimant is represented, the regulation directs the agency to mail the notice of denial to the attorney or legal representative, because that is the person who is usually responsible for preparing and filing the court action."); *Raddatz v. United States*, 750 F.2d 791, 797 (9th Cir. 1984) (holding that there was no valid final denial from the government because the denial letter was not sent by certified or registered mail and was not mailed by the agency to which the claim was presented); *Dyniewicz v. United States*, 742 F.2d 484, 486 (9th Cir. 1984) (holding that an agency's compliance with final-denial regulations provides claimants "with a clear landmark that [their] claim[s] have] been denied and that [Section 2401(b)'s] six month clock has begun to run.").

199. 28 U.S.C. § 2675(a) (emphasis added).

eral agency.²⁰⁰ Outside the administrative-exhaustion context, the United States may raise the deeming option by arguing that the plaintiff's claim is time-barred because she failed to file suit six months after the claim was deemed denied.²⁰¹ This brings us to the next topic, the Act's statute of limitations.

B. *The Statute of Limitations*

1. A Jurisdictional Condition or an Affirmative Defense? The Curse of *Irwin v. Department of Veterans Affairs*

The FTCA's statute of limitations imposes two filing deadlines on claimants. The first requires plaintiffs to file an administrative claim with the appropriate federal agency within two years after the claim accrues.²⁰² The second time period prescribed in the FTCA applies to the time within which a claimant must file suit in federal district court. Once a claim has been finally denied by an administrative agency, a claimant has six months to file suit.²⁰³ With respect to formal, written denials issued by the agency, the statute-of-limitations clock begins to run "after the date of mailing, by certified or registered mail, of notice of final denial . . ." ²⁰⁴ Failure to comply with either the two-year or six-month limitations period bars the claimant's suit "forever."²⁰⁵ As one court has noted, the FTCA's statute of limitations "represents a deliberate balance struck by Congress whereby a limited waiver of sovereign immunity is conditioned upon the prompt presentation of tort claims against the government."²⁰⁶

200. *See id.* (stating that a claimant may only exercise the deeming option six months from the date on which a claim is presented to the appropriate federal agency).

201. *See infra* note 204 (discussing the limitations period applicable to the deeming option).

202. Section 2401(b) provides:

A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401(b).

203. *See id.*

204. *Id.* Although the text of § 2401(b) is silent with respect to the limitations period applicable to deemed denials, one author has argued elsewhere that courts should borrow the six-month period prescribed in § 2401(b) and apply that time period to deemed denials. *See Colella, supra* note 20, at 427-48. Obviously, if no statute of limitations applies to deemed denials, the burden-of-proof issue never arises. Because the statute of limitations applicable to the deeming option remains an open question, we shall assume for purposes of this Article that formal denials and deemed denials are subject to the six-month limitations period set forth in § 2401(b).

205. 28 U.S.C. § 2401(b).

206. *Gould v. United States Dep't of Health & Human Servs.*, 905 F.2d 738, 742 (4th Cir. 1990) (en banc); *accord United States v. Kubrick*, 444 U.S. 111, 117-18 (1979); *Hart v. Department of Labor ex rel. United States*, 116 F.3d 1338, 1341 (10th

How courts allocate the burden of proof with respect to the FTCA's statute of limitations appears to turn on how they characterize an FTCA statute-of-limitations challenge. In particular, courts are split on the question of whether the FTCA's statute of limitations is a jurisdictional prerequisite to suit or an affirmative defense.²⁰⁷ If the FTCA's statute of limitations is a jurisdictional condition to bringing suit in an Article III court, then the three-part allocation rule proposed here would apply and the FTCA plaintiff would carry the burden of persuasion.²⁰⁸ On the other hand, if the FTCA's statute of limitations is deemed a traditional affirmative defense,²⁰⁹ the proposed rule would be inapplicable and the burden of persuasion would lie with the United States. Disentangling this issue first requires a consideration of a decision by the Supreme Court that, ironically, did not specifically address the FTCA, burdens of proof, or whether a limitations period prescribed in a waiver-of-sovereign-immunity statute is jurisdictional.

In *Irwin v. Department of Veterans Affairs*,²¹⁰ the Supreme Court decided whether the thirty-day limitations period in Title VII of the Civil Rights Act can be equitably tolled.²¹¹ The Court recognized that the statute of limitations in Title VII was a condition of the waiver of sovereign immunity and that, when interpreting the scope of the waiver, courts cannot read into the statute conditions that are not unequivocally expressed.²¹² Despite the absence of any equitable tolling language in Title VII, the Court held that application of equitable tolling to Title VII suits was a permissible construction of the statute because private parties are subject to equitable tolling and because doing so would not undermine congressional intent.²¹³

Cir. 1997) (citing *Pipkin v. United States Postal Serv.*, 951 F.2d 272, 275 (10th Cir. 1991)).

207. For cases holding that the FTCA's statute of limitations is jurisdictional, see *Flory v. United States*, 138 F.3d 157, 159 (5th Cir. 1998); *Coska v. United States*, 114 F.3d 319, 322 (1st Cir. 1997); *Deutsch v. United States*, 67 F.3d 1080, 1091 (3d Cir. 1995); *Attallah v. United States*, 955 F.2d 776, 779 (1st Cir. 1992); *Bradley v. United States*, 951 F.2d 268, 270 (10th Cir. 1991); *Gould v. United States Dep't of Health & Human Servs.*, 905 F.2d 738, 741 (4th Cir. 1990) (en banc). For cases holding that the Act's limitations periods are *not* jurisdictional, see *Perez v. United States*, 167 F.3d 913, 915-16 (5th Cir. 1999); *Kanar v. United States*, 118 F.3d 527, 530-31 (7th Cir. 1997); *Glarner v. United States Dep't of Veterans Admin.*, 30 F.3d 697, 701 (6th Cir. 1994); *Schmidt v. United States*, 933 F.2d 639, 640 (8th Cir. 1991). For an argument that two recent Supreme Court decisions compel the conclusion that the FTCA's limitations periods are jurisdictional, see *Parker & Colella*, *supra* note 20, at 902-04.

208. See, e.g., *Crawford v. United States*, 796 F.2d 924, 929 (7th Cir. 1986) (holding that the plaintiff bears the burden of proof with respect to the FTCA's statute of limitations); *De Witt v. United States*, 593 F.2d 276, 281 (7th Cir. 1979) (same).

209. See Fed. R. Civ. P. 8(c) (listing the statute of limitations as an affirmative defense).

210. 498 U.S. 89 (1990).

211. See *id.* at 93-94.

212. See *id.* at 94-95.

213. See *id.* at 95-96.

Courts have held that *Irwin* stands for the proposition that the FTCA's statute of limitations is not jurisdictional, but rather an affirmative defense, thereby imposing on the United States the burden of proof on statute-of-limitations matters.²¹⁴ But even if the FTCA's limitations periods may be equitably tolled,²¹⁵ *Irwin* simply cannot be read as authority for the proposition that the Act's limitations periods are affirmative defenses rather than jurisdictional prerequisites to suit. Although a more detailed analysis of this point is provided elsewhere,²¹⁶ we briefly recount that argument here. Courts holding that the FTCA's statute of limitations is no longer jurisdictional have ostensibly said that the limitations periods are not conditions of the Act's waiver of sovereign immunity. Of course, this reading of the FTCA is incorrect. In *United States v. Kubrick*,²¹⁷ the Supreme Court squarely held that the FTCA's limitations periods are conditions attached to the waiver of sovereign immunity.²¹⁸ Because the Act's statute of limitations is a condition precedent to bringing suit in federal district court, waiver-of-sovereign-immunity principles compel the conclusion that the statute of limitations is jurisdictional.²¹⁹ Accordingly, the FTCA's limitations periods are jurisdictional conditions, not affirmative defenses, thereby triggering the allocation rule proposed here.

2. Allocation for the Two-Year Limitations Provision

Whether an FTCA claim is jurisdictionally barred for failing to meet the two-year limitations period in 28 U.S.C. § 2401(b) depends upon whether the claim "accrued" more than two years before the claim was filed with the relevant federal agency. Although the FTCA does not define "accrual," the Supreme Court has held that the two-year clock begins running when an FTCA plaintiff knew, or, in the exercise of reasonable diligence, should have known, of her injury and its cause.²²⁰ The purpose of the Act's two-year limitations period is to ensure the prompt presentation of tort claims against the United States.²²¹

214. See *supra* note 207.

215. See Parker & Colella, *supra* note 20, at 902-14 (arguing that two Supreme Court decisions decided after *Irwin* cast serious doubt on the proposition that the FTCA's limitations periods may be equitably tolled).

216. See *id.*

217. 444 U.S. 111 (1979).

218. *Id.* at 117-18.

219. See *United States v. Dalm*, 494 U.S. 596, 609-10 (1990); see also *United States v. Williams*, 514 U.S. 527, 534 n.7 (1995) (citing *Dalm* for the proposition that the statute of limitations in a tax refund statute "narrow[s] the waiver of sovereign immunity . . . by barring the tardy").

220. See *Kubrick*, 444 U.S. at 122-25.

221. See, e.g., *id.* at 117 (stating that the purpose of the statute of limitations provision is "to encourage the prompt presentation of claims"); *Gould v. United States Dep't of Health & Human Servs.*, 905 F.2d 738, 741-42 (4th Cir. 1990) (en banc) (not-

A plaintiff will fail to overcome the no-jurisdiction presumption if the face of her complaint reveals that she knew or should have known of her injury and the cause of that injury more than two years before an administrative claim was filed with the appropriate agency. To satisfy Prong 1, a plaintiff need not allege specifically that she did not know or should not have known of her injury and the cause more than two years before filing a claim. Most plaintiffs, however, provide both the date on which they were injured and the date on which a claim was filed with the federal agency, so that the face of the complaint will often give the government a fairly good indication of when plaintiffs believe their claims accrued. The simplest example is if a plaintiff alleges that on a certain date she suffered personal injuries as a result of the negligent conduct of a federal employee. Comparing the date of injury and cause with the date on which the claim was filed will be dispositive of the two-year limitations question.

To meet its burden of production, the United States must make a *prima facie* case that the plaintiff was armed with enough facts about injury and cause more than two years before an administrative claim was filed with the relevant federal agency. Because the FTCA's accrual standard poses the question of whether the plaintiff was on sufficient notice of injury and cause, the government can produce documentary or testimonial evidence regarding the facts in the plaintiff's possession more than two years before she filed her claim with the government. The government need not produce evidence that the plaintiff knew the full extent of her injuries for the two-year clock to begin running.²²² The government may also present evidence that the plaintiff "should have known" of injury and cause more than two years before filing a claim with the agency. This evidence may consist of facts well known throughout the community in which the plaintiff resides. Additionally, expert testimony may be offered on the question of whether a plaintiff exercised reasonable diligence in light of the facts known to her more than two years before a claim was filed with the federal agency.

If the government meets its burden of production, the plaintiff must then persuade the district court that her claim was timely filed with the appropriate federal agency.²²³ The argument can be made, how-

ing that statutes of limitations protect defendants from having to confront controversies after the loss of evidence).

222. See, e.g., *Goodhand v. United States*, 40 F.3d 209, 212 (7th Cir. 1994) ("The statute of limitations begins to run upon the discovery of the injury, even if the full extent of the injury is not discovered until much later."); *Robbins v. United States*, 624 F.2d 971, 972-73 (10th Cir. 1980) (holding that an injury begins the running of the statutory period even if the "ultimate damage is unknown or unpredictable").

223. See, e.g., *Crawford v. United States*, 796 F.2d 924, 929 (7th Cir. 1986) (holding that the plaintiff bears the burden of proof with respect to the FTCA's statute of limitations); *Drazan v. United States*, 762 F.2d 56, 60 (7th Cir. 1985) (same); *Thompson v. United States*, 642 F. Supp. 762, 766 & n.8 (N.D. Ill. 1986) (same).

ever, that because the “should have known” standard is very much like a defense of contributory negligence—each aimed at showing that the plaintiff did not act reasonably—the government should bear the burden of persuasion on the issue.²²⁴ The argument is unpersuasive. Comparing the “should have known” inquiry to the defense of contributory negligence overlooks the point that, historically, allocating the burden of proof has proceeded along different lines when subject matter jurisdiction is at issue than when an affirmative defense is at issue. Jurisdiction-seeking parties have always carried the burden of persuasion on the jurisdictional issue, whereas defendants have always shouldered the burden of proving affirmative defenses. More importantly, though, imposing a burden of persuasion on the government with respect to the “should have known” standard but imposing a burden of persuasion on the plaintiff with respect to the actual notice standard fosters non-uniformity in the allocation of the burden of proof. Because the Act’s statute of limitations is a jurisdictional condition, the plaintiff must carry the burden of persuasion on the jurisdiction question, regardless of the particulars of the jurisdictional condition itself.

3. Allocation for the Six-Month Limitations Provision: The Curse of *Schmidt v. United States*

The six-month limitations period in the FTCA applies to the period during which a plaintiff must file suit in federal district court after her claim is finally denied.²²⁵ The FTCA provides that the six-month clock begins to run “after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which [the claim] was presented.”²²⁶ There are two issues here. The first is whether suit was filed more than six months after the date of the denial letter, and the second is whether the plaintiff received a proper “final denial.” This section does not address the latter issue because it is precisely the same question posed in the administrative-exhaustion context.²²⁷ Accordingly, we only discuss burden allocation with respect to whether the plaintiff filed a complaint within six months from the date of the denial letter. This determination, in turn, may depend upon the date on which a final denial was mailed to the claimant.

To meet its burden of production, the United States must present evidence suggesting that the plaintiff’s claim was denied in writing and mailed to the plaintiff by certified or registered mail more than six months before the plaintiff filed suit in federal district court. A copy of the denial letter and evidence of the method of delivery is plainly sufficient to meet this burden. The plaintiff then bears the burden of

224. See Prosser & Keeton, *supra* note 8, § 65, at 451.

225. See 28 U.S.C. § 2401(b) (1994).

226. *Id.*

227. See *supra* Part IV.A.3.

persuading the district court that her suit was timely, something the plaintiff will have a difficult time doing short of arguing for equitable tolling of the statute.²²⁸

The question of how to best allocate the burden of proof with respect to the FTCA's six-month limitations period was squarely addressed in *Schmidt v. United States (Schmidt I)*.²²⁹ There, the plaintiff was injured on a plane and filed a claim with the Federal Aviation Administration (FAA), alleging that her injuries were caused by negligent air traffic controllers.²³⁰ The FAA denied the claim in writing on November 19, 1986; the plaintiff's attorney received the letter on November 24, 1986; and the plaintiff filed suit on May 21, 1987.²³¹ The government moved to dismiss the complaint under Rule 12(b)(1) for lack of subject matter jurisdiction, arguing that the suit was time-barred because it was filed more than six months after the date of the denial letter.²³² The plaintiff asserted that the claim was not mailed until November 21, 1986, thereby making her suit timely.²³³ Neither the plaintiff nor the government could establish the date on which the denial letter was mailed because the FAA gave its outgoing mail to a private carrier.²³⁴ Plainly, if the denial letter was mailed on the date it was drafted (November 19, 1986), the plaintiff's suit would be untimely by two days. The district court dismissed the complaint for lack of subject matter jurisdiction, concluding that the plaintiff failed to meet her burden of complying with the FTCA's six-month limitations period.²³⁵

In *Schmidt I*, the Eighth Circuit affirmed. The *Schmidt I* court stated that "[t]he district court correctly noted that the [plaintiff] bore the burden of establishing subject matter jurisdiction once the Government challenged it."²³⁶ The Eighth Circuit agreed with the district court's conclusion that the suit should have been dismissed for lack of subject matter jurisdiction.²³⁷ "[T]he evidence," reasoned the court, "fails to establish the [plaintiff's] contention that the denial letter was not mailed until November 21, [1986]. Consequently, the [plaintiff has] failed to carry [her] burden of establishing the facts to support subject matter jurisdiction."²³⁸ The Supreme Court, however, granted certiorari, vacated *Schmidt I*, and remanded the case to the Eighth

228. *But see* Parker & Colella, *supra* note 20, at 911-14 (arguing that the FTCA's six-month limitations period cannot be equitably tolled as a matter of law).

229. 901 F.2d 680 (8th Cir. 1990), *cert. granted and judgment vacated*, 498 U.S. 1077 (1991), *on remand*, 933 F.2d 639 (8th Cir. 1991).

230. *See* 901 F.2d at 681-82.

231. *See id.* at 682.

232. *See id.*

233. *See id.*

234. *See id.*

235. *See id.*

236. *Id.* at 683.

237. *See id.*

238. *Id.*

Circuit for consideration in light of *Irwin v. Department of Veterans Affairs*.²³⁹

On remand, the Eighth Circuit in *Schmidt v. United States (Schmidt II)* reversed the district court.²⁴⁰ Stating that the “implicit holding” in *Irwin* was that the FTCA’s limitations period is not jurisdictional and may be equitably tolled, the *Schmidt II* court concluded the effect of this “implicit holding is to remove the burden of proving the date of mailing from the [plaintiff]. Because the FTCA’s statute of limitations is not jurisdictional, failure to comply with it is merely an affirmative defense which the defendant has the burden of establishing.”²⁴¹ Because the government had not established the date on which the plaintiff’s denial letter was mailed, “[t]he government . . . would not have met its burden [of proof] had the burden been placed on it in the district court.”²⁴²

Schmidt II’s conclusion that the FTCA’s six-month limitations period is an affirmative defense rather than a jurisdictional condition simply reads too much into *Irwin*. As has been argued in more detail elsewhere,²⁴³ *Irwin* does not stand for the proposition that the FTCA’s limitations periods are not jurisdictional; they are, as long as they condition the congressional waiver of sovereign immunity, which they unquestionably do.²⁴⁴ Once *Irwin* is properly understood, *Schmidt II*’s holding—the Act’s six-month limitations period is an affirmative defense that must be ultimately proved by the government—falls of its own weight. *Schmidt II*, therefore, is a thin reed upon which to argue that the government bears the ultimate burden of proof when the six-month limitations period is raised as a jurisdictional bar to suit.

It is a close question, however, whether the allocation rule we propose would produce a result similar to that reached by the *Schmidt II* court. On one hand, a court could have reasonably inferred that the date of the denial letter, coupled with the evidence showing that the letter was given to a private mail service, is sufficient to make a prima facie case that the six-month clock began running on November 19,

239. 498 U.S. 89 (1990).

240. 933 F.2d 639 (8th Cir. 1991).

241. *Id.* at 640.

242. *Id.*

243. See Parker & Colella, *supra* note 20, at 902-04.

244. See *United States v. Dalm*, 494 U.S. 596, 608-10 (1990); *United States v. Motz*, 476 U.S. 834, 841 (1986); *Block v. North Dakota*, 461 U.S. 273, 287 (1983); *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979). Just because the Supreme Court vacated *Schmidt I* and remanded the case to the Eighth Circuit for consideration in light of *Irwin* surely does not mean that *Schmidt I* was wrongly decided on the burden-of-proof issue. Because *Irwin* dealt exclusively with the question of equitable tolling, the *Schmidt II* court should have determined in the first instance whether the FTCA’s six-month limitations period may be equitably tolled, rather than announce a new rule for allocating the burden of proving compliance (or non-compliance) with the FTCA’s statute of limitations.

1986. On the other hand, an argument can be made that the government should have provided the court with some evidence linking the date of the letter with the mailing by registered or certified mail, something the government did not do. Resolving this problem turns on whether the six-month limitations provision is triggered *only* when a denial letter is mailed by certified or registered mail. The question, whose resolution is beyond the scope of this Article, is an open one under the cases.²⁴⁵

C. *The Discretionary Function Exception*

Congress included a discretionary function exception in the FTCA, the text of which states that the Act shall not apply to “[a]ny claim . . . 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 employee of the Government, whether or not the discretion involved be abused.”²⁴⁶ The discretionary function exception is grounded in the separation of powers doctrine²⁴⁷ and is intended “to prevent judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.”²⁴⁸

Through four Supreme Court decisions handed down over the past fifty years,²⁴⁹ a two-part test has evolved for applying the discretionary function exception. First, the exception covers conduct that is “discretionary” in nature. Therefore, the challenged conduct must involve “an element of judgment or choice,” rather than mandatory compliance with a specific “federal statute, regulation or policy.”²⁵⁰ Second, assuming that the challenged act or omission involves discretion, the exception applies only when the government conduct is “based on considerations of public policy”²⁵¹ or is “susceptible to pol-

245. Compare *Raddatz v. United States*, 750 F.2d 791, 797 (9th Cir. 1984) (holding that there was no valid final denial where the denial letter not sent by certified or registered mail), with *Pipkin v. United States Postal Serv.*, 951 F.2d 272, 274 (10th Cir. 1991) (holding that the six-month clock began running even though the denial letter was not sent by certified or registered mail because the plaintiff suffered no prejudice).

246. 28 U.S.C. § 2680(a) (1994).

247. See, e.g., *Tew v. United States*, 86 F.3d 1003, 1005 (10th Cir. 1996) (“The discretionary function exception is grounded in the doctrine of the separation of powers.”); *Wright v. United States*, 868 F. Supp. 930, 932 (E.D. Tenn. 1994) (noting that separation of powers principles support the discretionary function exception).

248. *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984).

249. See *United States v. Gaubert*, 499 U.S. 315 (1991); *Berkovitz v. United States*, 486 U.S. 531 (1988); *Varig Airlines*, 467 U.S. at 797; *Dalehite v. United States*, 346 U.S. 15 (1953). For a discussion of the evolution of the discretionary function exception prior to *Gaubert*, see Fishback & Killefer, *supra* note 21.

250. *Gaubert*, 499 U.S. at 322 (citations omitted).

251. *Id.* at 323 (citation omitted).

icy analysis.”²⁵² When faced with a challenge to federal subject matter jurisdiction pursuant to the discretionary function exception, courts must decide whether the act or omission that is the basis of the cause of action is discretionary and, if so, whether it has public policy implications.

1. Courts Grapple with Allocating the Burden of Proof: The Curse of *Prescott v. United States*

In contrast to the relatively well-defined parameters of the exception itself, courts have reached inconsistent results with respect to which party bears the burden of proving the applicability or non-applicability of the discretionary function exception. Some courts have held that the United States bears the ultimate burden of proving the applicability of the exception.²⁵³ Other courts have found that the FTCA plaintiff bears the burden of showing that the discretionary function exception does not apply.²⁵⁴ Still other courts have left the

252. *Id.* at 325.

253. *See, e.g., Prescott v. United States*, 973 F.2d 696, 702 (9th Cir. 1992) (noting that the government has the burden of proving the applicability of an exception to the FTCA); *Carlyle v. United States*, 674 F.2d 554, 556 (6th Cir. 1982) (same); *Stewart v. United States*, 199 F.2d 517, 520 (7th Cir. 1952) (same); *Cazales v. Lecon, Inc.*, 994 F. Supp. 765, 771 (S.D. Tex. 1997) (same); *Alef v. United States Dep't of Interior*, 990 F. Supp. 932, 934 (W.D. Mich. 1997) (same); *Davis v. United States*, 918 F. Supp. 368, 370 (N.D. Fla. 1996) (same); *Angle v. United States*, 931 F. Supp. 1386, 1390 (W.D. Mich. 1994) (same), *aff'd*, 89 F.3d 832 (6th Cir. 1996); *Brown v. United States*, No. 92-CV-82S, 1994 WL 319015, at *7 (W.D.N.Y. June 8, 1994) (same); *Doolin v. United States*, No. 93 C 2377, 1994 WL 233829, at *2 (N.D. Ill. May 23, 1994) (same); *cf. Smith v. United States*, 943 F. Supp. 159, 168 (D.R.I. 1996) (holding that the discretionary function exception applied in Suits in Admiralty Act and the burden of proof was on the government).

254. Courts that have placed the burden of proof on the plaintiff have not provided a detailed analysis of the issue. The strongest circuit court statement is in *Aragon v. United States*, 146 F.3d 819 (10th Cir. 1998). In that case, the Tenth Circuit held that plaintiff must show—as part of his overall burden to establish subject matter jurisdiction—that the discretionary function exception does not apply because it “poses a jurisdictional prerequisite to suit.” *Id.* at 823 (internal quotations and citations omitted); *see also Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995) (ruling on a motion involving the discretionary function exception and the independent contractor exception, and stating, “plaintiff bears the burden of persuasion if subject matter jurisdiction is challenged under Rule 12(b)(1)”); *Miller v. United States Dep't of Transp.*, 710 F.2d 656, 662 (10th Cir. 1983) (citation omitted). Among the district courts, two have concluded, with minimal analysis, that after the United States raises the burden of proof issue through a dispositive motion, the plaintiff bears the ultimate burden of proving that the exception does not apply. *See Pifer v. United States*, 903 F. Supp. 971, 972 (N.D. W.Va. 1995) (holding that the plaintiff “bears the burden of persuasion because a party who sues the United States bears the burden of identifying an unequivocal waiver of sovereign immunity”); *Hall v. United States Gen. Servs. Admin.*, 825 F. Supp. 427, 433 (D.N.H. 1993) (holding that “it is incumbent upon the plaintiffs to show that their case falls outside of the protective bounds of the ‘discretionary function’ exception”). In addition, without any analysis of the burden-of-proof issue with respect to the discretionary function exception, some courts have stated generally that the plaintiff bears the burden of proving subject matter jurisdiction under the FTCA and then ruled on the applicability of the discretionary function exception. *See,*

issue open.²⁵⁵

Just as *Irwin* and *Schmidt II* are curses on the house of the statute of limitations, the Ninth Circuit's decision in *Prescott v. United States*²⁵⁶ has played the same role in the discretionary function context. *Prescott*, unfortunately, contains the most detailed (and ultimately erroneous) analysis of burden allocation regarding the FTCA's discretionary function exception. In *Prescott*, workers at a nuclear test site brought an action against the United States to recover damages for injuries allegedly sustained during the government's nuclear testing program.²⁵⁷ The plaintiffs alleged that the United States committed eight separate tortious acts leading to their injuries, including failure to advise workers of the dangers of radiation exposure and failure to take precautions to prevent unnecessary exposures.²⁵⁸ The United States did not offer any evidence "that the alleged acts of negligence flowed from choices grounded in political, social or economic policy."²⁵⁹ Instead, the government argued that everything it did in carrying out the nuclear testing program fell within the discretionary function exception. The Ninth Circuit rejected such a blanket coverage of immunity. Because the United States failed to offer any evidence of policy judgments, the court stated that the jurisdictional issue turned on the "allocation of the burden of proving (or disproving) the applicability of the discretionary function exception."²⁶⁰

The *Prescott* court initially noted that the plaintiff has "the burden of persuading the court that it has subject matter jurisdiction" under the FTCA's waiver of sovereign immunity.²⁶¹ The court reasoned, however, that the plaintiff did not need to disprove each of the

e.g., *Val-U Constr. Co. v. United States*, 905 F. Supp. 728, 736 (D.S.D. 1995) (finding that the plaintiff did not meet its burden in showing that the defendant acted outside the discretionary function exception); *Higgins v. United States*, 894 F. Supp. 232, 235 (M.D.N.C. 1995) (refusing jurisdiction because the plaintiff failed to plead facts which would take the action outside of the discretionary function exception), *aff'd*, 81 F.3d 149 (4th Cir. 1996); *Goewey v. United States*, 886 F. Supp. 1268, 1274-78 (D.S.C. 1995) (barring a plaintiff's claims for failure to meet the burden under the discretionary function exception), *aff'd*, 106 F.3d 390 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 685 (1998).

255. *See Mesa v. United States*, 123 F.3d 1435, 1439 n.6 (11th Cir. 1997); *Ochran v. United States*, 117 F.3d 495, 504 n.6 (11th Cir. 1997); *Autery v. United States*, 992 F.2d 1523, 1526 n.6 (11th Cir. 1993); *Kiehn v. United States*, 984 F.2d 1100, 1105 n.7 (10th Cir. 1993); *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1542 (10th Cir. 1992); *Nyazie v. Kennedy*, No. 97-0120, 1998 WL 32601, at *4 n.7 (E.D. Pa. Jan. 27, 1998); *Wright v. United States*, 868 F. Supp. 930, 933 n.6 (E.D. Tenn. 1994); *Barrett v. United States*, 845 F. Supp. 774, 780 n.7 (D. Kan. 1994).

256. 973 F.2d 696 (9th Cir. 1992).

257. *See id.* at 698.

258. *See id.*

259. *Id.*

260. *Id.* at 701.

261. *Id.*

FTCA's thirteen jurisdictional exceptions listed in 28 U.S.C. § 2680.²⁶² The court explained that the plaintiff only needed to invoke jurisdiction through a complaint that facially alleges matters not excepted by § 2680. Then, the burden falls on the government "to prove the applicability of a specific provision of [the section]."²⁶³ The Ninth Circuit determined that this was the appropriate approach because "an exception to the FTCA's general waiver of immunity, although jurisdictional on its face, is analogous to an affirmative defense."²⁶⁴ Having placed the burden of persuasion on the United States, the Ninth Circuit could not help but find that the United States' motion should have been denied because the government did not offer any evidence that the alleged acts involved an element of judgment or "that the judgment (if any) was grounded in social, economic, or political policy."²⁶⁵ Courts have followed *Prescott's* lead in placing the ultimate burden of proof on the United States.²⁶⁶

Prescott wrongly held that the government bears the ultimate burden of proving that the discretionary function exception applies. The principle defect in *Prescott* is that the court failed to distinguish between the burden of production and the burden of persuasion and thereby preserve the fundamental principle that the plaintiff must prove subject matter jurisdiction. Without making the distinction, the Ninth Circuit placed the entire burden of proof—including both the burden of production and the burden of persuasion—on the government and imposed on the plaintiff only a wafer-thin burden of filing a complaint that is not jurisdictionally defective on its face. *Prescott* placed the burden of proof on the government because, in the court's eyes, the plaintiff would carry an otherwise unreasonable burden of having to disprove each of the FTCA's exceptions to federal jurisdic-

262. See *id.* (citing *Carlyle v. United States*, 674 F.2d 554, 556 (6th Cir. 1982) and *Stewart v. United States*, 199 F.2d 517, 520 (7th Cir. 1952)).

263. *Id.* (quoting *Carlyle*, 674 F.2d at 556).

264. *Id.* at 702.

265. *Id.* at 703.

266. See, e.g., *Miller v. United States*, 163 F.3d 591, 594 (9th Cir. 1998) (holding that the government bears the burden of establishing that discretionary immunity applies and that the test for establishing the discretionary function exception is met); *National Union Fire Ins. v. United States*, 115 F.3d 1415, 1417 (9th Cir. 1997) (same), *cert. denied*, 118 S. Ct. 1053 (1998); *Sabow v. United States*, 93 F.3d 1445, 1451 (9th Cir. 1996) (same); *Valdez v. United States*, 56 F.3d 1177, 1179 (9th Cir. 1995) (same). But see *Laurence v. United States*, 851 F. Supp. 1445, 1450 (N.D. Cal. 1994) (stating that "[i]n this Circuit at this time," the government bears the burden of proving the applicability of the discretionary function exception, but citing the Tenth Circuit's decision in *Kiehn* as questioning whether the minority rule of *Prescott* is harmonious with *United States v. Gaubert*), *aff'd sub nom.* *Laurence v. Department of the Navy*, 59 F.3d 112 (9th Cir. 1995). Some district courts, outside of the Ninth Circuit, have also followed *Prescott*. See, e.g., *Angle v. United States*, 931 F. Supp. 1386, 1390 (W.D. Mich. 1994) (placing the burden of proving the applicability of the discretionary function exception on the United States); *Brown v. United States*, No. 92-CV-82S, 1994 WL 319015, at *7 (W.D.N.Y. June 8, 1994) (same); *Doolin v. United States*, No. 93-C-2377, 1994 WL 233829, at *2 (N.D. Ill. May 23, 1994) (same).

tion.²⁶⁷ Under the burden-shifting scheme proposed here, however, the plaintiff has no such obligation. Only after the government produces enough evidence to make a prima facie case that the discretionary function exception applies must the plaintiff establish her right to sue the United States in federal court by proving that the exception does not apply.

Prescott is deficient for yet another reason. The Ninth Circuit, in essence, emasculated the jurisdictional nature of the discretionary function exception and proceeded to adopt a *Summers*-type shift of the burden of production and the burden of persuasion.²⁶⁸ In so doing, the *Prescott* court ignored the considerations that explain a burden shift for non-jurisdictional substantive issues versus those implicated when allocating the burden of proving subject matter jurisdiction. It may very well be, for example, that shifting the burden of persuasion is generally permissible where one party controls information relevant to a merit based issue. But this access-to-information rationale simply is not a viable basis for shifting the burden of persuasion when subject matter jurisdiction is at issue. Because federal courts are of limited jurisdiction and because jurisdictional determinations should be made early in a case, the party moving for dismissal is best able to focus the jurisdictional factual and legal issues, regardless of whether that party controls information relevant to the issues. The enhanced ability to narrow issues is reason *only* to impose a burden of production on the government, for once the government raises the discretionary function exception and produces prima facie evidence that it applies, there is no reason to excuse the plaintiff from convincing the court that subject matter jurisdiction exists.

Finally, the Supreme Court's decision in *United States v. Gaubert*²⁶⁹ undermines the *Prescott* court's rationale and supports burden-shifting of the kind proposed here. In addition to its rationale that the plaintiff should not have to disprove multiple exceptions, the *Prescott* court reasoned that the United States was the most appropriate party to show that its conduct was the result of "choices grounded in social, economic or political policy."²⁷⁰ In *Gaubert*, however, the Supreme Court stated that proof of actual policy considerations was not necessary as long as the challenged action or omission was susceptible to policy analysis.²⁷¹ Moreover, stating that governmental action taken pursuant to a policy-based regulation is presumed to be grounded in policy considerations, the Supreme Court endorsed a burden-shifting scheme in keeping with that proposed here. Once the government makes a prima facie showing that the actor's conduct was pursuant to

267. See *Prescott*, 973 F.2d at 701.

268. See *supra* Part II.B.1.

269. 499 U.S. 315 (1991).

270. *Prescott*, 973 F.2d at 702.

271. See *Gaubert*, 499 U.S. at 324-25.

a policy-based provision, the government enjoys a (rebuttable) presumption that the governmental conduct is policy based. Simply put, our prima facie case operates just like the *Gaubert* presumption. Once the government earns this presumption, the burden shifts to the plaintiff to show, by a preponderance of the evidence, that the conduct was not discretionary or was not grounded in the policy considerations underlying the provision.²⁷² Therefore, like *Schmidt II* and the statute of limitations, *Prescott* fails to provide a sound basis for concluding that the government must bear the ultimate burden of proving the discretionary function exception.

2. The Appropriate Allocation of the Burden of Proving the Discretionary Function Exception

Following the rule proposed here, imposing the burden of production on the government and the burden of persuasion on the plaintiff is appropriate in cases in which the government asserts the discretionary function exception. As with other jurisdictional conditions, the government should bear the initial burden of production on the discretionary function exception. This is because the government is in the best position to narrow the jurisdictional factual and legal issues sufficiently for the plaintiff and the court.²⁷³ Because the plaintiff must always establish federal jurisdiction, however, the plaintiff must bear the burden of persuading the court that it has jurisdiction after the government has challenged that jurisdiction by raising the exception.

To overcome the no-jurisdiction presumption, the plaintiff must allege in her complaint a cause of action that, on its face, does not come within the parameters of the discretionary function exception.²⁷⁴ For example, a plaintiff cannot allege a cause of action based upon exactly the same type of activity or omission that a court has found to be

272. See *id.* The *Prescott* court stated, on a petition for rehearing, that its decision was consistent with *Gaubert*. See *Prescott*, 973 F.2d at 702 n.4. The Ninth Circuit, however, referred only to the Supreme Court's holding that "a plaintiff must advance a claim that is facially outside the discretionary function exception." *Id.* The Ninth Circuit did not address the Supreme Court's language regarding the rebuttable presumption. *Id.* Other courts have questioned the continuing vitality of *Prescott* in light of *Gaubert*. See *Kiehn v. United States*, 984 F.2d 1100, 1105 n.7 (10th Cir. 1993); *Nyazie v. Kennedy*, No. 97-0120, 1998 WL 32601, at *4-*5 n.7 (E.D. Pa. Jan. 27, 1998); *Laurence v. United States*, 851 F. Supp. 1445, 1450 (N.D. Cal. 1994), *aff'd sub nom. Laurence v. Department of the Navy*, 59 F.3d 112 (9th Cir. 1995).

273. See *Ochran v. United States*, 117 F.3d 495, 504 n.4 (11th Cir. 1997) (failing to address whether the plaintiff or the government bears the burden of proving the applicability of the discretionary function exception, but stating that "[r]egardless where the burden of persuasion ultimately rests, the burden of production of the policy considerations that might influence the challenged conduct must be on the Government").

274. See *Kiehn*, 984 F.2d at 1105 n.7.

barred by the discretionary function exception.²⁷⁵ In *Prescott*, the government ostensibly argued that the face of the plaintiffs' complaint did not overcome the no-jurisdiction presumption. The government argued, based upon the Ninth Circuit's prior opinion in *In re Consolidated United States Atmospheric Testing Litigation* ("Atmospheric Testing"),²⁷⁶ that everything the government did in carrying out its nuclear testing program was covered by the discretionary function exception.²⁷⁷ Thus, according to the government, the plaintiffs' complaint, which challenged certain aspects of that program, should have been dismissed on its face because there was no set of facts that the plaintiffs could establish in the allegations that would fall outside the exception. The Ninth Circuit, however, found that *Atmospheric Testing* could not be read so broadly.²⁷⁸ Having found that the plaintiffs' complaint was facially valid, the government was destined to lose. The government had filed its motion as a motion for summary judgment and had produced no evidence.²⁷⁹ Thus, the government had a rather poor record (no evidence on the applicability of the discretionary function exception) and, given that record, faced an insurmountable legal standard (bearing the ultimate burden of proving the exception applied). The *Prescott* court had no trouble finding that the district court had properly denied the government's summary judgment motion.²⁸⁰

275. In *Mesa v. United States*, 123 F.3d 1435 (11th Cir. 1997), a facial attack was successful. The plaintiffs alleged that government DEA agents failed to ascertain the identity of the inhabitants of the plaintiffs' house and that the agents failed to cease questioning and detaining the plaintiffs once the agents allegedly should have known that the subject of the arrest warrant was not present. *See id.* at 1438. The government apparently offered no evidence regarding the application of the discretionary function exception. The plaintiffs, however, claimed that they were entitled to discovery before the court ruled on the government's motion to dismiss. *See id.* at 1439. The court stated that it is clear from the face of the complaint that the allegation of negligence involved the process of identifying the subject of an arrest warrant, which fundamentally implicated "an exercise of discretion and considerations of public policy." *Id.*; *see also Kiehn*, 984 F.2d at 1105 n.6 (finding that the plaintiff's failure-to-warn claim was not facially outside the discretionary function exception and therefore could not survive a motion to dismiss).

276. 820 F.2d 982 (9th Cir. 1987).

277. *See Prescott*, 973 F.2d at 698.

278. *See id.* at 699-700.

279. *See id.* at 700-02. Filing the dispositive motion as a motion for summary judgment, though unavoidable in some circuits, *see supra* Part I, raises a problem of establishing the quantum of proof necessary to have a court reach the merits of a plaintiff's FTCA claim. We argue that the plaintiff must bear the burden of proving by a preponderance of the evidence that the discretionary function exception does not apply. Under a summary judgment standard, however, the plaintiff can proceed to a determination of the merits of her claim by merely establishing a genuine issue of fact regarding the application of the exception, with all ambiguities resolved in the plaintiff's favor. Unless the court has a preliminary hearing on the exception's application, the burden of proving subject matter jurisdiction is, in effect, circumvented by the procedural posture of the dispositive motion. *See supra* Part II.

280. *See Prescott*, 973 F.2d at 702-03.

Moreover, overcoming the no-jurisdiction presumption may be somewhat more complicated in the discretionary function context given the confusing, and sometimes conflicting, language in federal court opinions stemming from a single sentence in the Supreme Court's decision in *United States v. Gaubert*.²⁸¹ There, the Court made the following, rather straightforward, statement: "For a complaint to survive a motion to dismiss [based on the discretionary function exception], it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime."²⁸² Some lower courts have interpreted this language to mean that FTCA plaintiffs bear the ultimate burden of pleading and proving that the discretionary function exception does not apply.²⁸³ This reading of *Gaubert*, however, is overbroad. The Court made the statement in the context of its holding that there is a presumption that actions taken pursuant to a discretionary regulation are based upon the policy underpinning of the regulation.²⁸⁴ The Court's language surely does not imply that every FTCA complaint must include an allegation regarding the non-applicability of the discretionary function exception. Properly understood, then, *Gaubert* stands for the proposition that, where an FTCA plaintiff has alleged negligent conduct involving a regulation, the plaintiff must also allege facts showing that the challenged act or omission violated a non-discretionary regulatory requirement or was not grounded in the policy of the regulation.²⁸⁵

Once a plaintiff overcomes the no-jurisdiction presumption, most challenges to subject matter jurisdiction pursuant to the discretionary function exception will require a "particularized and fact-specific inquiry" into the two-part discretionary function test.²⁸⁶ To meet its burden of production on the first part, the United States may present relevant policies, procedures, rules, regulations, or statutes that bear

281. 499 U.S. 315 (1991).

282. *Id.* at 324-25.

283. *See, e.g.*, *Val-U Constr. Co. v. United States*, 905 F. Supp. 728, 736 (D.S.D. 1995) (stating that the burden of proving that the discretionary function exception does not apply is appropriately placed on the plaintiff); *Wright v. United States*, 868 F. Supp. 930, 932 n.5 (E.D. Tenn. 1994) (noting that *Gaubert* implies that the burden lies with the plaintiff to establish that the conduct of the government agency or the employee is not protected under the exception); *McElroy v. United States*, 861 F. Supp. 585, 592 n.12 (W.D. Tex. 1994) (same).

284. *See Gaubert*, 499 U.S. at 324-25.

285. *See, e.g.*, *Sunrise Village Mobile Home Park v. Phillips & Jordan, Inc.*, 960 F. Supp. 283, 286 (S.D. Fla. 1996) (stating that "where the regulatory scheme expressly or impliedly confers policy-imbued decisions to the discretion of a federal agency, the burden is on the plaintiff to allege non-discretionary acts that give rise to liability"); *AIG Aviation Ins. Servs., Inc. v. United States*, 885 F. Supp. 1496, 1501 (D. Utah 1995) (stating that the plaintiffs' complaint failed to meet the *Gaubert* test because the plaintiffs failed to allege that inspectors' discretionary acts were not part of relevant regulatory policy schemes).

286. *Prescott v. United States*, 973 F.2d 696, 700 (9th Cir. 1992).

on the alleged tortious act or omission.²⁸⁷ The government may present these provisions to demonstrate that the challenged governmental act or omission is not specifically circumscribed by any governmental directive. Under the second part of the discretionary function test, the United States may present a basis for the court to conclude that the challenged act or omission has policy implications. The United States may submit affidavits or deposition testimony from government employees and documentary evidence showing that the alleged acts or omissions have actual social, economic, or political policy implications.²⁸⁸ The government can also show that its employee was acting pursuant to a discretionary statute, regulation, or guideline; in that case, there is a "strong presumption" that the employee's conduct is grounded in the policies of that provision.²⁸⁹ In addition, the Supreme Court has stated, the act or omission need only be susceptible to policy analysis.²⁹⁰ Accordingly, the government can present a hypothetical policy analysis, showing that policies could be implicated by the discretionary act or omission. Thus, in cases in which there is no evidence that policy considerations played a role in the discretionary act

287. See, e.g., *Davis v. United States*, 918 F. Supp. 368, 371 (N.D. Fla. 1996) (noting that the plaintiff failed to point out any statute or regulation that dictated the appropriate manner to maintain National Park Service ("NPS") roadways, and citing statutes and regulations that were relevant to NPS decision-making and gave the NPS discretion in roadway maintenance).

288. See, e.g., *Kirchmann v. United States*, 8 F.3d 1273, 1277 (8th Cir. 1993) (noting that the government submitted affidavits demonstrating that decisions in allocating personnel and funding for the construction of a missile site were grounded in national defense and economic policy considerations); *Nyazie v. Kennedy*, No. 97-0120, 1998 WL 32601, at *8 n.10 (E.D. Pa. Jan. 27, 1998) (acknowledging that the government offered the affidavit of a parkway superintendent regarding policy concerns that impacted maintenance and warning decisions); *Davis*, 918 F. Supp. at 371-72 (noting that the government offered the testimony of a National Park Service superintendent regarding economic policy, namely the impact of budgetary constraints).

289. *United States v. Gaubert*, 499 U.S. 315, 324 (1991). This is related to, but distinguishable from, Gaubert's statement that the plaintiff must allege facts in her complaint that would support a finding that challenged actions are not the type of conduct that would be grounded in the policy of a regulatory regime. See *id.* at 324-25. The presumption that action taken pursuant to a policy-based regulation is grounded in the policies of that regulation is a *matter of proof* and is an appropriate proffer on the second part of the discretionary function test. That a plaintiff must allege facts that would support a finding that the actions are not grounded in the policy of a regulatory regime is a *matter of pleading* that may be part of the analysis on a facial attack to the plaintiff's complaint. Courts have found that there is no jurisdiction where the plaintiff fails to rebut this presumption. See, e.g., *Irving v. United States*, 162 F.3d 154, 168 (1st Cir. 1998) (en banc) (identifying policies underlying OSHA inspection regulations and stating that the government had no burden of producing evidence of policy because it could rest on the presumption that discretionary acts are grounded in policy which the plaintiff failed to rebut); *Garcia v. United States*, 896 F. Supp. 467, 477 (E.D. Pa. 1995) (finding that statutes and regulations regarding customs inspections are based on the policy of protecting the integrity of the nation's borders and that the plaintiffs "failed to present any evidence which could overcome the presumption that the challenged conduct was grounded in [that] policy").

290. See *Gaubert*, 499 U.S. at 325.

or omission and even in cases in which there is no evidence of a conscious decision to act or not to act, the exception would still apply if there are potential policy implications.²⁹¹

Once the government has met its burden of production—giving the court sufficient competent evidence to rule in its favor if no other evidence is presented—the burden must shift to the plaintiff to persuade the court that subject matter jurisdiction exists. The plaintiff may attempt to defeat the government's prima facie case in one of two ways. First, the plaintiff can show that a specific and mandatory statute, regulation, or similar provision does not give the government employee any discretion to exercise judgment with respect to the challenged act or omission.²⁹² Second, the plaintiff can show that the challenged act or omission was not based on policy considerations and is not susceptible to policy analysis.²⁹³ Under either approach, the plaintiff must

291. See, e.g., *Baum v. United States*, 986 F.2d 716, 720-21 (4th Cir. 1993) (holding that the court is to look at "the nature of the challenged decision in an objective, or general sense, and ask whether that decision is one which we would expect inherently to be grounded in considerations of policy" and thus it is largely irrelevant whether government agents actually engaged in a deliberative process); *Kiehn v. United States*, 984 F.2d 1100, 1108 (10th Cir. 1993) (holding that it was not necessary that park rangers actually based their decisions upon any policy considerations because such decisions were susceptible to policy analysis and therefore inherently involved policy implications); *Hagy v. United States*, 976 F. Supp. 1373, 1379 (W.D. Wash. 1997) (stating that "any decision not to warn the public of a danger posed by [human growth hormone] is by nature policy-laden"); *Davis*, 918 F. Supp. at 372 (holding that it is irrelevant whether any actual policy analysis took place because "the relevant inquiry is whether, objectively, the decision was 'susceptible' to political, economic and social policy analysis"); *Bowman v. United States*, 848 F. Supp. 979, 985 (M.D. Fla. 1994) (holding that it is not necessary that there be any conscious decision for the discretionary function exception to apply). *But see* *Brown v. United States*, No. 92-CV-82S, 1994 WL 319015, at *17 (W.D.N.Y. June 8, 1994) (holding that the government failed to establish the second part of the discretionary function test because it only suggested, without offering sufficient evidence, that policy factors influenced the thoroughness of a government inspection).

292. See, e.g., *Aragon v. United States*, 146 F.3d 819, 823-24 (10th Cir. 1998) (concluding that the plaintiff unsuccessfully contended that the government failed to comply with a specific and mandatory provision requiring it to cooperate with local water pollution authorities and to avoid polluting the groundwater through its disposal activities); *Kirchmann*, 8 F.3d at 1276 (holding that although plaintiff cited six sections of various federal regulations, no specific statute or regulation was implicated); *Shrieve v. United States*, 16 F. Supp.2d 853, 858 (N.D. Ohio 1998) (maintaining that the plaintiff did not establish that postal service regulations mandated mail delivery to both sides of a state road).

293. See, e.g., *Myers v. United States*, 17 F.3d 890, 896-97 (6th Cir. 1994) (upholding the plaintiffs' contention that the discretionary function exception did not apply because inspectors "should be guided by objective principles of safety, not concerns of public policy"); *Ayala v. United States*, 980 F.2d 1342, 1349-50 (10th Cir. 1992) (finding that the discretionary function exception did not apply because the inspector's decision regarding where to connect lights involved technical judgments rather than policy considerations). In *Kirchmann*, the Eighth Circuit used burden-shifting language to describe the second part of the discretionary function test. See 8 F.3d at 1277. After discussing the evidence that the United States had submitted to show that missile construction decisions implicated national defense and economic policies, the

persuade the court that the discretionary function exception does not apply.

Both the government and the plaintiff will have a strong incentive to present the best evidence available to persuade the court of their respective positions. In theory, it should not matter where the burden of persuasion lies because the party that submits the weightier evidence should prevail under a preponderance of the evidence standard.²⁹⁴ In practice, however, the burden of proof in the discretionary function context is vitally important, because, as *Prescott* illustrates, courts can use the burden of proof as a procedural tool for granting or denying dispositive motions challenging subject matter jurisdiction.

D. *The Independent Contractor Exception*

The FTCA's waiver of sovereign immunity is also limited to the acts and omissions of agents or employees of the United States.²⁹⁵ Under the FTCA, the United States is not liable for the negligent acts or omissions of an independent contractor. In two decisions, the Supreme Court has given lower courts guidance in determining whether parties are independent contractors or agents of the United States.²⁹⁶ The Court has held that the distinction between an independent contractor and an agent turns on the absence of authority of the government to control the "detailed physical performance" of the contractor.²⁹⁷ Thus, the United States is not liable for the contractor's acts or omissions unless it supervises the "day-to-day operations" of the contractor.²⁹⁸ In addition to this "strict control test," some circuits have used factors listed in section 220 of the Restatement (Second) of Agency to determine whether an individual is an employee or

court, citing both *Gaubert* and *Prescott*, stated that the plaintiffs "have offered nothing that would have allowed the trial court to conclude that the government's stated reasons for not supervising the day-to-day operations of the contractors are pretextual . . . or would be objectively illegitimate even if pretextual." *Id.* (citations omitted).

294. Indeed, courts have avoided deciding the burden-of-proof issue by stating that their holding would be the same regardless of which party bore the burden. *See Mesa v. United States*, 123 F.3d 1435, 1439 n.6 (11th Cir. 1997) (holding that the discretionary function exception applies "regardless of who bears the burden"); *Kiehn*, 984 F.2d at 1105 n.7 (stating that the rule of burden allocation of *Prescott* may be suspect in light of *Gaubert*, but that this did not alter the discretionary function analysis in the case).

295. Under the FTCA, the plaintiff can only recover those damages "caused by the negligent or wrongful act or omission of any *employee of the Government*." 28 U.S.C. § 1346(b)(1) (Supp. II 1996) (emphasis added). The Act's definition of an "employee of the government" includes officers and employees of federal agencies and the military, but the definition of "Federal agency" expressly *excludes* "any contractor with the United States." 28 U.S.C. § 2671 (1994).

296. *See United States v. Orleans*, 425 U.S. 807, 815-18 (1976); *Logue v. United States*, 412 U.S. 521, 531-32 (1973).

297. *Logue*, 412 U.S. at 527-28.

298. *Id.* at 529.

an independent contractor.²⁹⁹ The Restatement lists the following factors:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and

299. See *Linkous v. United States*, 142 F.3d 271, 275-76 (5th Cir. 1998); *Robb v. United States*, 80 F.3d 884, 889 n.5 (4th Cir. 1996); *Will v. United States*, 60 F.3d 656, 659 (9th Cir. 1995); *Leone v. United States*, 910 F.2d 46, 50 (2d Cir. 1990); cf. *Curry v. United States*, 97 F.3d 412, 414 (10th Cir. 1996) (using a modification of the Restatement factors for a government contractor case).

Courts typically resort to the Restatement factors when examining the contractual relationships of private physicians who work at medical facilities operated by the United States. In such a situation, the Fifth Circuit has reasoned that it was necessary to consider the Restatement factors rather than rely only on a "strict control test" because, otherwise, no professional who exercises "professional judgment could ever be considered an employee of the United States for FTCA purposes." *Broussard v. United States*, 989 F.2d 171, 175 (5th Cir. 1993). *But see Leone*, 910 F.2d at 49 (finding no support for making any distinction between professionals and other contractees, but then stating "that the strict control test, as well as principles of agency, govern this inquiry" (emphasis added)).

The lower courts' reference to § 220 of the Restatement (Second) of Agency had its genesis in the Supreme Court's *Logue* decision. In support of the control test, *Logue* noted that under modern common law, as reflected in the Restatement, the distinction between a contractor and an agent turns on the absence of authority of the principal to control the physical performance of the contractor. See *Logue*, 412 U.S. at 527. Actually, the "extent of control" is only the first of ten Restatement factors, and the *Logue* Court's reference to the Restatement to support the control test would not itself justify use of all of the Restatement factors. Nevertheless, the Supreme Court's two independent contractor cases under the FTCA, *Logue* and *Orleans*, both dealt with organizations rather than individuals, situations where the control test by itself was arguably dispositive. In situations involving individuals rather than organizations, it would not be unreasonable to refer to the other Restatement factors.

In the final analysis, the relevant inquiry is what Congress intended when it used the terms "employee" and "contractor" in the Act. A general principle of statutory interpretation is that, absent a statutory definition, Congress intended to use the established common law meaning of terms. See *Molzof v. United States*, 502 U.S. 301, 307-08 (1992). The Supreme Court has relied on this doctrine in interpreting the terms "employee" and "contractor" under the federal copyright statute to justify incorporation of general common law of agency. See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989).

(j) whether the principal is or is not in business.³⁰⁰

As with the discretionary function exception, courts have reached different results in determining who should bear the burden of proof on the independent contractor issue. Most courts have held that the plaintiff bears the burden of proving that a party is an agent or employee of the government.³⁰¹ At least one court, however, has held that the burden of proving that the independent contractor exception applies lies with the United States.³⁰² That court, though, relied on *Prescott*, a decision we have suggested incorrectly allocates the burden of proof.

The proposed allocation rule is in keeping with the parameters of the independent contractor exception. To overcome the no-jurisdiction presumption, the plaintiff must initially allege a claim that is not, on its face, barred by the independent contractor exception. This does not mean, however, that the plaintiff must specifically include any allegations regarding the independent contractor exception. If a plaintiff alleges, for example, that the "United States is liable for the negligent acts of *its independent contractor*," call it Acme Widgets, Inc., that claim would clearly be subject to dismissal pursuant to a Rule 12(b)(1) facial challenge. A claim that "the United States is liable for the negligent actions of Acme Widgets, Inc." would not necessarily suffer the same fate.³⁰³

If the plaintiff overcomes the no-jurisdiction presumption, the burden shifts to the United States to produce evidence on the applicability of the independent contractor exception. The determination of whether an FTCA claim is jurisdictionally defective under the independent contractor exception is inherently fact specific. To establish its *prima facie* case, the government may focus on the intent of the parties and produce contractual provisions that describe the relation-

300. Restatement (Second) of Agency § 220 (1958).

301. See, e.g., *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995) (stating that under the independent contractor exception, the "plaintiff bears the burden of persuasion if subject matter jurisdiction is challenged under Rule 12(b)(1)"); *Daniels v. Johnson Controls World Servs., Inc.*, No. 93-3316, 1994 WL 495862, at *2 (E.D. La. Sept. 7, 1994) (finding that the plaintiff had failed to meet his "burden to produce material facts indicating that [the defendant] actually did operate as an employee of the United States"); *Mocklin v. Orleans Levee Dist.*, 690 F. Supp. 527, 529 (E.D. La. 1988) (holding that the plaintiff bears "the burden of proving that the allegedly negligent contractor was an employee of the Government, not an independent contractor"), *aff'd*, 877 F.2d 427 (5th Cir. 1989); *Walker v. United States*, 549 F. Supp. 973, 978 (W.D. Okla. 1982) (finding that the plaintiff in a malpractice action had "failed to sustain his burden to prove" that a doctor was an "employee of the Government" under the FTCA (citation omitted)).

302. See *Hagy v. United States*, 976 F. Supp. 1373, 1376-77 (W.D. Wash. 1997) (holding that the government bears the burden of proving that the plaintiff's claim falls within the independent contractor exception to the FTCA.)

303. It would be vulnerable, however, to an attack. The statute states that the United States is not liable for the actions of "any contractor with the United States." 28 U.S.C. § 2671 (1994). The statute does not use the term "independent contractor."

ship between the government and the contractor.³⁰⁴ Many government contracts contain explicit language stating that the contractor acts “as an independent contractor and not as an agent of the government.”³⁰⁵ This, of course, is not determinative if the parties’ course of conduct shows that an agency relationship actually existed.³⁰⁶ Thus, the government will often produce other evidence indicating that the contractor is independent and that the government should not be liable for the contractor’s acts or omissions. The government may produce declarations or deposition testimony from government and contractor employees stating how the relationship worked in practice,³⁰⁷ historical documents that show who was responsible for performing certain functions; and, if the action involves a facility where the employees worked, the government may produce statistics showing the number of government employees at the facility versus the number of contractor employees there.

To meet its burden of persuasion, the plaintiff may present similar evidence to show that the independent contractor exception does not apply.³⁰⁸ Courts, however, have held that the following factors, standing alone, are insufficient to defeat the independent contractor excep-

304. See, e.g., *Wood v. Standard Prods. Co.*, 671 F.2d 825, 829 (4th Cir. 1982) (stating that the terms of the contract are critical in determining the relationship between the government and a contractor); *Goewey v. United States*, 886 F. Supp. 1268, 1274-75 (D.S.C. 1995) (holding that the government met its burden by submitting contractual provisions showing that the contractor furnished the personnel, tools, and supplies and was responsible “for managing the total work product”), *aff’d mem.*, 106 F.3d 390 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 685 (1998).

305. See *Alexander v. United States*, 605 F.2d 828, 832 n.2 (5th Cir. 1979); *Buchanan v. United States*, 305 F.2d 738, 743 (8th Cir. 1962). *But see* *B & A Marine Co. v. American Foreign Shipping Co.*, 23 F.3d 709, 711 (2d Cir. 1994) (stating that the United States appointed a shipping company “as its agent, and not as an independent contractor” in its agreement (citation omitted)).

306. Whether the parties believed that they were creating an agency relationship is only one of the factors for determining whether an agency relationship existed under § 220 of the *Restatement (Second) of Agency*. See *Brown v. United States*, No. 92-CV-82S, 1994 WL 319015, at *9 (W.D.N.Y. June 8, 1994) (holding that even though a contract provided that “[p]erformance of work hereunder shall be subject to technical supervision of representatives of the Postal Service,” the plaintiff failed to present sufficient evidence to show that the government exercised authority to control the contractor on a day-to-day basis (citation omitted)).

307. See, e.g., *Hagy*, 976 F. Supp. at 1377-78 (stating that the government established that it had no authority to exercise control over the employees of a National Pituitary Agency by submitting declarations and deposition testimony); *Connor v. United States*, 967 F. Supp. 894, 898 (M.D. La. 1997) (finding the government’s submission of affidavit testimony to demonstrate the lack of an agency relationship sufficient).

308. See, e.g., *B & A Marine Co.*, 23 F.3d at 713-14 (finding that the plaintiff presented contractual and affidavit evidence showing that a company was an agent of the government); *Kolovitz v. United States*, No. 93 C 3395, 1995 WL 32612, at *4-5 (N.D. Ill. Jan. 26, 1995) (holding that after the plaintiff presented contractual provisions and deposition testimony regarding the frequency of government inspections, there was an issue of fact regarding whether the government supervised and controlled the contractor’s work).

tion: the government owned the property that is the subject of the suit;³⁰⁹ the government funded the work that gave rise to the tort;³¹⁰ the government included contractual provisions that allow the government to monitor the contractor's performance;³¹¹ or the government could force compliance with federal regulations.³¹² Yet, the plaintiff may attack the persuasiveness of the government's prima facie case and thereby cast doubt on the facts or precedents relied upon by the government. Additionally, the plaintiff may wish to present her own evidence that shows the independent contractor exception does not apply. The plaintiff, for example, can depose the government's declarants, seek production of government documents, and interview or subpoena contractor witnesses and documents. Regardless of which tactic the plaintiff chooses, the plaintiff will have to offer a persuasive rebuttal of the government's prima facie case, otherwise her case will be dismissed for lack of subject matter jurisdiction.

CONCLUSION

This Article attempts to come to grips with the vexing question of how the burden of proof should be allocated when a jurisdictional condition of the FTCA is litigated. That journey has required us to address a number of seemingly unrelated legal issues—Rule 12(b)(1) conversion; burden-of-proof “theory”; federal-courts doctrine; and waiver-of-sovereign-immunity principles. All of these issues, we have

309. See, e.g., *Larsen v. Empresas El Yunque, Inc.*, 812 F.2d 14, 14-16 (1st Cir. 1986) (finding the government not liable for a contractor's negligence though it “owned and controlled” the premises where the accident occurred); *Gowdy v. United States*, 412 F.2d 525, 534-35 (6th Cir. 1969) (holding that the independent contractor exception does not apply even though the government may have had “superior knowledge of safety” of its property); *Conner*, 967 F. Supp. at 898 (holding that the plaintiffs' argument that the government was liable because it owned the premises was wholly inadequate to defeat the independent contractor motion).

310. See, e.g., *United States v. Orleans*, 425 U.S. 807, 816 n.6 (1976) (noting that “granting of funds can be conditional without changing the . . . relationship” between the contractor and the government); *Hagy*, 976 F. Supp. at 1377-78 (holding that the power of the National Institute of Health to stop the funding of a human growth hormone program did not demonstrate sufficient control to convert the program into a federal agency for purposes of the FTCA).

311. See, e.g., *Leone v. United States*, 910 F.2d 46, 50 (2d Cir. 1990) (holding that even though the government acted “generally as an overseer,” the independent contractor exception applied); *Brooks v. A. R. & S. Enters., Inc.*, 622 F.2d 8, 12 (1st Cir. 1980) (holding that the right to inspect did not nullify the independent contractor exception).

312. See, e.g., *Orleans*, 425 U.S. at 815-16 (holding that the government, in fixing conditions to implement federal objectives, “d[id] not convert the acts of entrepreneurs . . . into federal governmental acts”); *Logue v. United States*, 412 U.S. 521, 529-30 (1973) (holding that the independent contractor exception applied even though the government required a county prison contractor to comply with federal standards for treatment of federal prisoners); *Hines v. United States*, 60 F.3d 1442, 1447 (9th Cir. 1995) (holding that a requirement that a contractor comply with Postal Service regulations did not establish employee status).

pointed out, converge at the doorstep of burden allocation. This Article suggests that distinguishing between the burden of persuasion and the burden of production is a practical way to bring these principles together into a uniform allocation rule that promotes the efficient resolution of jurisdictional determinations that is fair to both plaintiffs and the United States.

The three-part rule proposed here recognizes the time-honored principle that plaintiffs ultimately bear the burden of persuading an Article III court that it has subject matter jurisdiction over a federal statutory claim. At the same time, however, the rule also accounts for the problems encountered by plaintiffs who may not know the jurisdictional defects in their FTCA suits and who may not possess information critical to a jurisdictional determination. The rule does so, not by taking the draconian step of shifting the burden of persuasion onto the United States, but by endorsing the more limited and principled step of requiring the United States to raise the issue and produce sufficient competent evidence that an FTCA claim is jurisdictionally barred. Once the government makes a *prima facie* case that a federal district court lacks jurisdiction over an FTCA claim, the plaintiff must then satisfy her ultimate burden of persuading the court that she is entitled to have her tort claim adjudicated in a federal forum.

When applied to the most frequently litigated jurisdictional conditions of the FTCA, the proposed rule imposes a uniform approach to allocation. By advocating a uniform approach, we suggest that some courts should take a second look at the allocation rule they have applied to the Act's statute of limitations and discretionary function exception. We have argued that, with respect to those two conditions, courts, by shifting the burden of persuasion to the United States, have unjustifiably strayed from the limited-jurisdiction principle and from the Act's waiver-of-sovereign-immunity scheme.

In the end, rather than grapple with the theoretical nuances that have burdened discussions of burden allocation, this Article attempts to marry theory with practice, focusing on principles that courts and commentators have agreed define the parameters of burden-of-proof allocation. In doing so, we hope that the three-part rule proposed here advances our collective understanding of burden allocation generally and burden allocation in FTCA litigation in particular, providing plaintiffs, the United States, and courts with a useful tool for deciding when the federal courthouse doors should open and when they should not.

Notes & Observations