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The Quality of Mercy Is Not Strained: Interpreting the Notice Requirement of the Federal Tort Claims Act

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NOTE

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What need the bridge much broader than the flood?
The fairest grant is the necessity.
Look, what will serve is fit.[1]

INTRODUCTION

Under the Federal Tort Claims Act of 1946 (FTCA),[2] the United States is liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances."[3] This limited waiver of sovereign immunity,[4] subject to certain exceptions,[5] grants federal district courts exclusive jurisdiction over civil tort actions against the United States for money damages.[6]

The Act requires a claimant suing the United States to file her claim first with the appropriate administrative agency.[7] If the agency denies the claim, it mails a notice of final denial, and the

1. WILLIAM SHAKESPEARE, *Much Ado About Nothing, in* SHAKESPEARE: THE COMPLETE WORKS 697, 704 (G.B Harrison ed., Harcourt, Brace & World 1968). By the pricking of my thumbs, something Shakespeare this way comes.

2. 28 U.S.C. §§ 1291, 1346, 1402, 2401, 2402, 2411, 2412, 2671-2680 (1994).

3. 28 U.S.C. § 2674; *see also* 28 U.S.C. § 1346(b).

4. *See* 35 AM. JUR. 2D *Federal Torts Claims Act* § 2 (Supp. 1998).

5. *See* 28 U.S.C. § 2680. The exceptions vary widely. To cite some examples, the United States has not waived its sovereign immunity for claims arising from postal delivery, *see* § 2680(b); tax collection, *see* § 2680(c); the activities of the Panama Canal Company, *see* § 2680(m); wartime combatant activities of the military, *see* § 2680(j); abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights, *see* § 2680(h); or with some exceptions, for claims against law enforcement officers or arising from assault, battery, false imprisonment, false arrest, or malicious prosecution, *see* § 2680(h).

6. *See* 28 U.S.C. § 1346(b). Plaintiffs may sue the United States for torts caused by the negligent or wrongful acts or omissions of a federal employee acting within the scope of her office or employment. *See* 28 U.S.C. § 1346(b).

7. The applicable section of the statute, 28 U.S.C. § 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.

claimant then has six months to file the claim against the United States in federal court.[8] Failure to file suit within six months from the date of mailing and within two years after the claim accrues[9] "forever bar[s]" the claimant from seeking relief in the courts under the FTCA.[10] The Act does not specify to whom the agency must send the notice of denial. The Department of Justice (DOJ), charged by Congress with administering the Act,[11] therefore promulgated 28 C.F.R. § 14.9(a), which requires that the agency send notice to the claimant, her attorney, or her legal representative.[12]

The courts have applied this regulation to claims arising under the Act nearly uniformly, interpreting it to permit an agency to send notice to any of the recipients enumerated in the regulation. They generally have dismissed claimants' arguments that the notice of denial should have been sent only to them, or alternatively, to their attorneys, often with a succinct reference to the language of section 14.9.[13] In late 1996, however, the Ninth Circuit let slip the dogs of war and held in *Graham v. United States* that section 14.9(a) requires that the notice of denial be sent only to the claimant's at-

8. 28 U.S.C. § 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.

See also 28 U.S.C. § 2675(a).

9. Despite the disjunctive in § 2401(b), which might lead the unwary to believe that a plaintiff need satisfy only one of the two conditions specified therein, the courts have held that a suit is time-barred unless it is filed within two years after it accrues *and* within six months of final denial by the agency. *See, e.g.,* Houston v. United States Postal Serv., 823 F.2d 896, 902 (5th Cir. 1987); Willis v. United States, 719 F.2d 608 (2d Cir. 1983); Schuler v. United States, 628 F.2d 199, 201 (D.C. Cir. 1980); *infra* notes 62-67 and accompanying text.

10. *See* 28 U.S.C. § 2401(b).

11. *See* 28 U.S.C. § 2672 (1994) (directing agencies to adjust claims "in accordance with regulations prescribed by the Attorney General").

12. *See* 28 C.F.R. § 14.9(a) (1998) ("Final denial of an administrative claim shall be in writing and sent to the claimant, his attorney, or legal representative by certified or registered mail.").

13. *See, e.g.,* Hanson v. United States, 908 F.2d 257, 258 (8th Cir. 1990) (rejecting under the language of § 14.9 claimant's argument that the American Bar Association's Model Code of Professional Responsibility Rule 4.2, which prohibits an attorney from communicating directly with a represented party, mandates sending notice only to claimant's attorney); Hatchell v. United States, 776 F.2d 244, 245 (9th Cir. 1985) (holding that the notice of denial sent to claimant's attorney satisfied the requirements of § 14.9); Dyniewicz v. United States, 742 F.2d 484, 485 (9th Cir. 1984) (finding that sending the notice to claimant complied with § 14.9); Childers v. United States, 442 F.2d 1299, 1302 (5th Cir. 1971) (citing § 14.9 to dismiss plaintiff's argument that mailing the notice to claimant is mandatory); Robinson v. United States, No. CIV.A.92-4869, 1993 WL 74841, at *7 n.3 (E.D. Pa. Mar. 15, 1993) (finding that the Drug Enforcement Agency was "authorized by law," i.e., 28 C.F.R. § 14.9, to send the notice of final denial to the claimant and therefore did not breach its ethical duty not to communicate directly with represented parties).

torney, if the agency knows that the claimant is represented.[14] The court justified its override of the language of the regulation primarily on the grounds of "prevailing ethical standards."[15] Sending the notice to the claimant, the Ninth Circuit held, violates the ethical rule that attorneys may not communicate directly with parties they know to be represented.[16] Because the Bureau of Prisons sent the notice of denial to Graham instead of to her attorney, the court permitted Graham's suit to proceed despite its late filing.[17]

The Ninth Circuit's holding, while well-meaning, is perplexed in the extreme. This Note contends that courts should follow the traditional reading of section 14.9(a) and uphold the propriety of notice sent to either the claimant or her attorney. Courts seeking to grant relief to an unfortunate claimant should look to the principles of equity, not to a tortured reading of section 14.9. Part I argues that the traditional judicial interpretation of the Act's notice-of-denial requirement, unlike the Ninth Circuit's reading, accords with the judicial deference properly given to administrative regulations, the plain language of 28 C.F.R. § 14.9(a), and the established

14. *See* Graham v. United States, 96 F.3d 446, 449 (9th Cir. 1996). Katherine Graham, a federal prisoner, filed an administrative claim with the Department of Justice's Bureau of Prisons. Graham listed her attorney on the claim form and her attorney confirmed his representation via mutual correspondence with the Bureau. When the Bureau eventually denied the claim, however, it sent the notice of denial directly to Graham, who, not realizing its importance, threw it away. The attorney, assuming that the agency had not acted on the claim, waited the six months specified in 28 U.S.C. § 2675(a) and then filed suit in district court. In opposition to defendant's motion to dismiss the suit as untimely, Graham argued that the mailing of the notice to her did not trigger the statute of limitations because the Bureau should have sent the notice to her attorney. The district court held that although the Bureau had "inadvertently" mailed the notice to the claimant, the regulation authorized such action, and dismissed the suit. The Ninth Circuit reversed. *See* 96 F.3d at 447-48.

15. *See* 96 F.3d at 449.

16. *See* 96 F.3d at 449; MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1996). In so holding, the court created a split among the federal courts of appeals on the specific issue of whether sending notice directly to the claimant constitutes an ethical violation. *Compare Graham,* 96 F.3d 446 *with Hanson,* 908 F.2d at 258 (rejecting an analysis very similar to that of the *Graham* majority and upholding the mailing of notice to a represented claimant). On the larger issue of this Note, whether an agency complies with 28 C.F.R. § 14.9 when it sends notice to a represented claimant, the *Graham* court essentially overruled an earlier Ninth Circuit opinion. *Compare Graham,* 96 F.3d at 449 (finding a violation of § 14.9) *with Dyniewicz,* 742 F.2d at 485 (finding compliance with § 14.9). The *Graham* court acknowledges only the split with *Hanson.*

17. *See Graham,* 96 F.3d at 447-48.

In the FTCA context, only one court besides *Graham* has allowed an untimely suit to go forward on the ground that notice should have been sent to the attorney instead of to the claimant. *See* McCaffrey v. Nylon, Inc., No. CIV.A.95-3787, 1996 WL 122710, at *2 (E.D. Pa. Mar. 13, 1996). In contrast to the Ninth Circuit, however, the *McCaffrey* court noted that 28 C.F.R. § 14.9(a) does not ordinarily oblige the government to contact claimant's counsel. *See McCaffrey,* 1996 WL 122710, at *2. Instead, the court gave relief to the plaintiff by equitably tolling the statute of limitations. *See generally infra* section III.C. A United States Bankruptcy Court, on the other hand, found the *Graham* reasoning attractive and held that a bankruptcy notice sent to a represented claimant was inadequate. *See In re* Grand Union Co., 204 B.R. 864, 876-77 (Bankr. D. Del. 1997).

precepts of statutory construction. Part II demonstrates that sending the notice of denial directly to the claimant has the Ninth Circuit's wrong rebuke and does not violate the ethical prohibition against communication with represented parties. Finally, Part III proposes an alternative method for ensuring that claimants are not unfairly deprived of their rights by outrageous fortune or unscrupulous defendants. Courts should apply the well-established doctrine of equitable tolling when extraordinary circumstances warrant relief, instead of being straight-jacketed in every case by a per se rule.

I. Heeding the Words, Words, Words: The Justifications for a Literal Reading

The traditional reading of 28 C.F.R. § 14.9(a), which permits an agency to send notice to either the claimant, her attorney, or her legal representative,[18] enjoys strong support from a number of sources. Section I.A demonstrates that the doctrines of judicial deference to agencies' interpretations of statutes and their own regulations dictate that courts should regard as authoritative both the DOJ's regulation and its reading of that regulation. Section I.B then contends that the plain language of the regulation, interpreted in accordance with the canons of construction, justifies a traditional reading by the DOJ or other agency. Section I.B also argues that the drafters of the regulation intended to give agencies discretion in choosing the recipient of the denial notice, and that courts should give effect to that intent because the usual justification for overriding regulatory text — clear frustration of drafters' intent — is not applicable here.

A. *To Thine Own Agencies Be True: The Commitment to Judicial Deference*

The principles of judicial deference to administrative agencies' interpretations of statutes and of their own regulations demand that courts respect the traditional interpretation of 28 C.F.R. § 14.9(a). Given broad discretion by the FTCA to interpret the statute,[19] the DOJ decreed that notice may be sent either to the claimant or to her representative. Part I.A.1 first asserts that because section 14.9(a) is a reasonable and permissible construction of the Act's notice provisions, a court may not fashion, wrest, and bow its own reading of the statute to require that agencies send notice only to

18. For the sake of succinctness, this Note does not make separate arguments regarding a claimant's legal representative. Instead, this Note can adequately address the role of a legal representative with its arguments regarding attorneys. *See Graham,* 96 F.3d at 448 (calling Graham's attorney her "legal representative").

19. *See* 28 U.S.C. § 2672 (1994) (providing that agencies adjust claims "in accordance with regulations prescribed by the Attorney General").

attorneys. Part I.A.2 then argues that because the judiciary also owes deference to an agency's interpretation of its own regulations, a court should ratify the DOJ's construction of section 14.9(a), which permits notice to be sent to either a claimant or her attorney. This Part concludes that these doctrines of judicial deference require that courts direct policy concerns to the political branches of the government. Because neither the DOJ nor Congress has found section 14.9(a) and its traditional interpretation to be so rank and gross in nature as to require changing, courts should accede to the language of the regulation and its implementation by agencies and allow agencies to send notice to the claimant.

1. Chevron *Deference*

Under the principles of judicial deference to agencies' interpretations of statutes, a court should defer to the regulation promulgated by the DOJ, which allows agencies to choose the recipient of the notice of denial. The Supreme Court has held, most notably in *Chevron U.S.A., Inc. v. Natural Resources Defense Council,*[20] that when a court reviews an administrative agency's interpretation of a statutory provision the agency is charged with administering, the court must accept the agency's "reasonable" or "permissible" construction, if the statute is silent or ambiguous on the issue in question.[21] The interpretation offered by the agency, moreover, need not be the only permissible interpretation or even one the court itself would have reached.[22] "If the agency regulation is not in conflict with the plain language of the statute," the Supreme Court makes clear, "a reviewing court must give deference to the agency's

20. 467 U.S. 837 (1984). Earlier Supreme Court cases also expounded the principles of deference to agency interpretations of statutes. *See, e.g.*, Udall v. Tallman, 380 U.S. 1, 16 (1965).

21. *See Chevron,* 467 U.S. at 842-44; *see also* KMart Corp. v. Cartier, Inc., 486 U.S. 281, 291-92 (1988). The Court in *Chevron* made clear that if Congress "explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." 467 U.S. at 843-44. If, on the other hand, Congress directly addressed the issue and its intent is clear, the court must reject any construction that is contrary to the clear congressional intent. *See* 467 U.S. at 842-43, 843 n.9.

Later cases discussed what sort of ambiguity courts require in the statute in order to proceed to the determination of whether the agency's interpretation is reasonable or permissible and therefore entitled to deference. A minority of courts maintain that any ambiguity whatsoever is enough for a court to proceed to the reasonableness/permissibility determination. *See, e.g.*, Tataranowicz v. Sullivan, 959 F.2d 268, 276-77 (D.C. Cir. 1992) (finding ambiguity in a statutory caption sufficient). The majority view, however, requires that the ambiguity be substantial. A court must first apply the traditional tools of statutory construction; only if the court cannot thereby discern congressional intent does it analyze the agency's interpretation. *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 446-48 (1987).

22. *See* Young v. Community Nutrition Inst., 476 U.S. 974, 981 (1986); *Chevron,* 467 U.S. at 843 n.11; Reed v. Reno, 146 F.3d 392, 395 (6th Cir. 1998).

interpretation of the statute."[23] In short, the judiciary may not supplant an agency's judgment with its own.[24]

In enacting and amending the Federal Tort Claims Act, Congress essentially delegated the choice to the DOJ by remaining silent on the issue of the proper recipient of the denial notice.[25] The Attorney General, in promulgating 28 C.F.R. § 14.9(a), construed the FTCA's notice requirement to allow notice to be sent to either the claimant or her attorney. To merit the great deference accorded administrative regulations, section 14.9(a) need only be reasonable, a measure the regulation easily meets. Though 28 U.S.C. § 2401(b) mentions neither the claimant nor the claimant's attorney, section 2675 speaks in terms of the claimant. A suit is barred, that section provides, unless "the *claimant* shall have first presented the claim to the appropriate Federal agency."[26] When the only party named in the FTCA notice provisions is the claimant, allowing the notice of denial to be sent to the claimant is not "arbitrary, capricious, or manifestly contrary"[27] to the statute.[28]

Because section 14.9(a) is a reasonable interpretation of the Act's notice provisions, that regulation should be the be-all and end-all of a court's analysis of permissible notice recipients. A court cannot issue a blanket order that notice be sent only to counsel of record.[29] Such a rule, in addition to playing fast and loose with the plain language of the regulation, would not give proper deference to the DOJ's interpretation. A court should not disturb a reasonable choice made by an agency unless the statute or its legislative history shows that Congress would not have approved of the

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23. *KMart Corp.,* 486 U.S. at 292; *see also Chevron,* 467 U.S. at 844 (holding that courts must uphold administrative regulations unless they are "arbitrary, capricious, or manifestly contrary to the statute").

24. *See* Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); Associated Fisheries of Me., Inc. v. Daley, 127 F.3d 104, 109 (1st Cir. 1997).

25. *See* 28 U.S.C. §§ 2401(b), 2675(a) (1994); *Chevron,* 467 U.S. at 843-44. The legislative history is similarly silent. *See* S. Rep. No. 89-1327 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2515; H.R. Rep. No. 89-1532 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2515 .

26. 28 U.S.C. § 2675(a) (emphasis added).

27. *Chevron,* 467 U.S. at 844.

28. One might argue, of course, that the drafters of § 2675 merely used the term "claimant" as shorthand for "claimant, or, if the claimant is represented, her attorney." Under *Chevron,* however, a proponent of 28 C.F.R. § 14.9(a) need only demonstrate that interpreting the statutory "claimant" to refer to the actual claimant is not manifestly contrary to the statute. *Chevron* does not allow a reviewing court to decide that the drafters actually meant something different, unless the drafters' intent is unmistakable. *See* Young v. Community Nutrition Inst., 476 U.S. 974, 981 (1986); *Chevron,* 467 U.S. at 844; Reed v. Reno, 146 F.3d 392, 395 (6th Cir. 1998).

29. *Cf.* United States v. Locke, 471 U.S. 84, 95 (1985) ("[T]he fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes . . . . 'There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.'" (quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978))).

agency's interpretation.[30] Nothing in the Act, its amendments, or its legislative history demonstrates congressional rejection of the DOJ's interpretation of the notice requirement. Because the Ninth Circuit "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency,"[31] the *Graham* court should have confirmed the language of section 14.9.

2. Bowles *Deference*

The Ninth Circuit is further curtailed to the fair proportion of the traditional reading by a second prescript of judicial deference. In addition to giving deference to the regulation promulgated by the DOJ, a court should also give deference to the DOJ's interpretation of its own regulation and allow the DOJ and its constituent subdivisions to choose from among the recipients the Attorney General listed in section 14.9(a). The Supreme Court held in *Bowles v. Seminole Rock and Sand Company*[32] and subsequent cases[33] that when the meaning of an administrative construction itself is in doubt, an agency's interpretation of its own regulation is controlling unless that interpretation is "plainly erroneous or inconsistent with the regulation."[34] As with *Chevron* deference, an agency's approach need not be the only one it could have permissibly adopted, nor even one the court itself would have chosen.[35]

The Bureau of Prisons (the Bureau), a subordinate arm of the Justice Department,[36] has interpreted section 14.9(a) in conformity

30. *See Chevron,* 467 U.S. at 845.

31. 467 U.S. at 844.

32. 325 U.S. 410 (1945).

33. *See, e.g.,* Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994); Martin v. Occupational Safety and Health Review Commn., 499 U.S. 144 (1991); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 354-59 (1989); *see also, e.g.,* General Elec. Co. v. EPA, 53 F.3d 1324, 1327 (D.C. Cir. 1995); Kester v. Campbell, 652 F.2d 13 (9th Cir. 1981).

34. *Bowles,* 325 U.S. at 414. This kind of deference, the Court noted, is "even more clearly in order" than deference to agency interpretations of statutes. *See* Udall v. Tallman 380 U.S. 1, 16 (1965); *see also* Mausolf v. Babbitt, 125 F.3d 661, 667 (8th Cir. 1997); Southern Pac. Transp. Co. v. Public Serv. Commn., 909 F.2d 352, 356 (9th Cir. 1990). The Court explained that while congressional intent or constitutional principles may sometimes be relevant in choosing a construction, the "ultimate criterion" is the administrative interpretation. *See Thomas Jefferson Univ.,* 512 U.S. at 512; *Bowles,* 325 U.S. at 414.

35. A court need only find that the agency's construction is sufficiently reasonable and consistent with the wording of the regulation and the statute under which the regulation was promulgated. *See* Pauley v. Bethenergy Mines, Inc., 501 U.S. 680, 702 (1991); Young v. Community Nutrition Inst., 476 U.S. 974, 981 (1986); *see also General Elec. Co.,* 53 F.3d at 1327 (noting that courts may defer even "where the agency's reading of the statute would not be obvious to the most astute reader" (internal quotation marks omitted)).

36. The Department of Justice consists of four principal organizational units: offices, divisions, bureaus, and boards. *See* 28 C.F.R. § 0.1 (1998). The Bureau of Prisons, like the other DOJ subdivisions, remains under the control of the DOJ. For example, the Attorney General resolves any jurisdictional disagreements between the Bureau and the other subdivisions. *See* 28 C.F.R. § 0.195 (1998). The Attorney General also controls both the Director of

with that regulation's plain language: the Bureau sends notice either to claimants or to attorneys.[37] While the Bureau may have a "practice" of sending notice to counsel,[38] doing so is not an obligation. Because the DOJ's interpretation of section 14.9(a) via the Bureau[39] is consistent with the regulation, a court complying with the *Bowles* doctrine should defer to the DOJ's construction and allow notice to be sent to either a claimant or her attorney.[40]

Obliged to acknowledge the pertinence of at least the *Chevron* doctrine,[41] the *Graham* court charges once more unto the breach and declares that the Bureau did not follow its own interpretation of the regulation in question. The Ninth Circuit claims that the Bu-

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the Bureau and the discharge of the Bureau's duties. *See* 18 U.S.C. §§ 4041, 4042 (1994); 28 C.F.R. § 0.96, 0.96(d) (1998). The Director of the Bureau may redelegate the authority given to him by the Attorney General only to employees of the Department of Justice. *See* 28 C.F.R. § 0.97 (1998).

Given the dominion of the DOJ over the Bureau of Prison's affairs, the *Graham* majority is correct to consider the Bureau of Prisons and the DOJ to be the same agency. *See* Graham v. United States, 96 F.3d 446, 449 (9th Cir. 1996) (calling the DOJ "the defendant in this action"); *see also* Reynolds v. Wise, 375 F. Supp. 145, 148 (N.D. Tex. 1974) ("[T]he Bureau of Prisons . . . functions as a part of the Department of Justice . . . ."); *cf.* Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Compensation, 117 S. Ct 796, 807 (1997) (holding that when Congress has divided the adjudicative and enforcement/litigation duties of a single agency into "two sub-'agencies,' . . . it is the overarching agency that is the 'agency'" for purposes of naming a respondent).

37. *See Graham,* 96 F.3d at 450 (Kozinski, J., dissenting) ("Contrary to what the opinion claims, the agency has never interpreted the regulation as requiring that notice be sent to counsel if the claimant is represented."). *Compare* Hatchell v. United States, 776 F.2d 244, 245 (9th Cir. 1985) (reporting that the Bureau of Prisons sent notice of denial to claimant's attorney) *with Graham,* 96 F.3d at 447 (reporting that the Bureau of Prisons sent notice of denial to claimant) *and* Hanson v. United States, 908 F.2d 257, 258 (8th Cir. 1990) (per curiam) (same). Other agencies have proved likewise variable in their "practice" under the FTCA. *Compare, e.g.,* Reynolds v. United States, 748 F.2d 291, 292 (5th Cir. 1984) (reporting that the Veterans Administration (VA) sent notice to claimant) *with* Berti v. V.A. Hosp., 860 F.2d 338, 339 (9th Cir. 1988) (reporting that the VA sent notice to claimant's counsel).

38. *See Graham,* 96 F.3d at 450 (Kozinski, J., dissenting).

39. *See supra* note 36. Even if a court considered the Bureau to be a separate agency from the DOJ, however, the traditional construction of § 14.9(a) would still prevail. If the Bureau of Prisons were a different agency than the DOJ, the Bureau's interpretation of the FTCA's notice provisions or of § 14.9(a) would not merit deference; under *Chevron,* the proper inquiry would be solely regarding the DOJ's interpretation. *See* American Rivers, Inc. v. Federal Energy Regulatory Commn., 129 F.3d 99, 107 (2d Cir. 1997); California Natl. Guard v. Federal Labor Relations Auth., 697 F.2d 874, 879 (9th Cir. 1983). And under *Chevron,* the result is clear: courts (and other administrative agencies) must accede to the DOJ's interpretation of the statutory notice provisions, i.e., § 14.9(a), which allows notice to be sent to a represented claimant. *See supra* notes 20-31 and accompanying text.

40. *See* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945). In fact, a court might have rendered the Bureau infirm of purpose if the agency had interpreted § 14.9(a) as the Ninth Circuit has. Construing § 14.9(a) to direct notice to be sent only to known counsel is inconsistent with that regulation, given § 14.9(a)'s "or" language. *See infra* section I.B (discussing the regulation's plain language and arguing that courts must give effect to that language). Courts will invalidate an agency interpretation inconsistent with the wording of the regulation. *See* United States v. Larionoff, 431 U.S. 864, 872-73 (1977).

41. *See Graham,* 96 F.3d at 449.

reau's correspondence with Graham's counsel[42] showed that the Bureau intended to deal solely with the attorney, and that the Bureau therefore follows the *Graham* majority's interpretation of section 14.9(a).[43] This mumpsimus ascends the highest heaven of invention, but does not hold up under the applicable case law or the facts. By sending notice alternatively to claimants and to counsel,[44] the Bureau has demonstrated that the DOJ interprets section 14.9(a) to allow for a choice of notice recipients. Under *Bowles,* a court should defer to that interpretation.[45] The "or" in section 14.9(a) and the Bureau's application of that disjunctive denote a foregone conclusion: the Ninth Circuit should have adhered to the principles of judicial deference and upheld the sending of the notice to Graham.

The FTCA gives the DOJ license to issue regulations interpreting the Act. Policy arguments regarding those regulations "should be addressed to legislators or administrators, not to judges."[46] 28 C.F.R. § 14.9(a) and the DOJ's interpretation of it are reasonable[47]—and thereby hangs a tale. Had the DOJ or Congress agreed with the Ninth Circuit's perception of the impropriety of sending notice directly to a represented claimant, either one could have changed the policy at some time during the twenty years since the regulation was enacted.[48] Instead, they acquiesced in the findings of the courts that heeded the regulation's "or."[49] Under the principles of judicial deference articulated by the Supreme Court and the Ninth Circuit itself, absent exceptional circumstances[50] courts should approve the discretion the statute and regulation give to administrative agencies.

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42. *See supra* note 14.

43. *See Graham,* 96 F.3d at 449-50. Giving deference to the Bureau's blunder of sending the notice to the claimant, the majority declares, would be improperly applying the *Chevron* doctrine to the "rubber-stamping [of] an after-the-fact rationalization of a mistake." 96 F.3d at 450.

44. *See supra* note 37 and accompanying text.

45. *See supra* notes 32-40 and accompanying text.

46. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 864 (1984); *see also* Stedman v. Pederson, 875 F.2d 781, 784 (9th Cir. 1989).

47. *See supra* notes 26-28 and accompanying text.

48. *See* Diamond Roofing Co. v. Occupational Safety & Health Review Commn., 528 F.2d 645, 648-49 (5th Cir. 1976) ("If the regulation missed its mark, the fault lies in the wording of the regulation — a matter easily remedied under the flexible regulation promulgating structure . . . .").

49. *See supra* note 13.

50. *See infra* Part III.

B. *Speaking Plain and to the Purpose: Language, Construction, and the Department of Justice's Intent*

A court may find the traditional reading of 28 C.F.R. § 14.9 unreasonable under *Bowles* only if it clearly thwarts the plain language of the regulation or the intent of the regulation's drafter, the DOJ.[51] Yet the unambiguous language of the regulation[52] requires that courts approve whatever recipient the agency chooses, be it the claimant or her attorney. This section argues that the traditional reading of section 14.9(a), which allows notice of denial to be sent to either the claimant or her attorney, frustrates neither the regulation's plain meaning nor the purposes of the regulation and the statutory notice provisions it effects. This section makes clear, furthermore, that the evidence of the DOJ's intent in drafting section 14.9(a) supports the traditional interpretation of the regulation.

The text of a regulation or statute is the accepted starting point for interpretation.[53] With exquisite reason, courts have agreed that the purpose and meaning of statutes and regulations are best indicated by the "ordinary meaning" of the words used.[54] The judiciary, furthermore, is loath to assume that the drafters' work product is merely full of sound and fury, signifying nothing: the courts have a duty to give effect, if possible, to every word and phrase used in a regulation.[55] In short, the plain meaning controls.[56]

The text of 28 C.F.R. § 14.9(a) is clear.[57] The regulation provides: "Final denial of an administrative claim shall be in writing and sent to the claimant, his attorney, *or* legal representative by certified or registered mail."[58] In common usage, the word "or"

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51. *See* Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994).

52. The regulation provides: "Final denial of an administrative claim shall be in writing and sent to the claimant, his attorney, or legal representative by certified or registered mail." 28 C.F.R. § 14.9(a) (1998).

53. *See, e.g.,* Moskal v. United States, 498 U.S. 103, 108 (1990); Pennsylvania Dept. of Pub. Welfare v. Davenport, 495 U.S. 552, 557-58 (1990); Citizens Action League v. Kizer, 887 F.2d 1003, 1006 (9th Cir. 1989). Courts apply the same principles of construction to regulations as they do to statutes. *See, e.g.,* Anderson Bros. Ford v. Valencia, 452 U.S. 205, 222 n.20 (1981); Miller v. United States, 294 U.S. 435, 439 (1935).

54. *See Moskal,* 498 U.S. at 108. *See also, e.g.,* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 57 n.9 (1996); Morales v. Trans World Airlines, 504 U.S. 374, 385 n.2 (1992); United States v. Locke, 471 U.S. 84, 95-96 (1985); United States v. 594,464 Pounds of Salmon, 871 F.2d 824, 825-26 (9th Cir. 1989).

55. *See* United States Dept. of the Treasury v. Fabe, 508 U.S. 491, 504 n.6 (1993); United States v. Nordic Village, Inc., 503 U.S. 30, 36 (1992).

56. *See* United States Natl. Bank of Or. v. Independent Ins. Agents of America, Inc., 508 U.S. 439, 453-54 (1993); Connecticut Natl. Bank v. Germain, 503 U.S. 249, 254 (1992); Strickland v. Commissioner, Me. Dept. of Human Serv., 48 F.3d 12, 17 (1st Cir. 1995).

57. A disagreement between courts as to the interpretation of a statute or regulation does not make the statute or regulation ambiguous for purposes of plain-language analysis. *See* Jones v. Brown, 41 F.3d 634, 639 (Fed. Cir. 1994).

58. 28 C.F.R. § 14.9(a) (emphasis added).

indicates a choice among all of the concepts which surround it.[59] Rather than following the Ninth Circuit's attempt to fright the words out of their right sense and ignore part of the text, courts should presume the usual disjunctive usage of "or" and allow an agency sending a notice of denial to choose between the claimant and her attorney.[60]

Giving effect to section 14.9(a)'s text does not obstruct the DOJ's intent in promulgating the regulation or the aim of the FTCA's notice provisions. A court may ignore the plain language of a regulation only when straightforward application of the text would lead to absurd results, ones that clearly frustrate the drafters' intent.[61] In *Willis v. United States*,[62] for example, the Second Circuit held that Congress intended the "or" in section 2401(b) of the FTCA[63] to mean "and."[64] Otherwise, a claimant who filed a claim with the administrative agency within two years of the claim's accrual could thereafter bring a claim in a district court at any time in the future, no matter how heavy the interim.[65] The specter of such an absurd result,[66] the court found, justified the performance of "surgery upon [the] statutory text[ ] . . . thereby giving effect to what Congress meant as distinguished from what it said."[67] Other

59. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1585 (1986) ("*conj. 1* — used as a function word to indicate (1) an alternative between different or unlike things, states, or actions; (2) choice between alternative things, states or courses."); THE AMERICAN HERITAGE DICTIONARY 873 (2d college ed. 1985) ("a. An alternative, usually only before the last term of a series."); BOB DOROUGH, *Conjunction Junction, on* SCHOOLHOUSE ROCK: GRAMMAR ROCK (American Broadcasting Music, Inc. 1973).

60. *See* Graham v. United States, 96 F.3d 446, 450 (9th Cir. 1996) (Kozinski, J., dissenting); *see also supra* note 13 and accompanying text.

61. *See* California Fed. Sav. & Loan Assn. v. Guerra, 479 U.S. 272, 284 (1987); Commissioner v. Brown, 380 U.S. 563, 571 (1965); Trustees of Ind. Univ. v. United States, 618 F.2d 736, 739 (Ct. Cl. 1980); Chicago Transit Auth. v. Adams, 607 F.2d 1284, 1289-90 (7th Cir. 1979). Alternatively, in exceptional cases where straightforward application of regulatory text leads to a particularly unfair expiration of the limitations period, courts may utilize the doctrine of equitable tolling. *See infra* Part III.

62. 719 F.2d 608 (2d Cir. 1983).

63. *See supra* note 8.

64. Other courts holding § 2401(b)'s "or" to mean "and" include the 5th Circuit in *Houston v. United States Postal Serv.*, 823 F.2d 896, 902 (5th Cir. 1987), and the D.C. Circuit in *Schuler v. United States*, 628 F.2d 199, 201 (D.C. Cir. 1980).

65. *See* Willis v. United States, 719 F.2d 608, 610 (2d Cir. 1983).

66. Such a result would deprive a potential defendant of the repose that statutes of limitations are meant to provide. *See* United States v. Kubrick, 444 U.S. 111, 117 (1979); English v. Pabst Brewing Co., 828 F.2d 1047, 1049 (4th Cir. 1987). The evidence in a case, furthermore, would be left but a very prey to time: the eventual factfinder would have to piece out the imperfections of unavailable or forgetful witnesses and lost evidence. *See Kubrick*, 444 U.S. at 117; Mortensen v. United States, 509 F. Supp. 23, 27 (S.D.N.Y. 1980).

67. *Willis*, 719 F.2d at 610. The court points to the legislative history of § 2401 to illuminate Congress's intent that the "or" mean "and." In the Senate report, for example, the congressional committee stated that "a claimant must file a claim in writing . . . within 2 years after the claim accrues, and [is] further require[d to file] a court action within 6 months of notice by certified or registered mail of a final decision . . . ." S. REP. NO. 89-1327, Analysis

courts, similarly wishing to avoid results that plainly contradict legislative purpose, have also refused to be bound by the whips and scorns of a strict grammatical construction.[68]

In contrast to these cases, however, the traditional reading of 28 C.F.R. § 14.9(a) is consistent with the intent of the regulation's drafter. The purpose of section 14.9(a) is to explicate the FTCA's notice provisions,[69] which say only that an agency must send the notice of denial by certified or registered mail.[70] Section 14.9(a) clarifies these provisions by specifying to whom the notice may be sent, and the traditional interpretation of the regulation simply conforms to the words of the regulation. Any fears that the traditional interpretation of section 14.9(a) produces "absurd or futile"[71] results, therefore, are shallow, without instance.[72]

The Ninth Circuit, however, focuses not on the purpose of the regulation but rather on the purpose of the statutory notice provisions. Reasoning that the object of the notice provisions is to "ensure that notice is given in a manner that effectively triggers the time for filing a court action,"[73] the court claims that allowing an agency to send notice directly to a represented claimant thwarts that purpose.[74] The court focuses on an attorney's responsibility for preparing and filing the suit,[75] implying that the running of the limi-

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§ 7 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2515, 2522; *see also Willis,* 719 F.2d at 612. The Senate report adds that the proposed amendments to the FTCA "will have the effect of reducing the number of pending claims which may become stale and long delayed because of the extended time required for their consideration." S. REP. NO. 89-1327, Statement. After judicial recognition of such clearly expressed intent, Congress likely felt it unnecessary to change the wording of the Act's notice provisions. The history of § 14.9(a), on the other hand, evidences no such clear intent contrary to the regulation's plain meaning. Though § 14.9(a) is a regulation, unlike § 2401, the same principles of construction apply to both regulations and statutes. *See supra* note 53.

68. *See supra* note 61 and accompanying text.

69. *See* Graham v. United States, 96 F.3d 446, 448 (9th Cir. 1996) ("In implementing the statute, the Department of Justice has attempted to prescribe the notice requirement more fully . . . .").

70. *See* 28 U.S.C. §§ 2401(b), 2675(a) (1994).

71. J.C. Penney Co. v. Commissioner, 312 F.2d 65, 68 (2d Cir. 1962).

72. As Part II demonstrates, sending notice to a represented claimant pursuant to § 14.9 does not violate the ethical rule against communicating with represented parties, because the ethical rule itself contains an exception for communications authorized by law. Allowing a court to overturn as "absurd" (i.e., as an ethical violation) this or any other law authorizing contact with a represented claimant would render that exception meaningless. *See infra* Part II.

73. *Graham,* 96 F.3d at 448. In support of its claim, the majority adduces the Senate and House reports on the 1966 amendments to the FTCA. *See* 96 F.3d at 448. Neither report, however, discusses the notice provisions. The Senate report, for example, merely reiterates that the claimant must file suit within six months of notice by certified or registered mail of the agency's final decision. *See* S. REP. NO. 89-1327, Analysis § 7 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2515, 2522.

74. *See Graham,* 96 F.3d at 448.

75. *See* 96 F.3d at 448.

tations period should depend upon the agency's mailing the denial notice to the person who will pursue the claim. But this supposition greets the statute with sharp defiance: section 2401(b) specifically states that the statute of limitations is triggered on the date the notice is *mailed.*[76] Neither notice provision deems relevant the date of receipt or the recipient's role in proceeding with the claim; they simply dictate that the claimant has six months from the date of mailing to file suit. Neither receipt by nor actual notice to the claimant is required.[77] An agency effectively commences the six-month limitations period by sending the notice directly to a represented claimant.

Even assuming arguendo that satisfactory triggering of the statute of limitations requires receipt and comprehension by the person who will prepare the claim, the Ninth Circuit's per se rule would not advance that end enough to justify its bloody constraint on the plain language of section 14.9(a). The *Graham* majority's interpretation benefits only those claimants with attorneys; its translation of section 14.9(a) cannot make an unrepresented claimant more noble in reason and better able to understand the notice she receives. The Ninth Circuit's reading, furthermore, will matter only in those cases where a represented claimant fails to timely forward the notice to her attorney. Only then would the traditional reading puzzle the putative will of the FTCA's notice provisions; this hardly constitutes the "plain variance" or "absurd result" necessary to ignore the text of the regulation.[78] And for myriad reasons, an attorney could untimely file a claimant's suit even if the agency sends the notice of denial directly to the attorney.[79] The *Graham* attorney-only pre-

76. *See* 28 U.S.C. § 2401(b) (1994) ("unless action is begun within six months after the date of mailing"). Other statutes, in contrast, provide that *receipt* of the notice triggers the statute of limitations. *See, e.g.,* 42 U.S.C. § 2000e-16(c) (1994) (providing that a complaint against the government for a violation of Title VII of the Civil Rights Act must be filed within 90 days of the claimant's receipt of notice of final action taken by the EEOC).

77. *See* Berti v. V.A. Hosp., 860 F.2d 338, 340 (9th Cir. 1988); Carr v. Veterans Admin., 522 F.2d 1355, 1357 (5th Cir. 1975); Pascarella v. United States, 582 F. Supp. 790, 792 (D. Conn. 1984).

The two-year statute of limitations in § 2401(b) is equally strict. A claim accrues once a plaintiff discovers the existence and cause of her injury, for example, even if she is unaware that her injury was negligently inflicted or that she has legal rights. *See* United States v. Kubrick, 444 U.S. 111, 123 (1979); Golden v. U.S. Marshals Serv., No. C 95-3417, 1995 WL 705134, at *3 n.2 (N.D. Cal. Nov. 15, 1995).

78. In those cases where the attorney did not receive notice because the administrative agency did not act fairly (where the agency deliberately declined to send the notice to an attorney with whom it had been previously communicating, for example), a court could equitably toll the statute of limitations. *See infra* Part III.

79. In *Pascarella v. United States,* 582 F. Supp. 790 (D. Conn. 1984), for example, the General Services Administration sent its final denial of the plaintiff's claim to her attorney at his firm. No one at the firm ever brought the notice to the attention of the plaintiff's counsel, so both he and the plaintiff remained unaware of the denial until after the statute of limitations had run. The court, unsympathetic to their plight, issued summary judgment for the defendant. *See* 582 F. Supp. at 792. Potential mishaps need not be as complicated as that.

cept is a tool too rudely stamped to achieve the statute's supposed aim.

An examination of other regulations drafted by the subdivisions of the DOJ, furthermore, demonstrates the DOJ's purposefulness in designating both a represented claimant and her attorney as authorized recipients. In other regulations but not in section 14.9(a), the Attorney General allowed limitations on the parties to whom agencies may send notice. By doing so, the DOJ evinced its most profound earnest that agencies be free to choose the recipient of the notice of denial. The regulations of the DOJ's Immigration and Naturalization Service (INS),[80] for example, direct that the INS send notice only to the attorney or representative of record if the person is represented.[81] By passing on this attorney-only notice provision in the INS regulations, the DOJ has exhibited its ability to limit the entities to whom notice may be sent.[82] That the Attorney General chose to employ the differing language of section 14.9(a) with respect to FTCA claims confirms its intent to allow notice under the FTCA to be sent also to a represented claimant.[83] If it

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An attorney could simply misplace the notice of denial, for instance, or miscalculate the date on which the limitations period expires.

80. The INS, like the other DOJ subdivisions, remains under the control of the DOJ. The Attorney General bears the ultimate responsibility of administering and enforcing the immigration laws, controls all employees and records of the INS, and is charged with promulgating the immigration regulations. *See* 8 U.S.C. § 1103(a) (1994). The Attorney General may delegate his responsibilities and authority to the Commissioner of the INS, *see* 8 U.S.C. § 1103(b), but doing so does not divest the Attorney General of any of his powers, privileges, or duties. *See* 8 C.F.R. § 2.1 (1994).

81. 8 C.F.R. § 292.5(a) (1994) provides: "Whenever a person is required by any of the provisions of this chapter to give or be given notice[,] . . . such notice . . . shall be given by or to . . . the attorney or representative of record, or the person himself if unrepresented."

82. This differentiation regarding notice also appears in other contexts. The bankruptcy rules, for example, contain several contrasting rules of service. Rule 3007 states that an objection to a claim must be delivered to the claimant; Rule 7004(h) requires that service on insured depository institutions be made to their counsel; and Rule 7004(b)(9) requires that a debtor and its attorney be served simultaneously if the debtor is represented. *See In re* Lomas Financial Corp., 212 B.R. 46, 52-53 (Bankr. D. Del. 1997). Section 405 of the Social Security Act (SSA), which deals with the procedure for payment of social security benefits, provides that notice of a final decision by the Commissioner of Social Security will be mailed to the individual. *See* 42 U.S.C. § 405; 20 C.F.R. § 422.210(c) (1994). If an individual formally appoints a representative, however, the Social Security Administration will send the notice to the representative. *See* 20 C.F.R. § 404.1707; 20 C.F.R. § 404.1715 (1994). In either case, the Fifth Circuit has held that the statute of limitations on judicial review under the SSA begins running when the *individual* receives notice, not when the attorney receives it. *See* Flores v. Sullivan, 945 F.2d 109, 113 (5th Cir. 1991).

83. *Cf.* BFP v. Resolution Trust Corp., 511 U.S. 531, 537 (1994) ("[I]t is generally presumed that [a drafter] acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another."); Tafoya v. United States Dept. of Justice, Law Enforcement Assistance Admin., 748 F.2d 1389, 1391-92 (10th Cir. 1984) ("We presume that . . . clear use of different terminology within a body of legislation is evidence of an intentional differentiation.").

had had no such intent, the DOJ would have used language like that of the INS regulation.[84]

The DOJ intended, as clear as is the summer sun, to authorize agencies to send notice to the claimant *or* her attorney. Except in extraordinary conditions that justify an exception to the traditional reading,[85] courts should yield to that intent.

II. Much Ado About Nothing: The Ethics of Sending Notice to a Represented Claimant

The traditional construction of 28 C.F.R. § 14.9(a) does not violate the ethical rule against attorneys communicating with parties they know to be represented by legal counsel.[86] Because the rule itself allows for direct contact with represented parties where authorized by law, sending the notice of denial to a represented claimant does not contravene the rule.

The *Graham* majority issues its per se rule largely in response to the ethical violation it misreads into an agency's communicating directly with a represented claimant. The court, in refusing to dismiss Graham's suit as untimely,[87] calls upon the long-standing ethical rule that prohibits attorneys from communicating with persons they know to be represented about the subject matter of the representation. This rule, the Ninth Circuit explains, is designed to prevent a lawyer from improperly taking advantage of a lay person's lack of

84. The language of the INS regulation also counters any claim that the DOJ included the words "the claimant" in 28 C.F.R. § 14.9(a) only to account for claimants not represented by an attorney. The INS Commissioner, and therefore the DOJ, *see supra* note 80, encompasses unrepresented claimants much more definitely in the INS regulation by providing that notice be sent to "the person himself if unrepresented." 8 C.F.R. § 292.5. Had the DOJ intended for notice to be sent only to a represented claimant's attorney, furthermore, it could have accomplished that result without naming "the claimant" at all. A regulation naming the claimant's attorney as the only proper recipient of the denial notice would allow for the notice to be sent to the claimant if she had no attorney.

85. *See infra* Part III.

86. The general embodiment of this proscription is Rule 4.2 of the American Bar Association (ABA) *Model Rules of Professional Conduct,* which provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Model Rules of Professional Conduct Rule 4.2 (1995). The Model Rules of Professional Conduct were adopted in 1983, replacing the ABA *Model Code of Professional Responsibility,* which itself superseded the 1908 *Canons of Professional Ethics.* DR 7-104(A)(1) of the *Model Code* was substantially identical to the original Model Rule 4.2. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 396 (1995); Annotated Model Rules of Professional Conduct Rule 4.2, Model Code Comparison (1983).

All 50 states and the District of Columbia have rules to protect represented persons from contact by opposing counsel. *See* Graham v. United States, 96 F.3d 446, 449 (9th Cir. 1996). *See generally* ABA Comm. on Ethics and Professional Responsibility Formal Op. 396 (1995) (examining the history of the prohibition, beginning with Hoffman's 1836 treatise).

87. For the facts of the case, see *supra* note 14.

legal knowledge and training.[88] So while the majority's rewriting of the regulation is madness, there is commendable method in it; the court wishes to prevent agencies from causing claimants like Graham to lose their claims through their own incompetence.[89] The majority accordingly concludes that the direct contact with a represented claimant permitted by 28 C.F.R. § 14.9(a) violates the anti-contact ethical norm.[90]

The milk of human kindness, however, cannot overcome the express license granted by the ethical rule itself for an administrative agency to send the notice of denial to a claimant. The rule specifically allows communication with a represented party if such contact is "authorized by law."[91] Communications authorized by law, the drafters of the model rule elucidated, include those that are "specifically authorized by statute, court rule, court order, *statutorily authorized regulation* or judicial decisional precedent."[92] Even the Ninth Circuit admits that "express legal authorization overrides ethical rules."[93] Because the FTCA directs the Attorney General to promulgate regulations to implement the Act,[94] sending notice to a represented claimant under the auspices of 28 C.F.R. § 14.9(a) fits into the "authorized by law" exception to Model Rule 4.2, its predecessors, and its state-law progeny.[95]

A proponent of the Ninth Circuit's standpoint might attempt to fright the soul of this fearful adversary by arguing that the general authority the FTCA gives to the DOJ to promulgate regulations does not specifically authorize the DOJ to issue regulations that contravene ethical rules, and that such regulations are therefore "not authorized by law." Even assuming arguendo that section 14.9(a) does violate the anti-contact rule, however, the DOJ did not

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88. *See Graham,* 96 F.3d at 449; *see also* Hill v. St. Louis Univ., 123 F.3d 1114, 1121 (8th Cir. 1997); ABA Comm. on Ethics and Professional Responsibility Formal Op. 396 (1995); ANNOTATED MODEL RULES, *supra* note 86, Legal Background.

89. *See Graham,* 96 F.3d at 448.

90. *See* 96 F.3d at 449.

91. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1995). Every jurisdiction but Florida expressly makes this exception to its anti-contact rule. *See* ABA Comm. on Ethics and Professional Responsibility Formal Op. 396 (1995). *But see also* Florida Bar Assn. Comm. on Professional Ethics, Op. 89-6 (1990) (maintaining that even Florida's rule "must be construed to allow compliance with statutes requiring notice or service of process directly on the adverse party"). For the sake of clarity, this Note will use the language of Model Rule 4.2 and the ABA opinions regarding Rule 4.2.

92. ABA Comm. on Ethics and Professional Responsibility Formal Op. 396 (1995) (emphasis added).

93. *Graham,* 96 F.3d at 449.

94. *See* 28 U.S.C. § 2672 (1994).

95. If issued pursuant to statutory authority, substantive agency regulations implementing federal statutes have the "force and effect of law." *See* Chrysler Corp. v. Brown, 441 U.S. 281, 295-96 (1979 (internal quotation marks omitted)); Public Utilities Commn. v. United States, 355 U.S. 534, 542 (1958).

need specific congressional authorization to promulgate such a regulation. The Supreme Court has held that state law is nullified to the extent that it conflicts with a federal regulation.[96] The Court added that "[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law; moreover, whether the administrator failed to exercise an option to promulgate regulations which did not disturb state law is not dispositive."[97] The general grant of authority the Act gives to the DOJ, therefore, is sufficient to support the DOJ's issuance of 28 C.F.R. § 14.9(a), regardless of whether that regulation contradicts the no-contact rule.[98] An agency sending notice to a represented claimant in accordance with section 14.9(a) confines itself within the modest limits of ethics, because doing so is authorized by law.

Refusing to be cornered by the authorized-by-law exception, however, the *Graham* majority screws its courage to the sticking place and asserts that the *real* issue is whether 28 C.F.R. § 14.9(a) should even be interpreted to authorize agency contact with a represented claimant. The court notes that the defendant "government offers no guidance as to why such a blanket authorization is necessary, or even useful, in this context"[99] and chides the Eighth Circuit for not explaining why the regulation should be read to authorize such contact when it upheld the mailing of notice to a represented claimant in *Hanson v. United States*.[100] The regulation

96. *See* Fidelity Fed. Sav. & Loan Assn. v. De La Cuesta, 458 U.S. 141, 153 (1982); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

97. *Fidelity Fed.*, 458 U.S. at 154; *see also Chrysler Corp.*, 441 U.S. at 308; United States v. Shimer, 367 U.S. 374, 381-83 (1961).

98. Nevertheless, the judiciary has expressed some concern over an agency being allowed to misuse the "authorized by law" exception to exempt its attorneys from adherence to the rules of ethics. The single regulation called into question on these grounds is 28 C.F.R. § 77, in which the DOJ authorizes government attorneys to communicate directly with a number of represented parties, including represented defendants being investigated for "additional, different, or ongoing crimes or civil violations" and employees of a represented organization who are not "controlling individual[s]." *See* 28 C.F.R. §§ 77.6(e), 77.10(c) (1994). At least one court has held that this regulation is "not authorized by law," on the grounds that general statutes do not give sufficient authority for the DOJ to excuse its attorneys from state ethical requirements. *See* United States *ex rel.* O'Keefe v. McDonnell Douglas Corp., 961 F. Supp. 1288, 1294 (E.D. Mo. 1997); *cf.* United States v. Lopez, 4 F.3d 1455 (9th Cir. 1993) (reaching the same holding regarding the "Thornburgh Memorandum," a DOJ policy statement that was the precursor to 28 C.F.R. § 77). *O'Keefe*, however, overlooks the Supreme Court precedent holding that a regulation prevails over conflicting state law. *See, e.g., Fidelity Fed.*, 458 U.S. at 153-54; *Florida Lime & Avocado Growers, Inc.*, 373 U.S. at 142-43. In addition, the administrative role of an attorney merely sending notice of denial to a claimant does not raise the same ethical dilemmas as an attorney performing the investigative and adversarial functions contemplated in § 77.

99. Graham v. United States, 96 F.3d 441, 449 (9th Cir. 1996).

100. *See* 96 F.3d at 449; Hanson v. United States, 908 F.2d 257 (8th Cir. 1990). *Hanson* is the only other appellate decision to date on the ethical violation issue. In *Hanson*, the Bureau of Prisons sent its notice of denial by certified letter to the claimant, who subsequently did not file his medical malpractice suit against the government until nearly three months after the limitations period had expired. In his appeal from the dismissal of his claim, the

should therefore be interpreted, the court concludes, not as "an exception to prevailing ethical norms . . . [but rather] in accordance with those norms."[101]

The Ninth Circuit's reasoning, however, overlooks the fact that in all American jurisdictions but one,[102] the exception *is* the norm. Because section 14.9(a) gives express permission to contact a represented party, the lawyer who does so is almost universally in compliance with the ethical rule. Neither the government nor the judiciary need cudgel their brains to justify the necessity or usefulness of authorizing the exception to the ethical rule. The DOJ had the authority to draft this regulation, and the regulation says an agency may send notice to the claimant. The Ninth Circuit should respect that administrative decision, rather than calling for the DOJ or another court to justify the regulation.[103]

An agency deciding where to send notice, therefore, need not think too precisely on the event. Regardless of whether the sending of the notice of denial to a represented claimant is intentional[104] or erroneous, the agency that does so violates no ethical rule against communicating with represented parties.[105]

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claimant argued that sending the notice to him instead of to his attorney of record violated DR 7-104(a)(1) of the ABA's *Model Code of Professional Responsibility,* and therefore rendered the notice ineffective. The Eighth Circuit affirmed the dismissal, holding that since 28 C.F.R. § 14.9(a) authorized the Bureau to send the notice to the claimant, no ethical violation occurred. *See Hanson,* 908 F.2d at 258.

The *Graham* dissent hurls down its indignation at the majority's censure of its fellow appellate court: "No doubt the Eighth Circuit didn't offer such an explanation," the dissent retorts, "because it saw no plausible way to wring the majority's meaning from the regulation's sparse language." *Graham,* 96 F.3d at 450 (Kozinski, J., dissenting).

101. *Graham,* 96 F.3d at 449.

102. *See supra* note 91.

103. Concluding that 28 C.F.R. § 14.9(a) is not authorized by law, furthermore, would have dire effects on the administrative state. As the dissent points out, scores of federal regulations "authorize — perhaps even require — that notice be sent to the claimant personally[,]" to the claimant *and* her attorney, or in language substantially identical to that of 28 C.F.R. § 14.9(a), to the claimant *or* her attorney. *See Graham,* 96 F.3d at 452 nn.3, 5 (Kozinski, J., dissenting) (listing 31 regulations requiring notice to be sent to the claimant, 7 regulations requiring notice to be sent to the claimant and her attorney, and 22 regulations requiring notice to be sent to the claimant or her attorney). The *Graham* per se rule would invalidate all of the regulations in the second and third groups, and possibly those in the first as well, a result that Congress could not have intended.

104. If the claimant can demonstrate that the agency deliberately sent the notice to her instead of to her known counsel with the intent of causing her to miss the six-month deadline, a court could exercise its equitable discretion, toll the statute of limitations, and allow her suit to proceed. *See infra* Part III.

105. *See Hanson,* 908 F.2d at 258; Robinson v. United States, Nos. CIV. 92-4869, CIV. 92-6175, 1993 WL 74841, at *7 n.3 (E.D. Pa. Mar. 15, 1993) ("[T]he DEA was 'authorized by law' [i.e., 28 C.F.R. § 14.9] to send the final denial to the claimant."); *cf.* Weinstein v. Rosenbloom, 322 N.E.2d 20, 24-25 (Ill. 1974) (holding that notice requesting a continuance sent by an attorney directly to the adverse party, in accordance with the applicable regulation of the Illinois Industrial Commission, was "pursuant to law" and therefore did not violate Canon 7, EC 7-18 of the Code of Professional Responsibility).

III. The Better Part of Valor is Discretion: The Equitable Tolling Alternative

Even though sending notice to a represented claimant is authorized by 28 C.F.R. § 14.9(a) and therefore does not in and of itself violate ethical norms, occasionally a court should refuse to countenance such an action and allow a suit otherwise precluded by the statute of limitations to proceed. This Part describes some of those situations and contends that even in those cases, the *Graham* majority's per se rule prohibiting agencies from sending notice to represented claimants is not necessary to do good service to claimants. The per se rule, moreover, is overbroad: any represented claimant who received notice would benefit from the rule, regardless of the circumstances surrounding the running of the statute of limitations in that case.

Instead, in extreme cases courts should apply the well-established principles of equitable tolling to permit suit when dismissal would be unjust. The doctrine of equitable tolling allows a court to suspend the statute of limitations temporarily on grounds of fairness to the plaintiff, usually having to do with some secret mischief the defendant sets abroach.[106] Application of this doctrine strikes the proper balance between serving the interests of justice and heeding the will of Congress in enacting the FTCA's statute of limitations. Courts may refuse to ratify an agency's sending of notice to a represented claimant, but if it were done, when 'tis done, then 'twere well it were done equitably.

Section III.A first describes the judicial acceptance of equitable tolling in the FTCA context. Acknowledging the need for some flexibility in applying statutes of limitations to bar actions under the Act, section III.A maintains that the doctrine of equitable tolling serves that need with more matter and less art than the Ninth Circuit's per se rule. Section III.B then presents the rules for equitable tolling under the Act, which rein in trial judges' discretion and en-

106. *See infra* section III.B. Many courts distinguish between two kinds of equitable exceptions to the limitations period: equitable tolling and equitable estoppel. When a plaintiff is unaware of her cause of action, these courts say, equitable tolling is the proper course. A court may toll the limitations period, for example, when "the defendant has wrongfully deceived or misled the plaintiff in order to conceal the existence of a cause of action." English v. Pabst Brewing Co., 828 F.2d 1047, 1049 (4th Cir. 1987); *see also* Kelley v. NLRB, 79 F.3d 1238, 1247-48 (1st Cir. 1996); Goodhand v. United States, 40 F.3d 209, 213 (7th Cir. 1994). Equitable estoppel, on the other hand, applies when the plaintiff knows about the cause of action. A court will toll the statute of limitations on the basis of equitable estoppel when the defendant's intentional misconduct causes the plaintiff to miss the filing deadline. *See Kelley,* 79 F.3d at 1247; *Goodhand,* 40 F.3d at 213; *English,* 828 F.2d at 1049.

The Supreme Court in *Irwin v. Department of Veterans Affairs,* 498 U.S. 89 (1990), however, noted in dictum that equitable estoppel should be treated as a form of equitable tolling. *See* 498 U.S. at 96. In any event, the courts agree that equitable exceptions in a suit against the government, whatever they are called, should be sparingly applied. *See infra* notes 130-32 and accompanying text.

sure that equitable tolling is applied only in exceptional cases. Section III.B also offers some applications of those standards to illustrate how the doctrine remains faithful to section 14.9(a) in most cases but allows a departure from the text where justified. Finally, section III.C demonstrates that by applying the doctrine of equitable tolling, a district court gave fit disposition to a suit brought under the Act.

A. *Both Rhyme and Reason: The Need for Equitable Tolling in Claims under the FTCA*

The doctrine of equitable tolling addresses the concerns of both fair play and circumspection. This doctrine allows courts to overlook the expiration of the limitations period, but only in cases where the facts and justice warrant such a result.

The Ninth Circuit, though it created a per se rule that does not comport with applicable law, followed the time-honored tradition of trying to protect unwitting plaintiffs. Cases where an agency sends the notice of denial to a claimant in a deliberate attempt to delay her filing of a lawsuit, for example, would justifiably catch the conscience of a court. A claimant might also deserve relief in cases where the claimant and her attorney strive mightily to preserve their legal rights but miss the limitations period because the notice was sent to the claimant and lost.[107] As the Sixth Circuit notes, the claimant often is not to blame when the course of judicial redress does not run smooth:

> [B]y setting short time limitation periods and establishing a maze of regulatory appeals, the government virtually assures that any but the most astute [claimant] will find his or her claim barred by some procedural technicality once he or she gets to the United States District Court. We . . . believe these plaintiffs should be able to pursue their individual claims.[108]

The Ninth Circuit advances this notion not wisely but too well. Courts do need to have a measure of flexibility in deciding whether or not to apply statutes of limitations in order to "further the interests of justice."[109] If a defendant sent the notice of denial to a claimant in a deliberate attempt to hinder her suit, for example, fairness to the plaintiff would warrant withholding enforcement of the statute of limitations.

But courts should not allow the exception to swallow the rule. The Ninth Circuit's per se rule against sending notice to repre-

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107. *See, e.g.*, McCaffrey v. Nylon, Inc., No. CIV.A.95-3787, 1996 WL 122710, at *1 (E.D. Pa. Mar. 13, 1996).

108. Andrews v. Orr, 851 F.2d 146, 152 (6th Cir. 1988) (internal quotation marks omitted).

109. Forti v. Suarez-Mason, 672 F. Supp. 1531, 1549 (N.D. Cal. 1987).

sented claimants encompasses *all* such claimants, regardless of the wherefores of their untimely filing. A claimant who let the limitations period expire out of sheer forgetfulness or even apathy, for example, would still benefit from the rule. That the Ninth Circuit spurns the clear language of section 14.9(a) to secure such an overbroad result is the most unkindest cut of all. By substituting the doctrine of equitable tolling, on the other hand, a court can determine on a case-by-case basis whether the sending of notice to a represented claimant justifies a departure from the license of 28 C.F.R. § 14.9(a).[110] The principles of equitable tolling, unlike the Ninth Circuit's per se rule, give courts the ability to permit technically time-barred suits only when doing so would serve the interests of justice.

Because of this selectivity, courts would be more comfortable with the equitable tolling alternative. The courts, far from agreeing that the gentler gamester is the soonest winner, are generally strict in requiring compliance with statutes of limitations:

> Procedural requirements . . . for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants. . . . "[I]n the long run, experience teaches us that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law."[111]

A court that believes that as a matter of course it must be cruel only to be kind would likely reject a per se rule that disregards the statute of limitations in every case where a represented claimant received notice. Even a more lenient court would probably take exception to a rule that allows undeserving claimants to profit. If courts instead followed the guidelines of equitable tolling already laid out by the judiciary, they could allow an untimely suit to proceed only when the facts of the case warrant such a result.

B. *The Happy Few: The Protocol of Equitable Tolling under the Act*

The courts have with right and conscience recognized the need for equitable tolling in actions under the FTCA. Dealing established precedent a very palpable hit, the Supreme Court held in *Irwin v. Department of Veterans Affairs*[112] that statutes of limitations in suits against the government, like those in actions against private defendants, may be equitably tolled.[113] The majority of

110. *See, e.g., McCaffrey,* 1996 WL 122710.

111. Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 152 (1984) (quoting Mohasco Corp. v. Silver, 447 U.S. 807, 826 (1980)); *see also* McNeil v. United States, 508 U.S. 106, 113 (1993).

112. 498 U.S. 89 (1990).

113. *See* 498 U.S. at 95-96. Before *Irwin,* courts had uniformly held that the statutory time limits in the FTCA were jurisdictional in nature and therefore could not be waived,

courts have since interpreted *Irwin* to mean that statutory time limits in most suits against the government,[114] including actions under the FTCA,[115] are not jurisdictional prerequisites and are therefore subject to waiver, equitable tolling, and estoppel.[116]

A court wishing to apply the doctrine of equitable tolling can go about its business straight, because the judiciary has already clearly specified when a court should utilize equitable tolling in an FTCA case. In *Irwin,* the Supreme Court limited equitable tolling to cases where "the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass."[117] The circuit courts, agreeing that equitable tolling is an "exceptional doctrine" generally available only to vigilant or deceived parties,[118] have clarified *Irwin* by specifying factors that weigh in favor of equitable tolling. These factors include the plaintiff's reasonable lack of knowledge, actual or constructive, of the filing requirements; her reasonableness in remaining unaware of the proper filing procedures; her diligence in pursuing her legal rights; and the absence of prejudice to the defendant if the case is allowed to proceed.[119]

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tolled, or estopped. *See, e.g.,* Soriano v. United States, 352 U.S. 270, 276 (1957); Gould v. U.S. Dept. of Health & Human Serv., 905 F.2d 738, 741 (4th Cir. 1990); Burns v. United States, 764 F.2d 722, 724 (9th Cir. 1985).

114. Although *Irwin* dealt with a Title VII employment discrimination action, the Court's holding has since been applied to a plethora of other types of suits against the United States. *See, e.g.,* Fadem v. United States, 52 F.3d 202 (9th Cir. 1995) (Quiet Title Act); Anderson v. Unisys Corp., 47 F.3d 302 (8th Cir. 1995) (Age Discrimination in Employment Act); Wilson v. United States, 23 F.3d 559 (1st Cir. 1994) (Public Vessels Act and Suits in Admiralty Act); Nunnally v. MacCausland, 996 F.2d 1 (1st Cir. 1993) (Civil Service Reform Act); Catawba Indian Tribe v. United States, 982 F.2d 1564 (Fed. Cir. 1993) (Tucker Act); Goldbach v. Sullivan, 779 F. Supp. 9 (N.D.N.Y. 1991) (Equal Access to Judgment Act). *But see* Webb v. United States, 66 F.3d 691 (4th Cir. 1995) (holding that the presumption of equitable tolling does not apply in tax refund cases).

115. The first circuit court to apply *Irwin* to the FTCA was the Eighth Circuit, in *Schmidt v. United States,* 933 F.2d 639 (8th Cir. 1991). The court found that "necessary to [*Irwin*'s] expressed holding is an implied holding that strict compliance with the statute of limitations is not a jurisdictional prerequisite to suing the government." 933 F.2d at 640. Other circuit courts have since concurred. *See, e.g.,* Goodhand v. United States, 40 F.3d 209, 213-14 (7th Cir. 1994); Glarner v. Department of Veterans Admin., 30 F.3d 697, 701 (6th Cir. 1994); Pipkin v. United States Postal Serv., 951 F.2d 272, 275 (10th Cir. 1991). In several cases, however, the Fifth Circuit has disregarded *Irwin* and held that the FTCA time limits remain jurisdictional and unwaivable. *See* Flory v. United States, 138 F.3d 157, 159 (5th Cir. 1998); Price v. United States, 69 F.3d 46, 54 (5th Cir. 1995).

116. *See Schmidt,* 933 F.2d at 640; *Glarner,* 30 F.3d at 701; *Goodhand,* 40 F.3d at 213-14; *cf.* Warren v. Department of the Interior Bureau of Land Management, 724 F.2d 776, 778 (9th Cir. 1984) (holding that the regulations promulgated pursuant to 28 U.S.C. § 2672, i.e. 28 C.F.R. §§ 14.1-14.11, are not jurisdictional prerequisites).

117. *Irwin,* 498 U.S. at 96; *see also* Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 151 (1984).

118. *See* Wilson v. United States, 23 F.3d 559, 561-62 (1st Cir. 1994).

119. *See, e.g.,* Kelley v. NLRB, 79 F.3d 1238, 1248 (1st Cir. 1996); Glarner v. Department of Veterans Admin., 30 F.3d 697, 702 (6th Cir. 1994).

In short, the courts recognize that the patient must minister to herself. They will not extend equitable tolling to cases involving inexcusable or "garden variety" neglect,[120] where the claimant "failed to exercise due diligence in preserving [her] legal rights."[121] For instance, a plaintiff would probably not receive the benefits of equitable tolling if she just forgot to give the notice to the earnest advocate she hired to plead for her. Similarly, the courts would almost certainly refuse to forgive a missed deadline if the claimant gave the notice to her attorney but the attorney simply did not file in time. The result of a case like *Graham*, where the claimant accidentally throws the notice away,[122] is more difficult to predict. Graham's failure to exercise due diligence — to examine her mail at least cursorily and refrain from discarding letters from the agency with which she filed a claim — might prevent her from reaping the benefits of equitable tolling.[123] On the other hand, a court applying the principles of equitable tolling might examine Graham's educational and personal background, as well as her probable expectation that all notices would be sent to her attorney, and determine that her throwing away the notice did not sink to the level of "garden variety" neglect.[124] So long as the claimant exercised the diligence

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120. *Black's Law Dictionary* defines "excusable neglect" as

> a failure to take the proper steps at the proper time, not in consequence of the party's own carelessness, inattention, or willful disregard of the process of the court, but in consequence of some unexpected or unavoidable hindrance or accident, or reliance on the care and vigilance of his counsel or on promises made by the adverse party.

BLACK'S LAW DICTIONARY 566 (6th ed. 1990). It adds that at least for purposes of a motion to vacate judgment, excusable neglect is "that neglect which might have been the act of a reasonably prudent person under the circumstances." *Id.; see also* United States v. York Elec. Constr. Co., 25 F.R.D. 478, 479 (D. N.D. 1960).

121. *Irwin*, 498 U.S. at 96; *see also Baldwin County Welcome Ctr.*, 466 U.S. at 151; Johnson v. United States Postal Serv., 64 F.3d 233, 238 (6th Cir. 1995); Arigo v. United States, 980 F.2d 1159, 1162 (8th Cir. 1992).

122. *See* Graham v. United States, 96 F.3d 446, 447 (9th Cir. 1996).

123. *See Irwin*, 498 U.S. at 96 ("We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights."); *Baldwin County Welcome Ctr.*, 466 U.S. at 151 ("One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence.").

The Ninth Circuit's description of the facts does not suggest that Graham failed to see the notice of denial. The majority indicates that the claimant "did not realize the import of the denial," which implies that Graham read or at least saw the letter. *See Graham*, 96 F.3d at 447. In a more generous reading of the facts, Graham might have assumed that the notice she received was simply a copy of a notice sent to her attorney. A "reasonably prudent person under [those] circumstances," BLACK'S LAW DICTIONARY 566 (6th ed. 1990), however, would have confirmed with her attorney sometime in the months after she received the notice that the attorney had indeed received a copy, or at least questioned whether the attorney had everything she needed to file suit. *Cf.* Pratt v. McCarthy, 850 F.2d 590, 592 (9th Cir. 1988) ("The mistake [of counsel] cannot be characterized as unique or extraordinary. . . . No one checked to ensure that a notice of appeal was filed when the deadline approached. To find excusable neglect on these facts would run roughshod over our existing precedent.").

124. *Cf.* Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. Partnership, 507 U.S. 380, 392 (1993) ("Although inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect, it is clear that 'excusable neglect' under [FRCP]

due in her particular situation, the courts may consider equitable tolling as an alternative to dismissal for untimely filing.

Applying this due-diligence criterion, the courts have indicated that they will toll the limitations period when the plaintiff reasonably relied on deceptive or obstructionist conduct of the defendant[125] and for other circumstances where the claimant's failure to meet the filing deadline was beyond her control.[126] Given the Ninth Circuit's focus on an agency's knowledge that the claimant is represented,[127] a court applying the doctrine to a FTCA suit might also require the attorney to have taken measures to inform the agency of her representation, and the agency to have acknowledged that representation. The courts might toll a limitations period, for instance, if an agency intentionally mails the notice to the claimant in the hope that the letter would never be forwarded to the known attorney, and its plan succeeds.[128] This justification for equitable tolling would not extricate Graham from her plight, unfortunately, because the *Graham* majority found that the Bureau's mailing of the notice to Graham was inadvertent.[129] As a more mundane example, equitable tolling might also be well thought upon in a case where an agency accidentally sends notice to the claimant, but due to some clerical error by the agency the claimant's attorney is unable to confirm, despite her best efforts, that the notice was sent at all.

The courts should not think meet to put a forgiving disposition on for every represented claimant who files untimely after directly receiving a notice of denial. Because "[t]he certainty and repose [that statutes of limitations] confer would be lost if their application is up for grabs in every case,"[130] courts should utilize equitable tolling carefully and only in limited circumstances.[131] In the context of suits against the government, some courts apply the doctrine of eq-

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Rule 6(b) is a somewhat 'elastic concept' and is not limited strictly to omissions caused by circumstances beyond the control of the movant.").

125. *See* Kelley v. NLRB, 79 F.3d 1238, 1247-48 (1st Cir. 1996); Goodhand v. United States, 40 F.3d 209, 213 (7th Cir. 1994); Niccolai v. United States Bureau of Prisons, Director, 4 F.3d 691, 693 (8th Cir. 1993).

126. *See Baldwin County Welcome Ctr.*, 466 U.S. at 151; *Kelley*, 79 F.3d at 1248 ("out of [the plaintiff's] hands"); *Niccolai*, 4 F.3d at 693; Forti v. Suarez-Mason, 672 F. Supp. 1531, 1550 (N.D. Cal. 1987) ("extraordinary events which are beyond plaintiffs' control").

127. *See Graham*, 96 F.3d at 448.

128. Of course, the significant evidentiary issue of the defendant's intent would have to be resolved by the court.

129. *See Graham*, 96 F.3d at 448.

130. English v. Pabst Brewing Co., 828 F.2d 1047, 1049 (4th Cir. 1987).

131. *See Kelley*, 79 F.3d at 1247; Pipkin v. United States Postal Serv., 951 F.2d 272, 275 (10th Cir. 1991); Pratt v. McCarthy, 850 F.2d 590, 592 (9th Cir. 1988).

uitable tolling even more sparingly.[132] Unless the facts surrounding the mailing of the notice of denial satisfy the requirements for the application of equitable tolling, the court should follow the traditional interpretation of section 14.9(a) and uphold the agency's mailing to the claimant.

By applying these principles to the facts of a particular FTCA action, a court can ease the winter of a deserving plaintiff's discontent without creating a glorious summer for everyone else. Absent an extraordinary state of affairs, the court would remain faithful to the language of and intent behind 28 C.F.R. § 14.9(a), as well as to the doctrines of judicial deference to agency interpretations of statutes and their own regulations. Because courts would apply equitable tolling only in exceptional situations, the regulation's "or" would still have meaning in the vast majority of cases.

C. *Thus Hath the Course of Justice Whirled About: The Sound Application of Equitable Tolling in* McCaffrey v. Nylon

The even-handed justice of equitable tolling has already been applied successfully to the notice provisions of the Act and 28 C.F.R. § 14.9(a). In 1996, a U.S. district court considered an issue and facts similar to those of *Graham*.[133] The National Park Service had been communicating with the claimants' attorney, but then broke its promise to notify the attorney of its final decision on their administrative claim.[134] The evidence also showed that the claimants never received the notice sent directly to them by the agency.[135] While acknowledging that the agency had discharged its obligation under the Act when it mailed the notice to the claimant, the court applied the doctrine of equitable tolling and allowed the plaintiffs to proceed despite the late filing of their suit.[136]

The court justifiably held that the facts warranted the equitable tolling of the statute of limitations. The plaintiffs were both diligent and misled;[137] they were not to blame for their failure to file within the statutory time limits.[138] Citing *Irwin* and finding that this was

132. *See, e.g., Kelley,* 79 F.3d at 1248 ("It is axiomatic that '[t]he grounds for tolling statutes of limitations are more limited in suits against the government.'" (quoting Swietlik v. United States, 779 F.2d 1306, 1311 (7th Cir. 1985))).

133. *See* McCaffrey v. Nylon, Inc., No. CIV.A.95-3787, 1996 WL 122710, at *1-2 (E.D. Pa. Mar. 13, 1996).

134. *See McCaffrey,* 1996 WL 122710, at *2.

135. *See McCaffrey,* 1996 WL 122710, at *2.

136. *See McCaffrey,* 1996 WL 122710, at *1-2.

137. *See* Wilson v. United States, 23 F.3d 559, 561-62 (1st Cir. 1994) (declining to apply equitable tolling in a case where the plaintiff had failed to exercise due diligence and was not misled by the government defendant).

138. Compare *McCaffrey,* 1996 WL 122710, at *1-2 with *Yillah v. United States,* No. CIV.A.98-2842, 1998 WL 661545 (E.D. Pa. Sept. 24, 1998), in which the court found an FTCA plaintiff undeserving of equitable relief. In response to a motion to dismiss for un-

"not a case in which a litigant 'failed to exercise due diligence in preserving his legal rights,'" the court denied defendants' motion to dismiss the untimely suit.[139] Significantly, the court noted that section 14.9(a) does *not* oblige the government to send notice to claimant's counsel.[140] Such a holding would have been mercy, but too much security: all represented claimants to whom the agency sent notice would then have been entitled to a tolling of the limitations period, regardless of the reason for their failure to file timely or their own fault therein.[141] By using the doctrine of equitable tolling instead of subsuming all claimants under a "one-size-fits-all" rule, the district court bent justice to its awe without breaking it all to pieces.

Conclusion

Courts should follow the traditional, literal reading of 28 C.F.R. § 14.9(a), which allows an agency to send the FTCA notice of denial to either a claimant or her attorney, even if the claimant is represented. Unlike the Ninth Circuit's per se rule requiring that agencies send notice only to the attorney, the traditional reading grows in a fair consent with the doctrine of judicial deference to agencies' interpretations of statutes and their own regulations, the plain language of section 14.9(a), the established precepts of statutory construction and the intent of the regulation's drafters. An agency choosing to send notice to a represented claimant does not violate the ethical rule against direct contact with represented persons, because the communication is authorized by law, the regulation itself.

In exceptional situations that justify a departure from the text of section 14.9(a) — where the claimant's suit is filed late because the agency sent the denial notice to the claimant even though justice and fairness, given the facts, would clearly require the agency to send notice to the attorney — the court may equitably toll the FTCA's statute of limitations to allow an otherwise-untimely suit to proceed. The equitable tolling approach departs from the tradi-

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timely filing, the plaintiff claimed that the defendant agency's use of permissive ("suit may be filed") rather than mandatory language in its notice of denial inadequately notified his counsel of the limitations period, thereby entitling the plaintiff to equitable relief. *See* 1998 WL 661545, at *3. The court found this argument "implausible," noting that "[e]ven a cursory reading of the relevant statutory provisions should have alerted counsel to inquire [with the agency] as to the actual status of the claim and whether Mr. Yillah's statutory rights were being affected." 1998 WL 661545, at *3. Refusing to invoke the doctrine of equitable tolling, the court dismissed the suit for lack of subject matter jurisdiction. *See* 1998 WL 661545, at *3-4.

139. *See McCaffrey,* 1996 WL 122710, at *2 (quoting Irwin v. Department of Veterans Affairs, 498 U.S. 89, 96 (1990)).

140. *See McCaffrey,* 1996 WL 122710, at *2.

141. *See supra* sections III.A and III.B.

tional reading of section 14.9(a) only in the most extraordinary and specific of circumstances. A court utilizing this doctrine, therefore, remains faithful for the most part to the precepts of judicial deference, the text of the regulation, the rules of statutory construction, and the drafters' intent. One district court has already successfully used equitable tolling in the FTCA context, correctly giving relief to a deserving plaintiff while at the same time avoiding the overbreadth of a per se rule.

The ability to achieve an equitable result in a specific case while considering only the facts of that case is a consummation devoutly to be wished. Such a solution accords section 14.9(a) itself and applicable case law, and serves the interests of claimants without unduly restricting the courts. Therefore let every court now task its thought, that this fair action may on foot be brought.[142]

142. Selections from SHAKESPEARE: THE COMPLETE WORKS appear throughout this Note. Under these circumstances, bluebooking is a custom more honored in the breach than in the observance.