

1-1-2007

# FEDERAL TORT CLAIMS ACT—SEEKING REDRESS AGAINST THE SOVEREIGN; BALANCING THE RIGHTS OF PLAINTIFFS AND THE GOVERNMENT WHEN APPLYING FEDERAL RULE OF CIVIL PROCEDURE 15(c) TO FTCA CLAIMS

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### Recommended Citation

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# NOTES

## FEDERAL TORT CLAIMS ACT—SEEKING REDRESS AGAINST THE SOVEREIGN: BALANCING THE RIGHTS OF PLAINTIFFS AND THE GOVERNMENT WHEN APPLYING FEDERAL RULE OF CIVIL PROCEDURE 15(C) TO FTCA CLAIMS

### INTRODUCTION

In December 2000, the *Boston Globe* published a series of articles exposing corruption within the Boston office of the Federal Bureau of Investigation (FBI).<sup>1</sup> One such piece focused on the 1965 slaying of Edward “Teddy” Deegan by two FBI informants.<sup>2</sup> The article discussed “secret documents” that demonstrated the FBI knew beforehand of the informants’ plans, but did nothing to stop the murder.<sup>3</sup> Upon learning of the FBI’s appalling actions, Teddy Deegan’s brother, Richard, filed an administrative wrongful death claim against the United States under the Federal Tort Claims Act

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1. Ralph Ranalli, *FBI Reportedly Hid Key Evidence, Documents Show It Knew of Deegan Slaying Plot in '65*, BOSTON GLOBE, Dec. 21, 2000, at B1 [hereinafter *FBI Reportedly Hid Key Evidence*], available at 2000 WLNR 2285990 (Westlaw); see also Patterson v. United States, 451 F.3d 268, 269 (1st Cir. 2006) (decision involving wrongful death claims arising from this alleged corruption). For more articles published in the *Boston Globe* alleging similar FBI corruption in Massachusetts, see Ralph Ranalli & Shelley Murphy, *New Rules on U.S. Informants Call for Scrutiny, Safeguards Changes Reflect the Fallout from Bulger—FBI Case*, BOSTON GLOBE, Jan. 12, 2001, at B6, available at 2001 WLNR 2244995 (Westlaw); Ralph Ranalli, *Papers May Tell of Slay Framing Judge to Read 1968 Transcript*, BOSTON GLOBE, Dec. 13, 2000, at B3, available at 2000 WLNR 2305468 (Westlaw).

2. *FBI Reportedly Hid Key Evidence*, *supra* note 1, at B1.

3. Deegan was described as a “small-time hoodlum” who was targeted for murder by mafia members who were also FBI informants. *Id.* One key report stated that a full two days before Deegan’s murder, another FBI informant told an FBI Special Agent that hit men were planning to kill Deegan, and that the murder had the blessing of the then New England Mafia boss, Raymond L.S. Patriarca. *Id.* Even so, the FBI did nothing to warn or otherwise protect Deegan, and he was shot to death in a Chelsea, Massachusetts, alley. *Id.* For an in-depth recounting of the Deegan tragedy, see Hans Sherrer, *FBI’s Legacy of Shame, Timeline of the FBI’s Four-Decades Long Cover-Up of Complicity in Edward Deegan’s Murder, and the Agencies Frame-Up of Four Innocent Men*, JUSTICE: DENIED MAG., Winter 2005, at 24, available at [http://justicedenied.org/issue/issue\\_27/fbi's\\_legacy\\_of\\_shame.html](http://justicedenied.org/issue/issue_27/fbi's_legacy_of_shame.html).

(FTCA).<sup>4</sup> However, the claim was subsequently denied on technical grounds.<sup>5</sup>

Nearly a year later, Teddy Deegan's daughter, Catherine Deegan Patterson, and her sister, Yvonne Deegan Gioka, submitted their own administrative FTCA claim against the government<sup>6</sup> for wrongful death and infliction of emotional distress.<sup>7</sup> However, their administrative claim was filed after the FTCA's two-year statute of limitations had tolled; therefore, it was denied by the government on the ground that it was time-barred.<sup>8</sup> In response, Catherine and Yvonne filed a claim in the U.S. District Court for the District of Massachusetts, arguing that even if untimely, their complaint should nonetheless "relate back" to the date of Richard Deegan's original administrative FTCA claim and avoid being swallowed up by the government's statute of limitations defense.<sup>9</sup>

The relation-back doctrine, codified by Federal Rule of Civil Procedure (FRCP) 15(c), has been applied in the context of FTCA claims with conflicting results, leading to uncertainty as to whether the rule is applicable in such disputes.<sup>10</sup> Presently, a split in the federal courts of appeals exists over the application of FRCP 15(c) to claims filed pursuant to the FTCA; with a number of circuits (and recently lower courts) holding that relation back is not allowed to save any untimely FTCA claims, regardless of the circumstance.<sup>11</sup>

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4. *Patterson*, 451 F.3d at 269.

5. *Id.* Richard Deegan was purporting to act as the "voluntary" administrator of Teddy's estate when he filed the administrative claim. *Id.* The claim was denied on the ground that Massachusetts law does not recognize the authority of voluntary administrators to pursue wrongful death claims. *Id.*

6. All FTCA claims must first be presented to the federal agency whose employee allegedly committed the tortious conduct before suit may be filed in court. *See infra* text accompanying notes 163-165.

7. *Patterson*, 451 F.3d at 269. "Patterson was acting as the newly-appointed administrator of her father's estate," distinguishing her claim from Richard Deegan's. *Id.*

8. *Id.* at 269-70.

9. *Id.* at 270. The U.S. District Court for the District of Massachusetts, and subsequently the U.S. Court of Appeals for the First Circuit, also denied Catherine Deegan Patterson's claim. *Id.* The First Circuit held that relation back, "even if permissible," was not appropriate in this situation, because Richard Deegan's original claim was itself untimely, "and thus [Patterson's] attempts to have [her] claims relate back to that claim are plainly futile." *Id.* at 273. However, the First Circuit left to another day the issue of whether relation back is at all permissible in FTCA claims. *Id.*

10. Compare *Manko v. United States*, 830 F.2d 831 (8th Cir. 1987), and *Withrow v. United States*, No. Civ. A. 5:05-152-JMH, 2005 WL 2403730 (E.D. Ky. Sept. 28, 2005), with *Avila v. INS*, 731 F.2d 616 (9th Cir. 1984).

11. *See infra* Part II.

This Note focuses on the factors that a court should be aware of when claimants like Catherine and Yvonne argue that their amended FTCA claims relate back to a timely filed claim. Part I provides a background and general overview of FRCP 15(c) and the FTCA. Part II discusses a current circuit split concerning the proper application of FRCP 15(c) to FTCA claims, and specifically FRCP 15(c)'s limitations period. Part III analyzes this split by considering various policy goals and objectives set out by Congress with respect to FTCA claims, while also examining the purpose and subsequent development of FRCP 15(c). Additionally, Part III concludes that a bright-line rule of law denying relation back in all FTCA claims, regardless of the circumstances, is contrary to the principle goals of both FRCP 15(c) and the FTCA. Finally, this Note presents a workable approach to dealing with this procedural conflict, which evaluates the rights and interests of each party and suggests a number of factors that courts and litigants should consider when faced with this thorny and unsettled issue.

## I. BACKGROUND—FRCP 15(c) AND THE FTCA

### A. *FRCP 15(c)—From Common Law to Modern Practice*

FRCP 15 facilitates amended and supplemental pleadings.<sup>12</sup> An amended pleading encompasses events or transactions that have taken place prior to the filing of the original pleading, while supplemental pleadings relate to those events that occur after the original filing.<sup>13</sup> FRCP 15(c) indicates circumstances in which amended pleadings—filed *after* the statute of limitations has run on the original claim—may “relate back” to the date of the original pleading to avoid being time-barred.<sup>14</sup> Specifically, FRCP 15(c) provides:

An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision

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12. 3 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 15.02[1] (3d ed. 2006).

13. *Id.*

14. *Id.*

(2) is satisfied and . . . the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.<sup>15</sup>

Under this doctrine, “parties may correct technical errors in their pleadings, assert a new claim or defense, or change the name of the party being sued *even after* the statute of limitations for asserting such claims has expired.”<sup>16</sup>

### 1. Relation Back at Common Law

At common law, courts generally applied one traditional rule that governed when an amended claim could relate back to a timely filed claim.<sup>17</sup> Under this rule, courts permitted the relation back of an amended complaint only if it provided more detail or information about the original claim, or “amplified” a claim.<sup>18</sup> As such, amendments that added a new cause of action were not allowed to relate back to the timely filed claim.<sup>19</sup> This narrow application was justified on the theory that permitting new causes of action to relate

15. FED. R. CIV. P. 15(c).

16. Steven S. Sparling, Note, *Relation Back of “John Doe” Complaints in Federal Court: What You Don’t Know Can Hurt You*, 19 CARDOZO L. REV. 1235, 1244 (1997) (emphasis added); accord Robert D. Brussack, *Outrageous Fortune: The Case for Amending Rule 15(c) Again*, 61 S. CAL. L. REV. 671, 674 (1988) (“If an amendment relates back it is treated as if it were filed along with the original complaint, even if it was actually filed after the expiration of the limitations period.”); see FED. R. CIV. P. 15(c)(2) (asserting new claim or defense); *id.* 15(c)(3) (changing party name).

17. Rebecca S. Engrav, Comment, *Relation Back of Amendments Naming Previously Unnamed Defendants Under Federal Rule of Civil Procedure 15(c)*, 89 CAL. L. REV. 1549, 1555 (2001).

18. *Id.* at 1555-56; see also *Mo. Pac. Ry. Co. v. Moffatt*, 55 P. 837, 838 (Kan. 1899) (permitting amended negligence complaint that added specific ways in which the defendant railroad had been negligent, as “[n]o new cause of action was set forth in the amended petition”); *Love v. S. Ry. Co.*, 65 S.W. 475, 476 (Tenn. 1901) (allowing an amendment that named new beneficiaries in a wrongful death case, where the original complaint only named the administrator, to relate back as “the amendment d[id] not set up a new cause of action, or bring in new parties”).

19. See 6 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1471 (2d ed. 1990) (stating that, at common law, amendments that added a new cause of action or changed the cause of action were not allowed); see also *Union Pac. Ry. Co. v. Wyler*, 158 U.S. 285, 296 (1895) (holding that “from its very reason, [relation back] applies only to an amendment which does not create a new cause of action”); *Whalen v. Gordon*, 95 F. 305, 308-09 (8th Cir. 1899) (“[A]n amendment which introduces a new or different cause of action, and makes a new or different demand . . . does not relate back to the beginning of the action . . . [and] is the equivalent of a fresh suit upon a new cause of action . . .”).

back denied a defendant his rights under the applicable statute of limitations.<sup>20</sup> Due to this stringent standard, a considerable amount of litigation addressed the definition of “cause of action.”<sup>21</sup> Additionally, determining whether an amendment “amplified” the original claim, or instead presented a new cause of action, was a procedural matter that at times led to harsh results for plaintiffs, even “when the amendment would have caused little, if any, surprise or prejudice” to the opposing party.<sup>22</sup>

As a result of this perceived injustice, federal courts began to broaden the scope of the relation-back doctrine by applying the rule in a more liberal fashion.<sup>23</sup> Courts began permitting the relation back of amended claims that modified the original cause of action as long as the amendment had the same factual basis as the original claim.<sup>24</sup> In this circumstance, the amended claim caused no surprise or prejudice to the defendant, who was held to be on notice of the new cause of action from the outset of the litigation.<sup>25</sup> However, courts were unwilling to further “extend this relaxation” by allowing amended claims to add or substitute new parties to the action.<sup>26</sup>

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20. See *Whalen*, 95 F. at 308 (stating that relation back “is never permitted to deprive the adverse party of any legal defense to the claim presented by the amendment, such as that which arises by virtue of the provisions of the statute of limitations”).

21. Harold S. Lewis, Jr., *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision*, 85 MICH. L. REV. 1507, 1513 (1987).

22. Engrav, *supra* note 17, at 1557. For examples of a narrow application of relation back at common law leading to harsh results, see *Wylar*, 158 U.S. at 298 (holding that an amendment seeking to change legal theory from negligence to violation of a state statute was barred by the statute of limitations, even though the original pleading stated the necessary facts relevant to establishing the violation), and *Boston & M. R. R. v. Hurd*, 108 F. 116, 124-25 (1st Cir. 1901) (denying an amendment that sought to change a claim based on common law personal injury to statutory wrongful death).

23. Engrav, *supra* note 17, at 1557.

24. *Id.* The Supreme Court followed this approach when it addressed the relation-back issue. See, e.g., *Mo., Kan. & Tex. Ry. Co. v. Wulf*, 226 U.S. 570, 576 (1913) (holding that plaintiff’s amended claim, which sought to assert a new federal statutory claim, as opposed to the original Kansas state law claim, “introduced no new or different cause of action, nor did it set up any different state of facts as the ground of action, and therefore it related back to the beginning of the suit”).

25. See *N.Y. Cent. & Hudson River R.R. v. Kinney*, 260 U.S. 340, 346 (1922) (holding that “when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and . . . a liberal rule should be applied”).

26. Clif J. Shapiro, Note, *Amendments that Add Plaintiffs Under Federal Rule of Civil Procedure 15(c)*, 50 GEO. WASH. L. REV. 671, 674 (1982); see also *Mellon v. Ark. Land & Lumber Co.*, 275 U.S. 460, 463 (1928) (stating that an amendment that added a new defendant “was in effect the commencement of a new and independent proceeding

## 2. Codifying FRCP 15(c)—Implementing the Goals of Civil Procedure

The original FRCP 15(c), as promulgated in 1938, abandoned the common law “cause-of-action” test in favor of a new standard.<sup>27</sup> The new FRCP 15(c) stated that “[w]henever the claims or defense asserted in the amended pleading *arose out of the conduct, transaction, or occurrence* set forth, or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.”<sup>28</sup> In essence, this codified the more liberal approach to relation back that was applied by federal courts in the years leading up to the adoption of FRCP 15(c).<sup>29</sup> Notice of the amended claim was now an important factor to be used by federal courts in determining whether to permit relation back.<sup>30</sup> Specifically, federal courts would permit relation back if the defendant received sufficient notice of the new claim to ensure that his defense of the action would not be disturbed.<sup>31</sup>

As codified, FRCP 15(c) reflects one of the most important policies of the Federal Rules—to provide every chance for a claim “to be decided on its merits rather than on procedural technicalities.”<sup>32</sup> Additionally, a liberal application of FRCP 15(c) is in accord with the application of other Federal Rules of Civil Procedure, which seek to adjudicate claims in a just and efficient manner.<sup>33</sup>

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against him”); *Hackner v. Guar. Trust Co.*, 117 F.2d 95, 99 (2d Cir. 1941) (“[W]here new service of process is required, it would appear that [plaintiff’s] claim would not relate back to the date of original suit . . .”).

27. *Engrav*, *supra* note 17, at 1559.

28. FED. R. CIV. P. 15(c) (1938) (emphasis added); *see also* *Shapiro*, *supra* note 26, at 674 n.22.

29. *Engrav*, *supra* note 17, at 1560; *see also* 6 WRIGHT ET AL., *supra* note 19, § 1471 (stating that due to the Supreme Court’s “broad interpretation” of the cause of action limitations on amended pleadings, federal courts began to widen the scope of permissible amendments as to the applicability of the relation-back doctrine).

30. *Sparling*, *supra* note 16, at 1250.

31. *Id.*

32. 6 WRIGHT ET AL., *supra* note 19, § 1471; *see also* *Foman v. Davis*, 371 U.S. 178, 181 (1962) (“It is . . . entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities.”); *Conley v. Gibson*, 355 U.S. 41, 48 (1957) (“The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.”).

33. 3 MOORE ET AL., *supra* note 12, § 15.02[1]. Moore comments:

Pleadings are not intended to be an end in themselves, but only a means to dispose of the controversy. Rule 15, when read in conjunction with other rules, fosters this approach. Rule 1 requires a “just, speedy, and inexpensive determination of every action.” Rule 8 requires all pleadings to be construed

Even under this liberal approach, amendments that sought to add new parties (rather than, or in addition to, new claims) were typically denied relation back.<sup>34</sup> This result was predicated on the theory that amendments adding new parties—filed after the applicable limitations period expired—would deny a defendant his or her right to a limitations defense if allowed to relate back.<sup>35</sup> The limitations defense serves the purpose of ensuring fairness to the defendant by preventing the surprise of a claim that has been “dormant for so long that proof, witnesses and memories all, have disappeared.”<sup>36</sup> While this new approach to relation back did increase the number of meritorious claims that proceeded to trial, harsh results were not completely eradicated, as many claims were still defeated on purely technical, procedural grounds.<sup>37</sup>

These strict rulings frequently occurred in suits by private parties against the government.<sup>38</sup> This was often the result of two factors: (1) a short limitations period for actions against the government,<sup>39</sup> and (2) private parties suing an improper federal agency, when the real party in interest was the U.S. government.<sup>40</sup>

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in a manner to do “substantial justice.” Rule 61 requires the court to disregard errors or defects that do not affect the substantive rights of the parties. Rule 15 provides that amendments should be freely given when justice so requires and that supplemental pleadings should be allowed on reasonable notice and on terms that are just.

*Id.* (citations omitted); *see* FED. R. CIV. P. 1.

34. Sparling, *supra* note 16, at 1251; *see also* Athas v. Day, 161 F. Supp. 916, 919 (D. Colo. 1958) (holding that FRCP 15(c) does not enable a new party “to avoid the effect of a statutory limitation fixing the time in which the action may be brought”).

35. Sparling, *supra* note 16, at 1251. This is based on the premise that the defendant would have had no way of anticipating the new claim being asserted. *Id.*

36. Aslanidis v. U.S. Lines, 7 F.3d 1067, 1074 (2d Cir. 1993); *see also* Burnett v. N.Y. Cent. R.R. Co., 380 U.S. 424, 428 (1965) (“Statutes of limitations are primarily designed to assure fairness to defendants.”); 3 MOORE ET AL., *supra* note 12, § 15.19[1] (“The purpose of the statute of limitations is to prevent stale claims.”); Shapiro, *supra* note 26, at 672 (discussing how stale claims present defendants with problems of evidence loss, disappearance or death of witnesses, and factual matters being obscured by imperfect memories, “any of [which] can greatly prejudice a defendant”).

37. 6A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1498 (2d ed. 1990); *see also* Davis v. L.L. Cohen & Co., 268 U.S. 638, 640 (1925) (stating that an “amendment of writ and declaration . . . by substituting the designated Agent as the defendant, was, in effect, the commencement of a new and independent proceeding”); Robbins v. Esso Shipping Co., 190 F. Supp. 880, 884 (S.D.N.Y. 1960) (“[I]f the effect of the amendment is to substitute for the defendant a new party, such amendment amounts to a new and independent cause of action and cannot be permitted when the statute of limitations has run.”).

38. 6A WRIGHT ET AL., *supra* note 37, § 1502.

39. *Id.*

40. *See* Cohn v. Fed. Sec. Admin., 199 F. Supp. 884 (W.D.N.Y. 1961). In *Cohn*, the plaintiff made timely service and institution of an action against the United States,



The strict dismissal of claims based on technical errors was demonstrated by a series of FTCA claims involving the U.S. Post Office Department.<sup>41</sup> The plaintiffs, who were injured by the alleged misconduct of post office employees, often misnamed the U.S. Post Office Department as the defendant in their FTCA claim, when the U.S. government was the real party in interest.<sup>42</sup> Unfortunately for the plaintiffs, if their amended complaints were filed after the applicable limitations period, a strict application of the relation-back doctrine led to the dismissal of their otherwise meritorious claims.<sup>43</sup> FRCP 15(c) was amended in 1966 in order to address this harsh result,<sup>44</sup> as well as to establish uniformity with respect to the “sporadic” application that relation back was then receiving.<sup>45</sup>

### 3. 1966 Amendments to FRCP 15(c)—The Scope Is Broadened

FRCP 15(c) was amended in 1966 to establish the specific conditions that permit the relation back of amended complaints that

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however her complaint “failed to join the Secretary of Health, Education and Welfare who [was] an indispensable party to the action.” *Id.* at 885. The district court refused the plaintiff’s motion for leave to serve an amended complaint to substitute the proper party for the defendant originally named, holding that “changing the name of the defendant to the present Secretary of Health, Education and Welfare would amount to the commencement of a new proceeding and would not relate back in time so as to avoid the statutory [limitations] provision.” *Id.*

41. 6A WRIGHT ET AL., *supra* note 37, § 1502.

42. *Id.* at 146; *see also* Lomax v. United States, 155 F. Supp. 354 (D. Pa. 1957). In *Lomax*, the plaintiff filed a complaint against the U.S. Post Office Department to recover damages for injuries he sustained due to a postal employee’s alleged negligent operation of a post office vehicle. *Id.* at 356. Upon obtaining advice from counsel that the proper defendant was the United States (and not the U.S. Post Office Department), the plaintiff amended the complaint to substitute the United States as the party-defendant. *Id.* This amendment occurred more than two years after the action accrued. *Id.* The district court granted the government’s motion to dismiss, reasoning that “while it may seem harsh to deprive the plaintiff of his remedy because of his error in instituting his action against the wrong party,” the amended complaint was time-barred by the FTCA’s statute of limitations. *Id.* at 359.

43. 6A WRIGHT ET AL., *supra* note 37, § 1502. The dismissal of these claims was “soundly criticized on the ground that [it] deprived plaintiff of an adjudication of the controversy’s merits solely because of a technical pleading error.” *Id.* at 164.

44. “Clarification of the application of the relation back doctrine to suits against the United States by private parties was a very important objective of the 1966 amendment to FRCP 15(c) because it was in this context that harsh results frequently were reached.” *Id.* at 163.

45. Engrav, *supra* note 17, at 1561 (noting the rule was amended to address inconsistencies that existed when courts were applying relation back); *see also* FED. R. CIV. P. 15(c) advisory committee’s notes on the 1966 amendments (stating that incorrect criteria was occasionally applied by courts when addressing relation back of amended claims, “leading sporadically to doubtful results”).

add or change parties to the original action.<sup>46</sup> To achieve this result, a second sentence was added to the rule, stating that an amendment changing or adding a party may relate back if the opposing party both received adequate notice of the claim and knew or should have known that the action would have been initiated against him.<sup>47</sup>

Taken as a whole, the amended FRCP 15(c) expanded the coverage of the relation-back doctrine.<sup>48</sup> In keeping with the trend toward liberal pleading, plaintiffs no longer had to worry about the dismissal of meritorious claims for failing to properly name the defendant.<sup>49</sup> Furthermore, while the rule was amended in large part to prevent the harsh outcomes resulting from complaints which originally named improper *defendants*, the Advisory Committee noted, “the attitude taken in revised FRCP 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs.”<sup>50</sup> Most courts and commentators agreed that the critical component of amended FRCP 15(c) was notice—specifically whether the original pleading gave the defendant adequate notice of the claims or parties he needed to defend against.<sup>51</sup>

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46. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 5.27, at 307 (3d ed. 1999); see also FED. R. CIV. P. 15(c) advisory committee’s notes on the 1966 amendments. The advisory committee’s notes on the 1966 amendments to FRCP 15(c) state:

FRCP 15(c) [was] amplified to state more clearly when an amendment of a pleading changing the party against whom a claim is asserted (including an amendment to correct a misnomer or misdescription of a defendant) shall “relate back” to the date of the original pleading. The problem has arisen most acutely in certain actions by private parties against officers or agencies of the United States.

*Id.*

47. Specifically, the rule reads:

[T]he amendment changes the party or the naming of the party against whom a claim is asserted if . . . the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

FED. R. CIV. P. 15(c)(3).

48. Sparling, *supra* note 16, at 1252.

49. See FRIEDENTHAL ET AL., *supra* note 46, § 5.27, at 308-09.

50. FED. R. CIV. P. 15(c) advisory committee’s notes on 1966 amendments; see Shapiro, *supra* note 26, at 678.

51. Shapiro, *supra* note 26, at 678; see *Williams v. United States*, 405 F.2d 234, 236 (5th Cir. 1968) (holding that “notice is the critical element involved in Rule 15(c) determinations”).

## B. *The FTCA*

The FTCA, enacted by Congress in 1946, permits private parties to sue the U.S. government for most torts committed by federal employees acting on behalf of the United States.<sup>52</sup> The FTCA imposes liability for injuries caused by the negligent acts of government employees while acting within the scope of their employment.<sup>53</sup> By permitting individuals to bring claims against the federal government, the FTCA expressly waives the sovereign immunity of the United States from legal actions sounding in tort.<sup>54</sup> The theory that the United States, as a sovereign nation, is immune from legal claims to which it does not expressly consent is rooted in the tradition of governmental immunity.<sup>55</sup>

### 1. Traditional Sovereign Immunity

#### a. *History of sovereign immunity the context of the English feudal system*

The theory that the sovereign was immune from liability for tortious acts stems from the English axiom that “the King can do no

52. 28 U.S.C. § 1346 (2000); WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 131 (4th ed. 1971). In addition to simple negligence claims, the FTCA covers medical malpractice, trespass, and claims arising out of arrests by federal law enforcement officers. Jonathan A. Willens, Nat'l Inst. for Trial Advocacy, *Commentary*, 28 U.S.C.S. §§ 2671-2680, at 209-10 (2005), available at 28 US NITA 2671 (LEXIS). However, the FTCA expressly excepts several negligence claims. See 28 U.S.C. § 2680 (barring claims such as negligent transmission of mail, errors in tax collection, libel, slander, misrepresentation, deceit, and others).

53. The statute provides:

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

28 U.S.C. § 1346(b)(1). “Employee of the Government includes . . . employees of [federal agencies], members of the military or naval forces of the United States, members of the National Guard . . . and [those] acting on behalf of a federal agency in an official capacity . . . .” *Id.* § 2671.

54. 28 U.S.C. § 1346(b)(1); see also Elana Wexler, Note, *Section 2401(B) Reconfigured: Irwin v. Department of Veterans Affairs Leads to the Right Result for the Wrong Reasons*, 74 *FORDHAM L. REV.* 2927, 2928 (2006) (“It is well settled that the United States, as a sovereign nation, is immune from suit unless it specifically consents to be sued. The [FTCA] expressly waives the United States’s [sic] immunity from suits in tort . . . .” (citation omitted)).

55. Wexler, *supra* note 54, at 2928; see *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (“The United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court’s jurisdiction to entertain the suit.” (citations omitted)).

wrong.”<sup>56</sup> While it was well-recognized by the fourteenth century that the king could himself commit an illegal act, the structure of the English feudal system was such that a king was immune from suit.<sup>57</sup> Even as the feudal system began to wane, and the king’s dominance receded, “the fiction of the unity of crown and state persisted, and the fact that the king traditionally had not been subject to judicial sanctions provided a foundation for the doctrine of immunity for the English government.”<sup>58</sup> While certain remedies slowly developed to aid English citizens seeking relief against the crown, tortious acts could never be directly attributed to the king himself.<sup>59</sup>

*b. Adoption and criticisms of the U.S. sovereign immunity doctrine*

Scholars have noted that it is “a bit hard to understand” the precise legal principles that the United States relied upon when it adopted the doctrine of sovereign immunity.<sup>60</sup> Though on somewhat uncertain grounds, the Supreme Court upheld the theory of governmental immunity in a series of decisions during the nineteenth century.<sup>61</sup> Following this line of cases, it soon became settled law that the government was free from liability unless it gave

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56. PROSSER, *supra* note 52, § 131, at 970; *see* *United States v. Thompson*, 98 U.S. 486 (1879).

57. Under this system, the lord of each manor would hold court for his subjects, but was never himself subject to the jurisdiction of his own court. Instead, a lord was subject only to the court of a higher noble in the feudal pyramid. As the king was at the top of the pyramid, he was subject to no higher noble, and thus, no court at all, leading to his status as immune from suits. *Developments in the Law: Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 829 (1957) [hereinafter *Developments*].

58. *Id.* at 830.

59. Over the course of the sixteenth century, a new principle emerged that permitted citizens who were harmed by the king’s agents to seek redress against that officer in an individual capacity. *Id.* Recognized as the officer’s suit in damages, this remedy permitted actions “against officers who acted outside their legal authority or who failed to execute their official duties; the consent of the sovereign was not required.” Jeremy Travis, Note, *Rethinking Sovereign Immunity After Bivens*, 57 N.Y.U. L. REV. 597, 605 (1982).

60. PROSSER, *supra* note 52, § 131, at 971; *Developments, supra* note 57, at 830.

61. *Developments, supra* note 57, at 830. “[T]he Court defended the doctrine of immunity on the ground that it was vital for the efficient operation of the Government.” *Id.* However, this “anomalous acceptance” of the doctrine was applied by the Court “seemingly without any attempt at justification.” *Id.*; *see, e.g., Hill v. United States*, 50 U.S. (9 How.) 386, 389 (1850) (applying the doctrine based on the fact that it had been “universally assented to”); *see also United States v. McLemore*, 45 U.S. (4 How.) 286 (1846); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

consent to be sued.<sup>62</sup> Justice Holmes opined: “A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.”<sup>63</sup>

Although sovereign immunity had a long history within the English feudal system, some scholars argued that it should not apply in the United States’ nonfeudal system of government.<sup>64</sup> This debate was predicated on the different manner in which the sovereign is placed within the United States’ governmental structure as opposed to the English governmental structure.<sup>65</sup> Under the English feudal structure the king “was a personal ruler and the fountain of justice,” and thus was exempt from the jurisdiction of any court.<sup>66</sup> However, the U.S. government was founded on the principle that no governmental body, not even the Executive, is above the law.<sup>67</sup> Instead, American government exists separate and apart from the sovereign.<sup>68</sup> As such, disapproval of the doctrine often focuses on the fact that it applies a traditional, feudal concept to our own federal government.<sup>69</sup>

Furthermore, “[a]s the role of federal government expanded” the number of federal employees also increased—inevitably leading to a greater number of tortious acts committed by these individuals.<sup>70</sup> However, as a result of the judicial branch’s adoption of sov-

62. PROSSER, *supra* note 52, § 131, at 971.

63. *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907); *see also* PROSSER, *supra* note 52, § 131 n.14.

64. Wexler, *supra* note 54, at 2933; Edwin M. Borchard, *Governmental Responsibility in Tort*, VI, 36 YALE L.J. 1, 38 (1926).

65. Borchard, *supra* note 64, at 38.

66. *Id.*

67. As Professor Erwin Chemerinsky states, “The effect of sovereign immunity is to place the government above the law and to ensure that some individuals who have suffered egregious harms will be unable to receive redress for their injuries.” Erwin Chemerinsky, *Shifting the Balance of Power? The Supreme Court, Federalism, and State Sovereign Immunity: Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1202 (2001).

68. Borchard, *supra* note 64, at 38. According to Borchard, sovereign immunity “was introduced into the United States after American independence, notwithstanding that the [United States] has from the beginning been separated from government and . . . has been deemed merely an agent of the sovereign.” *Id.*

69. Wexler, *supra* note 54, at 2933.

70. *Id.*; *see also* *Feres v. United States*, 340 U.S. 135, 139-40 (1950) (“As the Federal Government expanded its activities, its agents caused a multiplying number of remediless wrongs—wronges which would have been actionable if inflicted by an individual or a corporation but remediless solely because their perpetrator was an officer or employee of the Government.”).

foreign immunity, injured plaintiffs could not bring lawsuits against the federal government under a theory of vicarious liability.<sup>71</sup>

Even so, tort victims who were injured by government employees could seek relief by applying to Congress for private bills of relief.<sup>72</sup> However, “the process was expensive for [injured plaintiffs] and burdensome to Congress.”<sup>73</sup> In fact, the process of adjudicating these claims by way of private relief bills was viewed by many in Congress as nothing short of “unsatisfactory, and an outright failure.”<sup>74</sup> Additionally, as the government expanded, Con-

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71. *Wexler*, *supra* note 54, at 2933. Vicarious liability is “[l]iability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties.” BLACK’S LAW DICTIONARY 934 (8th ed. 2004). For a discussion on the application of vicarious liability, see PROSSER, *supra* note 52, § 69, and see also RESTATEMENT (SECOND) OF AGENCY, § 216 (1958) (“A master or other principal may be liable to another whose interests have been invaded by the tortious conduct of a servant or other agent, although the principal does not personally violate a duty to such other or authorize the conduct of the agent causing the invasion.”).

72. Adam Bain & Ugo Colella, *Revisiting Equitable Tolling and the Federal Tort Claims Act: Putting the Legislative History in Proper Perspective*, 31 SETON HALL L. REV. 174, 189 (2000). The private bill consisted of a congressional proposal that would either provide compensation to an injured party or provide the claimant with a jurisdictional ticket to adjudicate the claim. *Id.* Private relief bills involve petitioning Congress to provide benefits or relief to specified individuals. This measure is often used when administrative or legal remedies are exhausted. For more information on the legislative process regarding private bills, including measures used to introduce the bills, and committee and floor considerations, see RICHARD S. BETH, *PRIVATE BILLS: PROCEDURE IN THE HOUSE* (1998), available at <http://www.rules.house.gov/archives/98-628.htm>.

73. *Wexler*, *supra* note 54, at 2933. According to Justice Jackson, “[t]he volume of these private bills, the inadequacy of congressional machinery for determination of facts, the importunities to which claimants subjected members of Congress, and the capricious results, led to a strong demand that claims for tort wrongs be submitted to adjudication.” *Feres*, 340 U.S. at 140; see also Irvin M. Gottlieb, *Tort Claims Against the United States*, 30 GEO. L.J. 462, 464-65 n.16 (1942) (specifically discussing the statistics of the private bills procedure and noting the burden placed on Congress with a preponderance of diminutive claims).

74. Gottlieb, *supra* note 73, at 464 (noting that given the expanding role of the federal government into “the life of every citizen in such an intimate manner,” a waiver of liability for tortious conduct “constitutes a patent injustice to bona fide claimants”); see also Daniel Shane Read, *The Courts’ Difficult Balancing Act to be Fair to Both Plaintiff and Government Under the FTCA’s Administrative Claims Process*, 57 BAYLOR L. REV. 785, 789 (2005). Read states:

As decades passed, the process of private citizens petitioning Congress for legislation for relief from wrongs done by federal employees proved unworkable. The number of claims taxed Congress’s time and Congress was ill-suited for the task of administering justice. President Franklin Roosevelt commented in 1942 that during the last three Congresses, almost 6,300 private claim bills were introduced, less than twenty percent of which became law, and that of all the Presidential vetoes during those Congresses, one-third were made up of private claim bills. The President also noted that the existing Congressional

gress began to waive its sovereign immunity in various circumstances, including suits against the government sounding in contract and certain admiralty and maritime torts.<sup>75</sup> The growing dissatisfaction surrounding the doctrine of sovereign immunity, coupled with Congress's partial waiver of immunity in certain situations, demonstrated that legislation was needed to eliminate governmental immunity from suit for acts committed by its federal employees.<sup>76</sup> As a result, Congress passed the FTCA in 1946, waiving the government's sovereign immunity from tort liability.<sup>77</sup>

## 2. FTCA's Statute of Limitations Provisions

### a. *Original limitations period*

The purpose of the FTCA was to create an equitable remedy for those who were injured by federal employees working in their governmental capacity.<sup>78</sup> The FTCA also sought to balance this objective with the congressional "interest in limiting the burdensome [private claim] process."<sup>79</sup> As originally enacted in 1946, the FTCA demanded that claimants bring their tort claims against the govern-

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procedure for tort relief was "slow, expensive, and unfair both to the Congress and to the claimant."

*Id.* (citation omitted) (quoting FRANKLIN D. ROOSEVELT, SIMPLIFICATION OF PROCEDURE REGARDING HANDLING OF SMALL CLAIMS AND CONSTRUCTION OF BRIDGES, H.R. DOC. NO. 77-562, at 2 (1942), available at <http://www.presidency.ucsb.edu/ws/print.php?pid=16275>).

75. PROSSER, *supra* note 52, § 131, at 971 ("[W]ith the establishment of a Court of Claims [in 1855] to hear contract cases, and various other minor provisions permitting even some actions in tort, a measure of relief was obtainable for those with grievances against the United States."); see Wexler, *supra* note 54, at 2935 (noting that in the 1920s, Congress waived governmental immunity with respect to admiralty and maritime torts); see also *Feres*, 340 U.S. at 139 ("The Tort Claims Act was not an isolated and spontaneous flash of congressional generosity. It marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit."). For a detailed discussion of federal statutes permitting tort actions against the government prior to the enactment of the FTCA, see JAYSON & LONGSTRETH, *HANDLING FEDERAL TORT CLAIMS* § 2.05 (1994).

76. PROSSER, *supra* note 52, § 131, at 972.

77. *Id.*

78. S. REP. NO. 79-1400, at 30 (1946); see also *Developments*, *supra* note 57, at 887 ("The most important consideration supporting a waiver of sovereign immunity is the inequity of not compensating for injuries suffered through the fault of government employees.").

79. Wexler, *supra* note 54, at 2936; see also *Developments*, *supra* note 57, at 889 ("From the legislative history of the FTCA . . . it is clear that one of Congress' primary motives was to remove from its calendars the many private bills resulting from the absence of a judicial remedy.").

ment within one year after the claims accrued.<sup>80</sup> This relatively short statute of limitations was deemed by some as necessary to protect the government's interest of the government in defending against stale claims, given that claimants could still use the traditional remedial method of petitioning Congress for a private bill of relief.<sup>81</sup> However, for many plaintiffs, this one-year limitations period simply proved too short.<sup>82</sup>

*b. The 1949 amendment—extending the limitations period to two years*

Between the years 1946 and 1949, many FTCA claimants saw their actions dismissed pursuant to the strict construction of the one-year limitations period.<sup>83</sup> This was especially true of victims whose injuries did not fully develop until after this one-year time frame.<sup>84</sup> Additionally, due to the delays in government communication that existed at this time, particularly in the armed services, there was a likelihood that a wrongful death notification to the next of kin would arrive at a time when the running of the statute had already barred the filing of an FTCA claim.<sup>85</sup> Furthermore, as Congress began to review the limitations periods of other state and federal tort statutes, it concluded that the one-year limitations period was out of touch with the state and federal legislative landscape.<sup>86</sup>

Accordingly, in 1949 Congress amended the FTCA's limitations period by extending it to two years.<sup>87</sup> This was an attempt to balance the federal government's goal of providing tort claimants with their day in court, while protecting the government's defense

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80. Federal Tort Claims Act, Pub. L. No. 79-601, 60 Stat. 842 (1946) (codified as amended at 28 U.S.C. § 2401(b) (2000)).

81. Bain & Colella, *supra* note 72, at 193. Judge Alexander Holtzoff, acting as Special Assistant to Attorney General Frank Murphy, testified before the Senate Judiciary Committee, remarking:

It seemed to us that a *short* statute of limitations, such as 1 year, is necessary for the purpose of protecting the interests of the Government, and is not unfair to the claimant, because the lawyer of the claimant should be able to bring this suit within 1 year after the cause of action has accrued.

*Id.* (quoting *Tort Claims Against the United States: Hearings Before a Subcomm. of the S. Comm. on the Judiciary*, 76th Cong. 38 (1940)).

82. *Id.* at 197.

83. *Id.*

84. H.R. REP. NO. 81-276, at 4 (1949).

85. Bain & Colella, *supra* note 72, at 197-98 (citing H.R. REP. NO. 81-276, at 2-4).

86. H.R. REP. NO. 81-276, at 2-4.

87. Federal Tort Claims Act, Pub. L. No. 81-55, 63 Stat. 62, 62 (1949) (codified as amended at 28 U.S.C. § 2401(b) (2000)).



against stale claims. "The period of 2 years proposed in the bill represent[ed] a happy medium which has been tested and found satisfactory in the laboratory of legal experience."<sup>88</sup>

*c. Congress again amends the FTCA's limitations provision in 1966*

Soon after the FTCA was enacted, the government realized that most tort claims filed against it could be settled in pre-trial negotiations, obviating the need to resort to expensive and time-consuming judicial processes.<sup>89</sup> Congress noted that approximately eighty percent of the meritorious FTCA claims filed in 1965 were settled prior to trial.<sup>90</sup> Legislators believed that permitting federal agencies to settle a substantial number of these claims, as opposed to the Department of Justice, would be a more efficient use of government resources.<sup>91</sup> Therefore, in 1966 Congress enacted legislation that imposed a "mandatory administrative-exhaustion procedure" on all FTCA claimants.<sup>92</sup> Under the new process, claimants first had to present their tort claims to the responsible administrative agencies whose employees' wrongful conduct gave rise to the claim, for possible settlement prior to filing suit.<sup>93</sup>

This "exhaustion provision" precluded claimants from filing an action against the government pursuant to the FTCA for six months, as the action first had to be presented to the proper administrative agency.<sup>94</sup> If the agency did not deny or settle the claim

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88. H.R. REP. NO. 81-276, at 4; *see also* *United States v. Kubrick*, 444 U.S. 111, 117 (1979).

89. Ugo Colella, *The Case for Borrowing a Limitations Period for Deemed-Denial Suits Brought Pursuant to the Federal Tort Claims Act*, 35 SAN DIEGO L. REV. 391, 398 (1998).

90. Read, *supra* note 74, at 791. Specifically, Congress pointed out:

In the fiscal year 1965, the [government] settled 731 tort cases after suit had been instituted . . . for a total of \$6 million. Where the cases resulted in judgment against the Government, the record for the same year showed that there were 169 judgments which totaled approximately \$4 million. . . . Therefore, it is established that of the meritorious [FTCA] claims filed against the Government . . . about 80 percent are settled prior to actual trial.

S. REP. NO. 89-1327, at 2-3 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2515, 2516.

91. Read, *supra* note 74, at 91.

92. 28 U.S.C. § 2675(a); *see also* Colella, *supra* note 89, at 398.

93. 28 U.S.C. § 2675(a). This administrative claim must be filed with the responsible agency within two years after the claim accrues. *Id.* § 2401(b).

94. *Id.* § 2675(a). Specifically, the provision reads:

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

upon the expiration of this six-month period, Congress gave claimants the choice to either negotiate further with the agency until the claim was resolved, or deem the claim denied and file suit in federal court.<sup>95</sup> However, once the agency denied the claim, the claimant was required to file suit in the district court within six months.<sup>96</sup> This new administrative requirement was intended by Congress “to expedite the resolution of tort claims brought against the United States.”<sup>97</sup> Both the House and Senate Judiciary Committees agreed that the new procedure would reduce the number of stale claims that the government would need to address.<sup>98</sup>

As a result of the administrative filing requirement, claimants must first deal with the appropriate administrative agency, irrespective of the extent of the alleged injury or amount of damages sought.<sup>99</sup> While a great deal of litigation has surrounded what actually constitutes effective notice of an administrative claim,<sup>100</sup> the language of the FTCA’s limitations period requires that notification be given to the proper federal agency in writing, accompanied by a claim for monetary damages for property or personal injury.<sup>101</sup> Proper notification of the claim permits the appropriate administra-

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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 . . . . 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.

*Id.* The purpose of the administrative claim requirement is to allow the government a procedure by which it can “investigate, evaluate, and consider settlement of a claim. This purpose requires that the claimant provide sufficient information to permit the government agency both to conduct a meaningful investigation of the incident and to estimate the claim’s worth.” Willens, *supra* note 52, at 353.

95. 28 U.S.C. § 2675(a); *see also* Colella, *supra* note 89, at 398.

96. “A tort claim against the United States shall be forever barred . . . unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.” 28 U.S.C. § 2401(b).

97. Bain & Colella, *supra* note 72, at 201.

98. *Id.*

99. Donald N. Zillman, *Maritime Personal Injury: Presenting a Claim Under the Federal Tort Claims Act*, 43 LA. L. REV. 961, 967 (1983).

100. *Id.* Most of the cases that involve litigation over the notice requirement involve claimants who were not actually intending to meet the administrative filing requirement from the outset. *Id.* at 971. “Rather, the cases suggest that the plaintiff discovered the jurisdictional requirement of an administrative claim only after filing suit and was attempting to discover some previous action that would qualify as a presentation of an administrative claim. Courts generally have been unsympathetic to these creative presentation efforts.” *Id.*

101. 28 C.F.R. § 14.2(a) (2006).

tive agency to investigate the matter and assess whether there is merit to the allegations.<sup>102</sup> Determining the merit of the administrative claim is an essential component of the administrative filing requirement, as it furthers the legislative goal of settling FTCA claims, thereby avoiding costly litigation.<sup>103</sup>

## II. THE APPLICATION OF FRCP 15(c) TO CLAIMS BROUGHT PURSUANT TO THE FTCA—THE CURRENT CIRCUIT SPLIT

### A. *Permitting Relation Back in FTCA Claims*

One of the most important policies of the Federal Rules of Civil Procedure is to ensure that claimants get their day in court, rather than have meritorious claims dismissed on procedural technicalities.<sup>104</sup> In *Conley v. Gibson*, Justice Black opined for a unanimous Court that “[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.”<sup>105</sup> Soon after Justice Black articulated this liberal approach to the Federal Rules of Civil Procedure, the Court of Appeals for the Fifth Circuit applied FRCP 15(c) with this “required liberality” in *Williams v. United States*.<sup>106</sup>

In *Williams*, Louise J. Smyre, as next friend,<sup>107</sup> brought a suit pursuant to the FTCA against the United States for her minor son’s personal injuries, which resulted “from the explosion of an Army M-80 firecracker.”<sup>108</sup> After the statute of limitations had expired

102. George A. Bermann, *Federal Tort Claims at the Agency Level: The FTCA Administrative Process*, 35 CASE W. RES. L. REV. 509, 563-64 (1985).

103. See *infra* Part III.B.2; see also Bermann, *supra* note 102, at 531. Bermann notes that

Congress clearly intended by the 1966 amendments to encourage and facilitate administrative disposition of tort claims. Thus, if the original Act was designed to ease the burdens on Congress by shifting primary responsibility for government tort claims to the courts, the 1966 amendments sought in turn to transfer the burden to the agencies.

*Id.* (citation omitted).

104. 6 WRIGHT ET AL., *supra* note 19, § 1471.

105. *Conley v. Gibson*, 355 U.S. 41, 48 (1957) (noting that the pleading procedures shall be liberally “construed as to do substantial justice” (quoting FED. R. CIV. P. 8(f))).

106. *Williams v. United States*, 405 F.2d 234, 239 (5th Cir. 1968).

107. In a next friend claim, “[a] person . . . appears in a lawsuit to act for the benefit of an incompetent or minor plaintiff, but . . . is not a party to the lawsuit and is not appointed as a guardian.” BLACK’S LAW DICTIONARY, *supra* note 71, at 1070.

108. *Williams*, 405 F.2d at 235.

on this claim, “Smyre, who had long been in the case as next friend—sought leave to amend the [original] complaint to appear as a party plaintiff in her own right, [seeking] recovery for loss of services.”<sup>109</sup> Naturally, “[t]he Government [challenged] this proffered amendment on the ground that it . . . was [time-]barred by the [FTCA’s] statute of limitations.”<sup>110</sup> Reasoning that the doctrine of relation back under FRCP 15(c) was to be “liberally applied in Federal Courts,”<sup>111</sup> the Fifth Circuit held that “[c]learly notice is the critical element involved in Rule 15(c) determinations.”<sup>112</sup> Applying this standard, the court determined that because the injury to a minor under these circumstances would typically give rise to an injury to the parent, this claim “reasonably indicate[d] a likelihood that the parent would incur losses of a recoverable kind,” and as such the government was put on notice of the parent’s claim at the outset of the litigation.<sup>113</sup> The court held that, assuming proper notice was given, permitting relation back would not be prejudicial to the government.<sup>114</sup>

Several years later, the Court of Appeals for the Ninth Circuit also addressed the issue of the applicability of FRCP 15(c) to tardy FTCA claims in *Avila v. INS*.<sup>115</sup> As in *Williams*, the court overturned a lower court’s decision and permitted a father, Jesus

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109. *Id.*

110. *Id.*

111. *Id.* at 236.

112. *Id.* (“Rule 15(c) is ‘based on the idea that a party who is notified of litigation concerning a given transaction or occurrence is entitled to no more protection from statutes of limitations than one who is informed of the precise legal description of the rights sought to be enforced.’” (quoting 3 MOORE, FEDERAL PRACTICE ¶ 15.15[2], at 1021)).

113. *Id.* at 239. The court noted that,

This [notice requirement] becomes of special importance in situations in which a common set of operational facts gives rise to distinct claims (or defenses) among distinct claimants (or defendants). A ready illustration is a personal injury resulting later in death with (a) the individual’s claim for lifetime pain, suffering and loss of earnings, etc. (b) the survival of (a) to his personal representative and (c) the pecuniary loss sustained by the decedent’s dependents because of his death.

*Id.* at 238.

114. *Id.* at 238; see also Romualdo P. Eclavea, Annotation, *Statute of Limitations Under Federal Tort Claims Act (28 U.S.C.A. § 2401(b))*, 29 A.L.R. FED. 482 (1976).

115. *Avila v. INS*, 731 F.2d 616 (9th Cir. 1984). In *Avila*, father Jesus Cardona filed an action pursuant to the FTCA on behalf of his mentally impaired son, Daniel Cardona, seeking damages for an alleged wrongful deportation of the latter. *Id.* at 618. After the two-year limitations period ran on this original claim, Jesus sought to amend the claim by adding himself as a claimant and detailing his personal expenses incurred in his searched for his son. *Id.* The district court dismissed this amended claim. *Id.*

Cardona, to amend a claim originally filed on behalf of his son, Daniel, after the two-year limitations period had run.<sup>116</sup> Relying on the rationale set forth in *Williams*, the Ninth Circuit Court of Appeals held that “[i]n deciding whether an amendment relates back to the original claim, notice to the opposing party of the existence and involvement of the new plaintiff is the critical element.”<sup>117</sup> Applying this standard, the court ruled that the government would incur no prejudice from permitting relation back of Jesus Cardona’s claim, as the original complaint both put the government on notice of the fact that he was Daniel’s father and explained the resulting damages sustained by his son.<sup>118</sup>

B. *Refusing to Extend FRCP 15(c) to FTCA Claims—Splitting the Circuits*

The Supreme Court has held that conditions placed on the federal government’s waiver of sovereign immunity must be strictly observed.<sup>119</sup> Accordingly, when construing the FTCA’s statute of limitations provision, the Court has been careful to apply this waiver in accordance with congressional intent.<sup>120</sup> When the Court of Appeals for the Eighth Circuit addressed the issue of whether FRCP 15(c) was applicable to a claim brought pursuant to the FTCA, it used this strict sovereign immunity canon of construction to hold that relation back was effectively inapplicable to the FTCA’s limitations period.<sup>121</sup> Additionally, the court supported its new bright-line rule of law with its interpretation of the history and legislative goals of the 1966 amendments to the FTCA.<sup>122</sup>

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116. *Id.* at 619.

117. *Id.* at 620; *see also* *Leachman v. Beech Aircraft Corp.*, 694 F.2d 1301, 1308 (D.C. Cir. 1982) (noting that, “[a]s the Advisory Committee note [to the 1966 amendment of FRCP 15(c)] suggests[,] . . . it is clear that the crucial policy underlying the rule is notice to the party opposing the amendment” (citation omitted)).

118. *Avila*, 731 F.2d at 620. In particular, the court stated that “[t]he nature of Jesus’ damages was such that the government would reasonably expect [them] to occur from its wrongful deportation of a mentally impaired citizen.” *Id.*

119. *Soriano v. United States*, 352 U.S. 270, 276 (1957) (noting that “this Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed”).

120. *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979) (“[T]he [FTCA] waives the immunity of the United States and . . . in construing the statute of limitations, which is a condition of that waiver, we should not take it upon ourselves to extend the waiver beyond that which Congress intended.”).

121. *Manko v. United States*, 830 F.2d 831, 840-42 (8th Cir. 1987).

122. *Id.* at 841.

In *Manko v. United States*, the court was faced with whether a belatedly amended FTCA complaint, seeking to introduce plaintiff's wife as a co-plaintiff in order to assert a new loss of consortium cause of action, related back to the date of the original claim.<sup>123</sup> Affirming the lower court's decision, the Court of Appeals for the Eighth Circuit held that the application of FRCP 15(c) to the amended claim was improper.<sup>124</sup> Quoting *Kubrick*, the court pointed out that the FTCA limitations provision was "the balance struck by Congress in the context of tort claims against the Government," with the purpose of "encourag[ing] the prompt presentation of claims."<sup>125</sup> As such, strictly construing the FTCA's statute of limitations and not permitting relation back was in accordance with the fact that the FTCA's statute of limitations "is a condition of waiver of the sovereign immunity of the United States."<sup>126</sup>

Furthermore, although the Court of Appeals for the Eighth Circuit recognized that the government could not distinguish the facts presented from those in *Avila*,<sup>127</sup> it declined to follow the Court of Appeals for the Ninth Circuit's holding on the ground that its reasoning was flawed.<sup>128</sup> The Eighth Circuit argued that the *Avila* court's reliance on *Williams* was improper because *Williams* was decided prior to the 1966 amendments to the FTCA, which established the administrative-claims system to help settle FTCA claims.<sup>129</sup> As such, the court "believe[d] the result in *Avila* [was] at odds with the congressional purpose underlying § 2401(b) because . . . amendments which add new claims or increase the amount of damages sought change the government's settlement calculus."<sup>130</sup>

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123. *Id.* at 838-39. In *Manko*, husband Louis H. Manko brought a claim against the United States pursuant to the FTCA for injuries stemming from a swine flu immunization. *Id.* at 834. After the limitations period had run on this claim, Mr. Manko's wife, Sylvia Manko, sought to join the action in order to assert a claim for loss of consortium. *Id.* at 838. After this was denied, Mr. Manko attempted to amend his timely filed claim and name his wife as a co-plaintiff in order to have it relate back to the original filing date. *Id.* This claim was denied on the ground that it was time-barred by the FTCA's statute of limitations. *Id.*

124. *Id.* at 841-42.

125. *Id.* at 839 (quoting *Kubrick*, 444 U.S. at 117).

126. *Id.* at 842.

127. *Id.* at 841.

128. *Id.*

129. *Id.*

130. *Id.*; see also *Lee v. United States*, 980 F.2d 1337 (10th Cir. 1992). In *Lee*, the Court of Appeals for the Tenth Circuit adhered to the holding articulated in *Manko* when faced with the issue of whether an amended FTCA claim may relate back to an original timely claim. *Id.* at 1341. The court reasoned that the legislative history of the FTCA demonstrated a congressional intent "to create a system by which an administra-

Permitting relation back of these amended claims, which was certain to increase the total damage award sought by the plaintiff, would unfairly disrupt this “settlement calculus” as the new parties or claims would not have been factored into the government’s initial settlement equation.<sup>131</sup> Therefore, the court found that *Avila* was not good authority on the issue of relation back of FTCA claims.<sup>132</sup>

Recently, the District Court for the Eastern District of Kentucky also addressed this issue in *Withrow v. United States*, and set out the current circuit split over the application of FRCP 15(c) to amended claims filed pursuant to the FTCA.<sup>133</sup> Detailing the congressional intent with respect to the FTCA’s statute of limitations,<sup>134</sup> and noting the sovereign immunity justification for narrowly construing the limitations period,<sup>135</sup> the court held the new loss of consortium claim asserted by the plaintiff was time-barred.<sup>136</sup> Furthermore, the court noted that while the strict application of statutes of limitations sometimes defeats otherwise valid claims, “that is their very purpose, and they remain as ubiquitous as the statutory rights or other rights to which they are attached or are applicable.”<sup>137</sup> Although noting that it is not the intention of the government to deprive injured tort victims of their day in court, the

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tive agency could resolve ‘specific claims for specific amounts of money.’” *Id.* (quoting *Manko*, 830 F.2d at 840). As such, “[a]llowing the [plaintiff’s] amended complaint in this case would . . . violate congressional intent to create a system for administrative agencies dealing with specific claims. For all these reasons, the [plaintiff’s] claim cannot relate back to the original claim.” *Id.*

131. *Manko*, 830 F.2d at 841.

132. *Id.*

133. *Withrow v. United States*, No. Civ. A. 5:05-152-JMH, 2005 WL 2403730 (E.D. Ky. Sept. 28, 2005). In *Withrow*, decedent Thomas Withrow’s spouse, Thelma Withrow, brought an action against the United States (pursuant to the FTCA) for wrongful death damages. *Id.* at \*1. This original action listed Mrs. Withrow as the only claimant, and did not mention loss of consortium damages. More than a year later, after the limitations period had run on this claim, Mrs. Withrow filed an amended claim that added her children as claimants and new loss of consortium damages. *Id.* at \*2. The United States moved to dismiss these new claims, and the district court granted the motion on the grounds that the limitations period had run and the tardy claims did not relate back to the original timely filed claim. *Id.*

134. *Id.* at \*6 (“If the Court permitted relation back in this matter, the Court would be frustrating the balance struck by Congress in enacting the two-year statute of limitations.”).

135. *Id.* (“Another equally compelling reason to deny relation back is that the FTCA is a waiver of sovereign immunity and, consequently, should be strictly construed.”).

136. *Id.* at \*8.

137. *Id.* at \*6 (citing *United States v. Kubrick*, 444 U.S. 111, 125 (1979)).

court nonetheless adopted the reasoning of the Courts of Appeals for the Eighth and Tenth Circuits and held that relation back was not permissible with respect to FTCA claims.<sup>138</sup>

### III. ANALYSIS

With the current split in the federal courts of appeals, litigants like Catherine Deegan Patterson and Yvonne Deegan Gioka are left to wonder whether their amended FTCA claims will be permitted to relate back to an original timely filed claim.<sup>139</sup> Courts will naturally tend to adhere to bright-line rules rather than ad hoc approaches when applying a statute of limitations, as they are easy to apply and lead to more predictable outcomes.<sup>140</sup> However, these judicial tendencies must be balanced against the rights of injured claimants with legitimate claims of fault against the government.

The remainder of this Note analyzes the legal tension that exists when litigants attempt to apply FRCP 15(c) to FTCA claims. Therefore, the underlying goals and objectives of the FTCA will first be examined. These objectives demonstrate that the reliance on outdated principles of sovereign immunity is not important enough to outweigh the primary purpose of the FTCA: providing a remedy for citizens injured by tortious acts of the government.<sup>141</sup> Additionally, the legislative goals of the 1966 amendments to the FTCA will also be scrutinized, and shown to support the argument that the FTCA was passed in order to make the process by which claimants can collect for governmental tortious actions more equitable and expeditious to them. Next, this Note will discuss the original purpose and subsequent development of FRCP 15(c), along with its liberalizing 1966 amendments, and will argue that a bright-

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138. *Id.* (“Permitting relation back would be contrary to the purposes of the FTCA, which are to encourage prompt resolution and settlement of specific claims. As the Tenth Circuit held, allowing the amended administrative claim in this matter ‘would . . . violate congressional intent to create a system for administrative agencies dealing with specific claims.’” (quoting *Lee v. United States*, 980 F.2d 1337, 1341 (10th Cir. 1992))).

139. *See supra* text accompanying notes 1-9.

140. *DeBusk v. Johns Hopkins Hosp.*, 677 A.2d 73, 76 (Md. 1996) (noting that “[o]bjective standards and bright-line rules such as statutes of limitations are the very keys to predictability, in the sense that everyone is treated in the same manner and everyone knows or can discover the rules in advance of their application”).

141. *Odin v. United States*, 656 F.2d 798, 801 (D.C. Cir. 1981) (“In the early twentieth century, however, Congress began serious consideration of a general tort claims statute, because of . . . the unfairness inherent in the immunity doctrine. . . . These efforts culminated in 1946 with the passage of the Federal Tort Claims Act . . .” (citation omitted)).



line rule of law that FRCP 15(c) has no application to FTCA claims presents a procedural injustice that is contrary to the spirit of the Federal Rules of Civil Procedure. Finally, the Analysis will conclude by recommending a number of factors courts should consider when presented with amended FTCA claims like those of Catherine Deegan Patterson and Yvonne Deegan Gioka.

A. *Bright-Line Rule Disallowing Relation Back in FTCA Claims Is Contrary to the Objectives of the Act*

Congressional passage of the FTCA in 1946 was a historic moment in the development of tort claims against the U.S. government. In waiving the sovereign immunity of the Executive as to the tortious acts of its officers and employees, it is quite clear that the chief purpose of the Act was to broaden the government's liability as to tort claims, with the underlying objective of providing justice to parties injured by the government.<sup>142</sup> As such, strictly construing the FTCA's limitations period to disallow relation back in any FTCA claim, based in part on traditional notions of sovereign immunity, runs contrary to the intent of this legislative measure, which was meant as a remedy for private citizens injured by the tortious conduct of government employees.

1. Congress Enacted the FTCA in Order to Broaden the Government's Accountability in Tort

The harsh bright-line approach taken by the Courts of Appeals for the Eighth and Tenth Circuits—disallowing relation back in *any* FTCA claims, regardless of the factual and procedural circumstances—undermines the pro-plaintiff legislative goals of the FTCA. Prior to the enactment of the FTCA, private citizens enjoyed little solace when injured by tortious acts of government officials or employees. Individuals who were injured by a government employee's wrongdoing could only file suit directly against the government employee, rather than the federal government itself under a vicarious liability theory.<sup>143</sup> This left injured victims with little possibility of collecting an adequate judgment unless the particular government official was wealthy. While relief was also available through a private bill in Congress, these bills could not fairly and

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142. Bermann, *supra* note 102, at 524.

143. Wexler, *supra* note 54, at 2933; *see supra* text accompanying note 71.

adequately compensate injured citizens, as the process was quite burdensome and time-consuming.<sup>144</sup>

Additionally, as pointed out by many legal scholars, it is the judicial system, rather than legislative branch, that is “generally a more suitable forum for the adjudicatory process of determining the liability of the United States in tort.”<sup>145</sup> After Congress passed the FTCA in 1946, expressly waiving governmental immunity with respect to tort suits brought forth by private citizens, the D.C. Circuit articulated the legislative objectives underpinning the Act rather poignantly in *Odin v. United States*:

Congress passed the [FTCA] to remove the often unjust shield provided by the doctrine of sovereign immunity and for the “broad and just purpose” of “compensating the victims of negligence in the conduct of governmental activities.” This goal of just compensation is not advanced by refusing to allow unknowledgeable claimants to amend their claims and seek *all* their damages when they failed, through ignorance of technical governmental procedures, to request their full damages in their original claims.<sup>146</sup>

In *Odin*, the Court of Appeals for the D.C. Circuit acknowledged that the primary objective of the FTCA is just compensation for those injured as a result of governmental tortious conduct.<sup>147</sup> A strict refusal to permit the operation of FRCP 15(c) to all FTCA claims is precisely the technical procedural barrier that the *Odin* court held the Act should be construed to avoid.<sup>148</sup> Accordingly, the legislative goals of the FTCA are not adequately served when

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144. Read, *supra* note 74, at 789. Before the FTCA, those who were injured by government employees faced “a very difficult and unappealing choice.” *Id.* The plaintiffs could sue the government employee individually. However, if the plaintiff won a favorable judgment, equitable compensation depended on the individual defendant’s ability to pay the judgment. If this course of action seemed overly troublesome, a plaintiff could, in the alternative, petition Congress for relief. *Id.* However, “[t]he former was risky unless the government employee was wealthy, and the latter was burdensome and time-consuming.” *Id.* For a thorough analysis on the burdens associated with private relief bills, see JAYSON & LONGSTRETH, *supra* note 75, § 2.02 (noting that because private bills were typically a claimant’s only relief measure, “it was not long before petitions for relief became so numerous that Congress found itself under an intense and time-consuming burden of attempting to adjudicate, to the detriment of its duty to legislate”). See also *supra* text accompanying notes 72-75.

145. *Developments, supra* note 57, at 888.

146. *Odin*, 656 F.2d at 805 (quoting *Indian Towing Co. v. United States*, 350 U.S. 61, 68 (1955)).

147. *Id.*

148. *Id.*; see also *Lopez v. United States*, 758 F.2d 806, 809 (1st Cir. 1985) (stating that the FTCA “was designed to accord injured parties an opportunity for recovery ‘as

FRCP 15(c) is not applied to a federal law, and should not be construed as such unless expressly stated by legislative measure.<sup>149</sup>

## 2. Government's Reliance on Sovereign Immunity Has No Merit in the Modern Construction of Federal Statutes

The adherence by the judicial branch to sovereign immunity principles, even when construing federal statutes that expressly waive this immunity, is inconsistent with the fundamental principles of American government. As stated by Professor Erwin Chemerinsky:

A doctrine derived from the premise that "the King can do no wrong" deserves no place in American law. The United States was founded on a rejection of a monarchy and of royal prerogatives. American government is based on the fundamental recognition that the government and government officials can do wrong and must be held accountable. Sovereign immunity undermines that basic notion.<sup>150</sup>

Even so, for more than 150 years the Supreme Court has held that "sovereign immunity is a doctrine that protects the United States" against liability absent its express consent to suit.<sup>151</sup> Not only is the doctrine still adhered to in many areas of federal, and primarily state government,<sup>152</sup> but it is often given considerable

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a matter of right'. . . . [T]he law was not intended to put up a barrier of technicalities to defeat their claims" (quoting S. REP. NO. 79-1400, at 31 (1946))).

149. For a discussion on the application of the Federal Rules of Civil Procedure to *inconsistent* federal statutes, see Gregory J. Ressa, *Rule 4(j) of the Federal Rules of Civil Procedure and the Forthwith Service Requirement of the Suits in Admiralty Act*, 54 FORDHAM L. REV. 1195, 1203 (1986) (noting that when a FRCP conflicts with federal procedural statute, an issue of legislative intent arises).

150. Chemerinsky, *supra* note 67, at 1202 (citation omitted).

151. Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1, 8 (2002); *see also* Chemerinsky, *supra* note 67, at 1203 ("[T]he Court has indicated no willingness or likelihood of relaxing the sovereign immunity of the United States government.").

152. Reviewing several recent Supreme Court decisions that deal with state immunity claims, Professor Chemerinsky notes that "sovereign immunity is not fading from American jurisprudence; quite the contrary, the Supreme Court is dramatically expanding its scope." Chemerinsky, *supra* note 67, at 1202; *see Alden v. Maine*, 527 U.S. 706, 713 (1999) (holding that sovereign immunity broadly protects state governments from being sued in state court, based on the rationale that "the Constitution's structure, its history, and the authoritative interpretations by this Court make clear [that] the States' immunity from suit is a fundamental aspect of . . . sovereignty"); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (holding that Congress's ability to authorize suits against state governments and to override sovereign immunity is greatly

weight when courts construe laws that waive sovereign immunity.<sup>153</sup> The Court has declared that conditions providing for governmental waiver must be strictly construed in favor of the sovereign, and not read for more than what the language precisely permits.<sup>154</sup> As such, courts denying relation back of amended FTCA claims have, in large part, rested their holdings on this strict interpretation when applying sovereign immunity principles.<sup>155</sup>

While the doctrine of sovereign immunity has a long history entrenched in the English feudal system, protecting the English sovereign from suit for centuries,<sup>156</sup> federal sovereign immunity has no constitutional basis in the United States.<sup>157</sup> In fact, giving weight to the doctrine may even be inconsistent with the Constitution.<sup>158</sup> Moreover, as the doctrine effectively puts the government above the law, a notion that “is inconsistent with a central maxim of American government,”<sup>159</sup> the judicial system should not be giving sovereign immunity principles much authority, if any, when construing American laws. This is particularly true when Congress ex-

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limited by the Eleventh Amendment, which presupposes that “it is inherent in the nature of sovereignty [for the government] not to be amenable to the suit of an individual without its consent” (citing *Hans v. Louisiana*, 134 U.S. 1, 13 (1890)); see also Jeffrey K. O’Connor, Note, *Is It the Officer or the Gentleman?: Issues of Capacity in § 1983 Actions Brought in Federal Court*, 28 W. NEW ENG. L. REV. 323, 336-37 (2006) (noting that while “Congress may abrogate state immunity by clear statutory intent . . . after *Seminole Tribe*, it appears that this is only available when Congress is legislating pursuant to the enforcement power conferred by § 5 of the Fourteenth Amendment”).

153. Read, *supra* note 74, at 788 (“[B]ecause one of the reasons for sovereign immunity is the presumption that laws are made in order to govern citizens and not to bind the sovereign, when laws are passed which expressly waive this sovereign immunity and bind the United States, they are strictly construed.” (citation omitted)).

154. See *supra* text accompanying notes 119-120.

155. *Supra* text accompanying notes 119-120; see also *Scarborough v. Principi*, 541 U.S. 401, 423 (2004) (Thomas, J., dissenting) (“[I]n a case . . . where the statute defines the scope of the Government’s waiver of sovereign immunity . . . [and] there is no express allowance for relation back . . . I conclude that the sovereign immunity canon applies to construe strictly the scope of the Government’s waiver.”).

156. *Developments, supra* note 57, at 829.

157. Chemerinsky, *supra* note 67, at 1202.

158. Chemerinsky argues:

Article VI of the Constitution states that the Constitution and laws made pursuant to them are the supreme law, and, as such, it should prevail over government claims of sovereign immunity. Yet, sovereign immunity, a common law doctrine, trumps even the Constitution and bars suits for relief against government entities in violation of the Constitution and federal laws.

*Id.* (citation omitted); see also *Edelman v. Jordan*, 415 U.S. 651, 687 (1974) (Brennan, J., dissenting) (referring to the “nonconstitutional but ancient doctrine of sovereign immunity”).

159. Chemerinsky, *supra* note 67, at 1202.

pressly waives executive immunity as to wrongful conduct on behalf of its officers and employees, as it did when it passed the FTCA.

A true democratic system of government will only be fully realized if the sovereign itself provides its constituents with appropriate judicial recourses, which can be used when the government wrongs its citizens.<sup>160</sup> However, the strict construction of federal laws—many of which are intended to provide remedies to private citizens—limits an injured plaintiff's ability to seek redress, in part due to a judicial acceptance of sovereign immunity.<sup>161</sup> These limitations have little policy support in modern American jurisprudence.<sup>162</sup> As such, sovereign immunity principles should not be considered when courts construe provisions of federal laws, including the FTCA's statute of limitations period.

B. *Legislative Goals of the FTCA's 1966 Amendments Should Further the Application of Relation Back Rather than Suppress It*

In 1966, Congress amended the FTCA by enacting an administrative claim requirement to address congressional concerns arising from the flood of lawsuits filed after passage of the FTCA.<sup>163</sup> Additionally, legislators acted upon a fear that "these areas of litigation [were] expanding at a steady pace."<sup>164</sup> Under this new procedural requirement, Congress mandated that all claims brought under the FTCA first be presented to the federal agency whose employee allegedly caused the injury complained of before suit could be filed in court.<sup>165</sup> Congress felt that the new process would allow federal agencies to settle a greater number of tort claims, giving the govern-

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160. *Developments, supra* note 57, at 829.

161. *Id.*

162. Chemerinsky, *supra* note 67, at 1223. "The strongest argument for sovereign immunity likely is tradition: It has existed, in some form, through most of American history and is based on English law. But this begs the central question: Is this a tradition that should continue?" *Id.* Professor Chemerinsky declares it should not, and argues that "[s]overeign immunity conflicts with other, more important traditions in American law: enforcing the Constitution and federal laws, ensuring government accountability, and providing due process of law." *Id.*

163. S. REP. NO. 89-1327, at 2 (1966), as reprinted in 1966 U.S.C.C.A.N. 2515, 2516.

164. *Id.* at 6.

165. 28 U.S.C. § 2401(b) (2000). During this administrative-exhaustion process, the appropriate federal agency evaluates the claim in an effort to determine if it is meritorious, and has six months to make a final disposition on the claim. If the agency denies the claim, or an agreement is not reached within six months, the claimant may file suit in federal court. *Id.* § 2675(a).

ment additional time and resources to allocate towards claims presenting more complex legal issues and questions of fact.<sup>166</sup> As such, “the mandatory administrative claims process [was] intended to serve as an efficient effective forum for rapidly resolving tort claims with low costs to all participants.”<sup>167</sup> Additionally, the process sought “to maximize the benefit achieved through application of prompt, fair and efficient techniques that achieve an informal resolution of administrative tort claims without burdening claimants or the agency.”<sup>168</sup>

In passing the 1966 amendments to the FTCA, Congress ultimately furthered two stated goals: (1) providing private claimants with a fair and expeditious procedure when seeking redress against the government, and (2) easing court congestion by giving the appropriate federal agencies an opportunity to settle these claims themselves.<sup>169</sup> Denying relation back in FTCA claims, irrespective of the particular circumstances before a court, runs contrary to the first goal, and does little to advance the second.

### 1. Fair and Expeditious Treatment of Claims

The legislative history of the 1966 amendments to the FTCA, along with the accompanying committee reports, demonstrates that a primary objective of the amendments was to provide alleged victims of governmental wrongs a more equitable remedy process.<sup>170</sup> Prior to the amendments, the only available course of action for FTCA claimants was to file a claim just as any private tort claimant would, unless the claim was for less than \$2500.<sup>171</sup> However, with the 1966 amendments came a procedure in which the appropriate federal agency, which had a sizable amount of resources at its disposal and experience with settling these types of claims, would have

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166. Read, *supra* note 74, at 791.

167. *Id.* at 831 (quoting 28 C.F.R. § 14.6(a) (2005)).

168. *Id.*

169. S. REP. NO. 89-1327, at 2.

170. *Id.*; H.R. REP. NO. 89-1532, at 6-7 (1966).

171. S. REP. NO. 89-1327, at 2; Shahan J. Kapitanian, Note, *The Federal Tort Claims Act Presentment Requirement: Minimal Notice Sufficient to Pass Legal Muster and Preserve the Right to File a Subsequent Lawsuit in Federal Court*, 35 SUFFOLK U. L. REV. 145, 148-49 (2001). For claims that were less than \$2500, a claimant had the choice of filing an administrative claim with the corresponding government agency or commencing the action in federal court. *Id.* at 148. If the claimant chose the former, he could not file suit in district court until the agency had fully disposed of the claim. *Id.* at 149. This administrative filing was optional. *Id.*

the authority to settle the claim itself.<sup>172</sup> Given the complexities and high costs of litigation that typically accompany tort claims, a procedure that facilitates out-of-court settlement is quite beneficial to the private plaintiff.<sup>173</sup>

The 1966 amendments to the FTCA were a legislative measure that sought to provide an equitable form of redress to those injured by government. Given this pro-plaintiff congressional action, the FTCA limitations period should not be construed so strictly as to bar an injured claimant's meritorious claim on the theory of a court-fashioned rule of law that has no legislative support.<sup>174</sup> This construction is especially troubling, given that there is no indication in the text of the FTCA's limitations provision that supports this position.<sup>175</sup> Therefore, the legislative goal of making the FTCA claims process more amenable to plaintiffs is in no way furthered, and is in fact hindered by refusing to allow relation back in all such actions.

## 2. Increasing the Settlement Probability of FTCA Claims and Reducing Court Congestion

The 1966 amendments had the additional purpose of reducing the number of FTCA claims filed in court by increasing out-of-court settlement of such claims, and thereby reducing court congestion.<sup>176</sup> By enlarging administrative authority to settle appropriate claims, the role of the judiciary in handling governmental tort claims was reduced, thus accomplishing the goal of judicial econ-

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172. S. REP. NO. 89-1327, at 2 ("Tort claims against the Government for the most part arise in connection with the activities of . . . the Post Office Department, the Defense Department, the Veterans' Administration, the Department of the Interior, and the Federal Aviation Agency. These agencies . . . have a large degree of experience in settling such claims.").

173. Note, *Federal Tort Claims Act: Notice of Claim Requirement*, 67 MINN. L. REV. 513, 519 (1982).

174. "The Eighth Circuit's opinion [in *Manko*] does virtually nothing to explain the source of its rule, . . . [and] no other source for its rule can be found in the FTCA, so the Eighth Circuit fabricated its own rule essentially out of whole cloth." Petition for Writ of Certiorari at 13-14, *Lee v. United States*, 509 U.S. 913 (1993) (No. 92-1390).

175. *Id.*

176. The 1966 amendments encourage settlement and thus eliminate "the need for filing suit and possible expensive and time-consuming litigation." S. REP. NO. 89-1327, at 2; see also Read, *supra* note 74, at 791 (noting that in 1965, "approximately eighty percent of the meritorious claims filed against the Government under the FTCA were settled prior to trial"). As such "legislators hoped that passage of the amendment would permit federal agencies to settle substantial numbers of tort claims, thus enabling the Department of Justice's Civil Division to give greater attention to those cases that involved difficult legal and damage questions." *Id.*

omy.<sup>177</sup> As increased pre-litigation settlement is facilitated by compliance with the administrative claim process, adequate notice to the appropriate federal agency is “necessary for the fruitful settlement of claims.”<sup>178</sup>

The importance of the administrative handling of FTCA claims in order to encourage out-of-court settlement is stressed by the courts that have refused to permit relation back of amended FTCA claims. These courts, particularly the Court of Appeals for the Eighth Circuit in *Manko*, have pointed out that amendments that add new parties or claims are likely to increase, often substantially, the amount of damages sought by the injured claimant.<sup>179</sup> Allowing these amended claims to go forward would unfairly tamper with the government’s “settlement calculus” because they would not have been factored into the equation when the government investigated and negotiated the plaintiff’s original claim.<sup>180</sup> As such, courts refusing to permit relation back rely quite heavily on the argument that relation back of amended claims frustrates the FTCA’s administrative filing requirements, and thus is not permissible as a matter of law.<sup>181</sup>

While at first glance this appears to be a very strong factor in favor of refusing to apply FRCP 15(c) to FTCA claims, it is problematic in several aspects. First and foremost, unbridled support for the pre-settlement goals of the 1966 FTCA amendments fails to consider the dual objective of providing for more equitable treatment to private claimants when dealing with the government.<sup>182</sup> As future courts address the applicability of relation back within the

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177. Sidney B. Jacoby, *The 89th Congress and Government Litigation*, 67 COLUM. L. REV. 1212, 1212-13 (1967).

178. Kapitanyan, *supra* note 171, at 166 (discussing the competing legislative goals of the 1966 FTCA amendments, specifically that of judicial economy and the equitable treatment of private FTCA claimants); *see also* Kornbluth v. Savannah, 398 F. Supp. 1266, 1268 (E.D.N.Y. 1975) (noting that the purpose of the administrative filing requirements “is to spare the Court the burden of trying cases when the administrative agency can settle the case without litigation”).

179. *Manko v. United States*, 830 F.2d 831, 841 (8th Cir. 1987); *see also* Lee v. United States, 980 F.2d 1337, 1341 (10th Cir. 1992); *Withrow v. United States*, No. Civ. A. 5:05-152-JMH, 2005 WL 2403730, at \*6 (E.D. Ky. Sept. 28, 2005).

180. *Manko*, 830 F.2d at 841 (“Allowing material changes in claims after [the expiration of the limitations period] would severely disrupt the settlement process.”); *see supra* text accompanying notes 130-131.

181. *Lee*, 980 F.2d at 1341 (finding that permitting relation back of an amended FTCA claim “would . . . violate congressional intent to create a system for administrative agencies dealing with specific claims”).

182. S. REP. NO. 89-1327, at 2 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2515, 2516.



realm of the FTCA, it is essential that these competing interests are given equal consideration. In order to properly “strike a balance between seeking judicial economy and providing claimants with equitable relief,”<sup>183</sup> both of these interests need to be factored into the equation. This will ensure that the FTCA’s limitations period is not turned into an absolute procedural barrier that bars otherwise meritorious amended claims from ever having the chance to be litigated, especially when the government is on notice of the new claim from the outset of the litigation.<sup>184</sup>

Second, and perhaps equally persuasive, is the fact that many of the tardy amended FTCA complaints that seek to apply relation back are filed with the appropriate federal agency while the original (and properly filed) claim remains pending with the government.<sup>185</sup> The effect of this circumstance is twofold: First, the filing of an amended administrative claim while the original is still pending with the federal agency does not rob the government of its chance to factor the new damages into its settlement negotiations. This avoids the problem addressed by the Courts of Appeal for the Eighth and Tenth Circuits pertaining to the application of FRCP 15(c) preventing the administrative agencies from being able to implement an effective “settlement calculus” while negotiating claims with injured citizens.<sup>186</sup>

Equally important is the prejudicial effect that delay on the part of the administrative agency in making a disposition on the claim will have on the injured private citizen. Under the administrative filing requirements created by the 1966 amendments to the FTCA, the appropriate federal agency has six months to reach final disposition of a claim after the original filing date.<sup>187</sup> The failure of the agency to reach a disposition within six months may be considered to be a “final denial” by the claimant, permitting him to end the administrative process and file suit in the appropriate federal district court.<sup>188</sup> However, the claimant is not required to file suit

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183. Kapitanayan, *supra* note 171, at 165-66.

184. *Odin v. United States*, 656 F.2d 798, 805 (D.C. Cir. 1981); *see also* Laurie Helzick, *Looking Forward: A Fairer Application of the Relation Back Provisions of Federal Rule of Civil Procedure 15(c)*, 63 N.Y.U. L. REV. 131, 140 (1988) (noting that “[r]elation back was developed in order to liberalize the rules of pleading for the plaintiff without contravening the policies behind the statute of limitations”).

185. *Petition for Writ of Certiorari*, *supra* note 174, at 10.

186. *Manko v. United States*, 830 F.2d 831, 841 (8th Cir. 1987).

187. 28 U.S.C. § 2675(a) (2000).

188. *Id.*

and may continue to negotiate with the government to reach an acceptable settlement.<sup>189</sup>

Unfortunately, for plaintiffs filing FTCA claims, many of which are filed *pro se* by the injured person or a family member,<sup>190</sup> administrative negotiations may continue for several years after the filing of the claim, well beyond the FTCA's two-year limitations period.<sup>191</sup> Naturally, if a *pro se* plaintiff receives no notice from the administrative agency regarding the claim, it is unlikely he will seek representation until the claim is finally denied by the government, at which point his only recourse is through federal district court.<sup>192</sup> However, if the claim is denied after the expiration of the FTCA's limitations period, subsequent meritorious claims that may be discovered upon a plaintiff's first retaining counsel will only have a chance at being litigated through the relation-back doctrine.

As such, strict refusal to permit application of the doctrine puts the injured plaintiff in an unfair position, and allows the government an added incentive in the negotiation process to stretch the denial of a claim beyond the acceptable limitations date. While injured tort victims lie uncompensated, the FTCA's administrative filing requirement unfairly gives the government an incentive to drag on the litigation beyond the limitations period. It is no wonder that one author has noted that "[t]he number of failed claims resulting from the FTCA presentation requirements is depressing. . . . Many meritorious claims have never received a hearing, no doubt leaving their proponents to wonder how sincere is Congress's pledge to recompense victims of negligent or wrongful acts of government employees."<sup>193</sup>

Therefore, whether the appropriate federal agency has made a final disposition of the claim—ending any possibility of negotiating a settlement at the administrative level—is a factor courts should

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189. Zillman, *supra* note 99, at 969.

190. Petition for Writ of Certiorari, *supra* note 174, at 12.

191. Zillman, *supra* note 99, at 969 (discussing the proper presentation of FTCA claims, and noting that "[o]ften administrative negotiations will continue for several years after the filing of the claim").

192. The administrative claim process is deceptively simple, as a series of legal issues lay beneath the apparently simple framework. *See* Bermann, *supra* note 102, at 563-64. FTCA procedures, namely its administrative exhaustion requirement, "are different from private party tort litigation and actions against other government entity defendants." Zillman, *supra* note 99, at 967. While it is not unreasonable to expect *pro se* litigants to be familiar with this process, courts should recognize that demanding strict compliance with the FTCA's administrative filing requirements will likely result in many claims being dismissed on purely technical grounds.

193. Zillman, *supra* note 99, at 996.

consider when deciding whether to apply FRCP 15(c) to tardy FTCA amendments. The bright-line approach taken by the Courts of Appeals for the Eighth and Tenth Circuits<sup>194</sup> prevents a court presented with the issue from considering this factor.

C. *The History and Development of the Relation-Back Doctrine Demand that FRCP 15(c) Has Some Applicability to FTCA Claims*

The development of the relation-back doctrine in American jurisprudence has focused on an important detail—getting tardy but otherwise meritorious claims to trial.<sup>195</sup> Rule makers have consistently demonstrated that they favor a liberal construction and application of FRCP 15(c).<sup>196</sup> They began broadening the relation-back doctrine by abandoning the common law “cause-of-action” test<sup>197</sup> and have continued to expand the rule by adding legislative amendments.<sup>198</sup> This legislative expansion of the relation-back doctrine is in accordance with the goals of the Federal Rules of Civil Procedure as to the governance of pleadings in general.<sup>199</sup> Additionally, the 1966 amendments to FRCP 15(c), which specifically broadened the rule in part to rectify a trend of harsh results arising in certain actions by private parties against officers or agencies of the United States (including FTCA claims), demonstrate a further congressional desire to adequately provide plaintiffs with a judicial forum for meritorious claims, especially claims filed against the govern-

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194. *Lee v. United States*, 980 F.2d 1337 (10th Cir. 1992); *Manko v. United States*, 830 F.2d 831 (8th Cir. 1987); *see also supra* Part II.B.

195. *Woods v. Ind. Univ.-Purdue Univ.*, 996 F.2d 880, 883 (7th Cir. 1993) (“We have long left no doubt of the broad scope to be given FRCP 15(c).”). The Court of Appeals for the Seventh Circuit also noted relation back “has its roots in the equitable notion that dispositive decisions should be based on the merits rather than technicalities.” *Id.* at 884.

196. *See* 3 MOORE ET AL., *supra* note 12, § 15.02[1] (noting that FRCP 15 in general is meant to allow for the liberal allowance of amendments “in the interests of resolving cases on the merits”); *see also Siegel v. Converters Transp., Inc.*, 714 F.2d 213, 216 (2d Cir. 1983) (finding that for over forty years FRCP 15(c) has been liberally construed).

197. *See supra* text accompanying notes 17-26.

198. *See supra* notes 46-51.

199. *Conley v. Gibson*, 355 U.S. 41, 48 (1957); *see also Schiavone v. Fortune*, 477 U.S. 21 (1986), *superseded by* FED. R. CIV. P. 15(c)(3) (1991 Amendments). In specifically addressing the application of FRCP 15(c) to pleadings that misname the proper defendants, Justice Blackmun made evident that as “Justice Black reminded [the Court], more than 30 years ago . . . the ‘principal function of procedural rules should be to serve as useful guides to help, not hinder, persons who have a legal right to bring their problems before the courts.’” *Id.* at 27 (quoting Order Adopting Revised Rules of the Supreme Court of the United States, 346 U.S. 945, 946 (1954)).

ment.<sup>200</sup> A bright-line rule disallowing the application of FRCP 15(c) to any FTCA claim is in sharp contrast to these legislative goals.

### 1. Purpose of FRCP 15(c)

“The primary purpose of the Federal Rules of Civil Procedure is to facilitate the presentation of cases and promote their disposition on the merits.”<sup>201</sup> FRCP 15(c) supports this objective by permitting a claimant to contravene a statute of limitations and cure an otherwise defective claim by providing liberal standards for determining when amendments are permitted to relate back to the date on which the party filed its original pleading.<sup>202</sup> Once the statute of limitations has run on a cause of action, FRCP 15(c) is often “the only vehicle available for a plaintiff to amend [a] complaint.”<sup>203</sup> Therefore, if the legislative goals of the Federal Rules of Civil Procedure are truly meant to avoid technical pitfalls at the pleading stages, courts should not create rules of law that specifically undermine these objectives without an express indication from Congress that the FRCP at issue is not to apply. At the very least, judicial ruling from the bench that an FRCP has no application to a federal law should be premised on a finding that the particular statutory provision directly conflicts with the FCRP at issue. The FTCA’s statute of limitations provision does neither of these.<sup>204</sup> Instead, the Courts of Appeals for the Eighth Circuit and, subsequently, the Tenth Circuit merely “fabricated its own rule essentially out of whole cloth,” as there is no source of conflict in the statute that justifies this new bright-line rule of law within the language of the FTCA.<sup>205</sup>

Equally persuasive is the language of pertinent Department of Justice regulations—specifically 28 C.F.R. § 14.2—which defines what constitutes a sufficient administrative claim, and when a claim is deemed to be presented.<sup>206</sup> One of these guidelines, 28 C.F.R. § 14.2(c), provides that a claim “may be amended by the claimant at

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200. 6A WRIGHT ET AL., *supra* note 37, § 1502.

201. Shapiro, *supra* note 26, at 671; *see also* Foman v. Davis, 371 U.S. 178, 181 (1962).

202. Shapiro, *supra* note 26, at 671.

203. 3 MOORE ET AL., *supra* note 12, § 15.19[3][a].

204. *See* Petition for Writ of Certiorari, *supra* note 174, at 14 (noting that neither the text of the FTCA’s limitations provision, nor any other language in the statute, supports the position that relation back is not applicable to FTCA claims).

205. *Id.*

206. 28 C.F.R. § 14.2 (2006).

any time prior to final agency action or prior to the exercise of the claimant's option [to file suit after six months]."<sup>207</sup> While this apparently liberal regulation governing the amendment of FTCA claims still pending in the administrative channels does not expressly discuss the amendment of claims filed *after* the limitations period on the original claim has run (in which case relation back would demand application), the plain language of the regulatory provision is quite clear—an amended claim may be filed at any time prior to an agency denial of the claim. The regulation makes no mention of the effect an amendment may have if it is filed after the two-year limitations period has expired. However, if the federal government had intended for relation back not to apply in this circumstance, it would have regulated accordingly.<sup>208</sup> In determining that FRCP 15(c) did apply to FTCA claims, the Ninth Circuit acknowledged that this plain regulatory language must be taken into account when construing the FTCA's limitations period.<sup>209</sup>

## 2. Specific Liberalizing Purpose of the 1966 Amendments to FRCP 15(c) Is Frustrated if Relation Back Is Not Permitted in FTCA Claims

FRCP 15(c) was amended in 1966 to clarify “when an amendment of a pleading changing the party against whom a claim is asserted . . . shall ‘relate back’ to the date of the original pleading.”<sup>210</sup> The “very important objective of the 1966 amendments to FRCP 15(c)” was to clarify the application of relation back to suits by private citizens against the government.<sup>211</sup> This was necessary due to the fact that it was in these types of claims that “harsh results frequently were reached.”<sup>212</sup> Given the complex nature of the federal

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207. *Id.* § 14.2(c) (emphasis added); see also Petition for Writ of Certiorari, *supra* note 174, at 14 (noting that the relevant agency regulations “freely authorize amendment of FTCA claims pending in federal agencies prior to final agency decision but . . . give no warning to claimants of the trap that has been created for all claimants by the government in [these] cases”).

208. Interestingly, 28 C.F.R. § 14.2(b)(4), which directly precedes 28 C.F.R. § 14.2(c), does speak directly to the effect that certain administrative FTCA claims will have on the FTCA's limitations period. This strengthens the proposition that, had the government intended for tardy amendments to have an effect on the FTCA's statute of limitations, it would have stated such in the regulation.

209. *Avila v. INS*, 731 F.2d 616, 620 (9th Cir. 1984) (noting that “the strict requirements of the [agency] regulations” did not pose a barrier to the filing of amended claims, and in fact expressly provided for them).

210. FED. R. CIV. P. 15(c) advisory committee's notes on 1966 amendments.

211. *Id.*; 6A WRIGHT ET AL., *supra* note 37, § 1502.

212. 6A WRIGHT ET AL., *supra* note 37, § 1502.

administrative system, private citizens often filed claims that misnamed or confused the appropriate federal agencies, and amendments that were filed after the limitations period were often denied, resulting in the dismissal of otherwise potentially meritorious claims.<sup>213</sup> As such, the 1966 amendments were intended to “have the desirable effect of facilitating a citizen’s suit against his sovereign by eliminating an unnecessary trap for the unwary.”<sup>214</sup> Even though the thrust of the 1966 amendments to FRCP 15(c) was to correct the effect of misnaming a defendant in claims filed by private citizens against the government, the force of the 1966 amendments should not be ignored when addressing the applicability of relation back of amendments that identify new claims or plaintiffs for two important reasons.

First, while dismissal of meritorious claims due to a plaintiff’s incorrect naming of the appropriate federal agency was the “technical pleading error” that was sought to be eradicated, this problem likely could have been corrected by a change in the federal statute at issue (such as by changing the language of the FTCA), or by an administrative regulation that addressed the naming of an improper defendant.<sup>215</sup> However, given the broader difficulties private liti-

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213. See *Cohn v. Fed. Sec. Admin.*, 199 F. Supp. 884 (W.D.N.Y. 1961); *Hall v. Dep’t of Health, Educ., & Welfare*, 199 F. Supp. 833 (S.D. Tex. 1960); *Sandridge v. Folsom*, 200 F. Supp. 25 (M.D. Tenn. 1959); *Cunningham v. United States*, 199 F. Supp. 541 (W.D. Mo. 1958). For an in-depth look at these cases, which were “quite at odds with [his] sense of justice,” see Clark Byse, *Suing the “Wrong” Defendant in Judicial Review of Federal Administrative Action: Proposals for Reform*, 77 HARV. L. REV. 40 (1963). Given the undesirable results of these cases, Byse proposed that FRCP 21 (which controls the misjoinder and nonjoinder of parties) should have been amended to expressly permit, by way of a separate provision, relation back in actions filed against the United States, when certain procedural safeguards were met. *Id.* at 55-56.

214. 6A WRIGHT ET AL., *supra* note 37, § 1502; see also *Moore v. U.S. Postal Serv.*, No. 95-1021, 1995 U.S. App. LEXIS 31559, at \*4 (7th Cir. Oct. 13, 1995) (“[The] second paragraph of Federal Rule of Civil Procedure 15(c) allows liberal amendment to add the United States as a defendant. . . . [The plaintiff] is thus entitled to the opportunity to add the United States as a proper defendant as a matter of course.”); *Lojuk v. Johnson*, 853 F.2d 560, 563-64 (7th Cir. 1988) (“The second paragraph of FRCP 15(c) . . . was added specifically to take care of situations where a person denied federal benefits did not file within the appropriate period a civil action against the federal officer . . . but instead wrongly sued an improper governmental defendant.”).

215. Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 409 (1967). When the advisory committee proposed a redrafting of FRCP 15(c) in March 1964, it noted several unsatisfactory decisions in which claimants seeking social security benefits mistakenly named the United States as defendant, when the correct party was the Secretary of Health, Education, and Welfare. See *Cohn*, 199 F. Supp. 884; *Hall*, 199 F. Supp. 833; *Sandridge*, 200 F. Supp. 25; *Cunningham*, 199 F. Supp. 541; see also Sidney B. Jacoby, *The Effect of Recent Changes in the Law of “Nonstatutory” Judicial Review*,

gants often faced when suing the government, “a rule amendment seemed in order.”<sup>216</sup> Consequently, the 1966 amendments were approved by Congress to facilitate the broader reach of FRCP 15(c) and better arm private litigants as they enter the often tangled and often harsh realm of litigating suits against the United States.<sup>217</sup>

Additionally, the course of action taken by the Eighth and Tenth Circuits has the potential effect of creating the very situation that the 1966 amendments sought to redress—dismissing meritorious claims due to the technical errors that in no way prejudice the government.<sup>218</sup> It is not impossible to contemplate a situation in which a party who is injured by a government employee and seeks compensation via the FTCA mistakenly files the administrative claim with an improper federal agency. If this administrative claim is denied after the statute of limitations has run on the claim, and the plaintiff then turns to the federal court system with an amended claim that corrects the party misnomer, a district court in one of these circuits would interpret the court of appeals’ holding as completely barring the relation back of an amended FTCA claim. Unfortunately, the plaintiff would then be stuck with a defective pleading that would demand dismissal of the action. This is precisely the procedural trap that the 1966 amendments sought to eliminate with respect to claims filed by private litigants against the government. Even so, the Courts of Appeals for the Eighth and Tenth Circuits’ fashioning of an unprecedented rule of law, namely

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53 GEO. L.J. 19, 42 (1964). In these cases, a tardy amendment to name the proper defendant was denied. *Id.* In response, the Social Security Administration, “in an attempt to prevent similar situations in the future,” amended its own regulations to govern these situations, providing that where an improper defendant was named, the Administration itself would notify the plaintiff of the error and permit him sixty days to correct the complaint. *Id.* at 43 n.148. While this action was “highly commendable” and could have been followed by other federal administrative branches, it “in no way lessen[ed] the desirability of broadly amending FRCP 15(c) . . . since [ ] suits for social security benefits constitute[d] only one example of a larger problem.” *Id.*

216. Kaplan, *supra* note 215, at 408-09 (noting that the problem citizens faced when seeking redress from the government was based on a “somewhat wooden application of the ideas that private litigants must cut square corners in dealing with the Government.”).

217. Helzick, *supra* note 184, at 137 (“The amended FRCP 15(c) was intended to dispel the confusion regarding the requirement for relation back of claims against all parties, private and governmental.”); see also FED. R. CIV. P. 15(c) advisory committee’s notes on 1966 amendments (“In actions between private parties, the problem of relation back of amendments . . . has generally been better handled by the courts, but incorrect criteria have sometimes been applied, leading sporadically to doubtful results. . . . FRCP 15(c) has been amplified to provide a general solution.”).

218. 6A WRIGHT ET AL., *supra* note 37, § 1502.

that FRCP 15(c) has no applicability to *any* FTCA claims, presents claimants with an obstacle of procedural injustice that lawmakers sought to eradicate more than fifty years ago.

D. *Factors Courts Should Consider When Confronted with the Applicability of FRCP 15(c) to FTCA Claims*

The arguments relied upon by the courts that have fashioned the rule of law that FRCP 15(c) has no application to claims filed under the FTCA do not outweigh the policy objectives that are accomplished by allowing relation back to save amended complaints in limited circumstances.<sup>219</sup> As such, when confronted with amendments seeking to add new plaintiffs or new claims, courts should consider several factors that will both prevent injustice to the government, while at the same time effectuating the policies of FRCP 15(c). As stated above, these factors seek to promote the just adjudication of claims based on their merits rather than disposing of them based on technical pleading errors.<sup>220</sup>

First, courts should refrain from considering the “ease of congestion” settlement goal as the only objective to be accomplished by the administrative filing requirements created by the 1966 amendments to the FTCA.<sup>221</sup> Equally as important to this need of reducing court congestion and procuring an out-of-court conclusion to FTCA claims is the desire to provide private claimants with a suitable process for seeking redress against the government.<sup>222</sup> As this factor weighs in favor of permitting the relation back of amended FTCA claims, it should have the effect of canceling out the other stated goal of the 1966 amendments. In choosing not to weigh either of these administrative filing goals, the courts give fair consideration to the rights of each party involved in the litigation.

Second, courts should inquire into whether the tardy amended claim was filed while the original, timely filed claim was still pending in the administrative channel with the corresponding federal agency. If this is indeed the case, courts can look more favorably upon applying relation back to the tardy amendment, as the government still has a chance to factor the new damages into its settle-

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219. See *supra* text accompanying notes 195-198.

220. *Conley v. Gibson*, 355 U.S. 41, 48 (1957).

221. S. REP. NO. 89-1327, at 2 (1966), as reprinted in 1966 U.S.C.C.A.N. 2515, 2516.

222. *Id.*



ment negotiations.<sup>223</sup> This would side-step the problem focused on by the Courts of Appeals for the Eighth and Tenth Circuits pertaining to FRCP 15(c) preventing the administrative agencies not being able to implement an effective “settlement calculus,” while at the same time taking away a clear advantage afforded to the government if it decides to prolong the settlement process beyond plaintiff’s afforded limitations period.

Finally, after the above factors are taken into consideration, the court should apply a modified form of FRCP 15(c) analysis to determine if relation back is permissible to the FTCA claim presented. Assuming the amended claim is filed with the appropriate federal agency while the original claim is pending, the court should inquire into whether the plaintiff is adding a new claim *or* adding a new party to the action. Claims asserting new parties should be scrutinized with more caution, as the government is more likely to be prejudiced on account of having no notice of the new litigant from the outset of the action.<sup>224</sup> Therefore, a heightened or strict notice requirement should be employed by the presiding court in order to ensure that the government is not prejudiced by the fact that it was not afforded the benefit of the new party exhausting the administrative claims process prior to filing the action in federal court.

However, when the original party is only filing a new claim that arises out of the conduct or transaction of the underlying factual

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223. Compare, e.g., *Lee v. United States*, 980 F.2d 1337 (10th Cir. 1992), with *Manko v. United States*, 830 F.2d 831 (8th Cir. 1987). In *Lee*, the plaintiff filed her amended FTCA claim while the original claim was pending with appropriate government agency. Petition for Writ of Certiorari, *supra* note 174, at 5. As such, the government could have altered its settlement calculus before making a final disposition of the original claim, and a potential settlement that factored in the new claims could have been negotiated at the administrative level. However, in *Manko* the plaintiff filed her amended claim after the federal agency had denied the original administrative claim. *Id.* at 10. In such a case, the government can make a stronger argument that the settlement process was “severely disrupt[ed],” as the federal agency did not have an ample opportunity to factor in these new claims and increased damage requests at the administrative level. *Manko*, 830 F.2d at 841.

224. 3 MOORE ET AL., *supra* note 12, § 15.19[3][a] (“Courts generally allow the relation back of amendments to add claims more freely than amendments to add parties.”); see also *Intown Props. Mgmt., Inc. v. Wheaton Van Lines, Inc.*, 271 F.3d 164, 170 (4th Cir. 2001) (“Rule 15 has its limits, and courts properly exercise caution in reviewing an application of the rule that would increase a defendant’s exposure to liability. Thus, an amendment to the pleadings that drags a new defendant into a case will not relate back to the original claims unless that defendant had fair notice of them.”); *Martell v. Trilogly, Ltd.*, 872 F.2d 322, 324 (9th Cir. 1989) (stating when seeking to change an opponent party, “[t]he litigant seeking amendment must satisfy more stringent requirements”).

circumstances, traditional FRCP 15(c) analysis should apply; the notice requirement should not be subject to a strict or heightened standard of review. This traditional relation back analysis is necessary for several different reasons. First, claims that simply assert new causes of action, as opposed to a new party, have usually been given more favorable deference by courts called on to determine whether FRCP 15(c) can save an otherwise tardy and defective claim.<sup>225</sup> Second, this protects the plaintiff's right to avail himself of the goals of the Federal Rules of Civil Procedure and sustain a judgment on the merits of the claim, as opposed to facing dismissal as a result of technical pleading errors. Finally, given the amount of FTCA claims with which federal administrative agencies are accustomed to dealing, it is far more likely to be on notice of a potential claim that the plaintiff has omitted from his administrative form when commencing an action against the government than would a typical private defendant.

#### CONCLUSION

Private litigants spend a tremendous amount of time and money on FTCA claims, many of which are dismissed for technical pleading errors.<sup>226</sup> This forces a vast number of injured citizens, many with meritorious claims, to suffer harm without adequate compensation. Although their tort claims would likely have been found valid if filed against a private citizen, their actions are held untimely and dismissed because the opposing party is the government. Clearly a statute of limitations belongs within the American legal framework. However, procedural rules like relation back have been adopted to alleviate the harshness of the limitations defense. Even so, a rule of law that FRCP 15(c) has absolutely no application to FTCA claims is the prevailing view in the courts of appeals today. Nevertheless, this rule has not been adopted by any legislative measure, but instead has been applied as the result of an unsupported reading of the FTCA's limitations period and the case law interpreting this statute.

Any factors that may persuade a court to determine a rule of law that FRCP 15(c) has no application to FTCA claims must be balanced against the fundamental policies underlying the Federal Rules of Civil Procedure, which demand that technical pleading er-

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225. Shapiro, *supra* note 26, at 677 (noting that there is a greater likelihood that a defendant will be prejudiced when a new party is added).

226. Zillman, *supra* note 99, at 996.

rors should not necessarily be outcome determinative.<sup>227</sup> Courts must not be permitted to apply a bright-line rule that unfairly absolves the government of liability, even though it has potentially wronged one of its citizens. Therefore, in cases like those involving Catherine Deegan Patterson and her sister Yvonne Deegan Gioka,<sup>228</sup> the United States should not be allowed to hide behind procedural barriers based on judicially crafted rules of law. Instead it must be forced to answer for the wrongful (and occasionally appalling) conduct of its federal employees by permitting those citizens injured by acts of the government to seek redress against the sovereign and have their day in court. Denying relation back of FTCA claims, irrespective of the facts and procedural settings of the cases, simply has no place in modern American jurisprudence.

*John S. Gannon\**

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227. *Conley v. Gibson*, 355 U.S. 41, 48 (1957).

228. *See supra* text accompanying notes 1-9.

\* I would like to thank my parents, Marcia and John Gannon, and my grandmother, Dorothy Vinal, for their unwavering love, support, and guidance throughout my educational pursuits. I would also like to thank the entire staff of the *Western New England Law Review* for their assistance in developing and editing this Note.