

# Military Tort Claims: a Primer

by David A. Buzard



Virginia is the most heavily militarized jurisdiction in the United States, with several major military bases and hundreds of lesser installations throughout the Commonwealth. This guarantees the constant presence of hundreds of thousands of military personnel and civilian employees. They interact each day with private citizens (including military spouses and children)—be it driving on our roadways, flying over our persons and properties, and practicing the liberal professions (medicine, law, engineering). Moreover, the regular rotation of military personnel ensures a constant flow into our Commonwealth from other states and overseas of thousands of dependent families who bring their own recent interactions with military personnel.

Because of this pervasive military presence in civilian daily life, all Virginia practitioners, plaintiffs' and defense, of any flavor of personal injury litigation—automobile accidents, slip 'n fall, medical malpractice, negligent facilities engineering, etc.—should have a basic knowledge of the various military claims acts.

## The Statutory Framework<sup>1</sup>

The sovereign (i.e., our government, including its armed forces) is immune from suit unless it has consented to it; any consent is strictly limited in scope to the express terms of the act granting consent to suit. Moreover, military and other U.S. government employees generally are immune from personal suit concerning acts performed within the scope of their employment.<sup>2</sup>

The Federal Tort Claims Act ("FTCA")<sup>3</sup> is the principle and overriding statute enabling a victim of the negligence of a person acting within the scope of his or her employment with the United States government. The FTCA provides that "[t]he United

States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstance, but shall not be liable for interest prior to judgment or for punitive damages."<sup>4</sup> There is also no right to trial by a jury under the FTCA.<sup>5</sup> The FTCA and the other claims statutes look to the law of the state where the act or omission occurred to decide the cause of action and extent of compensatory damages. (State caps apply<sup>6</sup>). The "law of the state" is the whole law, including the state's choice of law rules.<sup>7</sup> However, the latter governs where local and federal law conflict.<sup>8</sup> Thus, state law statutes of limitation, and state law tolling provisions, do not apply.<sup>9</sup> A claim must be brought ". . . within two years after such claim accrues or unless action is begun within six months after the date of . . . final denial of the claim by the agency to which it was presented."<sup>10</sup> "Accrual" also is defined by federal law.<sup>11</sup>

The FTCA is territorially limited. It applies only to claims arising in the United States.<sup>12</sup> Thus, the remedies of persons injured by military negligence abroad (even U.S. citizens in U.S. military hospitals overseas) are limited to one of the lesser claims acts, and are barred from having their claim ultimately decided judicially.

Excluded from liability by the express terms of Section 2680 of Title 28 are claims arising from discretionary government functions: admiralty—except claims under the Death on the High Seas Act<sup>13</sup>; intentional torts (Such a claim is outside the scope of employment and the personal tortfeasor is, therefore, not immune.) and combat activities. Claims cognizant under the Federal Employees' Compensation Act<sup>14</sup> and the Longshore and Harbor Workers' Compensation Act<sup>15</sup> are "comp barred" from the FTCA and the other acts.

Also excluded is that portion of any claim caused by a government contractor, to the extent such contractor may have assumed liability.<sup>16</sup> For example, the Portsmouth Naval Hospital in recent years has out-sourced much of its nursing services to private nursing services that provide contract RNs, LPNs and CNAs to the hospital. Where such a contractor is the source of injury-causing negligence, that contractor's negligence is not cognizable under the FTCA. Therefore, the negligent person (and the service that provided him or her to the government) are not immune. Suit can be brought in state court, without first presenting any sort of administrative claim. Punitive damages may be alleged, the case may be tried to a jury, and plaintiff's counsel's fees are not limited.

As a practice tip, one may not learn that a contractor is involved until after filing the administrative claim and completion of the claims officer's initial investigation. In the meantime, the underlying state limitations period continues to run. Therefore, timely request and review of the records (see "Getting Your Records") is essential to filing the administrative claim well before the two-year limitation period. It is not unusual that an investigation is not initiated until a claim is filed. Imagine learning two years and a day afterwards that you could have had a punitive damages claim tried by a Portsmouth jury, and you no longer even have an FTCA claim because it was not a military doctor after all.

Military members are barred from recovery under the FTCA, as well as the other claims acts, for personal injury or death "incurred incident to military service or duty."<sup>17</sup> This nonstatutory exclusion has a truly draconian effect. "Incident to service" means any and all activities, not just work-related military duties, to which the service member is exposed due to his or her military service—including use of base recreational facilities and receipt of health care services. This nonstatutory bar to recovery, known as the Feres Doctrine, is periodically challenged and is invariably upheld.<sup>18</sup> The result is that even in the most heinous cases of negligence, the injured service member (or his survivors when the result is death) must be content with the usual medical and veterans benefits for which any other service member is entitled. Even conservative commentators agree that the Feres Doctrine should be undone.<sup>19</sup> Although the service member bar to recovery is not statutory, it probably will require legislation to undo.

***The Virginia practitioner should also be aware of lesser known acts that afford relief for some situations beyond the scope of the FTCA.***

The Virginia practitioner should also be aware of lesser known acts that afford relief for some situations beyond the scope of the FTCA. These are the Military Claims Act<sup>20</sup> (compensation for negligence not covered by the FTCA, including that occurring outside the United States); the Foreign Claims Act<sup>21</sup> (compensation to foreign nationals and nations for damage caused by non-combat activities outside the United States); and the Non-Scope Claims Act<sup>22</sup> (nominal payment for employee negligence committed outside the scope of military employment and not payable under any other provision of law). There are also various Status

of Forces Agreements and implementing bilateral treaties between the United States and nations hosting our armed forces abroad that have their own claims provisions.<sup>23</sup> None of these statutes, however, authorize suit against the United States should the administrative remedy prove unsatisfactory. Finally, although active duty service members are barred from recovery under the claims acts, their potential avenues of recovery through either a fact-based humanitarian plea to the service responsible, or even a private bill in Congress, should not be dismissed out-of-hand.

Attorneys' fees for assisting claimants are limited to 20% of any compromise or settlement of an administrative claim, and to 25% of any judgment for plaintiff or settlement after suit is filed. They are paid out of the amount awarded and not in addition.<sup>24</sup> There is no limitation on costs, which also may be deducted from the award.

## **The Administrative Claim<sup>25</sup>**

For any tort claim against the military services, an administrative claim must be presented within two years of accrual.<sup>26</sup> "Presented" does not mean postmarked by a certain date, but actually received by the service(s) concerned within the two-year period.<sup>27</sup> A lawsuit against the United States may be brought under the FTCA only if the plaintiff has first sought administrative relief from the military service whose activities gave rise to the claim, and that service has either finally denied the claim, or has had the claim pending for at least six months.<sup>28</sup> Moreover, if the administrative claim is affirmatively denied, an FTCA claimant has only six months from the date of mailing by the service of its notice of the denial (not receipt by the claimant of the notice) in which to file suit.<sup>29</sup> These requirements are jurisdictional, and the result for not complying is summary judgment for the government. (Note that premature filing of a suit does not toll the underlying two year limitation period for filing the administrative claim.)

The administrative claim procedures are governed by regulations of both the Attorney General, at 28 C.F.R. Part 14, and the particular military service involved: Air Force, 32 C.F.R. Part 842; Army, 32 C.F.R. Part 536; Navy (including Marine Corps), 32 C.F.R. Part 750.

The claim must be filed in writing, with a demand for "a sum certain." Government Standard Form 95 ("SF 95"), available from federal agencies and on the Web at [www.doj.gov/civil/forms](http://www.doj.gov/civil/forms), should be used, although other written notification setting forth the details of the incident and the resulting damages may be held adequate. Failure to meet the basic presentment requirements may result in denial at the administrative level and lack of jurisdiction over a subsequent FTCA lawsuit, resulting in dismissal.<sup>30</sup>

The claim should be signed by the claimant or an authorized agent as determined by state law.<sup>31</sup> Attach evidence of the representative's authority, such as a Certificate of Qualification, or an Appointment as Guardian. The attorney, generally, also signs the claim form.

One claim form is filed per claimant, as well as a separate "sum certain" for each claimant. State law decides proper claimants, theories of recovery and elements of damage for each. Any derivative claim should be filed on a separate claim form with a

*... the military services take very seriously their obligations under the FOIA and Privacy Act.*

separate “sum certain.” If a military dependent child is injured by medical negligence at a U.S. military hospital, SF 95s should be filed for the derivative claims of both parents, even if one or both were on active-duty at the time of the incident.

The claim must be filed with the appropriate government agency.<sup>32</sup> For military claims, this is the branch of service whose activities gave rise to the claim.<sup>33</sup> For example, in a claim involving medical negligence at the Naval Medical Center, Portsmouth, the original claim form (SF 95 and attachments) should be filed with the Naval Legal Service Office Mid-Atlantic, in Norfolk.

Moreover, if a claim is expected to be worth in excess of \$200,000 (i.e., the maximum settlement authority with which the military services currently are vested, before having to go to the Department of Justice), courtesy copies should be filed with the Department of the Navy, Office of the Judge Advocate General, Claims and Tort Litigation Division (Code 15), in Washington, D.C. This will notify the service’s headquarters to assign a lead headquarters claims officer, who will be the agency lawyer with whom you most likely will work and the lawyer who will prepare and submit a settlement proposal to the Department of Justice for approval.

However, if it is expected that the claim will be worth less than \$200,000, the local claims officer will be the key lawyer working on the claim and obtaining settlement approval authority. In these cases, forwarding copies of the claim to headquarters would be counterproductive. One may unwittingly engage an extra layer of unnecessary bureaucracy, which may engender a certain degree of animosity.

For claims brought pursuant to a Status of Forces Agreement or treaty, such claims generally should be presented to the U.S. Sending State Office (i.e. the claims office of a nation-state that has sent its forces into a host nation-state) for the country in which the injury occurred. Usually, this office is located in the U.S. embassy for that country. For example, a private Italian citizen injured by the negligence of a U.S. serviceman stationed in Italy would present his claim to the U.S. Sending State Office for Italy, located in the U.S. Embassy, Rome.

In the event of a multi-service claim, such as an Army doctor at an Air Force Hospital, duplicate original SF 95s should be filed with each agency involved. A cover filing letter should be dual-addressed, so both services are on notice of the multi-service claim. The services will decide who will “lead” the administrative process.<sup>34</sup>

Damages in any subsequent lawsuit are limited to the amount claimed administratively, unless there is newly-discovered evidence or proof of intervening facts relating to the amount of the claim.<sup>35</sup> Amending a claim to assert additional damages or even an additional theory of liability will start a new six-month period before suit can be filed.<sup>36</sup> However, different bases, allegations or

theories of recovery that were not raised in the administrative claim may be barred at trial.<sup>37</sup>

A claimant may request reconsideration of a denied claim.<sup>38</sup> A request for reconsideration must be filed in writing within six months of the final denial and prior to initiation of suit. If granted, a new six-month period begins to run before any suit under the FTCA can be filed.<sup>39</sup> The basis for a reconsideration request is either new evidence or disregarded material evidence. If an insufficient basis is shown, the service will not grant reconsideration, and the six-month post denial period in which to file suit has not been tolled.

## Getting Your Documents

As with any good demand, the administrative claim should be investigated before being presented, and all pertinent documentation should be included in your presentation. However, since military installations and medical care providers are not subject to Virginia laws on pre-suit access to medical records, police reports, etc., how is one to obtain pertinent documents? The answer is through requests made pursuant to the U.S. Freedom of Information Act (“FOIA”)<sup>40</sup> and/or the U.S. Privacy Act.<sup>41</sup> Bear in mind that the FOIA’s rationale is not to afford trial lawyers free pre-trial discovery, but to afford the citizenry access to its government’s records. Thus, taking a cavalier attitude toward the official endowed with denial authority over your request will not get you very far. However, the military services take very seriously their obligations under the FOIA and Privacy Act. The following is a checklist to use in crafting a request under the FOIA/Privacy Act:

- The request is directed only to an agency within the Executive Branch of the federal government. (Neither Congress nor the Judiciary are subject to the FOIA.)
- The request is addressed to the proper agency, department and office maintaining the records sought (although the recipient is under an affirmative duty to forward the request to the office maintaining the records, the closer you strike at first, the sooner you will get your records).
- The request asks only for records contained in existing systems of records (and does not ask for creation of a new system of records, analysis of information, or compiling of information from documents or among several systems of records, etc.).
- The request identifies with particularity the records sought.
- The request expresses willingness to pay the government’s costs. (It may also request a waiver of same, and many agencies routinely waive the copy fee, especially if the request is made per the Privacy Act on behalf of the subject of the records.)
- The request contains a Privacy Act waiver from any private individual who is the subject of the record (for instance, a patient’s own medical records).
- If requesting personnel records of government employees, state that redaction of personal information, e.g. residential addresses, social security numbers, etc., is acceptable. (This will avoid the delay of an initial denial on this basis alone.)
- It invokes the Freedom of Information Act, 5 U.S.C. § 552, and if applicable, the Privacy Act, 5 U.S.C. § 552a (although this

requirement was abrogated early in the Clinton administration,<sup>42</sup> as a practical matter the clear invocation of FOIA assists in obtaining proper attention to the request immediately upon its receipt.

There are, of course, myriad exceptions and exemptions to release of records under the FOIA and Privacy Act, most notably law enforcement records, classified documents and records prepared in anticipation of litigation.<sup>43</sup> The military services' position on the later is much more stringent than the current state of Virginia law concerning the Work Product Doctrine. For instance, the military services routinely perform a formal investigation after any serious injury, which includes findings of fact, opinions, and recommendations, with witness statements and other evidence attached as exhibits. The services routinely will deny release of the whole investigation, however, not just the opinions and recommendations, even though it is standard operating procedure (i.e., done in the regular course of business) to perform the investigation regardless of the pendency, probability or even possibility of litigation.<sup>44</sup>

Therefore, a subpoena *duces tecum* for denied records, particularly investigations, may have to be sought. If so, there are regulations pertinent to each service which must be followed, commonly referred to as the Touhy Regulations.<sup>45</sup> These are: for the Air Force, AF Regulation 110-5 of May 12, 1989; for the Army, 32 C.F.R. Part 516; and for the Navy (including the Marine Corps), 32 C.F.R. Part 720-725. It is also highly advisable to consult with the cognizant U.S. Attorney's Office before issuing any subpoena, as that will be the counsel defending the service's position in court (which starts with removal to federal court if the subpoena was issued under state authority) if you seek to enforce the subpoena.

## Filing and Prosecuting Suit

As mentioned above, an FTCA lawsuit may not be brought earlier than six months after properly presenting the administrative claim, if one wishes to deem the service's indecision as a denial of the claim by the service concerned. Once suit is filed, however, the service attorney who was handling it is not completely out of the picture. The U.S. Attorney's Office will take the lead on the suit, obviously, yet will look to the service attorney for detailed litigation support.

While the administrative claim is pending, the service attorney probably will make formal requests for further information from claimant's counsel. If these requests for further information go unanswered, then any further information claimant possesses may not be allowed in evidence during a subsequent lawsuit that was filed before the service concerned had the chance to evaluate the further information during the administrative claim phase.

Therefore, one should not rush to file suit unless and until the service has had a reasonable chance to review and act upon all information pertinent to the claim. In fact, all pertinent information should be submitted with the SF 95, and as claimant's counsel comes into possession of further information, it should be forwarded to the service attorney immediately. This way, it will be clear that the government had ample opportunity to evaluate all aspects of the claim administratively, and there will be no question as to any of the information's admissibility after suit is filed.

Those more accustomed to prosecuting suits in state court may balk at such a practice, as it is tipping all of one's deck to the defense without the defense showing even one card—not even the identities or reports of its experts who may have reviewed the case during the service's investigation. However, once suit is filed and the Federal Rules of Civil Procedure kick in, and especially while on the federal “rocket docket,” plaintiff's counsel will appreciate already having made all requisite disclosures and entering the fray with the bulk of its preparatory work already done.

***Although the U.S. Attorney's Office representing the service relies heavily upon the service attorney for litigation support, it is the Department of Justice that has sole settlement authority after suit is filed.***

Although the U.S. Attorney's Office representing the service relies heavily upon the service attorney for litigation support, it is the Department of Justice that has sole settlement authority after suit is filed.<sup>46</sup> Thus, if for whatever reason claimant's counsel came to an irreconcilable impasse with the service concerned, a settlement still may be reached. However, bear in mind that, as a rule of thumb, if the service concerned firmly recommends denial of the claim, the Department of Justice will defer to that recommendation, and the claim will be paid only upon judgment.

As mentioned above, an FTCA suit is not tried to a jury. Therefore, a whole different set of dynamics comes into play, the finder of fact being the bench.<sup>47</sup> Trial briefs are encouraged, yet one must be wary of including documents and information that may not be admitted in evidence. There is no keeping from the fact-finder information later deemed inadmissible, and the fact-finder (i.e. Federal Judge or Magistrate) may resent any perceived attempt at influencing him or her with information that would not be admitted by the Federal Rules of Evidence.

## Government Third-party Recovery

Both defense and plaintiffs' attorneys are affected by the Medical Care Recovery Act (“MCRA”),<sup>48</sup> which, being federal law, overrides the Virginia Anti-Subrogation Statute<sup>49</sup> by virtue of the supremacy clause.<sup>50</sup> The MCRA applies to all cases in which the United States provides or pays for medical care to a tortiously injured person. The medical care may be provided directly at military or veterans' facilities, or paid for by government-sponsored insurance programs such as “Tricare” (formerly known as “Champus”). The government has a right to recover its costs from the tortfeasor who is subrogated to the rights of the injured person, and may require the injured person to assign his claim to the government.<sup>51</sup> Moreover, the government is deemed a third-party beneficiary of any medpay, no-fault, workers' compensation or like coverage.<sup>52</sup> Furthermore, if the injured person is a military member who, because of the injuries, is unable to perform any military duties, the government has a right to recover the amount of the member's pay for the period of total disability.<sup>53</sup>

To enforce these provisions, the government has the right to intervene or join in any action brought by the injured person

against the tortfeasor or may institute proceedings itself.<sup>54</sup> Rarely, if ever, does the government initiate proceedings. Instead, it will assert a lien upon the proceeds of the personal injury action when it receives knowledge that the injured person is bringing a claim, usually when plaintiff's counsel requests documentation as to the value of medical services received in connection with the tortious injury.

This MCRA lien can be truly parasitic. Although, in reality, the government would hardly ever realize any recovery but for private initiative in bringing personal injury actions, the MCRA does not provide for any pro rata sharing of attorney's fees or costs. Moreover, government physicians are forbidden from offering expert opinion testimony;<sup>55</sup> thus, claimants must engage a private physician—in addition to their government-furnished one—to render causation opinions, which increases costs.<sup>56</sup>

The government will, however, cooperate in terms of providing an affidavit, or even live testimony, as to the value of medical treatment rendered. It may also, in certain cases and for equitable grounds, negotiate a reduction in the amount it will accept in satisfaction of its lien. As a condition of such cooperation, however, the government will require the plaintiff to assert a claim on its behalf in his or her motion for judgment.<sup>57</sup>

## Conclusion

It is hoped that this article has primed its reader on spotting, evaluating and bringing a military tort claim, as well as the impact upon a personal injury suit of the plaintiff's having received military medical treatment. Much more detailed and expansive texts are available.<sup>58</sup> All Virginia practitioners with any military-related clientele should join the VSB Military Law Section. And all representing folks with military tort claims are well advised to join the Federal Tort Claims and Military Advocacy Section of the Association of Trial Lawyers of America, and thereby tap into an extensive network of attorneys throughout the nation and world who regularly practice in this esoteric yet highly relevant field. 📌



**David A. Buzard** received his J.D. from Tulane University in 1990, and his B.A. in linguistics from Northwestern University in 1984, having transferred from Carleton College in 1982. He is the current secretary of the Virginia State Bar military law section board of governors, vice-chair of the Association of Trial Lawyers of America federal tort liability and military advocacy section, and also chair of the Norfolk and Portsmouth Bar Association military law and lawyers committee. He served more than six years on active duty with the U.S. Navy Judge Advocate General's Corps, and he continues to serve as a reserve officer. He resides in Norfolk with his wife and two children, and practices in Virginia Beach with Bennett & Zydron, P.C.

### Endnotes

1 I wish to thank William M. Sexton and George M. Kelley, III, of the Norfolk Naval Legal Service and U.S. Attorney's Offices, respectively, for their invaluable advice and paper entitled "Federal Government Tort Claims," presented

at the February 2001 Norfolk and Portsmouth Bar Association CLE *Tort Claims: Federal, State and Local Governments* (available from the NPBA, 999 Waterside Drive, Suite 1330, Norfolk, VA 23510, tel. 757-622-3152), from which I draw heavily in this section; and also U.S. Navy JAG Instruction 5890.1 of 17 Jan 1991 ("Administrative Processing and Consideration of Claims on Behalf of and Against the United States").

- 2 Federal Employees Liability Reform and Tort Liability Compensation Act of 1988, P.L. 100-694 (amending 28 U.S.C. §§ 2679(b) and 2679(d)); 10 U.S.C. § 1089 (military health care providers); 10 U.S.C. § 1054 (military attorneys).
- 3 28 U.S.C. §§ 1346(b), 2671-2672, 2674-2680; 28 C.F.R. Part 14.
- 4 28 U.S.C. § 2674.
- 5 28 U.S.C. § 2402.
- 6 28 U.S.C. § 1346(b).
- 7 *Richards v. U.S.*, 369 U.S. 1 (1962).
- 8 28 U.S.C. § 1346(b).
- 9 See, e.g., *Kerstetter v. U.S.*, 57 F.3d 362 (4th Cir. 1995); *Robbins v. U.S.*, 624 F.2d 971 (10th Cir. 1980) (incompetency does not toll the statute of limitations); *Miller v. U.S.*, 803 F. Supp. 1120 (E.D.Va. 1992) (infancy does not toll the statute of limitations). But see, *Webrman v. U.S.*, 830 F.2d 1480 (8th Cir. 1987) (continuing tortious conduct or continuous medical treatment may delay accrual); *Rosales v. U.S.*, 824 F.2d 799 (9th Cir. 1987) (reassurance by government physicians that medical complications experienced are normal may delay plaintiff's knowledge of injury and postpone accrual); *Barrett v. U.S.*, 689 F.2d 324 (2d Cir. 1982), cert. denied, 462 U.S. 1131 (1983) (active or fraudulent concealment by the government of its role in the injury-causing event will postpone accrual); *Washington v. U.S.*, 769 F.2d 1436 (9th Cir. 1985) and *Clifford v. U.S.*, 738 F.2d 977 (8th Cir. 1984) (where the cause of plaintiff's disability was the government's negligence, claim did not accrue because plaintiff lacked mental capacity to understand the significance of the relevant facts); contra, *Barren v. U.S.*, 839 F.2d 987 (3d Cir.), cert. denied, 488 U.S. 827 (1988) (refusing to delay accrual even when incapacity results from the government negligence which gave rise to the claim).
- 10 28 U.S.C. § 2401(b).
- 11 See, e.g., *Kubrick v. United States*, 444 U.S. 111 (1979).
- 12 28 U.S.C. §2680(k).
- 13 46 U.S.C. § 761.
- 14 5 U.S.C. § 8116c.
- 15 33 U.S.C. § 905 and 5 U.S.C. § 8171.
- 16 28 U.S.C. § 2671; *U.S. v. Seckinger*, 397 U.S. 203 (1969).
- 17 *Feres v. U.S.*, 337 U.S. 49 (1949).
- 18 See, e.g., *Ratcliff v. U.S.*, 187 F.3d 637 (6th Cir. 1999), cert. denied, 529 U.S. 1004 (2000). See generally, J. F. McConnon, Jr. and P. F. Fingley, *The Feres Doctrine* (U.S. Dept. of Justice, Torts Branch Monograph, 1997).
- 19 See, James J. Kilpatrick, "Military Injustice: Court should scrap Feres doctrine," *Virginian-Pilot*, January 14, 2000, at B11, col.1. Fortunately, some inroad has been made by the survivor of a British soldier killed, and 16 others injured, when their U.S. Army driver rolled their van on the way back from an Army-sponsored rugby match in Georgia. *Whitley v. U.S.*, No. 97-8886 (11th Cir., 3/26/99), settled in March 2000 while on appeal to the U.S. Supreme Court.
- 20 10 U.S.C. § 2733.
- 21 10 U.S.C. § 2734.
- 22 10 U.S.C. § 2737.
- 23 See, e.g., Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces ("NATO SOFA"), 4 UST 1792, TIAS 2846; International Agreements Claims Act, 10 U.S.C. 2734a .
- 24 28 U.S.C. § 2678.
- 25 I wish to thank Susan M. Cremer, Esq., of the Georgia and Minnesota Bars, and current Chair of ATLA's Federal Tort Liability and Military Advocacy Section, for her invaluable advice and paper entitled "Administrative Settlement of FTCA Medical Negligence Claims," *2001 ATLA Annual Convention Reference Materials*, at 535-542 (see, note 46, *infra*), from which I draw heavily in this section.
- 26 28 U.S.C. § 2401(b).
- 27 *Drazan v. U.S.*, 762 F.2d 56 (7th Cir. 1985).
- 28 28 U.S.C. § 2675.
- 29 28 U.S.C. § 2401(b).
- 30 28 U.S.C. §§ 2401, 2671, 2675; 28 C.F.R. § 14.2.

- 31 28 C.F.R. §§ 14.2(a) and 14.3.
- 32 28 U.S.C. §§ 2401(b), 2675(c).
- 33 28 C.F.R. § 14.2 (b)(1).
- 34 28 C.F.R. § 14.2 (b)(2)(3).
- 35 28 U.S.C. § 2675(b); *Barrett v. U.S.*, 622 F. Supp. 574 (S.D.N.Y. 1985); *Sullivan v. U.S.*, F.R.Serv. 3d 553 (S.D.Ga. 1985).
- 36 See, 28 C.F.R. § 14.2(c).
- 37 *Murrey v. U.S.*, 73 F.3d 1448 (7th Cir. 1996). *But see, Drew v. U.S.*, 217 F.3d 193 (4th Cir. 2000), *Frantz v. U.S.*, 29 F.3d 222 (5th Cir. 1994) (allegations in the administrative claim put government on sufficient notice of facts, a reasonably diligent investigation of which would itself sufficiently notify the government of the later-amended theory of recovery).
- 38 32 C.F.R. § 842.90.
- 39 *Id.*; see also 32 C.F.R. § 750.31.
- 40 5 U.S.C. 552.
- 41 5 U.S.C. 552a.
- 42 White House Memorandum for Heads of Departments and Agencies on the Freedom of Information Act, October 4, 1993; and Attorney General Memorandum for Heads of Departments and Agencies on the Freedom of Information Act, also October 4, 1993.
- 43 For detailed and voluminous material on the FOIA and FOIA request processing and litigation, visit [www.doj.gov/04foia](http://www.doj.gov/04foia).
- 44 The Department of the Navy, in finally denying FOIA requests for such information as late as late September 2001, cites *U.S. v. Weber Aircraft Corp.*, 465 U.S. 792 (1984) and *Martin v. Office of Special Counsel*, MSPB, 819 F.2d 1181 (D.C.Cir. 1987) for the proposition that findings of fact and witness statements are protected.
- 45 Derived from authority endorsed in *United States ex rel Touby v. Ragen*, 340 U.S. 462, 71 S.Ct. 416 (1951).
- 46 The current settlement authorities within Department of Justice hierarchy and the Eastern District of Virginia U.S. Attorney's Office, with the military services pre-suit claims settlement authorities included for illustration, are as follows:
- |  |   |
|--|---|
| Assistant U.S. Attorney                | \$0   |
| Dept of Transportation (Coast Guard)   | \$100,000 (for pre-suit claims settlement)  |
| Depts of Army, Navy, Air Force, & VA   | \$200,000 (for pre-suit claims settlement)  |
| US Atty's Off., Division Civil Chief   | \$200,000 (after filing suit)               |
| US Atty's Off., District Civil Chief   | \$500,000 (after filing suit)               |
| Dept of Justice, Torts Branch Director | \$500,000 (for pre-suit claims settlement)  |
| U.S. Attorney                          | \$1,000,000 (after filing suit)             |
| Assistant Attorney General             | \$2,000,000 (all, and via the Torts Branch) |
| Attorney General                       | >\$2,000,000 (all)                          |
- 47 For an excellent discussion, see Ira H. Leesfield, "Trying an FTCA Case to the Bench," *ATLA 2001 Annual Convention Reference Materials*, at 543-551 (available from Assoc. of Trial Lawyers of America, 1050 31st Street, N.W., Washington, DC 20007, 1-800-622-1791).
- 48 42 U.S.C. §§ 2651-2653.
- 49 Va. Code § 38.2-3405
- 50 U.S. Const., Art. 6, cl.2.
- 51 42 U.S.C. § 2651(a).
- 52 42 U.S.C. § 2651(c).
- 53 42 U.S.C. § 2651(b).
- 54 42 U.S.C. § 2651(d).
- 55 32 C.F.R. § 97.6(e). Although a request for expert or opinion testimony may be granted in cases of "exceptional need or unique circumstances" (*id.*), "[i]t is expected that approval for . . . personnel to provide expert or opinion testimony rarely will be granted." Secretary of the Navy Instruction 5820.8A of 27 Aug 91, ¶ 4.b.
- 56 For these reasons, countless hundreds of military health care recipients forego bringing action against their tortfeasors. The government could recover millions of dollars if the MCRA were amended to allow pro-rata sharing of attorney's fees and costs, and if government physicians were allowed to give expert testimony regarding their patients.
- 57 An example of such an allegation is: "As a result of said injuries, the plaintiff has received and in the future will continue to receive medical and hospital

care and treatment furnished by the United States of America. The plaintiff, for the sole use of and benefit of the United States of America, under the provisions of Title 42, U.S.C. §§ 2651-2653, and with its express consent, asserts a claim for the reasonable value of said past and future care and treatment."

58 See, e.g., Jayson and Longstreth, *Handling Federal Tort Claims* (Matthew Bender, 1997); Morris, *Federal Tort Claims* (West, 1993 & Supp. 2001).