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Claim Requirements of the Federal Tort Claims Act: Minimal Notice or Substantial Documentation?

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NOTES

Claim Requirements of the Federal Tort Claims Act: Minimal Notice Or Substantial Documentation?

INTRODUCTION

The Federal Tort Claims Act[1] (FTCA) allows persons injured by negligent federal employees acting within the scope of their employment to sue the federal government.[2] Before Congress amended the FTCA in 1966,[3] an injured party seeking less than $2,500 in damages could either file a claim with the offending agency or sue the government directly.[4] A party seeking more than $2,500 had no choice but to file suit.[5] Congress amended the FTCA[6] in order to encourage claims settlement,[7] to reduce court congestion,[8] and to minimize the

1. 28 U.S.C. §§ 1346, 2671-2680 (1976 & Supp. V 1981).

2. 28 U.S.C. § 1346(b) (1976) provides that:

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, 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.

3. Act of July 18, 1966, Pub. L. No. 89-506, 80 Stat. 306 (1966).

4. *See* 28 U.S.C. § 2672 (1964), *amended by* 28 U.S.C. § 2672 (Supp. II 1965-66); *cf.* Schlingman v. United States, 229 F. Supp. 454, 455 (S.D. Cal. 1963) ("The filing of an administrative claim is not a prerequisite to filing or maintaining an action in this court, especially when the demand is in excess of $2,500."). A claimant who chose to submit a claim to the federal agency could withdraw the claim and file suit if he gave fifteen days written notice and the agency had not yet made final disposition of the claim. *See* 28 U.S.C. § 2675 (1964), *amended by* 28 U.S.C. § 2675 (Supp. II 1965-66).

5. *See* 28 U.S.C. § 2672 (1964), *amended by* 28 U.S.C. § 2672 (Supp. II 1965-66); *Improvement of Procedures in Claims Settlement and Government Litigation: Hearings on H.R. 13650, 13651, 13652, and 14182 Before Subcomm. No. 2 of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. 13 (1966) [hereinafter cited as *Hearings*] (statement of John W. Douglas, Assistant Attorney General) ("[T]he present statutory scheme forces all tort claims over $2,500 to become tort suits . . . ."); S. REP. No. 1327, 89th Cong. 2d Sess. 2, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2515, 2516 [hereinafter cited as S. REP. No. 1327] ("For claims over [$2,500], the individual has no alternative but to file suit.").

6. Act of July 18, 1966, Pub. L. No. 89-506, 80 Stat. 306 (1966) (codified at 28 U.S.C. §§ 2401, 2671, 2672, 2675, 2677, 2678, 2679, 31 U.S.C. § 724(a), and 38 U.S.C. § 4116 (1976)). For additional discussion of the 1966 amendments, see Corboy, *The Revised Federal Tort Claims Act: A Practitioner's View*, 2 FORUM 67 (1967); Corboy, *Shielding the Plaintiff's Achilles' Heel: Tort Claim Notices to Governmental Entities*, 28 DE PAUL L. REV. 609, 635-42 (1979); Jacoby, *The 89th Congress and Government Litigation*, 67 COLUM. L. REV. 1212, 1212-22 (1967); Pitard, *Procedural Aspects of the Federal Tort Claims Act*, 21 LOY. L. REV. 899, 899-905 (1975); Silverman, *The Ins and Outs of Filing a Claim Under the Federal Tort Claims Act*, 45 J. AIR. L. COM. 41 (1979); Comment, *The Federal Tort Claims Act and Administrative Claims*, 20 BAYLOR L. REV. 336 (1968); Comment, *Administrative Claims and the Substitution of the United States as Defendant Under the Federal Drivers Act: The Catch 22 of the Federal Tort Claims Act?*, 29 EMORY L.J. 755, 764-68 (1980).

7. *Hearings*, *supra* note 5, at 13 (statement of John W. Douglas, Assistant Attorney Gen-

cost of processing claims.[9] Specifically, Congress amended 28 U.S.C. section 2672[10] to instruct the Attorney General to promulgate regulations governing the handling and settlement of tort claims.[11] Congress also changed section 2675(a)[12] to state that "[a]n action shall not be instituted upon a claim against the United States . . . unless the claimant shall have first presented the claim to the appropriate Federal agency . . . ."[13]

This administrative claim requirement demands that an injured party properly present the claim within the FTCA's two-year limitations period.[14] Failure to do so deprives federal courts of jurisdiction over any subsequent suit based on the claim.[15] Unfortunately,

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eral) ("The possibility of an early settlement *without* a lawsuit is advantageous . . . .") (emphasis added); S. REP. NO. 1327, *supra* note 5, at 3, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS at 2517 ("meritorious [claims] can be settled more quickly"); *see* notes 41-57 *infra* and accompanying text.

8. *Hearings*, *supra* note 5, at 13 (statement of John W. Douglas, Assistant Attorney General) ("[O]ne of the primary objectives [of this bill] is to reduce unnecessary congestion in the courts."); S. REP. NO. 1327, *supra* note 5, at 4, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS at 2518 ("Another objective of this bill is to reduce unnecessary congestion in the courts.").

9. *Hearings*, *supra* note 5, at 13 (statement of John W. Douglas, Assistant Attorney General) (plaintiff benefits because settlement entails no litigation expenses; government benefits because settlements are usually "less expensive than judgments"); S. REP. NO. 1327, *supra* note 5, at 3, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS at 2517 (minimizes need for "expensive and time-consuming litigation").

10. Act of July 18, 1966, Pub. L. No. 89-506, sec. 1, 80 Stat. 306, 306 (1966).

11. 28 U.S.C. § 2672 (1976), provides in pertinent part that:

> The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States 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 agency 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.

Congress also increased agency settlement authority from $2,500 to $25,000 "to make the administrative settlements a meaningful thing." S. REP. NO. 1327, *supra* note 5, at 4, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS at 2518; *see* 28 U.S.C. § 2672 (1976).

12. Act of July 18, 1966, Pub. L. No. 89-506, sec. 2, 80 Stat. 306, 306 (1966).

13. 28 U.S.C. § 2675(a) (1976) states in full:

> (a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

14. 28 U.S.C. § 2401(b) (1976) provides that:

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

15. *E.g.*, Kielwien v. United States, 540 F.2d 676, 679 (4th Cir.) ("The right to sue the Government exists wholly by consent as expressed in § 2675, 28 U.S.C., which fixes the terms

the interaction between private individuals and government claims officers complicates the claim requirement.[16] In an FTCA action, the claimant usually completes a Standard Form 95[17] and sends it to the appropriate federal agency. After receiving the form, the claims officer will request documentation pursuant to the Department of Justice regulations.[18] If the injured party fails to provide all or part of

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and conditions on which suit may be instituted. The first requirement is the filing of a claim. That requirement is jurisdictional and is not waivable."), *cert. den.*, 429 U.S. 979 (1976); Best Bearings Co. v. United States, 463 F.2d 1177, 1179 (7th Cir. 1972) ("Requirement for an administrative claim to be filed as a prerequisite under the Federal Tort Claims Act exemplifies one such condition; since the claim must precede the suit, the requirement is jurisdictional and cannot be waived.").

Courts ordinarily dismiss without prejudice suits filed by persons who fail to comply with these jurisdictional prerequisites. However, if the court dismisses the suit after the FTCA's two-year statute of limitations has run, the claim is barred. Robinson v. United States Navy, 342 F. Supp. 381, 383 (E.D. Pa. 1972).

16. For a variety of reasons, claimants often fail to respond to an agency's documentation requests. *See, e.g.*, Avery v. United States, 680 F.2d 608, 610 (9th Cir. 1982); Tucker v. United States Postal Serv., 676 F.2d 954, 955 (3d Cir. 1982); Douglas v. United States, 658 F.2d 445, 447 (6th Cir. 1981); Hoaglan v. United States, 510 F. Supp. 1058, 1059 (N.D. Iowa 1981).

17. *See* Appendix A.

18. By authority granted under 28 U.S.C. §2672 (1976), the Attorney General promulgated regulations governing the processing of claims filed with federal agencies. *See* 28 C.F.R. §§ 14.1-14.11 (1982). 28 C.F.R. §§ 14.2-14.4 are the only regulations relevant to this Note. They define "presenting a claim," explain who may file a claim, and detail claim documentation requirements. These regulations are, in pertinent part:

28 C.F.R. § 14.2 (1982) Administrative claim; when presented.

(a) For purposes of the provisions of 28 U.S.C. 2401(b) and 2672, a claim shall be deemed to have been presented when a Federal agency receives from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident.

28 C.F.R. § 14.3 (1982) Administrative claim; who may file.

(a) A claim for injury to or loss of property may be presented by the owner of the property, his duly authorized agent or legal representative.

(b) A claim for personal injury may be presented by the injured person, his duly authorized agent, or legal representative.

(c) A claim based on death may be presented by the executor or administrator of the decendent's [*sic*] estate, or by any other person legally entitled to assert such a claim in accordance with applicable State law.

(d) A claim for loss wholly compensated by an insurer with the rights of a subrogee may be presented by insurer. A claim for loss partially compensated by an insurer with the rights of a subrogee may be presented by the parties individually as their respective interests appear, or jointly.

(e) A claim presented by an agent or legal representative shall be presented in the name of the claimant, be signed by the agent or legal representative, show the title or legal capacity of the person signing, and be accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative.

28 C.F.R. § 14.4 (1982) Administrative claims; evidence and information to be submitted.

(a) *Death*. In support of a claim based on death, the claimant may be required to submit the following evidence or information:

(1) An authenticated death certificate or other competent evidence showing cause of death, date of death, and age of the decedent.

(2) Decedent's employment or occupation at time of death, including his monthly or yearly salary or earnings (if any), and the duration of his last employment or occupation.

(3) Full names, addresses, birth dates, kinship, and marital status of the decedent's

the requested information, the question arises whether he has prop-

survivors, including identification of those survivors who were dependent for support upon the decedent at the time of his death.

(4) Degree of support afforded by the decedent to each survivor dependent upon him for support at the time of his death.

(5) Decedent's general physical and mental condition before death.

(6) Itemized bills for medical and burial expenses incurred by reason of the incident causing death, or itemized receipts of payment for such expenses.

(7) If damages for pain and suffering prior to death are claimed, a physician's detailed statement specifying the injuries suffered, duration of pain and suffering, any drugs administered for pain, and the decedent's physical condition in the interval between injury and death.

(8) Any other evidence or information which may have a bearing on either the responsibility of the United States for the death or damages claimed.

(b) *Personal injury*. In support of a claim for personal injury, including pain and suffering, the claimant may be required to submit the following evidence or information:

(1) A written report by his attending physician or dentist setting forth the nature and extent of the injury, nature and extent of treatment, any degree of temporary or permanent disability, the prognosis, period of hospitalization, and any diminished earning capacity. In addition, the claimant may be required to submit to a physical or mental examination by a physician employed by the agency or another Federal agency. A copy of the report of the examining physician shall be made available to the claimant upon the claimant's written request provided that he has, upon request, furnished the report referred to in the first sentence of this paragraph and has made or agrees to make available to the agency any other physician's reports previously or thereafter made of the physical or mental condition which is the subject matter of his claim.

(2) Itemized bills for medical, dental, and hospital expenses incurred, or itemized receipts of payment for such expenses.

(3) If the prognosis reveals the necessity for future treatment, a statement of expected expenses for such treatment.

(4) If a claim is made for loss of time from employment, a written statement from his employer showing actual time lost from employment, whether he is a full or part-time employee, and wages or salary actually lost.

(5) If a claim is made for loss of income and the claimant is self-employed, documentary evidence showing the amounts of earnings actually lost.

(6) Any other evidence or information which may have a bearing on either the responsibility of the United States for the personal injury or the damages claimed.

(c) *Property damage*. In support of a claim for injury to or loss of property, real or personal, the claimant may be required to submit the following evidence or information:

(1) Proof of ownership.

(2) A detailed statement of the amount claimed with respect to each item of property.

(3) An itemized receipt of payment for necessary repairs or itemized written estimates of the cost of such repairs.

(4) A statement listing date of purchase, purchase price and salvage value, where repair is not economical.

(5) Any other evidence or information which may have a bearing on either the responsibility of the United States for the injury to or loss of property or the damages claimed.

The regulation's requirements for presenting a claim apply both to 28 U.S.C. § 2401(b), the statute of limitations provision, and to 28 U.S.C. § 2672, which authorizes promulgation of claim processing regulations. *See* notes 11 & 14 *supra* for the text of these sections.

The Attorney General added the last sentence of §14.2(b)(1) to clarify that claims are "presented" only when received by the appropriate agency. *See* 46 Fed. Reg. 52,355 (1981). Individual agencies may promulgate their own FTCA regulations, but these must be consistent with Justice Department regulations. *See* 28 C.F.R. § 14.11 (1982).

"There has been disagreement in the federal courts whether these provisions establish the requirement for a proper presentation of a claim pursuant to section 2675 or whether they only outline procedures for settlement negotiations under section 2672." Note, *Federal Tort Claims Act: Notice of Claim Requirement*, 67 MINN. L. REV. 513, 520 (1982); *see* Avery v. United States, 680 F.2d 608, 611 (9th Cir. 1982) (Justice Department regulations deal with an agency's settlement authority and do not interpret §2675(a)); Douglas v. United States, 658 F.2d 445, 447-48 (6th Cir. 1981) (Justice Department regulations govern settlement proceedings, not federal jurisdictional prerequisites). However, this Note argues that because Congress intended

erly "presented the claim" under section 2675 so as to toll the FTCA's statute of limitations.

Courts addressing the issue disagree on the proper interpretation of the legislative history of the FTCA amendments.[19] The First Circuit, in *Swift v. United States,*[20] relied on Congress's intent to encourage presuit settlements in holding that claimants who fail to comply with documentation requests have not properly presented a claim.[21] Thus, claims that are not adequately documented within the FTCA's two-year statute of limitations are forever barred.

In contrast, the Fifth Circuit has since concluded in *Adams v. United States*[22] that a claim for a sum certain[23] need only provide

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the 1966 amendments to improve settlement of claims, *see* notes 41-57 *infra*, the Justice Department settlement regulations necessarily inform the definition of §2675's presentation requirement.

19. Although "it is appropriate to begin with the language of the statute itself," Northwest Airlines v. Transport Workers Union, 451 U.S. 77, 91 (1981), courts must rely instead on the legislative history because the FTCA amendments do not themselves define "presented the claim." *See* 28 U.S.C. § 2675(a) (1976). Moreover, although "[a] fundamental canon of statutory construction is that . . . words [should] be interpreted as taking their ordinary, contemporary, common meaning," Perrin v. United States, 444 U.S. 37, 42 (1979), no court has relied on the plain meaning of the "presented the claim" language. *See, e.g.,* Avery v. United States, 680 F.2d 608, 610 (9th Cir. 1982) ("the statute on its face does not provide a clear answer to the problem before us").

When the words of a statute are ambiguous, as they are here, the courts should use the legislative history to ascertain what Congress intended. United States v. Public Utils. Commn., 345 U.S. 295, 315 (1953). Even if the words of the statute did have a plain meaning, that meaning might still yield "to persuasive evidence of a contrary legislative intent." Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 20 (1979); *accord*, United Steelworkers v. Weber, 443 U.S. 193, 202 (1979). Similarly, other authorities indicate that courts should not rely too heavily on the plain meaning rule. *See, e.g.*, Towne v. Eisner, 245 U.S. 418, 425 (1918) ("A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."); Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.) ("it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary"), *aff'd.*, 326 U.S. 404 (1945); Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1317 (1975) ("[Statutory construction] questions cannot be answered by the simple-minded formulae often advanced, including the plain meaning rule.").

20. 614 F.2d 812 (1st Cir. 1980). Plaintiff's husband died of a heart attack shortly after having an automobile accident with a Forest Service employee. Counsel submitted plaintiff's two million dollar claim for personal injury, loss of consortium, and wrongful death, but ignored the agency's repeated documentation requests. The Court of Appeals affirmed the trial court's holding that the plaintiff's claim should be dismissed as premature.

21. 614 F.2d at 814 (" 'The purpose of requiring preliminary administrative presentation of a claim is to permit a government agency to evaluate and settle the claim at an early stage . . . .' ") (quoting Kornbluth v. Savannah, 398 F. Supp. 1266, 1268 (E.D.N.Y. 1975)). The First Circuit also upheld the district court's conclusion that an agency can demand supporting information pursuant to Justice Department regulations, 28 C.F.R. §§ 14.2(a) and 14.4. 614 F.2d at 814. For a discussion of the problems that this approach creates, see notes 58-71 *infra* and accompanying text.

22. 615 F.2d 284 (5th Cir. 1980). Plaintiffs, husband and wife, filed suit against the Air Force, alleging that Air Force physicians negligently delivered their child. The child suffered severe brain damage during birth, allegedly due to an oxygen deficiency. Plaintiffs submitted a completed Standard Form 95, *see* Appendix A, and claimed a sum certain. However, they did not submit requested supporting documentation and failed to include information regarding

the affected agency with notice[24] and that a second policy of the 1966 amendments — promoting fair treatment of claimants — prevents federal agencies from requiring claim documentation.[25] Accordingly, the Fifth Circuit held that undocumented claims that provide the agency with notice sufficient to permit investigation satisfy section 2675's presentation requirement and preserve the injured party's ability to sue.[26] Three other circuits have since adopted the *Adams* interpretation of the amendment's legislative history.[27]

This Note finds both the *Adams* and *Swift* positions unsatisfactory. Part I contends that *Adams* misconstrued the legislative history of the FTCA amendments by applying a minimal notice standard

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future expenses. The parties disputed whether the Air Force possessed or had access to the information demanded. The district court deemed this question irrelevant and ruled that the claimants, to perfect their claim, should have informed the Air Force that they had not incurred any unreported medical expenses and should also have provided an estimate of future medical expenses. It then held that plaintiffs failed to satisfy the administrative claim requirement and dismissed the action for lack of jurisdiction. *See* 615 F.2d at 285-86. The Fifth Circuit reversed, stating that an injured party meets the claim requirement of § 2675 if he or she "(1) gives the agency written notice of [the] claim sufficient to enable the agency to investigate and (2) places a value on [the] claim." 615 F.2d at 289. The court did not base its holding on the assumption that the Air Force already had the information.

23. The *Adams* court required a claimant to "place[ ] a value on his or her claim." 615 F.2d at 289. This precondition derives from section 2675(b), which states that "[a]ction under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency . . . ." 28 U.S.C. § 2675(b) (1976). Courts have universally recognized this sum certain requirement. *See, e.g.*, Erxleben v. United States, 668 F.2d 268, 272 (7th Cir. 1981) (per curiam) ("It is well settled that a Standard Form 95 filed with the 'amount of claim' omitted is invalid. Likewise, a separate claim notice submitted without a specific dollar amount is ineffective."); Bialowas v. United States, 443 F.2d 1047 (3d Cir. 1971) (dismissing suit because, among other things, plaintiff had not claimed sum certain damages).

Most of the litigation regarding the sum certain requirement involves claims that contain qualified amounts. *See, e.g.*, Erxleben v. United States, 668 F.2d 268, 273 (7th Cir. 1981) (per curiam) (personal injury claim for "149.42 presently" states a sum certain); Fallon v. United States, 405 F. Supp. 1320, 1322 (D. Mont. 1976) (personal injury claim for "approximately $15,000.00" states a sum certain); *cf.* Caton v. United States, 495 F.2d 635, 638 (9th Cir. 1974) (personal injury claim for an amount "unknown at this time" does not state a sum certain and thus failed to meet the jurisdictional prerequisites of § 2675).

24. 615 F.2d at 288-89.

25. 615 F.2d at 288, 291.

26. 615 F.2d at 289.

27. *See* Avery v. United States, 680 F.2d 608 (9th Cir. 1982); Tucker v. United States Postal Serv., 676 F.2d 954 (3d Cir. 1982); Douglas v. United States, 658 F.2d 445 (6th Cir. 1981). Although none of the plaintiffs in these cases contended that the agency already possessed the requested information, the court in each instance applied the *Adams* standard. *See* note 22 *supra*. At least one district court in the Eighth Circuit has accepted the *Adams* documentation standard. *See* Hoaglan v. United States, 510 F. Supp. 1058, 1061 (N.D. Iowa 1981).

The Seventh Circuit Court of Appeals has not yet decided a case directly on point. It has, however, strongly suggested that it will follow *Adams* when given the opportunity. *See* Erxleben v. United States, 668 F.2d 268, 271 n.6 (7th Cir. 1981) (per curiam). Notwithstanding *Erxleben's* implication, at least one district court in the Seventh Circuit has since declined to follow *Adams*. *See* Howard v. United States, No. 81 C 3856 (N.D. Ill. Jan. 8, 1982) (available on LEXIS, Genfed library, Dist. file). One district court in the Second Circuit has also refused to apply the *Adams* standard. Pollitt v. United States, No. 80 Civ. 3883 (HFW) (S.D.N.Y. Feb. 13, 1981) (available on LEXIS, Genfed library, Dist. file).

and then argues that *Swift* contravenes the amendments' fairness policy by permitting ambiguous, overreaching documentation requests. Part II contends that courts should interpret section 2675's "presented the claim" language as an accommodation between two competing Congressional objectives: presuit claims settlement and fair treatment of claimants. The Note proposes that until the Department of Justice modifies its current claims regulations,[28] courts should toll the statute of limitations whenever an individual's claim includes the information requested on Standard Form 95. However, the statute of limitations should begin to run again if the claimant fails to comply with unambiguous documentation requests that demand information ordinarily discoverable under the Federal Rules of Civil Procedure.

I. Current Approaches: Minimal Notice and Documentation

Both *Adams* and *Swift* relied on the legislative history of the FTCA amendments to support their respective interpretations of the administrative claim requirement. Neither interpretation is correct because both promote only one of the goals of the amendments, instead of encouraging both presuit settlement *and* fair treatment of claimants.

A. *Minimal Notice: Misconstruing Legislative Intent*

Adams and other courts[29] adopting a minimal notice standard base their position on two aspects of the legislative history. First, according to these courts, the Senate Report accompanying the 1966 amendments[30] indicates that Congress patterned the claim requirement after state and municipal statutes, which require only minimal notice.[31] Second, these courts reason that a minimal notice standard furthers the amendments' policy of promoting fair treatment of claimants without impeding Congress's intent to promote presuit settlement of claims.[32] Neither argument is persuasive.

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28. *See* note 18 *supra*; *cf.* note 98 *infra*.

29. *See* note 27 *supra*.

30. S. Rep. No. 1327, *supra* note 5, *reprinted in* 1966 U.S. Code Cong. & Ad. News 2515. The House Report on the FTCA amendments bill, H.R. Rep. No. 1532, 89th Cong., 2d Sess. (1966), contains wording almost identical to the Senate Report. For this reason, and because the courts refer only to the Senate Report, this Note will cite the Senate Report as authority for the legislative history of the FTCA amendments.

31. *See* Avery v. United States, 680 F.2d 608, 610-11 (9th Cir. 1982); Tucker v. United States Postal Serv., 676 F.2d 954, 958 (3d Cir. 1982); *Adams*, 615 F.2d at 289.

32. *Avery*, 680 F.2d at 611; *Tucker*, 676 F.2d at 958; *Adams*, 615 F.2d at 289.

1. *State and Municipal Statutes*

Senate Report No. 1327 establishes that Congress intended to emulate state and municipal statutes when it enacted the 1966 amendments;[33] however, the inference supported by Congress's reliance on these statutes is not clear. The *Adams* court observed that the municipal statutes cited by the Senate Report often require only "notice of an accident within a fixed time,"[34] and reasoned that Congress intended that similar minimal notice would satisfy section 2675's administrative claim requirement.[35] However, a critical examination of the entire legislative history reveals that Congress never intended that its reference to municipal statutes would govern the definition of "presented the claim." Instead, the Senate Report cited those statutes simply as precedent for the administrative claim requirement itself.

Two arguments support this interpretation. The first turns on the Senate Report's presentation of the state statutes. The Report states at the outset of its discussion of these statutes that "[t]he requirement of an administrative claim as a prerequisite to suit has numerous

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33. The relevant Senate Report passage states that:

> The requirement of an administrative claims as prerequisite to suit has numerous precedents in statutes governing tort claims against municipalities. These laws often provide that a municipality must be given notice of an accident within a fixed time. The purpose of this notice has been summarized as being—
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> "* * * to protect the municipality from the expense of needless litigation, give it an opportunity for investigation, and allow it to adjust differences and settle claims without suit (McQuillin, Municipal Corporations (3d ed.), section 53.153)."
>
> In this connection, it is relevant to note that section 1-923 of the District of Columbia Code includes the following language concerning suits for damages caused by employees driving vehicles—
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> "* * * No suit shall be instituted * * * unless the claimant shall have first given notice to the District and shall have presented to the District in writing a claim for money damages in connection therewith, and the District has had 6 months from the date of such filing within which to make final disposition of such claim * * *."
>
> Another example of a precedent in State practice is to be found in the laws of the State of Iowa (Laws of the 61st General Assembly, ch. 79 (Mar. 26, 1965)) which provide requirements very similar to those provided in H.R. 13650. This statute provides for tort claims against the State of Iowa and requires that a claim must first be presented to a State appeal board and further includes language providing that no suit is permitted unless the appeal board has made final disposition of the claim.

S. REP. NO. 1327, *supra* note 5, at 3-4, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS at 2517-18; *cf. Hearings*, *supra* note 5, at 19 ("A number of States and municipalities which permit suits . . . require the filing of claims . . . in advance of the lawsuit. That is true in the District of Columbia.").

34. 615 F.2d at 289 (quoting S. REP. NO. 1327, *supra* note 5, at 3, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS at 2517).

35. The court stated that "Congress deemed this minimal notice sufficient to inform the relevant agency of the existence of a claim . . . . This requisite minimal notice . . . promptly informs the relevant agency of the circumstances of the accident so that it may investigate the claim and respond either by settlement or by defense." 615 F.2d at 289. The court could have reinforced this point by citing the House Hearings' only reference to notice. *See Hearings*, *supra* note 5, at 20.

precedents in statutes governing tort claims against municipalities."[36] The Senate Report's subsequent discussion of notice[37] must be read in the context of this introductory statement, which indicates that the state statutes were cited as support for, and not as a description of, the proposed federal administrative claim requirement.

Second, the Report's approving reference to the District of Columbia and Iowa statutes[38] supports the conclusion that Congress cited those statutes merely as precedent for an administrative claim requirement. Neither statute imposes the same requirements as the FTCA,[39] a fact that the Senate Report partially acknowledged.[40] This inconsistency between the Senate Report's mention of notice and its citation of the two state statutes suggests that Congress never considered the state statutes' *definition* of a claim requirement, but rather intended to justify through precedent what was then a novel federal administrative claim requirement.

2. *Fair and Equitable Treatment*

Senate Report No. 1327 indicates that the main purpose of the 1966 amendments was to encourage presuit settlements[41] in order to reduce litigation expenses[42] and court congestion.[43] Instead of construing the claim requirement in light of this objective, *Adams* relied

36. S. REP. No. 1327, *supra* note 5, at 3, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS at 2517 (emphasis added).

37. S. REP. No. 1327, *supra* note 5, at 4, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS at 2517-18; *see* note 33 *supra*.

38. S. REP. No. 1327, *supra* note 5, at 3, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS at 2517-18; *see* note 33 *supra*.

39. The D.C. Code requires claimants to provide notice to the District of Columbia in accordance with § 12-309 and to present a claim for money damages. D.C. CODE ANN. § 1-1213 (1981). The Code defines notice in § 12-309 as "the approximate time, place, cause, and circumstances of the injury or damage." D.C. CODE ANN. § 12-309 (1981). The FTCA's claim requirement differs from the D.C. Code's because neither section 2675(a) nor section 2401(b) defines "presented the claim." *See* notes 13-14 *supra*.

The Iowa statute also differs from the FTCA. Although neither statute explains what a claimant must do to present a claim, *see* 28 U.S.C. §§ 2675(a), 2401(b); IOWA CODE ANN. § 25.1 (West 1978), Iowa requires a claimant to file his claim with the state appeal board, IOWA CODE ANN. § 25A.13, whereas the United States requires the claimant to file with the appropriate federal agency, 28 U.S.C. § 2675(a) (1976).

40. S. REP. No. 1327, *supra* note 5, at 4, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS at 2517-18 ("[T]he State of Iowa . . . provide[s] requirements very similar to those provided in H.R. 13650.").

41. S. REP. No. 1327, *supra* note 5, at 3, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS at 2517 (the amendments increase the chance of "possible settlement before a court action" because the agency will have the "best information concerning the activity which gave rise to the claim"); *see also Hearings*, *supra* note 5, at 13 (statement of John W. Douglas, Assistant Attorney General) ("The possibility of an early settlement" is increased.); 112 CONG. REC. 12,259 (1966) (statement of Representative Ashmore) ("The object, really, is to settle claims . . . fairly expeditiously and prevent unnecessary lawsuits.").

42. S. REP. No. 1327, *supra* note 5, at 3, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS at 2517 (the amendments encourage the parties to settle cases and thus eliminate "the need for filing suit and possible expensive and time-consuming litigation"); *see also* 112 CONG. REC.

on the 1966 amendments' prefatory language, which states that the FTCA amendments and three companion bills,[44] "have the common purpose of providing for more fair and equitable treatment of private individuals and claimants when they deal with the Government or are involved in litigation with their Government."[45] The *Adams* court concluded that the goal of fairness would be frustrated if a claimant were required to provide more information than was necessary to enable the agency to investigate the claim.[46]

The *Adams* court's reliance on the goal of fairness suffers from two flaws. First, the court used the fairness policy to make compliance with government documentation requests voluntary,[47] thus undermining the amendments' goal of providing the government with information that could facilitate presuit settlement.[48] The govern-

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14,376 (1966) (statement of Senator Ervin) ("[M]eritorious claims would be settled more quickly, without the need for expensive and time-consuming litigation . . . .").

43. S. REP. NO. 1327, *supra* note 5, at 4, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS at 2518 ("Another objective of this bill is to reduce unnecessary congestion in the courts.").

Before the 1966 amendments, the Attorney General could not settle claims without court approval. The 1966 amendments abolished this requirement. Jacoby, *The 89th Congress and Government Litigation*, 67 COLUM. L. REV. 1212, 1219-20 (1967).

44. The three other bills sought to benefit private citizens *vis-à-vis* the government. The first provided agencies with additional authority to compromise Government claims against private individuals and to terminate or suspend collection efforts when the debtor-citizen lacks all present or prospective ability to pay. *See* H.R. REP. NO. 1533, 89th Cong., 2d Sess. (1966). The second imposed statutes of limitations for contract and tort actions initiated by the government *against* private individuals. *See* H.R. REP. NO. 1534, 89th Cong., 2d Sess. (1966). The third allowed private individuals winning civil suits against the Government to collect costs as part of awarded judgments. *See* H.R. REP. NO. 1535, 89th Cong., 2d Sess. (1966). The three bills, all of which had been requested by the Justice Department, were eventually enacted by Congress. *See* Act of July 18, 1966, Pub. L. No. 89-505, 80 Stat. 304 (1966); Act of July 18, 1966, Pub. L. No. 89-507, 80 Stat. 308 (1966); Act of July 19, 1966, Pub. L. No. 89-508, 80 Stat. 308 (1966).

45. S. REP. NO. 1327, *supra* note 5, at 2, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS at 2515-16.

46. 615 F.2d at 289, 291-92.

47. 615 F.2d at 290 ("A claimant will ordinarily comply with 28 C.F.R. §§14.1-14.11 if he or she *wishes to settle* his or her claim with the appropriate agency.") (emphasis added).

48. Many courts that have construed § 2675(a) to require documentation have recognized the importance of supporting documentation to the presuit settlement process. *See, e.g.*, Swift v. United States, 614 F.2d at 814 ("[C]ounsel's failure to document the personal injury part of the administrative claim precluded the agency from evaluating the entire claim for settlement purposes."); Keene Corp. v. United States, No. 80 Civ. 401 (S.D.N.Y. Sept. 30, 1981) (available on LEXIS, Genfed library, Dist. file) ("[T]he Government, at a minimum, is entitled to sufficient information to enable it to evaluate the claim and choose between settlement and litigation."); Rothman v. United States, 434 F. Supp. 13, 17 (C.D. Cal. 1977) ("their failure to furnish information on damages absolutely foreclosed the government from arriving at a reasonable settlement figure").

Both plaintiff's and defendant's lawyers agree that responsible claim evaluation requires more information than the *Adams* minimal notice standard can produce. *See, e.g.*, P. HERMANN, BETTER SETTLEMENTS / THROUGH LEVERAGE 170 (1965) (a wise lawyer for the plaintiff will itemize all medical bills having to do with a particular accidental injury, will furnish copies of the bills to an insurance adjuster or defense counsel, and will attempt to secure an employer's statement of time and wages lost); Faust, *What Insurance Companies Want from Claimant's Counsel to Expedite Settlements*, in NEGOTIATING SETTLEMENTS IN PERSONAL IN-

ment needs information soon after it receives notice of the claim in order to expedite settlement negotiations. In fact, the current regulations primarily request information that either determines whether the claimant is the proper party to bring the claim or enables the agency to assess the accuracy of the alleged damages.[49] Disclosure of this information is essential to the policy of facilitating presuit settlements.

Adams argued that a minimal notice requirement adequately encourages settlements because an agency can obtain through investigation the information needed to settle a case.[50] This point is unpersuasive for two reasons. First, agencies lack the resources[51] to obtain information that the claimant can provide with little inconvenience.[52] Second, most information requested under the current regulations can be acquired through discovery after a suit is filed.[53] If the government requests information during discovery, the claim-

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JURY ACTIONS 4, 5 (1956). (To judge the settlement value of the case, the insurance company needs a doctor's certificate explaining plaintiff's injury, the name of the plaintiff's employer, the type of work the plaintiff does and his wages, and a statement of the period of disability claimed.); Frost, *Compromising Cases Which Have Settlement Values of $500 to $1,500*, in NEGOTIATING SETTLEMENTS IN PERSONAL INJURY ACTIONS 14, 15 (1956) (claimant's attorney must provide the insurance company with "medical reports and itemized lists of special damages" if he wants to settle the claim); Lynch, *Settlement of Civil Cases: A View from the Bench*, LITIGATION, Fall 1978, at 8, 9 (settlement information required by insurance companies includes medical reports, verification of wages and copies of medical bills); Wormwood, *Evaluation and Settlement of Claims*, 38 WIS. B. BULL., Oct. 1965, at 7, 8-10. (Some of the more important factors considered by the defense attorney before settlement discussions include: medical and hospital expenses to date, future medical and hospital expenses, loss of earnings, and, in death cases, dependency.).

49. *See* note 18 *supra*.

50. 615 F.2d at 289 ("minimal notice . . . promptly informs the relevant agency . . . so that it may investigate the claim").

51. The sheer volume of claims renders effective independent investigation difficult. *See* Volk, *Processing and Negotiating the Military Medical Malpractice Claim*, TRIAL, June 1982, at 51, 52 ("Unfortunately, the agency will do very little on your [medical malpractice] claim for almost the entire six months. There simply are so many claims that until the six-month deadline begins to expire, the claim will not be worked.").

Of course, the fact that very little can be done on a medical malpractice claim does not mean that an agency cannot process simpler claims more quickly. *See* S. REP. NO. 1327, *supra* note 5, at 5, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS at 2518-19 ("It is obvious that there will be some difficult tort claims that cannot be processed and evaluated in [the] 6 month period. The great bulk of them, however, should be ready for decision within this period."). *Cf.* notes 54 & 56 *infra* and accompanying text.

52. *See* Rothman v. United States, 434 F. Supp. 13, 17 (C.D. Cal. 1977) ("Such information was within the sole control of plaintiffs, and by withholding it they automatically frustrated the purpose of Congress in requiring an administrative claims procedure in the first place.").

53. In general, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ." FED. R. CIV. P. 26(b)(1). This provision has been liberally construed. *See, e.g.*, Herbert v. Lando, 441 U.S. 153, 177 (1979) ("The Court has more than once declared that the deposition-discovery rules are to be accorded a broad and liberal treatment to effect their purpose of adequately informing the litigants in civil trials."); Harris v. Nelson, 394 U.S. 286, 297 (1969) ("[Rule 26(b)] has been generously construed to provide a great deal of latitude for discovery."); Hickman v. Taylor, 329 U.S. 495, 507 (1947) ("We agree, of course, that the deposition-discovery rules are

ant or his attorney will be forced to provide the information anyway. Thus, the question in most cases is not *whether* the claimant must provide documentation but *when*. The policy of increasing presuit settlements, coupled with the fact that any information withheld can eventually be procured through discovery, indicates that the claimant should provide requested information along with the claim.

A second, more fundamental objection to the *Adams* court's reliance on the fairness policy is that Congress did not intend fairness to mean that claimants need not document their claims. A careful reading of the Senate Report reveals that Congress considered the amendments to be "fair and equitable" because the settlement process would reduce the time and expense imposed on private individuals bringing suits against the government.[54] The Senate Report and the Hearings state that agencies should be able to handle the claims of private individuals quickly, particularly if the claims are simple.[55] In fact, the Department of Justice, the agency that requested the bill, believed that simpler claims could be handled without the aid of counsel.[56] Even an individual who hires an attorney benefits by settling with the agency within six months of filing a claim because the statutory limit on attorneys' fees is lower during that period than it is afterward.[57] The fact that Congress made presuit settlement an attractive alternative demonstrates that it intended to promote "fair and equitable treatment . . . of claimants" by reducing the time and expense of litigation. *Adams* incorrectly relied on the fairness policy to support a minimal notice requirement that might undermine the goal of expeditious settlement. The better interpretation of the legislative history is that the settlement policy embodied in the FTCA amendments demands compliance with reasonable agency documentation requests, an issue to which this Note now turns.

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to be accorded a broad and liberal treatment."); 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2007 (1970).

54. Congress recognized, however, that some complex suits might not be settled. *See* S. REP. NO. 1327, *supra* note 5, at 5, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS at 2518 ("[S]ome difficult tort claims cannot be processed and evaluated in this 6-month period."). The inferences supported by recognition of this fact are discussed at note 65 *infra* and accompanying text.

55. S. REP. NO. 1327, *supra* note 5, at 3, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS at 2517. ("[M]eritorious [claims] can be settled more quickly without the need for filing suit and possible expensive and time-consuming litigation."); *Hearings*, *supra* note 5, at 15 ("[A claimant] could [settle] without the bother and cost of litigation."). Congress also knew that presuit settlement would save the government money. *Hearings*, *supra* note 5, at 13 (statement of John W. Douglas, Assistant Attorney General) (settlements are "less expensive than judgments"); S. REP. NO. 1327, *supra* note 5, at 4, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS at 2518 (settlement would save the Government "unnecessary" litigation expenses).

56. *Hearings*, *supra* note 5, at 13 (Statement of John W. Douglas, Assistant Attorney General) (the "claimant . . . may not need to engage a lawyer").

57. *See* 28 U.S.C. § 2678 (1976) (twenty percent limit for settlements during administrative proceedings, twenty-five percent limit in all other situations).

B. *Documenting Claims: Potential for Overreaching*

In *Swift v. United States,*[58] plaintiffs ignored the government's repeated request to " 'provide [the agency] with the necessary evidence needed in support of a claim for personal injury and death as specified on the [standard claim] form.' "[59] The district court, recognizing that federal regulations[60] grant agencies the authority to request such information, dismissed the suit for want of jurisdiction.[61] The First Circuit Court of Appeals affirmed, reasoning that allowing the plaintiff to file suit without first documenting the claim with the appropriate agency would frustrate the FTCA amendments' policy of increasing presuit settlements.[62]

Although *Swift* properly requires documentation to encourage presuit settlements, the opinion is unsatisfactory because it upholds the Department of Justice regulations in their entirety[63] without determining whether they violate the fairness policy of the FTCA amendments.[64] Congress intended the amendments to provide more equitable treatment of claimants by reducing the time and expense of filing claims against the government.[65] It did not, however, intend the administrative claim procedure to prejudice a claimant's ability to litigate if settlement negotiations proved fruitless.[66]

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58. 614 F.2d 812 (1st Cir. 1980).

59. 614 F.2d at 813.

60. *See* note 18 *supra*.

61. *See* 614 F.2d at 814.

62. 614 F.2d at 814; *see* note 21 *supra*.

63. *See* 614 F.2d at 814-15.

64. *See* notes 25 & 45-46 *supra* and accompanying text (discussing fairness policy of FTCA amendments).

65. *See* notes 54-57 *supra* and accompanying text.

66. Congress did not expressly consider the limits that should be imposed on an agency's authority to request documentation. Instead, it indicated that the amendments would promote fair treatment of claimants by expediting the process of filing claims against the government. *See* notes 45-46 & 54-57 *supra* and accompanying text. Congress's silence concerning the permissible extent of documentation requests necessitates an inquiry into how Congress would have limited documentation had it considered the issue. *See* J. GRAY, THE NATURE AND SOURCES OF THE LAW 165 (1909).

Several factors indicate that Congress would have prevented documentation requests from prejudicing a claimant's ability to seek recourse in the courts. First, statements in the legislative history support this conclusion. Congress anticipated that many claims would not be settled. *See* S. REP. No. 1327, *supra* note 5, at 5, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS at 2518-19. Moreover, Congress wanted claimants to have the option of filing suit. *See id.* at 6, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS at 2520. Because Congress knew that administrative proceedings would not resolve all disputes, it would not have sanctioned a documentation requirement that might prejudice claimant's case or prevent him from suing altogether.

Second, an analysis of the FTCA's original purpose lends further support to this conclusion. Congress enacted the FTCA in part to extend "to injured parties . . . recovery as a matter of right." S. REP. No. 1400, 79th Cong., 2d Sess. 30 (1946); *see also* Note, *The Federal Tort Claims Act*, 56 YALE L.J. 534, 534-35 (1947) (discussing reasons for enacting the FTCA). In amending the FTCA to establish an administrative claim requirement, Congress never expressed an intention to prejudice the right to trial it had previously created. Therefore, Con-

Current Justice Department regulations prejudice claimants in three ways. First, they fail to advise the claimant about the information that an agency is authorized to demand.[67] Second, the regulations are inconsistent with Standard Form 95,[68] the instrument by which claims are filed. Third, the Justice Department regulations permit an agency to demand information that it could not obtain if the parties were conducting discovery.[69] This potential for over-

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gress would not approve of documentation requirements that would impair a claimant's right to litigate.

67. The regulations are ambiguous in two respects. First, they state that an agency may require a claimant to provide "[a]ny other evidence or information which may have a bearing on either the responsibility of the United States . . . or the damages claimed." 28 C.F.R. § 14.4(a)(8), (b)(6), (c)(5) (1982); *see* note 18 *supra*. The breadth of this language arguably sanctions requests that demand information only tangentially related to the claim. To date, however, no case has arisen where a claimant has challenged a particular request because of its ambiguity, and *Swift* does not indicate whether a claimant would prevail if such challenge were made.

Second, the regulations imply that compliance with a documentation request is optional because they state that "the claimant *may be required* to submit the following evidence or information . . . ." 28 C.F.R. § 14.4(a), (b), (c) (1982) (emphasis added). The courts have divided on the phrase's proper interpretation. *Compare* Tucker v. United States Postal Serv., 676 F.2d 954, 957 (3d Cir. 1982) ("That the information designated in 28 C.F.R. § 14.4 is intended for [settlement] purpose[s], and not as a prerequisite to the satisfaction of the timely filing requirement of 28 U.S.C. § 2401(b), is confirmed by the permissive language *'may* be required to submit.' ") (emphasis in original) *with* Kornbluth v. Savannah, 398 F. Supp. 1266, 1268 (E.D.N.Y. 1975) ("Unfortunately, plaintiffs put the emphasis on the wrong word. The regulation provides that such information 'may be *required*.' ") (emphasis in original). Thus, the regulations do not clearly apprise claimants of the information an agency may permissibly require. As a consequence, claimants may view agency documentation requests with a suspicion that will undermine the mutual trust needed to settle prior to suit. *Cf.* H. BAER & A. BRODER, HOW TO PREPARE AND NEGOTIATE CASES FOR SETTLEMENT 91 (1973); P. HERMANN, *supra* note 48, at 160. The Justice Department could eliminate this problem by stating specific documentation requirements in its regulations and in Standard Form 95. *See* Appendix A; note 98 *infra*.

68. Standard Form 95 warns that "[f]ailure to completely execute this form or to supply the requested information within two years from the date the allegations accrued may render your claim 'invalid.' " Standard Form 95, Back (Rev. 6-78); *see* Appendix A. Standard Form 95 is thus consistent with *Swift* in that it demands compliance with agency documentation requests. In contrast, the Justice Department regulations require that a claimant must execute "Standard Form 95 *or other written notification* of an incident," 28 C.F.R. § 14.2(a) (1982) (emphasis added), thus implying that *Adams*-type minimal notice will suffice. The phrase "other written notification" has generated considerable confusion. *Compare* Odin v. United States, 656 F.2d 798, 803 n.22 (D.C. Cir. 1981) (deferring "to the Justice Department's interpretation of its own regulations," court stated that a defective Standard Form 95, when combined with information in letters from plaintiff, her attorney, and her physician, constituted "other written notification") *and* Dillon v. United States, 480 F. Supp. 862, 863 (D.S.D. 1979) (the court relied on this phrase to justify plaintiff's failure to include in her administrative claim the allegation that an operation was performed without informed consent) *with* Mudlo v. United States, 423 F. Supp. 1373, 1377 (W.D. Pa. 1976) ("if one wants to make a claim not on the usual form, then the claimant had better make sure that the claim provides the necessary information to indicate the basis for the demand").

69. *See* 28 C.F.R. § 14.4(a)(8), (b)(6), (c)(5) (1982). ("claimant may be required to submit . . . [a]ny other evidence or information which may have a bearing on either the responsibility of the United States . . . or the damages claimed"); *see also* 28 C.F.R. § 14.4(b)(1) (1982) (requiring physical or mental examination, if so requested); note 18 *supra*.

Congress probably envisioned that documentation requirements would be consistent with the discovery provisions of the Federal Rules of Civil Procedure. The Senate Report observed

reaching could jeopardize the private individual's ability to file suit on a claim[70] by allowing the government to circumvent the carefully

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that "80 percent [of tort cases] are settled prior to trial," S. REP. No. 1327, *supra* note 5, at 3, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS at 2517, and expressed no intention to alter this result by expanding discovery authority under the administrative claim requirement. *Cf.* Jacoby, *supra* note 43, at 1215 ("Formerly, when suit was necessary . . . the broad discovery procedures of the Federal Rules of Civil Procedure . . . were frequently employed . . . ."). Congress probably designed the amendments to improve the timing of, and not the number of, settlements. Thus, the legislative history does not express a congressional intent to expand the scope of discovery in administrative claim proceedings.

70. By allowing an agency to request *"[a]ny* other evidence or information which may have a bearing on either the responsibility of the United States . . . or the damages claimed," 28 C.F.R. § 14.4(a)(8), (b)(6), (c)(5) (1982) (emphasis added), the Justice Department regulations permit the government to demand information that is subject to an absolute or qualified privilege. In contrast, FED. R. CIV. P. 26(b)(3) protects attorney work product. To discover documents and other tangibles in anticipation of litigation, the party seeking discovery must show that he has a "substantial need" for the material, and that he cannot, without undue hardship, obtain a substantial equivalent by other means. *See, e.g., In re* Murphy, 560 F.2d 326, 334 (8th Cir. 1977); 8 C. WRIGHT & A. MILLER, *supra* note 53, at § 2025. Work product that includes conclusions, opinions, or legal theories concerning the litigation receives even greater protection. *See, e.g.,* Upjohn Co. v. United States, 449 U.S. 383, 399 (1981) ("[f]orcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes"); *In re* Doe, 662 F.2d 1073, 1079 (4th Cir. 1981) ("while the protection of opinion work product is not absolute, only extraordinary circumstances requiring disclosure permit piercing the work product doctrine"), *cert. denied*, 102 S. Ct. 1632 (1982); Walker v. United Parcel Servs., 87 F.R.D. 360, 362 (E.D. Pa. 1980).

Similarly, FED. R. CIV. P. 26(b)(4)(B) provides qualified protection to facts known and opinions held by experts not expected to testify. A party may discover such information only upon a showing of exceptional circumstances. *See, e.g.,* Hoover v. United States, 611 F.2d 1132, 1142 n.13 (5th Cir. 1980) (party seeking such disclosure carries a heavy burden); United States v. John R.-Piquette Corp., 52 F.R.D. 370, 372-73 (E.D. Mich. 1971); 8 C. WRIGHT & A. MILLER, *supra* note 53, at § 2033; *see generally* Comment, *Ambiguities After the 1970 Amendments to the Federal Rules of Civil Procedure Relating to Discovery of Experts and Attorney's Work Product*, 17 WAYNE L. REV. 1145 (1971).

While not specifically protected by the Federal Rules of Civil Procedure, a third category of information universally recognized as nondiscoverable consists of the confidential communications between attorney and client. 8 C. WRIGHT & A. MILLER, *supra* note 53, at § 2017; *see, e.g.*, Diversified Indus. v. Meredith, 572 F.2d 596, 601 (8th Cir. 1978) ("long established rule that confidential communications between an attorney and his client are absolutely privileged from disclosure against the will of the client"); Pfizer Inc. v. Lord, 456 F.2d 545, 548 (8th Cir. 1972) (per curiam) ("It is a fundamental "tenet of the law of evidence that, generally, communications between attorney and client are privileged and not subject to compelled disclosure.").

Obviously, agencies should at no time be allowed to request information that is subject to an absolute privilege. On the other hand, information subject to qualified privilege may be crucial to settlement prospects. However, an unqualified right to obtain this information circumvents the careful balance of interests expressed in the Federal Rules of Civil Procedure.

A hearing to determine if an agency actually had a "substantial need" to obtain certain information might preserve the balance of procedural interests, but would increase ancillary judicial proceedings required to determine whether requested information fell within a particular rule of privilege, as well as whether the request itself satisfied the "substantial need" requirement. Ancillary proceedings might also create an atmosphere hostile to settlement prospects.

The proposal advanced in this Note requires that courts preclude ancillary procedures having to do with an agency's "substantial need" until the claimant files suit. This approach has two advantages. First, it limits presuit proceedings to issues going to whether the requested information is privileged. Second, and more important, such a rule balances discovery powers between claimants and agencies. Because claimants cannot use the Freedom of Information

tailored balance of competing interests contained in the Federal Rules of Civil Procedure. Thus, the regulations violate the fairness policy by impairing a claimant's ability to litigate his claim if negotiations prove unsuccessful.

While *Swift* correctly promotes the settlement policy of the FTCA amendments, it fails to accommodate the FTCA's other policy objective — fair treatment of claimants — by upholding the Department of Justice regulations.[71] Because neither *Swift* nor *Adams* accommodates the competing interests of the FTCA amendments, the next section of this Note proposes a proper balance.

III. Balancing the Competing Policies of the 1966 Amendments

Documentation of claims facilitates settlements. The sooner an agency receives the presuit information necessary to evaluate a claim, the sooner serious settlement negotiations can take place.[72] Moreover, a documentation requirement discourages claimants from submitting inflated claims, which only hamper settlement prospects.[73] Finally, many documentation requests are patently reasonable because they enable the agency to obtain information that the claimant either already possesses or can easily acquire.[74]

However, an agency should not use documentation requests as a subterfuge to dismiss otherwise valid claims. The requests should not prejudice a subsequent suit should settlement negotiations prove fruitless.[75] Moreover, the agency should request specific information because ambiguous requests prevent even diligent claimants from knowing whether they have provided all the requested information.[76]

To balance the competing fairness and settlement policies of the FTCA amendments, courts should hold that the statute of limitations tolls when the claimant files a Standard Form 95 or provides

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Act to obtain privileged information even if they can show a "substantial need" for it, the government should not be allowed to secure similarly privileged information through documentation requests. To do otherwise would be to give one potential litigant an unfair settlement advantage. *See* notes 85-88 *infra* and accompanying text.

71. *See* Note, *supra* note 18, at 521.

72. *See* note 48 *supra* and accompanying text.

73. *See* H. Baer & A. Broder, *supra* note 67, at 81 ("Defendant's representative is not predisposed to negotiate against a ridiculously high demand."); H. Edwards & J. White, The Lawyer as a Negotiator 224 (1977) ("[A] defense attorney should never make a settlement unless the investigation file contains sufficient information to support the amount which is being paid."); P. Hermann, *supra* note 48, at 41 ("Nothing gets negotiation off to a poorer start than a ridiculous demand or offer . . . .").

74. *See* note 52 *supra* and accompanying text.

75. *See* notes 66 & 70 *supra* and accompanying text.

76. *See* note 67 *supra* and accompanying text.

equivalent information within the two year limitation period.[77] However, if a claimant subsequently fails to comply within a reasonable time with an agency's unambiguous[78] requests for information discoverable under the Federal Rules of Civil Procedure,[79] the statute of limitations should begin to run again. Information provided within a reasonable time should relate back to the initial filing.[80]

This proposal properly accommodates the two competing policies of the 1966 FTCA amendments. Requiring claimants to comply with documentation requests enables the agency to obtain the information it needs to evaluate claims and begin settlement negotiations.[81] Demanding that agencies make specific requests minimizes the possibility that claimants will be unable to determine whether they have complied.[82] Finally, limiting requests to those that satisfy the discovery provisions of the Federal Rules of Civil Procedure ensures that claimants will not be prejudiced should they choose to

77. This standard is consistent with the *Adams* minimal notice requirement. *See* notes 24-27 & 30-32 *supra* and accompanying text; *cf.* Apollo v. United States, 451 F. Supp. 137, 139 (M.D. Pa. 1978) (allowing a timely claim that failed to meet sum certain requirement to be amended after the statute of limitations had run); Note, *supra* note 18, at 531-34 (proposing a factor test to determine what information is required to notify an agency of a claim).

78. To comply with the Federal Rules of Civil Procedure, an agency's documentation request should be specific. *See* FED. R. CIV. P. 33 (interrogatories); Jewish Hosp. Assn. v. Struck Constr. Co., 77 F.R.D. 59, 60 (W.D. Ky. 1978) (plaintiff not required to answer interrogatory question that is ambiguous and calls for a legal conclusion); Struthers Scientific & Intl. Corp. v. General Foods Corp., 45 F.R.D. 375, 382 (S.D. Tex. 1968) ("Though technical precision in the phrasing of interrogatories is not demanded, something more is required than the vague phraseology used here.") (footnote omitted); Mort v. A/S D/S Svendborg, 41 F.R.D. 225, 227 (E.D. Pa. 1966) (interrogatory "calling for a recitation of all information the defendant possesses 'relating to the accident' is entirely too broad to permit an effective response"); Stovall v. Gulf & S. Am. S.S. Co., 30 F.R.D. 152, 154 (S.D. Tex. 1961) ("Any interrogatory which is too general and all-inclusive need not be answered.").

79. FED. R. CIV. P. 26, 34-36 properly limit the agency's authority to request supporting documentation. These rules allow discovery of the types of information already listed in 28 C.F.R. §§ 14.1-14.11 (1982) and the type of documentation available to claimants through the Freedom of Information Act (FOIA). *See* notes 86-88 *infra* and accompanying text. The other discovery rules involve depositions. Because these devices are very expensive and unavailable to claimants through the FOIA, neither party should be permitted to use them during administrative proceedings.

80. *See* Apollo v. United States, 451 F. Supp. 137, 139 (M.D. Pa. 1978) (applying relation back theory to cure defective claim).

81. *See, e.g.,* Swift v. United States, 614 F.2d at 814 ("[C]ounsel's failure to document the personal injury part of the administrative claim precluded the agency from evaluating the entire claim for settlement purposes."); Haynes v. United States, No. 81 C 2341 (N.D. Ill. Oct. 2, 1981) (available on LEXIS, Genfed library, Dist. file) ("Allowing a claimant to ignore a proper request for supporting materials and to then file a claim in federal court, would prohibit meaningful agency evaluation of the claim and would subvert the purposes of Section 2675(a)."); Keene Corp. v. United States, No. 80 Civ. 401 (S.D.N.Y. Sept. 30, 1981) (available on LEXIS, Genfed library, Dist. file) ("[T]he Government, at a minimum, is entitled to sufficient information to enable it to evaluate the claim and choose between settlement and litigation."); Rothman v. United States, 434 F. Supp. 13, 17 (C.D. Cal. 1977) ("their failure to furnish information on damages absolutely foreclosed the government from arriving at a reasonable settlement figure"); *see also* notes 50-53 & 72-73 *supra* and accompanying text.

82. *See* note 67 *supra* and accompanying text; text accompanying note 76 *supra*.

litigate their claims.[83] This approach provides the agency with the same information it would obtain through discovery, but allows it to demand the documentation before suit so that prompt settlement negotiations can take place.[84]

A claimant will also be able to evaluate his claim.[85] An injured party has two avenues for obtaining information from the government. First, he can simply request the information from the agency. Second, should the agency prove uncooperative, the claimant can compel disclosure under the Freedom of Information Act (FOIA).[86] Although the scope of discovery under the FOIA is not as broad as that available under the Federal Rules of Civil Procedure,[87] discovery opportunities are not so disparate that the government will enjoy a significant advantage over the plaintiff during presuit negotia-

83. *See* notes 69-70 *supra* and accompanying text.

84. This result is consistent with congressional intent to expedite settlements. *See* S. REP. No. 1327, *supra* note 5, at 3, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS at 2517 (FTCA amendments designed to help settle meritorious claims "more quickly").

85. Settlements rarely occur until each party knows the strengths and weaknesses of the other's case. *See, e.g.,* H. BAER & A. BRODER, *supra* note 67, at 91 ("It is impossible to emphasize strongly enough the role of disclosure in facilitating settlement. Free and open exchange of information generates mutual confidence, and this in turn creates the atmosphere out of which successful settlements are negotiated."); P. HERMANN, *supra* note 48, at 160 ("Probably the greatest roadblock in the way of advantageous settlement of personal injury claims is failure of the opposing sides to furnish information to each other. It is like trying to sell a product without disclosing much about it."). This observation applies to presuit administrative settlement because a claimant is not likely to settle his case without knowing the viability of the government's defenses. *See* Jacoby, *supra* note 43, at 1215 ("The limited opportunities for [the claimant to conduct] discovery . . . may diminish the frequency of administrative settlements . . . ."). Congress did not, however, consider the effect that one-way discovery would have on the settlement process. *See id.* at 1217 n.29 ("The brief legislative history . . . does not contain any discussion of the difficulties of discovery in the required administrative process."). For a discussion of the problem of one-way discovery and of possible solutions, see *id.* at 1215-17. This Note argues that claimants can use the Freedom of Information Act (FOIA) to obtain information needed for settlement evaluation. *See* notes 86-88 *infra* and accompanying text.

86. Freedom of Information Act, 5 U.S.C. § 552 (1976 & Supp. II 1978). Sections 552(a)(1) and 552(a)(2) require publication or disclosure of agency records, such as rules of procedure ((a)(1)(C)) and administrative staff manuals ((a)(2)(C)). Claimants most frequently seek disclosure of agency records through section 552(a)(3):

> (3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

The FOIA is intended to allow private citizens broad access to records maintained by government agencies. *See* Baldrige v. Shapiro, 455 U.S. 345, 352 (1982); NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 220-24 (1978); Department of the Air Force v. Rose, 425 U.S. 352, 361 (1976); Environmental Protection Agency v. Mink, 410 U.S. 73, 79-80 (1973).

87. Nine categories of records have been excluded from the Act. *See* 5 U.S.C. § 552(b) (1976). However, "these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act. 'These exemptions are explicitly made exclusive' . . . and must be narrowly construed." Department of the Air Force v. Rose, 425 U.S. at 361 (quoting Environmental Protection Agency v. Mink, 410 U.S. at 79); *accord* Chilivis v. SEC, 673 F.2d 1205, 1211 (11th Cir. 1982); Kuehnert v. FBI, 620 F. 2d 662, 665 (8th Cir. 1980).

tions.[88] Moreover, a claimant controls the ultimate weapon against a

88. The FOIA exemption most likely to include records needed by claimants is 5 U.S.C. § 552(b)(5) (Exemption 5), which excludes "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency . . . ." The Supreme Court has construed this section to "exempt those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975); *accord* Renegotiation Bd. v. Grumman Aircraft Engr. Corp., 421 U.S. 168, 184 (1975). Specifically, documents covered by Exemption 5 include those that fall within "the attorney-client privilege, . . . the attorney work product privilege, . . . and the so-called executive, governmental or deliberative process privilege." Pies v. IRS, 668 F.2d 1350, 1352 (D.C. Cir. 1981); *accord* Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980). Because the proposal set forth in this Note would limit an agency's ability to request privileged information, *see* note 70 *supra* and accompanying text, Exemption 5 would not place claimants at a disadvantage relative to the government.

The most severe limit on the FOIA as a substitute discovery device is that it only applies to items "on which information is stored." B. MEZINES, J. STEIN, & J. GRUFF, 2 ADMINISTRATIVE LAW § 9.07[2]; *see, e.g.*, NLRB v. Sears, Roebuck & Co., 421 U.S. at 161-62 (FOIA does not compel agencies to write opinions or to create explanatory material); Yeager v. Drug Enforcement Admin., 678 F.2d 315, 321 (D.C. Cir. 1982); DiVigio v. Kelley, 571 F.2d 538, 542 (10th Cir. 1978). Though the information need not be transcribed into a document, *see, e.g., Yeager,* 678 F.2d at 321 ("computer-stored records . . . are still 'records' for purposes of the FOIA"); Save the Dolphins v. United States Dept. of Commerce, 404 F. Supp. 407, 411 (N.D. Cal. 1975) (movie film is a record), three dimensional items may not be reachable under the FOIA. *See, e.g.*, Nichols v. United States, 325 F. Supp. 130, 135 (D. Kan. 1971) (A record is "[t]hat which is written or transcribed to perpetuate knowledge of act" and does not include items such as rifle and bullets used to assassinate President Kennedy.), *affd.*, 460 F.2d 671 (10th Cir.), *cert. denied*, 409 U.S. 966 (1972); Note, *The Freedom of Information Act — A Potential Alternative to Conventional Criminal Discovery*, 17 AM. CRIM. L. REV. 73, 99-101 (1976). *But see* Note, *The Definition of "Agency Records" Under the Freedom of Information Act*, 31 STAN. L. REV. 1093, 1095-98 (1979).

The proposal advanced by this Note requires claimants to answer questions posed by agencies. *See* notes 78-79 *supra* and accompanying text. Because the stored information limitation applies to agency records but not to materials possessed by claimants, the government arguably has a better capacity to exercise discovery. This advantage is offset somewhat because, even as to privileged documents, the FOIA "extend[s] to the discovery of purely factual material appearing in those documents in a form that is severable without compromising the private remainder of the documents." Environmental Protection Agency v. Mink, 410 U.S. 73, 91 (1973). Courts applying *Mink*'s distinction between deliberative and factual information, 410 U.S. at 90-92, have protected documents that reveal litigation theories or strategies, *see, e.g.*, NLRB v. Sears, Roebuck & Co. 421 U.S. 132, 155 (1975), but have ordered production of those containing purely factual material. *See, e.g.,* Deering Milliken, Inc. v. Irving, 548 F.2d 1131, 1138 (4th Cir. 1977) ("facts contained in witnesses' statements of other purely factual material"); Iglesias v. CIA, 525 F. Supp. 547, 560 (D.D.C. 1981) (handwritten notes prepared by attorney for use in litigation). In contrast, Rule 26(b)(3) requires a showing of substantial need before documents "prepared in anticipation of litigation or for trial" are discoverable. *See* FED. R. CIV. P. 26(b)(3). Ultimately, the fact "[t]hat for one reason or another a document may be exempt from discovery does not mean that it will be exempt from a demand under FOIA." Playboy Enters. v. Department of Justice, 677 F.2d 931, 936 (D.C. Cir. 1982). Because agency attorneys will not rely very heavily on their memories to store facts relevant to FTCA claims, claimants should be able to obtain considerable amounts of factual information through the FOIA.

FOIA discovery may also impose time delays on claimants. *See* Levine, *Using the Freedom of Information Act as a Discovery Device*, 36 BUS. LAW. 45, 46-47 (1980). Toran, *Information Disclosure in Civil Action: The Freedom of Information Act and the Federal Discovery Rules*, 49 GEO. WASH. L. REV. 843, 868-69 (1981). Theoretically, an agency could postpone compliance to prevent disclosure of its case during administrative proceedings. However, the prospect of

recalcitrant agency — he can refuse to settle.[89]

In fact, a claimant may not need to resort to any sort of presuit discovery because Congress intended that administrative proceedings would encourage prompt settlement of simpler claims.[90] If the agency involved admits liability upon conclusion of its internal investigation, it will need documentation only to determine that the claimant is the proper party to raise the claim and that the damages sought are accurate.[91] If the resulting award is satisfactory to the claimant, he will not need to obtain additional information pertinent to settlement evaluation. Thus, the proposal permits both the claimant and the agency to obtain information needed to investigate settlement options.

One could criticize the approach advanced by this Note by arguing that it will produce ancillary proceedings on two issues: whether the information requested was discoverable under the Federal Rules,[92] and whether the plaintiff replied within a reasonable time. This objection is not without merit because extensive litigation over

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presuit settlement, together with an occasional resort to judicial prodding, should provide an incentive sufficient to expedite processing of FOIA requests.

Finally, claimants seeking information under the FOIA would lose discovery leverage that FED. R. CIV. P. 26(b)(3) sometimes provides to parties who show "substantial need." *See* NLRB v. Sears, Roebuck & Co., 421 U.S. at 149 n.16 ("Exemption 5 was intended to permit disclosure of those intra-agency memoranda which would 'routinely be disclosed' in private . . . litigation and we accept this as the law." (*quoting* H.R. REP. No. 1497, 89th Cong., 2d Sess. 10 (1966)); Environmental Protection Agency v. Mink, 410 U.S. at 86 ("Nor does the Act, by its terms, permit inquiry into particularized needs of the individual seeking the information, although such an inquiry would ordinarily be made of a private litigant."). Under this Note's approach, a claimant would not suffer from this loss of leverage because neither party could use a "substantial need" proceeding. *See* note 70 *supra*.

Thus, although "[d]iscovery for litigation purposes is not an expressly indicated purpose of the Act," Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 24 (1974), claimants can use the FOIA to obtain information for settlement evaluation. *See Bannercraft Clothing Co.*, 415 U.S. at 30 (Douglas, J., dissenting) ("That Act, contrary to what the Court says, had as one of its purposes 'discovery for litigation purposes.' "); Levine, *supra*, at 55; Toran, *supra*, at 859-65. This Note's proposal, which provides both agencies and claimants with information needed to evaluate claims, should maximize the FTCA amendments' presuit settlement policy.

89. *See* S. REP. No. 1327, *supra* note 5, at 6, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS at 2520 ("If a satisfactory arrangement cannot be reached in the matter, the claimant can simply do as he does today — file suit.").

90. Congress acknowledged that "some difficult tort claims . . . cannot be processed and evaluated in this 6-month period," S. REP. No. 1327, *supra* note 5, at 5, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS at 2518, but envisioned that agencies would be able to settle simple, meritorious claims quickly. *Id.* at 3, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS at 2517.

91. Congress arguably anticipated that the administrative claim procedure would work in this manner. *See* S. REP. No. 1327, *supra* note 5, at 3, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS at 2517.

92. Avery v. United States, 680 F.2d 608, 611 (9th Cir. 1982) ("Since the claims presentation requirement is jurisdictional, if it were interpreted to require more than minimal notice, there would be, inevitably, hearings on ancillary matters of fact whenever the agency rejected a claim as incomplete.").

a standard that tolls the statute of limitation would undermine the rule by making it uncertain.

The ancillary proceedings concern is not compelling for three reasons. First, communication between agency officials and claimants during the administrative process will enable potential plaintiffs to clarify some ambiguous documentation requests,[93] thus eliminating the need for judicial proceedings. Second, attorneys can avoid ancillary disputes about the propriety of particular documentation requests by examining cases that interpret the discovery provisions of the Federal Rules of Civil Procedure.[94] Finally, the only alternative to the approach proposed by this Note is a documentation standard that rigidly defines the sort of information that an agency can request. But a bright line rule has other disadvantages. *Swift* draws a line favoring presuit settlement but fails to promote the FTCA amendments' fairness policy;[95] the *Adams* minimal notice rule, on the other hand, favors fairness at the expense of settlement[96] and produces no more certainty than this Note's approach because it requires only that the notice be "sufficient to enable the agency to in-

93. *See, e.g.,* Tucker v. United States Postal Serv., 676 F.2d 954, 955 (3d Cir. 1982) (several letters from government to claimant); Avery v. United States, 680 F.2d 608, 609 (9th Cir. 1982) (discussions between Navy and claimant's attorney); Douglas v. United States, 658 F.2d 445, 447 (6th Cir. 1981) (fourteen letters between parties).

94. This Note criticizes the Justice Department regulations, which currently give agencies the authority to request documentation, but it does not argue that agencies cannot make such requests in specific cases. For example, the Federal Rules of Civil Procedure permit discovery of medical reports. *See* FED. R. CIV. P. 34(a); Fleming v. Gardner, 84 F.R.D. 217, 218 (E.D. Tenn. 1978) (emergency room records concerning hospitalization and treatment); Flora v. Hamilton, 81 F.R.D. 576, 580 (M.D. N.C. 1978) (records of psychiatric exam conducted some fifteen years earlier); Mattson v. Pennsylvania R.R., 43 F.R.D. 523, 526 (N.D. Ohio 1967) (hospital and physicians' records). This right to discover medical records is not limited by Rule 35, which governs physical and mental examinations. FED. R. CIV. P. 35(b)(3) (rule "does not preclude discovery of a report of an examining physician . . . in accordance with the provisions of any other rule"); *see, e.g.*, Buffington v. Wood, 351 F.2d 292, 296 (3d Cir. 1965) (Rule 35 is merely a method to avoid having to show cause to discover medical reports. It was not intended to be the exclusive method for medical report exchange.); Hughes v. Groves, 47 F.R.D. 52, 57 (W.D. Mo. 1969) ("Relevant hospital records appear in any personal injury case to be subject to production for 'good cause shown.' . . . Rule 35, however, may not pre-empt production of reports under Rule 34 . . . ."); Leszynski v. Russ, 29 F.R.D. 10, 12 (D. Md. 1961) ("Rule 35 does not prevent a plaintiff or a defendant from obtaining an order under Rule 34 requiring the opposite party to produce and to permit the inspection and copying of medical reports and hospital records, unless such reports and records are privileged."); *cf. In re* Grand Jury Subpoena, 460 F. Supp. 150, 151 (W.D. Mo. 1978) ("This Court has been unable to locate a case which recognizes a federal common law physician-patient privilege."); Hardy v. Riser, 309 F. Supp. 1234, 1236 (N.D. Miss. 1970) ("There is no federally-created physician-patient privilege."). This Note's approach would permit documentation requests seeking claimant medical records because such requests would be allowed under the Federal Rules of Civil Procedure. *Cf.* Avery v. United States Postal Serv., 680 F.2d 608, 609 (9th Cir. 1982) (medical reports); Tucker v. United States Postal Serv., 676 F.2d 954, 956 (3d Cir. 1982) (itemized medical bills); Hoaglan v. United States, 510 F. Supp. 1058, 1059 (N.D. Iowa 1981) (medical reports).

95. *See* notes 62-71 *supra* and accompanying text.

96. *See* notes 47-57 *supra* and accompanying text.

vestigate."[97] The Justice Department could conceivably promote both policies with bright line regulations,[98] but this option offers no guidance to courts defining the claim requirement under current regulations. Thus, courts must choose between a standard that offers a bright line test but fails to promote simultaneously the two policies underlying the FTCA and one that advances both policies but produces ancillary proceedings on the meaning of its terms. Because the prospect of additional proceedings will be minimized by resort to existing interpretations of the Federal Rules of Civil Procedure, and by communications between claimants and agencies, the courts should adopt a standard that furthers both policies of the FTCA amendments.

CONCLUSION

It is unfortunate that plaintiffs are often denied an opportunity to have the merits of their claims considered because of their failure to comply with documentation requests.[99] Although Congress imposed an administrative claim requirement, it failed to define the term.

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97. 615 F.2d at 289; *see* Note, *supra* note 18, at 531.

98. Consistent regulations with specific documentation requirements will promote both policies underlying the 1966 amendments. With only a few modifications, the present regulations could be made acceptable. First, the requirements listed in section 14.4 should be consistent with the list on the back of the Standard Form 95. *See* notes 18 & 68 *supra* and accompanying text; Appendix A. Because many claimants see only Standard Form 95, the affected agency should not jeopardize settlement prospects by making additional requests. For claimants who see both the regulations and Standard Form 95, complete consistency can only reduce confusion, again creating a better settlement environment.

Second, sections 14.4(a)(8), (b)(6) and (c)(5) should be eliminated from the regulations. *See* notes 67 & 69 *supra* and accompanying text. These ambiguous sections are currently open to abuse. After handling thousands of tort cases, government agencies and the Attorney General must know which documents are needed to settle the vast majority of each type of claim. The settlement prospects of claims unusual enough to require special information should be sacrificed for the sake of clarity. This result is not unreasonable because Congress realized that some claims would be too complicated to settle in an administrative setting. *See* note 90 *supra*. Justice Department regulations that specifically identify the documentation required of claimants would preclude agency demands for nondiscoverable information. *See* notes 69-70 *supra* and accompanying text. As the body of case law involving challenges to specific requirements grows, the number of ancillary proceedings to determine the propriety of agency demands will decrease. If the Justice Department eliminates these regulations and harmonizes Standard Form 95 with section 14.4, it would eliminate the need for a relation back doctrine. *See* note 80 *supra* and accompanying text. Standard Form 95 and the regulations would then provide claimants with notice of exactly what information would be required to toll the statute of limitations.

Finally, the new regulation should clearly state that a claimant must submit the information required by section 14.4 and by Standard Form 95 within the statutory period in order to satisfy the jurisdictional prerequisites of section 2675(a). Section 14.2(a) should state that the claim must consist of an executed Standard Form 95 and the documentation it requires, or any other writing that provides the same information and documentation. This approach would eliminate the confusion created by the word "notification." *See* note 68 *supra* and accompanying text.

99. Many of these cases admittedly evoke sympathy for the claimant. *See, e.g.*, Adams v. United States, 615 F.2d 284 (5th Cir. 1980) (brain damaged child); Rothman v. United States, 434 F. Supp. 13 (C.D. Cal. 1977) (wrongful death of son).

Relying on the legislative history, the *Adams* and *Swift* courts have attempted to explain the claim requirement, but each failed to balance the competing policies that caused Congress to enact the administrative claim provision. The Department of Justice could remedy the situation by introducing new regulations,[100] but it has failed to act.

This Note offers a solution that, unlike the approaches adopted in *Adams* and *Swift*, promotes both the settlement and fairness policies of the FTCA amendments: toll the statute of limitations upon the filing of the Standard Form 95 or its equivalent, but make plaintiffs comply with all unambiguous documentation requests that satisfy the discovery standards of the Federal Rules of Civil Procedure. The proposal will admittedly engender ancillary proceedings, but their number will be minimized by claimant communication with affected agencies and by existing precedent. Thus, while the proposed solution may not be entirely satisfactory, it represents the best available alternative.

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100. *See* note 98 *supra*.

APPENDIX A
STANDARD FORM 95-FRONT

CLAIM FOR DAMAGE, INJURY, OR DEATH	INSTRUCTIONS: Prepare in ink or typewriter. Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary	FORM APPROVED OMB NO. 43-R0397

1 SUBMIT TO:	2. NAME AND ADDRESS OF CLAIMANT (*Number, street, city, State, and Zip Code*)

3 TYPE OF EMPLOYMENT ( ) MILITARY ( ) CIVILIAN	4. AGE	5. MARITAL STATUS	6. NAME AND ADDRESS OF SPOUSE, IF ANY (*Number, street, city, State, and Zip Code*)

7 PLACE OF ACCIDENT (*Give city or town and State; if outside city limits, indicate mileage or distance to nearest city or town*)	8. DATE AND DAY OF ACCIDENT	9. TIME (*A.M. OR P.M.*)

10 AMOUNT OF CLAIM (*in dollars*)			
A PROPERTY DAMAGE	B PERSONAL INJURY	C WRONGFUL DEATH	D TOTAL

11. DESCRIPTION OF ACCIDENT (*State below, in detail, all known facts and circumstances attending the damage, injury, or death, identifying persons and property involved and the cause thereof*)

12 PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (*Number, street, city, State, and Zip Code*)

BRIEFLY DESCRIBE KIND AND LOCATION OF PROPERTY AND NATURE AND EXTENT OF DAMAGE (*See instructions on reverse side for method of substantiating claim*)

13. PERSONAL INJURY

STATE NATURE AND EXTENT OF INJURY WHICH FORMS THE BASIS OF THIS CLAIM

14 WITNESSES

NAME	ADDRESS (*Number, street, city, State, and Zip Code*)

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

15 SIGNATURE OF CLAIMANT (*This signature should be used in all future correspondence*)	16. DATE OF CLAIM

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

The claimant shall forfeit and pay to the United States the sum of $2,000, plus double the amount of damages sustained by the United States. (*See R.S. §§3490, 5438; 31 U.S.C. 231.*)

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS

Fine of not more than $10,000 or imprisonment for not more than 5 years or both. (*See 62 Stat. 698, 749, 18 U.S.C. 287, 1001.*)

95-109

STANDARD FORM 95 (Rev. 8-72)
PRESCRIBED BY DEPT. OF JUSTICE
28 CFR 14.2

APPENDIX A
STANDARD FORM 95-REVERSE

PRIVACY ACT NOTICE

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.

A. *Authority:* The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 *et seq.*, 28 U.S.C. 2671 *et seq.*, 28 C.F.R. 14.3.

B. *Principal Purpose:* The information requested is to be used in evaluating claims.

C. *Routine Use:* See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.

D. *Effect of Failure to Respond:* Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim "invalid."

INSTRUCTIONS

Complete all items—Insert the word NONE where applicable

Claims for damage to or for loss or destruction of property, or for personal injury, must be signed by the owner of the property damaged or lost or the injured person. If, by reason of death, other disability or for reasons deemed satisfactory by the Government, the foregoing requirement cannot be fulfilled, the claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with said claim establishing authority to act.

If claimant intends to file claim for both personal injury and property damage, claim for both must be shown in item 10 of this form. Separate claims for personal injury and property damage are not acceptable.

The amount claimed should be substantiated by competent evidence as follows.

(a) In support of claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically reparable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

Any further instructions or information necessary in the preparation of your claim will be furnished, upon request, by the office indicated in item #1 on the reverse side.

(d) Failure to completely execute this form or to supply the requested material within two years from the date the allegations accrued may render your claim "invalid".

INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property.

17 DO YOU CARRY ACCIDENT INSURANCE? [ ] YES, IF YES, GIVE NAME AND ADDRESS OF INSURANCE COMPANY (*Number, street, city, State, and Zip Code*) AND POLICY NUMBER [ ] NO

18 HAVE YOU FILED CLAIM ON YOUR INSURANCE CARRIER IN THIS INSTANCE, AND IF SO, IS IT FULL COVERAGE OR DEDUCTIBLE?	19 IF DEDUCTIBLE, STATE AMOUNT

20 IF CLAIM HAS BEEN FILED WITH YOUR CARRIER, WHAT ACTION HAS YOUR INSURER TAKEN OR PROPOSES TO TAKE WITH REFERENCE TO YOUR CLAIM? (*It is necessary that you ascertain these facts*)

21 DO YOU CARRY PUBLIC LIABILITY AND PROPERTY DAMAGE INSURANCE? ☐ YES, IF YES, GIVE NAME AND ADDRESS OF INSURANCE CARRIER (*Number, street, city, State, and Zip Code*) ☐ NO

☆ GPO : 1978 O—260-460 (51)

STANDARD FORM 95 BACK (Rev. 6-78)