ARTICLE
LIMITATIONS OF ACTION UNDER THE FTCA: A SYNTHESIS AND PROPOSAL

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The Federal Tort Claims Act creates a limited waiver of the federal government's sovereign immunity, by allowing parties to sue government employees for torts committed in the course of their official duties. The Act's statute of limitations currently requires that claims be brought within two years of accrual. However, neither the Act nor the legislative history defines or offers guidelines for determining when tort claims accrue and, correspondingly, when the limitation period commences.

The authors argue that the present statute of limitations reflects a simple conception of government torts, in which the victim immediately becomes aware of his injury and its cause. Consequently, it may unfairly bar plaintiffs where the existence or origin of an injury cannot reasonably be discovered until after the limitation period has expired. The authors consider a due diligence standard of accrual, formulated by the Supreme Court in United States v. Kubrick, which partially relaxes the strict time bar in medical malpractice actions. They survey subsequent judicial treatment of the Kubrick standard in various contexts for which determining the point of claim accrual is complex. Finally, the authors propose an amendment of the statute of limitations that embodies the Kubrick standard for all such situations.

The 1946 Federal Tort Claims Act ("FTCA" or "the Act") creates a limited waiver of the United States' sovereign immunity from liability arising out of the tortious conduct of its employees.1 Under section 2401(b) of the Act, a tort victim has two years to bring a suit after the cause of action accrues.2 By restricting the time within which tort claims can be brought, this

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2 28 U.S.C. § 2401(b) (1982) provides:
A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.
provision encourages prompt claims and, in effect, restricts subject matter jurisdiction.

No general theory has rationalized the principal intellectual problem inherent in the FTCA’s limitation doctrine: determining the point at which the cause of action accrues and the statutory period begins to run. In part the absence of theory stems from the negligence model that motivated the passage of the Act in the first place, a model typified by the image of a postal truck crashing into a plaintiff’s vehicle. Such fact scenarios leave no doubt that a tort has been committed. In addition, they raise no conceptual difficulties as to when the tort was committed and by whom, whether damage was caused thereby, and whether the person operating the defendant’s vehicle was a government employee.

Although the legislative history of the Act strongly suggests that the Act was designed to address such “garden-variety tort suits,” the explicit language of the FTCA reaches further and embraces any tort actionable under state law in the jurisdiction where the conduct occurs. As a result, the FTCA applies to a wide variety of factual circumstances, comprising more complex, attenuated, and unperceived conduct. In such situations, the accrual dates for the torts involved are difficult to determine, and the operation of the statute’s two-year limitation period is therefore problematic.

Three important categories of circumstances embody the doctrinal issues that arise in determining the accrual dates for computing limitation periods; each may have considerable practical impact. In the first category, the tort is undiscoverable for a period of time, due to either the conduct of the defendant or simply the nature of the tortious event. In the second category, one or more tortfeasors actively conceal the tort from the putative plaintiff. In the third category of circumstances, the tort is an ongoing tort for which the putative plaintiff defers bringing suit. The following examples reflect the breadth and significance of the problem of determining the appropriate limitation period.

1. Late Discovery

(a) The plaintiff is the victim of a tort arising from past exposure to a toxic substance.5

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3 See infra note 28 and accompanying text.
4 C.P. Chemical Co. v. United States, 810 F.2d 34, 36 (2d Cir. 1987).
(b) The plaintiff is in a coma for more than two years after
government physicians committed malpractice in treatment.6

2. Concealment

(a) The plaintiff is the victim of a secret prison medical test
that results in physical harm.8

(b) The plaintiff is the unknowing subject of an improper
investigation by law enforcement personnel or other government
agents, carried out using electronic surveillance, undercover
agents, informants, or other techniques calculated not to come
to the investigatee’s attention.9

(c) The plaintiff is injured during a medical test negligently
conducted by government physicians who purposely suppress
the plaintiff’s medical records to prevent discovery of the injury
and its cause.10

3. Continuous Course of Conduct

The plaintiff owns farmland that is subject to annual flooding
as a result of the construction and operation of a military base
located on an adjacent parcel of property.11

At the heart of the current unsatisfactory understanding of
the FTCA limitation period’s operation lies the Supreme Court’s
decision in United States v. Kubrick,12 which held that a plaintiff’s
medical malpractice action accrued when he became aware
of both the existence and cause of his injury. Many courts have

6 Clifford v. United States, 738 F.2d 977 (8th Cir. 1984) (statute did not run on
comatose patient; period began to run only when guardian was appointed for patient,
and when guardian had requisite knowledge of patient’s injury and a legal duty to act
for the patient). See also Washington v. United States, 769 F.2d 1436 (9th Cir. 1985)
(cause of action accrued when patient died, not earlier when patient went into coma;
suit held timely when instituted by survivors promptly after the death of the victim);
Dundon v. United States, 559 F. Supp. 469 (E.D.N.Y. 1983) (although the date of
accrual began before the decedent entered a coma, the statute of limitations was tolled
during the period that the decedent lay comatose, since his mental condition, allegedly
caued by his physicians, directly prevented him from understanding the nature and
cause of his injuries).
7 See infra notes 187–213 and 300–301.
8 See Cain v. United States, 643 F. Supp. 175 (S.D.N.Y. 1986); Scott v. Casey, 562
9 See, e.g., Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984), cert. denied sub nom.
10 See Harrison v. United States, 708 F.2d 1023 (5th Cir. 1983).
11 See Korgel v. United States, 619 F.2d 16 (8th Cir. 1980).
deemed *Kubrick* to be limited to medical malpractice actions.\textsuperscript{13} Some courts, however, have extended its approach to other forms of tortious conduct.\textsuperscript{14} We propose that *Kubrick*’s approach offers a sound analytical basis for analyzing all circumstances arising under the Act, therefore ensuring consistency in the circuits.\textsuperscript{15} Although the decision is widely misread by lower courts that ignore its factual context,\textsuperscript{16} *Kubrick* contains the seeds of a general theory of the accrual of causes of action that can provide the basis for a coherent policy applicable to all factual contexts in which the Act is applied.

In Part I of this Article, we briefly describe the prevailing standards used by courts in applying the limitation period prescribed by the FTCA. In Part II we examine the way these standards are used in various types of cases. In Part III we propose that a simple discovery and reasonable diligence standard, such as that employed in medical malpractice cases under the Act,\textsuperscript{17} should govern in all of the troublesome situations illustrated by the above hypotheticals. Furthermore, the coherence of such a unified rule strongly urges its use in a variety of other situations where strictly applying the FTCA’s limitation period currently produces harsh results. In Part IV we offer an

\textsuperscript{13} Cases purporting to limit the *Kubrick* rationale to medical malpractice cases include Gross v. United States, 676 F.2d 295, 300 (8th Cir. 1982) (in a claim for intentional infliction of emotional distress arising out of a fraudulent attempt to deny the plaintiff participation in a feed grain program, the court held that “*Kubrick* involved a medical malpractice action, not a continuing tort. Where the tortious conduct is of a continuing nature, the *Kubrick* rule does not apply . . . .”), and Ware v. United States, 626 F.2d 1278, 1284 n.4 (5th Cir. 1980) (rejecting application of the medical malpractice accrual test articulated in *United States v. Kubrick* to an FTCA action in which the government misdiagnosed the plaintiff’s cattle as tubercular and consequently destroyed them).

\textit{See also} Herrera-Díaz v. United States, Dep’t of Navy, 845 F.2d 1534, 1536 (9th Cir. 1988) (“Tort claims usually accrue at the time of a plaintiff’s injury. In medical malpractice actions under the FTCA, however, a claim does not accrue until a plaintiff discovers both the injury and its cause . . . .”), cert. denied, 488 U.S. 924 (1988).


\textsuperscript{15} For example, the adoption of such an approach will resolve differences among the circuits on the issue of whether the diligence discovery approach applies to wrongful death cases under the FTCA. See \textit{In re Swine Flu Prods. Liab. Litig.} (Sanborn v. United States), 764 F.2d 637 (9th Cir. 1985) (discussing divergence of view among the circuits on this issue and citing cases).

\textsuperscript{16} \textit{See infra} text accompanying notes 98–104.

\textsuperscript{17} \textit{See infra} notes 87–104.
amendment to the FTCA that would effect the doctrinal unification proposed here.

I. THE FTCA LIMITATION PROVISION: HISTORY AND INTERPRETATIONS

In a time when the federal government is nearly omnipresent in American society, the Federal Tort Claims Act is a critical remedial provision defining the substantive rights of citizens to bring suit against the government for its tortious conduct. The availability of an FTCA remedy, however, often turns on the operation of the statute’s limitation period, a feature that is sometimes overlooked or dismissed as a pro forma procedural hurdle. While appearing straightforward, the FTCA’s limitation provision is surrounded by confusion and conflict, as demonstrated by examining its history and the available guidelines for its interpretation.

A. Legislative History

The Federal Tort Claims Act was enacted in 1946 as part of a legislative package designed to reorganize and reallocate congressional responsibilities, including its responsibility for the tortious conduct of government agents and employees. Up to that point, the federal government had not waived its sovereign immunity against tort liability, although it had long before waived immunity from suit for other types of legal actions. In an effort to end the burdensome and anachronistic procedure of securing relief from torts committed by the federal government through private bills, Congress vested the United States District Courts with article I jurisdiction to hear specified tort

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19 See, e.g., Act of Mar. 3, 1887, ch. 359, 24 Stat. 505 (waiver of sovereign immunity for claims based upon the Constitution, acts of Congress, any regulation of an executive department, or express or implied contracts with the government of the United States). See generally Holzoff, The Handling of Tort Claims Against the Federal Government, 9 L. & CONTEMP. PROBS. 311 (1942) (discussing congressional waivers of sovereign immunity prior to the FTCA).
20 By the 1940's, Congress was receiving approximately 2000 private claims bills each year. See S. REP. No. 1400, 79th Cong., 2d Sess. 30–31 (1946). These bills were processed through the Claims Committees of both houses with an eventual success rate of roughly 25%. Id. Not all of these claims arose out of tortious conduct; however, a report on an earlier draft of the FTCA estimated that up to 60% of all claims would be handled through this Act. See H.R. REP. No. 2800, 71st Cong., 3d Sess. 2 (1931).
claims and concurrently dissolved its own Claims Committees. Partial relief from the private claims burden, as well as the creation of a right to recovery from government torts, appear to be the overarching purposes of the legislation.

Although the FTCA was the product of twenty years of legislative proposals, hearings, reports, enactments, and vetoes, the statute of limitations provision of the Act was rarely at issue. The few discussions that did concern the provision shed little light on the intended meaning of "accrual" for the purposes of the Act. Lack of concern over this issue may have stemmed from the fact that Congress envisioned the Act as addressing mundane, common law torts, most of which arise out of specific, straightforward incidents such as automobile accidents. Furthermore, although the Act has been revised several times, the amendments and their accompanying legislative history do not clarify the lawmakers' intentions. This obscurity of intention is further clouded by the legislative history of the final version of the Act, which differs from that of the earlier versions and, therefore, casts doubt on the prior history. To a great extent, therefore, interpretation of this section of the Act has been left to the judiciary.

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22 60 Stat. at 843–44.
23 60 Stat. at 818, 826–27. All remaining domestic claims responsibilities were transferred to the Judiciary Committees of each house. Id. Further, Congress banned the consideration of private bills for which a claim could be pursued under the FTCA. Id. at 831. Despite this ban, claims which fall within an exception to the FTCA can still be presented to Congress. See House COMM. OF THE JUDICIARY, 101st Cong., 1st Sess., SUPPLEMENTAL RULES OF PROCEDURE FOR PRIVATE CLAIMS BILLS 2–3 (Comm. Print 1989) (First Amendment to the Constitution guarantees the right "to petition the Government for a redress of grievances"); see also infra note 257 and accompanying text.
26 60 Stat. 845, § 420.
27 See Kubrick, 444 U.S. at 119.
28 See, e.g., 89 CONG. REC. A4185 (Extension of Remarks of Hon. Paul Stewart) (describing the need for a remedy for "the ordinary common-law tort" committed by a government employee, such as the victim of a collision with a postal truck); H.R. REP. No. 2245, 77th Cong., 2d Sess. 7 (1942) (noting the particular importance of giving a right to sue "in respect to such torts as negligence in the operation of vehicles"); see also C.P. Chemical Co. v. United States, 810 F.2d at 36–37 (2d Cir. 1977) (observing that the focus of the FTCA was on liability for "negligence in the operation of vehicles").
29 See United States v. Yellow Cab, 340 U.S. 543, 549–50 (1951) ("[T]he reports [of the final FTCA bill] omitted previous discussions which tended to restrict the scope of the Tort Claims bill").
The original language of the FTCA’s statute of limitations appears to be based on a pre-existing provision allowing district courts original jurisdiction in suits brought against the United States.\textsuperscript{30} The statute had disallowed any suit against the federal government unless it had been brought “within six years after the right [for which the claim had been made] accrued.”\textsuperscript{31} As enacted, the FTCA’s limitation provision specified a much shorter time for bringing tort actions than had been allowed for other actions brought against the United States. It provided that claims against the United States under the FTCA would “be forever barred” unless an action was brought “within one year after such claim accrued or within one year after the date of enactment of th[e] Act, whichever [was] later.”\textsuperscript{32} What little interpretive material exists suggests that this short period was intended to encourage the prompt presentation of claims and thereby prevent injustice to the government resulting from the loss of critical evidence.\textsuperscript{33} With minor stylistic amendments,\textsuperscript{34} the statute of limitations provision was recodified in 1948 as 28 U.S.C. § 2401(b).\textsuperscript{35}

In 1949, Congress lengthened the limitation period an additional year.\textsuperscript{36} Lawmakers sensed that the prior one-year period


\textsuperscript{31} Id.

\textsuperscript{32} 60 Stat. 845, § 420 (codified at 28 U.S.C. § 942 (1946)). Also, denials of claims for less than $1,000 that had been brought pursuant to the administrative claim provision of the Act could be challenged within an additional six-month period. Id.

\textsuperscript{33} See H.R. Rep. No. 2428, 76th Cong., 3d Sess. 5 (1940). Hearings on earlier versions of the FTCA had provoked the following comments:

I realize the handicap an agency would be under if it were sued for an accident as much as a year after it happened, without any notice. Witnesses would have gone to the four winds, and there would be no opportunity to present a proper defense.

Tort Claims Against the United States: Hearings on S. 2680 Before Subcomm. of the

Sen. Comm. on the Judiciary, 76th Cong., 3d Sess. 22 (1940) (remarks of Herbert

Bingham, ABA). “[One year] is necessary for the purpose of protecting the interests of

the government.” Id. at 38 (remarks of Alexander Holtzoff, Dep’t of Justice). Mr.

Holtzoff also noted that in cases of hardship caused by the one-year period, a claimant could still seek relief from Congress through a private bill. Id. at 38, 47. Indeed, he expected that this would occur and noted that it had occurred in other areas already.

Hearings on H.R. 7236, supra note 24, at 21.

No language in the numerous hearings and reports specifically refers to what is meant by the term “accrues.” Rather, the recorded statements address the length of the period in which to bring a claim once that claim is actionable.

\textsuperscript{34} See S. Rep. No. 1559, 80th Cong., 2d Sess. 10 (1948).

\textsuperscript{35} Act of June 25, 1948, ch. 646, 62 Stat. 971.

was "too short and tend[ed] toward injustice in many instances," and that it should correspond more closely with the period provided in most state statutes of limitations for torts and in other federal statutes of limitations. Specifically, Congress explained that the one-year period was "unfair to some claimants who suffered injuries which did not fully develop until after the expiration of the period for making a claim." Although Congress recognized that the extension of the statutory period to two years would expand opportunities for bringing suit under the FTCA, it did not intend the amendment to be viewed as a congressional effort to "encourage delay in the enforcement of a claimant's rights or to harass the Federal agencies in the defense against such suits." The amendment merely extended by one year the time to file a claim after that claim had already accrued. The amendment, however, did not address the meaning of accrual.

Congress has passed a variety of other amendments to section 2401 and its predecessors since 1911, but none bears on the

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38 Id. at 1228–29. The committee found that the average state limitation period for torts was 2.92 years, and the average period for other federal causes of action, for instance certain admiralty actions, was approximately 2.2 years. Id.
39 Id. This statement appears to imply that a claim accrues when an injury occurs rather than when it is fully developed; otherwise there would be no reason for extending the limitation period. See Brief for the United States at 25, United States v. Kubrick, 444 U.S. 111 (1979) (No. 78-1014). However, the statement could mean that once a claim has accrued, the limitation period is not tolled by the fact that the resulting injury is not fully manifested. Brief for Respondent at 18–19 n.12, United States v. Kubrick, 444 U.S. 111 (1979) (No. 78-1014). Yet this language leaves ambiguous exactly at what stage of an injury, prior to "complete development," a claim may accrue for purposes of the Act.
41 Id. at 4.
42 A further amendment in 1966 gave § 2401(b) its current form by altering the FTCA's administrative claim requirements. Act of July 19, 1966, Pub. L. 89-506, § 7, 80 Stat. 307. In Brief for the United States, supra note 39, at 26, the government argues that two other bills passed on the same day as the 1966 amendment elucidate Congress's understanding of how causes of action accrue for statute of limitations purposes. See 28 U.S.C. §§ 2415, 2416 (1988). These two statutes establish statutes of limitations for actions brought by the United States and adopt a diligence discovery rule. Id. The government argued that if Congress intended a similar rule under the FTCA, it would have provided as such. Id. at 27. This ignores the fact, however, that the 1966 amendments to the FTCA were focused on the administrative claim system, and the legislative history demonstrates that the statute of limitations issue was not addressed. See generally 1966 U.S. Code Cong. & Admin. News 2515.
definition of the period currently applied to such claims. Most significantly for purposes of this analysis, none of the other legislative materials informs our understanding of when a claim is deemed to accrue for limitation purposes or what circumstances, if any, extend or “toll” the running of the limitation period.\footnote{A full roster of the legislative developments in this area follows: Act of Mar. 3, 1911, ch. 231, § 24, para. 20, 36 Stat. 1087, 1093 (origins of present six-year period found in 28 U.S.C. § 2401(a) (1988)); Act of Nov. 23, 1921, ch. 136, § 1310(c), 42 Stat. 227, 311; Act of June 2, 1924, ch. 234, § 1025(c), 43 Stat. 253, 348; Act of Feb. 24, 1925, ch. 309, 43 Stat. 972; Act of Feb. 26, 1926, ch. 27, § 1122(c), 44 Stat. 9, 121; Act of Aug. 2, 1946, ch. 753, tit. IV, § 420, 60 Stat. 812, 845 (first FTCA provision, one-year period); Act of June 25, 1948, ch. 646, 62 Stat. 971; Act of Apr. 25, 1949, ch. 92, § 1, 63 Stat. 62 (providing present two-year limitation period); Act of Sept. 8, 1959, Pub. L. 86-238, § 1(3), 73 Stat. 471, 472; Act of July 18, 1966, Pub. L. 89-506, § 7, 80 Stat. 306, 307; Act of Nov. 1, 1978, Pub. L. 95-563, § 14(b), 92 Stat. 2143, 2389.} Of course, Congress need not and cannot define every legislative term. Those having unambiguous usage should speak for themselves. But “accrual,” at least in the statute of limitations context, had a broad range of connotations at the time the Act was passed.\footnote{“Accrue” was commonly defined to mean “to arise, to happen, to come into force or existence; to vest; as in the phrase, ‘The right of action did not accrue within six years.’” Black’s Law Dictionary 29 (3d. ed. 1931); see also Balleinette’s Law Dictionary 16 (2d ed. 1948) (“[a]s applied to a cause of action, the word means to arrive; to commence; to come into existence; to become a present and enforceable demand”). Restatement of Torts explains that “the statute does not usually begin to run until the tort is complete . . . . [I]t is ordinarily not complete until there has been an invasion of a legally protected interest of the plaintiff.” Restatement of Torts § 899 (1939). In regard to knowledge of the tort, Restatement of Torts noted: “it is still true that in many of the States that, in the absence of fraud or concealment of the cause of action, the statutory period runs from the time the tort was committed although the injured person had no knowledge or reason to know of it.” However, several states have adopted a discovery-style rule for medical malpractice cases. Id. at comment e. Because the federal courts have determined that federal law controls the definition of accrual, however, state constructions of that term cannot be imputed to Congress. See Soriano v. United States, 352 U.S. 270, 276 (1957); United States v. Sherwood, 312 U.S. 584 (1941); Moll v. US Life Title Ins. Co. of New York, 654 F. Supp. 1012, 1021 (S.D.N.Y. 1987); Hammond v. United States, 388 F. Supp. 928, 930 (E.D.N.Y. 1975) (citing numerous cases).} Consequently, courts have had to choose which meaning to apply.

\section*{B. Guides to Construction}

The courts have strictly applied section 2401(b),\footnote{See generally W. Ferguson, The Statutes of Limitation Saving Statutes (1978).} treating it as a typical statute of repose.\footnote{See generally W. Ferguson, The Statutes of Limitation Saving Statutes (1978).} As the Supreme Court has noted:
[A]lthough affording plaintiffs what the legislature deems a reasonable time to present their claims, [statutes of limitations] protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise. 47

Courts have strictly construed section 2401(b) and have largely refused to create exceptions to its operation. 48 Some courts have attributed their reluctance to bend the temporal bar to their belief that they lack power to create equitable waivers of its application. 49

In construing the FTCA’s limitation provision, the Supreme Court has said that courts should not “extend the waiver beyond that which Congress intended.” 50 This strict approach is consistent with the Supreme Court’s assessment of what the Act’s legislative history commands. 51 In accord with that approach, federal courts have consistently refused to make the usual equitable exceptions to the operation of the statute of limitations for cases brought under the FTCA. For instance, courts have held that neither minority status, 52 mental incapacitation, 53 nor state of war will toll the limitation period for a claimant. 54 Thus courts have generally refused to read section 2401(b) provisions

47 Kubrick, 444 U.S. at 117. In Kubrick, the plaintiff brought a tort claim against the government alleging mistreatment at a Veterans Administration hospital. The Supreme Court held that the plaintiff’s claim accrued when he knew of both the existence and cause of his injury, but that he need not have been aware of negligence, for he was on notice to seek expert advice once the injury and its cause were discovered. See infra text accompanying notes 87–97 for a full discussion of Kubrick.

48 See Block v. North Dakota Bd. of Univ. and School Lands, 461 U.S. 273 (1983), where the Supreme Court held that a state must comply with conditions on waivers of sovereign immunity when bringing a suit against federal officials. The Court said: “[When Congress attaches conditions [such as a statute of limitations] to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied.” Id. at 287.


broadly, even when a narrow construction has caused harsh results and risked a denial of the relief Congress intended to provide through the immunity waiver.

C. Law Governing Accrual Determination

State judicial construction of similar state law provisions provides an obvious and potentially fertile source of guidance for interpreting the FTCA’s limitation provision. Indeed, issues arose early in the judicial interpretation of section 2401(b) over whether state or federal law controlled the determination of when a claim accrued under the Act. The FTCA is uniquely structured to draw the substantive tort causes of action from state law, by providing that “the district courts . . . have exclusive jurisdiction of civil actions on claims against the United States . . . 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.”

This structure seems to suggest that where tort liability in a particular state is circumscribed by that state’s rules for accrual of causes of action, those rules should also be used in applying the FTCA. Such an interpretation would not abrogate section

35 See Bailey v. United States, 642 F.2d 344, 346–47 (9th Cir. 1981) (suit by heirs of decedent killed on gunnery range by alleged negligence of the Air Force dismissed as time-barred where claim had been mailed but not properly presented); Wollman v. Gross, 637 F.2d 544, 549 (8th Cir. 1980) (suit for alleged negligence of government employee in automobile accident time-barred despite the plaintiff’s claim that he was “blamelessly ignorant” of the legal significance of an accident with a government employee); Snodgrass v. United States, 567 F. Supp. 33, 34–36 (E.D.N.Y. 1983) (claim for alleged unlawful arrest, imprisonment, and detention by federal agents time-barred despite allegations that the plaintiff had not known the agents were involved); In re “Agent Orange” Prod. Liab. Litig., 506 F. Supp. 757, 760 (E.D.N.Y. 1980) (in litigation against the Navy for alleged injuries from exposure to the chemical known as “agent orange,” time constraints of § 2401(b) were not subject to extension or waiver).

36 The Court in Kubrick cited Indian Towing Co. v. United States, 350 U.S. 61 (1955), in which the Court had stated:

The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private parties. Of course, when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction.

Id. at 68–69.

2401(b); once a claim is held to have accrued according to state law, it would be untimely if not pursued within two years.

In contrast to the liability provisions of the Act, however, section 2401(b)'s text provides no reason to believe that it was meant to be interpreted in accordance with state law. The legislative history of section 2401(b) does not aid in resolving this point.

Although several early cases held that state law controlled when a claim accrued, subsequent cases have concluded that federal law controls this determination. The principal consideration guiding most federal decisions on the issue is that yielding the accrual issue to state law would preclude the uniformity sought through the statute of limitations provision. In the FTCA, as several courts have noted, Congress deferred to state law for tort definitions because of the technical complexity of delineating every possible ground for liability in the Act itself; however, the statute of limitations was a discrete issue that Congress could and did address uniformly according to federal law. One court has further reasoned that if a state rule of accrual resulted in a shorter limitation period than a federal rule, more private claims for relief would be submitted to Congress, a situation the FTCA was meant to prevent. Federal law is now uniformly held to control when a claim accrues under the Act.

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58 See supra note 2 for the text of § 2401(b).
59 See supra text accompanying notes 18–44.
60 See, e.g., Tyminski v. United States, 481 F.2d 257, 262–63 (3d Cir. 1973); see generally Annotation, Statute of Limitation Under Federal Tort Claims Act, 29 A.L.R. Fed. 482 § 5 (1976 & Supp. 1989). Until the 1980's, the First Circuit held the view that state law governs when a claim accrues for purposes of the FTCA. See Hau v. United States, 575 F.2d 1000, 1002 (1st Cir. 1978). Although that court has not expressly reversed itself, in more recent cases it has referred exclusively to federal law for the definition of accrual. See Nicolazzo v. United States, 786 F.2d 454, 455 (1st Cir. 1986). Lower courts within that circuit have interpreted Nicolazzo as holding that federal law controls. See Santana v. United States, 693 F. Supp. 1309, 1312 n.2 (D.P.R. 1988).
61 See Quinton v. United States, 304 F.2d 234, 235–40 (5th Cir. 1962); Maryland v. United States, 165 F.2d 869, 871 (4th Cir. 1947).
62 See, e.g., Quinton, 304 F.2d at 236.
63 Id.
64 Maryland, 165 F.2d at 872.
65 See supra note 60. The Supreme Court's decision in Kubrick implicitly removes any remaining doubts on this point. Although the Court in Kubrick did not expressly address the choice of law issue, the accrual rule that emerged was in large part based on the Court's opinion in Urie v. Thompson, 337 U.S. 163 (1949), a case that held that federal law controls. Kubrick at 120 n.7. Thus the Court appeared to assume that federal law controlled in Kubrick. Furthermore, the holding in Kubrick clearly establishes the parameters of the accrual of a cause of action under the Act and thus any state rules that conflicted with the holding would not apply. Id. at 124–25.
Oddly, this results in the separation of the limitation doctrine from the substantive causes of action. In other contexts the Supreme Court has held that state statutes of limitations are substantive law, requiring that a court exercising diversity jurisdiction apply the state period.66 State rules supersede federal rules in determining when the cause of action accrues and what steps are required for its commencement.57 Under the FTCA, however, while liability is premised on state tort law, the jurisdiction exercised rests not upon diversity but federal subject matter. Therefore, the federal Act’s limitation period applies and limits the substantive causes of action based on state law.

Nonetheless, state law still influences the accrual issue in one important respect: a claim cannot accrue for statute of limitations purposes until it exists, and state law determines its existence.68 Thus state law controls when the event is defined as an actionable tort, and federal law governs when, on or after that date, a claim accrues for purposes of section 2401(b). This mechanical point does not conflict with the current FTCA statute of limitations jurisprudence, discussed below.

II. Present Operation of the Statute

Although many cases brought under the FTCA are clearly either within or without the limitation period, in other cases courts must struggle with the question of whether a plaintiff has brought suit within the statutory time limit. For cases that do not fit the notion of a simple, obvious, physical tort that usually comes to mind when envisioning an FTCA suit, the courts have developed an approach by which they assess the plaintiff’s diligence (or lack thereof) in determining whether the limitation period should be applied strictly.69 To understand why this approach is only a partial solution to the problem, the approach and its application must first be examined.

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67 See, e.g., Walker v. Armco Steel Corp., 446 U.S. 740, 751–52 (1980) (In a diversity suit, Fed. R. Civ. P. 3 does not govern when an action is filed for purposes of Oklahoma’s statute of limitations; the state’s “actual service” of process requirement is substantive and must be satisfied before the limitations period is tolled).
69 We refer hereinafter to this approach as the “diligence discovery” or “due diligence” rule.
Section 2401(b) provides that a prospective plaintiff's tort claims are "forever barred unless . . . presented in writing to the appropriate Federal agency within two years after such claim" accrued. Ordinarily, a cause of action accrues when the alleged injury occurs. The alleged injury is deemed to occur when the actionable conduct is complete, rather than when its effects are felt. Thus, when the actionable conduct is complete, the statutory period begins to run. The premise in such situations, however, is that the conduct will immediately come to the victim's attention. The Supreme Court has commented that the paradigm for application of the Act as a whole is a simple traffic accident involving a government vehicle.

B. Medical Malpractice Cases—the Kubrick Approach

Following enactment of the FTCA, courts began to recognize that equating accrual of a cause of action with the date of the act or omission that caused the tortious injury could potentially lead to injustice in the medical malpractice context. Often, the victim of medical malpractice may not know of an injury or its cause within a short statutory period of limitations because the consequences of malpractice may take years to develop, and the character of the injury may prevent discovery by anyone but a physician. A legal rule that charges an unknowing plain-

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71 Kubrick, 444 U.S. at 120.
72 See generally Shockley v. Vermont State Colleges, 793 F.2d 478, 481 (2d Cir. 1986), and cases cited therein; Chardon v. Fernandez, 454 U.S. 6, 8 (1981); Delaware State College v. Ricks, 449 U.S. 250, 258 (1980).
73 Kubrick, 444 U.S. at 120.
74 See C.P. Chemical Co. v. United States, 810 F.2d 34, 36 (2d Cir. 1987).
75 Kosak v. United States, 465 U.S. 848, 855 (1984) ("[o]ne of the principal purposes of the Federal Tort Claims Act was to waive the Government’s immunity from liability for injuries resulting from auto accidents").
76 See, e.g., Quinton v. United States, 304 F.2d 234 (5th Cir. 1962). In Quinton, the plaintiff was negligently given transfusions of RH positive rather than RH negative blood in an Air Force hospital. Id. at 235. The plaintiff had no reason to suspect that a mistake had been made. As a direct result of the negligent transfusions, the plaintiff delivered a stillborn baby four years later. Id.
77 See RESTATEMENT (SECOND) OF TORTS § 899 comment c (1979), quoted in Kubrick, 444 U.S. at 120 n.7. Also, medical malpractice claims often arise from negligent omissions, particularly failures to give adequate medical advice, which plaintiffs have no reason to suspect because they are not themselves aware of the potential alternatives. In these situations, there is likely to be a significant time delay between the omission and an event that will bring it to light.
tiff with knowledge of a malpractice cause of action for statute of limitations purposes would be akin to the early English common law fiction that a plaintiff has an actionable case as of the date of an injury notwithstanding the plaintiff's own ignorance of that injury or its cause.\textsuperscript{78} Although the federal courts have been willing to adopt a more equitable rule at least to a limited extent,\textsuperscript{79} the exact parameters of such a rule are still the subject of debate.

To alleviate the injustice of barring a medical malpractice action under the FTCA before a putative plaintiff even recognizes its existence, the federal courts have developed a "diligence discovery" rule of accrual in such cases. Under this approach a claim does not accrue until "the claimant discovered, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged malpractice."\textsuperscript{80} The courts derived this rule from the Supreme Court's earlier consideration of the accrual of a cause of action under the Federal Employers' Liability Act, where it found that a plaintiff's "blameless ignorance" concerning a cause of action under the Act could not be held against him.\textsuperscript{81} By permitting some suits that otherwise would be barred, it actually serves Congress's intent to reduce the number of private bills introduced for the purposes of resolving tort claims against the government.\textsuperscript{82} This rule quickly spread throughout the federal courts of appeals.\textsuperscript{83}

\textsuperscript{78} See Restatement of Torts § 899 comment c (1939). Around the time the FTCA was enacted, this was in fact the rule in many states. See generally Lillich, The Malpractice Statute of Limitations in New York and Other Jurisdictions, 47 Cornell L.Q. 339 (1962). A diligence discovery approach now prevails in a number of states. See infra note 279 and accompanying text.

\textsuperscript{79} See, e.g., Quinton, 304 F.2d at 240.

\textsuperscript{80} Quinton, 304 F.2d at 240.

\textsuperscript{81} Urie v. Thompson, 337 U.S. 163, 171 (1949). Urie involved a railroad worker's claim that he contracted silicosis as a result of his employer's negligent failure to protect him adequately against silica dust. \textit{Id.} at 165–66. While the Court held that "each intake of dusty breath" does not constitute a separate cause of action under the Act, \textit{Id.} at 170, the plaintiff had no reason to know of his condition at an earlier date and could not have an actionable injury until the "effects of the deleterious substance manifest themselves." \textit{Id.} (citation omitted). Thus his action was not time-barred since it was filed within the limitations period after he discovered his injury. \textit{Id.}

\textsuperscript{82} Tort claims that are barred by the FTCA's statute of limitations presumably may be introduced as private bills in Congress. Cf. Maryland v. United States, 165 F.2d 869, 872 (4th Cir. 1947) (construction of the limitation period is governed by federal law because state periods that are shorter would thwart the FTCA's purpose of eliminating private bills for tort claims, since plaintiffs barred by a state limitation period would still be able to submit private bills).

\textsuperscript{83} See generally Hungerford v. United States, 307 F.2d 99 (9th Cir. 1962); Tyminski v. United States, 481 F.2d 257 (3d Cir. 1973); Toal v. United States, 438 F.2d 222, 224–25 (2d Cir. 1971).
By the 1970's, however, an important ambiguity in the diligence discovery rule became apparent: does the limitations period begin to run when the plaintiff knows, or should know, of an injury and its cause, or not until the plaintiff also knows that the injury was negligently inflicted? Each position has merit. On the one hand, a cause of action should not accrue until all the elements of a tort (for example duty, breach of duty, causation, and damages) are known, or should have been known, since these establish the point at which a plaintiff has a reasonable basis for determining whether or not to bring suit. But requiring knowledge of negligence (the existence of the defendant's legal duty to the plaintiff and breach of that duty) allows some claims to be actionable almost indefinitely and places the defendant the burden of the plaintiff's failure to find competent advice. Such a situation would arguably defeat the purpose of the FTCA statute of limitations as a statute of repose. The Supreme Court attempted to resolve this controversy in *Kubrick*.

In *Kubrick*, the Court considered an FTCA claim for damages resulting from the plaintiff's deafness, which was allegedly caused by negligent post-surgery treatment of an infection at a Veterans Administration hospital. Although the plaintiff had known of the injury and its probable cause for some time, he had not been able to determine within two years of the surgery whether it was negligently inflicted, despite diligent efforts to pursue this information. Based on this finding of diligence, the trial court held the action timely, and the court of appeals affirmed. The Supreme Court reversed, holding that the statute started to run when the plaintiff had actual knowledge of the

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84 Bridgford v. United States, 550 F.2d 978, 981–82 (4th Cir. 1977). See also De Witt v. United States, 593 F.2d 276 (7th Cir. 1979); Exnicious v. United States, 563 F.2d 418 (10th Cir. 1977); Jordan v. United States, 303 F.2d 620 (6th Cir. 1974).
86 Id.
87 Id. at 113–16. Kubrick had sought surgery at a Veterans Administration hospital for an infected femur in April 1968. After surgery, the surgical wound was irrigated with the antibiotic neomycin, and shortly thereafter Kubrick began to experience deafness. In January 1969, an ear specialist diagnosed his condition as bilateral nerve deafness, a permanent condition, and informed him that neomycin treatment was the probable cause. Kubrick was not able to ascertain for some time, however, that this treatment was negligent, and thus he did not file suit for several years. Id.
89 Id. Specifically, the court held that actual knowledge of an injury and its cause is sufficient to create a rebuttable presumption that the injury was negligently inflicted. Id.
90 Kubrick v. United States, 581 F.2d 1092 (3d Cir. 1978).
injury and its probable cause. The Court was unwilling to equate “a plaintiff’s ignorance of his legal rights [with] his ignorance of the fact of his injury or its cause”.

A plaintiff such as Kubrick, armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community. To excuse him from promptly doing so by postponing the accrual of his claim would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims against the Government . . . . But however or even whether he is advised, the putative malpractice plaintiff must determine within the period of limitations whether to sue or not, which is precisely the judgment other tort claimants must make.

The result of this ruling was stark: Kubrick had already won a substantial award on the merits in the court below.

The result the Court reached in Kubrick clearly eliminated any “knowledge of negligence” element from the diligence discovery rule, yet it left several ambiguities. The narrowest reading of the decision triggers the statute of limitations in an FTCA medical malpractice action where actual knowledge of an injury and its probable cause exists. Thus, the Supreme Court implicitly recognized the special situation of medical malpractice claimants by applying a diligence discovery rule of accrual, albeit narrower than the rule previously adopted by most courts under which commencement of the limitation period was deferred until discovery of negligence. However, the Court left unclear whether an objective “knew or should have known” standard applies, or whether the statute commences only when a plaintiff has actual knowledge of an injury and its cause.

Further, the Court did not address other situations where application of the diligence discovery rule may be difficult due to

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91 Kubrick, 444 U.S. at 125. The dissent argued that Urie should control and that a plaintiff who was blamelessly ignorant of the cause of action, despite diligently pursuing the necessary information, should be excused from strict application of the two-year period. Id. at 127–28 (Stevens, J., dissenting).

92 Id. at 122.

93 Id. at 123–24.

94 Kubrick, 435 F. Supp. at 189.

95 See, e.g., 3 THE DEPARTMENT OF JUSTICE MANUAL § 4-5.227 (1988) (“[Kubrick holds] that a claim accrues within the meaning of Section 2401(b) when the plaintiff knows both the existence and the cause of his/her injury, and not at a later time when he/she also knows that the acts inflicting the injury may constitute medical malpractice”).

96 This ambiguity has led to a variety of applications of the rule. See Abney, For Whom the Statute Tolls: Medical Malpractice Under the Federal Tort Claims Act, 61 Notre Dame L. Rev. 696 (1986).
unique factual considerations, such as the government’s fraudulent concealment of information. *Kubrick* has been variously applied to such situations; examples of issues and trends in its application are set out below.97

Several courts have held that *Kubrick* and the diligence discovery rule generally do not apply during the period of a plaintiff’s continuous treatment by the allegedly negligent doctor or hospital.98 This exception is motivated by a reluctance to impose the ordeal of litigation on a patient receiving treatment, especially when some hope exists that the condition will improve.99 This special rule seems to conflict with the general tenor of the Supreme Court’s discussion,100 since the plaintiff in such circumstances is temporarily excused from any diligence obligation. Similarly, courts have apparently departed from the *Kubrick* approach where the plaintiff could not mentally comprehend the injury or its cause precisely because of the government’s negligence.101 Situations such as these highlight the difference between a discovery rule that includes an objective “knew or should know” component, and a rule that is purely subjective.

Several other cases present issues that test the parameters of the diligence discovery rule. For instance, in some cases potential plaintiffs have been misled by government doctors into thinking that a certain injury was not negligently inflicted, but rather comprised part of the normal treatment process.102 Some

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98 See, e.g., Wehrman v. United States, 830 F.2d 1480 (8th Cir. 1987).

99 Id. at 1485.

100 The Court’s discussion indicates that § 2401(b) is meant to be construed narrowly, a situation that would not allow for a baldly equitable exception such as the continuous treatment doctrine. *Kubrick*, 444 U.S. at 117 (“we are not free to construe [§ 2401(b)] so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims”); see also Note, *Federal Tort Claims Act*, 14 SUFFOLK U.L. REV. 1428, 1439 (1980).

101 See cases cited *supra* note 6; but see Barren v. United States, 839 F.2d 987, 994 & n.2 (3d Cir. 1988) (“[i]t may be that when the negligence of the defendant impairs the ability of a plaintiff to take the necessary measures to file a claim, fairness requires that we relax the [application of the reasonable diligence] rule . . . . That, however, is an issue for Congress . . . [i]nclusion of a plaintiff’s mental capacity as a factor to be considered in determining the reasonableness of plaintiff’s diligence runs counter to [the] general approach”), cert. denied, 109 S.Ct. 79 (1988).

102 See, e.g., McDonald v. United States, 843 F.2d 247 (6th Cir. 1988); Colleen v. United States, 843 F.2d 329 (9th Cir. 1987).
courts have held that these assurances relieve the plaintiff from compliance with the "diligence" component of the discovery rule, because they prevent a plaintiff from knowing of a particular injury or its cause.

Other courts, however, have upheld the diligence requirement even where the injury itself was expected, and therefore gave the plaintiff no reason to suspect any negligence.\footnote{See, e.g., Sexton v. United States, 832 F.2d 629 (D.C. Cir. 1987) (parents of child who died in 1968 of complications from experimental radiation treatment for leukemia should have looked into their claim then, even though death was expected; they could not bring an action 10 years later when they discovered that the treatment was improper).} In addition, some courts have held that even where a plaintiff has been lulled into the belief that negligence was not involved, \textit{Kubrick} nonetheless requires a search for any potential negligence once the injury and its cause are known.\footnote{\textit{Id.} at 636.} In situations such as these where the injury may have both a negligent and non-negligent cause, discovery of the latter controls for purposes of the discovery rule.

Thus \textit{Kubrick} did not settle the issues concerning when a claim accrues under the FTCA. The factual posture before the Court in that case has been seen by several lower courts as too narrow to have generated broad guidelines applicable to other tort situations.

\textbf{C. The Diligence Discovery Test in Practice}

Under \textit{Kubrick}, where a plaintiff actually identifies through due diligence the tortious activity and its origin, the statute of limitations should begin to run at the time of the injury. But determining at what point the plaintiff failed to exercise due diligence is often a difficult task. "The question of what knowledge should put a claimant on notice of the existence of a viable claim is not soluble by any precise formula."\footnote{Waits v. United States, 611 F.2d 550, 552 (5th Cir. 1980) (upholding award to a plaintiff who suffered amputation of his leg, where the Veterans Administration hospital failed to provide him with his records in time to assess the merits of his claim within the two-year limitation period).} The Supreme Court offered guidance in \textit{Kubrick} by mentioning two elements that would necessitate a further investigation by a plaintiff into a possible cause of action: the fact of the injury, and the identity (though not necessarily the governmental capacity) of the tort-
feasor—the "what" and "who" of the alleged tort.\textsuperscript{106} Therefore, under \textit{Kubrick}, if a plaintiff knows that he was injured by an act, and that it was the defendant who performed the act, the statute of limitations begins to run whether or not the plaintiff knew that the act was illegal.\textsuperscript{107}

Where a plaintiff was not clearly in possession of these "critical facts" about the injury and the tortfeasor's identity, the relevant test in determining whether the plaintiff acted with the requisite diligence is the "objective standard of a hypothetical reasonable man."\textsuperscript{108} Thus, when a "person of ordinary intelligence [has] knowledge of facts sufficient to suggest" that he has been injured, the statute commences to run, regardless of the plaintiff's ignorance about the tortfeasor's identity.\textsuperscript{109}

In addition, while notice of a particular cause of action may be required to trigger the limitation period,\textsuperscript{110} courts have indicated in other contexts that general suspicions surrounding a possible cause of action may also be sufficient to require further inquiry.\textsuperscript{111} Likewise, the commencement of a related lawsuit

\textsuperscript{106} \textit{Kubrick}, 444 U.S. at 122.
\textsuperscript{107} \textit{Id.} at 113–16. \textit{See also} Liuzzo v. United States, 485 F. Supp. 1274 (E.D. Mich. 1980). In \textit{Liuzzo}, the children of a civil rights worker sued the United States and the FBI for alleged involvement in the murder of the plaintiff's mother by Klansmen. The plaintiffs alleged that the FBI had prior knowledge, through an informant, of a conspiracy to murder the victim, but they did nothing to prevent it. In applying the \textit{Kubrick} rationale, the court held that the plaintiffs' cause of action was not time-barred because, under those particular circumstances, the cause of action could not have accrued until the plaintiffs had reason to know the tortfeasor's identity. The court said:

[T]he plaintiffs in this case had no reason to investigate the cause of their mother's death in 1965, because, based on the information known at that time, they believed and were led to believe the cause to be the three Klansmen. Moreover, even if they had had reason to investigate further in 1965, it is not clear that the FBI should reasonably have been a target of their inquiries.

\textit{Id.} at 1284.
\textsuperscript{109} Renz v. Beeman, 589 F.2d 735, 751 (2d Cir. 1978) (quoting Sielecken-Schwartz v. American Factors, Ltd., 265 N.Y. 239, 246, 192 N.E. 307, 310 (1934)), cert. denied, 444 U.S. 834 (1979). In \textit{Renz} a beneficiary of a family trust sought to impose a constructive trust on 2000 shares of voting preferred stock purchased by a trustee (who was also a beneficiary of the trust) and to remove the trustee. The Second Circuit held that the plaintiffs had the duty to inquire "with diligence" into the activities of the defendant when they received a letter describing the defendant's stock ownership, even though the letter did not describe the source of the ownership. 589 F.2d at 750–51.
\textsuperscript{110} See Hobson v. Wilson, 737 F.2d 1, 35 (D.C. Cir. 1984).
\textsuperscript{111} In Richel v. Levy, 370 F. Supp. 751 (E.D.N.Y. 1974), the plaintiffs brought a class action suit to seek redress for allegedly fraudulent real estate investment schemes. In the pleadings, the plaintiffs admitted that they had been "suspicious generally" of the defendants' activities more than two years before bringing the suit. The court found that had the plaintiffs been reasonably diligent, they would have conducted further investigations when suspicions were aroused, and the court accordingly dismissed the
may provide the means necessary for investigating possible wrongful activity.\textsuperscript{112}

The courts have also inconsistently resolved the question of whether the plaintiff must know of the tortfeasor’s government status before the limitation period begins to run. In \textit{Scott v. Casey,}\textsuperscript{113} the plaintiffs brought an FTCA suit against the government for injuries resulting from their participation in a medical experiment at a federal prison. The plaintiffs claimed that although the experiments took place in the late 1950’s, it was not until the late 1970’s that they learned of the federal government’s involvement in the testing. The court found that the plaintiffs knew that they had suffered injuries from the test, that the test was conducted at a federal prison hospital, and that they were to receive good-time credit for their participation. The court entered judgment for the defendants, saying it was “hard pressed to believe that, given the foregoing circumstances, the plaintiffs were unaware of the government’s involvement in the study,” and that armed with this knowledge, they should have sought legal advice.\textsuperscript{114} \textit{Scott} demonstrates that where a potential claimant is aware of facts which would alert a reasonable individual that a particular party is involved in certain conduct, the claimant will be held to have known of that party’s involvement.

In contrast, \textit{Peck v. United States}\textsuperscript{115} provides an example of a case where application of the “diligence discovery” standard did not require dismissal. \textit{Peck} was a civil action against the FBI for an alleged violation of the plaintiff’s constitutional

\begin{footnotesize}
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\item \textsuperscript{112} In \textit{Klein v. Shields & Co.}, 470 F.2d 1344 (2d. Cir. 1972), a brokerage firm had originally brought suit in 1960 alleging that Klein had breached a contract to purchase securities; Klein counterclaimed, alleging that the brokers had failed to deliver the securities. The brokerage firm ceased prosecution of the action in 1961, but in 1971, Klein brought suit on the same grounds and added a claim of securities fraud. The district court dismissed the complaint, holding that the action was time-barred. In affirming the lower court, the Second Circuit held that Klein could have discovered the alleged fraud in 1960 when the possibility of fraud should have been apparent, and had the means to take depositions that “would have provided whatever further insight was necessary.” \textit{Id.} at 1346–47.

For other examples in which courts have expected a reasonably diligent potential plaintiff to investigate the possibility of a claim, see \textit{Korweck v. Hunt}, 646 F. Supp. 953, 958–59 (S.D.N.Y. 1980); \textit{Berry Petroleum Co. v. Adams & Peck}, 518 F.2d 402, 410 (2d Cir. 1975).
\item \textsuperscript{113} 756 F. Supp. 475 (N.D. Ga. 1983).
\item \textsuperscript{114} \textit{Id.} at 482.
\item \textsuperscript{115} 740 F. Supp. 1003 (S.D.N.Y. 1979).
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rights. The plaintiff claimed that, in 1961, the FBI had learned through an informant of an impending assault on the plaintiff, but did not act to prevent it. The informant testified in other trials in 1965, where he revealed that he had been present at the incident, and that he had called the FBI prior to the assault. Newspaper articles, published during the trial, reported the identity of the informant and implied that he might have been involved in the incident. The court said that these facts alone did not reveal that the FBI might have had prior knowledge of the assault, and held that further discovery was necessary to determine if the plaintiff had been on notice of a possible cause of action. Other courts have expressed this thought as a rule that where a "critical element" of a claim is not known to a plaintiff, the statute does not commence to run.

D. Rationale Underlying the Diligence Discovery Rule

In Kubrick, the plaintiff had actual knowledge of his injury and the identity of the person who had inflicted it. The Court concluded that once the plaintiff knew the "critical facts that he has been hurt and who has inflicted the injury," he knew enough to commence the running of the statute of limitations; the burden was then on the plaintiff to "protect himself by seeking advice in the medical and legal community" to determine the existence of a cause of action.

To resolve the issue before it in Kubrick, the Court examined the purposes of the limitations statute and found that the lower court's decision did not serve those purposes. The Court concluded that postponing accrual until a plaintiff became aware that his injury was negligently inflicted "would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims against the Government."

This statement focused the analysis on the issue of diligence, but the Court did not address what "reasonable diligence" means and why its exercise is important.

116 Id. at 1019–20.
117 Id. at 1020.
119 Kubrick, 444 U.S. at 118.
120 Id. at 123.
121 Id.
Thus, under *Kubrick* as applied in other decisions, an approach has developed toward statute of limitations problems by which “accrual may be postponed until the plaintiff has or with reasonable diligence should have discovered the critical facts of both his injury and its cause.” Supra 122 The diligence discovery rule should not be characterized as an equitable tolling of the statute, notwithstanding the obvious concern with fairness inherent in the diligence discovery rule. One commentator flatly asserted that the FTCA cannot be so tolled, Supra 123 although at least one court has purported to do so. Supra 124 The equitable tolling cases are quite specific in their genesis and limited in scope, and do not offer a broad exception to applying an otherwise appropriate statute of limitations. Supra 125 In *Kubrick* and other cases the courts have instead rationalized the adoption of a diligence discovery rule by stating that it more adequately serves the purposes of the statute than do other rules, and that it leads to fundamentally fair results.

As noted above, while designed to give potential plaintiffs a reasonable time to bring their claims, limitation periods are also designed to “protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.” Supra 126 The articulated focus of statutes of limitations, therefore, seems to be on the difficulties inherent in litigating stale claims and on the unfairness to defendants that would result from having to search for evidence that has faded or has been lost due to the passage of time. Supra 127

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122 Barrett v. United States, 689 F.2d 324, 327 (2d Cir. 1982); see Urie, 337 U.S. 163; see also Schroer v. Chimura, 634 F. Supp. 941, 943 (N.D.N.Y. 1986) (applying Barrett).


126 Kubrick, 444 U.S. at 117.

127 See also Walker v. Armco Steel Corp., 446 U.S. 740, 751 (1980) (“[t]he statute of limitations establishes a deadline after which the defendant may legitimately have peace of mind; it also recognizes that after a certain period of time it is unfair to require the defendant to attempt to piece together his defense to an old claim”); Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342, 348–49 (1944) (“[s]tatutes of limitation . . . in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared”).
This concern with the inequitities defendants suffer when faced with stale claims suggests a presumption behind the statutes of limitations that it is fair to require a plaintiff to bring a case within a certain time regardless of how just a claim may be.\(^{128}\) If concerns about fading evidence and fairness to defendants were the controlling factors in the analysis of whether or not a limitation period should be strictly applied, then the plaintiff’s conduct and ability to determine the critical facts of a case would have little or nothing to do with the accrual of the cause of action. Nonetheless, in some cases concerns about fading evidence and fairness to defendants are subordinated to the nature of the plaintiff’s circumstances, and the plaintiff is granted a reprieve from the time bar. The Supreme Court has said that the “policy of repose, designed to protect defendants, is frequently outweighed . . . where the interests of justice require vindication of the plaintiff’s rights.”\(^{129}\) Thus, the assertion some courts have flatly made that the FTCA cannot be “equitably tolled”\(^{130}\) appears questionable.

The shift of focus to concerns about “vindication of the plaintiff’s rights”\(^{131}\) is evident in the development of the “blameless ignorance” principle by which the limitation period does not commence until the plaintiff knew or should have known the critical facts regarding the cause of action.\(^{132}\) The genesis of this

\(^{128}\) See *Order of R.R. Telegraphers*, 321 U.S. at 348–49.

\(^{129}\) Burnett v. New York Cent. R.R. Co., 380 U.S. 424, 428 (1965). *Burnett* held that the statute of limitations under the Federal Employers’ Liability Act (“FELA”) was tolled when the plaintiff filed suit in state court. The Court said that the plaintiff’s failure to file in federal court was “not because he was disinterested, but solely because he felt that his state action was sufficient. Respondent could not have relied upon the policy of repose embodied in the limitation statute, for it was aware that petitioner was actively pursuing his FELA remedy.” *Id.* at 429–30. Thus, the Court found that the policy of repose was outweighed by the plaintiff’s right to compensation. Interestingly, in *Barren v. United States*, 839 F.2d 987, 995 (3d Cir. 1988), one dissenting judge apparently thought that if the court focused on the plaintiff’s circumstances, the policy of repose would take care of itself. He rejected the government’s claim that an equitable approach to determining accrual “is ‘unworkable as a practical matter’ because it ‘does not indicate how long accrual should be delayed.’” *Id.* at 999 (Becker, J., dissenting).

He said that this should not concern the court because “a plaintiff who brings suit after too long a period will have trouble adducing evidence and proving his claim.” *Id.* at 1000. Thus, this jurist considered the two-year period to be a useful—if somewhat arbitrary—deadline for determining when a claim has become stale, and focused instead on the fairness to the plaintiff; he thereby assumed that the tendency of evidence to disappear over time would operate as a practical check on bringing stale claims.


\(^{131}\) *Burnett*, 380 U.S. at 428.

\(^{132}\) *See Kubrick*, 444 U.S. at 120 n.7.
principle can be traced to *Urie v. Thompson*, in which the Supreme Court tolled the statute of limitations under the Federal Employers’ Liability Act in light of the plaintiff’s “blameless ignorance” of the “inherently unknowable” facts of his work-related injury. The Court said:

[We did] not think the humane legislative plan intended such consequences to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights.

By the time the Court decided *Kubrick*, the federal courts had generally recognized that “any plaintiff who is blamelessly ignorant of the existence or cause of his injury should be accorded the benefits of the more liberal accrual standard.” This approach colored the Court’s interpretation of the FTCA, notwithstanding that the FTCA is a limited waiver of sovereign immunity and that courts were cautioned not to “extend the waiver beyond that which Congress intended.” While this reminder should temper those courts eager to extend the statute of limitations period on equitable grounds, section 2401(b)’s imprecise language necessitates construction by the courts in all but the most straightforward cases. It is not simply a matter of deciding whether to extend the waiver; the courts must define what section 2401(b) means. In that process, recourse to general principles of interpretation, including equitable considerations, is inescapable. While courts must be careful not to take it upon themselves to grant relief beyond that intended by Congress, they must also be mindful of the FTCA’s remedial purpose.

Thus “vindication of the plaintiff’s rights” does not become any less important because the FTCA is a limited waiver of

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133 337 U.S. 163 (1949).
134 *Id.* at 169–71.
135 *Id.* at 170.
136 *Id.* at 169.
137 *Barrett*, 689 F.2d at 327.
139 See *Houston v. United States Postal Serv.*, 823 F.2d 896 (5th Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988), in which the court said that “[e]quitable considerations that may waive or toll limitations periods in litigation between private parties do not have the same effect when suit is brought against the sovereign. This is because under the doctrine of sovereign immunity the government’s exposure to liability can be no greater than it permits.” *Id.* at 902 (citation omitted).
140 See supra notes 43–44 and accompanying text.
sovereign immunity. This is implicit in *Kubrick*, where the Supreme Court acknowledged that there are certain “critical facts” that a plaintiff must possess before the limitation period begins to run.\(^1\)\(^4\) Indeed, the Court’s statement that the “purpose of the limitations statute” is to require “the reasonably diligent presentation of tort claims”\(^1\)\(^2\) incorporated this fairness principle. Although the Court reaffirmed a policy of protecting defendants and the courts from stale claims,\(^1\)\(^3\) it focused on whether or not it would be fair to the plaintiff to toll the statute of limitations until the plaintiff knew that his injury was due to the defendant’s negligence.

**E. Burdens and Motion Practice Under a Diligence Regime**

Many limitation issues are raised either in motions brought under Rule 12 of the Federal Rules of Civil Procedure against a plaintiff’s pleadings, or in summary judgment motions brought under Rule 56. Using the more nuanced diligence discovery approach to deciding these issues may appear to reduce the likelihood of efficiently disposing of cases on these motions. As discussed below, this is not necessarily so. More importantly, however, the diligence discovery approach may allow some cases to remain on the docket that in fairness deserve to be heard, but which would otherwise be summarily dismissed on limitation grounds.

Rule 12 limitation motions will lie in some FTCA cases even under a broad diligence discovery approach. Where the cases involve obvious physical torts,\(^1\)\(^4\) and the complaint on its face reveals that the defendant acted outside the statutory period,

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\(^1\)\(^4\) The Court said:
We are unconvinced that for statute of limitations purposes a plaintiff’s ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment. That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury.

*Kubrick*, 444 U.S. at 122.

\(^1\)\(^2\) Id. at 123 (emphasis added).

\(^1\)\(^3\) Id. at 117.

\(^1\)\(^4\) See supra text accompanying notes 70–75.
motions addressed to the pleadings will still be feasible.\textsuperscript{145} If, however, the plaintiff then responds with an affidavit suggesting that the plaintiff did not know and could not reasonably have known of the wrong until a later date, which is within the statutory period, a motion to dismiss will be converted to a summary judgment notice by operation of law.\textsuperscript{146} Summary judgment may also be granted on limitation grounds, despite the application of the diligence discovery rule to the plaintiff’s conduct.\textsuperscript{147} On a limitation motion, as in other summary judgment applications under Rule 56, the burden in the first instance is on the moving party to demonstrate that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law.\textsuperscript{148} Ambiguities must be resolved against the moving party\textsuperscript{149} and uncertainties about material facts will defeat the motion.\textsuperscript{150} An additional doctrine applies in at least some circuits, however, so that after the defendant has established that conduct at issue is beyond the normal reach of the statutory period, the burden shifts to a plaintiff who seeks to pursue claims arising out of events going back more than two years “to prove [his or her] diligence as the prerequisite to allowing equitable tolling of the limitations statute.”\textsuperscript{151} Nonetheless, in a series of 1986 decisions\textsuperscript{152} the Supreme Court reaffirmed the longstanding principle that the presence of issues of fact precludes summary judgment on such limitation questions under the Act.\textsuperscript{153}

\textsuperscript{145} See, e.g., Zavala ex rel. Ruiz v. United States, 876 F.2d 780 (9th Cir. 1989) (medical malpractice action dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction where administrative claim was filed more than four years after cause of action accrued); Barnhart v. United States, 884 F.2d 295, 296 (7th Cir. 1989) (medical malpractice action under the FTCA in which the defendant’s original summary judgment motion was converted to a motion to dismiss under Rule 12(b)(1); such preliminary matters most appropriately treated as motions to dismiss), cert. denied, 110 S.Ct. 2561 (1990).


\textsuperscript{147} See, e.g., Dulaine v. United States, 371 F.2d 824 (9th Cir. 1967), cert. denied, 387 U.S. 920 (1967).


\textsuperscript{149} Hamilton, 773 F.2d at 466.

\textsuperscript{151} Id.


\textsuperscript{153} See Celotex Corp. v. Catrett, 477 U.S. 317 (1986), cert. denied, 484 U.S. 1066 (1988); Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505 (1986). Although these important decisions made it easier to bring a successful summary judgment motion and dispose of baseless claims before trial, they did not resolve the more particular questions about the appropriateness of a summary judgment based on a limitation issue.

\textsuperscript{153} See, e.g., Cain v. United States, 643 F. Supp. 175, 179–80 (S.D.N.Y. 1986);
Several decisions refer to the "jurisdictional" nature of the limitation defense. However, the limitation provision should not be construed as self-effectuating; the mere raising of a motion on this ground does not deprive the district court of subject matter jurisdiction over the cause of action. As the above-mentioned summary judgment cases make clear, fact issues often control when the viability of the suit is not evident from the face of the pleadings, and the court has the power to retain the suit while supervising the motion practice in order to streamline the issues. Indeed, there are numerous reported decisions in which the trial court has elected to reserve the limitation question until trial. Judges would otherwise risk deciding pre-trial motions, including issues of what "should have been known," without requisite factual background. Some cases will remain in which pleadings and affidavits cannot give the court sufficient depth of understanding to allow comfortable disposition of limitation questions on motion. The defense is not foregone in such situations, of course, and is simply presented at trial as a decision for the trier of fact.

Cordaro v. Lusardi, 354 F. Supp. 1147 (S.D.N.Y. 1973), aff'd without opinion, 513 F.2d 624 (2d Cir. 1975). Some decisions have suggested that only in "extreme circumstances" is summary judgment appropriate on limitation issues. See Freschi, 583 F. Supp. at 785.

See, e.g., cases cited infra notes 162-163.

See, e.g., Oslund v. United States, 701 F. Supp. 710 (D. Minn. 1988) (where the plaintiff presented strong evidence that he had been severely dysfunctional for years and had only recently gained the capacity to understand the cause of his injury, question of whether his action was barred by the statute of limitations was for the jury).

See generally Zavala ex rel. Ruiz v. United States, 876 F.2d 780 (9th Cir. 1989) (court dismissed medical malpractice case pursuant to Rule 12(b)(1) but only after finding facts from evidence presented, and determining that abandonment by the injured infant's father did not toll the period of limitations since he had knowledge of the child's condition and responsibility for the child).

See also Herrera-Diaz v. United States, 845 F.2d 1534, 1541 (9th Cir. 1988) (Norris, J., dissenting), cert. denied, 109 S. Ct. 306 (1988). The dissent stated:

"Discovery of this technical cause simply cannot be deemed sufficient knowledge of cause to trigger the statute of limitations. Without some suggestion that a human agent had contributed to her son's injury, [the mother] cannot be faulted for not inquiring further about the cause of [the boy's] cerebral palsy. In other words, the record as it now stands fails to establish that [the mother] had sufficient knowledge of who inflicted her son's injury."

Id. at 1541.


See Oslund, 701 F. Supp. at 712 ("[T]he ultimate resolution of whether the statute should be tolled must wait until trial. At trial both sides may present their conflicting evidence, and the trier of fact will decide the issue").
The jurisdictional nature of the defense, therefore, raises one last question: whether failure to raise the defense waives it, or whether the defendant may raise the limitation period as a bar at any time, without having included it in the pleadings. Many cases in contexts other than the FTCA have held the statute of limitations to be an affirmative defense under Rule 8, which a defendant must assert or waive. And where the United States is a plaintiff, a defendant who fails to assert the statute of limitations defense punctually waives that defense. Where the United States is a defendant, however, older decisions do tend to discuss the jurisdictional nature of the defense and usually conclude that the action must be dismissed even though the government did not plead the statute of limitations. In one of the few cases to discuss this rule under the FTCA, decided

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159 Fed. R. Civ. P. 8(c) ("In pleading to a preceding pleading, a party shall set forth affirmatively . . . [the] statute of limitations").

160 See, e.g., Davis v. Bryan, 810 F.2d 42 (2d Cir. 1987) (in civil rights action against the government brought by a prisoner, district court judge erred in granting summary judgment to appellees on statute of limitation grounds because appellees had not pleaded the defense, but the court had raised the statute of limitations issue sua sponte); Banks v. Chesapeake and Potomac Tel. Co., 802 F.2d 1416, 1427 (D.C. Cir. 1986) (in race and sex discrimination action against former employer, "reliance on statute of limitations is an affirmative defense and is waived if a party does not raise it in a timely fashion" (citations omitted)); Chapman v. Orange Rice Milling Co., 747 F.2d 981 (5th Cir. 1984) (in breach of contract action brought by lessor, court held that the statute of limitations, an affirmative defense, must be specifically pled or is waived).

But see Expertise, Inc. v. Actea Fin. Co., 810 F.2d 968 (10th Cir. 1987) (in breach of contract action, statute of limitations was not waived though it was not raised in the defendant’s answer because it was included in the pretrial order); Rivera v. Anaya, 726 F.2d 564, 565 (9th Cir. 1984) (in action brought by migrant farm workers against employer for violating government regulations, the defendant’s “failure to raise the statute of limitations as a defense in response to the first pleading did not serve to waive his right to raise it later [in a summary judgment motion] absent prejudice to the plaintiffs”).

161 United States v. Ward, 618 F. Supp. 884, 901 (D.C.N.C. 1985) (in action by the United States to recover expenses incurred in cleaning up sites at which oil containing polychlorinated biphenyls had been dumped, the defendants waived statute of limitations defense as to counterclaims against them by failing to include that defense in reply to counterclaims and failing to seek to amend reply to add that defense); United States v. Eycheson, 237 F. Supp. 371 (D. Mont. 1965) (in action by the United States for damage caused to property by forest fire, statute of limitations defense waived where not raised in answer).

162 See Isthmian S.S. Co. v. United States, 191 F. Supp. 338 (S.D.N.Y. 1961) (in action against the United States in admiralty to recover sums deducted from freight demurrage charges, statutes of limitation deemed jurisdictional, and therefore applicability of six-year limitation had to be considered, even though it was not within the issues formulated by pre-trial stipulation or pleaded as a basis of jurisdiction), aff’d, 302 F.2d 69 (2d Cir. 1962); Werner v. United States, 10 F.R.D. 245 (S.D. Cal. 1950) (in action against the United States for reformation of a lease, where the claim was barred because the action was not brought within six years from the date the cause of action accrued, the action would be dismissed for want of jurisdiction even though the government had not pleaded the statute barring the claim), aff’d, 188 F.2d 266 (9th Cir. 1951).
shortly after the limitation provision took its present form, the
court held that where an action against the United States under
the FTCA is barred by the limitation provision, the court must
dismiss the action regardless of whether the limitation is
pleaded.163 Nevertheless, given the increased rigor with which
diligence notions are being applied to government litigation to-
day,164 in the future the statute of limitations defense may be
waivable even under the FTCA.

III. BEYOND THE KUBRICK PARADIGM

However useful courts may have found Kubrick in deciding
cases with similar facts,165 they continue to apply the diligence
discovery rule to dissimilar cases in an ad hoc manner. This
reflects the varying levels of comfort courts experience in intro-
ducing equitable principles into the analysis. Thus courts have
sometimes concluded that they are powerless to use equity to
prevent strict application of the limitation period and thereby
avoid a harsh result.166

Just after Kubrick was decided, in Steele v. United States167
the Seventh Circuit refused to apply a diligence discovery rule
to a plaintiff who alleged that the Federal Aviation Adminis-
tration negligently left electric current on a transformer from which
the plaintiff received an electric shock.168 The court cited a
number of reasons why diligence discovery may uniquely apply
to the medical malpractice context: the injury involved may go
unnoticed, its origin may be especially difficult to learn, and the
causal connection may be especially difficult to ascertain; the
standard of care in such cases is therefore difficult to judge.169
The court said that if the diligence discovery rule applies outside
the medical malpractice context at all, then the threshold of

164 Paetz v. United States, 795 F.2d 1533 (11th Cir. 1986) (in age discrimina-
tion suit by former civil service employee, the government’s failure to assert statute of limitations
as an affirmative defense in pleadings constituted a waiver of the defense), cert. denied,
165 See, e.g., Fernandez v. United States, 673 F.2d 269, 270–72 (9th Cir. 1982).
166 See Barren v. United States, 839 F.2d 987, 996–97 (3d Cir. 1988) (Becker, J.,
what he saw as “the obvious injustice” of a strict interpretation of the Kubrick rule
without taking into account “[b]asic principles of equity.” Id. 167
167 599 F.2d 823 (7th Cir. 1979).
168 Id. at 824–28.
169 Id. at 828.
discovery should be lowered. The plaintiff should only need to know, actually or constructively, "the last essential element of the tort, i.e., the damage" to commence the running of the statute of limitations.170

Similarly, the Fifth Circuit described the diligence discovery rule applied in *Kubrick* as "the medical malpractice accrual test,"171 finding that a different test "similar to, but distinct from, the medical malpractice accrual test" applies outside the malpractice context.172 This was so because the *Kubrick* test developed "to protect those who suffered damage arising out of both a specialized area, medicine, and a unique relationship, doctor-patient."173

Yet a number of courts have decided that the *Kubrick* diligence discovery rule is not limited to the medical malpractice context. Thus, "any plaintiff who is blamelessly ignorant of the existence or cause of his injury shall be accorded the benefits of the discovery rule . . . . [T]he rule was not created in a medical malpractice context and is not limited to such cases."174

In *Guccione v. United States*,175 the court applied a *Kubrick* diligence discovery standard to a plaintiff alleging injuries sustained during the course of the FBI's ABSCAM investigation. The court said, "[t]his special rule of accrual may . . . be applied where it has been shown that the plaintiff was blamelessly ignorant of his claim due to the government's deliberate concealment of its facts."176

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170 Id.
171 Ware v. United States, 626 F.2d 1278, 1284 n.4 (5th Cir. 1980).
172 Id.
173 Id. at 1284 n.4. The court held that a cause of action for destruction of cattle accrues when "the injury coincides with the negligent act and some damage is discernable at the time." Id. at 1284.
174 Stoleson v. United States, 629 F.2d 1265, 1269 (7th Cir. 1980). In Orlikow v. United States, 682 F. Supp. 77 (D.D.C. 1988), the plaintiff alleged that the Central Intelligence Agency was negligent in secretly funding a doctor who experimented on unwitting human subjects. The court said that "where the 'what' element and the 'who' element is missing [sic] from the puzzle, a claim against the government should be tolled if plaintiff had expended due diligence to uncover these facts." Id. at 84. In Bush v. United States, 823 F.2d 909 (5th Cir. 1987), the court applied the diligence discovery rule to a plaintiff who alleged that the State Department failed to release available medical records, which allegedly resulted in his inability to obtain adequate medical treatment. Id. at 910–11.
176 Id. at 536; see also Barrett v. United States, 689 F.2d 324, 327 (2d Cir. 1982), cert. denied, 462 U.S. 1131 (1983), where the court stated:

The diligence discovery rule of accrual is not often applied outside the medical malpractice area, but may be appropriate in non-malpractice cases, where plaintiffs face comparable problems in discerning the fact and cause of their
Thus, when faced with facts that do not fall within the *Kubrick* paradigm, some courts have continued to consider the appropriate application of equitable concerns in determining when a cause of action accrues under the FTCA. A clear consensus on the permissible scope of equity has yet to emerge. The following discussion highlights three categories of cases outside medical malpractice where courts have applied diligence discovery principles.

A. Active Concealment

Courts have long recognized that cases in which a defendant is alleged to have deliberately concealed the facts relating to the alleged tortious actions present difficult limitation issues. In suits under the FTCA, such issues have arisen in actions involving law enforcement investigations, medical tests, and other circumstances.

Of course, it is not always easy to determine whether conduct amounts to fraud or deliberate concealment. Mere nondisclosure does not necessarily constitute concealment; it is said that the government has no obligation to discover its agents’ torts and injuries. Thus, any plaintiff who is blamelessly ignorant of the existence or cause of his injury should be accorded the benefits of the more liberal accrual standard.

*Id.* at 327 (citations omitted).


180 See, e.g., Gibson v. United States, 781 F.2d 1334 (9th Cir. 1986) (FBI allegedly burned down the plaintiff’s garage to conceal investigation); Diminnie v. United States, 728 F.2d 301 (6th Cir. 1984) (A plaintiff previously convicted of extortion for sending anonymous threats that federal buildings would be blown up sued a federal agent for allegedly concealing the fact that he, rather than the plaintiff, had sent the threats), *cert. denied*, 469 U.S. 842 (1984); Loftridge v. United States, 612 F. Supp. 631 (W.D. Mo. 1985) (Occupational Safety and Health Administration allegedly failed to discover hazardous conditions and concealed information about its investigation).
publish the facts to prospective plaintiffs.\textsuperscript{181} In addition, if a plaintiff has actual notice of a potential claim, the period begins to run despite the fact that the defendant may have attempted to conceal the cause of action.\textsuperscript{182}

Several examples illustrate these principles. For instance, cases involving allegations of impermissible law enforcement investigations or techniques, such as physical or electronic surveillance or surreptitious entries into the premises of an investigative target, by their nature concern acts that are intended to remain unknown to the person or entity being investigated.\textsuperscript{183} In such circumstances, obvious injustices result if the claim is deemed to have accrued at the time of the plaintiff's injury. Where a plaintiff had no means of discovering the critical facts on which to base a claim within the limitation period, an FTCA remedy is illusory. Additionally, unless the accrual test factors in concealment efforts, those engaged in such activities would have a strong incentive to conceal their actions in the hope that they will escape liability by the mere passage of time. Congress could not have intended for the FTCA to be unavailable to those injured by inherently undiscoverable, wrongful governmental activities. Thus, application of the traditional accrual test is not calculated to allow proper vindication of rights when the nature of the wrongful conduct is intentionally concealed by the actor.

Recognizing this, courts have applied the diligence discovery approach in such cases,\textsuperscript{184} thereby avoiding the inequity of either allowing the wrong to go unredressed because technically the limitation period expired before discovery, or allowing the plain-

\textsuperscript{181} See Davis v. United States, 642 F.2d 328 (9th Cir. 1981), cert. denied, 455 U.S. 919 (1982); cf. Pitts v. Unarco Indus., 712 F.2d 276 (7th Cir. 1983) (passive silence is insufficient to trigger the fraudulent concealment doctrine unless the defendant has a fiduciary relationship with the putative plaintiff), cert. denied, 464 U.S. 1003 (1983). See also Shock v. United States, 689 F. Supp. 1424 (D. Md. 1988) (failure to disclose voluntarily surgeon's negligence insufficient to make out case of fraudulent concealment).


\textsuperscript{183} See generally Hobson, 737 F.2d at 32–35 (reviewing older cases and adhering to the view previously adopted in that circuit that in "self-concealing wrongs" the burden is on the defendant to come forward with proof that the plaintiff could have discovered the cause of action in the exercise of due diligence); see also Peck v. United States, 470 F. Supp. 1003, 1018–19 (S.D.N.Y. 1979) (in civil action against the government, in part under the FTCA, for alleged violation of the plaintiff's constitutional rights by the FBI, due diligence rule applied where the plaintiff alleged that the defendant had engaged in covert acts).

\textsuperscript{184} See Barrett, 689 F.2d at 327.
tiff to delay until receiving “actual notice” of the actionable conduct.

As stated by the Second Circuit in a seminal intentional concealment case, “every federal statute of limitations . . . [includes] the equitable doctrine that in case of defendant’s fraud or deliberate concealment of material facts relating to his wrongdoing, time does not begin to run until plaintiff discovers, or by reasonable diligence could have discovered, the basis of the lawsuit.”

But in some cases not coming within the FTCA (such as the securities fraud cases discussed immediately below), courts of appeals only consider the time to run from actual, not constructive, discovery of the tortious conduct. As the discussion below suggests, while this approach may work in those other contexts, a closer examination of the cases involving alleged deliberate concealment reveals that the “actual discovery” rule is not an appropriate test under the FTCA.

The leading case adopting the actual discovery test for accrual of causes of action in the active concealment circumstance is the Seventh Circuit’s decision in Tomera v. Galt, a non-FTCA case. In Tomera, the plaintiff brought an action for alleged securities fraud, claiming that the defendants had taken positive steps to prevent the plaintiff from discovering illegal activity. The Seventh Circuit held that while the due diligence standard for accrual would apply to fraudulent behavior that went “undiscovered even though the defendant after commission of the wrong does nothing to conceal it,” if “the defendant has taken

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185 Id. (quoting Fitzgerald v. Seamans, 553 F.2d 220, 228 (D.C. Cir. 1977) (emphasis added)); cf. Crown Coat Front Co. v. United States, 275 F. Supp. 10 (S.D.N.Y. 1967) (distinguishing between “fraudulent concealment” and failure to ascertain the existence of a cause of action through exercise of due diligence”), aff’d, 395 F.2d 160 (2d Cir. 1968), cert. denied, 393 U.S. 853 (1968). See also Deyniewicz v. United States, 742 F.2d 484 (9th Cir. 1984) (“[i]f there are no grounds for tolling the statute of limitations based simply on the Government’s knowledge of its own wrongdoing absent fraudulent concealment, or other forms of conduct that may be recognized as grounds for equitable tolling of the statute” (citation omitted)) (emphasis in original); Hammond v. United States, 388 F. Supp. 928 (E.D.N.Y. 1975) (concealment by the government is no bar to the application of the limitations period).

186 See, e.g., Robertson v. Seidman & Seidman, 609 F.2d 583 (2d Cir. 1979); Sperry v. Barggren, 523 F.2d 708 (7th Cir. 1975); Tomera v. Galt, 511 F.2d 504 (7th Cir. 1975).

187 511 F.2d 504 (7th Cir. 1975). See also Sperry, 523 F.2d at 711 (in securities fraud case, “if [the defendant] should active concealment be found, the statute of limitations is tolled until actual discovery”); McConnell v. Frank Howard Allen & Co., 574 F. Supp. 781, 787–88 (N.D. Cal. 1983) (in securities fraud case, action with allegations of active concealment accrued on the date of actual discovery of the fraudulent conduct).

188 Tomera, 511 F.2d at 509.

189 Id. at 510.
positive steps after commission of the fraud to keep it concealed," the limitations period would be tolled "until actual discovery by the plaintiff."

Robertson v. Seidman & Seidman,\textsuperscript{191} a widely cited Second Circuit decision, is generally read to adopt the actual discovery rule announced in Tomera.\textsuperscript{192} In Robertson, a corporation alleged that the defendant, a certified public accounting firm, prepared false and misleading financial documents in an effort to further a conspiracy to defraud the corporation, thus violating the antifraud provisions of the Securities Exchange Act.\textsuperscript{193} The district court determined that the plaintiff's cause of action accrued from the time when it could have been alerted to the existence of fraud through the exercise of "reasonable diligence." The court granted the defendant's summary judgment motion and dismissed the complaint as time-barred.\textsuperscript{194}

On appeal, the Second Circuit reversed and remanded.\textsuperscript{195} The court held that "[u]nder the federal equitable tolling doctrine, the active concealment of fraudulent conduct tolls the statute of limitations in favor of the defrauded party until such time as he actually knew of the fraudulent conduct of the opposing party."\textsuperscript{196} The court ruled that should active concealment be found, the statute of limitations would be tolled until actual discovery, and it remanded the case to the district court for a

\textsuperscript{190} Id. The court quotes at length from a Pennsylvania case, Smith v. Blanchley, 198 Pa. 173, 47 A. 985 (1901), in announcing its actual discovery test. Tomera, 511 F.2d at 510. Such a reference is incongruous. Smith was an action based on an alleged fraudulent scheme to receive a large sum of money from the plaintiff in return for preventing the institution of a criminal prosecution against the plaintiff and his family. Smith, 198 Pa. at 174, 47 A. at 985. The Pennsylvania Supreme Court addressed the question of whether alleged fraudulent concealment would toll the statute of limitations. While the court held that allegations of fraudulent concealment would toll the statute, it applied a due diligence standard to the plaintiff's conduct and held that the action was time-barred:

The gradual leaking out of the circumstances, and the gossip and suspicions of others, started an investigation by plaintiffs, which the most ordinary prudence would have prompted at the beginning, and which would then have either foiled the scheme or led to its discovery, and the trial of this action while all the witnesses were alive and the matters fresh in their memories. As it is now, the evidence is so meager that one jury has disagreed upon it, and another has decided it on oath against oath with very little collateral evidence to help out either—an illustration of the very evil the statute of limitations was intended to prevent.

Id. at 180, 47 A. at 987 (emphasis added).

\textsuperscript{191} 609 F.2d 583 (2d Cir. 1979).

\textsuperscript{192} See, e.g., Baskin v. Hawley, 807 F.2d 1120, 1132 (2d Cir. 1986).

\textsuperscript{193} Id. at 585.

\textsuperscript{194} Id. at 586.

\textsuperscript{195} Id. at 594.

\textsuperscript{196} Id. at 593.
determination as to "whether there was sufficient concealment . . . to invoke the federal equitable tolling doctrine."\textsuperscript{197}

Apart from its limited application to securities fraud litigation, the actual discovery rule has been explicitly rejected in a number of opinions in other circuit courts of appeals.\textsuperscript{198} Instead courts have applied the due diligence test to cases of alleged active concealment. For example, \textit{Keating v. Carey},\textsuperscript{199} a non-FTCA Second Circuit decision, involved alleged constitutional violations by the State of New York in terminating the employment of a civil servant. The district court had granted the defendant's summary judgment motion on statute of limitation grounds, and the court of appeals reversed. The court held that "[u]nder federal law, when the defendant fraudulently conceals the wrong, the time does not begin running until the plaintiff discovers, or by the exercise of reasonable diligence should have discovered, the cause of action."\textsuperscript{200} The case was remanded "to determine the facts regarding [the plaintiff's] delay in bringing this action."\textsuperscript{201}

In \textit{Barrett v. United States},\textsuperscript{202} an action under the FTCA for alleged negligence by the United States in a chemical warfare experiment, the plaintiff's estate claimed that the government had conspired to conceal the facts surrounding the plaintiff's death.\textsuperscript{203} The court of appeals, in reversing the lower court's grant of summary judgment to the defendant, determined that if the plaintiff's allegations that the Army Chemical Corps actively covered up certain facts pertinent to the experiment were

\textsuperscript{197} \textit{Id.}.

\textsuperscript{198} See Campbell v. Upjohn Co., 676 F.2d 1122, 1128 (6th Cir. 1982), where the Sixth Circuit "declined to formulate a separate rule for cases involving active concealment by the defendant," holding that allegations that the defendant had concealed terms of an allegedly fraudulent merger agreement would "not exempt the plaintiff from the requirement of diligence in pleading the federal equitable tolling doctrine of fraudulent concealment"; State of Ohio v. Peterson, 651 F.2d 687, 694–95 (10th Cir. 1981) (Tenth Circuit affirmed lower court's application of due diligence standard to action by state against law firm for alleged securities fraud, in part because "we see no reason why an act of concealment by defendant should excuse plaintiff from his obligation of diligence which he owes the court as well as his adversaries"), \textit{cert. denied}, 454 U.S. 895 (1981); \textit{In re Beef Indus. Antitrust Litig.}, 600 F.2d 1148, 1169–1170 n.27 (5th Cir. 1979) (in antitrust action, "the running of statute of limitations would not have been tolled even had the defendants affirmatively concealed the alleged scheme"), \textit{cert. denied}, 449 U.S. 905 (1980).

\textsuperscript{199} 706 F.2d 377 (2d Cir. 1983).

\textsuperscript{200} \textit{Id.} at 382. Interestingly, the court cited \textit{Tomera}, discussed supra notes 187–190, for this proposition. \textit{Keating}, 706 F.2d at 382.

\textsuperscript{201} \textit{Id.} at 388.

\textsuperscript{202} 689 F.2d 324 (2d Cir. 1982), \textit{cert. denied}, 462 U.S. 1131 (1982).

\textsuperscript{203} \textit{Id.} at 326–27.
true, such action "would constitute deliberate concealment of material facts relating to the Government's wrongdoing and would trigger application of the diligence-discovery accrual standard."\textsuperscript{204} The Second Circuit remanded the case for a determination of when the plaintiff "should have discovered the critical facts relating to the cause" of the decedent's death.\textsuperscript{205}

Courts have also used the diligence discovery standard for FTCA cases involving alleged illegal law enforcement activities. In \textit{Guccione v. United States},\textsuperscript{206} the district court applied the diligence discovery standard in determining when a cause of action accrued for a plaintiff who alleged that he sustained injuries during the course of the FBI's ABSCAM investigation. The court said that "[t]his special rule of accrual may . . . be applied where it has been shown that the plaintiff was blamelessly ignorant of his claim due to the government's deliberate concealment of its facts."\textsuperscript{207}

The diligence discovery rule better coheres with Supreme Court jurisprudence on the deliberate concealment issue than does the actual discovery rule. A series of cases beginning in 1874 with \textit{Bailey v. Glover},\textsuperscript{208} demonstrates the origins of the diligence discovery rule in the Supreme Court's treatment of fraudulent concealment. In \textit{Bailey}, a case brought for alleged bankruptcy fraud, the Supreme Court stated:

\begin{quote}
[\textit{W}e hold that when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing or those in privity with him.\textsuperscript{209}
\end{quote}

Five years later, in \textit{Wood v. Carpenter},\textsuperscript{210} a case addressing an alleged credit fraud, the Court explained that even though the defendant attempted to conceal its fraudulent conduct,

\begin{quote}
\textsuperscript{204} Id. at 327.
\textsuperscript{205} Id. at 328.
\textsuperscript{207} 670 F. Supp. at 536. See also Clark v. United States, 481 F. Supp. 1086 (S.D.N.Y. 1979), appeal dismissed.
\textsuperscript{208} 88 U.S. (21 Wall.) 342 (1874).
\textsuperscript{209} Id. at 349.
\textsuperscript{210} 101 U.S. 135 (1879).
\end{quote}
proper diligence could not have failed to find a clue in every case that would have led to evidence not to be resisted. With the strongest motives to action, the plaintiff was supine. If underlying frauds existed, as he alleges, he did nothing to unearth them. It was his duty to make the effort.\(^{211}\)

These landmark decisions indicate that the Supreme Court has required a potential claimant to exercise reasonable diligence in bringing a cause of action, whatever the effort by the defendant to conceal it.\(^{212}\) Not to do so would be to defeat the purpose of the limitation period—encouraging prompt claims—in punishing the defendant.\(^{213}\) Applying this overarching principle to FTCA actions, the period during which a plaintiff must file suit should be calculated to commence from the point when a reasonably diligent person would have recognized a possible cause of action.

**B. Other Conduct Difficult to Discover**

Plaintiffs may have difficulty discovering the “critical facts” of their injuries for reasons other than deliberate concealment by defendants. At what point the claim accrues in such cases is appropriately determined by application of the same diligence discovery rule that is applied in deliberate concealment cases. The medical malpractice context discussed above\(^{214}\) provides one such example. Application of the rule in this context is straightforward.\(^{215}\)

Other contexts may pose problems in strictly applying the limitation period similar to those encountered in medical malpractice. For example, plaintiffs wrongfully exposed to toxic substances may not be immediately aware that the exposure will damage their health,\(^{216}\) or they may not initially be able to iden-

\(^{211}\) *Id.* at 140.


\(^{213}\) See *Kubrick*, 444 U.S. at 117–18; *Wood*, 101 U.S. at 139.

\(^{214}\) See *supra* notes 76–104 and accompanying text.

\(^{215}\) See Sheehan v. United States, 542 F. Supp. 18, 21 (S.D. Miss. 1982) (“general rule under the Federal Torts Claims Act is that plaintiff’s claim accrues when plaintiff’s injury manifests itself”; since the plaintiff’s injuries manifested themselves more than two years before he presented his FTCA claim, the action was time-barred.)

tify the exposure as the source of their health problems.\footnote{217} Or, apparently harmless activity can later turn out to have been the source of property damage for which plaintiffs seek recovery.\footnote{218}

In an extraordinarily difficult case, \textit{Allen v. United States},\footnote{219} the court employed the diligence discovery rule to determine the validity of claims brought by Nevada residents that they had suffered radiation-caused cancer and leukemia due to the government's nuclear testing program. The court found that

the \textit{Kubrick} standard readily lends itself to a case such as this, in which the injury does not manifest itself until years—sometimes decades—later and in which the critical facts concerning injury or causation are difficult if not impossible to easily ascertain. Construing the statute in this fashion avoids the impossible burden that would be placed on a plaintiff who would otherwise be expected to commence a lawsuit years before he knew he had an injury, knew the source of the injury, and thus knew he had a cause of action.\footnote{220}

The court also noted that application of the diligence discovery rule was consistent with the purpose of statutes of limitations, because when an injury takes time to manifest itself, “[g]enuine concern about lost evidence, fading memories, and the passage of time are subordinated to a greater concern that legal wrongs be remedied at the first practical opportunity.”\footnote{221} Thus, the diligence discovery rule serves as a mechanism for enforcing the objectives of the statute of limitations without precluding claims that cannot fairly be said to have accrued at the time of the injury-causing event.

\textbf{C. Continuous Conduct Cases}

The typical FTCA case involves a single injury-causing event, and the accrual analysis in such a case focuses on how long after that event a plaintiff has in which to bring a claim. The fact that the allegedly tortious act may result in repeated or continuous harm will not by itself justify an extension of the

\footnotesize{
\textsuperscript{217} See \textit{Stoleson v. United States}, 629 F.2d 1265 (7th Cir. 1980).
\textsuperscript{220} \textit{Id.} at 341 (citation omitted).
\textsuperscript{221} \textit{Id.}.
}
limitation period. The analysis becomes more complicated, however, where the allegedly wrongful conduct itself continues over many years.

If the alleged wrongful acts are separately actionable, the period of limitation is not extended for those acts that accrued more than two years before the action was brought. Allowing a plaintiff to avoid the statute of limitations for such acts would permit the plaintiff to salvage stale claims by characterizing them as elements of a single transaction, and in this way would defeat the very purpose of a statute of repose. In the closely analogous situation of an alleged conspiracy to injure a plaintiff over a period of time, one district court has said:

In a civil conspiracy action, the conspiracy itself is not actionable, but recovery may be had for the injury caused by specific acts. A person harmed may sue at the time each such act occurs, without having to wait until the termination of the conspiracy. The Statute of Limitations therefore commences to run with respect to each act when it occurs. Repeated wrongs are treated as separate rights of action and the Statute of Limitations begins to run as to each upon its commission.\(^{226}\)


\(^{224}\) See generally Blusal Meats, Inc. v. United States, 638 F. Supp. 824, 829 (S.D.N.Y. 1986) (criminal conspiracy notion, which allows all conspiratorial conduct to be considered as long as the "last overt act" is within the limitation period, held to be inapplicable in civil cases even where conspiracy is pled). Certain specialized statutory causes of action, essentially defining a single wrong of discrimination where a series of discriminatory acts has occurred, or making the existence of a conspiracy independently actionable, may be an exception. In the employment discrimination context, for example, while a plaintiff "may not evade theTitle VII stringent time limits merely by characterizing a completed act of discrimination as a 'continuing violation,'" a case-by-case review will be undertaken where a plaintiff asserts that the defendant engaged in a coherent scheme that extended into the limitation period. Drayton v. Veterans Admin., 654 F. Supp. 557 (S.D.N.Y. 1987); see also McPartland v. American Broadcasting Cos., Inc., 623 F. Supp. 1334, 1338–39 (S.D.N.Y. 1985). And in a civil RICO claim, there may often be multiple injuries necessitating analysis under "a recognized exception to the general rule" for the accrual of actions on individual injuries, under which "an action is timely as long as the last act evidencing the continuing practice falls within the limitation period." Bankers Trust Co. v. Feldesman, 65 B.R. 470, 490 (S.D.N.Y. 1986).

\(^{225}\) See Singleton v. City of New York, 632 F.2d 185, 192–93 (2d Cir. 1980) (in an action for alleged violation of constitutional rights by police officers, statute of limitations period was not tolled by allegations of conspiracy; the limitation period ran separately for each alleged wrongful act), cert. denied, 450 U.S. 920 (1981).

Where the alleged wrongful conduct does not consist of independently actionable events, and no single event can be identified as the cause of the harm, the conduct may be treated as a "continuous tort" for which the plaintiff has a cause of action that "accrues each day" the wrongful conduct continues. In such cases, the focus is on "when the last tortious act occurred." Although continuous tort cases arise infrequently under the FTCA, they have arisen in the property damage context, in which the damage can be traced to continued exposure to the source of the problem, as well as in the personal injury context, in which the injury results from a series of harmful inflictions. One court has commented that "the Kubrick [diligence discovery] rule does not apply" in such cases, noting the difficulty in ascertaining the existence and cause of injury in situations where that injury cannot be ascribed to any particular event: "Since usually no single incident in a continuous chain of tortious activity can 'fairly or realistically be identified as the cause of significant harm,' it seems proper to regard the cumulative effect of the conduct as actionable." The continuous tort doctrine, therefore, stems from a recognition of the difficulties entailed in determining when the injury occurred. The "continuous treatment" doctrine is a related doctrine that also alleviates the strict limitation period application in situations in which the tort can be said to occur over an extended period of time.


See Kennedy v. United States, 643 F. Supp. 1072, 1079 (E.D.N.Y. 1986) (rejecting the government’s claim that the limitation period began to run when the plaintiff bought property that was subject to continued erosion caused by the government’s construction of stone jetties).

Gross v. United States, 676 F.2d 295 (8th Cir. 1982) (the plaintiff allegedly suffered from emotional distress due to maliciously solicited statements that resulted in a denial of the plaintiff’s application to participate in a federal aid program).


For an example of the treatment of these issues under state law, see Justice v. Navig, 238 Va. 178, 381 S.E.2d 8 (1989) (in medical malpractice action against a surgeon, continuing treatment rule applied to eight years of non-negligent treatment that
the courts’ recognition of the unfairness of requiring a patient to bring suit while treatment continues.\textsuperscript{234} Courts have noted that it would contravene the necessarily trusting nature of the physician-patient relationship to require the patient to interrupt treatment and bring suit against the physician.\textsuperscript{235} If the patient felt compelled to investigate possible malpractice to preserve a potential claim, critical treatment might be interrupted.\textsuperscript{236} Moreover, the patient who did halt treatment to pursue a claim would face difficulty in obtaining sufficient information to identify the source of the harm, as physicians will naturally be disinclined to reveal all of the important facts about the care they have provided that may have resulted in harm to the patient.\textsuperscript{237}

Thus as originally formulated, the “continuous treatment” doctrine was based on the assumption that it was unfair to commence the running of the statute of limitations until the treatment ended. As one court has noted, however, courts “typically assume [the doctrine’s] existence and find it inapplicable on the facts.”\textsuperscript{238} But recent appellate cases have revitalized the doctrine. In \textit{Otto v. National Institute of Health},\textsuperscript{239} the Fourth Circuit applied the doctrine where the plaintiff was undergoing treatment at a new facility that had unique expertise with which to treat her condition. She had virtually no alternative but to exhaust the possibilities of improvement offered by the defendant.\textsuperscript{240} In another unusual case, \textit{Ulrich v. Veterans Administration Hosp.},\textsuperscript{241} the plaintiff suffered injuries when he fell or jumped from a smokestack at the defendant’s hospital, where he was undergoing treatment for service-related catatonic schizophrenia.\textsuperscript{242} The court said that it would be “absurd to

\footnotesize{followed allegedly negligent operation, and therefore the period of limitations did not begin to run until after the eight-year period of treatment ended).}


\textsuperscript{235} \textit{Ulrich}, 853 F.2d at 1080; \textit{Brown}, 353 F.2d 578, 580 (9th Cir. 1965); \textit{Kossick v. United States}, 330 F.2d 933 (2d Cir. 1964), \textit{cert. denied}, 379 U.S. 837 (1964).

\textsuperscript{236} \textit{Ulrich}, 853 F.2d at 1080; \textit{Tyminski}, 481 F.2d at 264.

\textsuperscript{237} \textit{Ashley v. United States}, 413 F.2d 490, 493 (9th Cir. 1969).


\textsuperscript{239} 815 F.2d 985 (4th Cir. 1987).

\textsuperscript{240} \textit{Id.} at 988-89.

\textsuperscript{241} 853 F.2d 1078 (2d Cir. 1988).

\textsuperscript{242} \textit{Id.} at 1079.
require [the plaintiff] to interrupt [the defendant’s] corrective treatment in order to commence legal proceedings.”

In *Otto* and *Ulrich*, requiring the plaintiff to bring suit while still undergoing treatment was obviously inappropriate. The appropriate result was reached through the continuous treatment doctrine; but the same result would be achieved by applying the diligence discovery rule. The concerns that led to the enunciation of the “continuous treatment” doctrine—*i.e.*, the nature of the physician-patient relationship, the desirability of continuing apparently necessary treatment, the difficulty in gathering important facts—would all be taken into account in the diligence discovery analysis regarding what constitutes reasonable inquiry. In the appropriate case, that analysis will result in a delay in the accrual of the cause of action. Thus the continuous treatment doctrine should be viewed not as an exception to the due diligence requirement, but rather “a factor in determining whether that requirement has been met.”

In *Wehrman v. United States*, the court considered applying a *Kubrick* diligence discovery rule in the continuous treatment context. In *Wehrman*, the lower court had ruled that the limitation period barred a plaintiff from bringing a suit based on treatment provided to him over the course of twenty-two years in a veterans hospital, during which his condition progressively worsened. According to the court of appeals, the district court had concluded that the plaintiff “failed to exercise reasonable diligence in becoming aware of a possible claim.” The government argued that the continuous treatment doctrine was “no longer viable following the Supreme Court’s decision in *Kubrick* . . . [, which] shifted the focus to the exercise of reasonable diligence by the plaintiff in discovering the injury.”

Although the court of appeals did not apply a diligence inquiry in *Wehrman*, it joined with the lower court in rejecting the “suggestion that the continuing treatment doctrine had been completely eviscerated by *Kubrick*. The court relied heavily on continuous tort, rather than continuous treatment, cases in its analysis, and recited the continuous tort principle that

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243 Id. at 1081.
245 830 F.2d 1480 (8th Cir. 1987).
246 Id. at 1486.
247 Id.
248 Id.
249 Id. at 1483–86.
"[w]here the tortious conduct is of a continuing nature, the Kubrick rule does not apply." Yet it also noted certain other elements, such as deliberate concealment, which factor into a diligence determination:

We . . . reject the district court's conclusion that Wehrman's claim is barred because he failed to exercise reasonable diligence in becoming aware of a possible claim. We add in passing that even if a diligence inquiry would apply in a continuing treatment context, the VA's affirmative actions to dissuade Wehrman from surgery ought at least to be a factor, along with his knowledge of the deterioration and severity of his condition, in analyzing whether Wehrman knew or should have known that there may have been negligence.

Thus the court suggests that its ruling may have been the same in Wehrman if it had applied the diligence discovery rule. The Wehrman court appeared to be struggling to avoid the harsh consequences of a strict application of the statute of limitations, which the court suggested must follow unless the continuous treatment doctrine was applied. But, as explained above, in an appropriate case the diligence discovery rule takes into account the same concerns that lead to application of the continuous treatment doctrine, as well as additional concerns that favor the plaintiff and serve the interests of fundamental fairness.

IV. AMENDING THE FTCA TO REFLECT THE DILIGENCE DISCOVERY STANDARD

Courts have been generally reluctant to employ diligence discovery principles to resolve statute of limitations problems under the FTCA beyond the malpractice context. The common law has arrived at currently accepted applications of the diligence discovery test noncomprehensively. While some commentators have read Kubrick as stating a universal federal limitations accrual principle, accrual questions in many FTCA cases are still decided on other bases. To promote uniformity and fairness in the application of the doctrine, and to serve the

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250 Id. at 1486 (quoting Gross v. United States, 676 F.2d 295, 300 (8th Cir. 1982)).
251 Id. at 1486.
253 See supra notes 166–173 and accompanying text.
remedial purpose of the FTCA, Congress should consider an amendment to the limitation provision that expressly authorizes the use of diligence discovery considerations under certain circumstances.

The need for greater equity and uniformity is sufficient reason for amending section 2401(b). But such amendment also may enable Congress to economize its own resources and more fully effectuate two original purposes of the Act: (1) relief of the congressional burden of resolving tort claims against the government through private legislation;\(^ {254} \) and (2) establishment of a remedy against the government as a matter of right rather than of sovereign grace. Section 2401(b) has hindered in part the fulfillment of each of these objectives.

First, although private claims that may be brought under the Act are banned from introduction into Congress,\(^ {255} \) the spate of exceptions and limitations to its coverage allow a range of claims to continue to be brought as private bills, which are not subject to a two-year statute of limitations.\(^ {256} \) Moreover, plaintiffs whose claims are time-barred may still introduce private tort claim bills in order to waive the expired statute of limitations.\(^ {257} \) Thus plaintiffs which would face a strict application of the limitation period in court will instead pursue private bills; as a result, many tort claim bills may be introduced into each congressional session.

Private bills must follow the same general enactment procedures as public bills. Specifically, the claimant must find a spon-


\(^{255}\) 60 Stat. 831 (1946).

\(^{256}\) Procedural rules of the House Committee on the Judiciary include a limitations provision governing the introduction of private claims bills; unless waived by a vote of two thirds of the appropriate subcommittee, private bills must be introduced within 15 years of the date the claim first accrued. House Comm. on the Judiciary, 101st Cong., Supplemental Rules of Procedure for Private Claims Bills 4–5 (Comm. Print 1989). See also supra text accompanying notes 29–34.

\(^{257}\) See Note, Private Bills in Congress, 79 Harv. L. Rev. 1684, 1695–96 (1966) (citing examples of waiver of an expired statute of limitations by private bills). William Kubrick, for instance, who lost his $320,000 judgment when the Supreme Court ruled that his claim was time-barred, was the subject of five private bills introduced in four consecutive years. See S. 232, 98th Cong., 1st Sess.; S. 1619, 97th Cong., 1st Sess.; H.R. 4836, 97th Cong., 1st Sess.; H.R. 7151, 96th Cong., 2d Sess.; S. 2169, 96th Cong., 1st Sess.. None of these bills, however, made it out of the House or Senate Committees on the Judiciary.

In the past five years only two private bills based on § 2401(b) have been passed. See Priv. L. No. 99-15, 100 Stat. 4319 (1986); Priv. L. No. 99-18, 100 Stat. 4320 (1986). Neither of these resolved the substantive claim involved, but rather they waived § 2401(b) by vesting the district courts with jurisdiction to hear the claims. Id.
sor who will draft and introduce the legislation. The bill is then referred to the appropriate committee, where staff begin an investigation into the claim’s merits. If the bill is reported favorably, it will generally pass through that house. Due to the vagaries of the system, however, only about fifteen to twenty percent of private bills are ever enacted, and currently most of those are immigration-related. Even though few private bills based on tort claims otherwise barred by section 2401(b) are enacted, all of those that are introduced unnecessarily command our lawmakers’ time and attention.

An amendment that broadens the scope of the FTCA would reduce the onus of private bills. Codifying a diligence discovery test will allow many claims under the FTCA that might otherwise be time-barred to proceed through the court system rather than the legislature, thus effectuating one of the original goals of the FTCA while conserving congressional resources. Such an amendment will also serve a second congressional purpose behind the Act—establishing a tort remedy against the United States as a matter of right rather than grace—by clarifying the rights of FTCA plaintiffs to proceed in the courts under the limitation provision and thus keeping many claims out of the discretionary private bill process.

A. A Proposed Core Amendment

Many states have adopted a common law diligence discovery test, similar to that of the federal courts which led to Kubrick,
to determine when causes of action accrue. However, some sixteen states have enacted statutory provisions setting forth versions of this test for one or more categories of causes of action.

Congress itself has shown a willingness to consider further amendments to the FTCA limitations provisions. Hence it is appropriate to sketch versions of a statutory proposal that could clarify and implement the diligence discovery standard for accrual of tort claims against the United States. Presented below are three alternative amendments to § 2401(b), which reserve to a varying extent certain accrual issues for common law treatment (changes to existing language and additions are noted in bold print):

(b) Except as provided in subsections (c) and (d) of this section, 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. A tort claim against the United States shall be deemed to have accrued [insert Alternative A, B, or C]

**Alternative A:**

when the injury is first discovered or in the exercise of reasonable care [diligence] should have been discovered.

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267 See supra notes 30-43 and infra notes 290-292.
This amendment adopts the *Kubrick* standard, and its language primarily draws upon that of Oregon’s statute governing accrual of medical malpractice actions. Many other state provisions use similar wording.

Although the language of this amendment is easy to understand and sets out the diligence discovery rule, this straightforward and simple version is subject to overly narrow interpretation because it does not distinguish between knowledge of the injury itself and knowledge of its cause in fact. In *Kubrick* the Court stressed that knowledge of both an injury and its cause is required before a claim accrues under the FTCA. Thus, while this alternative appears sufficient to deal with cases of hidden or latent injury, its failure to deal specifically with the two elements of knowledge that are generally taken to trigger claim accrual may generate confusion when the courts apply the statute, particularly in those medical malpractice cases where the injury may have been apparent for years before the plaintiff reasonably could become aware of the cause of that injury.

Further, the language of this amendment draft is not sufficiently explicit in addressing cases in which an injury does not become apparent until years after the initial act or incident that caused the harm occurred, or cases in which an injury or its cause are concealed from the plaintiff. Moreover, under any

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268 444 U.S. at 122.


271 444 U.S. at 125.

272 See, e.g., Barnhart v. United States, 884 F.2d 295 (7th Cir. 1989) (patient learned years later that his tardive dyskinesia was caused by administration of neuroleptic drugs), cert. denied, 110 S. Ct. 2561 (1990); Oberlin v. United States, 727 F. Supp. 946 (E.D. Pa. 1989) (issue of material fact existed as to when parents learned that minor child’s cerebral palsy could be result of physician’s failure to treat premature rupture of membranes appropriately); Young v. United States, 698 F. Supp. 393 (D. Mass. 1988) (patient did not have reasonable opportunity to discover cause of bone infection following knee surgery until subsequent examination by orthopedic surgeon); Nemmers v. United States, 681 F. Supp. 567 (C.D. Ill. 1988) (parents learned that minor child’s cerebral palsy could have been caused by negligence of physician years after child’s birth), aff’d, 870 F.2d 426 (7th Cir. 1989).


diligence discovery system for determining the accrual of causes of action, the length of the limitation period may be very short or potentially infinite, since the accrual date in such actions would depend solely upon the court’s determination of what constitutes due or reasonable diligence by the plaintiff. The language of Alternative A provides little guidance to the courts in these situations, thereby increasing the possibility of inconsistent adjudication.

Given that federal jurisprudence in FTCA and analogous cases has emphasized the specific elements of knowledge a plaintiff may have, any amendment to 28 U.S.C. section 2401(b) should deal explicitly with the elements of knowledge required. An elaborated statutory formula will permit more effective implementation of the concepts articulated by the Court in *Kubrick* in determining when a cause of action accrues.

*Alternative B:*

when the claimant discovers or in the exercise of due [reasonable] diligence should have discovered both the existence of the injury giving rise to the cause of action [claim] and the cause [in fact] of that injury.

This form of amendment explicitly states that a cause of action under the Federal Tort Claims Act accrues when a plaintiff has actual or constructive knowledge of the injury and its cause—a more complete statement of the diligence discovery rule articulated by the *Kubrick* Court. The amendment employs an objective standard for determining whether a plaintiff has exercised due diligence to learn whether a cause of action exists, thus following the Court’s suggestion in *Kubrick* that when both the existence of an injury and its cause are known, a plaintiff has a duty to seek advice in the medical and legal community.

The language of this amendment primarily draws upon Connecticut and Florida statutes governing accrual of actions for medical malpractice, borrowing the phrase “due diligence” from the Court’s language in *Kubrick*. The phrase “reasonable

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275 444 U.S. at 122.
276 Id. at 123–24.
278 444 U.S. at 116.
diligence” could be used as well, to accord with the diligence discovery rule’s articulation elsewhere in *Kubrick* and in several state statutes.279

The word “cause” is used in this amendment in the *Kubrick* sense280 to indicate that knowledge of the probable, rather than the “legal,” cause of the injury is necessary for a cause of action to accrue under the FTCA. The words “cause in fact” may be preferable, however, to insure that the amendment is not interpreted to require (as do the laws of several states) knowledge or evidence of negligent or wrongful conduct by another in order to trigger running of the statutory period. Several jurisdictions defer running the statutory period until there is awareness of the legal cause. That awareness is variously described as knowledge by plaintiff of wrongdoing, negligence, actionability, or all the elements of a cause of action.281 However, this approach is unduly protective of plaintiffs. A person who is aware of the fact of injury and its factual cause should instead be required to make reasonable investigation for self-protection and need not be shielded until demonstration of actionability fortuitously occurs.

While the language in Alternative B specifies these two elements as constituting knowledge sufficient for a cause of action to accrue under the FTCA, this draft provision stops short of spelling out the rule for situations in which an injury or its cause cannot be reasonably discovered until some time after the initial act giving rise to the action. Problems may arise in cases where either the injury itself is not discovered until years after the initial act or incident, or the injury or its cause are concealed from the plaintiff.282 The amendment is similarly silent on the question of a plaintiff’s rights and responsibilities in continuous


280 444 U.S. at 122.

281 See Bussineau v. President and Directors of Georgetown College, 518 A.2d 423, 435 (D.C. App. 1986) (declining to follow *Kubrick* discovery rule in a dental malpractice action, holding that cause of action accrued when the plaintiff knew or should have known by reasonable diligence of the injury, of its cause in fact, and of some evidence of wrongdoing). The court in *Bussineau* noted that North Dakota and Hawaii have rejected the diligence discovery rule as set out in *Kubrick*. Id. at 431–32 (citing Anderson v. Shook, 333 N.W. 2d 708 (N.D. 1983) (requiring knowledge of the injury, its cause, and of “possible negligence” before a cause of action accrues); Jacoby v. Kaiser Found. Hosp., 1 Haw. App. 519, 622 P.2d 613 (1981) (requiring knowledge of damage, of violation of a duty, and of a causal connection between the violation of the duty and the damage before the cause of action accrues)).

282 See the cases cited supra notes 273–274.
tort cases. Thus this approach to drafting the amendment does not offer much more guidance to courts than Alternative A and likewise may preserve the possibility of inconsistent adjudication in these situations.

Alternative C:

(1) when the act [or omission] giving rise to the cause of action first causes [substantial] injury, or (2) if the fact of injury and its cause [in fact] are not reasonably discoverable [ascertainable] until some time after the initial act [or omission], when the claimant [injured party] discovers [ascertains] or in the exercise of due [reasonable] diligence should have discovered [ascertained] the fact of injury and its cause [in fact].

This final variant incorporates the discovery rule stated in Kubrick and includes a provision for situations in which it may be difficult for a plaintiff exercising reasonable diligence to discover the cause of action. The amendment sets out the two-part test employed by the Court in Kubrick to determine accrual of a cause of action, and employs an objective standard. It also provides for continuous torts by accruing claims at the time of initial injury, unless circumstances prevent reasonable discovery.

This version draws not upon a statute governing accrual of medical malpractice actions but instead upon a Kansas statute governing accrual of various personal injury actions. It is intended that the statute will provide guidance to courts in many areas beyond medical malpractice. The Kansas statute uses the word "ascertain" rather than "discover." However, the word "discover" conforms more closely with the language in Kubrick, without any apparent loss of clarity. Prior discussions of the use of the words "reasonable diligence" over "due diligence" and "cause in fact" over "cause" would apply to this amendment as well.

The Kansas statute uses the phrase "substantial injury" in its provision governing accrual of several types of actions, including trespass on real property; taking, detaining, or injuring personal property; fraud; injury to the rights of another not arising

285 Id.
286 444 U.S. at 120, 122.
on contract; and wrongful death. However, the statute uses only the word "injury" in its provision governing accrual of medical malpractice actions. The Supreme Court of Kansas has construed the phrase "substantial injury" to mean "actionable injury," stating that to trigger the statute of limitations, the term "substantial injury" in the statute does not require an injured party to have knowledge of the full extent of the injury . . . . Rather, it means the victim must have sufficient ascertainable injury to justify an action for recovery of the damages, regardless of extent. An unsubstantial injury as contrasted to a substantial injury is only a difference in degree, i.e., the amount of damages. That is not a legal distinction.

Characterizing an injury as substantial strengthens the notion that knowledge of the injury is enough to require the victim to investigate the circumstances and ascertain whether the injury is actionable.

The phrase "act or omission" is found in the statutes of several states governing accrual of various personal injury actions, particularly medical malpractice actions. This formulation captures the appropriate range of conduct that may lead to a cause of action under the FTCA.

Alternative C, while somewhat cumbersome, expressly addresses situations in which an injury or its cause is difficult to discover, even in the exercise of reasonable diligence. Courts could apply this amendment to deal effectively with situations in which an injury is not discovered until long after the initial act or incident giving rise to the action, or in which an injury or its cause is concealed from a plaintiff, and thus preserve fundamental fairness without introducing excessive uncertainty into the waiver of immunity.

B. Dealing with Other "Harsh Results": Proposed Amendments Before Congress

Under certain circumstances, the administration of limitation provisions can cause harsh or unjust results. Congress is cur-

287 See KAN. STAT. ANN. §§ 60-513(b), (c) (Supp. 1990).
rently considering two amendments to the limitation provisions of the FTCA that deal specifically with important and repetitive problems of this nature. These pending bills would toll the FTCA statute of limitations for minors and for persons under legal disability. We would include them as subsections (c) and (d) of our amendment proposed above, as follows:

(c) A tort claim against the United States of any person who is under the age of 18 years at the time the claim accrues may be presented to the appropriate federal agency not later than two years after such person reaches the age of 18 years.²⁹¹

(d) A tort claim against the United States of any person who is under legal disability at the time the claim accrues may be presented to the appropriate federal agency not later than two years after the disability ceases.²⁹²

Many states have created exceptions that toll statutes of limitation in other specific circumstances, and over time Congress may elect to add further specific provisions if the volume and problematic nature of any category of case appear to warrant such amendment. Exceptions found in state statutes include medical malpractice actions arising out of placement of a foreign object that has no therapeutic purpose or effect in a patient’s body,²⁹³ exposure to phenoxy herbicides,²⁹⁴ exposure to asbestos,²⁹⁵ ionizing radiation injury,²⁹⁶ legal malpractice,²⁹⁷ nuclear incidents involving the release of radioactive material,²⁹⁸ and certain forms of securities transactions.²⁹⁹ Congress may wish to consider whether to amend section 2401(b) to include exceptions in any of these circumstances. Congress might also codify

²⁹⁷ See CAL. CIV. PROC. CODE § 340.6 (West 1982).
the federal common law exception for fraudulent concealment, which is frequently found in state statutes as well.

But if the courts appropriately apply a diligence discovery rule to all actions filed under the FTCA, most statutory exceptions to the two-year limitation period would be unnecessary. Under this rule, a cause of action does not accrue until a plaintiff is aware of both the injury and its cause in fact. Thus, in situations where a person was exposed to a toxic chemical, for example, the cause of action would not accrue until the plaintiff discovered or should have discovered the injury and its cause, though several years may pass before either of these becomes evident or reasonably discoverable. Thus, while we do not argue against the inclusion of specific provisions for repetitive situations, we simply note that a diligence discovery rule can effectively deal with many situations that have produced “harsh results” in the past.

C. Resolving the Government Status Problem

A potential problem for plaintiffs under section 2401(b) is that the statute does not require that plaintiffs be aware of the government-actor status of defendants before their claims accrue under the FTCA. Problems may arise when a plaintiff is injured, knows of that injury and its cause in fact, but is unaware that the person who inflicted that injury is a government employee acting within the scope of employment at the time of the incident, making the United States the proper defendant in a lawsuit and subjecting the action to the requirements of the FTCA. A plaintiff’s claim may be time-barred if the administrative claim is not filed within the two-year period following accrual as required by the FTCA, even though the plaintiff was unaware that the defendant was a government employee. This problem

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300 See Barrett v. United States, 689 F.2d 324, 327 (2d Cir. 1982) (quoting Fitzgerald v. Seamans, 553 F.2d 220, 228 (D.C. Cir. 1977)).

301 See, e.g., CONN. GEN. STAT. ANN. § 52-595 (West 1960); IDAHO CODE § 5-219 (1990); VT. STAT. ANN. tit. 12, § 521 (Supp. 1988) (for fraudulent and/or knowing concealment); CAL. CIV. PROC. CODE § 340.5 (West 1982); FLA. STAT. ANN. § 95.11(4)(b) (West 1982) (for fraud, (intentional) concealment, or intentional misrepresentation of fact); WIS. STAT. ANN. § 893.55(2) (West 1983) (for concealment in medical malpractice actions); OR. REV. STAT. § 12.110(4) (1989) (for fraud, deceit, or misleading representation in medical malpractice actions).

302 See Kubrick, 444 U.S. at 122.

has most frequently arisen in actions for injuries sustained in automobile accidents, but it has also arisen in medical malpractice.

The circuits are divided over whether a court has jurisdiction over an FTCA suit in which the plaintiff did not file a claim with the appropriate federal agency within two years of the injury because the defendant’s government status was not known. In the context of automobile accidents, the majority of courts have dismissed such actions, despite the plaintiff’s lack of knowledge.

Courts that have dismissed actions for failure to file a claim with the appropriate federal agency within the time limit have typically reasoned that a reasonably diligent plaintiff would be expected to discover the defendant’s government-actor status. In Bradley v. United States, for example, the Third Circuit noted that it “[does] not decide whether there might be a basis for some relaxation [of the filing requirements of the Federal Tort Claims Act] if it were in fact impossible for a diligent claimant to present a notice within two years of the claim accruing.”

The court found, however, that

[This was a routine automobile accident case in which the government employee was immediately identified, though his status was not. Thus, if [the plaintiffs] had promptly filed their action there is no doubt that with minimal discovery

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306 See, e.g., Bradley, 856 F.2d 575; Houston v. United States Postal Serv., 823 F.2d 896 (5th Cir. 1987); Henderson, 785 F.2d 121; Wilkinson, 677 F.2d 998; Wollman v. Gross, 637 F.2d 544. But see Staple v. United States, 740 F.2d 766 (9th Cir. 1984); Kelley, 568 F.2d 259.

307 Id.; see Houston, 823 F.2d at 902 (stating that a plaintiff who knows or should know that a driver was a government employee must exhaust the FTCA’s administrative requirements and then commence suit against the government on time); see also Henderson, 785 F.2d 121 (statute was not tolled because the plaintiff’s counsel was informed by U.S. Attorney of need to file administrative claim before proceeding in U.S. District Court); Wilkinson, 677 F.2d 998 (statutory period was not tolled for a plaintiff who possessed sufficient knowledge to put him on inquiry as to whether the defendant, a Navy boatswain on active duty, was operating a motor vehicle within the scope of his employment); Wollman v. Gross, 637 F.2d 544 (statutory period was not tolled because the plaintiff was aware that the defendant was employed by government agency at the time of the accident and could have been reasonably expected, with assistance of legal counsel, to research the defendant’s status for consideration of FTCA claim).

308 Bradley, 856 F.2d at 579.
they could have ascertained [the defendant] was a government employee in the scope of his employment so that timely notice could have been given under the Federal Tort Claims Act. Instead they chose to wait. While they were free to do so, they delayed at their own peril . . . . Thus while our result may seem harsh we are compelled to reach it.309

Those courts that have allowed plaintiffs to proceed despite noncompliance with the FTCA’s administrative claim requirement (notably the Second Circuit) have in effect applied a diligence discovery rule, concluding that in these cases, the plaintiffs did not and could not have known that the defendants were government employees acting within the scope of their employment. In Kelley v. United States,310 a case decided before Kuczyk, the Second Circuit held that an action originally filed against a federal employee in state court and subsequently removed to federal court was not barred, although the plaintiffs had failed to present an administrative claim within the period prescribed by the FTCA.311 The court stated that:

In exactly the most excusable and understandable case—the case of the plaintiff who sues in ignorance of the fact that the defendant was a federal driver operating within the scope of his employment—requiring an administrative filing produces the most unjust refinement of interpretation: the plaintiff must have filed a claim that he did not know he had; his suit must be dismissed unless plaintiff can prove that the Government was wrong in certifying that the federal employee was acting within the scope of his employment.312

The court in Kelley also was concerned that the government might “lull plaintiffs into a false sense of security by waiting until plaintiffs’ time to file an administrative claim had expired and thereupon move to be substituted [as a party defendant] and to dismiss,”313 and stated that

[1]he statute can not be thought to contemplate that the defense of the case by the United States will consist in moving to dismiss it because no administrative claim . . . was filed. That will typically have been the case; few, if any, plaintiffs will have sued the federal driver knowing that the

309 Id.
310 568 F.2d 259 (2d Cir. 1978).
311 Id.
312 Id. at 266.
313 Id. at 262.
suit might properly have been commenced against the United States.\textsuperscript{314}

While several courts have declined to follow \textit{Kelley},\textsuperscript{315} two courts have subsequently held that failure to file an administrative claim within the limitation period did not bar a plaintiff’s claim because the plaintiff had no knowledge or reason to suspect that the defendant was a government employee acting within the scope of employment.\textsuperscript{316} One district court expressly formulated a rule to deal with these situations:

\textit{[I]n a case in which the plaintiff prior to filing suit knew or had reason to know that the driver was (1) a federal employee (2) acting within the scope of his employment at the time of the accident, the requirement of Section 2675 [that an administrative claim be filed] applies. The plaintiff is required to seek administrative remedies; filing in state court is not a means of avoiding this requirement. Where the driver of a motor vehicle is sued individually in state court because the plaintiff did not know and had no reason to know that the defendant was (1) a federal employee (2) on federal business at the time of the accident and the United States subsequently removes the action to federal court under Section 2679, no exhaustion of administrative remedies is required.}\textsuperscript{317}

The court said that “[t]his formulation of the rule fits the congressional purpose more closely than the Second Circuit’s broader rule [as stated in \textit{Kelley}].”\textsuperscript{318}

In one medical malpractice case in which a plaintiff failed to file an administrative claim within the time limit, maintaining that she did not know the defendant was a government em-

\textsuperscript{314} \textit{Id.} at 265. \textit{Kelley} was motivated by the court’s concern for the innocent plaintiff who had no knowledge or reason to suspect that the defendant is a government employee until it was too late, but the facts of the case do not appear to support this premise. There the plaintiffs may have been on notice that the defendant was a government employee. Two months after the accident, an agent of the Department of Agriculture charged with investigating the accident interviewed the plaintiffs, and 16 months after the accident, the defendant testified at his deposition that he had been working the day of the accident, and the fact of his employment with the government was explicitly noted on the record. \textit{Id.} at 261.


\textsuperscript{316} See Van Lieu v. United States, 542 F. Supp. 862 (N.D.N.Y. 1982) (military status of driver was in no way communicated to the plaintiff until time following expiration of two-year period of limitation for filing administrative claim); \textit{Harris}, 490 F. Supp. 968.

\textsuperscript{317} \textit{Harris}, 490 F. Supp. at 971.

\textsuperscript{318} \textit{Id.}}
ployee, the court did not bar the plaintiff’s action but questioned whether she would be able in the exercise of due diligence to determine whether the defendant was employed by the government. 319

The diligence discovery rule requires that a plaintiff make a reasonable effort to determine whether an injury exists and the cause of that injury; in these situations, identification of the tortfeasor is part and parcel to learning the injury’s factual cause. One could thus argue that a diligence discovery regime ought to apply to ascertaining the alleged tortfeasor’s government-actor status. Courts still may avoid harsh results under such a standard in cases in which plaintiffs are unaware that defendants are government employees and fail to file claims in compliance with the FTCA’s administrative time constraint; if the court determines that the plaintiff (1) exercised reasonable diligence to determine the identity of the alleged tortfeasor, and (2) in the exercise of such diligence could not have been reasonably expected to discover that the defendant was a government employee, the court should toll the statute based on equity. 320 Interpreted in this way, the diligence discovery rule itself eliminates the need to make special provision for cases in which the government-actor status of a defendant is unknown to the plaintiff. However, it might be prudent to add the phrase “and the governmental status of the tortfeasor” to the definition of knowledge of the fact of injury required to trigger the running

319 Gould v. United States Dep’t of Health & Human Serv., 884 F.2d 785 (4th Cir. 1989). The court determined that the plaintiff had no indication that the defendant physicians, who worked in a private health facility, were employees of the U.S. Public Health Service; thus she had no reason to suspect that her claim was governed by the FTCA. Id. at 788. The court reasoned that
although [plaintiff] Gould was probably aware soon after her husband’s death that his death was caused by medical malpractice, she had no way of knowing that the principal causative actor contributing to his death was a government employee. She was, therefore, not “in possession of the critical fact[,] . . . [of] who has inflicted the injury,” . . . and, before the government informed Gould that [defendant] O’Rourke was a federal employee, did not have any “knowledge to put [her] on inquiry” . . . or any “notice to prompt [her] to explore the legal ramifications of the government’s involvement.”

Id. at 788 (quoting Kubrick, 444 U.S. at 122; Wilkinson, 677 F.2d at 1002; and Henderson, 785 F.2d at 126). But see Flickinger v. United States, 523 F. Supp. 1372 (W.D. Pa. 1981) (dismissing malpractice suit for failure to file an administrative claim within two years of injury despite the fact that the plaintiff did not know that the nurse who treated her was a federal employee until after the two-year period had expired); Lien v. Beehner, 453 F. Supp. 604, 606 (N.D.N.Y. 1978) (stating that “strong equitable considerations notwithstanding, the two-year limitation period of 28 U.S.C. § 2401(b) cannot be tolled or waived”).

of the statute. As is evident from the discussion above, these difficulties arise with sufficient frequency to suggest that the legislature should err on the side of spelling out the protections (and corresponding duties to investigate) within the diligence discovery approach.

D. Sunset Provisions

Congress should also consider whether to include a sunset provision to limit the time in which a tort claim may be brought regardless of when the cause of action was discovered. The Kansas statute includes such a provision, which states that

if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitations shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, but in no event shall an action be commenced more than 10 years beyond the time of the act giving rise to the cause of action."321

Many states that have adopted a diligence discovery rule have included a sunset provision.322 Other states use such provisions in areas other than tort, labelling them statutes of repose because they cut off exposure to litigation risk.323

The inclusion of a sunset provision poses inevitable line-drawing dilemmas but affords an opportunity to set a desirable outer limit on the continuation of exposure to liability. Notwithstanding the goal of assuring a just "vindication of the plaintiff's rights"324 by adoption of a sensible approach to application of the limitation period, concerns about fading evidence and fairness to defendants cannot be ignored. Insurance considerations also may urge inclusion of such a provision.325

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325 Yamaguchi v. Queen's Medical Center, 65 Haw. 84, 648 P.2d 689 (1982), offers a thoughtful discussion of the connection between insurance considerations and sunset provision policies. The Hawaii court stated that when the state's diligence discovery rule for medical malpractice actions was adopted, "the legislature was not blind to the rising cost of malpractice insurance and problems of proof attendant with stale claims,
We propose the following amendment to section 2401(b) to incorporate a sunset provision (changes noted in bold print):

(b) Except as provided in subsections (c) and (d) of this section, 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. A tort claim against the United States shall be deemed to have accrued [insert language of Alternatives A, B, or C], but in no event shall any action be commenced more than ____ years after the date of the alleged act or omission causing the injury [or death]. This ____-year time period shall be tolled for any period during which it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury [and/or its cause in fact] [by a plaintiff [claimant] in the exercise of reasonable [due] diligence].  

This draft provision draws upon Hawaii’s sunset provision and Florida’s statute tolling the limitation period for medical malpractice actions in which fraud, concealment, or intentional misrepresentation prevented plaintiff’s discovery of an injury or its cause. It balances the need to have an absolute limitation period for claims that are governed by a diligence discovery rule against the need to account for cases in which the defendant’s conduct itself prevents a plaintiff from discovering the injury and its cause in fact.

both of which were subject to exacerbation under an open-ended ‘discovery rule.”” Id. at 88, 648 P.2d at 692. The court cited the report of the legislature’s judiciary committee on the proposed six-year limitation, which noted that malpractice insurance premiums increased under a discovery rule because “insurers were required to hold in reserve funds for an indeterminable period of time.” Id. at 88 n.9, 648 P.2d at 692. The report recommended a six-year limitation on claims because “[t]estimony presented indicated that this [limitation period] would have a tendency of lowering the cost to doctors of maintaining malpractice insurance in that insurers could hold their reserves for a fixed period of time . . . .” Id. (quoting HOUSE STAND. COMM. REP. NO. 455, 7TH HAW. LEG., 1ST SESS., reprinted in HOUSE JOURNAL 947 (1973)).

Current sunset provisions in states that have a diligence discovery rule range from three years to 10 years. See, e.g., CONN. GEN. STAT. ANN. § 52-584 (West Supp. 1990); KAN. STAT. ANN. § 60-513 (Supp. 1990); N.C. GEN. STAT. § 1-52(16) (1983); OR. REV. STAT. § 12.115 (1989).

See HAW. REV. STAT. § 657-7.3 (1988); FLA. STAT. ANN. § 95.11(4)(b) (West 1982).
V. CONCLUSION

Several models exist for drafting an amendment to the limitation provision of the FTCA. These include the limitation rule for actions brought by the United States, as well as limitation sections in other statutes, in draft bills previously introduced, and in the Restatements.

Given the support identified in the case law for the diligence discovery approach, and the feasibility of amending section 2401(b) in a fairly simple fashion to achieve the goals of greater uniformity and fairness in court decisions, as well as to reduce the costs associated with private bills and fulfill the remedial purpose of the FTCA, we recommend an amendment along the lines proposed in this Article.