

1-1-2012

## Claim Accrual under the Federal Tort Claims Act: When Should Claimants File Suit against the Federal Bureau of Investigation for Tort Liability

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### Recommended Citation

17 Suffolk J. Trial & App. Advoc. 35 (2012)

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## CLAIM ACCRUAL UNDER THE FEDERAL TORT CLAIMS ACT: WHEN SHOULD CLAIMANTS FILE SUIT AGAINST THE FEDERAL BUREAU OF INVESTIGATION FOR TORT LIABILITY?

*We want the victim, if there is a victim, to be protected. He is protected with this type of legislation, probably better than if he had to rely on collecting money from a career agent, certainly better than if he had to rely on collecting from a career agent.*<sup>1</sup>

-William H. Webster, Director, Federal Bureau of Investigation

The process for filing an administrative claim under the Federal Tort Claims Act<sup>2</sup> (“FTCA”) against the Federal Bureau of Investigation (“FBI”) requires claimants to comply precisely with its statutory provisions and administrative requirements.<sup>3</sup> Unfortunately, for many claimants, such a process often results in complications due to procedural technicalities.<sup>4</sup> The two-year statute of limitations, based upon a claimant’s claim accrual date, often causes issues because of the difficulty of determining the exact date of the injury.<sup>5</sup> For many families of the victims of Winterhill Gang members and FBI informants James “Whitey” Bulger and Stephen Flemmi, determining the date claimants should have known they had claims against the FBI proved very difficult.<sup>6</sup>

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<sup>1</sup> *Federal Tort Claims Act: Hearings Before the Subcomm. on Admin. Law and Governmental Relations of the Comm. on the Judiciary, H.R.*, 95th Cong. 104 (1978) (statement of Hon. William H. Webster, Dir., Fed. Bureau of Investigation).

<sup>2</sup> 28 U.S.C. §§ 1346, 2401, 2671-2680 (2006).

<sup>3</sup> *See id.*

<sup>4</sup> *See id.* (listing procedural requirements); 28 C.F.R. § 14 (2009) (detailing procedural requirements prescribed by Attorney General); Donald N. Zillman, *Presenting a Claim Under the Federal Tort Claims Act*, 43 LA. L. REV. 961, 962 (1983) (suggesting both claimants and United States suffer due to statutory requirements of filing initial claim).

<sup>5</sup> *See United States v. Kubrick*, 444 U.S. 111, 113 (1979) (determining claim accrual date for different injuries and claims).

<sup>6</sup> *See Callahan v. United States*, 426 F.3d 444, 450 (1st Cir. 2005) (instructing of plaintiff by FBI agents to “not rely on newspapers accounts” because reports inaccurate); *McIntyre v. United States*, 367 F.3d 38, 40 (1st Cir. 2004) (discovering McIntyre’s body in makeshift grave fifteen years after his murder). James “Whitey” Bulger, born and raised in South Boston, Massachusetts, developed a drug trafficking and racketeering empire in South Boston. *See Richard Chacon, Three Reputed Mobsters Have Longstanding Ties to Each Other*, BOS. GLOBE, Jan. 6, 1995, at 11. Bulger employed many individuals to assist him in performing dangerous jobs. *See id.* Stephen “The Rifleman” Flemmi grew up in Roxbury, Massachusetts. *See id.* Flemmi’s skill in

Most individuals would not initially believe the FBI's possible involvement in the murders and crimes committed against their families.<sup>7</sup> In several decisions by the First Circuit Court of Appeals concerning FTCA claims against the FBI for their involvement with the actions of Bulger and Flemmi, the court found the claims untimely.<sup>8</sup> The court reasoned that the claimants should have known about the information supporting their claims at an earlier date.<sup>9</sup>

Established for the purpose of providing individuals wronged by government agencies a process for adjudicating claims against the United States government, the FTCA effectively serves as a waiver of sovereign immunity.<sup>10</sup> The FTCA requires claimants to fully exhaust the administrative remedies available through the statute before invoking the judicial process.<sup>11</sup> However, many claimants encounter procedural issues during the administrative claims process, which forces them to litigate the procedural issues of administrative claims.<sup>12</sup>

Part I of this Note discusses the intentions and goals of the federal government that relate to what the government hopes to achieve through the FTCA.<sup>13</sup> Part II explains the process for filing an administrative claim against a federal agency under the FTCA.<sup>14</sup> Finally, the Note specifically explores a pattern of "claim accrual date" issues in several decisions by the

marksmanship while serving as an Army paratrooper in the Korean War earned him "The Rifleman" nickname. *See id.* In the 1970s, Flemmi and Bulger joined forces as members of the Winter Hill Gang in Somerville, Massachusetts. *Id.*

<sup>7</sup> *See* Letter to the Editor, *FBI Reacts to Mafia Coverage*, BOS. HERALD, July 14, 1997, at 36 (reporting likely potential of illicit FBI involvement with mafia). Barry W. Mawn, FBI Special Agent in Charge of the Boston field office, wrote that "[a] number of allegations of misconduct by FBI agents are from a co-defendant of a pending federal racketeering case. Other allegations of tip-offs are from anonymous law enforcement sources or former law enforcement officials whose knowledge is questionable or speculative." *Id.*

<sup>8</sup> *See* *Donahue v. United States*, 634 F.3d 615, 625 (1st Cir. 2011); *Patterson v. United States*, 451 F.3d 268, 273 (1st Cir. 2006); *Rakes v. United States*, 442 F.3d 7, 24 (1st Cir. 2006); *Callahan v. United States*, 426 F.3d 444, 455 (1st Cir. 2005); *McIntyre v. United States*, 367 F.3d 38, 58 (1st Cir. 2004).

<sup>9</sup> *Kubrick*, 444 U.S. at 117-18 (developing standard for measuring claim accrual date to determine whether FTCA claim timely).

<sup>10</sup> *See* 28 U.S.C. §§ 1346, 2401, 2671-2680 (2006). "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . ." 28 U.S.C. § 2674.

<sup>11</sup> *See* *McNeil v. United States*, 508 U.S. 106, 112-13 (1993) (dismissing FTCA suit because claimant failed to exhaust administrative remedies and requirements).

<sup>12</sup> *See id.*; *Zillman*, *supra* note 4, at 962 (identifying numerous procedural issues encountered by FTCA claimants).

<sup>13</sup> *See infra* notes 18, 25, 30 and accompanying text (explaining purpose of FTCA claims process articulated through statutes and congressional reports).

<sup>14</sup> *See* discussion *infra* Part II.A (detailing procedural requirements and steps for FTCA claimants and administrative agencies in FTCA claims process).

First Circuit Court of Appeals.<sup>15</sup> The cases consist of a string of FTCA claims filed against the FBI in connection with the informant relationship between the FBI's Boston field office and Winterhill Gang members James "Whitey" Bulger and Stephen Flemmi.<sup>16</sup> The outcome and reasoning of the cases suggest that claimants must carefully construct an administrative claim under the FTCA by determining whether to list multiple legal theories, because the court may decide to either consider each theory separately, or find accrual based on only one theory if it finds the claimant could access information supporting that theory.<sup>17</sup>

## I. LEGISLATIVE HISTORY OF THE FEDERAL TORT CLAIMS ACT

In 1946, Congress enacted the FTCA as part of a group of legislation under sections 401-424 of the Legislative Reorganization Act ("LRA").<sup>18</sup> Through the LRA, Congress intended to waive governmental immunity from tort suits and allow individuals to bring tort claims against the United States for alleged negligence of government employees.<sup>19</sup> Additionally, the heads of government agencies received the authority to settle tort claims not exceeding \$1000.<sup>20</sup> Claimants with tort claims below or exceeding \$1000 could file directly in federal court.<sup>21</sup> Congress created

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<sup>15</sup> See discussion *infra* Part II.D (identifying First Circuit's method of evaluation for measuring claim accrual dates of FTCA claims).

<sup>16</sup> See, e.g., *Donahue v. United States*, 634 F.3d 615, 616 (1st Cir. 2011); *Patterson v. United States*, 451 F.3d 268, 269 (1st Cir. 2006); *Rakes v. United States*, 442 F.3d 7, 11 (1st Cir. 2006); *Callahan v. United States*, 426 F.3d 444, 446 (1st Cir. 2005); *McIntyre v. United States*, 367 F.3d 38, 40 (1st Cir. 2004); see also 28 C.F.R. § 14.2(b)(1) (2009) ("A claim shall be presented to the Federal agency whose activities gave rise to the claim.").

<sup>17</sup> See *infra* notes 102, 113 (discussing First Circuit's evaluation of legal theories of FTCA claimants injured by FBI's informant relationship).

<sup>18</sup> See Legislative Reorganization Act of 1946, Pub. L. No. 79-601, §§ 401-24, 60 Stat. 812, 843-44 (1946) (giving tort claimants the opportunity to pursue remedies against the United States); S. REP. NO. 79-1400, at 29-34 (1946) (articulating need for individuals to file tort claims against United States).

<sup>19</sup> See S. REP. NO. 79-1400, at 29, 31 (removing government employee from suit and inserting government employer, the United States).

<sup>20</sup> Legislative Reorganization Act of 1946, Pub. L. No. 79-601, § 403, 60 Stat. 812, 843-44 (1946) (requiring claimants to file directly with administrative agency if claim for \$1000 or less). After filing a claim with an agency, a claimant must wait for the agency to make a final disposition before filing in court, or a claimant must give the agency fifteen days notice in writing of claim withdrawal. *Id.* A claimant may choose whether to pursue claims of \$1000 or less through the agency or federal court. *Id.* In 1959, Congress increased the claim amount for the adjustment of claims by administrative agencies to \$2500. Pub. L. No. 86-238, § 2, 73 Stat. 471, 472 (1959). The Senate wished to increase the amount to \$3000. S. REP. NO. 86-797, at 2 (1959), reprinted in 1959 U.S.C.C.A.N. 2272, 2273.

<sup>21</sup> See § 403, 60 Stat. at 843-44 (allowing FTCA claimants option of filing directly with agency or pursuing claim immediately in court).

the FTCA to establish a uniform system for authorizing individuals to bring suits in tort against the United States.<sup>22</sup> The FTCA also established procedures for the administrative adjustment of claims by governmental agencies.<sup>23</sup>

Congress amended the FTCA in 1966.<sup>24</sup> Congress primarily intended for the amendments to increase the authority of government agencies to consider tort claims.<sup>25</sup> Before any claims can move to litigation in the federal courts, agencies must consider claims according to regulations established by the Attorney General.<sup>26</sup> The amendments implemented the mandatory process of filing an administrative claim with a government agency before a claimant can file an action against the United States in federal court.<sup>27</sup> Filing directly with the government agency provides the agency notice of the claim and the opportunity to investigate that claim.<sup>28</sup> The amendments further clarified the practical process a claimant must follow in filing an administrative claim against a government agency.<sup>29</sup> Collectively, Congress intended for the amendments to ease court congestion, avoid unnecessary litigation, and expedite fair

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<sup>22</sup> See S. REP. NO. 79-1400, at 29, 31; see also *United States v. Yellow Cab Co.*, 340 U.S. 543, 549-50 (1951) (discussing Congress's intent to change procedures to allocate more time for major public issues); Zillman, *supra* note 4, at 965 (listing FTCA virtues of helping overburdened courts and offering non-complex settlement of claims).

<sup>23</sup> See *supra* note 22 and accompanying text (discussing procedures and benefits yielded by Congress's creation of FTCA system).

<sup>24</sup> See S. REP. NO. 89-1327, at 1 (1966), reprinted in 1966 U.S.C.C.A.N. 2515, 2520-22 (explaining amendments to procedures and requirements of FTCA); H.R. REP. NO. 89-1532, at 3-6 (1966) (discussing amendments to FTCA).

<sup>25</sup> See S. REP. NO. 89-1327, at 2, reprinted in 1966 U.S.C.C.A.N. at 2516 (presenting goals of FTCA amendments); H.R. REP. NO. 89-1532, at 6; Zillman, *supra* note 4, at 966-67 (explaining 1966 amendments required claimants to deal with administrative agency before any court action). Congress wanted to use the amendments to encourage more settlements between claimants and agencies without the use of the courts. Zillman, *supra* note 4, at 966-67.

<sup>26</sup> See 28 C.F.R. §§ 14.1-11 (2011) (detailing requirements for administrative claims against federal agencies under the FTCA).

<sup>27</sup> See S. REP. NO. 89-1327, at 4, reprinted in 1966 U.S.C.C.A.N. at 2517-18 (requiring FTCA claimants file with specific agency of alleged liability because agency "directly concerned"); H.R. REP. NO. 89-1532, at 7.

<sup>28</sup> S. REP. NO. 89-1327, at 4, reprinted in 1966 U.S.C.C.A.N. at 2517-18 ("[An] agency would have the best information concerning the activity which gave rise to the claim . . . . [M]eritorious claims can be settled more quickly without the need for filing suit and possible expensive and time-consuming litigation."); H.R. REP. NO. 89-1532, at 7.

<sup>29</sup> S. REP. NO. 89-1327, at 4, reprinted in 1966 U.S.C.C.A.N. at 2518 (simplifying language in § 2401 requirements to file claim); H.R. REP. NO. 89-1532, at 8. Section 7 of the amendments simplified the language in the requirements of § 2401 for filing a claim in writing within two years after the claim accrues. *Id.* It also requires that for a claimant to file in federal court, he or she must do so within six months after the agency makes a final decision on that claim. *Id.*

settlements for claimants against the government.<sup>30</sup>

Congress considered the prerequisite procedure present in many state statutes, which required claimants to file an administrative claim prior to filing suit in court for tort claims against state governments and municipalities.<sup>31</sup> According to the Justice Department, a procedure that would require claimants to present to the specific government agency their claim of alleged negligent action would yield great productivity, because that agency would have the best access to the information of the activity or event that gave rise to the claim.<sup>32</sup> Additionally, an agency would likely have great interest in settling the claim depending upon liability.<sup>33</sup>

The amendments increased the claim amount of the tort claims that agencies had the authority to settle before assuming litigation costs and appearing in federal court.<sup>34</sup> Agency heads received the authority to settle claims up to \$25,000, while claims exceeding that amount require prior written approval by the Attorney General.<sup>35</sup> By increasing the claim amount from \$2500 to \$25,000, administrative agencies can make meaningful settlements without requiring the involvement of the courts.<sup>36</sup>

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<sup>30</sup> See S. REP. NO. 89-1327, at 2, *reprinted in* 1966 U.S.C.C.A.N. at 2516; H.R. REP. NO. 89-1532, at 6. Data showed that a large number of cases against the government were being settled prior to trial, specifically tort claims against the Post Office, the Defense Department, the Veteran's Administration, the Department of the Interior, and the Federal Aviation Agency, and Congress, therefore, recognized that the concentration of claims against these agencies led agencies to develop their own expertise in tort litigation. S. REP. NO. 89-1327, at 5, *reprinted in* 1966 U.S.C.C.A.N. at 2519; H.R. REP. NO. 89-1532, at 9.

<sup>31</sup> See S. REP. NO. 89-1327, at 3-4, *reprinted in* 1966 U.S.C.C.A.N. at 2517-18 ("[T]o protect the municipality from the expense of needless litigation, give it an opportunity for investigation, and allow it to adjust differences and settle claims without suit." (citing 18A MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 53.153 (3d rev. ed. 1977))); H.R. REP. NO. 89-1532, at 7.

<sup>32</sup> See *McNeil v. United States*, 508 U.S. 106, 112 n.7 (1993) (explaining agency interest and efficiency possible through required FTCA procedures); S. REP. NO. 89-1327, at 3, *reprinted in* 1966 U.S.C.C.A.N. at 2515, 2517; H.R. REP. NO. 89-1532, at 7 (focusing on agency interest in settling or handling claim without litigation).

<sup>33</sup> See *supra* note 32 and accompanying text (discussing reasons agencies better equipped and interested in handling administrative claims).

<sup>34</sup> H.R. REP. 1532, *supra* note 24, at 5; S. REP. 1327, *supra* note 24, at 9, *reprinted in* 1966 U.S.C.C.A.N. at 2518.

<sup>35</sup> See S. REP. NO. 89-1327, at 6, *reprinted in* 1966 U.S.C.C.A.N. at 2520 ("If a satisfactory arrangement cannot be reached in the matter, the claimant can simply do as he does today—file suit."); H.R. REP. NO. 89-1532, at 8.

<sup>36</sup> See S. REP. NO. 89-1327, at 6, *reprinted in* 1966 U.S.C.C.A.N. at 2518 (recognizing agency settlement of substantial tort claims); H.R. REP. NO. 89-1532, at 7-8. Congress decided that agency settlement allows "greater attention to those cases which involve difficult legal and damage questions in such areas as medical malpractice, drug and other products liability, and aviation accidents." S. REP. NO. 89-1327, at 6, *reprinted in* 1966 U.S.C.C.A.N. at 2518; see also Zillman, *supra* note 4, at 967 (highlighting Congress's recognition of importance of FTCA claimants working seriously with administrative agencies); Shahan J. Kapitanian, Note, *The Federal Tort Claims Act Presentment Requirement: Minimal Notice Sufficient to Pass Legal*

## II. FTCA CLAIM PROCEDURES

### A. Current Procedural Requirements for FTCA Claims

The statutory requirements for filing a tort claim against a government agency require claimants to present an administrative claim to the specific federal agency before bringing suit in court.<sup>37</sup> The regulations for the procedures for filing an administrative claim prescribed by the Attorney General contain more detailed specifications.<sup>38</sup> The regulations specify who can present a claim; when, where, and how to present a claim; and what to submit to the specific government agency.<sup>39</sup> There is no specification of the particular type of documentation required for filing an administrative claim, only that the claim supplies all the required and necessary information in writing.<sup>40</sup> After filing the administrative claim with the appropriate agency, a claimant must wait six months, or until receipt of an agency settlement offer or final denial letter, before bringing suit in federal court.<sup>41</sup>

The regulations created by the Attorney General allow for agencies to create their own rules, policies, and regulations for handling administrative claims within their specific agency.<sup>42</sup> For example, within the FBI, legal advisors employed by the agency evaluate claims filed under the FTCA.<sup>43</sup> A Principal Legal Advisor (“PLA”) examines administrative claims filed against the FBI.<sup>44</sup> For those that comply with statutory and procedural regulations, the PLA either denies the claim or proposes a

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*Muster and Preserve the Right to File a Subsequent Lawsuit in Federal Court*, 35 SUFFOLK U. L. REV. 145, 152-53 (2001) (outlining steps of administrative agency in FTCA claims process).

<sup>37</sup> 28 U.S.C. §§ 2401, 2671-2680 (2006) (outlining elements of lawsuit).

<sup>38</sup> See 28 C.F.R. §§ 14.1-.11 (2011) (outlining elements of administrative claim).

<sup>39</sup> See *id.*

<sup>40</sup> See *id.* § 14.2(a) (requiring written claim); Kapitanyan, *supra* note 36, at 154 (explaining claimants encouraged to use Standard Form 95); Zillman, *supra* note 4, at 969 (noting Standard Form 95 popular among claimants, but not required). See generally DEP’T OF JUSTICE, OMB NO. 1105-0008, STANDARD FORM 95 (2007).

<sup>41</sup> See 28 U.S.C. § 2675 (requiring agency make decision before claimant may file in federal court); see also 28 U.S.C. § 2401(b) (requiring claimant file suit within six months after agency disposition of claim). A claimant may bring suit in the federal judicial district in which the claimant resides or where the negligent act occurred. See 28 U.S.C. 1402(b) (2006).

<sup>42</sup> See 28 C.F.R. § 14.11 (“Each agency is authorized to issue regulations and establish procedures consistent with the regulations in this part.”).

<sup>43</sup> See Kevin Corr, *The Role of the FBI Principal Legal Advisor*, 19 J. LEGAL PROF. 157, 158-59 (1994). The FBI employs agents as Principal Legal Advisors (“PLAs”) for each of the main field office divisions. *Id.* at 157. PLAs review any administrative claims filed by claimants against the FBI and its agents. *Id.* at 159.

<sup>44</sup> See *id.*

payment for the claim.<sup>45</sup> The PLA considers administrative claims filed against the agency under section 2672 of the FTCA in determining whether to deny the claim or offer a settlement.<sup>46</sup>

As stated above, under the FTCA, a claimant cannot bring suit in federal court until all administrative remedies have been exhausted.<sup>47</sup> An agency must fully dispose of a claim before exclusive jurisdiction vests in United States federal court to decide the liability of the claim.<sup>48</sup> Despite the prescribed process and rules under the federal statutes for filing tort claims against government agencies, and the benefits achieved to ease court congestion through the 1966 amendments, several issues in the administrative claims procedure often require litigation in federal court.<sup>49</sup>

### *B. Judicial/Jurisdictional Treatment of FTCA Claims*

The FTCA's two-year statute of limitations begins to run starting on the claim accrual date.<sup>50</sup> The statutory requirements require strict compliance for filing an administrative claim against a government agency.<sup>51</sup> If a claimant fails to meet the procedural statute of limitations requirement, the claimant forever loses the opportunity to seek relief or

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<sup>45</sup> See *id.* (offering claim settlement if FBI at fault or denying claim if FBI not at fault); 28 C.F.R. §§ 14.9-.11 (providing agencies authorization to issue "regulations and establish procedures" following existing federal regulations).

<sup>46</sup> See 28 C.F.R. § 14.4 (indicating the evidence a claimant "may be required to submit" to an agency).

<sup>47</sup> *McNeil v. United States*, 508 U.S. 106, 112-13 (1993) (finding congressional intent behind § 2675(a) requires complete exhaustion of administrative remedies before invoking judicial process).

<sup>48</sup> See 28 U.S.C. § 2672; see also 28 C.F.R. §§ 14.2(c), 14.9(b). If a claimant files the tort claim in federal court before the agency makes its final disposition, according to the statutory and regulatory requirements, the court will immediately dismiss the suit. 28 U.S.C. § 2672.

<sup>49</sup> See *McNeil*, 508 U.S. at 112-13 (dismissing FTCA suit because claimant failed to exhaust administrative remedies and requirements); *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979) (determining how to measure claim accrual and statute of limitations); Zillman, *supra* note 4, at 962 (finding over 250 cases before federal courts considering statutory and regulatory procedures required under FTCA). Zillman questions whether Congress created statutory obstacles that allow administrative agencies and courts to read complexities into the FTCA beyond Congress's original intent, because procedural requirements of the FTCA limit having claims heard on the basis of the merits. *Id.* Zillman believes that a balance needs to exist between how both the claimant and government parties' interests are considered. *Id.*

<sup>50</sup> See 28 U.S.C. § 2401(b) (2006) (beginning statute of limitations when plaintiff's claim accrues because of knowledge of government liability); *Kubrick*, 444 U.S. at 117 (explaining 28 U.S.C. § 2401(b) acts as "limitations provision" meant to encourage prompt claim settlements).

<sup>51</sup> See *Kubrick*, 444 U.S. at 113 (addressing when "claim accrual date" occurs under the FTCA).

justice for their claim.<sup>52</sup> Under the traditional rule for FTCA claim accrual, a claim begins to accrue on the date of the plaintiff's injury.<sup>53</sup>

In *United States v. Kubrick*,<sup>54</sup> the Supreme Court created a "discovery rule" for assessing the claim accrual date of an FTCA claim for medical malpractice cases.<sup>55</sup> The Court held that a claim accrues when the plaintiff knows of both the existence and the cause of his injury.<sup>56</sup> The Court enforced the adherence to the statute of limitations requirement because the provision ensures that the "government is promptly presented with a claim while the evidence is still fresh, [and the evidence] is to be strictly construed in the government's favor."<sup>57</sup>

Many of the United States Courts of Appeals use the discovery rule in non-malpractice cases "where plaintiffs face comparable problems in discerning the fact and cause of their injuries."<sup>58</sup> Specifically, the First Circuit Court of Appeals expanded the use of the discovery rule beyond the

<sup>52</sup> See 28 U.S.C. § 2401(b).

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.

*Id.*

<sup>53</sup> See *Kubrick*, 444 U.S. at 120; *Attallah v. United States*, 955 F.2d 776, 779 (1st Cir. 1992); *Gonzalez-Bernal v. United States*, 907 F.2d 246, 249 (1st Cir. 1990).

<sup>54</sup> 444 U.S. 111 (1979).

<sup>55</sup> See *id.* at 119-20.

<sup>56</sup> See *id.* at 123 (creating discovery rule exception for medical malpractice cases). A claimant no longer lies at the mercy of the government once he or she is armed with knowledge of the fact of injury and the identity of the parties that caused the injury. *Id.* at 123. Congress intended the statute of limitations to "require the reasonably diligent presentation of tort claims." *Id.*

<sup>57</sup> *Patterson v. United States*, 451 F.3d 268, 270 (1st Cir. 2006); see also *Kubrick*, 444 U.S. at 117-18. Compare *Stoleson v. United States*, 629 F.2d 1265, 1270 (7th Cir. 1980) (applying *Kubrick* to find accrual date after medical opinion of causal connection), with *Waits v. United States*, 611 F.2d 550, 553 (5th Cir. 1980) (applying *Kubrick* to find accrual occurred when hospital released records to claimant indicating malpractice). See generally *Zillman*, *supra* note 4, at 984 (discussing *Waits* application of *Kubrick* to claim accrual appears less persuasive than *Stoleson*).

<sup>58</sup> *Barrett v. United States*, 689 F.2d 324, 327 (2d Cir. 1982); see *Garza v. U.S. Bureau of Prisons*, 284 F.3d 930, 934 (8th Cir. 2002) (applying expanded use of discovery rule); *Diaz v. United States*, 165 F.3d 1337, 1338 (11th Cir. 1999) (expanding use of discovery rule to include wrongful death case); *Gould v. U.S. Dep't of Health & Human Servs.*, 905 F.2d 738, 743 (4th Cir. 1990) (applying *Kubrick* discovery rule to FTCA claim accrual analysis); *Drazan v. United States*, 762 F.2d 56, 60 (7th Cir. 1985) (allowing plaintiff to show he had no reason to believe government caused injury). But see *Garrett v. United States*, 640 F.2d 24, 26 (6th Cir. 1981) (finding wrongful death claims accrue only from date of death).

medical malpractice context.<sup>59</sup> The court uses the discovery rule when evaluating the plaintiff's legal theory or theories articulated in the FTCA claim.<sup>60</sup>

*C. Case Study: FTCA Claims Against the FBI*

A series of cases in the First Circuit Court of Appeals involving FTCA claims against the FBI, which arose from the actions of confidential informants James "Whitey" Bulger and Stephen Flemmi, dealt directly with the administrative claim procedures of the FTCA.<sup>61</sup> Specifically, the procedural requirement of the claim accrual date, and the statute of limitations of FTCA claims, required judicial decision.<sup>62</sup> In its determinations, the First Circuit applied the discovery rule established by *United States v. Kubrick* to determine a claim accrual date.<sup>63</sup>

The First Circuit begins its analysis by using the date of the plaintiff's administrative complaint to determine the claim accrual date.<sup>64</sup> Plaintiffs list specific legal theories of tort liability by the FBI in their administrative complaint.<sup>65</sup> Using the plaintiff's legal theory or theories, the court inquires into what the plaintiff "should have known."<sup>66</sup> The

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<sup>59</sup> See *Skwira v. United States*, 344 F.3d 64, 74 (1st Cir. 2003) (applying discovery rule to wrongful death action). The court adapted the discovery rule from the medical malpractice context to measure FTCA claim accrual as "once a plaintiff knows, or in the exercise of reasonable diligence should know, (1) of her injury and (2) sufficient facts to permit a reasonable person to believe that there is a causal connection between the government and her injury." *Id.* at 78; *Attallah v. United States*, 955 F.2d 776, 780 (1st Cir. 1992) (using *Kubrick* discovery rule as exception to general rule for FTCA claims accrual).

<sup>60</sup> See, e.g., *Donahue v. United States*, 634 F.3d 615, 625-28 (1st Cir. 2011) (evaluating accrual date of plaintiffs' administrative claims); *Patterson v. United States*, 451 F.3d 268, 270-73 (1st Cir. 2006) (measuring claim accrual date to determine statute of limitations); *Rakes v. United States*, 442 F.3d 7, 19-20 (1st Cir. 2006) (finding claim accrual analysis necessary to determine applicability of statute of limitations); *Callahan v. United States*, 426 F.3d 444, 451 (1st Cir. 2005) (using accrual analysis to determine status of claim); *McIntyre v. United States*, 367 F.3d 38, 51-52 (1st Cir. 2004) (using claim accrual standard to evaluate plaintiffs' claims).

<sup>61</sup> See, e.g., *Donahue*, 634 F.3d at 625-28; *Patterson*, 451 F.3d at 270; *Rakes*, 442 F.3d at 19-20; *Callahan*, 426 F.3d at 451; *McIntyre*, 367 F.3d at 51-52.

<sup>62</sup> See *supra* note 61 (listing First Circuit cases requiring judicial decision on procedural issues of FTCA claims).

<sup>63</sup> See *supra* note 61 (listing cases where First Circuit applied "discovery rule" to determine claim accrual dates).

<sup>64</sup> See *Donahue*, 634 F.3d at 623 (identifying date administrative claim filed for purposes of evaluating claim accrual).

<sup>65</sup> See *id.* at 625 (using plaintiff's theory of liability to determine when to begin accrual measurement).

<sup>66</sup> *Rakes*, 442 F.3d at 20 (asking objectively what plaintiff "should have known"). In *Rakes*, the court found a reasonable person will learn of certain information through "the channels of communication that run among people connected through ties of neighborhood, community,

inquiry begins by first determining what generally available information of the relevant facts the court should charge the plaintiff with having knowledge of concerning the claim.<sup>67</sup> Then, an objective inquiry determines whether a plaintiff who knew at least “that much” information would further investigate, and what such an investigation would likely reveal.<sup>68</sup> In some cases, the court uses a five-factor test to evaluate the facts of a given case for determining a claim accrual date under the discovery rule.<sup>69</sup> The court applies the five-factor test objectively and breaks apart the two components of the initial inquiry for more particular evaluation.<sup>70</sup>

The First Circuit conducts the claim accrual analysis of a plaintiff’s legal theories without a precise rule for the consideration of the effect of multiple legal theories.<sup>71</sup> When a plaintiff’s claim includes multiple legal theories of FBI liability, the court evaluates a plaintiff’s administrative complaint differently on a case-by-case basis.<sup>72</sup> After determining which

friendship, and family.” *Id.* at 23.

<sup>67</sup> See *Donahue*, 634 F.3d at 624; *Patterson v. United States*, 451 F.3d 268, 270 (1st Cir. 2006); see also *Callahan v. United States*, 426 F.3d 444, 451 (1st Cir. 2005) (stating actual knowledge of injury and its cause unnecessary); *Skwira v. United States*, 344 F.3d 64, 78 (1st Cir. 2003) (finding something less than “definitive knowledge” sufficient to begin claim accrual).

<sup>68</sup> *Donahue*, 634 F.3d at 624; *Patterson*, 451 F.3d at 270; *Rakes*, 442 F.3d at 20; *Callahan*, 426 F.3d at 451; *McIntyre v. United States*, 367 F.3d 38, 52 (1st Cir. 2004).

<sup>69</sup> See *McIntyre*, 367 F.3d at 52 (using *Kubrick* discovery rule in five-factor analysis); see *infra* note 70 (listing five factors of test).

<sup>70</sup> *McIntyre*, 367 F.3d at 52. The first factor asks whether sufficient facts were available to provoke a reasonable person in the claimant’s circumstance to inquire or investigate further. *Id.* Secondly, “[a] claim does not accrue when a person has a mere hunch, hint, suspicion, or rumor of a claim, but such suspicions do give rise to a duty to inquire into the possible existence of a claim in the exercise of due diligence.” *Id.* (quoting *Kronish v. United States*, 150 F.3d 112, 121 (2d Cir. 1998)). Third, if a duty to inquire is established, the plaintiff is charged with the knowledge of what he or she would have uncovered through a reasonably diligent search. *Id.* Fourth, the court evaluates whether, after possession of the information from an investigation, the plaintiff would know enough to permit a reasonable person to believe that she had been injured and that a causal connection exists between the injury and the government’s action. *Id.* Finally, definitive knowledge by the claimant is not required, and each inquiry is highly fact- and case-specific. *Id.*

<sup>71</sup> See *Rakes*, 442 F.3d at 21 (finding inquiry requires circumstantial determination); see also *Donahue*, 634 F.3d at 624 (reaffirming *Rakes* analysis of FTCA legal theories because “cases cannot be analyzed in the abstract”). The court in *Rakes* reasoned that “[w]hether a court will need to make separate calculations as to timeliness for different theories of injury pertaining to a single set of facts, or can simply rely on the accrual date of the earliest—accruing theory, depends very much on the circumstances of the case.” 442 F.3d at 21.

<sup>72</sup> See *Rakes*, 442 F.3d at 20-21 (considering whether rule exists in method of evaluating legal theories). The court cautioned that “[n]either *McIntyre* nor *Callahan* should be viewed as setting forth a flat rule, or even a generally applicable rule subject to an easily stated exception.” *Id.* at 21. Compare *McIntyre*, 367 F.3d at 54, 57-58 (articulating two legal theories but only considering plaintiff’s first theory), with *Callahan*, 426 F.3d at 452 (holding claim accrues when

legal theory or theories to use in the accrual analysis, the court considers the factors of the information available to the plaintiff that supports the presented legal theories.<sup>73</sup> Based on the court's findings of the availability of information relevant to the plaintiff's legal theories, the court asks "whether a plaintiff who knew at least that much would have made a further investigation, and what such an investigation would likely have revealed."<sup>74</sup>

Evaluation of the claim accrual dates for FTCA claimants with claims against the FBI involving informants Bulger and Flemmi turned on the amount of media information available about the FBI and its relationship with Bulger and Flemmi.<sup>75</sup> Media publication of the connections of the FBI informant relationship to murders and extortion created enough information to begin the claim accrual dates for many FTCA claimants.<sup>76</sup>

#### *D. FBI Cases*

In *McIntyre v. United States*,<sup>77</sup> the First Circuit found that it could not reasonably expect the plaintiff to have discovered facts to support the theory of her claim until after the date that would warrant a violation of the statute of limitations.<sup>78</sup> Specifically, the court identified a "rumor" as the

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information vital to any theory of liability emerges).

<sup>73</sup> See *Rakes*, 442 F.3d at 20 (explaining process of considering factors); *McIntyre*, 367 F.3d at 52 (looking for facts available to plaintiff).

<sup>74</sup> See *Rakes*, 442 F.3d at 20, 22-23 (identifying information available to plaintiffs and expecting plaintiffs' knowledge of such information); *McIntyre*, 367 F.3d at 52, 55-56 (finding plaintiffs unable to know information to cause claim to accrue before date in question).

<sup>75</sup> See, e.g., *Donahue*, 634 F.3d at 626 (determining whether media information conclusive and persuasive at relevant time for accrual); *Patterson*, 451 F.3d at 271, 273 (finding murder highly publicized by media attention especially through newspaper); *Rakes*, 442 F.3d at 22-23 (focusing on number of Boston newspaper articles); *Callahan*, 426 F.3d at 452-53 (considering local Boston and national media coverage both in newspapers and television news networks); *McIntyre*, 367 F.3d at 48-49 (examining newspapers printed in city of murder and CBS 60 Minutes interview).

<sup>76</sup> *Callahan*, 426 F.3d at 452-54 (holding plaintiff should have discovered facts giving rise to claim earlier because facts publicized). The FBI agents' alleged fraudulent concealment of their knowledge concerning who had committed murder could not toll the limitations period for a FTCA suit beyond the point when the organized crime figure pled to murder. *Id.* at 454.

<sup>77</sup> 367 F.3d 38 (1st Cir. 2004).

<sup>78</sup> *Id.* at 54 (finding claim accrued only when FBI disclosed victim's informant status). McIntyre served as an informant for the Quincy Police Department. *Id.* at 42. He disappeared after relaying information to his handler about the attempted delivery of guns and ammunition from Massachusetts to the Irish Republican Army in Ireland, which involved Bulger and Flemmi. *Id.* at 42-43. The Quincy Police Department contacted the FBI with the information. *Id.* Shortly thereafter, the plaintiff's son disappeared, and she filed several missing persons complaints. *Id.* at

basis of knowledge for the FBI's wrongdoing.<sup>79</sup> Based on a rumor, "the McIntyres did not have a reasoned basis to believe that it was the FBI that leaked McIntyre's identity as informant to Bulger and Flemmi."<sup>80</sup> The rumor could not serve as the claimant's only basis to controvert the FBI's denial of wrongdoing.<sup>81</sup>

In a case consolidated with *McIntyre*, the First Circuit found that the claimants' FTCA claim accrual date exceeded the statute of limitations.<sup>82</sup> The court found that information available to the claimants through the public media supported the claimants' legal theory for their FTCA claim.<sup>83</sup> The court considered the available information sufficient to put the claimants on notice for purposes of identifying the claim accrual date.<sup>84</sup>

Similarly, in *Callahan v. United States*,<sup>85</sup> the widow of a murder victim filed an FTCA administrative claim against the FBI, alleging that the FBI's improper relationship with informants led to the murder of her husband.<sup>86</sup> As to the issue of establishing a claim accrual date, media

43. The plaintiff stated by affidavit that the government told her that her son "was a fugitive." *Id.* After a series of newspaper articles theorizing the FBI's involvement in McIntyre's murder, the revelations from Judge Wolf's 260-page opinion of *United States v. Salemme*, and the discovery of McIntyre's body, the plaintiff filed an administrative claim against the FBI. *Id.* at 43-47.

<sup>79</sup> *Id.* at 55 (focusing on "rumor" as plaintiff's hint of FBI wrongdoing).

<sup>80</sup> *Id.* at 55. The court explained that the claimant's knowledge of Bulger and Flemmi's responsibility for the murder did not fully support the basis for her claim against the FBI. *Id.* at 54; see also *United States v. Salemme*, 91 F. Supp. 2d 141, 215 (D. Mass. 1999) (stating that information concerning events could not be fully resolved in opinion), *rev'd in part sub nom.* *United States v. Flemmi*, 225 F.3d 78 (1st Cir. 2000).

<sup>81</sup> See *McIntyre*, 367 F.3d at 55.

<sup>82</sup> *Id.* at 59-61. The *Wheeler* decision was on consolidated appeal with *McIntyre*. *Id.* at 42. After firing John Callahan from World Jai Alai, Roger Wheeler was shot in his car in the parking lot of a Tulsa country club. *Id.* at 48. Wheeler believed John Callahan, the president of World Jai Alai, engineered profit skimming for members of Bulger's Winter Hill Gang. *Id.* The plaintiff filed a tort claim against the FBI after numerous articles, media specials, and the *Salemme* proceedings shed light on the FBI's relationship with informants Bulger and Flemmi. *Id.* at 48-51.

<sup>83</sup> *Id.* at 58-59 (finding claimant had access to all three elements necessary to support FTCA claim). The claimant's legal theory did not depend on any direct relationship between Wheeler and the FBI. *Id.* at 59.

<sup>84</sup> *Id.* (finding necessary information for FTCA claim available through news articles and 60 Minutes). The information available to the claimant provided the necessary information about the FBI's informant relationship with Bulger and Flemmi. *Id.* at 60-62.

<sup>85</sup> 426 F.3d 444 (1st Cir. 2005).

<sup>86</sup> *Id.* at 446. The plaintiff's husband, John Callahan, served as CEO of the company World Jai Alai. *Id.* at 447. Callahan became suspicious that individuals were skimming profits from the company. *Id.* To prevent Callahan from discovering the profit skimming, Bulger and Flemmi ordered a Winter Hill Gang member to kill Callahan. *Id.* Authorities discovered Callahan's body in the trunk of a car at the Miami airport. *Id.* at 448.

coverage determined the time when the claimant should have reasonably had the knowledge necessary to file a claim under the FTCA.<sup>87</sup> In *Patterson v. United States*,<sup>88</sup> the First Circuit found the claim untimely because the claimant should have reasonably acquired information about the FBI's involvement at least two years before filing the claim.<sup>89</sup> Similarly, extortion victims sued the FBI under the FTCA in *Rakes v. United States*,<sup>90</sup> claiming that the FBI shielded informants who acted as extortionists.<sup>91</sup> Again, the court found the claim untimely because the claimants should have been aware at an earlier time of information that would have caused speculation and investigation.<sup>92</sup>

In *Donahue v. United States*,<sup>93</sup> the First Circuit identified the two theories of liability permeating through the series of FTCA claims against the FBI because of their relationship with Bulger and Flemmi.<sup>94</sup> The first

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<sup>87</sup> *Id.* at 452-53. National television broadcasts on CNN and *60 Minutes*, numerous articles published in Boston newspapers, the publication of Judge Wolf's decision in *United States v. Salemme*, and the published FBI agent testimony from *Salemme*, all provided the claimant with necessary information for an FTCA claim against the FBI. *Id.* at 453. Judge Wolf's *Salemme* opinion included details of the corrupt relationship between the FBI and informants Bulger and Flemmi. *Id.* at 449-50. Boston newspapers immediately reported the details of Wolf's opinion. *Id.* at 450.

<sup>88</sup> 451 F.3d 268 (1st Cir. 2006).

<sup>89</sup> *Id.* at 273. Vincent Flemmi and Joseph Barboza, two FBI informants, murdered Edward "Teddy" Deegan in March of 1965. *Id.* at 269. The FBI knew of the informants' plans before they murdered Deegan, but did not prevent the murder. *Id.* Moreover, despite possessing information about the murder, the FBI did not stop the wrongful convictions of two other men. *Id.* The plaintiffs, Deegan's daughters, filed an administrative claim against the FBI. *Id.* The factor of a claimant's retirement during that time period did not constitute an excuse for lack of knowledge. *Id.* More persuasive, the Boston Globe published an article about the victim's murder the day after the murder occurred, and the Globe had interviewed the claimant. *Id.*

<sup>90</sup> 442 F.3d 7 (1st Cir. 2006).

<sup>91</sup> *Id.* at 11. Bulger and Flemmi successfully extorted the plaintiffs to sell them their liquor store. *Id.* Bulger and two other men made two attempts to take the plaintiffs' store, and on the second attempt, went to the plaintiffs' home. *Id.* at 13. Inside, the men displayed weapons on the kitchen table and threatened to kill the plaintiffs. *Id.* While holding the plaintiffs' one-year-old daughter, Flemmi stated that "it would be a shame for her not to see her father again." *Id.* After repeated attempts by Bulger to take the store, the plaintiffs contacted a relative in the Boston Police Department to contact the FBI. *Id.* Bulger returned to the plaintiffs and told them to have their police contact "back off," suggesting the FBI informant tipped-off Bulger of the police contact. *Id.*

<sup>92</sup> *Id.* at 24 (finding reasonable individual would have known they were injured and injury caused by the government). The court found that the claimants' lack of investigation into their speculated claim caused them to lose their right to pursue an FTCA claim, because the claim would have accrued earlier, and the statute of limitations therefore prohibited an FTCA claim. *Id.* at 26-27.

<sup>93</sup> 634 F.3d 615 (1st Cir. 2011).

<sup>94</sup> *Id.* at 625 (considering two theories of FBI liability for accrual analysis). The FBI declined Brian Halloran's offer to provide information about Bulger and Flemmi's involvement in Wheeler's murder. *Id.* at 618. Instead, Agent John Connolly leaked Halloran's identity to

theory, named the “emboldening” theory, posits that the FBI placed a protective shield around Bulger and Flemmi that allowed them “carte blanche to commit crimes.”<sup>95</sup> The second theory, known as the “leak” theory, supposes that the FBI engaged in wrongful disclosures of government informant identities to Bulger and Flemmi.<sup>96</sup> The court measured the claimants’ accrual dates using the case-by-case approach applied in *Rakes*.<sup>97</sup> Based on information generally available to the claimants, the court determined the accrual date.<sup>98</sup> The court found the information sufficient to “trigger accrual,” and, therefore, did not need to inquire further into what the information would have revealed to the claimants.<sup>99</sup>

### III. PROCEDURAL AMBIGUITY IN THE COURTS

FTCA claimants follow a regimented procedure for filing FTCA claims against the government.<sup>100</sup> Ambiguity in how the court will analyze a claimant’s theory or theories of liability adds to the technicalities of procedure already demanded from claimants.<sup>101</sup> The First Circuit refuses to apply a precise rule in evaluating a claimant’s FTCA claim; accordingly, the court reserves the right to determine on a case-by-case basis which of the plaintiff’s presented legal theories to consider, or, as it appears in *McIntyre*, to consider only one theory.<sup>102</sup>

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Bulger and Flemmi. *Id.* One night, Halloran asked his neighbor, Michael Donahue, for a ride home, and Bulger’s car pulled alongside and fired a series of shots that killed Donahue immediately. *Id.* Additionally, Halloran later died during the ambulance ride. *Id.* Next, FBI Agents Connolly and Morris actively sought to prevent other FBI offices from solving the Wheeler and Callahan murders. *Id.* at 618-19. The agents gave information to Bulger and Flemmi about pending investigations, failed to file information provided by Halloran, and prevented interviews of Bulger and Flemmi and the release of any information to the Massachusetts police concerning Bulger’s involvement in the Halloran and Donahue murders. *Id.* at 619.

<sup>95</sup> *See id.* at 625.

<sup>96</sup> *See id.*; *McIntyre v. United States*, 367 F.3d 38, 54 (1st Cir. 2004).

<sup>97</sup> *See Donahue*, 634 F.3d at 625 (using mode of analysis clarified in *Rakes* turning on particular circumstances of case).

<sup>98</sup> *Id.* at 625-26 (considering information from Boston newspapers, coverage by national and local media, and Agent Morris’s testimony).

<sup>99</sup> *Id.* at 627 (deciding media and testimony information satisfied plaintiffs’ knowledge requirement for claim accrual).

<sup>100</sup> 28 U.S.C. §§ 1346, 2401, 2671-2680 (2006); 28 C.F.R. §§ 14.1-11 (setting out detailed requirements from Attorney General for FTCA claims).

<sup>101</sup> *See supra* note 49 and accompanying text (discussing technical steps of filing an FTCA claim).

<sup>102</sup> *See Rakes v. United States*, 442 F.3d 7, 21 (1st Cir. 2006) (finding some instances require consideration of injury as single episode, while others require separate determinations).

In *Rakes*, the court discussed the different treatments in claim accrual analysis by the First Circuit in *McIntyre* and *Callahan*.<sup>103</sup> The court concluded that different treatment is appropriate in certain situations, and it cautioned that the evaluation made in *McIntyre* and *Callahan* did not establish a generally applicable rule for all legal theories.<sup>104</sup> Instead, it held that determining whether to evaluate different legal theories, or whether to rely on the earliest accruing theory, requires a circumstantial determination.<sup>105</sup>

The accrual date in *Callahan* occurred when information critical to either of the plaintiffs' theories of FBI liability emerged.<sup>106</sup> In *McIntyre*, the claim accrual date occurred when information emerged that supported one of the claimant's legal theories.<sup>107</sup> The court did not consider whether information existed that would make the other theory accrue.<sup>108</sup> In *Rakes*, the court reasoned that it will treat a claimant with several theories of liability as having sufficient knowledge for all theories, even if that claimant only has sufficient knowledge for one.<sup>109</sup>

#### IV. ANALYSIS OF THE EFFECT OF CLAIM ACCURAL MEASUREMENT ON THE FTCA CLAIMS PROCESS

The FTCA provides claimants with the means of accusing a government agency of tortious conduct, and, therefore, if one of the claimant's theories of government agency liability begins to accrue, the claimant has support for his or her claim.<sup>110</sup> If Congress intends to provide individuals with a device to sue a government agency, finding that one viable legal theory accrues for purposes of filing a claim satisfies the goal

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<sup>103</sup> *Rakes*, 442 F.3d at 20-21 (recognizing "threshold question" of working with multiple legal theories).

<sup>104</sup> *Id.* at 21 (reexamining methods of evaluation used in past cases with differently presented legal theories).

<sup>105</sup> See *Rakes*, 442 F.3d at 21; see also *Donahue v. United States*, 634 F.3d 615, 625 (1st Cir. 2011) (confirming case-by-case approach announced in *Rakes*).

<sup>106</sup> See *Callahan v. United States*, 426 F.3d 444, 452 (1st Cir. 2005) (stating claim accrues if any causal connection exists). In *Callahan*, the court stated that "[p]utting forth a specific theory of causation based on particular facts does not help a plaintiff, because only the earliest theory of causation matters for accrual analysis." *Id.*

<sup>107</sup> See *McIntyre v. United States*, 367 F.3d 38, 54 (1st Cir. 2004) (finding facts not discoverable for first theory until after date that would bar claim).

<sup>108</sup> See *id.* at 54 n.6 (passing on determination of when plaintiff's second theory accrued).

<sup>109</sup> See *Rakes*, 442 F.3d at 21-22 (finding *Rakes* claims accrued more than two years before they filed administrative claims).

<sup>110</sup> See *Callahan*, 426 F.3d at 452 (focusing on importance of knowing facts with "any causal connection" to plaintiff's injury and government); *supra* note 10 and accompanying text (discussing function and authority of FTCA).

of holding the agency liable.<sup>111</sup>

Making circumstantial determinations according to the relevant facts of a particular case may benefit claimants because of the individual attention and evaluation the court engages in when considering claims.<sup>112</sup> However, the court's consideration of the legal theory or theories asserted in the claimant's FTCA complaint to ascertain the claim accrual can affect whether the claimant can sue the government.<sup>113</sup> The application of the claim accrual analysis should either adhere to a specific rule, or it should individually consider multiple theories of liability asserted by the FTCA claimant.<sup>114</sup>

In *Rakes*, the First Circuit reasoned that a court's calculation of an accrual date through legal theory or theories "depends very much on the circumstances of the case."<sup>115</sup> The string of FTCA cases against the FBI for their involvement with informants Bulger and Flemmi involve a large body of common facts concerning the illicit relationship between the FBI and its informants.<sup>116</sup> Although each circumstance is unique for specific reasons, a group of claims exist that all stem from liability of the FBI's involvement with Bulger and Flemmi during a specific time period that led to the murders and injuries of innocent individuals.<sup>117</sup> Questions of liability do not appear to exist in any of the cases discussed, as evidenced by the court's findings that the information available to claimants would provide knowledge of government liability and the indication to file a claim to meet the accrual date.<sup>118</sup> If an FTCA claimant knows that the court will evaluate

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<sup>111</sup> See *supra* note 10 (quoting statutory language from 28 U.S.C. § 2674 about government liability).

<sup>112</sup> See *McIntyre*, 367 F.3d at 54 (applying claim accrual analysis to only first theory because it appears predominant theory).

<sup>113</sup> See *Callahan*, 426 F.3d at 452 (dismissing plaintiff's second theory of liability which would allow later accrual date than first theory); see also *Rakes*, 442 F.3d at 20-21 (refusing to conduct accrual analysis for three theories of liability).

<sup>114</sup> Compare *McIntyre*, 367 F.3d at 54 (analyzing one of the plaintiff's theories under claim accrual), with *Callahan*, 426 F.3d at 452 (considering first theory to establish requisite causation the only relevant theory).

<sup>115</sup> 442 F.3d at 21; see *supra* notes 71-72 and accompanying text (explaining *Rakes* court's reasoning on the consideration of legal theories).

<sup>116</sup> See *Donahue v. United States*, 634 F.3d 615, 616-21 (1st Cir. 2011); *Rakes*, 442 F.3d at 11-14 (describing prehistory of FBI's relationship with Bulger and Flemmi and actual extortion event); *Callahan*, 426 F.3d at 446-48 (describing FBI's relationship with Winter Hill gang and Callahan's death); *McIntyre*, 367 F.3d at 42-52 (providing factual background relevant to McIntyre and Wheeler's murders concerning FBI, Bulger and Flemmi).

<sup>117</sup> See *supra* note 116 (identifying record of common facts among different FTCA claimants).

<sup>118</sup> See *Rakes*, 442 F.3d at 24 (deciding *Rakes* and *Dammers* should have been aware government caused their injury); *Callahan*, 426 F.3d at 452-53 (finding sufficient facts plaintiff reasonably should have known to inquire and seek advice); *McIntyre*, 367 F.3d at 58 (concluding

the theory or theories of liability in a certain way, that claimant can attempt to effectively fashion the theory of liability to his or her advantage, rather than allow the court to determine which theory it wishes to use to measure claim accrual.<sup>119</sup>

Due to the tedious procedural steps of FTCA administrative claim process, the role of the court in determining the sufficiency of an FTCA claim may ultimately bar the claimant from seeking any consideration, recovery, or determination of the alleged government liability.<sup>120</sup> Judge Torruella's dissenting opinion in *Donahue* highlights the issue by focusing on the implications of the way the court determines accrual dates of FTCA claims.<sup>121</sup> Using a case-by-case analysis, and considering the specifics of the claims by the Donahue and Halloran estates, Judge Torruella found the claims not similarly situated to those in *McIntyre* and *Callahan*.<sup>122</sup> In *McIntyre* and *Callahan*, no individuals were charged for the murders, and public perception considered Bulger the prime suspect; in *Donahue*, the Suffolk County District Attorney prosecuted a suspect, James Flynn, for the Halloran and Donahue murders in 1985.<sup>123</sup> A jury acquitted Flynn in 1985.<sup>124</sup>

Tension exists between the practical operation of the FTCA and the need to adhere to a statute of limitations, and how such an adherence will ultimately require additional litigation of FTCA administrative claims.<sup>125</sup>

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Wheeler had sufficient notice of facts to begin claim accrual).

<sup>119</sup> See *Rakes*, 442 F.3d at 21 (holding method of evaluating FTCA theories requires circumstantial determination).

<sup>120</sup> See *supra* note 49 (explaining how courts must make determinations as to procedural compliance with FTCA statutory requirements).

<sup>121</sup> See *Donahue*, 634 F.3d at 633-34 (Torruella, J., dissenting) (discussing implications of majority's evaluation of accrual date).

<sup>122</sup> See *id.* at 633 (finding Halloran and Donahue families had reasonable belief that murderer identified in May 1982). Torruella points out that "[p]rior to the initiation of these lawsuits, the victims' families were told by those investigating the murders, to the extent they were told anything at all, that Flynn was responsible." *Id.* In opinions concerning the First Circuit's denial of rehearing en banc, the dissenting judges further note the lack of reasonableness in the majority's finding of the accrual date of September 2, 1998. See *Donahue v. United States*, 660 F.3d 523, 529 (1st Cir. 2011) (Lipez, J., dissenting). Judge Lipez notes that the "critical information" relied upon by the majority to determine the claim accrual date consisted of "information that was generally available at the time of the *Salemme* hearings." See *id.* (quoting *Donahue*, 634 F.3d at 625). Judge Lipez points out that only the *Donahue* decision relies upon this information as the sole basis for finding knowledge on the part of the claimants. See *id.*

<sup>123</sup> See *Donahue*, 634 F.3d at 632-33 (Torruella, J., dissenting).

<sup>124</sup> See *id.* at 619 (majority opinion); see also *id.* at 634 (Torruella, J., dissenting) (reasoning not reasonable for claimants to believe Flynn innocent after acquittal).

<sup>125</sup> See *id.* at 629 (majority opinion) (highlighting reasons for enforcing statute of limitations and applying legal rules evenhandedly); *id.* at 638 (Torruella, J., dissenting) (warning against premature filing of claims because of issues with pleading requirements and ethical obligations).

The legislature intended to use the administrative claims process to avoid unnecessary litigation.<sup>126</sup> However, it appears that some courts advocate filing claims with only “sufficient information for the agency to investigate the claims.”<sup>127</sup> Filing claims earlier may relieve courts from determining when claims accrue, but it will likely lead to an overwhelming number of administrative claims filed with agencies.<sup>128</sup>

Encouraging an earlier filing of administrative claims may ultimately help alleviate the court of making determinations about procedural issues of the FTCA administrative claim procedure.<sup>129</sup> If claimants file at an earlier date, the agency will determine whether to settle the claim or give the claimant the option to file suit in court.<sup>130</sup> While this approach would reduce the litigation of procedural elements before the court, it would likely increase the number of claims filed with agencies, and may force agencies to litigate claims due to the high volume filed.<sup>131</sup> Such an approach does not allow the agency to fully handle the case in the six month period prior to the claimant filing suit in federal court.<sup>132</sup>

## V. CONCLUSION

The most effective action in avoiding procedural issues with the FTCA statute of limitations and accrual date is to file an administrative claim at the claimant’s earliest suspicion of government liability or wrongdoing. Courts will likely consider legal theories asserted in the administrative complaint all together; thus, if the claimant asserts multiple theories, the first theory to accrue will determine the accrual date for all remaining theories.

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<sup>126</sup> See *supra* note 25 and accompanying text (discussing congressional intent to encourage settlement between claimants and agencies instead of involving federal courts).

<sup>127</sup> *Skwira v. United States*, 344 F.3d 64, 81(1st Cir. 2003); see *Donahue*, 634 F.3d at 627 (majority opinion) (explaining *Skwira*’s standard that “irrefutable proof of the government’s accountability” not required to file administrative claim). The majority in *Donahue* reiterates that “it is enough to have ‘possession of sufficient information for the agency to investigate the claim.’” *Id.* at 627 (quoting *Skwira*, 344 F.3d at 81).

<sup>128</sup> See *Donahue*, 634 F.3d at 627 (suggesting claimants who file early can continue investigating for more information supporting alleged government liability); see also *supra* note 28 and accompanying text (discussing agency interest in receiving administrative claims directly).

<sup>129</sup> See *supra* note 49 and accompanying text (explaining rising necessity to litigate procedural requirements of FTCA).

<sup>130</sup> See *supra* note 41 and accompanying text (explaining administrative agency makes initial disposition of FTCA administrative claim).

<sup>131</sup> But see *supra* notes 30, 32 (explaining Congress’s belief agency interest and expertise handling claims as reason for initial agency control).

<sup>132</sup> But see *supra* notes 30, 32.

While the initial purpose for the FTCA claims process prescribed by Congress intended to alleviate the burdens on the courts concerning potential suits, ironically, determinations about the procedural requirements of the FTCA flood the federal courts. The existing structure for claims under the FTCA appears to place more responsibility on the courts to determine and enforce procedural requirements of filing a claim against an administrative agency. Specifically, within the First Circuit Court of Appeals, it appears that the court advocates the earlier filing of administrative complaints under the FTCA with agencies like the FBI. If practiced, earlier filing may avoid much of the procedural litigation concerning the statute of limitations and claim accrual dates. The FTCA procedure would likely exist as a process between the claimant and the administrative agency, which would further the initial intentions of Congress by requiring claims filed directly with agencies for agency disposition and handling. Despite the danger in agency overload, earlier filing also would likely permeate through and cause the extinction of the litigation of the procedural requirements of the FTCA.

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