# Suing the Government

## General

### Federal sovereign immunity

#### What is federal sovereign immunity?

#### What is the constitutional provision that is seen as the basis of sovereign immunity under the U.S. constitution?

#### Prior to the FTCA, what did you have to do to get compensation for a tort by a federal government employee?

### Louisiana sovereign immunity

#### How is sovereign immunity different in Louisiana?

#### How does this difference affect the construction of the federal versus state tort claims act, i.e., how is a statute in dereliction of immunity construed differently from a statute creating immunity?

### What is the Court of Claims and what type of claims does it deal with?

## 42 USC 1983

### Why was 42 USC 1983 passed?

### What is the legal standard for who you can sue under 1983?

### Must these persons be government employees?

### How does the 11th Amendment limit the reach of 42 USC 1983?

### Absolute immunity

#### Why do legislators and judges get absolute immunity under 1983?

##### What would be the implications of allowing them to be sued for their laws or decisions?

##### What is the federal process for dealing with bad judges?

### Qualified immunity

#### What is the legal test for qualified immunity?

#### How does immunity provided by qualified immunity differ from the discretionary function exception?

##### Is it broader or narrower?

##### How is the purpose related?

## FTCA

### Causes of actions

#### What sort of actions does the FTCA cover?

#### What causes of action are excluded under the FTCA?

#### Can you collect pre-judgment interest or punitive damages under the FTCA? (Forget about the section on old death cases.)

#### Where do you look for law to apply in a FTCA case?

### *Bivens*

#### How does *Bivens* plug a hole in the original FTCA? (What actions does it cover that were excluded in the original FTCA?)

#### *Bivens* was decided in 1971. Why is it the logical extension of the Warren Court’s individual liberties decisions?

#### How was the FTCA amended after *Bivens*?

#### Who can you now sue under the FTCA for intentional torts such as battery and assault?

### Filing an FTCA claim

#### What is the procedural prerequisite before going to court under the FTCA?

#### What is the prescription/statute of limitations period for an FTCA claim?

#### When can you go to court after filing your claim under the FTCA?

#### What is the legal effect if you go to court without exhausting these requirements?

### What is the discretionary function exception?

#### Why is the discretionary function exception necessary to protect the other political and judicial controls on agencies?

#### What would be the consequences for agency political control if the only defenses were those ordinarily available in state tort claims, i.e., standard of care rather than the discretionary function defense?

### What does *Allen v. United States,* 816 F.2d 1417 (10th Cir. 1987)

#### Were the plaintiffs intentionally exposed to radioactive fallout?

##### Based on these facts, if this were an ordinary tort case, would plaintiffs have won?

##### Why does the discretionary function defense force a different result from a private tort claim?

#### How does the shift from ordinary negligence to discretionary function potentially confuse plaintiffs' attorneys, i.e., why is showing the defendant acted knowingly a problem in FTCA claims but great in most private tort claims?

### What were the lessons of *Berkowitz* and *Varig Airlines*?

#### On following regulations?

#### On drafting regulations to allow flexibility?

### *Gregor*

#### What was the alleged negligence by the DHH inspector?

#### How did DHH try to defend this with the discretionary function defense?

#### Why did the court reject this defense?

#### Looking at the inspector’s testimony, what did the court find was the real negligence by DHH?

## **Flood Control Act of 1928**

### The immunity provision of the Flood Control Act of 1928 (FCA)

#### What did *Central Green* say was the critical fact that determined whether immunity applied?

#### Does the Flood Control Act provide for a cause of action - what law gives you jurisdiction to bring a claim against the Corps?

#### Assume that the Corps makes a decision to not armor levees with concrete, knowing that this means they will fail when overtopped by a hurricane:

##### What would be the result under the FTCA if there was no FCA immunity?

##### What if FCA immunity applies?

#### Assume that the Corps is negligent in designing or building a levee:

##### What would be the result under the FTCA if there was no FCA immunity?

##### What if FCA immunity applies?

#### Assume that the Corps does not follow statutory standards in building a levee:

##### What would be the result under the FTCA if there was no FCA immunity?

##### What if FCA immunity applies?

### Thought question: How might abolishing the Flood Control Act immunity and only allowing the discretionary authority defense affect the Corps decisions about flood control projects?

# End