Drug Testing of Federal Government Employees: Is Harm Resulting from Negligent Record Maintenance Actionable?

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President Reagan signed an executive order in 1986 that requires all executive agencies to establish drug testing programs for agency employees and job applicants.¹ Federal regulations require agencies to retain in employee files the information derived from testing.² As more federal employees are tested more frequently, the potential for abuse in the maintenance and dissemination of employee records increases. Among the dangers to employees posed by drug testing is the risk of false positives—test results that incorrectly indicate drug use by the person tested.³ If an employee tests positive for a particular drug metabolite, the agency imposing the test may choose not to act against the employee despite the seeming evidence of drug use.⁴ The false result may nevertheless become part of the employee’s personnel record and may be dis-

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¹ Executive Order 12564, 51 Fed. Reg. 32889 (1986) ("Drug Free Federal Workplace"). In the interest of "achieving the objective of a drug-free workplace," the order directs each agency head to "establish a program to test for the use of illegal drugs by employees in sensitive positions," and to "establish a program for voluntary employee drug testing." The order also authorizes each agency head to conduct mandatory testing of employees under certain conditions (including reasonable suspicion of illegal drug use) and to test any applicant for employment. Finally, the order precludes the use of test results for gathering evidence against federal employees in criminal proceedings.

² 5 C.F.R. sec. 293.201 et seq.; and 5 C.F.R. sec. 294.101 et seq. ("[e]ach [executive department] agency shall establish an Official Personnel Folder for each employee . . .").


⁴ An employer may test for reasons other than a desire simply to dismiss its employees who use drugs. The purpose may be merely to determine the extent of drug use among employees or to use the test results as a means of identifying employees who should be supervised with particular scrutiny. Drug testing may also serve a purely deterrent function for the employer by discouraging drug use among employees. Whether these rationales are legitimate, however, is beyond the scope of this Comment.
seminated to third parties, such as prospective employers, with potential resultant harm to the employee's reputation and job opportunities.

The possibility of false positive results represents only one potential danger to an employee forced to submit to urinalysis. Studies have shown that large-scale testing programs may suffer from sample mislabeling and the confusion of different samples due to faulty chains of custody. Thus, any duty of care which an employer owes to maintain accurate personnel records is implicated by the negligent omission or inclusion of information that is necessary to reflect an employee's employment status accurately. While many of these problems are immediately generated by those who administer the tests, the duty of a federal employer in the chain of events has two aspects. First, the employer is initially responsible for directing that a test be administered. Second, the employer is responsible for the inclusion of any inaccurate test results in currently maintained and active employment files.

An action for defamation is the immediately apparent remedy for injury to reputation that is caused by the communication of inaccurate information in an employee's record. But because the Federal Tort Claims Act ("FTCA") bars defamation suits against the government, the claim of a federal employee alleging defama-

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8 Urinalysis is one of the means by which executive agencies can carry out the mandate of Executive Order 12564.

6 With respect to blood or urine samples, the "chain of custody" denotes the process of handling a sample from its source to the moment of chemical analysis. The true identity of a sample may be confused in two ways in the testing process. In the case of urinalysis, because the subject often produces the sample in private, there is the possibility of substitution of samples. This is sometimes referred to as a "false negative." The more common problem is that a blood or urine sample will be misidentified at some stage in its handling between the source and chemical analysis. There is also the danger that the sample will be adulterated by mixture with foreign substances (or other samples) at some point in its transportation or storage prior to testing.

7 See Clark v. American Broadcasting Company, 684 F.2d 1208, 1212 (6th Cir. 1982), quoting Nuyen v. Slater, 372 Mich. 654, 662, 127 N.W.2d 369 (1964) ("[a] communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him"); and Garrett v. Kneass, 482 So.2d 876, 879 (La. App. 1986) ("[l]anguage is defamatory when it... has a tendency to deprive [the plaintiff] of the benefits of public confidence or injure him in his occupation."). See also W. Page Keeton, ed., Prosser and Keeton on the Law of Torts, sec. 111 (5th ed. 1984) ("Prosser and Keeton"); and American Law Institute, Restatement (Second) of Torts, sec. 559, Comment e (1977). In certain cases, the defamatory nature of a statement will be presumed by the court and the plaintiff will not need to plead or prove actual damages in order to recover. See note 38.


8 28 U.S.C. sec. 2680(h). The FTCA provision which waives governmental immunity, see note 10, does not apply to "[a]ny claim arising out of assault, battery, false imprison-
tion will fail. The FTCA, however, explicitly authorizes negligence actions against the government. At least one court has recognized a remedy for federal employees in the form of an action for negligent maintenance of records. Because the two theories of recovery—negligence and defamation—address the same injury, however, other courts have characterized allegations of inaccurate record maintenance as defamation claims and have barred the action under the FTCA.

This Comment examines the utility and availability of a negligent maintenance of records theory to government employees suing federal agencies for maintaining and disseminating inaccurate employment information. This Comment argues that courts should recognize that the tort of negligent maintenance of records is often distinct from the tort of defamation, and concludes that government agencies may be liable for damages if they owe a specific duty to maintain accurate records. Both the scant legislative history of the FTCA and, more important, strong policy arguments favor judicial recognition of the negligent maintenance of records tort. Fundamental tort concepts of proximate causation further

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28 U.S.C. sec. 1346(b). The provision waives the government's sovereign immunity against suit for injury caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

The elements of a cause of action sounding in negligence are the existence of a duty, breach of that duty, a legally attributable causal connection between the negligent conduct and some injury, and some damage to the plaintiff's legally protected interests. See, for example, Moorhead v. Mitsubishi Aircraft International, Inc., 828 F.2d 278, 282 (5th Cir. 1987) (Texas law); Galanti v. United States, 709 F.2d 706, 708 (11th Cir. 1983) (Georgia law); and Toscano Lopez v. McDonald's, 193 Cal. App.3d 495, 238 Cal. Rptr. 436, 447 (1987). Some state tort claims acts are modeled on the federal act. See, for example, 9 Alaska Stat. sec. 50.250 et seq. (1987); Idaho Tort Claims Act, 6 Idaho Code sec. 901 et seq. (Michie 1988); and Iowa Tort Claims Act, Iowa Code Annot. ch. 25A.1 et seq. (West 1978).

Thus, the discussion herein of the FTCA is analogously applicable to state tort claims acts.

10 See Quinones v. United States, 492 F.2d 1269 (3d Cir. 1974), discussed in notes 16, 85-90 and accompanying text.

11 See notes 18-19, 21-22 and accompanying text.

12 See notes 34-36 and accompanying text.
support such a result.\textsuperscript{14}

Part I of this Comment analyzes the current legal culture's treatment of the negligent maintenance of records tort. Part II discusses the FTCA's legislative history and both policy and legal arguments concerning this tort. Finally, Part III explores the source of the duty by which a government agency may be obligated to maintain accurate records of drug test results.

I. JUDICIAL TREATMENT OF THE NEGLIGENT MAINTENANCE OF RECORDS TORT

Courts are severely divided over the availability of an action for negligent maintenance of records. Although the court in \textit{Duenges v. United States}\textsuperscript{15} rejected an early attempt to sue the federal government on the theory, the Third Circuit, in \textit{Quinones v. United States},\textsuperscript{16} allowed a federal employee to sue the government for negligent maintenance of personnel records. The plaintiff in \textit{Quinones} alleged that the government disseminated information based on incomplete and incorrect records to prospective employers and that as a result he was not hired. The court perceived a clear distinction between a claim for negligent maintenance of records and a claim for dissemination of injurious information. The latter would sound in defamation and thus be barred under the FTCA.\textsuperscript{17}

The court in \textit{Jimenez-Nieves v. United States}\textsuperscript{18} took the opposite approach. Alleging that the government mishandled his social security records, the plaintiff contended that his reputation was later harmed when his checks were not honored. The court refused to draw a distinction between negligence in the handling of records and the defamation involved in disseminating the informa-

\textsuperscript{14} See notes 62-70 and accompanying text.
\textsuperscript{15} 114 F. Supp. 751 (S.D.N.Y. 1953). In \textit{Duenges}, the plaintiff, who had been honorably discharged from the Army and later arrested for desertion, alleged that the Government had negligently maintained his records. The court held that the claim "arose out of false imprisonment and false arrest" as understood in the FTCA and was thus barred. Id. at 752.
\textsuperscript{16} 492 F.2d 1269 (cited in note 11). Barry Quinones was an employee of the Federal Bureau of Narcotics and Dangerous Drugs who had compiled a good work record, including awards and promotions. He alleged that he was denied employment in private industry because his employer made negative statements to prospective employers concerning his fitness and competence which implied that he had been discharged for misconduct. Quinones sued the government for both failure to make his records available to justifiably interested persons and failure to maintain "complete, comprehensive, adequate and accurate records" of his performance. Id. at 1272.
\textsuperscript{17} Id. at 1281.
\textsuperscript{18} 682 F.2d 1 (cited in note 9).
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Stating that the plaintiff's claims "resound in the heartland of the tort of defamation,"¹⁹ the court held that the action was barred by the libel and slander exceptions to the Federal Tort Claims Act.

The approaches represented by Quinones and Jimenez-Nieves are flatly at odds, as other courts have recognized.²⁰ Judicial reasoning in accepting or rejecting the theory of negligent maintenance of records is often unsatisfying and rather perfunctory, and demonstrates a failure to address fundamental issues of tort law jurisprudence. Some courts simply identify the two strands of decisions and choose one over the other. In Moessmer v. United States,²¹ for example, a former CIA employee alleged that reliance on false information in his employment files led CIA officials to pressure prospective employers not to hire him. The court agreed with the conclusion of Jimenez-Nieves and dismissed the Quinones argument by stating simply that "we decline to draw such a distinction in the present case."²² Cases such as Moessmer fail to provide either a satisfactory principle or reasoning that could result in one²³ that would guide an inquiry into a characterization of a negligent maintenance of records claim. They also fail to analyze why a claim should or should not fall within one of the FTCA exceptions. These courts are not alone in their troubles, however. Courts have been grappling with the scope of the exceptions to the FTCA since the Act was passed in 1946.²⁴

II. FTCA PRECLUSION, POLICY, AND COMMON LAW TORT EXCEPTIONS TO THE FTCA

Preclusion by one of the excepted torts under the FTCA is the major hurdle to an action for negligent maintenance of records in the federal employment context. The term "preclusion" refers to the superseding of one tort theory by another, where elements of both are present in the facts and where both theories may be utilized with respect to a similar injury. While pleading in the alter-

²⁰ See notes 22-23 and accompanying text.
²¹ 760 F.2d 236 (8th Cir. 1985).
²² Id. at 237.
²³ See Ortiz v. County of Hampden, 16 Mass. App. 138, 449 N.E.2d 1227, 1228 (1983) (recognizing the two lines of cases, the court found itself "persuaded by the reasoning in the Quinones case that the focus must be upon 'the type of governmental activity that might cause harm, not upon the type of harm caused'").
²⁴ See notes 44-61 and accompanying text.
native is a feature of federal practice and is typical at common law, there are situations where only one of two (or more) possible theories of relief will be entertained by courts.

Preclusion plays a major role in tort claims acts, such as the FTCA, which exclude certain types of tort actions against the government. The key question involves the characterization of the tort: Does the action sound in negligence, or does it sound in one of the excluded torts, thereby precluding the negligence claim? Courts should therefore make principled and reasoned characterization arguments before proceeding with other issues, such as the existence of a defendant's duty of care.

A. The Purposes of the Federal Tort Claims Act

The Federal Tort Claims Act, passed on August 2, 1946, waives the federal government's sovereign immunity from suit for injury caused by its own negligent conduct. But Section 2680(h) of the Act exempts several categories of tort from the waiver of immunity, including actions "arising out of" libel, slander, assault, battery, misrepresentation and other intentional torts.

Congress considered means of providing for tort relief against the United States for three decades prior to the passage of the Act.

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28 Fed. Rule Civ. Proc. 8 (e)(2) states that "[a] party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses."

29 See notes 43-61 and accompanying text.


28 28 U.S.C. sec. 1346(b):

The district courts shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

25 Some commentators have criticized the existence of the exceptions as ill-justified and antithetical to the primary purpose of the FTCA. See Kenneth Culp Davis, Administrative Law Treatise, sec. 25.08 at 854 (Supp. 1970) ("[t]he continued exemption of most deliberate torts seems clearly a source of injustice"); and Fowler V. Harper and Fleming James, Jr., The Law of Torts, Section 29.13 (1956); and Comment, The Federal Tort Claims Act, 56 Yale L.J. 534, 547 (1947).

26 The determination whether a particular claim is barred by one of the exclusions, however, "depends solely upon what Congress meant by the language used." United States v. Neustadt, 366 U.S. 696, 706 (1961). Thus, in an action for negligent maintenance of employment records, for instance, the standard of negligence will be determined by the law of the state in which the act occurred, but the question of whether the claim will be characterized as negligence or defamation will depend solely upon the FTCA and federal case law.
in 1946. Before 1946, a person who suffered injury at the hands of a government employee could attempt to sue the employee privately or petition Congress for a private relief bill.\textsuperscript{31} Such petitions became a significant burden on Congress. Many Congressional representatives argued that such bills did not result in equal application of the law and that Congress' resources were better spent elsewhere. Congress also had to contend with considerable external pressure. Legal commentators and several bar associations encouraged Congress to provide a remedy for parties injured by acts of United States government representatives.\textsuperscript{32} Thus, the dominant purposes of the FTCA were to relieve Congress of the burden of claims for private relief and to remedy the injustices caused by sovereign immunity to those who had suffered from the wrongful acts of government representatives.\textsuperscript{33}

The legislative history of the FTCA is not extremely helpful for determining the purpose of the exceptions in Section 2680(h).\textsuperscript{34} Before a Senate subcommittee Alexander Holtzoff testified that the excluded torts were "type[s] of torts which would be difficult to make a defense against, and which are easily exaggerated."\textsuperscript{5} There are also references in the legislative materials to three rationales for the exceptions embodied in Section 2680(h): (1) To en-

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\textsuperscript{31} Lester S. Jayson, 1 Handling Federal Tort Claims, sec. 51 at 2-5 and 2-6 (1988).

\textsuperscript{32} Id. at sec. 60 at 2-67 n. 5 and 6.

\textsuperscript{33} Id. at sec. 65.01 at 3-3. The Supreme Court described the background of the FTCA in \textit{Feres v. United States}, 340 U.S. 135, 139-40 (1950) ("[a]s the Federal Government expanded its activities its agents caused a multiplying number of remediless wrongs," wrongs which were "remediless solely because their perpetrator was an officer or employee of the Government").

\textsuperscript{34} See \textit{Johnson by Johnson v. United States}, 788 F.2d 845, 852 n. 5 (2d Cir. 1986) (the legislative history consists mostly of statements by members of Congress or administration officials on bills similar to the FTCA, which were not enacted; no legislative committee reports discuss the exceptions); \textit{Panella v. United States}, 216 F.2d 622, 625-26 (2d Cir. 1954) (legislative history is "meager"); and \textit{Collins v. United States}, 259 F. Supp. 363, 364 (E.D. Pa. 1966) (legislative history is not "at all helpful"). The absence of helpful legislative history addressing the FTCA exceptions has been noted by commentators as well. See Walter Gellhorn and Louis Lauer, \textit{Federal Liability for Personal and Property Damage}, 29 N.Y.U. L. Rev. 1325, 1341 (1954) ("[n]o persuasive reason has ever been advanced for [the willful torts] having been excluded from the reach of the Tort Claims Act").

\textsuperscript{35} Kenneth Culp Davis, 3 Administrative Law Treatise, sec. 25.08 at 470 (1958), testimony of Alexander Holtzoff before the Subcommittee of the Senate Committee on the Judiciary, 76th Cong., 3d Sess. Sec. 2690 at 39 (1940). Professor Davis has called this justification "thoroughly unpersuasive" because negligence actions are neither easier to defend against nor harder to exaggerate than intentional tort actions. Id. Holtzoff had been assigned several years earlier by Attorney General Mitchell to the task of coordinating the views of the Government departments concerning a tort claims act. He was instrumental in drafting earlier versions of what became the FTCA. See Edwin M. Borchard, \textit{The Federal Tort Claims Bill}, 1 U. Chi. L. Rev. 1, 1 n. 2 (1933).
sure that certain government activities are not disrupted by the threat of damage suits; (2) to avoid exposing the United States to liability for excessive or fraudulent claims; and (3) to exclude suits for which there are already adequate remedies.36

Only the second of the rationales suggested by the legislative history is relevant to the exclusion of an action for negligent maintenance of records,37 and it is unconvincing. An employee who can prove breach of a duty to maintain his personnel records and resultant harm has more than a "fraudulent" claim.

To the extent that Congress wrote the exceptions in the fear that punitive damage awards for intentional torts could be excessive, that fear is unrelated to the issue of preclusion, regardless of its merits. In any event, unlike an action sounding in defamation,38 a plaintiff in a negligence action must prove actual damages to win a judgment.39 As a practical matter, this proof requirement will serve as a cap on the amount recoverable for injury to reputation. An even more effective check against surreptitious punitive awards is the fact that FTCA actions are tried without a jury.40

The most persuasive explanation of Section 2680(h), but which does not appear in the legislative history, is that it repre-

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37 The first rationale concerns the discretionary function exception embodied in 28 U.S.C. sec. 2680(a), the policy behind which is that government officials must not be fearful of performing inherently discretionary functions. The policy sought to quell rampant fear of liability that may discourage innovation, and even participation, in government. The third rationale relates to exceptions such as that in Section 2680(c), which excludes claims arising with respect to tax assessment, customs duty and the detention of goods by customs officers.

38 Defamatory statements concerning a person with respect to his trade, occupation or business are slander per se. It is not necessary to prove special damages caused by the injurious character of the words. See, for example, Talbert v. Mauney, 80 N.C. App. 477, 343 S.E.2d 5, 8 (1986) (president of bank published statements that plaintiff forged his letters of credit and that plaintiff was a drug dealer). Publication of defamatory material is libelous per se—and actionable without proof of special damages—if it causes injury to one's business, trade, profession or office. Caruso v. Loc. U. No. 690, Int. Bro. of Team., 100 Wash.2d 343, 670 P.2d 240, 245 (1983). See also Keeton, Prosser and Keeton at sec. 112 (cited in note 7).

39 See note 10.

40 Because there is no right to sue the government "at common law" and because the FTCA creates an exception to the common law in this respect, the Seventh Amendment right to a jury trial does not apply to actions brought under the Act. Glidden Company v. Zdanok, 370 U.S. 530, 572 (1962). Juries but not judges are much more likely to exaggerate damages awards.
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sents Congress' desire to prevent the Government from being held vicariously liable for the willful and uncontrollable torts of its employees in cases where the Government has taken no specific and independent wrongful action, either directly by its officers, or indirectly by regulatory requirements. By allowing government liability to be based solely on its employment relationship with a tortfeasor, one ignores the impossibility of the government closely monitoring every one of its employees, and one exploits the government's position as an attractive "deep-pocket" defendant. 41

Under President Reagan's "Drug-Free Federal Workplace" executive order, 42 the number of federal employees who may be subject to testing is potentially large. One consequence of allowing an action for negligent maintenance of records would be an increase in government exposure to liability. Yet an increase in potential liability would be commensurate with the increased risk of harm to the employee that results from implementing and expanding drug testing programs.

However, judicial recognition of an action for negligent maintenance of records need not open the doors to excessive government liability. Most important, the risk of liability should be restricted to instances where government officials breach a clear and specific duty to maintain sensitive information. This restriction on liability would effectively contain government liability. The institution of a new, large-scale employee drug testing program greatly increases the aggregate risk of harm to employees resulting from the negligent handling of records. But such programs have no effect, for example, on the risk to society of drug-related wrongful acts committed by government employees (except, perhaps, to reduce the number of these acts through deterrence of drug use). Accordingly, while the government would be liable for negligent maintenance of drug-testing results under the reading of Section 2680(h) proposed by this Comment, it does not follow that the gov-

41 See, for example, Sheridan v. United States, 823 F.2d 820, 823 (4th Cir. 1987) (Winter, dissenting) ("the government should be held subject to suit in all cases where its alleged liability is independent of the assailant's employment status—i.e., where a court can isolate a government duty and source of negligence that is based on something other than the fortuitous circumstances that the government happens to be the assailant's employer"); and Thigpen v. United States, 800 F.2d 393, 399 (4th Cir. 1986) (Murnaghan, concurring) ("the United States owes no general duty to the public to supervise its employees with care"). See also Naisbitt v. United States, 611 F.2d 1350, 1356 (10th Cir. 1980) ("to hold the United States government legally responsible for the act in view of the immunity for liability based on intentional conduct and considering its lack of moral, legal or factual contribution would not only be invalid, it would constitute gross injustice").

42 See note 1.
ernment would be liable for negligent supervision of an employee who commits a wrongful act while under the influence of drugs, where the government had knowledge resulting from testing of the employee's drug use. Judicial recognition of an action for negligent maintenance of records does not open the doors to excessive government liability.

B. Case Law and FTCA Preclusion

In the absence of a clear and satisfactory legislative record, courts have had to determine the scope of the intentional tort exceptions listed in the FTCA. The judicial response has varied widely, with courts principally taking divergent positions on the scope of the statute's language which bars claims "arising out of" an excepted tort. 43

In a typical case, an employee whose reputation has been harmed by release of damaging, incorrect information brings an action against the employer for negligence in the maintenance of that information. By releasing the information to a third party, however, the employer has committed an act that constitutes an element of an action for defamation. Moreover, the interest in reputation that the employee seeks to vindicate by his or her negligence action is the same interest vindicated by a defamation action. The two causes of action depend on a common set of facts. Without the dissemination of information, the negligent maintenance would not have caused any injury. Similarly, absent negligent maintenance of the information, its dissemination would have caused no actionable harm.

In the early years after the Act's passage, the United States Supreme Court construed the FTCA liberally in several cases for the stated purpose of recognizing the remedial purpose of the Act. 44 More recently, there has been a general tendency to take a

43 "The provisions of this chapter and section 1346(b) of this title shall not apply to . . . (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights . . . ." 28 U.S.C. sec. 2680.

44 See Rayonier v. United States, 352 U.S. 315, 320 (1957) ("[t]here is no justification for this Court to read exemptions into the Act beyond those provided by Congress"); Indian Towing Co. v. United States, 350 U.S. 61, 68-69 (1955) (noting the statute's "broad and just purpose," the court asserted that it should not "import immunity back into a statute designed to limit it"); United States v. Yellow Cab Co., 340 U.S. 543, 548 (1951) (where statute contains a sweeping waiver of immunity to suit with well-defined exceptions, doctrine of strict construction should not be used to enlarge the exceptions); and United States v. Aetna Surety Co., 338 U.S. 366, 372 (1949) (finding Congressional intent not to bar subrogators claims). But see United States v. Shannon, 342 U.S. 288, 292 (1957) (refusing to
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stricter view of the Act when construing Section 2680(h). In these later cases, the Court has construed the "arising out of" language as a bar to actions that contain any elements of an excepted tort.**

Two competing concerns have given rise to this apparent dichotomy in judicial decisions. Where evidence of negligence as well as the elements of an excluded claim are present, courts have been concerned with not allowing a plaintiff to "circumvent" the exception** or to avoid it by artful pleading.** On the other hand, courts have been concerned that the negligent conduct of the government, which is often an antecedent event to any harm directly caused by an intervening actor, will go unpunished and therefore unchecked.**

The Supreme Court broadly construed Section 2680(h) in Neustadt v. United States,** which held that the government was

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*Neustadt*, 366 U.S. at 703 (cited in note 30). The classic example of an extremely formal reading of Section 2680(h) is *Moos v. United States*, 225 F.2d 705 (8th Cir. 1955), where a government surgeon operated on claimant's right leg instead of his left leg. The court held that the negligence action was barred by the assault and battery exception. But see *Lane v. United States*, 225 F. Supp. 850 (E.D. Va. 1964), where the court on similar facts refused to follow *Moos*.

See, for example, *Sheridan v. United States*, 542 F. Supp. 1243, 1244-45 (E.D.N.Y. 1982) ("[i]n determining the applicability of the exclusion, 'a court must look, not to the theory upon which the plaintiff elects to proceed, but rather to the substance of the claim which he asserts,' " quoting *Lambertson v. United States*, 528 F.2d 441, 443 (2d Cir. 1976)); and *Moffitt v. United States*, 430 F. Supp. 34, 37 (E.D. Tenn. 1976) ("[t]he crucial inquiry is, not whether the plaintiffs assert their claim in charges of negligence, but whether Congress intended to bar this type of suit, under whatever legal theory brought, by expressly limiting the waiver of governmental immunity in the Federal Tort Claims Act . . .").

*Nichols v. United States*, 236 F. Supp. 260, 263 (N.D. Miss. 1964) ("it must be said that the applicability of the jurisdictional exclusion in 28 U.S.C. sec. 2680(h) cannot turn upon the artistry of the pleader"); and *Coffey v. United States*, 387 F. Supp. 539, 540 (D. Conn. 1975) ("a plaintiff cannot overcome the exceptions in Section 2680(h) merely by the artistry of his pleadings").

The injustices which may result from too narrow a standard for finding government liability under the FTCA are apparent from the facts of *Bennett v. United States*, 803 F.2d 1502 (9th Cir. 1986). In *Bennett*, negligent hiring practices gave rise to the government employing a teacher who kidnapped, assaulted and raped several schoolchildren. A broad reading of Section 2680(h) would protect the government from the ramifications of this clearly negligent conduct in hiring. See also *Quinones*, 492 F.2d 1269 (cited in note 11) (government undertook the duty to maintain employment records); *Underwood v. United States*, 356 F.2d 92 (5th Cir. 1966) (government negligently failed to prevent assault); and *Loritts v. United States*, 489 F. Supp. 1030 (D. Mass. 1980) (government negligently failed to provide escorts to a member of female choral group who was assaulted and raped by a West Point cadet).

*366 U.S. 696* (cited in note 30). Commentators have criticized *Neustadt* for its broad rejection of the separability of tort theories. One author argues that the decision "breeds nonliability in contravention of the basic reasons behind the Tort Claims Act." Davis, Administrative Law Treatise at sec. 25.08 at 855 (cited in note 29).
not liable to a homebuyer who relied on a Federal Housing Administration ("FHA") inspector's inaccurate appraisal of a house. Stating that the homebuyer's claim, although framed in negligence terms, was one "arising out of" the excluded tort of misrepresentation, the Court held that Section 2680(h) required the dismissal of the action.⁶⁰

In Block v. Neal⁶¹ a unanimous Court refined the ruling in Neustadt by holding that where the underlying negligence or wrongful act constituted an independent cause of action, the FTCA exceptions might not be applicable even though elements of the excluded torts were present. In Neil, an officer of the Farmers Home Administration ("FmHA") supervised and inspected the construction of the plaintiff's house. Having assumed these two duties to the plaintiff, the officer was negligent in both respects. The plaintiff relied on negligently prepared inspection reports, only later to discover that the house had serious construction defects. The Court held that the plaintiff's action was not barred by the misrepresentation exception because the "duty to use due care to ensure that the builder adhere to previously approved plans . . . is distinct from any duty to use due care in communicating information to the respondent."²

Most recently, the Supreme Court faced the issue of the breadth of the "arising out of" language in Shearer v. United States.⁵³ In Shearer, the mother of a serviceman who had been kidnapped and murdered by another serviceman while off duty alleged that the Army had negligently failed to exert a reasonably sufficient control over the killer, and had negligently failed to warn other persons that the killer was at large while knowing that he had previously been convicted of manslaughter. The action was barred by the so-called "Feres doctrine."⁶⁴ Four of the eight sitting

⁶⁰ 366 U.S. at 702. See Comment, Negligence—Federal Tort Claims Act, 6 Rut.-Cam. L. J. 842 (1975), arguing that Neustadt presented a great but not insuperable challenge to the doctrine of Quinones. The comment argues persuasively that one may distinguish Quinones from Neustadt because a duty to the plaintiff existed only in the former case. The Supreme Court subsequently modified its holding in Neustadt, but not in a context in which it explicitly recognized the Quinones theory of negligent records maintenance. See notes 51-52 and accompanying text.


² Id. at 297.


⁶⁴ Id. at 57. The "Feres doctrine" derives from United States v. Feres, 340 U.S. 135 (cited in note 33), and holds that the FTCA is inapplicable to claims based on injuries suffered by military personnel as a result of the negligence of other armed services personnel.
Justices\textsuperscript{55} took the occasion, however, to argue that the "arising out of" language of Section 2680(h) is broad enough to encompass any action in which the facts, though stating a case for negligence, also support an action based on an excluded tort. The Justices declared that the Section 2680(h) exceptions could not be avoided by a "semantical recasting of events" to frame an assault and battery complaint in terms of negligence.\textsuperscript{56}

The view in \textit{Shearer} by the four justices of the Section 2680(h) intentional tort exceptions is too rigid and superficial to be convincing. Unfortunately, its formalism has spread to lower courts considering similar issues. For instance, in \textit{Johnson by Johnson v. United States},\textsuperscript{57} the court stated that to allow negligence claims based on prior foreseeability of harm "would defeat Congress's purpose in enacting Section 2680(h)" because such claims would be for injuries caused by an excluded tort.\textsuperscript{58} The reasoning in \textit{Johnson by Johnson} unjustifiably characterizes the lack of legislative history as consistent with its holding;\textsuperscript{59} but the case does not explain why Congress would have wanted the language in Section 2680(h) to be construed so broadly that it swallows up the operative provisions of the FTCA and thus allows the government to escape liability for its negligent acts. Several courts and individual judges have refused to accept \textit{Shearer}'s broad acceptance of preclusion.\textsuperscript{60}

In any event, the opinion expressed in \textit{Shearer} concerning Section 2680(h) is in tension with the Court's prior holding in \textit{Neal}, if not with the letter then certainly with the spirit.\textsuperscript{61} In addi-

\textsuperscript{55} Burger, White, Rehnquist and O'Connor.

\textsuperscript{56} \textit{Shearer}, 473 U.S. at 55.

\textsuperscript{57} 788 F.2d 845 (cited in note 34).

\textsuperscript{58} Id. at 851.

\textsuperscript{59} Id. at 852-53 ("[t]he meager legislative history available is consistent with the interpretation that Section 2680(h) cannot be avoided merely by alleging that an assault and battery was due to negligent supervision . . . . No report or congressional statement suggests otherwise").

\textsuperscript{60} See Bennett, 803 F.2d at 1503 (cited in note 48) ("without depending on the views expressed in \textit{Shearer}" court held that action for negligence was not barred by the FTCA assault and battery exception); and \textit{Morrill v. United States}, 821 F.2d 1426 (9th Cir. 1987) (three judge panel issued a per curiam decision noting that "this court has twice before declined to accept the statement of four members of the \textit{Shearer} court as controlling" and court held that the assault and battery exception did not preclude imposition of liability on the government for its supervisory negligence).

\textsuperscript{61} In an attempt to find consistency, several courts have interpreted \textit{Neal} to permit a \textit{Shearer} result which bars a broad range of negligence actions. See \textit{Johnson by Johnson}, 788 F.2d at 851 (cited in note 34); and \textit{Krejci v. U.S. Army Materiel Dev. Readiness Command}, 733 F.2d 1278, 1282 (7th Cir. 1984). According to these cases, \textit{Neal} allowed a separate action for negligence only where the negligent act was an independent tort, producing its own injury, no element of which was caused by an excluded tort. In other words, if the negligence
tion, because the view in Shearer was accepted by only four justices and lower courts have interpreted the view divergently, Shearer cannot be considered controlling on the Section 2680(h) preclusion issue.

C. Proximate Causation And Common Law Tort Jurisprudence

1. The Causal Chain From Negligence to Injury. The Shearer court's expansive reading of the "arising out of" language of Section 2680(h) assumes that the FTCA was drafted by Congress to recognize and allow only those actions against the government which are directly caused by the claimed injury. For example, under the Shearer view, if a plaintiff is assaulted by a government agent or employee, then Section 2680(h) bars an action against the government, even if the government was negligent in allowing the circumstances to arise which occasioned the attack, because the government did not directly cause the assault and battery tort.

The Shearer analysis, however, contradicts fundamental principles of tort law because the common law of tort considers a broad temporal range of events when determining the cause of an alleged injury. Determining whether a party's negligence is actionable turns on notions of proximate cause, a well-established if still somewhat confused area of tort law.\(^2\) Thus, courts will hold a negligent actor at fault for damage resulting from the actor's negligence despite an intervening act or event which may have occurred between the initial negligence and the ultimate injury. A defendant may be liable for negligence if he could have foreseen the possibility of an intervening act occurring.\(^3\)

The broad interpretation of Section 2680(h) by many courts\(^4\) is incorrect because it requires a negligence claim determination to turn on the nature of the intervening act rather than the act's ef-

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\(^3\) See, for example, Larson Mach., Inc., v. Wallace, 268 Ark. 192, 600 S.W.2d 1, 9 (1980) (if an injury is a natural or probable consequence of the original negligent act and is such as might reasonably have been foreseen, then an intervening cause is not sufficient to relieve the original actor of liability); and Sosa v. Coleman, 646 F.2d 991, 993 (5th Cir. 1981) (under Florida law, "where the intervening act is itself probable or foreseeable, [the] causal connection is not broken," between the initial negligence and the ultimate injury). See also Keeton, Prosser and Keeton at sec. 44 (cited in note 7); and ALI, Restatement (Second) of Torts at sec. 449 (cited in note 7).

\(^4\) See cases cited in notes 46-47.
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fect on causation. Such a formal and mechanical approach does not distinguish between acts of governmental negligence that proximately cause injury and those that do not.

A decision by the federal district court of Alaska explains the impropriety of relying on the type of intervening act rather than its substantive effect on causation for a determination of liability. In *DeLong v. United States*, civilian workers were allegedly struck and kicked by Marine guards on a restricted area of a military installation. The plaintiff maintained that military personnel were negligent in failing to notify the guards of the civilians’ right to be in the area. Distinguishing the case from those in which “the separate and independent acts of the intentional tortfeasor were intervening forces of such magnitude as to minimize or sever the connection between the government’s alleged negligence and the resulting injury,” the court held that this negligence action was separate from and not precluded by an action for assault and battery. Under the circumstances, stated the court, “the attack was not an intervening act and the tort did not arise out of the assault and battery. It had its roots in the Government’s negligence.”

Of course, courts are not constrained by common law tort notions in construing the provisions of the FTCA. But one must presume that Congress was aware of the basic tools of legal analysis used by courts when it enacted the FTCA with its provision creating governmental liability for negligent acts and certain omissions of government employees. This is especially important given the dearth of FTCA legislative history concerning preclusion. It is not clear from either the “arising out of” language of Section 2680(h) or the scant legislative history that Congress intended to override accepted concepts of proximate cause in determining whether or not a cause of action would lie in negligence. In these circumstances, ignoring many years of common law development makes little sense, particularly because the Shearer view is substantively unpersuasive.

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66 That is, these courts hold that if an intervening act is an element of a tort excluded by Section 2680(h), then they will bar a negligence action.
67 Id. at 337.
68 Id. at 338, quoting *Gibson v. United States*, 457 F.2d 1391, 1395-96 (3d Cir. 1972) (suit permitted for failure to exercise due care for safety of Job Corps instructors where trainee attacked instructor).
2. Comparing the Acts of Non-Government Employees. Shearer's view of Section 2680(h) leads to an anomaly when one considers the government's responsibility for wrongful acts of those not employed by the government. If an individual not employed by the government acquired access to negligently maintained government files and disseminated them in a defamatory manner, it is unlikely that a plaintiff's action against the government would be barred. Similarly, if a non-government employee commits an assault on government property, the FTCA exception for assault and battery will not protect the government from liability for an act of negligence which was a contributing cause of the assault.71

Such a view leads to a curious result: A preclusion determination under Section 2680(h) would turn not on the substantive issue of the government's culpability but on the employment status of a tortfeasor. If a tortfeasor were a government employee, the action would be barred; if he were not, the action would stand. Such an anomalous and inequitable result stands as another reason that the tendency to preclude tort actions under Section 2680(h) without explaining substantive issues of proximate cause, as represented by the Shearer view, should be rejected.72

3. Distinguishing Defamation from Assault and Battery. Much legal development concerning the FTCA exceptions has taken place in assault and battery cases. The intentional tort of assault and battery is listed as an exception to the FTCA, and the FTCA therefore shields the government from liability for assault and battery. However, there are strong reasons to hold the government liable whenever its negligent record keeping leads to defamation of an employee.

71 See, for example, Panella, 216 F.2d at 624 (cited in note 34). The court in Panella explained the rationale for treating tort actions differently in this context, stating that if a party who commits an assault is an employee of the government, then in the absence of the Section 2680(h) exception, the assault would give rise to an action against the government without any showing of negligence. But if a person who commits an assault is not a government employee, no assault action would lie against the government, even if there were a showing of negligence. Because Section 2680(h) was intended to prohibit claims which could have been prosecuted in the absence of the exception, the court argued the implication is that Section 2680(h) bars suit where the person committing an assault is a government employee but does not bar suit if he is not a government employee.

72 Many courts and commentators have criticized this inequitable result. See Note, Section 2680(h) of the Federal Tort Claims Act, 69 Geo. L.J. 803 (1981) (arguing for a "duty/causation" approach rather than an "employee/non-employee" approach to the FTCA assault and battery exceptions). See also Judge Winters' dissent in Sheridan, 823 F.2d 820 (cited in note 41) (a well-reasoned critique of courts' tendency to focus on employment status in FTCA cases involving assault and battery).
Both defamation and assault and battery are intentional torts. Both torts also involve an intervening actor who is the immediate cause of harm. In the case of assault and battery, however, the actor commits a prohibited act that is intended to inflict injury which is often severe. It is arguable that the government, notwithstanding its negligence, should not bear full liability for the harm resulting from such a willful and prohibited act. Although the government can control its negligence, and thereby control the commission of such offenses, the severity of the assault is largely in the hands of the intervening actor. Because the severity of the offense has a direct relationship to the extent of any damages, one can argue that the government should not bear such liability in assault and battery cases.\textsuperscript{73}

In contrast, where the government improperly maintains records leading to defamation of an employee, the intervening actor disseminates the information concerning the employee. Generally, this is done pursuant to a fixed and established procedure.\textsuperscript{74} Unlike assault and battery, dissemination of employee record information is often not a legally prohibited activity, and the intervening actor is usually not motivated by an intent to do harm to the employee’s reputation. Where agencies routinely disseminate information from employee records, any defamation that occurs is “intentional” in only the most formal sense. It is rarely deliberate and premeditated. Thus, in the typical case, the government’s negligence in maintaining records directly determines the severity of the harm that results from any subsequent dissemination of the information contained in the records. The extent of damage to the employee’s reputation is not likely to be caused by any willful deliberation of the intervening actor. Because there is more control by the government over the extent of the potential damage, there is less reason to insulate the government from liability than in an assault and battery action.

\textsuperscript{73} See, for example, \textit{Naisbitt}, 611 F.2d 1350 (cited in note 41), where two servicemen so deliberately and wilfully committed a series of assaults, rapes and murders that the court discounted as a causal factor any governmental negligence in failing to supervise them.

\textsuperscript{74} One such established procedure is invoked when a government agency makes employee information available to prospective employers. See \textit{Quinones}, 492 F.2d at 1277 (cited in note 11) (federal administrative regulations govern the disclosure of information from personnel records to the prospective employer of a government employee).
III. Duty To Exercise Care In The Maintenance Of Records

Given the framework described above, a "negligent maintenance of records" theory should usually not be precluded by Section 2680(h) of the FTCA. A necessary element of an action for negligence is the existence of a duty of care running from the defendant to the plaintiff.86 Any successful action against the government for mishandling personnel records requires that the government have owed the plaintiff a duty of care in the maintenance of the records. Because the "law of the place" applies to substantive matters in FTCA litigation,87 the existence of a duty must be determined according to applicable state law.

There is no universal test for the existence of a duty.87 It is "an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection."88 Among the many factors courts often consider to determine whether a duty exists are the foreseeability by the alleged wrongdoer of harm to the plaintiff, the existence of a statute or regulation which may create a duty and the gratuitous undertaking of a service by the alleged wrongdoer.89

Pursuant to President Reagan's executive order mandating a

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86 Prosser and Keeton at sec. 30 (cited in note 7).
87 See note 10 and accompanying text.
88 As is argued in Prosser and Keeton "[t]he statement that there is or is not a duty begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct." Prosser and Keeton at sec. 53 (cited in note 7). See also, Prosser, 52 Mich. L. Rev. 1 (cited in note 62).
89 Keeton, Prosser and Keeton at sec. 53 at 358.
87 The notion that the government "voluntary[ly] assum[es] ... a duty by affirmative conduct" is popular in litigation involving government defendants. See Quinones, 492 F.2d at 1278 (cited in note 11) (in action for negligent maintenance of records, "the employer would be required to confront the doctrine that one who gratuitously assumes to render a service obligates himself to proceed with due care"). See also Loritts, 489 F. Supp. at 1031 (cited in note 48) (the government "voluntarily undertook the task of providing escorts to the choral group of which plaintiff was a member. Having assumed that responsibility, the [government] is held to performance with due care"); and Indian Towing Co., 350 U.S. at 69 (cited in note 44) ("[t]he [government] need not undertake the lighthouse service. But once it exercised its discretion to operate a light ... and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order [and, if not,] to use due care to discover this first and to repair the light or give warning that it was not functioning").

Whether the theory of assumption of duty works in the case of government record-keeping is questionable. The government keeps personnel records for its own benefit and is not primarily concerned with the reliance of others upon the records. In any event, the stronger theory for the existence of a duty to maintain records is based on the existence of extensive administrative regulations, which suggests that the government should foresee harm that may result from negligent record keeping.
NEGLIGENT RECORD MAINTENANCE

"Drug-Free Federal Workplace,"80 several executive agencies have proposed guidelines for the maintenance and safeguarding of records that result from federal drug testing programs. These proposed guidelines "include a number of information collection and record keeping requirements which would be imposed on laboratories wishing to become certified to perform drug testing on [f]ederal employees."81 Other provisions severely restrict the categories of "routine use" disclosures that may be made of "records arising from drug testing of applicants and employees under E. O. [Executive Order] 12564."82

Courts may use administrative regulations to establish the existence of a duty of care,83 and judges generally adopt the requirements of a regulation as a standard of care when the regulation’s purpose is to protect a class of persons which includes the plaintiff alleging harm.84 The regulations passed pursuant to Executive Order 12564 were designed to protect the class of persons to whom drug tests were administered from harm that might result when the test results are mismanaged or disclosed without proper authority. Thus, a court may find that the Government has a duty to maintain such records with due care and that injury resulting from breach of this duty gives rise to an action for negligent maintenance of records.

80 See note 1.
83 See, for example, Delta Air Lines v. United States, 561 F.2d 381, 394 (1st Cir. 1977) (violation of an administrative regulation is either negligence per se or evidence of negligence); and Gill v. United States, 429 F.2d 1072, 1075 (5th Cir. 1970) (federal regulations may impose duties and standards of conduct on actors in suit under the FTCA). See also ALI, Restatement (Second) of Torts at sec. 285 (cited in note 7). But mere compliance with an administrative regulation, by itself, will not establish the exercise of due care. Wolford v. General Cable Company, 58 F.R.D. 583, 586 (E.D. Pa. 1973).
84 See Dyer v. United States, 832 F.2d 1062, 1065 (9th Cir. 1987) ("[n]egligence per se liability is founded upon violation of a statute or safety regulation, which raises a rebuttable presumption of negligence if the violation results in injury to a member of the class of persons intended to be protected by the legislation, and the harm is the kind the regulation was intended to prevent"); and Vu v. Singer Co., 538 F. Supp. 26, 32 (N.D. Cal. 1981) ("[v]iolation of [a] statute or regulation is evidence of negligence or may create a presumption of negligence"). See also ALI, Restatement (Second) of Torts, sec. 286 ("The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part (a) to protect a class of persons which includes the one whose interest is invaded, and (b) to protect the particular interest which is invaded, and (c) to protect that interest against the kind of harm which has resulted, and (d) to protect that interest against the particular hazard from which the harm results").
In an analogous situation, the court in *Quinones v. United States* found a governmental duty to maintain accurate personnel records within federal filekeeping regulations. The regulations require the creation of a personnel file for each employee and set forth guidelines for the maintenance and dissemination of information contained in the files. The *Quinones* court reasoned that because these agency regulations contemplated dissemination of the information in employees' files and consequently imposed safeguards, one could presume that the government also foresaw the potential risk to employees' reputations this information presented. The court therefore found a corresponding duty to use reasonable care in maintaining the accuracy of the records.

Courts use their discretion in locating a duty of care in the maintenance of records based upon administrative regulations and guidelines. The courts that have rejected the theory of negligent maintenance have done so generally in FTCA cases by finding the action barred under Section 2680(h), rather than by explicitly rejecting the existence of a duty to maintain records.

In a non-FTCA case, *Prouty v. National Railroad Passenger Corp.*, the court rejected the plaintiff's claim that his employer, Amtrak, owed a duty of care in the maintenance of his records. It distinguished *Quinones* by noting that *Quinones* relied on the presence of federal regulations, while in *Prouty* the "plaintiff ha[d] not indicated that Amtrak was charged with any specific duty to maintain employment records, imposed by statute or law."

As government agencies test more of their employees for drug...
use more frequently, information in employee files will grow significantly. By testing for information that will necessarily intrude into an employee's private life and by the very personal nature of most drug tests themselves, the government's ability to monitor its employees has increased. It is entirely appropriate for the law of torts to take account of the shift in federal employer-employee relations by offering protection against the possible abuses of private information. "[A]s our ideas of human relations change, the law as to duties changes with them."91

IV. Conclusion

Drug testing programs are being instituted in many Executive Branch agencies. The information maintained on employees is more extensive than before, and the potential for harm is great because of governmental access to and generation of such information. Where a federal employee suffers reputational injury or loses employment opportunities because of the release of incorrect or incomplete information contained in his employment records, he should be able to attempt to recover damages from the government by an action for negligent maintenance of records.

A court may deny recovery on two grounds. The court may find a negligence action precluded by the existence of an excluded tort listed under the FTCA, or the court may find no governmental duty to maintain records. Although the existence of a duty to maintain records is generally not difficult to demonstrate, especially where there are government regulations which acknowledge the existence of a potential for harm, preclusion by the FTCA raises a more difficult issue. Many courts, following Supreme Court language in Shearer, suggest a strict, formal approach to Government liability under the FTCA and have been unreceptive to claims alleging Government negligence where elements of a related intentional tort are present. Other courts have resisted this excessively formalistic approach, deciding cases with a view to the remedial purposes of the FTCA.

In federal employee suits brought under the FTCA, negligence in the maintenance of employment records should be treated as an actionable claim, independent of any defamation that may result from the negligence, where the employee alleges breach of a specific duty. Mere characterization of a harm as an intentional tort should not be permitted to consume a plaintiff's substantive claim

concerning government wrongdoing. Allowing an action for negligent maintenance of records is consistent both with Congress' apparent purposes in creating Section 2680(h) and with sound policy. Barring such actions allows the Government to escape liability for its negligent and wrongful acts, which is contrary to the fundamental premises underlying the FTCA's enactment.