Reducing the Federal Docket: An Exclusive Administrative Remedy for Prisoners Bringing Tort Claims Under the Federal Tort Claims Act

Willie Free, who is serving a life term in a federal penitentiary, has filed twelve lawsuits in the past two years. Each claim has sought relief under the Federal Tort Claims Act[1] for the alleged destruction of his personal property. Every time his cell has been searched, he has threatened to bring a tort claim against the government. In response to the threats, Judge Posner in *Free v. United States* observed that Free is trying to deter the prison guards from searching his cell, and is trying to obtain replacements for personal property at the government's expense.[2] In his last complaint, Free alleged that during a shakedown search of his cell, prison guards either negligently or intentionally destroyed some of his personal items including toothpaste, baby powder, and a tennis shoe.[3] Free estimated the value of the items to be fifty dollars. The parties consented to have the suit tried before a federal magistrate, and at its conclusion, the federal magistrate found for the United States. Free attempted to appeal this decision by bringing an action in federal district court under the In Forma Pauperis Statute.[4] The district court denied the petition, prompting Free to appeal to the Seventh Circuit Court of Appeals. Judge Posner wrote a colorful opinion denying Free's claim, and expressing a concern about the abuse of the judicial system by prisoner litigants.[5]

I. Introduction

This Note focuses on the problems of prisoner tort litigation in conjunction with the Federal Tort Claims Act (hereinafter F.T.C.A.).[6] *Free v. United States* illustrates the problems of prisoner tort litigation and the compelling need to change the current system. As a solution, this Note proposes that Congress (1) amend the current F.T.C.A. to

---

1. 28 U.S.C. §§ 2671-80 (1983).
2. Free v. United States, 879 F.2d 1535, 1536 (7th Cir. 1989).
3. *Id.* at 1535-36.
4. 28 U.S.C. § 1915 (1988). The In Forma Pauperis Statute allows indigent claimants to bring suit in federal court without paying the necessary court filing fees. *See infra* note 51 and accompanying text.
5. *Free*, 879 F.2d at 1535-36.
6. As will be discussed later in detail, the Federal Tort Claims Act is a waiver of immunity by the United States government for torts committed by government employees. The F.T.C.A. allows recovery if any employee of the United States government causes injury, loss of property, personal injury, or death by the negligent or wrongful act or omission while acting within the scope of his office or employment. 28 U.S.C. § 1346 (1988).

preclude prisoners from bringing suit in the federal district courts; (2) create an Office of Prisoner Complaints;[7] and (3) grant authority to the Attorney General[8] to appoint a Claims Officer who would be the director of the newly created Office of Prisoner Complaints. The proposed Office of Prisoner Complaints would provide an impartial and equitable outcome for prisoner tort claimants, unlike a solution that delegates authority to the Bureau of Prisons to render a final determination of prisoner tort claims.[9]

Habeas corpus[10] and civil rights[11] claims exceed the scope of this Note. Although judges, scholars, and practitioners have suggested that these areas of prisoner litigation are ripe for reform, the Supreme Court has repeatedly emphasized that these actions are fundamental to the scheme of the United States Constitution.[12]

II. The Federal Tort Claims Act in Conjunction with Federal Prisoner Tort Claims

A. An Historical Background of the F.T.C.A.

The United States government once held what Justice Frankfurter described as a "privileged position" of "legal irresponsibility" for torts

---

7. As discussed *infra*, in Section IV(B) the Office of Prisoner Complaints would be an independent agency established to provide an unbiased exclusive remedy for prisoner tort claimants.

8. The Attorney General would be the natural choice to appoint the Claims Officer because the F.T.C.A. already confers power to the Attorney General to settle tort claims. The Attorney General would simply be delegating authority to the Claims Officer. *See* 28 U.S.C. § 2677 (1988).

9. *See infra* notes 66-84 and accompanying text. As is apparent, the Bureau of Prisons would have difficulties rendering an unbiased decision because the prisoner's claim would involve its own prison officials.

10. The writ of habeas corpus is the essential remedy to safeguard citizens against imprisonment in violation of their constitutional rights. Darr v. Burford, 339 U.S. 200 (1950). "The Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2.

11. Civil rights claims include: "Every person who, under color of any statute, ordinance, regulation, custom or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States or any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (1988). *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (unreasonable search or seizures violating the fourth amendment may give rise to tort action against a federal official). The federal government is liable for civil rights violations occurring under the fourth amendment as discussed in *Bivens*, whereas civil rights actions outside the fourth amendment apply only to state and local government officials.

12. *See* Wolff v. McDonalds, 418 U.S. 539, 579 (1974); Johnson v. Avery, 393 U.S. 483, 485 (1969).

committed by government employees.[13] In 1946, Congress enacted the F.T.C.A. to provide a judicial remedy for private citizens injured by the negligence or misconduct of United States government employees.[14] Before the passage of the F.T.C.A., the doctrine of sovereign immunity was an insurmountable obstacle to plaintiffs seeking to bring tort suits against the United States.[15] The only remedy available to victims of a government tort was to submit a bill of private relief to Congress in the hope that it would receive sympathetic consideration and that they would pass it.[16]

After more than a century of legislative deliberation in developing a strategy to provide a remedy for those who suffered because of the wrongful conduct of federal employees,[17] Congress finally responded after a New York City catastrophe injured thousands of people and caused extensive damage.[18] The F.T.C.A., by its terms, retroactively applied to all tort claims occurring on or after January 1, 1945, thus providing a remedy for the victims of the calamity.[19]

The F.T.C.A is not a complete waiver of governmental immunity. Adjudication of tort claims within the scope of the F.T.C.A. must be tried by federal district court judges or federal magistrates.[20] Also, Congress

---

13. Keifer v. Reconstruction Fin. Corp., 306 U.S. 381, 388 (1939).

14. 28 U.S.C. § 1346 (1988).

15. "[N]o suit can be brought against the United States . . . . Even when suits are authorized, they must be brought only in designated courts." United States v. Shaw, 309 U.S. 495, 500-01 (1940). Also, the Supreme Court in State of Minn. v. United States, 305 U.S. 382, 388 (1939) stated: "[I]t rests with Congress to determine not only whether the United States may be sued, but in what courts the suit may be brought."

16. 1 L. JAYSON, HANDLING FEDERAL TORTS CLAIMS § 52 (1990). Because of this exclusive relief through private legislation, Congress found itself under an intense and time consuming burden of attempting to adjudicate claims. *Id.* President Fillmore even asserted that the private relief remedy was a "growing evil resulting in the denial of justice and at times even in the ruination of claimants." *Id.* at 2-7.

17. For legislative history showing the congressional purpose behind the adoption of a general tort claims act, reference should be made to the *Hearings Before the Joint Committee on the Organization of Congress*, 79th Cong., 1st Sess. 4, pts 1-4, 67-69, 95, 218-19, 241, 341, 598, 696-97, 907 (1945).

18. On the morning of July 28, 1945, a United States Army bomber, flying in dense fog, struck the Empire State Building. The crash caused the death or serious injury of numerous people and extensive property damage. At that time, no judicial remedy was available to the victims of that crash. Twelve months later, Congress responded by passing the Federal Tort Claims Act. 1 L. JAYSON, *supra* note 16, § 51.

19. The dominant objectives of the statute were to relieve Congress of the burdens and pressures of private relief bills and to do justice to those who suffered injuries or losses through the wrongs of government employees. 1 L. JAYSON, *supra* note 16, § 51.

20. Magistrates are such an integral part of the district court that if both parties agree, an F.T.C.A. suit instituted in a district court may be tried by a magistrate in accordance with the provisions of the Federal Magistrates Act. Thus, magistrates handle a number of tort claims brought in federal court. *See* Phillips v. United States, 792 F.2d 639 (7th Cir. 1986); 28 U.S.C. §§ 631-636 (1988).

has limited application of the Act by excluding certain categories of claims from recovery.[21] To the extent that a claim falls outside the scope of the act or within its limitations or exceptions, a district court has no jurisdiction over it.[22]

B. The F.T.C.A. in Conjunction with Federal Prisoner Claims

Prior to 1963, the district courts were closed to prisoners in federal penal institutions with respect to tort claims.[23] The following quote explains why judges were reluctant to allow prisoners to recover damages through tort claims.

> Courts assigned several reasons for refusing the prisoners to recover. It was said that to open the courts to prisoners confined in federal penal institutions who wish to assert that they had been injured by the negligence of government employees charged with their detention might be detrimental to the maintenance of discipline.[24]

However, in 1963, the Supreme Court in *United States v. Muniz*[25] decided that a federal prison inmate claiming injury as a result of the negligence of prison officials should not be barred from suing the United States

---

21. The following is a partial list of claims which have been excluded:
(1) claims arising out of the loss or miscarriage or negligent transmission of letters or postal matters;
(2) claims arising in respect of the assessment or collection of any tax or customs duty;
(3) claims of persons in the military forces for injury received in the line of duty or for which relief is provided by other law;
(4) claims for injury or death of a prisoner;
(5) claims arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights; and
(6) claims based upon the performance or failure to perform a discretionary function or duty on the part of a federal agency or employee, whether or not the discretion involved be abused.
28 U.S.C. § 2680 (1988).

22. *See, e.g.*, Strick Corp. v. United States, 625 F.2d 1001, 1010 (Ct. Cl. 1980); Maltais v. United States, 439 F. Supp. 540, 547 (N.D.N.Y. 1977).

23. W. WRIGHT, THE FEDERAL TORT CLAIMS ACT 29 (1959).

24. *Id.* A parallel can be drawn to Congress's decision to exclude servicemen and prisoners from recovering under the F.T.C.A. With the military, Congress feared that such a remedy would be disruptive of the chain of command that is crucial to the functioning of the military.

25. 374 U.S. 150 (1963) (prisoners allowed to bring suit under the F.T.C.A. for the first time). On remand, *see* Muniz v. United States, 280 F. Supp. 542 (S.D.N.Y. 1968) (denying recovery because of failure to establish negligence).

under the F.T.C.A. simply because of his status as a prisoner.[26] Since that time, federal prisoners have been allowed to bring their tort claims in federal district court.

The F.T.C.A., as it relates to prisoners, requires an inmate who desires recovery for a tort claim first to submit a claim, regardless of its amount, to the Bureau of Prisons.[27] The Director of the Bureau of Prisons has the authority to actually settle the dispute.[28] However, the Director redelegates this authority to the Regional Counsel when the claim exceeds $2,500.[29]

The first step in the administrative procedure is informal resolution.[30] The prisoner and a prison staff member attempt to resolve the

---

26. *Muniz*, 374 U.S. at 164-66.

27. In an effort to reduce the number of claims brought under the F.T.C.A., Congress amended the Act in 1966 to require an exhaustion of the administrative process before suit could be brought in federal court. The amended statute provides that no suit may be brought until after the appropriate agency has issued a final denial. The Bureau of Prisons's administrative remedy procedure is contained in Claims Under the Federal Tort Claims Act, 28 C.F.R. § 543.30-.32(1989).

28. 28 C.F.R. § 14.1-.11 (1989). The Director of the Bureau of Prisons is delegated authority by 28 C.F.R. §§ 0.96 and 0.172 (1989) to consider, ascertain, adjust, determine, settle, and pay the tort claims as long as the compromise does not exceed $2,500. The prison staff provides the necessary forms for inmates who wish to file a claim. These forms are then submitted to the Regional Office in the region where the basis for the claim occurred and are ordinarily investigated locally or in the location where the claim occurred. The Warden must designate a staff member to act as an investigating officer.

29. Claims Under the Federal Tort Claims Act, 28 C.F.R. § 543.31 (1989).

30. Claims Under the Federal Tort Claims Act, 28 C.F.R. § 543.31 (1989) establishes the following procedures:

(a) Staff shall provide the necessary forms to an individual who wishes to file a claim.
(b) Claims are to be submitted first to the Regional Office in the region where the basis for the claim occurred. *See* 28 C.F.R. § 503.
(c) Claims are ordinarily investigated locally (where the basis for the claim occurred).
(d) The Warden shall designate a staff member to act as Investigating Officer.
(e) The Warden shall submit the Investigative Report, with the Warden's recommendations, to Regional Counsel. The Regional Counsel shall consider the merits of the tort claim, and is authorized to propose to the claimant a settlement not to exceed $500 or to otherwise dispose of the claim.
(f) If the appropriate disposition appears to be a settlement offer in excess of $500, Regional Counsel shall forward the claim, as well as the institutional and regional recommendations to the Office of General Counsel. The General Counsel shall consider the merits of the tort claim and is authorized to propose a settlement to the claimant not to exceed $2500 or to otherwise dispose of the claim.
(g) Either the Regional Counsel or General Counsel may deny any claim filed under the Federal Tort Claims Act regardless of the amount of the claims.

dispute.[31] If this informal process fails, the inmate files a formal written complaint on the appropriate form.[32] Thereafter, if the inmate is not satisfied with the Warden's response to the initial complaint, the inmate may appeal to the Regional Director within twenty calendar days of the date of the Warden's response.[33] After the Regional Director issues the final disposition, if the prisoner claimant is unsatisfied with the result, the prisoner may appeal to the General Counsel within thirty calendar days from the date of the Regional Director's response.[34] The General Counsel's denial of the claim will constitute a final administrative denial.[35] Thereafter, the prisoner has the right to bring suit in federal district court.

These procedures have been explained in detail because the administrative remedy proposed by this Note, as will be discussed later, still requires the administrative process to be exhausted.

III. Problems with the Federal Tort Claims Act and the Growing Federal Docket

A. The Scope of the Problem

The United States federal courts are burdened by the staggering number of cases pending on the federal dockets. Between September 30, 1987 and September 30, 1988, there were 69,062 diversity filings and 39,732 prisoner petitions.[36] During the 1980s, prisoner litigation probably represented the largest increase in case filings in the federal judiciary.[37]

Judges in the 1940s and 1950s denied prisoners the right to bring tort suits against prison officials because of the fear of potential discipline problems that would be created inside the prisons.[38] Their concerns were warranted. The following comment is a prime example of how some federal prisoners abuse the judicial process:

> Since no human being could really generate more than 554 causes of action in one lifetime, one would assume that many of Green's

---

The denial of a claim constitutes a final administrative action.

(h) Staff shall attempt to make a claim determination within six months from the date of filing. If a final disposition is not made within the six month period, the claimant may assume that the claim is denied. The denial of a claim constitutes a final administrative action. An individual whose claim is denied may elect to institute a suit upon denial of that claim.

31. W. Wright, *supra* note 23, at 38-40.
32. *Id.*
33. Claims Under the Federal Tort Claims Act, 28 C.F.R. § 543.31 (1988).
34. *Id.*
35. *Id.*
36. Free v. United States, 879 F.2d 1535, 1537 n.1 (7th Cir. 1989).
37. *Id.* at 1538.
38. W. Wright, *supra* note 23.

> filings have been purely repetitions of previous suits. . . . In addition, most courts have found them frivolous, irresponsible and unmeritorious . . . and some have been found to be malicious and in bad faith as well. . . . One court suggested that by swamping the court with frivolous suits, Green somehow hoped to force his own release from custody. . . . Another considered it a scheme to impede the judicial system and bring the court system to a halt.[39]

Many prisoners are interested in using the courts to achieve ends other than the adjudication of meritorious claims. Prisoners use the judicial system to harass prison and judicial officials by pursuing cases to the full limits of the law. Others want the government to pay for their worn out personal items. "These cases are 'typically brought for their nuisance value by persons on whose hands time hangs heavy' and who hav[e] nothing else constructive to occupy their unproductive hours."[40]

In *Tinker-Bey v. Meyers*,[41] the issue was whether the United States government should be liable under the F.T.C.A. for a prisoner's two sweatshirts, pair of tennis shoes, and a pair of pajama bottoms allegedly lost when the prisoner was transferred into disciplinary segregation. The prisoner sought $150 to replace those items. Judge Posner denied the claim, labeling it as "frivolous," and stated "none of the usual inhibitions to bringing suits for trivial or imagined losses weighs on prisoners serving long prison terms."[42] Posner further expressed his frustration over prisoner litigation in *Free* when he stated that "[s]uch [frivolous] suits [filed under the Federal Tort Claims Act] convert the federal courts into small-claims courts and prison lost-and-found departments."[43]

Dollar amounts alone are not sufficient to deem claims frivolous. However, at a time when federal caseloads are bulging, a claim with an extremely small dollar amount does not necessitate attention by a federal judge.[44] These claims should be settled long before they reach the courthouse doors. As Judge Coffey stated in *Free*:

---

39. J. Anderson, Curbing the Abuses of Inmate Litigation 14 (1986) (quoting Green v. Arnold, EP-80-CA33 (W.D. Tex. 1981) (unpublished opinion)).

40. *Free*, 879 F.2d at 1540 (quoting Savage v. CIA, 826 F.2d 561, 563-64 (7th Cir. 1987)).

41. 800 F.2d 710 (7th Cir. 1986).

42. *Id.*

43. 879 F.2d at 1536.

44. The goal of many prisoners is to continue to torment the judges who put them in jail in the first place. In *Tinker-Bey*, Judge Posner provided another example of abusive prisoner litigation: "Another inmate sued for the value of an 'Afro pick' and refused a settlement offer of $2." 800 F.2d at 710.

> While there is no dispute that prison inmates are entitled to relief in a court of law for true violations of their constitutional rights, I do believe it is becoming more evident every day that the efficient administration of justice is not served with the filing of highly questionable complaints alleging constitutional violations intermingled with the loss of various articles of clothing . . . .[45]

B. The Increase in Prisoner Litigation in Conjunction with the F.T.C.A.

Several reasons exist for the dramatic increase in federal prisoner litigation over the past twenty years. Supreme Court decisions in the 1960s and 1970s account for a large portion of this increase. In *Younger v. Gilmore*,[46] the Supreme Court held that the United States must protect prisoners' right of access to the courts by providing them with law libraries or alternative sources of legal knowledge.[47] The Supreme Court went a step further in *Bounds v. Smith*[48] when it decided that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."[49]

Another reason prisoners continue to bring vexatious litigation is because the F.T.C.A. is inundated with flaws; thus, prisoners exploit the deficiencies and file numerous claims. A significant problem is that no minimum amount in controversy is required to file an action under the F.T.C.A. Federal prisoners may bring claims in federal court regardless of the dollar amount or type of dispute.[50] In addition, the increase in federal prisoner litigation has occurred because the F.T.C.A., in conjunction with the In Forma Pauperis Statute, provides prisoners, *at no cost*, the opportunity to bring tort actions repeatedly in federal court to redress acts allegedly committed by federal prison officials.

The In Forma Pauperis Statute[51] allows inmates to file civil or criminal claims in federal court without prepaying filing costs so long as they

---

45. 879 F.2d at 1539-40 (Coffey, J., concurring).

46. 404 U.S. 15 (1971) (affirming Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970)).

47. *Id.*

48. 430 U.S. 817 (1977).

49. *Id.* at 828 (footnote omitted). As will be discussed *infra* Section V(A), a tort claim is not considered to be a fundamental right; thus, the Constitution would not require federal courts to entertain prisoners' tort claims or dictate that prisoners be afforded the right to bring suit in a federal court.

50. *See, e.g.*, Free v. United States, 879 F.2d 1535 (7th Cir. 1989); Tinker-Bey v. Meyers, 800 F.2d 710 (7th Cir. 1986).

51. 28 U.S.C. § 1915 (1988).

file an affidavit, in good faith, stating their inability to pay the costs of the lawsuit.[52] Significantly, unlike a paying litigant, an inmate filing an in forma pauperis claim lacks any monetary incentive to refrain from filing malicious or repetitive lawsuits.[53] Congress, in order to prevent abusive or frivolous litigation, enacted section 1915(d) of the In Forma Pauperis Statute authorizing federal courts to dismiss claims filed by prisoners in forma pauperis if the claims are frivolous or if the court is satisfied that the allegations of poverty are untrue.[54] Although federal judges can review frivolous claims quickly and dismiss them sua sponte, the docket continues to be burdened with repetitive federal inmate claims. As Chief Justice Rehnquist stated in his dissent in *Cruz v. Beto*,[55] "The inmate stands to gain something and lose nothing. . . . Though he may be denied legal relief, he will nonetheless have obtained a short sabbatical in the nearest federal courthouse."[56] Indeed, the Supreme Court has recognized that meritless in forma pauperis complaints impede efficient judicial administration.[57]

The In Forma Pauperis Statute, recent case law requiring mandatory access to the courts, and the deficiencies in the F.T.C.A. have resulted in an overwhelming amount of prisoner litigation placed on federal court dockets. Unfortunately, this litigation tends to be unmeritorious and serves only to burden the federal courts.

In conclusion, the federal court system should not serve as a dumping ground for prisoners' frustrations. Judges, as well as taxpayers and other litigants, suffer as a result of the repetitive and abusive litigation. Other litigants are pushed back in the line for adjudication of their claims when numerous frivolous claims or minor disputes[58] continue to saturate the docket. The public must bear the burden of paying higher taxes for the prisoner litigants who file in forma pauperis. Moreover, prisoners themselves may suffer if the current abuse is not halted. As the court in *Green v. Wynick* stated, "[I]t is common sense that conscientious

---

52. *Id.*

53. "Congress recognized, however, that a litigant whose filing fees and court costs are assumed by the public, unlike a paying litigant, lacks an economic incentive to refrain from filing frivolous, malicious, or repetitive lawsuits." Neitzke v. Williams, 109 S. Ct. 1827, 1831 (1989).

54. 28 U.S.C. § 1915(d) (1988).

55. Cruz v. Beto, 405 U.S. 319, 327 (1972) (Rehnquist, J., dissenting).

56. *Id.* at 326-27 (Rehnquist, J., dissenting).

57. *Neitzke*, 109 S. Ct. at 1832.

58. Minor disputes are deemed minor only in the sense that they are of little monetary worth. Often, the prisoner is suing to establish a principle, and is unconcerned about the actual loss he has incurred. This Note argues that minor disputes do not deserve federal district court attention; instead, these types of disputes command an exclusive administrative remedy.

recognition of prisoner rights can continue only as long as the process is not abused by the prisoners to the extent that renders it meaningless. We are coming dangerously close to that time."[59] Furthermore, as Judge Coffey stated in *Free*:

> Given the tremendous increase in prisoner cases in the federal courts and the projected increase in prisoner population, as well as the vast amount of court time directed toward the imposition of these appeals that could be used to address other, more substantial controversies, singling out prisoners' unmeritorious small tort claims for relegation to an administrative remedy is clearly a logical step toward reducing the caseload of the federal judiciary . . . .[60]

Thus, as this Note advocates, Congress should revise the F.T.C.A. to preclude prisoners from the federal courts and to establish an independent administrative remedy.

IV. The Proposal of an Impartial, Equitable, but Exclusive Administrative Remedy

A. The Current Remedy for Prisoner Tort Claims

The early tort claims bills of the 1920s and 1930s considered an administrative mode for governmental tort liability.[61] The bill finally enacted (the F.T.C.A.) adopted a judicial mode for disposition of tort claims.[62] Congress vested decisional authority in the federal courts and agencies to dispose of tort claims.[63] In 1966, Congress amended the F.T.C.A. to require claimants to exhaust the administrative process before filing in the federal courts, which thus demonstrates that Congress intended and encouraged agencies to dispose of tort claims.[64] "If the original act was designed to ease the burdens of Congress by shifting primary responsibility for government tort claims to the courts, the 1966 amendments sought to transfer the burden to the agencies."[65] Thus, Congress recognized, at that time, the need for agency resolution. The

---

59. Green v. Wyrick, 428 F. Supp. 732, 735-36 n.4 (W.D. Mo. 1976) (quoting Green v. Garrot, Misc. No. 76-8184 (8th Cir., Nov. 2, 1976)).

60. 879 F.2d at 1540 (Coffey, J., concurring).

61. Bermann, *Federal Tort Claims at the Agency Level: The FTCA Administrative Process*, 35 Case W. Rev. 509, 529 (1985).

62. *Id.* at 529.

63. *Id.*

64. *Id.* at 520.

65. *Id.* at 531.

current F.T.C.A. must be modified in order to reduce the federal workload, to decrease the number of frivolous and minor claims, and to provide an impartial and equitable remedy for federal prisoners. Accordingly, this Note proposes that Congress should (1) revise the F.T.C.A. to preclude federal prisoners from bringing their claims in federal district court; (2) enact a subsequent statute to establish an Office of Prisoner Complaints; and (3) allow the Attorney General[66] to appoint an official (Claims Officer) to establish the Office of Prisoner Complaints.

B. The Proposal: The Office of Prisoner Complaints

The concept of an Office of Prisoner Complaints is modeled after ombudsman laws that have existed in Scandinavia since 1713[67] and in the United States since the 1960s.[68] In Scandinavia, "[t]he Ombudsman is an officer of Parliament who investigates complaints from citizens that claim they have been unfairly dealt with by government departments and who, if he finds that a complaint is justified, seeks a remedy."[69] In the United States, Hawaii, Nebraska, and Iowa have enacted ombudsman legislation with similarities to the Scandinavian Ombudsman.[70]

Unlike this Note's proposal, state ombudsman statutes grant power to the Ombudsman *only* to make recommendations and to publish reports that serve merely to embarrass public employees; whereas, the proposal of this Note is to grant a public official (hereafter a Claims Officer) the power to make *binding* decisions.[71] Thus, the proposed statute requires that if the Claims Officer finds that a prison employee is guilty of any wrongdoing, the Bureau of Prisoners will be responsible for paying estimated damages caused by the employee or employees as determined by the Claims Officer. The prisoner will be unable to appeal the Claims Officer's decision in a federal court. The remedy is exclusive and final.

---

66. As the Federal Tort Claims Act already authorizes the Attorney General to settle claims, theoretically the Attorney General would be delegating authority to another official responsible for prisoner tort claims; thus, the proposed Office of Prisoner Claims would be an extension of the Attorney General's office. *See* 28 C.F.R. § 14.10 (1988).

67. In 1713, Sweden created an Ombudsman Office. It was the first country to establish such an office. The Ombudsman Office's function was to exercise general supervision over public servants to ensure that the laws and regulations were being complied with and they were discharging their duties properly. Rudholm, *The Chancellor of Justice*, in THE OMBUDSMAN 17 (D. Rowat ed. 1965).

68. Hawaii, Nebraska, and Iowa have patterned statutes after ombudsman legislation. *See* Frank, *State Ombudsman Legislation in the United States*, 29 U. MIAMI L.R. 397, 398 (1975). The proposal of this Note differs substantially from these statutes.

69. ROWAT, THE OMBUDSMAN 7 (D. Rowat ed. 1965).

70. Frank, *supra* note 68, at 398. *See also* HAWAII REV. STAT. §§ 96-1 to 96-19 (Michie 1988 & Supp. 1990); 21 IOWA CODE ANN. §§ 601G.1-.23 (West 1988); NEB. REV. STAT. § 81-8240 (1987).

71. *See* Frank, *supra* note 68, at 435.

To attain the goal of rendering unbiased, fair, and quick resolutions of prisoner tort claims, the Attorney General will appoint a Claims Officer recognized for wise judgment, objectivity, and integrity, who will be responsible for establishing the Office of Prisoner Complaints. The Claims Officer need not be an attorney, but must be well-equipped to analyze administrative and legal issues. Her term will be set for a number of years to ensure isolation from the political process.[72] Moreover, in order to conduct a fair and thorough investigation of the federal prisoners' tort claims, she will need to be empowered with the tools to deal with the federal prison personnel and the Bureau of Prisons — the agency ultimately responsible for paying the claims.[73] In order to carry out the goals of the Office of Prisoner Complaints, the Claims Officer must have the following power:

(1) To appoint a Deputy Claims Official who will serve as the acting director when the Claims Official is unavailable. The Deputy will be expected to possess the same qualifications as the Claims Officer.[74]

(2) To control the selection and retention of the staff.[75]

(3) To delegate authority to the staff.[76]

(4) To make rules and regulations for conducting investigations.

(5) To receive complaints from federal prisoners, investigate those claims, make findings, and report findings to the respective prisons.[77]

(6) To subpoena any person to appear to give sworn testimony, or produce documentary or other evidence that is necessary for

---

72. The Claims Officer will serve for a number of years in order to be shielded from political pressures. This is modeled after the federal judiciary in which federal judges are given a life term to serve in order to remain a non-political entity. A long term is desirable to permit the Officer sufficient time to become proficient at the attendant duties; to provide a measure of independence from politics; and to provide prestige and security to attract qualified people to the position. To ensure the accountability that is desired, an excessively long term would not be recommended. Frank, *supra* note 68, at 413.

73. Again, this proposed Office is patterned after the Ombudsman Statute. *See* Frank, note 68, at 423.

74. Patterned after the Ombudsman Statute, the appointment of a Deputy by the Claims Official is compulsory. Frank, *supra* note 68, at 410-11. The Deputy will be the acting official when the Claims Officer is unavailable. Thus, it would be essential for the Deputy to possess all of the same qualities as the Claims Officer.

75. The Claims Officer, by selecting the staff, can then ensure the accountability and impartiality that is required for this Office.

76. The Claims Officer will be responsible for explaining the actual findings and reports that will be sent to the Bureau of Prisons. This ensures the accountability and integrity of the office because employees, unlike the Claims Officer, will not necessarily be required to have all of the qualifications as the Claims Officer.

77. The Ombudsman will be responsible for setting up procedures for the prisoners to follow, *e.g.*, forms to complete and deadlines for claims.

the investigation.[78]

(7) To participate and cooperate with the Bureau of Prisons' personnel in such conferences as might lead to improvements in the functioning of the prisons.

(8) To bring suit in district court to force the prison authorities to cooperate or to enforce the provisions of the Office.

(9) To hold hearings that will require mandatory attendance of the parties.[79]

Importantly, the proposed procedure for federal prisoners bringing tort claims under the amended F.T.C.A. will still require federal prisoners to exhaust the current Bureau of Prisons administrative process. However, upon receiving a final denial from the Bureau of Prisons, instead of allowing an appeal to the federal courts, prisoners will be restricted to filing their claims with the Office of Prisoner Complaints.

Upon receipt of a prisoner tort claim, the Claims Office will inform the respective prison authorities that an investigation is being conducted. At that point, the prison officials, as discussed briefly above, will be obligated to cooperate,[80] and any records or documents that the prison authorities possess will be subject to review.[81] If the Claims Officer determines that a hearing[82] will enhance an understanding of the facts of the case, all parties will be obligated to attend.

Before reaching a conclusion that is adverse to the federal prison, the Claims Officer will be required to consult with the prison officials, if the Officer has not already done so while conducting the investigation, and to provide the prison officials with an opportunity to respond to the allegations. This process minimizes any bias or oversight the Claims Officer may have formed during the investigation. Upon a finding that prison officials committed a tort as alleged by the prisoner, the Bureau of Prisons will be obligated to perform the requirements that the Claims

---

78. The power to subpoena serves as a legal device to compel persons to appear or produce evidence because of the threat of legal sanctions for non-cooperation. This is an essential power of the Claims Officer so that the necessary evidence can be gathered in order to render an equitable result.

79. The word "hearing" refers to an administrative agency hearing and would require compliance with administrative procedures. The Ombudsman Statute omits the word "hearing."

80. Failure to cooperate will require the Claims Officer to file suit in federal district court to enforce compliance by the prison officials.

81. Limitations will be placed on the examination of confidential documents and records of the Bureau of Prisons. Frank, *supra* note 68, at 424.

82. If the Claims Officer determines that a hearing is necessary, all of the procedures for an *administrative* hearing must be followed.

Officer outlines.[83] In addition, if she determines that insufficient evidence exists to find for the prisoner claimant, the Claims Officer will have an obligation to explain the decision to the prisoner. This will help to ensure objectivity and accountability in the process.

The foregoing description of the exclusive administrative remedy proposed by this Note demonstrates that the Office of Prisoner Complaints is designed as a system to provide federal prisoners with an equitable determination of their tort claims without resorting to the federal courts. The current administrative process which channels complaints through the Bureau of Prisons lacks the independence and impartiality that is required for an exclusive equitable outcome. For example, as previously discussed, the Warden of the Prison or a prison official who has been given authority determines the outcome of the prisoner's claim. Obviously, the Warden has a bias against awarding money to prisoners for claims committed by the prison's employees. The Warden may have a legitimate fear that if the prisoner is awarded damages, the prison would be disrupted and the Warden's decision would prompt more prisoners to bring claims against the prison officials.

C. The Legitimacy of An Office of Prisoner Complaints

The proposed Office of Prisoner Complaints will relieve the federal courts of minor and frivolous prisoner tort claims and, at the same time, offer federal prisoners a fair remedy. Although courts currently play a major role in correcting abuses by prison officials, judges do not have time to monitor the prison system. With the extensive power and discretion given to the prison officials today, the Claims Officer, unlike a federal court, will have the time, power, and authority to target prison abuses and to investigate complaints more thoroughly.

> At the present time it is extremely difficult in many situations to uncover the policies, objectives, and procedures of administrative agencies. . . . The mere availability of the knowledge will make it possible for society's leaders to come to grips with some of the basic policy problems that will inevitably demand re-evaluation.[84]

Therefore, the Claims Officer will be able to pinpoint the repetitive or frivolous claims brought by prisoners, and rapidly dispose of them.

---

83. Under the Scandinavian Ombudsman Statute and state models, the Claims Officer has no power to give orders or make decisions. The Claims Officer's function is simply to issue recommendations in the report. However, under the type of administrative scheme that is to be established, it is essential that the prison, if found to have committed a tort, provide a remedy to the prisoner. Frank, *supra* note 68, at 398.

84. Nader, *Ombudsmen for State Governments*, in The Ombudsman 243 (D. Rowat ed. 1965) (quoting Pierce, *Symposium on the Model State Administrative Procedure Act: "The Act as Viewed by an Academician,"* 16 ADMIN. L. REV. 51 (1963).

The Office of Prisoner Complaints also will serve to reduce litigation costs, relieve taxpayers burdened by in forma pauperis claimants, decrease litigation time for other litigants affected by frivolous claims, and reduce the federal docket. Prisoners will be afforded relief for their legitimate claims and will not continue to burden the federal courts with minor or frivolous litigation. This Note urges Congress to adopt this proposal establishing an Office of Prisoner Complaints.

V. The Constitutionality of an *Exclusive* Administrative Remedy for Prisoner Tort Claims

Any attempt to restrict a federal prisoner's access to the federal courts would have to comport with the Constitution — the supreme law of the land.[85] This Note acknowledges that at least three constitutional concerns are raised by the proposed statute. A cursory discussion[86] of these problem areas, however, reveals that the Constitution is not violated by the proposal.

A. Restricting the Jurisdiction of the Federal Courts

The first constitutional issue raised is Congress's authority to remove prisoner tort claims from the jurisdiction of the federal judiciary. The jurisdiction of the federal courts is contained within article III of the United States Constitution.[87] Jurisdiction of the courts to hear a case or controversy can be examined in three components: original jurisdiction in the Supreme Court, appellate jurisdiction in the Supreme Court, and both original and appellate jurisdiction in the lower federal courts.[88] The full scope of the original jurisdiction of the Supreme Court is set forth in article III of the United States Constitution.[89] Congress may neither expand nor contract the list of cases in the Supreme Court's original jurisdiction.[90] Because article III does not include prisoner tort claims, Congress may eliminate entirely the right of a prisoner to sue in federal court without running afoul of the Supreme Court's original jurisdiction.

The appellate jurisdiction of the Supreme Court extends to all cases over which the Court lacks original jurisdiction.[91] However, the Con-

---

85. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173-80 (1803).

86. Despite the acknowledged importance of the United States Constitution, it is beyond the scope of this Note to provide a complete analysis of the constitutional issues raised by the proposal. Instead, this Section simply recognizes those areas that are most troublesome and provides a brief analysis of the constitutional concerns.

87. U.S. Const. art. III, §§ 1-2.

88. *See* U.S. Const. art. III, §§ 1-2.

89. U.S. Const. art. III, § 2, cl. 2.

90. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

91. U.S. Const. art. III, § 2, cl. 2.

stitution permits Congress to limit this jurisdiction.[92] Although Congress's ability to carve out exceptions is not without some constitutional limitations,[93] it seems fairly clear that Congress could constitutionally remove prisoner tort claims entirely from the jurisdictional reach of the Supreme Court.

Although the first act of Congress was the creation of the inferior federal courts,[94] the Constitution does not specify the scope of their jurisdiction, nor does it even require that Congress create them.[95] As a result, some courts and scholars have suggested that Congress may restrict the jurisdiction of the lower federal courts in any way it sees fit.[96] In *Quinn v. California Shipbuilding Corp.*, a district court judge stated: "The United States District Court is a court of limited jurisdiction controlled by grants of power through Acts of Congress. . . . That the power to grant jurisdiction to the District Courts includes the power to withdraw jurisdiction is likewise settled."[97] Thus, Congress could remove prisoner tort claims from the jurisdiction of the federal judiciary without violating article III of the United States Constitution.

B. Equal Protection Considerations

The second constitutional issue raised by this Note's proposed statute is the claim that prisoners are being denied equal protection of the laws.[98] Under an equal protection analysis, all laws that make distinctions

---

92. *Id.* In *Ex parte McCardle*, the Supreme Court acknowledged that its appellate jurisdictional power was "conferred with such exceptions and under such regulations as Congress shall make" according to article III, section 2, clause II. 74 U.S. (4 Wall.) 506, 513 (1868).

93. *See, e.g.*, United States v. Klein, 80 U.S. (13 Wall.) 128 (1871). In *Klein*, the Supreme Court decided that Congress, in removing from the Court's appellate jurisdiction a case involving a plaintiff who was seeking to use a presidential pardon to recapture his lands seized by the federal government during the Civil War, had exceeded its powers to make exceptions to the Court's appellate jurisdiction. *Id.* at 147-48. *See also* United States v. Brainer, 691 F.2d 691 (4th Cir. 1982); ROWAK, ROTUNDA & YOUNG, CONSTITUTIONAL LAW (3d ed. 1986).

94. The Federal Judiciary Act of 1789, 1st Cong., 1st Sess. (1789).

95. *See* U.S. CONST. art. III, §§ 1-2.

96. Although the Supreme Court has not considered this issue, some scholars take issue with the contention. *See, e.g.*, Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205 (1985).

97. 76 F. Supp. 742, 743 (S.D.C.A. 1947) (Congress withdrawing jurisdiction of the district courts with the Portal-to-Portal Act).

98. Although the right of equal protection embodied in the fourteenth amendment was originally a right that citizens enjoyed only against the several states, the Supreme Court has applied it to the federal government by reading it into the fifth amendment. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497 (1954) (by reading the equal protection clause into the fifth amendment, the Court applied its decision in Brown v. Board of Educ. to segregated schools in the District of Columbia).

or classifications are subjected to judicial scrutiny. The strength of the judicial scrutiny depends on the characterization of the classification. For example, for certain classifications, including race and alienage, the Court applies strict scrutiny.[99] For others, like gender, the Court applies intermediate scrutiny.[100] For all other types of classifications, the Court applies only low-level scrutiny, often termed the "rational basis test."[101] Prisoners are not a suspect classification.[102] As a result, this Note's proposal need only survive low-level scrutiny. Under this minimal scrutiny, "laws are presumed to be constitutional under the equal protection clause for the simple reason that classification is the very essence of the art of legislation."[103]

A statute will be upheld under minimum scrutiny if it is rationally related to a legitimate governmental interest.[104] Clearly, the reduction of the burgeoning federal court docket is a legitimate governmental interest. Congress has already acted in other ways to try to achieve this reduction.[105] Furthermore, this Note's proposal is rationally related to a governmental interest; by precluding prisoners from filing tort claims in federal court, Congress will be taking a significant step toward reducing the federal docket to a manageable level. Thus, Congress may legitimately enact this Note's proposal without violating the equal protection clause.

C. Procedural Due Process Analysis

The last constitutional concern raised by this Note's proposal is procedural due process. Procedural due process requires that no person "be deprived of life, liberty, or property, without due process of law."[106] The first step in any due process analysis is to determine whether the governmental action to which a plaintiff objects constitutes a deprivation of life, liberty, or property. If it does, the next stage is to determine what process is due the plaintiff in order to justify the deprivation. The deprivation involved by the proposed statute is the loss of a prisoner's

---

99. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 424 (1984); Korematsu v. United States, 323 U.S. 214 (1944).

100. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976); Reed v. Reed, 404 U.S. 71 (1971).

101. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 482 (1955).

102. Moss v. Clark, 886 F.2d 686, 689-90 (4th Cir. 1989) (discussing in some detail the necessary showing required in order to be deemed a suspect class and why prisoners fail to meet that showing). *See also* McGinnis v. Royster, 410 U.S. 263, 270 (1973).

103. City of Cleburne v. Cleburne Living Center Inc., 473 U.S. 432 (1985). *See also* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).

104. McGinnis v. Royster, 410 U.S. 263, 270 (1973).

105. Congress, for example, recently increased the minimum dollar value for diversity cases.

106. U.S. CONST. amend V.

right to sue in federal court for torts committed by a government employee.[107] According to the Supreme Court's analysis in *United States v. Demko*,[108] the proposed Office of Prisoner Complaints does not violate the due process clause.

In *Demko*, the Supreme Court held that a prisoner who was precluded from suing in federal court under the F.T.C.A. for an injury incurred while working within the federal prison was not denied due process of law.[109] In that case, the prisoner's only remedy was the exclusive remedy provided under 18 U.S.C. § 4126,[110] which is basically a workmen's compensation statute for prisoners working in a prison. The *Demko* Court reasoned that compensation laws are substitutes for, and not supplements to, common law tort actions. According to the Court in *Demko*, so long as the government has supplied an administrative compensation remedy that reasonably and fairly compensates the prisoner, no due process violation has occurred.[111]

It thus follows that the proposed administrative remedy will be adequate if the following principles are observed:

> In all instances, the [government] must adhere to previously declared rules for adjudicating the claim or at least not deviate from them in a manner which is unfair to the individual against whom the action is to be taken. The government always has the obligation of providing a neutral decisionmaker — one who is not inherently biased against the individual or who has a personal interest in the outcome.[112]

In this case, prisoners are being deprived of the opportunity to litigate their tort claims in federal court. However, this deprivation is being offset by a reasonable and fair administrative compensation system. Under the analysis used in *Demko*, the enactment of this Note's proposal would not, therefore, constitute an unconstitutional deprivation of property without due process of law.

---

107. To the extent that a deprivation of life, liberty, or property may occur in the very commission of the tort, a remedy would be provided by other federal laws (such as § 1983 actions) and the United States Constitution itself. *See, e.g.*, Daniels v. Williams, 474 U.S. 327 (1986).

108. 385 U.S. 149 (1966).

109. *Id.* at 153-54.

110. 18 U.S.C. § 4126 (1988).

111. 385 U.S. at 152.

112. *Id.* at 152. *See also* Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044 (1984); Van Alstyne, *Cracks In the "New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 489 (1977).

Although each of these constitutional "red flags" could be the subject of an entire Note, this Note's short analysis should suffice to demonstrate that the proposed exclusive administrative remedy is not inconsistent with the United States Constitution.

VI. Conclusion

The federal judiciary during the past decade has been flooded by federal prisoner tort litigation. The following reasons account for some of this increase: (1) the F.T.C.A. waives sovereign immunity and allows federal prisoners to sue the government for prison officials' actions; (2) the F.T.C.A. does not require a minimum dollar value for the right to bring the controversy in federal court; (3) a recent Supreme Court holding requires prisons to be equipped with legal assistance and law libraries to provide prison litigants more information about the legal system; and (4) the In Forma Pauperis Statute allows the majority of federal prisoners, indigents, to file claims in federal court without paying the filing court costs. Federal prisoners, with all of these opportunities, are burdening the courts, other litigants, and the taxpayers with frivolous and minor claims. Bored or mischievous prisoners abuse the judicial and prison systems by bringing repetitive and frivolous claims.

This Note proposes that Congress amend the current F.T.C.A. by prohibiting the federal courts from entertaining prisoner tort claims. To replace the federal courts, Congress should establish an Office of Prisoner Complaints to adjudicate the federal prisoners' tort claims after they have exhausted the Bureau of Prisons administrative remedy. Patterned after ombudsman legislation, the Office of Prisoner Complaints, as contemplated by this Note, will provide an impartial, equitable, and quick remedy for federal prisoners allegedly injured by federal prison officials' torts. The Office of Prisoner Complaints, unlike the federal courts, would have the time and resources to target prison guard abuses. The decision of the Office of Prisoner Claims would be final and binding.

The constitutional analysis of this proposal demonstrates that it would pass constitutional muster. First, the United States Constitution grants Congress the power to limit and alter the jurisdiction of the lower federal courts. The equal protection clause is not violated by this proposal because precluding prisoners from the federal docket rationally relates to the legitimate goal of reducing the federal docket. Also, the proposal establishes an equitable procedure for prisoners who have been injured by the government, thus providing prisoners with due process. Therefore, none of the constitutional challenges succeed.

As Judge Posner stated in *Free v. United States*, "At a time of staggering federal caseloads, the need to devise alternative remedies for classes of litigation that do not imperatively require the full article III

treatment is urgent; one of those classes is small tort claims by federal prisoners.''[113] Congress should carefully consider this Note's proposal as one such alternative remedy.

*Lori Carver Praed**

---

113. 879 F.2d 1535, 1536 (7th Cir. 1989).

* B.S., Indiana University, 1986; J.D. candidate, Indiana University School of Law-Indianapolis, 1991.