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NOTE

DISCOVERY RULE IN MEDICAL MALPRACTICE UNDER THE FEDERAL TORT CLAIMS ACT: THE SUPREME COURT'S DECISION IN UNITED STATES V. KUBRICK WAS NOT MEANT TO BE SECONDARY AUTHORITY

By: Cory Zajdel

Imagine a judiciary arranged into numerous levels of courts in a hierarchal system including a high court which has the power to select the cases it will hear. This high court also hands down final decisions that can only be overturned by the people as a whole, or in some instances, by congressional statutory amendment. Under no circumstance may a lower court directly disagree with this high court. Now, imagine the same legal system with one minor exception: If the lower court concludes the high court decided a case wrongly, the lower court can write an opinion in which it seemingly agrees with the high court, but actually changes or modifies previous high court decisions. While this scenario seems unthinkable in the United States, lower courts have continually altered and extended the reasoning of United States v. Kubrick. In Kubrick, the high court ruled on the meaning of "accrual" within the statute of limitations pertaining to medical...

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2. 28 U.S.C. § 2401(b) (2000) provides:
   A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such a claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.
3. Id.
malpractice\textsuperscript{4} under the Federal Tort Claims Act ("FTCA").\textsuperscript{5} Accordingly, if the issue presented in Kubrick is not re-clarified, Kubrick\textsuperscript{6} will become a "dead letter."\textsuperscript{7}

The scope of this note is limited to a discussion of the original two-year administrative filing requirement under the FTCA statute of limitations.\textsuperscript{8} In part I, this note examines crucial background information regarding both the FTCA and federal sovereign immunity.\textsuperscript{9} In part II, this note discusses the Supreme Court's decision in Kubrick.\textsuperscript{10} In part III, this note explores two different ways the discovery rule, as formalized in Kubrick, has been interpreted by the lower courts in deciding medical malpractice cases under the FTCA.\textsuperscript{11} In part IV, this note illustrates a missed opportunity to clarify and limit the discovery rule in Hughes v. United States.\textsuperscript{12} Lastly, this note suggests\textsuperscript{13} what can be done by administrative agencies, the judiciary,\textsuperscript{14} and the legislature\textsuperscript{15} to remedy the spreading epidemic of judicial anarchy within the ever-searching FTCA "discovery rule" jurisprudence.

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4. Medical malpractice is a form of negligence. In order to prove negligence, a plaintiff has the burden of proving that the defendant (1) had a duty of care (reasonable person standard), (2) breached the duty, (3) was the cause in fact, (4) proximately caused the harm, and (5) that there was actual harm or damages. See Dan B. Dobbs, The Law of Torts 269 (2000). Similarly, a plaintiff in a medical malpractice case has the burden of proving these same elements. Id. at 631. The major difference between the two types of actions is the duty of care element. Under a negligence action, the defendant will be compared to how the reasonable person would conduct himself. On the other hand, a medical malpractice action will look to the minimal acceptable standard within the profession either in that locality or nationally, as evidenced by expert witnesses. Id. at 631-33.


6. The purpose of this article is to prove that Kubrick was a valuable and rational decision which should be followed. Unfortunately, in light of recent appellate court decisions, Kubrick may have already become a "dead letter."

7. "A law or practice that, although not formally abolished, is no longer used, observed, or enforced." Black's Law Dictionary 403 (7th ed. 1999).


9. See infra Part II.

10. See infra Part III.

11. See infra Part IV.

12. Hughes, 263 F.3d 272 (3rd Cir. 2001); see also infra Part V.

13. See infra Part VI.

14. See infra Part VI at A.

15. See infra Part VI at B.

16. See infra Part VI at C.
I. FEDERAL TORT CLAIMS ACT ("FTCA")

The FTCA is a limited waiver of sovereign immunity.17 "Government – the sovereign – cannot be sued for negligence without its consent."18 Prior to 1946, when the original version of the FTCA was enacted, a citizen harmed from a tortious act by the federal government or its employees had almost no redress.19 Because of the FTCA’s inherent limited waiver of sovereign immunity, Congress drew out various exceptions to possible claims. The FTCA’s structure now forces a claimant through a multitude of steps before a federal district court attains jurisdiction to hear such a case.20

17. Immunities are defined as "a defense to tort liability which is conferred on an entire group or class of persons or entities under circumstances where considerations of public policy are thought to require special protection for the person, activity or entity in question at the expense of those injured by its tortious act." EDWARD J. KIONKA, TORTS IN A NUTSHELL: INJURIES TO PERSONS AND PROPERTY 398-401 (1977). Sovereign or governmental immunity originally came from the concept in England, "The King can do no wrong." This meant that the king was unable to commit a tort and that to file suit against the Crown (Sovereign), the King must consent to it. Id. at 398-9; see also DOBBS, supra note 4, at 693 (2000). Cf. 35 AM. JUR. 2D Federal Tort Claims Act § 1, at 296 (1967 & Supp. 1985). "Most immunities have fared poorly in recent decades in the U.S. plaintiff-friendly courts, especially when health care is at issue. For example, 'charitable immunity,' which long shielded not-for-profit hospitals, has been cut back sharply." John L. Akula, Sovereign Immunity and Health Care: Can Government Be Trusted?: As its health care role expands, does government's legal immunity undermine its accountability?, HEALTH AFFAIRS, Nov.-Dec. 2000, at 152, 154.

18. Akula, supra note 17, at 154. For a full discussion on federal sovereign immunity and specifically how it pertains to the FTCA, see L. JAYSON, HANDLING FEDERAL TORT CLAIMS (1993); see also Cohens v. Virginia, 19 U.S. 264, 380 (1821) (stating that "a sovereign independent State is not suable, except by its own consent").

19. The only exception to this rule was that a victim of a tortious act committed by the federal government or its employees could try to pressure a private bill through congress. A private bill authorized a particular plaintiff to sue on his claim. However, this method was burdensome and time consuming. See PROSSER AND KEETON, THE LAW OF TORTS 1033-4 (5th ed. 1984); see also PROSSER ET AL., TORTS: CASES AND MATERIALS 651 (10th ed. 2000).

The first step requires that a claim must be presented to the proper agency within two years after such a claim accrues. Determining the date of accrual and counting off two years from that date is the cause of much litigation in federal district courts. This first and all-

21. Originally, Congress only allowed one year from the date of accrual to present this type of claim; however, congress amended this statute to allow for a claimant to present his claim within two years from the date of accrual. See 28 U.S.C. § 2401(b) (amended on April 25, 1949, by deleting “one year” and inserting “two years”) (2000); “Rather than carve out certain exceptions to the statute of limitations and thereby incorporate some form of equitable tolling into the FTCA, Congress chose instead to increase the limitations period from one to two years for all tort claimants.” Richard Parker & Ugo Colella, Revisiting Equitable Tolling and the Federal Tort Claims Act: The Impact of Brockamp and Beggerly, 29 SETON HALL L. REV. 885, 908 (1999).

22. 28 U.S.C. § 2401(b) (2000). “Section 2401(b), . . . is the balance struck by Congress in the context of tort claims against the Government; and we are not free to construe it so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims.” Kubrick, 444 U.S. at 117 (quoting Campbell v. Haverhill, 155 U.S. 610, 617 (1895)); “The second time period prescribed in the FTCA applies to the time within which a claimant must file suit in federal district court.” Ugo Colella & Adam Bain, The Burden of Proving Jurisdiction Under the Federal Tort Claims Act: A Uniform Approach to Allocation, 67 FORDHAM L. REV. 2859, 2915 (1999); see also Ugo Collela, The Case for Borrowing a Limitations Period for Deemed-Denial Suits Brought Pursuant to the Federal Tort Claims Act, 35 SAN DIEGO L. REV. 391, 406 (1998) (stating that the “the two-year period in 2401(b) prescribes a time limit within which a claimant must submit her claim to an administrative agency, and the six-month period prescribes a time limit within which a claimant must file suit in an Article III court”). One reason the Supreme Court has given for the importance of following a statute of limitation is that “[t]he process of discovery and trial . . . is obviously more reliable if the witness or testimony in question is relatively fresh.” Bd. of Regents v. Tomanio, 446 U.S. 478, 487 (1980). Therefore, “there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a substantive claim will be barred without respect to whether it is meritorious.” Id.

23. Maahs v. United States, 840 F.2d 863 (11th Cir. 1988). This court held that the Federal Rule of Civil Procedure 6(a) applies to claims brought against the Federal Government under the FTCA. Under this reasoning, the day after accrual is the date the government shall begin counting off two years for the purpose of the statute of limitations within the FTCA. Id.

important procedural matter of accrual is not defined anywhere in the statute.\textsuperscript{25}

Prior to Supreme Court intervention, and because of a lack of legislative guidance, determining the accrual of a claim under the FTCA was subject to a variety of interpretations.\textsuperscript{26} "In FTCA actions charging negligence, accrual generally occurs when the harm or injury is inflicted."\textsuperscript{27} This rule of law is referred to as the "injury discovery rule." Although the injury discovery rule is the general rule for measuring accrual, medical malpractice presents a special situation because there are different circumstances when a potential claimant lacks the knowledge that an invasion of a legally protected right has occurred.\textsuperscript{28} Kubrick is the controlling case on the matter of defining "accrual" and implementing some form of a discovery rule in medical malpractice claims under the FTCA.

\textbf{II. Kubrick v. United States: Definitely Not Negligence Discovery; Rather, Leaning Toward Injury Discovery Rule}

Without express approval from Congress or any preliminary hint from the Supreme Court, an overwhelming number of federal district courts began to incorporate a broad discovery rule into the FTCA.\textsuperscript{29} A pre-Kubrick standard was "a malpractice action against the United States can be maintained within two years after the claimant discovered, or in the exercise of reasonable diligence should have discovered, the existence of the acts of malpractice upon which his

before the federal courts at one time involve[d] claims of approximately $5 billion. New suits are filed at the rate of more than 1,500 each year." L. Jayson, \textit{supra} note 18, at 1, 8-9.


27. Abney, \textit{supra} note 25, at 698.

28. "The causal connection between an injury and the federal government may remain obscure or hidden for some time. The injury itself may remain unknown for decades following the actual medical negligence. [This] will often delay presentation of a valid tort claim beyond the apparently proper limitations period." \textit{Id.} at 721.

29. See Grasso, \textit{supra} note 24, at 4-5.
claim is based.” The Supreme Court took up *Kubrick* to clarify the FTCA discovery rule as applied to medical malpractice actions.

*Kubrick* had surgery on his right femur at a Veterans' Administration (VA) Hospital in 1968. Following surgery, the infected area was irrigated with neomycin, an antibiotic, until the infection cleared. Six weeks later, the veteran noticed ringing in his ears and a slight loss of hearing. Eventually, Kubrick filed a claim for an increase in disability benefits with the VA in 1969, “alleging that the neomycin treatment had caused his deafness.” Kubrick’s claim for disability benefits was denied in September 1969. The claim was denied again on reconsideration in August 1972.

Kubrick did not file his claim with the district court under the FTCA until 1972. He claimed his injuries were due to negligent treatment in the VA Hospital. The district court rejected the United States’

30. *See id.* Another standard used by circuit courts was stated, “[U]ntil claimant has had a reasonable opportunity to discover all of the essential elements of a possible cause of action – duty, breach, causation, damages – his claim against the Government does not accrue.” *See* Major Carl M. Wagner, United States v. *Kubrick*: Scope and Application, 120 MIL. L. REV. 139, 142 (quoting Bridgford v. United States, 550 F.2d 978 (4th Cir. 1977)).

31. Specifically, the issue in *Kubrick* was “whether the claim ‘accrues’ within the meaning of the Act when the plaintiff knows both the existence and the cause of his injury or at a later time when he also knows that the acts inflicting the injury may constitute medical malpractice.” *Kubrick*, 444 U.S. at 113.

32. *Id.*

33. *Id.*

34. *Id.* at 113-4.

35. Veterans’ benefits under 38 U.S.C § 1151 (2000) are an independent claim that can coexist with a tort claim under the FTCA. A veteran can be awarded increased benefits under § 1151 and win a tort claim under the FTCA under the same cause of action.


37. The Department of Veterans Affairs allows a claimant the ability to contest its first administrative claim decision through both veterans benefits under 38 U.S.C. § 1151 (2000) and tort claims under 28 U.S.C. § 2401 (2000). These administrative appeals are referred to as reconsiderations.

38. *Kubrick*, 444 U.S. at 115 n.4. The administrative exhaustion requirement in 28 U.S.C § 2675(a) (2000) states:

An action shall not be instituted upon a claim 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, unless the claimant shall have first presented the claim to
argument that Kubrick's "claim had accrued in January 1969, when he learned from Dr. Sataloff that his hearing loss had probably resulted from the neomycin." 39 Instead, the district court held (consistent with most other district courts) that a claim accrues only when a claimant has discovered, or with reasonable diligence should have discovered, the malpractice. 40 The district court's decision was affirmed by the United States Court of Appeals for the Third Circuit when it ruled that Kubrick's claim did not accrue until June 1971. 41 The Supreme Court reversed. 42

In its opinion, the Supreme Court began with a brief summary on the importance of statutes of limitation 43 and then mentioned Congress' decision to waive the government's sovereign immunity. 44 In doing so, the Court neither extended nor limited what Congress originally intended. 45

The Supreme Court announced, "It is undisputed in this case that in January 1969 Kubrick was aware of his injury and its probable cause." 46 The Court would not go so far as to toll the statute of limitations until Kubrick had discovered in 1971 that the treatment received was malpractice. 47 Therefore, the lower court's conclusion that the statute

the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.

Even though Kubrick did not satisfy this requirement in only filing for § 1151 benefits, the United States dropped this issue on appeal. Kubrick, 444 U.S. at 115-6 n.4.

40. See id. at 180.
41. Kubrick v. United States, 581 F.2d 1092, 1097 (3rd Cir. 1978), aff'g 435 F. Supp. 166 (E.D. Pa. 1977), rev'd, 444 U.S. 111 (1979). Under this reasoning, Kubrick's claim was timely because the claim was filed within two years from June 1971.
43. Id. at 117.
44. Id. at 117-8
45. Id.
46. Id. at 118.
47. Id. The argument the Supreme Court makes in reference to Kubrick being able to file his claim in 1975 or 1980 if Dr. Soma had not mentioned that the act may have been malpractice is particularly the reason this author's conclusion incorporates a statute of repose. Id. There must be a point in the future at which time all claims become stale. Furthermore, the court mentions, "[w]e . . . cannot hold that Congress intended that 'accrual' of a claim must await awareness by the plaintiff that his injury was negligently inflicted." Id. at 123. See generally Sexton v. United States, 832 F.2d 629 (D.C. Cir. 1987).
of limitation was tolled until the claimant had discovered the malpractice was not supported by case law, legislative history, or the actual language of the FTCA. In fact, the legislative history supports the argument for an injury discovery rule where the date of accrual is the time of injury. Furthermore, there is a clear distinction between a patient whose injury is not apparent immediately (injury in fact) and a patient "in possession of the critical facts that he has been hurt and who has inflicted the injury.'

Finally, the Court extended an invitation to Congress to amend the statute at any time to "effect its legislative will." In coming to this conclusion, the Court decided that where the legislative history is not particularly clear, it is best to err on the side of narrowing the doctrine rather than extending it past Congress' original intent. Therefore, the Kubrick standard can be stated as a two-year statute of limitations period that does not begin to run until the plaintiff has discovered or should have discovered with reasonable diligence both his injury and its cause, not at some later date when the plaintiff discovers malpractice.

This accrual standard, although substantially limited as compared to many district courts' previous interpretations, is still more generous to plaintiffs than the average medical malpractice accrual standard.

III. CONTINUOUS MOVEMENT AWAY FROM THE KUBRICK STANDARD

Although the Supreme Court established the test for future "discovery rule" cases involving medical malpractice in Kubrick, the circuits continue to split on the issue of accrual. The overwhelming

48. For a thorough discussion on the importance or lack thereof with respect to legislative history, see Ugo Colella & Adam Bain, Revisiting Equitable Tolling and the Federal Tort Claims Act: Putting the Legislative History in Proper Perspective, 31 SETON HALL L. REV. 174, 182-85 (2000). For a further discussion focusing on legislative history concerning the FTCA's statute of limitation, see id. at 190-205.

49. Kubrick, 444 U.S. at 119.

50. Id. at 119 n.6 (evaluating the meaning behind some of the legislative history, specifically while discussion was going on regarding amending one year of accrual to two years).

51. Id. at 122.

52. Id. at 125.

53. Id. at 120; see also id. at 125-6 (Stevens, J., dissenting).

54. See generally Wagner, supra note 30, at 140.
reason for the split in circuits can be attributed to the interpretation of the specific amount of knowledge required to begin the accrual of a claim. The knowledge requirement necessitates both knowledge of the injury and the cause thereof. While this question seems elementary, various factual situations have given the circuits ample ability to alter the limited confines of Kubrick.

Subsequent cases can be classified into two doctrines: "government causation discovery rule" and "causation discovery rule/immediate physical cause." Most of these decisions come down to the factual determination of whether the injury was caused by an omission or commission. It is important to note that each decision involving these

55. Id. at 164.
56. Id. at 155-75 (general discussion on the different ways courts have interpreted knowledge for claims involving medical malpractice and the accrual standard under the FTCA).
57. Id. at 140.
58. See Drazan v. United States, 762 F.2d 56, 59 (7th Cir. 1985); Augustine v. United States, 704 F.2d 1074 (9th Cir. 1983); Diaz v. United States, 165 F.3d 1337 (11th Cir. 1999); McGraw v. United States, No. 00-35514, 2002 U.S. App. LEXIS 15774 (E.D. La. Aug. 16, 2002).
60. See Richman v. United States, 709 F.2d 122 (1st Cir. 1983); Kronisch v. United States, 150 F.3d 112 (2d Cir. 1998); Edwards v. United States, No. 98-2075, 1999 U.S. App. LEXIS 2688 (4th Cir. Feb. 2, 1999); Kerstetter v. United States, 57 F.3d 362 (4th Cir. 1995); Dawkins v. United States, No. 99-1746, 2000 U.S. App. LEXIS 4457 (6th Cir. Mar. 13, 2000); McCoy v. United States, 264 F.3d 792 (8th Cir. 2001). Claimants’ attorneys often try to differentiate their cause of action from the Kubrick line of cases by asserting that the injury was caused by an omission rather than a commission. See Augustine, 704 F.2d at 1078; see also Arvayo, 766 F.2d at 1419 ("[Claimants] assert that there is a basic theoretical distinction between malpractice cases involving a 'commission; — an affirmative act which results in clearly identifiable injuries — and malpractice cases involving an 'omission,' i.e., a failure to diagnose, treat, or warn."). They further argue that an omission is not easily identifiable by a potential claimant because all the necessary facts needed by the claimant are held by the person causing the harm — the doctor. Augustine, 704 F.2d at 1078; McGraw, 2002 U.S. App. LEXIS 15774, at *8 ("[I]t is often very difficult for a plaintiff to determine the genesis of an injury resulting from a doctor's omissions."). Conversely, other courts have found "[t]he omission/commission divide [to be] largely elusive." Sexton, 832 F.2d at 634. For cases that are pro-claimant, see Augustine, 704 F.2d at 1078; Drazan, 762 F.2d at..."
two standards correctly states and proclaims to agree with the *Kubrick* standard. Each decision, however, finds a way to differentiate the fact patterns to seemingly narrow *Kubrick* to only the particular facts of the case. Arguably, not one circuit continues to follow the discovery rule first enunciated in *Kubrick*.

A. Government Causation Discovery Rule Cases

Courts usually summarize the government causation discovery rule doctrine by commenting that the statutory period does not run until the "cause that is in the government's control" has been discovered. In *Drazan v. United States*, the Seventh Circuit examined the knowledge requirement for purposes of starting the clock on the statute of limitations. The question in front of the court was whether the statute of limitations began to run in February 1981 when the claimant's surviving spouse "learned that her husband had died of lung cancer," or whether the limitations period began in December 1981 when "she received her husband's medical reports and discovered the results of the [previously neglected] x-ray." The court began by stating the *Kubrick* standard correctly. Next, the court stated unambiguously that the injury to the claimant was death. However, the court ran into a small problem when defining the cause of the injury. Here, the court found that "[w]hen there are two causes of an injury, and only one is the government, the knowledge that is required to set the statute of limitations running is knowledge of the government cause, not just of the other cause." Finally, the standard the court set forth was that the statute of limitations "begins to run either when the government cause is known or when a reasonably

59. For cases that are pro-government, see Sexton, 832 F.2d at 634 ("courts have found adequate knowledge of injury and cause in situations where plaintiffs' knowledge was far more limited as to the character of the government agents' omission."); Dyniewicz, 742 F.2d at 486-87.
61. *Drazan*, 762 F.2d at 59; see also *Augustine*, 704 F.2d at 1074.
62. 762 F.2d 56 (7th Cir. 1985).
64. *Drazan*, 762 F.2d at 58.
65. *id*.
66. *id* ("The statute of limitations in federal tort claims cases starts to run when a person knows that he is injured and knows what caused the injury, even if he does not know and has no reason to know that the cause involved negligence.")
68. *id*. at 59.
diligent person (in the tort claimant’s position) reacting to any suspicious circumstances of which he might have been aware would have discovered the government cause — whichever comes first.\(^6\)

This standard takes away any notion of the injury prong of the \textit{Kubrick} standard, instead relying strictly on knowledge of cause or reasonable knowledge of suspicious circumstances to determine accrual under the statute of limitations. This standard has been criticized as going beyond \textit{Kubrick} by incorporating notice of negligence, which was specifically rejected by the \textit{Kubrick} Court.\(^7\)

In \textit{Diaz v. United States}\(^7\), the Eleventh Circuit was asked to decide whether to follow the \textit{Drazan} government causation discovery rule as urged by the claimant, or to follow a strict rule, at the government’s urging, that claims accrue no later than on the date of death.\(^7\)

The court was "persuaded that \textit{Drazan} presents the better rule."\(^7\)

In following \textit{Drazan} and the government causation discovery rule cases, the Eleventh Circuit holds that "a wrongful death claim [that has multiple causes] accrues when the plaintiff knows, or exercising reasonable diligence should know, both of the decedent’s death and its causal connection with the government."\(^7\)

\section*{B. Causation Discovery Rule Cases (Immediate Physical Cause)}

Courts usually summarize the causation discovery rule doctrine to mean that the limitations period begins to run when the plaintiff knew of the injury, who caused the injury, and why.\(^7\)

In \textit{Sexton v. United States},\(^7\) a six-year-old child died of leukemia after battling the disease for three years.\(^7\)

Although the child died in 1968, the parents did not present a wrongful death claim on behalf of their child until 1983, nearly fifteen and a half years later.\(^7\)

\begin{footnotes}
\footnoteref{6}{Id.}
\footnoteref{7}{Wagner, \textit{supra} note 30, at 165 ("The example given was not a good one because it provided notice of both potential causation and potential negligence.").}
\footnoteref{71}{\textit{Diaz}, 165 F.3d 1337 (11th Cir. 1999).}
\footnoteref{72}{Id. at 1340.}
\footnoteref{73}{Id.}
\footnoteref{74}{Id.}
\footnoteref{75}{\textit{Sexton}, 832 F.2d at 632; \textit{Arvayo}, 766 F.2d at 1421; \textit{Price}, 775 F.2d at 1494.}
\footnoteref{76}{\textit{Sexton}, 832 F.2d 629 (D.C. Cir. 1987).}
\footnoteref{77}{Id. at 630.}
\footnoteref{78}{Id.}
\end{footnotes}
claimants argued that they did not have sufficient knowledge to be put on notice and that the statute of limitations therefore did not begin to run until June 14, 1981. However, the court held that the claimants had adequate knowledge at the date of their child's death.

On appeal, the District of Columbia Circuit Court began by stating that Kubrick applied in this case, commenting, "It seems simple enough to say that the basic injury was death." When discussing cause, the court found that "a plaintiff's understanding of the basic nature of the treatment should suffice to begin the statute running" and that these were the critical facts which put an affirmative duty on the claimants to determine whether or not they have obtained a cause of action. The court stressed that "Kubrick regarded . . . the historical facts associated with the injury itself [as critical]." With this in mind, the court effectively adopted the immediate physical cause test: "the 'cause' is known when the immediate physical cause of the injury is discovered." Therefore, the injury was death to the claimant, and the immediate physical cause of the death was leukemia. The critical question of "why" in the Kubrick inquiry may be answered by another medical professional. Claimants knew that two types of treatment were used while under the watchful eye of government doctors; they need now only ask whether or not they have a viable claim. Accordingly, the court ruled that the claimants had failed to present their claim within the two-year statute of limitations period.

A similar conclusion was reached by the Tenth Circuit in Arvayo v. United States. In August 1979, a military base doctor misdiagnosed a

79. Id. at 632. Claimants' argument that the statute of limitations did not begin to run until June 14, 1981, which was exactly two years and one day after the death of their child, would have been timely under § 2401, as mentioned supra note 23, where the court acknowledged that the clock starts the day after the knowledge of injury and cause.
80. Sexton, 832 F.2d at 632.
81. Id. at 633 ("We think that [nothing here] prevents the application of Kubrick.").
82. Id.
83. Id.
84. Id. (referring to the concepts in Kubrick involving the reasonably diligent claimant's investigation after assuming an affirmative duty).
85. Id. at 634.
86. Id. (citing Zeleznik v. United States, 770 F.2d 20, 23 (3rd Cir. 1985)).
87. See Sexton, 832 F.2d at 633-4 (example of when this analysis can be used).
88. Id. at 637.
89. Arvayo, 766 F.2d 1416 (10th Cir. 1985).
baby as having an upper respiratory infection which was rectified the next day with a correct diagnosis of meningitis. The district court ruled that the claim did not accrue until August 1981, thus giving the claimants until August 1983 to file a timely claim under the FTCA. The court stated, and both parties agreed, that the injury was mental retardation, brain damage. A significant argument remained, however, as to the cause of injury. The government, withdrawing from its initial proffer for a strict injury discovery rule, urged the court that the cause of the brain damage was bacterial meningitis. On the other hand, the claimants argued the cause was not only the meningitis, but also the failure to diagnose and treat the meningitis. Ultimately, the court agreed that there could be two causes to an injury. Furthermore, the court held that under these facts, where the injury was known to the claimants and where there was also some knowledge of a misdiagnosis or change in diagnosis, "a reasonable person in the [claimants'] position would have made some type of inquiry as to whether [the doctor's] diagnosis had been correct." Therefore, the court held that a reasonable person in the claimants' position would have inquired into the suspicious diagnosis.

Finally, in Dyniewicz v. United States, Mark and Carol Dyniewicz were killed in a flood on a Hawaii highway in March 1980. Although this case did not involve medical malpractice, the discovery rule discussion is instructive. The Ninth Circuit reasoned that "[d]iscovery of the cause of one's injury . . . does not mean knowing who is

90. Id. at 1417-8.
91. Id. at 1418 (discussing the district court's memorandum opinion).
92. Id. at 1419.
93. Id.
94. Id.
95. Id. at 1420.
96. Id. at 1422 ("We do not intend to imply that in every failure to diagnose, treat, or warn case the plaintiff's cause of action accrues at the time the plaintiff receives a diagnosis different from a previous diagnosis and is aware that he or she has been injured.").
97. Id. at 1422-3. "[O]nce the plaintiffs knew the bare facts that doctors treating their son had made two different diagnoses . . . within twenty-four hours, they were under a duty to inquire into the medical treatment of their child to determine if the misdiagnosis might have been a cause of his injuries." Sexton, 832 F.2d at 634.
98. Arvayo, 766 F.2d at 1422-3.
99. Dyniewicz, 742 F.2d 484 (9th Cir. 1984).
100. Id. at 485.
The 'cause' is known when the immediate physical cause of the injury is discovered. The cause of action accrues at the point in time where injury and immediate physical cause are known to the claimants. The court held, consistent with other courts following the government causation or immediate physical cause discovery rule, that "[a]ppellants knew both the fact of injury and its immediate physical cause, the flooded highway, when the bodies of Mr. and Mrs. Dyniewicz were found." Therefore, the claim was deemed untimely.

IV. Hughes v. United States: The Newest Judicial Folly (The Third Circuit Writes Its Own Law)

The discovery rule issue has been relatively quiet in the recent past. Courts have either followed the government causation or immediate physical cause reasoning. Hughes, however, has brought back to life the same issues resolved in the Kubrick decision. The decision in Hughes is important because it shows a blatant disregard for stare decisis, while reintroducing uncertainty to both claimants and the

101. Id. at 486. "The general rule in tort law is that the claim accrues at the time of the plaintiff's injury." Id. (quoting Davis v. United States, 642 F.2d 328, 330 (9th Cir. 1981)). Furthermore, "[w]ith knowledge of the fact of injury and its cause the malpractice plaintiff is on the same footing as any negligence plaintiff." Dyniewicz, 742 F.2d at 486 (quoting Davis, 642 F.2d at 331).

102. Dyniewicz, 742 F.2d at 487.

103. Id. at 487.


105. The Supreme Court consistently discusses the importance of following judicial precedent. In upholding the central holding of a prior Supreme Court decision, the Supreme Court, in Planned Parenthood v. Casey, 505 U.S. 833 (1992), stated:

The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should
government alike. Furthermore, the decision in Hughes has altered the settlement prospects during the administrative exhaustion requirement.

The critical facts in Hughes v. United States are disturbingly similar to those of Kubrick. Nevertheless, Hughes is the furthest any court has stretched the Kubrick standard to date. The outcome of this case is unfortunate because the district court decided it correctly at first, only to have the decision overturned by a policy-driven court of appeals.

Raymond Hughes was admitted to a Department of Veterans Affairs Medical Center ("VAMC") on April 15, 1997, at which time he was given Heparin, a blood thinner, in preparation for a cardiac catheterization and a subsequent coronary bypass surgery. Hughes remained on the blood thinner for eight days. At some point between April 16 and June 4 when Hughes was unconscious, he developed gangrene of the extremities. Specifically, the VAMC had to amputate "his right leg above the knee, left hand, right metacarpal, and left leg below the knee." The doctor informed Hughes that the amputation was caused by an allergic reaction to the blood thinner medication.

Hughes then filed for 38 U.S.C. § 1151 benefits. Showing interest in a possible tort claim, Hughes consulted an attorney in April 1999, almost two years after leaving the hospital. After receiving the medical records from the VA and having them reviewed by a professional in the medical field, the attorney decided not to take the case. Finally, Hughes filed an administrative tort claim on December 16, 1999, two years and four months after the claimant's discharge from the VAMC and two years and six months after regaining consciousness. This claim was subsequently denied.

 come to be seen so clearly as error that its enforcement was for that very reason doomed.

505 U.S. at 854 (citations omitted).
107. Id.
108. Id.
109. Id. at *2.
110. Id.
111. Id.
113. Id.
114. Id. at *2-3.
115. Id. at *3.
116. Id.
Hughes argued that he did not know he had a tort claim as a result of the "doctors' assurances that because of his previously unknown allergy, the amputations were unavoidable." In response, the court determined that "this point highlights plaintiff's awareness not only of his injury but also its cause." The district court concluded that Hughes' claim accrued sometime during June or July of 1997 at the point when he realized he was an amputee.

Conversely, when this case reached the United States Court of Appeals for the Third Circuit, the court instantly characterized the case as one having to do with the failure to diagnose and treat, or a case involving an omission. After agreeing not to extend the definition past Congress' original intent in the FTCA, and after fleshing out both the claimants' and the government's arguments, the court proceeded to review the Kubrick standard. The Third Circuit determined that Kubrick stood for the proposition that "once the plaintiff knows 'the critical facts that he has been hurt and who has inflicted the injury,' he can seek medical and legal advice to determine whether the medical care he received was substandard and whether he has a viable cause of action for negligence." Although correctly stating the standard, the court distinguished this case from Kubrick because here the injury was the direct result of the "VA doctors' failure to monitor and treat his reaction to the heparin," while in Kubrick the injury directly resulted from the administration of a particular drug. Under this reasoning, two classes of cases were announced and recognized in the Third Circuit: 1) injury discovery and 2) government causation. In distinguishing Hughes from Kubrick, and,

117. Id. at *8.
119. Id. at *9.
120. Hughes v. United States, 263 F.3d 272 (3rd Cir. 2001).
121. Id. at 274.
122. Id. at 275.
123. "[Hughes'] argument is that giving him the heparin did not cause his injury; rather, it was caused by the failure of the treating physicians timely to apply anticoagulants and other appropriate treatment to combat the [allergic reaction]." Id. "[T]he government argues that Hughes had all relevant information about his injury and its cause when he was discharged on July 23, 1997, the date it claims the statute of limitations began to run." Id.
124. Id. at 275-6.
125. Id. (citing Kubrick, 444 U.S. at 122).
126. Hughes, 263 F.3d at 276.
127. Id.
in so doing, distinguishing injury discovery from government causation, this court seemingly eliminates any surviving remnants of the Kubrick decision in the Third Circuit. By applying a causation analysis to the procedural aspect of this case, the court jumps ahead of itself.

At this point, the court should not be in search of whether or not the claimant can win a case on the merits with respect to the issue of causation, but rather into which category of patient the particular claimant falls. Kubrick clearly states, "The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury."128 Therefore, Kubrick postulates two classes of patient: (1) a patient whose injury does not immediately present itself, and (2) a patient who recognizes he has been harmed or injured and knows who was responsible for this injury. The former patient may not know of his injury until it manifests, and therefore "the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain,"129 while the latter patient will receive no protection from the court because it was his duty to move forward as a reasonable person would in search of the critical facts behind the cause of the injury. Once an injury has presented itself to the patient, the specific details behind the cause are easily identified by other members of the same profession.130 Therefore, the most important question that can be asked in a medical malpractice action for the purpose of accrual of the statute of limitations under the FTCA is, What constitutes injury?

Clearly, in the Hughes case the injury was the amputation, the cause was the reaction to Heparin, and the alleged negligence was the failure to timely diagnose and treat the reaction. By confusing knowledge of cause with knowledge of negligence, the Third Circuit follows the opinion directly repudiated in Kubrick.131

Hughes has all the makings of a Kubrick II. Kubrick starts accrual as of the time when the claimant knows or has reason to know of both the existence of an injury and its probable relation to medical treatment.132 Here, there can be no doubt that the injury was known to Hughes at the very time he woke up because the injury was so severe that notice was hard to deny. Furthermore, Hughes was under the care of the government constantly from the time he went into heart surgery with

129. Id.
130. Id.
131. Kubrick v. United States, 581 F.2d 1092 (3rd Cir. 1978) (negligence portion of the discovery rule doctrine was eliminated by Kubrick).
all limbs intact until he awoke a quadruple amputee. Additionally, Hughes was notified by a doctor of the immediate physical cause of his injury, the allergic reaction to Heparin, as soon as he regained consciousness. Using the Kubrick standard, "The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury." Thus, the government will not allow such a claimant to sit on his knowledge of the facts which verify injury and cause.

The Hughes court significantly altered the well-established meaning of injury by mistakenly incorporating cause into the injury prong rather than leaving cause as its own prong. This knowledgeable claimant should have been considered accrued under the FTCA.

V. SUGGESTIONS FOR GETTING BACK TO KUBRICK

With the decision in Hughes taking the FTCA discovery rule further then it has ever been extended in the past, it is now time for reform. This reform can be accomplished through administrative agencies, the Supreme Court, or the legislature.

A. Administrative Agencies

When an administrative agency originally denies a medical malpractice claim, the lawyer in charge of the claim should make a strong "discovery rule" argument. The lawyer should also alert the U.S. Attorney’s Office that the case would be a good or bad candidate for Supreme Court review in order to make sure the proper evidence is entered into the record at the district court level. Furthermore, if and when the case reaches the Solicitor General’s Office after making its way up through the appeals process, pressure must be placed from the top levels of the agency in order to have the Solicitor General’s Office

133. Hughes, 263 F.3d at 273-4.

134. Id. at 274. Furthermore, even under a causation discovery rule/immediate physical cause, the claimant’s argument should have failed on the statute of limitations argument.

agree to write a brief on the agency’s behalf. Policy should come before publicity, and politics must defer to legal reasoning.  

B. Supreme Court  

Since the Supreme Court has the ability to control its own docket through the writ of certiorari, the simple answer to a complex issue could be as easy as the Supreme Court granting certiorari to a FTCA “discovery rule” case. In the event that the Court declines to hear such a case because *Kubrick* is still good law, Justices on the Court with a strong disposition against the way lower courts have decided more recent “discovery rule” cases under the FTCA should continue to vocalize this opinion passionately within the dicta of other reported opinions by discussing *Kubrick* specifically.  

The Supreme Court recently mentioned the problems involved in discovery rule cases in *TRW Inc. v. Adelaide Andrews*  

and *Rotella v. Wood.* In *Rotella,* while discussing the possibility of a “discovery rule” under the Racketeer Influenced and Corrupt Organizations Act (RICO), the majority said:  

> [I]n applying a discovery accrual rule, we have been at pains to explain that discovery of the injury, not discovery of the other elements of a claim, is what starts the clock. In the circumstance of medical malpractice, where the cry for a discovery rule is 

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136. While it may look bad for a clear victim of tortious behavior administered by an employee of the United States to be denied her day in court, justice requires that the law be followed. Furthermore, the judgment fund, from which these judgments and settlements are paid, derive from tax revenue. The judgment fund has steadily increased in recent years. In other words, the harmed individual will be rewarded out of innocent people’s pockets when this does not need to be the case.  

137. Although there is nothing binding about dicta, Justices can often use it to get across to lower courts their opinions of what they believe to be wrong in a particular area of law that is parallel to the issue at hand.  

138. 534 U.S. 19 (2001). Justices Scalia and Thomas in their concurring opinion wrote that the period accrues “when the plaintiff has a complete and present cause of action.” *Id.* at 31-2. In rejecting an injury discovery rule, while never mentioning *Kubrick,* Scalia asserted that those appeals should be made to Congress. *Id.* at 34.  

139. 528 U.S. 549 (2000).  

loudest, we have been emphatic that the justification for a discovery rule does not extend beyond the injury.\textsuperscript{141}

C. Legislature

Congress has remained silent for a long period of time on the presumption that \textit{Kubrick} had settled the controversy over what they meant by the wording in the statute of limitations for the FTCA. Meanwhile, the legislature could clear up this ambiguity in numerous ways.\textsuperscript{142}

1. \textit{Enact a Separate Statute of Limitations for the FTCA}

All claims against the federal government are governed by a statute of limitations either written expressly into the language of the statute or incorporated from a similar regulation at either the state or federal level.\textsuperscript{143} As stated in \textit{Kubrick}, "Statutes of limitations . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."\textsuperscript{144} The FTCA uses the multipurpose 2401(b) for its limitation.

The negative aspect of sharing a statute with other sections of the U.S. Code is that it must be written in general terms, leaving room for interpretation. If a separate section was written and approved by the legislature, it could speak to each individual issue in a specific matter while retaining the meaning for any other regulation sharing the wording. Each person must have his own social security number because each individual has distinct qualities and must be easily distinguishable from everyone else. If two individuals have the same social security number, they are sure to run into difficulties at some point in their lives. Similarly, each statute should have its own limitations provision because each statute is created for a different purpose, written in a way specific to the cause.

\textsuperscript{141} \textit{Rotella}, 528 U.S. at 555-6.

\textsuperscript{142} The legislature might have been reluctant in the past to alter the wording of § 2401(b), because it is the statute of limitations for multiple sections of the U.S. Code.

\textsuperscript{143} \textit{See DOBBS, supra} note 4, at 550.

\textsuperscript{144} \textit{Kubrick}, 444 U.S. at 117 (quoting \textit{R.R. Telegraphers v. Ry. Express Agency}, 321 U.S. 342, 349 (1944)).
2. Add Language to the Definition Section

Congress should simply amend the FTCA’s definition section\(^\text{145}\) to include a part codifying the *Kubrick* standard under the heading “Accrual.” This definition should explain the discovery rule theory of Congress’ choice. The legislation could read like this: As used in chapter 2401(b) of this title, the term “accrual” in any claim except those involving medical malpractice means that time when a claimant is injured. In any claim involving medical malpractice, “accrual” means that time when a claimant has knowledge or with reasonable diligence should have knowledge of both injury and cause. Knowledge of the injury is the critical inquiry. This section does not distinguish injuries that are caused either by an omission or a commission.

By enacting a narrower and stricter standard modeled after the *Kubrick* decision, there will be no “wiggle room” for lower level courts to use in finagling decisions in an inequitable manner.

3. Amend Accrual Back to One Year

Congress could also repeal the 1949 amendment\(^\text{146}\) in order to give potential claimants only one year to file this claim with the correct administrative agency.\(^\text{147}\) By returning the time limit back to one year, but not defining the term accrual in the statute as recommended in the previous section, the legislature will still give the judiciary the ability to use factual distinctions in order to decide which standard — injury discovery, government causation discovery, causation discovery or omission/commission — the court will use in a particular case. Along with this suggested repeal, however, Congress must also amend the statute by creating a five-year statute of repose.


\(^{146}\) See *supra* text accompanying note 21.

\(^{147}\) One commentator has suggested, “Congress could roll back the two-year period for bringing all FTCA actions and adopt a rule that makes state statutory time limits on state tort actions the time limit for initiating FTCA claims.” Richard W. Bourne, *A Day Late, A Dollar Short: Opening A Governmental Snare Which Tricks Poor Victims Out of Medical Malpractice Claims*, 62 U. PITT. L. REV. 87, 119 (2000).
4. Five-Year Statute of Repose

While decreasing the period of time to file a claim other than a discovery rule type of claim, but adding language creating a five-year statute of repose, Congress will effectively eliminate the possibility of a stale claim. At the same time, this statute of repose will charge claimants with some responsibility to inquire into any wrongdoing while the situation is still fresh in the participant's memory. "Statutes of ultimate repose provide a counter rule to the accrual-discovery rule by adding an alternative prescriptive period which begins running at the time of the defendant's act rather than at the time harm was inflicted or discovered." Therefore, a clause added to the statute could be worded in the following manner: "In no event, can suits be commenced more than five years after the defendant's negligent act."

VI. H.R. 4600: CONGRESS' MOST RECENT OPINION ON CLAIMS AGAINST HEALTH CARE PROVIDERS; A NEW STATUTE OF LIMITATION FOR ALL MEDICAL MALPRACTICE CLAIMS AGAINST THE GOVERNMENT?

On September 26, 2002, the House of Representatives passed H.R. 4600, entitled, Help Efficient, Accessible, Low Cost, Timely Health Care (HEALTH) Act of 2002. Although the central piece of the bill concerns capping damage awards in health care lawsuits, the legislation does make a meaningful statement regarding Congress' present intent about the discovery rule in medical malpractice claims. The statute reads:

The time for the commencement of a health care lawsuit shall be 3 years after the date of manifestation of injury or 1 year after the claimant discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time for commencement of a health

148. DOBBS, supra note 4, at 557.
149. See id.
151. H.R. 4600 § 4 (capping damages awards).
care lawsuit exceed 3 years after the date of manifestation of injury unless tolled [due to fraud].\textsuperscript{152}

Although this bill expired at the end of the 107th Congress, it was reintroduced by Congressman Greenwood on February 5, 2003, in the 108th Congress.\textsuperscript{153}

It is clear that the legislature has abandoned the word “accrual” for a more explanatory phrase including the word “injury.” By abandoning the term accrual, extending the period to file a claim to three years, and adding a two-part conjunctive test of which the shorter period of time shall apply, the legislature procures a stricter standard for individuals than the judicially created discovery rule under the FTCA. This is illustrative of the present Congress' clear intention regarding the treatment of the discovery rule. It is notable that there is no mention of cause in any part of the statute. Therefore, there will be a strong presumption that Congress is trying to create an injury discovery rule, which might have been the original intention of the FTCA.

This bill's relationship to the FTCA has yet to be seen. Although on its face the bill does not seem to affect any provisions of the FTCA, unless the federal government will be considered a medical healthcare provider under the definitions section of the bill,\textsuperscript{154} the clear statement is that the government is trying to lessen the liability of healthcare providers through a limitation on the time in which a potential claimant can bring a suit against his provider. Taking this reasoning and placing the federal government in the private sector's position, sovereign immunity causes the legislation to be read more narrowly. Therefore, a claimant against the government with a similar statute of limitations would have a much steeper hill to climb when arguing for the discovery rule, in addition to having only one year rather than two to file the claim.

\textbf{VII. CONCLUSION}

It is imperative to the very foundation of the United States legal system created by the Constitution that Supreme Court decisions remain binding precedent upon the federal appellate and district

\textsuperscript{152} H.R. 4600 § 3.
\textsuperscript{154} H.R. 5 § 9; see also H.R. 4600 § 9.
courts, as well as state courts interpreting federal law.\textsuperscript{155} Currently, a claimant injured in one state will be treated differently then one injured in another state for discovery rule purposes under the FTCA. The uncertainty of more recent precedent makes it hard for the government to expedite these matters through the administrative agencies and subsequently through the court systems.\textsuperscript{156}

While this paper suggests multiple ways in which to settle the controversy of when a claim accrues under § 2401(b) in medical malpractice cases involving the discovery rule, it is essential that one of these recommendations be followed in order to (1) firmly establish a clear discovery rule; (2) restore the meaning behind sovereign immunity and how limited a waiver shall be interpreted; and (3) to save the taxpayers billions of dollars.\textsuperscript{157} Veterans of the United States Military who seek medical treatment from VA hospitals will be the class of persons most affected by the proposed reforms. Although veterans have contributed greatly to this country, the privilege awarded to veterans and citizens with the passing of the FTCA should and shall remain just that, a privilege, not to be extended beyond what the legislature specifically stated, nor beyond the Supreme Court’s interpretation of such language. Although Hughes would have been a perfect vehicle for the Supreme Court to re-clarify the Kubrick standard, it is unquestionable that doctors will continue to commit medical malpractice on patients, and lower courts will continue to butcher and extend the discovery rule as they see fit. Accordingly, chances will arise continually in the future to re-clarify the discovery rule. It is the job of all governmental branches to be prepared.

\textsuperscript{155} \textit{Casey}, 505 U.S. at 854; Cohens v. Virginia, 19 U.S. 264 (1821)(asserting appellate jurisdiction over interpretations of federal law and the Constitution by state courts of last resort and overturning Virginia’s highest court with appellate jurisdiction).

\textsuperscript{156} Because of this lack of certainty, administrative agencies are hesitant to deny claims when there is a discovery rule issue presenting. This hesitancy can be shown through a shockingly high amount of motions for summary judgment and dismissals for lack of subject matter jurisdiction once the action comes before a federal district court. \textit{See} Sexton v. United States, 644 F. Supp. 755 (D.C. Cir. 1986); Hughes, 2000 U.S. Dist. LEXIS 15740, at *2. If the decision is made on the statute of limitations issue in favor of the claimant, the case is usually not litigated any further, but rather settled by the government as the merits of these cases and the evidence established are usually more than ample to support a decision against the government.

\textsuperscript{157} The treasury fund that pays these claims is financed with taxpayer monies.