3-1-1992

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CHOOSE OF LAW UNDER THE FEDERAL TORT CLAIMS ACT: RICHARDS AND RENVOI REVISITED

JAMES A. SHAPIRO*

The Federal Tort Claims Act (FTCA) authorizes negligence actions against the United States Government but requires that the applicable law come from the state where the negligence occurred. Thirty years ago, in Richards v. United States, the United States Supreme Court ruled that the applicable law includes not only the state's substantive law, but also its choice of law rules. The result may be that a court will apply the substantive law of a state where the negligence did not occur.

In this Article, James Shapiro finds that three decades of decisions adhering to Richards have produced a body of case law that is unnecessarily complicated and inconsistent with congressional intent. Mr. Shapiro also argues that too often plaintiffs receive disproportionately large recoveries because of the Richards approach.

Mr. Shapiro recommends that the FTCA's language designating the applicable law to be "the law of the place where the act or omission occurred" be reinterpreted or amended so that the applicable law is limited to only the state's substantive law. Such an interpretation would deny federal courts the opportunity to manipulate the FTCA to reach a desired result and would subject the United States to liability as Congress originally intended.

The Federal Tort Claims Act (FTCA) is a limited waiver of sovereign immunity in tort actions against the United States Government. One of the many limitations on this waiver is that the liability of the United States be determined "in accordance with the law of the place

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The author gratefully acknowledges Professor J.B. Corr of American University Law School for his suggestions and encouragement in the preparation of this Article. The author also thanks Thomas P. Walsh and Nancy K. Needles, of the United States attorney's office for the Northern District of Illinois, for inspiring this Article by trying (and winning) a case in which the issue arose.

where the act or omission occurred.” At first, many courts understandably assumed this language meant what it seems to mean on its face: that the FTCA automatically applies where the negligence occurred. Thirty years ago, however, in Richards


3. See, e.g., Voytas v. United States, 256 F.2d 786, 790 (7th Cir. 1958) (applying substantive tort law of Virginia, where Government was allegedly negligent in storing explosives, to issue of Government’s duty, although explosion occurred in Illinois and Virginia would have chosen Illinois law had its lex loci delicti choice of law rule been applied); Eastern Air Lines v. Union Trust Co., 221 F.2d 62, 80-81 (D.C. Cir.) (divided court holding that Virginia rather than District of Columbia law applied to airplane crash in District of Columbia because Government’s negligence occurred in Virginia flight tower), cert. denied in part, aff’d in part, rev’d in part, 350 U.S. 907, 911 (1955); cf. Richards v. United States, 285 F.2d 521, 526 (10th Cir. 1960) (Murrah, C.J., dissenting) (arguing that FTCA provides its own conflicts rule: law of place of negligence), aff’d on grounds opposite to dissent, 369 U.S. 1 (1962); United States v. Marshall, 230 F.2d 183, 187 (9th Cir. 1956) (applying Idaho law to Government’s liability because Government’s negligence in Utah had operative effect in Idaho). But see Hess v. United States, 259 F.2d 285, 291 (9th Cir. 1958) (holding that law of place includes its conflicts rules, as in diversity cases, because statutory words are broad enough to include such rules and they are not excepted in FTCA), rev’d on other grounds, 361 U.S. 314 (1960); Landon v. United States, 197 F.2d 128, 131 (2d Cir. 1952) (applying conflicts rule of New York, where negligence occurred, to determine that New Jersey’s rule on reimbursement from claims against third parties controlled).


One court has defined “place” in the context of the FTCA as “the political entity in which the tortious act occurred.” Ira S. Bushey & Sons, Inc. v. United States, 276 F. Supp. 518, 524 (E.D.N.Y. 1967), aff’d on other grounds, 398 F.2d 167 (2d Cir. 1978); see also Hess v. United States, 361 U.S. 314, 318 n.7 (1960) (holding that “term ‘place’ in the [FTCA] means the political entity . . . whose laws shall govern the action against the United States ‘in the same manner and to the same extent as a private individual under like circumstances’” (quoting federal tort claims procedure in 28 U.S.C. § 2674 (1988))). Another court has distinguished “law of the place” from “law of the state” for the purpose of suggesting that the law of a place could be federal rather than state law. Southern Pac. Transp. Co. v. United States, 462 F. Supp. 1193, 1213 (E.D. Cal. 1978); accord Caban v. United States, 728 F.2d 68, 72 (2d Cir. 1984).

Although many governmental acts or omissions occur in American political entities such as the District of Columbia and United States territories, which are “places” but not “states,” this Article uses those terms interchangeably in recognition of common usage by the courts and the fact that most FTCA cases apply the law of one of the 50 states. See Southern Pac., 462 F. Supp. at 1213 (“In the vast majority of FTCA cases, [the] law [of the place] will, in fact, be the law of [the] state.”).

5. The Supreme Court has unequivocally and quite defensibly interpreted “the place
v. United States,6 the United States Supreme Court held that "the law" of the state where the negligence occurred is the "whole" law of that state—both the state's substantive law and its choice of law rules—rather than simply the state's "internal" or substantive law.7 Consequently, the substantive tort law to be applied in an FTCA case might not be that of the state in which the negligence occurred, as many courts had assumed based on the apparent meaning of the statutory language,8 but rather the law of some other state chosen by the choice of law rules of the state where the negligence occurred.9 This approach in choice of law cases has

where the act or omission occurred" to mean the place of negligence, not the place of injury. Richards, 369 U.S. at 9.


7. Id. at 11.

8. Even after the Supreme Court unequivocally interpreted the statutory language to refer to the whole law rather than the internal law of the place where the negligence occurred, some courts ignored this precedent—presumably by mistake—and continued to apply internal law, apparently not considering the statute's susceptibility to another construction. See, e.g., Bannon v. United States, 293 F. Supp. 1050, 1054 (D.R.I. 1968) (applying substantive law of Massachusetts, where Government's alleged medical malpractice occurred, without applying Massachusetts's lex loci delicti rule, which would have referred court to law of Rhode Island, where death occurred); McSwain v. United States, 291 F. Supp. 386, 388 & nn.2-3 (E.D. Pa. 1968) (applying Colorado's substantive law of respondeat superior and interspousal immunity without choice of law analysis, although all parties to accident in Colorado were Pennsylvania domiciliaries, and Colorado had never formally adopted lex loci delicti or any other choice of law rule for tort cases until First National Bank v. Rostek, 182 Colo. 437, 442-44, 514 P.2d 314, 316-18 (1973), in which the state supreme court rejected lex loci delicti); cf. Bell Helicopter v. United States, 833 F.2d 1375, 1377-78 (9th Cir. 1987) (rejecting plaintiff's argument that Richards mandates application of Alaskan whole law to contribution claim against Government under Federal Employees Compensation Act); Johns-Manville Sales Corp. v. United States, 622 F. Supp. 443, 446 n.5 (N.D. Cal. 1985) (acknowledging plaintiff's argument that California conflicts rules should apply, but choosing California internal law without meaningful choice of law analysis); Sawyer v. United States, 297 F. Supp. 324, 337 (E.D.N.Y. 1969) (expressly acknowledging applicability of whole law of state where negligence occurred, but applying New York's substantive law without choice of law analysis, even though case involved plane crash with multistate contacts), aff'd on other grounds, 436 F.2d 640 (2d Cir. 1971); Mills v. United States, 297 F. Supp. 972, 974 (D.D.C. 1969) (acknowledging and applying Richards, but interpreting "law of the place where the act or omission occurred" to be "substantive law of the state where the injuries were sustained," thereby contradicting not only the Supreme Court's whole law ruling, but also its holding that applicable law is where negligence, not injury, occurs); Maryland v. Capital Airlines, 267 F. Supp. 298, 302 (D. Md. 1967) (acknowledging Richards, but "[a]s the accident occurred in Maryland," applying Maryland's whole law to collateral estoppel issue when negligence occurred at Washington Air Route Traffic Control Center in Virginia).

often been referred to as "renvoi."\textsuperscript{10}

For three decades, the Supreme Court's surprising renvoi approach has heavily influenced multistate tort litigation—not only under the FTCA,\textsuperscript{11} but also under other federal acts concerning tort liabil-


10. Note, Choice-of-Laws Rule Under the Federal Tort Claims Act, 10 UCLA L. REV. 681, 686 (1963); see Lea Brilmeyer & James Martin, Conflict of Laws: Cases and Materials 300 n.2 (3d ed. 1990). The French word "renvoi" (pronounced rohn-vwah' in French but often anglicized to ren'-voy or ron'-voy) means "echo." Webster's Third International Dictionary 1923 (3d ed. 1971). American jurisprudence adopted the word for its rich connotation of a forum state's reference to another state's whole rather than internal law, which causes the choice of law to "bounce back," like an echo off a wall, to the law of the forum state (called "remission"), with which it is presumably more familiar, or to that of a third state (called "transmission"), which it may be more comfortable in applying. See generally Eugene F. Scoles & Peter Hay, Conflict of Laws § 3.13 (1982) (providing an overview of renvoi and its application).

Note that the statutory renvoi applied in Richards is a little different from the common-law renvoi applied by one state to refer to the whole law of another. Under Richards, the FTCA, as the Supreme Court construed it, starts the renvoi, and refers to the whole law of the state where the negligence occurred. Under the common law, the forum court—as opposed to a statute—starts the renvoi by referring to the whole law of the state to which it is directed by the forum's choice of law rules. This distinction may well be outcome-determinative in FTCA cases if the forum's choice of law rules differ from those of the place where the negligence occurred, and if the differing choice of law rules ultimately refer to conflicting laws of different states. For a brief discussion of the predominant choice of law approaches, see infra notes 33-34.

11. See cases cited supra note 9. The modern choice of law approaches, primarily governmental interest analysis and the Second Restatement of Conflicts' "most significant relationship" test, Restatement (Second) of Conflict of Laws § 148 (1971), make choice of law under the FTCA especially critical because the United States, the only possible FTCA defendant, has no domicile for choice of law purposes. See O'Rourke v. Eastern Air Lines, 730 F.2d 842, 850 n.12 (2d Cir. 1984) ("United States . . . is neither incorporated nor domiciled in any one state."); see also Foster v. United States, 768 F.2d 1278, 1284 (11th Cir. 1985) ("United States is obviously a domiciliary of neither Florida nor Illinois."). Donaldson v. United States, 634 F. Supp. 735, 739 (S.D. Fla. 1986) ("United States conducts its activities in all of the fifty states and cannot be said to have any greater contact with Arizona than it does with Florida."). But see Hitchcock v. United States, 665 F.2d 354, 360 (D.C. Cir. 1981) (analagizing Government to national corporation headquartered in District of Columbia, which "would have some interest in having its law applied to decide the liability of a business headquartered there"). The lack of a one-state domicile for the United States places increased weight on the plaintiff's domicile and other factors in any modern choice of law analysis. See, e.g., Foster, 768 F.2d at 1283 (holding that Florida had no interest in protecting nondomiciliary defendant like United States with its limitation on wrongful death recovery); Donaldson, 634 F. Supp. at 740 (finding that because United States was not domiciled in either Florida or Arizona, Florida domicile of most plaintiffs and their decedents' estates took on greater importance); Reminga v. United States, 448 F. Supp. 445, 458 (W.D. Mich. 1978) ("Application of Michigan law as to the amount of damages plaintiffs may recover would injure no important Wisconsin aeronautical safety policy," because Wisconsin would be indifferent to limiting the exposure of a nondomiciliary like the United States.), aff'd on other grounds, 631 F.2d 449 (6th Cir. 1980).

The traditional lex loci delicti approach takes discretion away from the federal court be-
The impact under the FTCA has been especially strong in aviation cases like Richards, in which the United States is often a defendant due to its employment of air traffic controllers, and in which choice of law issues are rife because of the multistate and multinational nature of aviation. More often than not, Richards's effect has been adverse to the United States, because the lower federal courts have often used the Supreme Court's flexible choice of law rule to choose the law of a state that affords plaintiffs a larger recovery than would be had under another state's law. Moreover, Richards is internally inconsistent, and potentially conflicts with another FTCA provision, the foreign country exclusion. Many may argue that Richards should not be overturned because it is a thirty-year-old precedent that the lower federal courts have followed without serious ques-
tioning. But if Justice Brandeis in *Erie Railroad v. Tompkins* could "abandon a doctrine so widely applied throughout nearly a century" as *Swift v. Tyson,* then likewise no reason exists to perpetuate a thirty-year-old precedent simply because it has been the rule of law for so long.

This Article first examines Chief Justice Warren’s analysis in *Richards,* discussing its internal inconsistencies as well as its contravention of congressional intent. It then examines how the lower courts have almost uniformly applied *Richards* over the past thirty years to benefit plaintiffs in FTCA cases. Next, the Article explores a "double choice of law" problem that *Richards* creates when the Government's negligence occurs in more than one state. Finally, the Article argues that the "law of the place where the act or omission occurred" should be reinterpreted—or recodified—to mean internal law rather than whole law, in accordance with Congress's intent when it enacted the FTCA.

I. THE COURT'S ANALYSIS IN *RICHARDS v. UNITED STATES*

*Richards v. United States* was a wrongful death case brought against the United States on behalf of passengers killed when their airplane crashed in Missouri en route to New York after taking off from Oklahoma. At the time the passengers' relatives filed the action, Missouri limited all wrongful death plaintiffs to a $15,000 recovery. Oklahoma had no such limitation. The relatives sued the United States in federal district court in Oklahoma under the FTCA, claiming that employees of the Federal Aviation Administration (FAA) negligently permitted American Airlines to place an unsafe cylinder in one of the airplane's engines at American's depot in Tulsa, Oklahoma. Because they alleged the FAA's negligence occurred in Oklahoma, the relatives hoped to have the district court apply Oklahoma's wrongful death statute as "the law of the place where the act or omission occurred" and

18. 304 U.S. 64 (1938).
19. Id. at 77.
24. The Court referred to the FAA as the "Civil Aviation Agency," although the agency was called the Federal Aviation Agency at the time. The agency was later renamed the Federal Aviation Administration, its current designation, in Pub. L. No. 89-670, 80 Stat. 931 (1966) (codified as amended at 49 U.S.C. § 1301(1) (1988)).
thereby to gain the benefit of Oklahoma's unlimited recovery for wrongful death. The district court, however, dismissed the case, and the United States Court of Appeals for the Tenth Circuit affirmed on the ground that the Oklahoma wrongful death statute did not have extraterritorial effect, and thus could not apply to deaths that occurred in Missouri rather than Oklahoma. Chief Judge Murrah of the Tenth Circuit dissented on the ground that Oklahoma internal rather than whole law applied under the FTCA, and that therefore the Oklahoma wrongful death statute also applied.

The Supreme Court also affirmed, but on the ground that the whole law rather than internal law applied, precisely the converse of the dissenting opinion in the Tenth Circuit. Chief Justice Warren set forth three reasons for the Court's holding. First, applying the whole law, rather than internal law, of the place where the negligence occurred is more consistent with treating the United States as a private defendant, as another provision of the FTCA mandates. This is because a private defendant would always be subject to conflicts rules in a lawsuit with multistate aspects, although they would be the conflicts rules of the forum, not those of the place of negligence, unless those places happened to be one and the same. Second, the Court wanted to give impetus to what was then a burgeoning trend away from the traditional *lex loci delicti* rule in favor of more modern choice of law analyses. The

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27. *Richards*, 285 F.2d at 523. The district court opinion is unreported. See Recent Case, 15 VAND. L. REV. 1322, 1322 n.4 (1962). Presumably, the district court concluded that the Oklahoma wrongful death statute was inapplicable and dismissed the case because third-party defendant American Airlines had already paid or tendered to the plaintiffs $15,000, the maximum recovery under the Missouri wrongful death statute that ultimately applied in the case.

28. *Richards*, 285 F.2d at 524-26. The majority opinion briefly discusses the choice of law issue and seems to adopt the internal law construction of § 1346(b), but does not rely on it in its holding. *Id.* at 524-25.

29. *Id.* at 526 (Murrah, C.J., dissenting).


31. *Id.* at 11-12 (citing 28 U.S.C. § 2674 (1958)).

32. *See infra* notes 37-55 and accompanying text.

33. *Lex loci delicti* means law of the place of the wrong. BLACK'S LAW DICTIONARY 911 (6th ed. 1990). The *First Restatement of Conflicts* defines the place of the wrong as the place where the last act necessary to make the actor liable takes place. *Restatement of Conflicts of Law* § 377 (1934). The last act necessary to make the actor liable is injury to the plaintiff. *Cf.* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 165 (5th ed. 1984) (listing damages as last element of cause of action for negligence and noting that statute of limitations generally held not to run until damage has occurred, suggesting cause of action does not accrue until plaintiff is injured).

34. *Richards*, 369 U.S. at 12-13. Today, there are primarily two approaches: governmental interest analysis and the “most significant relationship” test of § 6 of the *Second Restatement*. Governmental interest analysis compares the policies behind the laws of each of the states with any relationship to the case, and chooses the law of the state whose policy would
whole law rule would accomplish this by allowing the federal courts to apply the modern conflicts approaches when states in which the United States is negligent have adopted them.\textsuperscript{35} Third, Congress did not clearly express its intent to have the internal law of the place of the act or omission govern.\textsuperscript{36} Of these three reasons, only the second is arguably compelling, and even that reason was undermined by the Court's very holding in Richards.

A. The United States as Private Defendant

Section 2674 of the FTCA mandates that "[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances."\textsuperscript{37} Reading this provision together with the provision of section 1346(b) that liability be determined according to "the law of the place where the act or omission occurred,"\textsuperscript{38} the best be furthered by applying that state's law. See generally Gregory E. Smith, Choice of Law in the United States, 38 Hastings L.J. 1041, 1047-48 (1987) (providing an overview of governmental interest analysis and surveying different choice of law rules). One variation of governmental interest analysis is called "comparative impairment," in which the forum court applies the law of the state whose policy would be most damaged by choosing the law of another state. The Second Restatement's "most significant relationship" test applies several discrete factors, which vary according to the type of case, to certain general choice of law principles, which remain constant for every type of case. \textit{Restatement (Second) of Conflict of Laws} \textsection{} 148 (1971). For tort cases, the discrete factors are (1) place of injury, (2) place of conduct causing the injury, (3) domicile of the parties, and (4) center of the parties' relationship. \textit{Id.} The general choice of law principles include the needs of the interstate system; the policies and relative interests of interested states, including the forum state; certainty; and ease of application. \textit{Id.} \textsection{} 6.

\textsuperscript{35} See infra notes 56-63 and accompanying text.

\textsuperscript{36} Richards, 369 U.S. at 13-14.

\textsuperscript{37} 28 U.S.C. \textsection{} 2674 (1988). \textit{Compare id.} (FTCA provision) with 28 U.S.C. \textsection{} 1606 (similar provision in Foreign Sovereign Immunities Act (FSIA)). In Barkanic v. General Admin. of Civil Aviation of the People's Republic of China, 923 F.2d 957 (2d Cir. 1991), the United States Court of Appeals for the Second Circuit used language from \textsection{} 1606 of the FSIA materially identical to that of \textsection{} 2674 of the FTCA to apply the choice of law rules of the forum state. \textit{Id.} at 959-60. In doing so, the Second Circuit rejected analogizing to the FTCA because of the absence of any provision in the FSIA akin to the FTCA's "law of the place where the act or omission occurred." \textit{Id.} at 959 (quoting \textsection{} 2674 and citing \textsection{} 1606).

\textsuperscript{38} Richards, 369 U.S. at 6 (quoting 28 U.S.C. \textsection{} 1346(b)). It is not altogether clear why the Court even had to read \textsection{} 1346(b) in conjunction with \textsection{} 2674. The context of the language from \textsection{} 1346(b) is that the Government will be liable "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. \textsection{} 1346(b) (emphasis added). Thus, the "private individual" provision of \textsection{} 2674 seems superfluous to the "private person" clause of \textsection{} 1346(b). \textit{See infra} notes 64-67 and accompanying text. \textit{But see} Caban v. United States, 728 F.2d 68, 73-74 (2d Cir. 1984) (arguing that "under like circumstances" modification of "private individual" provision in \textsection{} 2674 distinguishes it from "private person" clause in \textsection{} 1346(b)); \textit{cf. id.} at 76-77 (Cardamone, J., concurring in the result) (rejecting the "like circumstances" argument in favor of a Supremacy Clause analysis).
Richards Court reasoned that "where the forum State is the same as the one in which the act or omission occurred, our interpretation will enable the federal courts to treat the United States as an individual would be treated under like circumstances." In other words, because "an individual . . . under like circumstances" would be subject to conflicts rules, the United States should be too. But what if the forum state is not the same as the one in which the act or omission occurred? Under Richards, that situation would result in the following non sequitur: Because a private defendant would be subject to the choice of law rules of the forum in which a plaintiff brought an action against him, the United States should be subject to the choice of law rules of the place where the act or omission occurred. Such a result is not treating the United States as a private individual would be treated under like circumstances.

In a footnote, Chief Justice Warren somewhat obliquely acknowledged this problem without fully addressing it. He used a hypothetical twist on the procedural posture of Richards in an attempt to illustrate how the United States would be treated like a private individual under his renvoi approach. The Chief Justice supposed the plaintiffs had directly sued American Airlines, a third-party defendant in Richards, in

39. Richards, 369 U.S. at 12; see Note, supra note 10, at 687 n.36. The significance to the Court of the forum state being the same as the state in which the negligence occurred lies in the fact that the forum state's choice of law rules always govern a private defendant for state law questions under diversity jurisdiction. See Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).

40. In Richards, for example, what if an FAA flight tower in Missouri had sent an erroneous radio transmission to the airplane while it was still over Oklahoma, resulting in a crash in Oklahoma? Cf. Eastern Air Lines v. Union Trust Co., 221 F.2d 62, 80 (D.C. Cir.) (holding that FAA's negligence occurred in Virginia flight tower even though crash occurred in District of Columbia), cert. denied in part, aff'd in part, rev'd in part, 350 U.S. 907, 911 (1955). The negligent act then would have occurred in Missouri, warranting the Oklahoma district court to apply Missouri's whole law under the Supreme Court's analysis in Richards. At the time, Missouri, like Oklahoma, followed the lex loci delicti rule, whereby the situs of the last act necessary to make the United States liable, the hypothetical crash in Oklahoma, determined the applicable law. Gaston v. Wabash R.R., 322 S.W.2d 865, 866-67 (Mo. 1959), effectively overruled by Kennedy v. Dixon, 439 S.W.2d 173, 184 (Mo. 1969) (abandoning lex loci delicti in favor of the "most significant relationship" test from the Restatement (Second) of Conflict of Laws). Thus, under Gaston, which was still good law at the time of the crash, and the Supreme Court's approach in Richards, Oklahoma law (and its unlimited recovery for wrongful death) would have been applicable to the hypothetical.

41. See Klaxon, 313 U.S. at 496.

42. Accord Note, supra note 10, at 687 ("[I]f the state of the negligent act has adopted a 'contacts' theory of conflicts while the forum state follows the [First] Restatement position, the government may not incur liability under the same law as that applicable to a private codefendant.")

43. See Richards, 369 U.S. at 12 n.25.

44. See id.
Oklahoma. If the Court had applied Oklahoma’s internal law in the FTCA suit against the United States, then the United States would have been treated differently from private defendant American Airlines, to whom Oklahoma whole law—and thus, because of Oklahoma’s lex loci delicti rule, Missouri internal law—would have applied. Under the Court’s whole law approach, however, the United States and American Airlines would have been treated identically in the hypothetical, because the United States would also have been governed by Oklahoma’s whole rather than internal law.

But then the Chief Justice conceded that because the FTCA’s venue provision allows suit to be brought wherever the plaintiffs reside as well as where the negligence occurs, “a situation may arise where a District Court could not determine the Government’s and a private individual’s liability in exactly the same manner.” That precise situation would have arisen in Richards had any of the plaintiffs resided and sued in a state like New York—the destination of the ill-fated flight—which had retreated from the traditional conflicts approach by the time the Richards plaintiffs filed suit in the late 1950s. If any of the plaintiffs had in


46. Richards, 369 U.S. at 12 n.25.

47. Id.

48. Id. at 12 n.25 (citing 28 U.S.C. § 1402(b)); cf. Berger v. Winer Sportswear, Inc., 394 F. Supp. 1110, 1113 & n.2 (S.D.N.Y. 1975) (finding that because of § 1346(b) of the FTCA, "the usual choice of law principles applicable to solely private disputes are put aside"). For examples of where this situation would have arisen if a private defendant had been (or could have been, see supra note 45) sued together with the United States, see Washington v. United States, 769 F.2d 1436, 1437-38 (9th Cir. 1985) (Plaintiffs sued in California, their current residence, rather than New York, their former residence and site of medical malpractice at Air Force hospital.); Foster v. United States, 768 F.2d 1278, 1281-84 (11th Cir. 1985) (Plaintiff administrator sued in Florida, both his and decedent’s residence, rather than Illinois, where Government’s negligence occurred; the court applied Illinois’s “most significant contacts” test, which required application of Illinois law.).

49. See Haag v. Barnes, 9 N.Y.2d 554, 559-60, 175 N.E.2d 441, 443-44, 216 N.Y.S.2d 65, 69 (1961) (applying “most significant contacts” or “center of gravity” test to choose Illinois over New York law to govern paternity contract; traditional rule would also have chosen Illinois law); Auten v. Auten, 308 N.Y. 155, 160-61, 124 N.E.2d 99, 101-02 (1954) (applying "center of gravity" or "grouping of contacts" theory to select English rather than New York law to govern enforcement of marital separation agreement); see also Richards, 369 U.S. at 12
fact sued in New York (or some other state that had abandoned the *lex loci delicti* rule), the United States would have been subject to the choice of law rules of Oklahoma while the private defendant would have been subject to choice of law rules that would not necessarily have referred to the internal law of the place of injury, as Oklahoma’s did. In turn, Missouri’s $15,000 limitation on wrongful death recoveries would have applied to the United States while the private defendant might very well have had to pay more under the internal law of Oklahoma or New York, depending on where the district court in New York found the center of gravity to lie. In any event, the United States would have been treated very differently from, and likely much better than, a private defendant.

The Court’s attempt to reconcile section 1346(b) of the FTCA with section 2674 was unnecessary. Section 1346(b), like section 2674, already provides that the United States should be treated as a private defendant. Section 1346(b) makes the Government liable only “under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place of the act or omission.” The juxtaposition of “private person” with “in accordance with the law of the place of the act or omission” seems to suggest that the FTCA’s intent is to treat the United States as a private defendant under the internal law rather than whole law of the place where the negligence occurred. That is because a private defendant would normally be subject to the choice of law rules of the forum state, not the state where the negligence occurred. Congress would not have gone out of its way to specify the hypothetical private person’s liability under the law of the place of negligence if it had wanted that liability determined by the place of injury, or some other place to which the whole law of the place of negligence referred.

n.26 (citing cases from other jurisdictions that had abandoned or were in the process of abandoning *lex loci delicti*).


51. For a brief description of the “center of gravity” test, see *supra* note 49.


53. See *supra* note 38.


B. The Trend Toward Modern Choice of Law Analysis

After claiming that its "whole law" interpretation of section 1346(b) was more consistent with treating the United States as a private defendant, Chief Justice Warren bolstered the Court's holding by stating that this interpretation of the [FTCA] provides a degree of flexibility to the law... that would not be possible [if the internal law of the place of negligence applied]. Recently there has been a tendency on the part of some States to depart from the general conflicts rule in order to take into account the interests of the State having significant contact with the parties to the litigation. We can see no compelling reason to saddle the [FTCA] with an interpretation that would prevent the federal courts from implementing this policy in choice-of-law rules where the State in which the negligence occurred has adopted it. Should the States continue this rejection of the older rule in those situations where its application might appear inappropriate or inequitable, the flexibility inherent in our interpretation will also be more in step with that judicial approach.56

In the thirty years since Richards, the states have in fact continued to reject the older rule; the majority of states currently follow one of the more modern approaches.57 The Court's endorsement in Richards of the more modern approaches to choice of law certainly encouraged this development to some extent.58 In the end, however, federal law adopts whatever is the prevailing state law, including—according to Richards—state choice of law rules.59 In other words, the FTCA passively "piggybacks" on whatever choice of law rule happens to have been adopted.

57. See SCOLES & HAY, supra note 10, § 2.16, at 42 (explaining that the "rigid rules of the First Restatement have now been abandoned in many areas of conflicts law").
58. See Myers v. Gaither, 232 A.2d 577, 583-84 (D.C. 1967) (using language from Richards, quoted in text accompanying note 56, supra, to support adoption of governmental interest analysis in District of Columbia), aff'd, 404 F.2d 216 (D.C. Cir. 1968); Beaulieu v. Beaulieu, 265 A.2d 610, 615 (Me. 1970) (citing Richards to support Maine's adoption of Restatement (Second) of Conflict of Laws's approach); Griffith v. United Air Lines, 416 Pa. 1, 20-21, 203 A.2d 796, 804-05 (1964) (citing Richards to support Pennsylvania's rejection of lex loci delicti and adoption of governmental interest analysis); cf. McDaniel v. Sinn, 194 Kan. 625, 626-67, 400 P.2d 1018, 1019-20 (1965) (adhering to lex loci delicti rule despite parties' arguments, based on Richards, in favor of adopting significant contacts approach); Click v. Thuuron Indus., 475 S.W.2d 715, 719-20 (Tex. 1972) (Daniel, J., concurring) (using Richards to support adoption of one of modern choice of law approaches for future cases, but concurring in application of lex loci delicti in that particular case). But see Lillegraven v. Tengs, 375 P.2d 139, 140 & n.5 (Alaska 1962) (citing Richards to support application of lex loci delicti as general choice of law rule); Wolozin v. Wolozin, 149 Conn. 739, 741, 182 A.2d 8, 9 (1962) (citing Richards for proposition that lex loci delicti was majority rule, and following that rule).
by the state where the negligence occurred. Development of conflicts
docline under state law has thus been independent of any federal man-
date, although the Supreme Court's approval of the modern learning was
persuasive authority for some state courts deciding whether to adopt one
of the modern approaches. 60

Interestingly, the Court's stated policy favoring more flexible adop-
tion of new choice of law rules seems at odds with its rationale for treat-
ing the United States as a private defendant:

The general conflict-of-laws rule, followed by a vast majority of
the States [at the time of this decision], is to apply the law of
the place of injury to the substantive rights of the parties.
Therefore, . . . our interpretation will enable the federal courts
to treat the United States as an individual would be treated
under like circumstances. 61

If the Court was so intent on encouraging new thinking in the conflicts
arena, then it should not have used the traditional rule as its basis for
trying to treat the United States like a private litigant. Ironically, the
Court's very holding in Richards—applying Oklahoma's lex loci delicti
rule—only perpetuated the viability of that rule. 62 As the Court itself
acknowledged, the traditional rule had been rejected in several jurisdic-
tions by the time Richards was decided, 63 and Chief Justice Warren was
rather prescient in suggesting that the rejection might continue. The
Court did not need to choose the whole law of the place where the negli-
gence occurred to further a then-embryonic modern learning, which was
already on its way to becoming the majority rule. Nor did the Court
need to regressively apply the lex loci delicti in an unsuccessful attempt
to treat the United States like a private litigant.

own force under the FTCA, and deciding instead that state law applies by adoption into fed-
eral law).

60. See supra note 58.


62. See Lillegraven, 375 P.2d at 140-41; Wolozin, 149 Conn. at 741, 182 A.2d at 9; see
also Marine Constr. & Design Co. v. Vessel Tim, 434 P.2d 683, 686, 689 (Alaska 1967) (fol-
lowing Lillegraven); Landers v. Landers, 153 Conn. 303, 304-05, 216 A.2d 183, 184 (1966)
(following Wolozin by citing Richards to support application of lex loci delicti as majority rule
and expressly refusing to adopt one of the modern approaches despite recent advent of the
Restatement (Second) of Conflict of Laws). Alaska finally seemed to abandon lex loci delicti
the year after Marine Constr. was decided, and six years after Richards. See Armstrong v.
Armstrong, 441 P.2d 699, 701-04 (Alaska 1968). Connecticut, however, did not even begin to
question its lex loci delicti rule until the 1980s. See O'Connor v. O'Connor, 201 Conn. 632,
638, 519 A.2d 13, 16 (1986) ("[W]e are not wholeheartedly committed to application of lex
loci as the sole approach to choice of laws in all torts cases.") (citing Simaitis v. Flood, 182
Conn. 24, 437 A.2d 928 (1980)); Simaitis, 182 Conn. at 29-31, 437 A.2d at 831-32 (discussing
but declining to overrule lex loci delicti, and applying workers' compensation choice of law).

63. See Richards, 369 U.S. at 12 & n.26.
C. Congressional Intent

Not only was the Supreme Court's application of the whole law of the place of negligence regressive insofar as it perpetuated the *lex loci delicti* rule, but it also was contrary to congressional intent. Congress expressly stated in the FTCA itself that the United States is to be liable "*in accordance with* the law of the place where the act or omission occurred."64 In the early 1940s, when Congress considered and passed the FTCA, the predominant choice of law rule was *lex loci delicti*.65 It is doubtful that Congress would have deliberately chosen the law of the place of negligence only to have the law of the place of injury apply under then prevailing choice of law rules.66 Thus, Congress enacted a statutory choice of law rule in section 1346(b) of the FTCA; its very choice of the place of negligence itself suggests that the internal rather than whole law of that place be used.67

The Court was heavily influenced by the fact that Congress did not expressly consider the choice of law issue.68 Two reasons likely explain

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65. *Accord* Burgio v. McDonnell Douglas, Inc., 747 F. Supp. 865, 868 (E.D.N.Y. 1990) ("Since probably all of the states in 1928," when the Federal Reservations Act (FRA) was enacted, "applied the same choice of law rule for torts, that is, the place of the tort, it is likely that the legislators did not consider the issue."). Commentary suggesting change in conflicts doctrine certainly existed between 1928, when Congress passed the FRA, and 1942, when it passed the FTCA. See, e.g., David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 Harv. L. Rev. 173, 182-87 (1933) (focusing on choice of law in contracts cases); Louis B. Sohn, *New Bases for Solution of Conflict of Laws Problems*, 55 Harv. L. Rev. 978, 984-86 (1942) (proposing modified renvoi, among other things, to resolve conflicts issues); Comment, *Functional Application of Conflict of Laws Rules in Tort Cases*, 44 Yale L.J. 1233, 1238 (1935) (positing prototypical interest analysis whereby "forum may apply the law of the jurisdiction which has the greatest interest in securing conformity with the particular rule in issue"). The courts, however, were still reaffirming *lex loci delicti* during that period. See, e.g., Stahl v. Bell, 276 Mich. 37, 39, 267 N.W. 779, 780 (1936); Mertz v. Mertz, 271 N.Y. 466, 473-74, 3 N.E.2d 597, 599-600 (1936); Kerstetter v. Elfman, 327 Pa. 17, 18, 192 A. 663, 664 (1937).
66. In deciding what the term 'law' included, the Court was not 'bound' by a direct expression of Congress so it took notice of the prevailing state choice-of-law rule and held that the whole law of the place of the negligence must be used so that final reference would be to the 'place of injury' in most cases. Recent Case, supra note 27, at 1323. Ironically, the Supreme Court itself expressly rejected an interpretation of "the place where the act or omission occurred" to mean the place where the negligence had its operative effect, meaning the place of injury. See supra note 5. Yet the net effect of its whole law interpretation, at least at the time it decided *Richards*, when *lex loci delicti* was still the majority rule, was to apply the internal law of the place of injury.
67. *See* Richards v. United States, 285 F.2d 521, 526 (10th Cir. 1960) (Murrah, C.J., dissenting) (arguing that when Congress did not stop at saying the United States was to be liable as private person, but added "in accordance with the law of the place where the act or omission occurred," it thereupon prescribed that the United States would become liable under internal law), *aff'd on grounds opposite to dissent*, 369 U.S. 1 (1962).
68. *See* Richards v. United States, 369 U.S. 1, 8 (1962) ("It has been repeatedly observed that Congress did not consider choice-of-law problems during the long period that the legisla-
Congress' failure to address this issue explicitly. First, there simply was no choice of law issue in the early 1940s when Congress drafted and enacted the FTCA; as previously stated, virtually all of the states at that time recognized *lex loci delicti* as the appropriate choice of law rule. Second, Congress probably assumed it had changed the presumption favoring *lex loci delicti* by enacting its own statutory choice of law rule, specifically making the United States liable in accordance with the law of the place of negligence instead of the place of injury.

If Congress actually had thought it neglected a choice of law issue by failing to specify whether the internal or whole law of the place of negligence is to be applied, if it had then specifically considered the issue, and finally, if it expressly had directed the United States to be governed by the choice of law rules of any place in particular, that place most likely would have been the state where suit was filed—the forum state—rather than the state of the negligent act or omission. After all, even under traditional common-law *renvoi*, courts start with the choice of law rules of the forum state and no other.

Curiously, the Supreme Court seemed to start with the presumption that state conflicts rules apply in the absence of congressional intent to the contrary: "Certainly there is nothing in the legislative history [of the FTCA] that even remotely supports the argument that Congress did not intend state conflict rules to apply to multistate tort actions brought against the Government."

This analysis required the FTCA's legislative history to prove a tort-
tuous negative: that state choice of law rules were not to apply when there was no meaningful difference among them at the time Congress passed the FTCA. The peculiar presumption that state conflicts rules applied in the absence of express congressional intent to the contrary was all the more unusual in light of the ease with which the Court dismissed an argument by one of the litigants in Richards that the "place of the negligent act or omission" is really the place where the negligence has its operative effect, meaning the place of injury. In disposing of that argument, the Court

start[ed] with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used. We believe that it would be difficult to conceive of any more precise language Congress could have used to command application of the law of the place where the negligence occurred than the words it did employ in the Tort Claims Act.

Although the "operative effect" argument is somewhat more tenuous than the Court's "whole law" interpretation, it still would seem that the ordinary meaning of "the law" in the context of the United States being liable "in accordance with the law of the place where the act or omission occurred" is the internal rather than whole law of that place. Unlike the "operative effect" construction, Congress could have been more precise than simply stating "law of the place"—namely, by specifying the "internal law of the place"; the Court, however, should not have required that. As discussed above, almost all the states would have chosen the law of the place of injury at the time Congress passed the FTCA and Congress probably thought it had specifically rejected that choice by selecting the law of the place of negligence.

Moreover, Congress may have had good reason to specifically select the law of the place of negligence to govern the liability of the United States. One commentator has observed that "government employees are normally subjected to numerous regulations, some of which are based upon the local law of the employment area. By applying the internal law of the place of negligence, the Government's liability would be determined by the law to which its employees had adapted their conduct."

75. See supra note 65 and accompanying text.
76. Richards, 369 U.S. at 9-10; see supra notes 4-5.
77. Richards, 369 U.S. at 9.
78. 28 U.S.C. § 1346(b) (1988); see pre-Richards cases cited supra note 3. But see Hess v. United States, 259 F.2d 285, 291 (9th Cir. 1958) (holding that "statutory words, 'law of the place,' are broad enough to include [conflicts rules] and those areas are not excepted in the statute"), rev'd on other grounds, 361 U.S. 314 (1960).
79. See supra text accompanying notes 64-67.
80. Bronston, supra note 71, at 183; see, e.g., 41 C.F.R. § 101-38.301-3 (1990) (requiring
Even if the particular conduct in question were not based on federal regulation piggybacking on local law, the internal law of the place of negligence would still be the most logical choice for determining the United States’ liability.

Not only is the Court’s presumption in favor of applying whole law unusual, but the legislative history of the FTCA more than “remotely” supports the proposition that Congress did not intend whole law to apply. In fact, it seems to expressly do so. In the footnote immediately following its statement that the legislative history fails to show that whole law was not to apply, the Court itself acknowledges that Congress defined the phrase “law of the place where the act or omission occurred” as “local tort law,” among other things. “Local tort law” would seem

federal employees using government owned or leased vehicles to obey state and local traffic laws); 41 C.F.R. § 101-47.307-1 (1990) (requiring real property to be disposed of by quitclaim deed or deed without warranty “in conformity with local law and practice”).

82. Id. at 14 n.29 (emphasis added) (citing in part Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary, 77th Cong., 2d Sess. 30 (1942) [hereinafter House Hearings] (statement of Francis M. Shea, Assistant Attorney General, United States Department of Justice)). The context of Assistant Attorney General Shea’s reference to “local tort law” was as follows:

Mr. Shea: Under the other bill [H.R. 5373] it was not specifically provided that local law should govern . . . .
Mr. [Emanuel] Celler [Representative from New York]: Do you need that? Is that necessary to express it?
Mr. Shea: I should think the earlier bill [H.R. 5373] would probably be construed as applying local tort law, but this bill [H.R. 6364] specifically covers it . . . .
Mr. Celler: The only trouble is in future bills you may have to put that precedent in. If you leave it out the courts may not construe it should apply. I am only thinking out loud to get your reaction.
Mr. Shea: This bill provides explicitly for the application of local law.

House Hearings, supra, at 30 (emphasis added). Apparently, Congressman Celler was wrong in suggesting future bills might require specification that local tort law apply, because the Supreme Court did not even construe it to apply in Richards despite such specification. But cf. Bronston, supra note 71, at 182 & n.13 (construing Assistant Attorney General Shea’s comments to insure only that the Government’s liability would be determined by state law in general, as opposed to federal law or the internal law of the place where the act or omission occurred).

83. Richards, 369 U.S. at 14 n.29. In that footnote, the Court identified five different phrases in the legislative history of the FTCA that make apparent reference to “the law of the place where the act or omission occurred”: (1) “the law of the situs of the wrongful act or omission,” House Hearings, supra note 82, at 35; (2) “local law,” id. at 30 & passim (the Richards Court also cited several other legislative reports containing references to “local law” that are not particularly helpful and therefore are not cited here); (3) “local tort law,” id. at 30; (4) “the law of the situs of the alleged tort,” Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary, 76th Cong., 3d Sess. 44 (1940) [hereinafter Senate Hearings] (statement of Connecticut Senator John A. Danaher); (5) “the locale of the injury or damage.” House Hearings, supra note 82, at 9.

The first reference, “the law of the situs of the act or omission,” simply restates the statu-
to suggest congressional contemplation of the internal law rather than whole law of the state where the negligent act or omission occurred.

tory language with the word "situs" substituted for its synonym "place." Although that language itself provides no clues to congressional intent, its context—the "foreign country exclusion"—certainly does. See infra notes 84-91 and accompanying text.

The second reference, "local law," similarly adds little toward revealing congressional intent except for the numerous contexts in which it is used. One of those contexts is the decision to vest exclusive rather than concurrent jurisdiction in the district courts. House Hearings, supra note 82, at 61, ¶ (i). One of the reasons given for exclusive district court jurisdiction was that "the district court sits in only one State and is familiar with the local laws and decisions which are to govern the determination of tort claims against the United States." Id.

The implication in the above passage is that Congress expected the district courts to apply the internal tort law of the state in which they sit, rather than the tort law of some other state chosen by the conflicts rules of the state in which they sit, with which the courts would not be as familiar. Of course, this assumes, as Chief Justice Warren did, that the plaintiff sues in a federal district of the state where the negligence occurred, instead of where he resides. See Richards, 369 U.S. at 12 & n.25; supra notes 43-52 and accompanying text. Yet the language quoted above certainly seems to evince Congress's intent to have the district courts apply the internal law rather than whole law of the state where the negligence occurs.

Another context of "local law" in the legislative history of the FTCA is the administrative adjustment of tort claims. House Hearings, supra note 82, at 26 ¶ (2), 59 ¶ (ii). House Bill 6463 provided that "local law" would apply to administrative as well as judicial claims. Id. Assuming the same local law applied to administrative claims as to judicial ones, it is doubtful that Congress would expect administrative agencies to apply choice of law rules, as it would federal courts.

In addition, many courts use "local law" synonymously with internal law. See, e.g., Tyminski v. United States, 481 F.2d 257, 268 (3d Cir. 1973) (considering whether to "apply the choice of law rules of New Jersey or simply New Jersey's local law" and "applying New Jersey's local law in order to remain faithful to the governmental interests").

The third reference in the legislative history, "local tort law," appears to evince clear congressional intent to apply the internal "tort" law of the place of the act or omission rather than the choice of law rules of that place. See supra note 82 and accompanying text.

The fourth reference, "the law of the situs of the alleged tort," does not itself specify whether the "situs" is the place where the negligent act or omission occurs—giving rise to duty and breach of duty—or the place where the injury occurs that ripens the tort into a cause of action. See Restatement of Conflict of Laws § 377 (1934). The context of the reference, however, suggests it is the place of negligence:

Senator [John] Danaher [of Connecticut]: If we apply the rule of respondeat superior we should do it, should we not, on the basis of the law of the situs of the alleged tort? Mr. [Alexander] Holtzoff [Special Assistant to the Attorney General]: I agree with that. My thought was that provision [presumably "the law of the place where the act or omission occurred"] would accomplish that very result. Senate Hearings, supra, at 44. If Senator Danaher was concerned that the United States' vicarious liability for its employees' torts was to be governed by "the law of the situs of the alleged tort," he could only have meant the situs of the employees' negligence, not the situs of the plaintiff's injury. See Morici Corp. v. United States, 500 F. Supp. 714, 717 (E.D. Cal. 1980), rev'd on other grounds, 681 F.2d 645 (9th Cir. 1982). The location of the plaintiff's injury is irrelevant in determining whether the government employee was acting within the scope of his employment at the time he committed the negligent act or omission. Mr. Holtzoff's rejoinder seems to confirm that interpretation.

Finally, "the locale of the injury or damage" is simply a misstatement by Assistant Attor-
If "local tort law" did not intimate that internal law should apply, then almost certainly the "foreign country exclusion" and some of its history did. The FTCA exempts from coverage claims arising in a foreign country. A claim arises in a foreign country when the act or omission occurs there. The following syllogism was one of the stated reasons for the foreign country exemption: "Since liability is to be determined by the law of the situs of the wrongful act or omission, it is wise to restrict the bill to claims arising in this country." That history clearly contemplates the possibility that, without the foreign country exclusion, the United States would be governed by the law of a foreign country if its employees' negligence occurred there. Congress definitely did not want the United States governed by the unfamiliar law of a foreign sovereign. Yet that is precisely what could happen under Chief Justice Warren's

84. 28 U.S.C. § 2680(k) (1988) (excluding from the FTCA claims arising in a foreign country); House Hearings, supra note 82, at 29 ¶ (l)(ii).

85. 28 U.S.C. § 2680(k).

86. See In re Paris Air Crash of March 3, 1974, 399 F. Supp. 732, 737 (C.D. Cal. 1975) (citing Richards, 369 U.S. at 9-10, for proposition that FTCA claim arises for purpose of determining place of negligence under § 1346(b)—as opposed to foreign country exclusion under § 2680(k)—where negligence occurred, not where it had its operative effect); Aanestad v. Beech Aircraft Corp., 521 F.2d 1298, 1300 (9th Cir.), cert. denied, 419 U.S. 998 (1974); Roberts v. United States, 498 F.2d 520, 522 n.2 (9th Cir.), cert. denied, 419 U.S. 1070 (1974); L.D. Reeder Contractors v. Higgins Indus., 265 F.2d 768, 773-74 n.12 (9th Cir. 1959). But cf. Stoddard v. Ling-Temco-Vought, Inc., 513 F. Supp. 314, 318 (C.D. Cal. 1980) (holding that "a tort is deemed to occur at the place where injury is sustained regardless of the place of origin of the negligent act" for purposes of Death on High Seas Act, although the plaintiff attempted to bring claim under FTCA, which excludes claims in admiralty (quoting Chapman v. City of Grosse Pointe Farms, 385 F.2d 962, 965 (6th Cir. 1967))).

87. House Hearings, supra note 82, at 29, ¶ (l)(ii) (comparing H.R. 5373 to H.R. 6463, which added foreign country exclusion); id. at 35 (statement of Francis M. Shea, Assistant Attorney General, United States Department of Justice).

88. An example given in the context of the previously quoted syllogism confirms this:

Mr. Shea: Claims arising in a foreign country have been exempted from this bill . . . . Since liability is to be determined by the law of the situs of the wrongful act or omission it is wise to restrict the bill to claims arising in this country. This seems desirable because the law of the particular State is being applied. Otherwise, it will lead, I think, to a great deal of difficulty.

Mr. [John M.] Robsion [Representative of Kentucky]: You mean by that any representative of the United States who committed a tort in England or some other country could not be reached under this?

Mr. Shea: That is right.

House Hearings, supra note 82, at 35.

authorization of renvoi in Richards. Assuming the negligence occurs in the United States so that the claim arises there, but the injury from that negligence occurs in a foreign country or the foreign country otherwise has the most significant relationship to or interest in the tort, then the choice of law rules of the state of negligence might very well refer the forum court to foreign law. That would certainly be a result Congress did not intend—indeed, that it specifically precluded, according to the Supreme Court's interpretation of the foreign country exclusion. The FTCA's legislative history, together with the plain meaning of its language, suggests that Congress intended the United States to be governed by the internal rather than whole law of the place of negligence.

90. See Paris Air Crash, 399 F. Supp. at 741-45. In that case, the court held the foreign country exclusion inapplicable because the case "arose" in California, where the negligent acts and omissions occurred. In applying California's "government interest" choice of law analysis, the court seemed to seriously consider applying the law of damages from any of 24 foreign countries, especially France, the situs of the crash, and Japan, the domicile of several of its victims. Id.

The court ultimately did select California law to apply to the damage issues, but its analysis reeked of forum bias. See id. at 744-45 ("Generally a forum applies its own law, and it is incumbent on a litigant who wishes to apply the law of a foreign state to demonstrate that the latter rule of decision will further the interest of the foreign state"). Moreover, the court never considered whether the foreign country exemption would have precluded application of foreign internal law had California's interest analysis warranted it. It could well have been compelled to apply the law of France had California followed lex loci delicti or had the negligence occurred in a state that did. See also O'Rourke v. Eastern Air Lines, 730 F.2d 842, 850-51 (2d Cir. 1984) (considering application of Greek law, but ultimately choosing New York law to apply under New York's choice of law rules and not reaching Government's alternative argument that Greek law could not apply because of foreign country exclusion); Leaf v. United States, 588 F.2d 733, 736 n.3 (9th Cir. 1978) (presuming California, situs of at least some negligence, together with Arizona and Mexico, would apply its own law under California choice of law rules, thereby obviating need to decide whether application of Mexican law would contravene legislative intent of foreign country exclusion). But see Sami v. United States, 617 F.2d 755, 763 (D.C. Cir. 1979) ("[P]revailing conflicts principles in the District of Columbia and elsewhere ... permit application of an alternate substantive law] when foreign law conflicts with a strong public policy of the forum."). The court's conclusion in Sami is somewhat doubtful for several reasons. First, the court relied exclusively on the public policy exception to invalidate foreign law. The court itself acknowledged the narrowness of that exception. Id. at 763 n.10. Second, the public policy exception could just as easily invalidate the law of another state as it could the law of a foreign country (assuming the laws of foreign countries are no more obnoxious to the forum than those of other states). Third, the public policy exception certainly takes care of foreign law that is antithetical to American jurisprudence. It does not speak, however, to the situation in which the foreign law does not offend the public policy of the forum, yet is nevertheless unfamiliar to it. In that case, the forum court would still be in the position of applying foreign law contrary to the express wishes of Congress. See Spelar, 338 U.S. at 221. Finally, Sami does not suggest which "alternate substantive law" the forum would choose if the choice of law rules of the place of negligence clearly point to foreign law. Most states' choice of law rules do not provide for a "second best" choice.

91. See Spelar, 338 U.S. at 221.
II. LOWER FEDERAL COURTS’ APPLICATION OF RICHARDS

Generally, the lower federal courts have used the flexibility the Supreme Court gave them in Richards to award plaintiffs the largest possible recovery if the applicable choice of law rule gives them the discretion to do so.\(^9\) Courts usually have this flexibility when \textit{lex loci delicti} is

\(^9\) See, e.g., Foster v. United States, 768 F.2d 1278, 1284 (11th Cir. 1985) (using Illinois’s "most significant relationship" test to reverse district court's choice of Florida law, which barred surviving daughter's recovery due to her financial independence from parents just before their death, in favor of Illinois law, which permitted her to recover pecuniary damages despite financial independence); Butler v. United States, 726 F.2d 1057, 1066 (5th Cir. 1984) (using Mississippi’s "most significant relationship" test to affirm district court's choice of Mississippi law of damages over Government's argument for application of Louisiana law, which presumably afforded plaintiffs less of a recovery); Guillory v. United States, 699 F.2d 781, 784-87 (5th Cir. 1983) (using Texas’s "most significant relationship" test to reverse district court's choice of Texas law, which limited plaintiff’s award to only $1200 in funeral expenses, in favor of Louisiana law, which permitted recovery for love and affection in addition to pecuniary loss); Hitchcock v. United States, 665 F.2d 354, 360-61 (D.C. Cir. 1981) (using District of Columbia's interest analysis to choose District's law over Virginia's, which apparently would have foreclosed plaintiff's recovery); Loge v. United States, 662 F.2d 1268, 1273-74 (8th Cir. 1981) (applying District of Columbia's governmental interest analysis to reverse district court's dismissal of polio victim's complaint by choosing law of Arkansas, whose policy would be to compensate its domiciliaries), cert. denied, 456 U.S. 944 (1982); Tyminski v. United States, 481 F.2d 257, 265-68 (3d Cir. 1973) (employing New York's interest analysis to reverse district court's choice of New York law in favor of New Jersey law, which permitted plaintiff's recovery for gratuitous nursing services); Reminga v. United States, 448 F. Supp. 445, 457-59 (W.D. Mich. 1978) (using Wisconsin's "choice influencing factors" to choose Michigan law over Wisconsin law, which would have "substantially limited" plaintiffs' recovery), aff'd on other grounds, 631 F.2d 449 (6th Cir. 1980); Merchants Nat'l Bank & Trust Co. v. United States, 272 F. Supp. 409, 419 (D.N.D. 1967) (imputing "most significant relationship" choice of law rules to South Dakota, and using those rules to select North Dakota law, which did not limit plaintiffs' recovery as other states with contacts to case did); cf. Washington v. United States, 769 F.2d 1436, 1438 (9th Cir. 1985) (using New York's "center of gravity" test to affirm district court's choice of New York law in case of medical malpractice at Air Force hospital, but reversing its dismissal on statute of limitations grounds because the cause of action accrued when patient died rather than when she went into coma); Poindexter v. United States, 752 F.2d 1317, 1319-20 (9th Cir. 1984) (applying Nevada's whole law to reverse district court's choice of Arizona law, under which plaintiff's claim was barred based on her receipt of workers' compensation death benefits, and remanding for determination of "what substantive law Nevada would apply," although ambiguity remained as to whether "substantive law" meant internal law of Nevada or of some other state chosen by Nevada's whole law); Ducey v. United States, 713 F.2d 504, 508-09 nn.2, 4 (9th Cir. 1983) (employing what court interpreted to be Nevada's "most significant relationship" test to affirm district court's choice of Nevada law to govern recreational accident, but reversing on grounds that Nevada's recreational use statute permitted plaintiffs to recover); Moorhead v. Mitsubishi Aircraft Int'l, 639 F. Supp. 385, 390-91 & n.2 (E.D. Tex. 1986) (using Texas's "most significant relationship" test to choose Texas law after acknowledging important differences between Texas and Georgia law on issue of damages, but leaving unclear which parties those differences favored). But see Transco Leasing Corp. v. United States, 896 F.2d 1435, 1445, 1450-51 (5th Cir. 1990) (affirming district court's application of Louisiana law to damage issue and thus permitting lower recovery than Texas, although court in effect used \textit{dépêçage} to apply Texas law to liability issue); O'Rourke v. Eastern Air Lines, 730 F.2d 842, 846-51 (2d Cir. 1984) (selecting New York law, which limited plaintiff's recovery to pecuniary damages, over Greek law, which had
not clearly the law of the place of negligence. In some of these cases, concededly, the result would have been the same under the internal law construction of section 1346(b), even if the court had not manipulated the whole law of the place of negligence to help the plaintiff. In many cases, however, the court helped the plaintiff by choosing the internal law of a place other than that of the negligence, contrary to legislative intent but with the Supreme Court’s blessing.

A notable example of this tendency is Guillory v. United States, a Veterans Administration (VA) medical malpractice/wrongful death case. In Guillory, the United States Court of Appeals for the Fifth Circuit chose to apply Louisiana law and therefore reversed the district court’s choice of Texas law and its consequent award of only $1200 for funeral expenses. In contrast to Texas, Louisiana allowed recovery for loss of love and affection, which presumably would have produced an award much higher than $1200. The Fifth Circuit held that because Louisiana and Texas law were substantially identical on the issue of liability, Louisiana law better furthered the policies of both states by (1) protecting Texas’ interest in policing the conduct of doctors within its boundaries,

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94. See, e.g., Foster, 735 F.2d at 1284 (affording plaintiffs greater recovery by choosing internal law of place of negligence under whole law of that place); Butler, 726 F.2d at 1066 (same); Hitchcock, 665 F.2d at 359-61 (same); cf. Washington, 769 F.2d at 1438 (affording plaintiffs greater recoveries by construing internal law of place of negligence favorably to them, rather than by simply choosing that law); Ducey, 713 F.2d at 508-09 nn.2, 4 (same).

95. See, e.g., Guillory, 699 F.2d at 784-87 (affording plaintiffs greater recovery by choosing internal law of place other than that of negligence); Loge, 662 F.2d at 1273 (same); Tyminski, 481 F.2d at 265-68 (same); Reminga, 448 F. Supp. at 447-59 (same); Merchants Nat’l Bank, 272 F. Supp. at 419 (same).

96. 699 F.2d 781 (5th Cir. 1983).

97. Id. at 784-87. In choosing Louisiana law, the court used Texas’s “most significant relationship test,” which looks to the qualitative nature of the contacts an event has had with a jurisdiction. Id. at 784. After weighing each jurisdiction’s policy interests, the court concluded that Louisiana bore “the most significant relationship to the occurrence in question.” Id. at 786.

98. Id. at 784 (citing LA. CIV. CODE ANN. art. 2315 (West 1982), current version at art. 2315 (West 1991)).
and (2) compensating Louisiana domiciliaries adequately enough to prevent them from becoming burdens on the state.\footnote{99. Id. at 785-86; accord Moorhead v. Mitsubishi Aircraft Int'l, 639 F. Supp. 385, 390-91 (E.D. Tex. 1986) (holding that Georgia's interest in compensating its citizens "is important only when Georgia will be forced to bear the burden of providing for injured citizens who are inadequately compensated").}

What the Guillory court apparently failed to consider was how the issue of damages interacted with the issue of liability under Texas tort law. The Texas damage limitation quite obviously reflected a policy against punishing negligent doctors (or other tortfeasors) too severely, perhaps to keep insurance premiums under control.\footnote{100. Cf O'Rourke v. Eastern Air Lines, 730 F.2d 842, 850 (2d Cir. 1984) ("New York, in order to discourage forum shopping and encourage business within the state, has a governmental interest in assuring that defendants will not be subject to damage awards larger than [pecuniary damages resulting from decedent's death].").} Louisiana law, although consistent with Texas law on the isolated issue of liability, tended to undermine Texas' policy against large wrongful death verdicts. At the same time Louisiana was fulfilling its policy of adequately compensating its domiciliaries, it was denigrating Texas' interest in protecting doctors against large damage awards.

The result in Guillory was certainly an equitable one; yet it was not one contemplated by a Congress that only partially waived sovereign immunity in the FTCA. The VA's doctors treated the plaintiff's decedent in Texas.\footnote{101. After negligently treating their patient, the Veterans Administration doctors released him for the weekend. The patient returned home to Louisiana and died the next day. Guillory, 699 F.2d at 783.} That was surely the place whose law Congress would have expected to govern, whether it had the most significant relationship to the tort or not.\footnote{102. Cf Doyle v. United States, 530 F. Supp. 1278, 1285 (C.D. Cal. 1982) ("[T]o determine [a psychiatrist's] duties, not in accordance with the law of the state in which the psychiatrist practices, but rather in accordance with the law of the state the patient may return to, would render psychiatrists subject to varying and uncertain standards.").} Congress would have expected VA doctors not only to conform their standard of care to Texas law, but also to be punished for breaches of that standard in accordance with Texas's law of damages, whether it allowed recovery for funeral expenses, love and affection, or nothing at all.\footnote{103. Plaintiffs' personal injury lawyers might cry foul at the suggestion of abandoning the Richards rule and limiting a widow's award to $1200 for funeral expenses in a future case similar to Guillory. But it must be noted that abandoning the Richards rule does not require limiting a plaintiff's damages in every case. In Guillory, for example, had it been Louisiana that limited damages to funeral expenses and Texas that allowed recovery for love and affection, application of the internal rather than whole law of the state where the negligence occurred, as suggested here, would mandate selection of Texas's hypothetically more generous measure of damages. Had Texas actually permitted a higher award than Louisiana, the Fifth}
well-reasoned analysis, Guillory makes one of the best cases for rethinking Richards.

In a more overt manipulation of state law and state choice of law rules, the United States Court of Appeals for the Eighth Circuit, in Loge v. United States, imputed to Arkansas a plaintiff-oriented tort rule that conflicted with District of Columbia law. It then chose the imputed Arkansas tort rule under the District's governmental interest analysis. The plaintiff in Loge contracted polio in Arkansas after coming into contact with a live polio vaccine which the Government failed to test properly in the District of Columbia. The district court found that the plaintiff failed to state a cause of action under either District of Columbia or Arkansas law, and therefore engaged in no choice of law analysis because the laws of the two jurisdictions did not conflict.

The Eighth Circuit reversed, finding a conflict between Arkansas and District of Columbia law. According to the court, the District

Circuit's thorough yet result-oriented choice of law analysis in Guillory might very well have come out the other way.


105. Id. at 1273-74.

106. Id. at 1274; see infra note 114. Although the Loge court purported to apply the District's governmental interest analysis, it stated that "[k]ey factors in making this determination include the place where the injury occurred, the place where the conduct causing the injury occurred, and the residence of the parties." Loge, 662 F.2d at 1274 (citing Restatement (Second) of Conflict of Laws § 145 (1971)). These "key factors" are actually three of the four contacts listed in the Restatement's "most significant relationship" test for torts, rather than elements of interest analysis. Such contacts may indeed have some bearing on which state's policy would be advanced by having its law applied to the facts, but they are not necessarily considered in interest analysis jurisdictions. See generally Gary L. Milhollin, The New Law of Choice of Law in the District of Columbia, 24 Cath. U. L. Rev. 448, 452-78 (1975) (discussing the application of the interest analysis to torts in the District of Columbia).

Conversely, the Restatement (Second) of Conflict of Laws, like interest analysis, considers the policies of interested states, but does so only in the context of specific contacts it enumerates for different kinds of cases. Compare Restatement (Second) of Conflict of Laws § 6 (1971) (listing general principles to be used in determining which state has most significant relationship to any kind of case) with id. § 145 (mandating application of general principles from § 6 to tort cases but enumerating specific contacts to which those principles should be applied). The net effect of this seems to be that there is certainly an overlap between interest analysis and the Restatement insofar as they are both modern choice of law approaches considering policies behind conflicting laws, but their methodology differs significantly, and often in outcome-determinative ways. One commentator has suggested that the drafters of the second Restatement were advocates of governmental interest analysis. Smith, supra note 34, at 1046. Unfortunately, the courts have applied the factors provided in the Restatement mechanically, "undercutting the vitality of the true interest analysis." Id.

107. Loge, 662 F.2d at 1273.

108. Id.

109. Id. at 1274.
clearly would have barred the plaintiff’s cause of action. Although the Arkansas courts had never addressed the issue, the district court predicted they would adopt section 324A of the Second Restatement of Torts, which imposes liability for the negligent performance of an undertaking. The Eighth Circuit found that under section 324A of the Restatement, "presumably the government could be found liable under the theory that it failed to exercise reasonable care in undertaking to ensure the safety of live, oral poliovirus vaccine. The underlying policy goal of this tort rule would appear to be to compensate the injured.”

Evidently, the Eighth Circuit’s underlying policy goal, like that of Arkansas, was to compensate the injured, for it found “applicable the Arkansas rule in favor of protecting its citizens from injuries” because the plaintiffs were residents of Arkansas and the injury occurred there.

Although the court of appeals stated that the place of the negligence was a “key factor” in the District’s interest analysis, it gave that factor little weight, for in its choice of law analysis it made no mention of the fact that the United States’ negligence could only have occurred in the District, where it failed to ensure the vaccine’s safety. Nor did the court mention the apparent policy behind the District’s law, which was to protect one of its larger employers, the United States Government, from liability based on a negligent undertaking. Because Arkansas courts had

110. Id. at 1273 (citing Gelley v. Astra Pharmaceutical Prods., 610 F.2d 558, 561 (8th Cir. 1979)).


112. Loge, 662 F.2d at 1274.

113. Id.

114. The three “key factors” used by the court in Loge were actually from the Restatement (Second) of Conflict of Law's “most significant relationship” test, not the District of Columbia's interest analysis. See id. at 1274 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971)); supra note 106. The Eighth Circuit also cited one of its own precedents, Gelley v. Astra Pharmaceutical Prods., 610 F.2d 558 (8th Cir. 1979), for the proposition that the three factors were part of the District's interest analysis. Loge, 662 F.2d at 1274. Gelley, however, erroneously relied on a District of Columbia Circuit opinion for that proposition. Gelley, 610 F.2d at 561 n.4 (citing Semler v. Psychiatric Inst., 575 F.2d 922, 924 (D.C. Cir. 1978) (stating that “the method of governmental interest analysis is (1) to identify the state policies underlying each law in conflict, and (2) to decide which state's policy would be advanced by having its law applied to the facts")). Moreover, the Loge court omitted mention of the center of the parties' relationship, the fourth “key factor” in the Restatement's analysis.

115. See Hitchcock v. United States, 665 F.2d 354, 360 (D.C. Cir. 1981) (analogizing Government to national corporation headquartered in District of Columbia, which "would have some interest in having its law applied to decide the liability of a business headquartered
taken no affirmative steps to compensate Arkansas domiciliaries in a negligent undertaking situation, and because the Eighth Circuit had to impute such steps, it would appear that the District's interest in protecting the Government with its own clearly articulated law of nonliability for negligent undertakings outweighed Arkansas's unarticulated law. Yet the court of appeals seemed more intent on compensating the plaintiff in Loge than on applying Richards fairly.

In Tyminski v. United States, the United States Court of Appeals for the Third Circuit devised yet another way to manipulate Richards to provide the plaintiff with a larger recovery than she would have received had the internal law of the place of negligence applied. In Tyminski, the plaintiff's husband suffered from paraplegia caused by medical malpractice at a Veterans Administration hospital in New York. After he died, the plaintiff sued to recover the value of gratuitous nursing services she rendered in caring for his condition at home in New Jersey. New York law barred recovery for gratuitous nursing services and the district court applied New York law to deny the plaintiff recovery for their value.

The Third Circuit reversed the district court by choosing New Jersey substantive law under New York's governmental interest analysis. Although the New Jersey Supreme Court had not then faced the issue, the Third Circuit predicted that it would have permitted recovery of gratuitous nursing services. The court of appeals followed a New York case that refused to apply an Illinois limitation on wrongful death recovery; the New York case, in turn, followed reasoning espoused in a federal case that "[t]he predominant interests to be served on the issue of damages are those of the states containing the people or estates which will receive the recoverable damages." Because the plaintiff in Tyminski was a New Jersey resident while she was rendering gratuitous nursing services to her husband, "New Jersey law would determine the measure there"). But see supra note 11 (discussing United States' lack of domicile for choice of law purposes).

117. Id. at 260.
118. Id.
119. Id. at 266 (citing Coyne v. Campbell, 11 N.Y.2d 372, 376, 183 N.E.2d 891, 893, 230 N.Y.S.2d 1, 4 (1962)).
120. Recently, the New Jersey Supreme Court faced the issue and vindicated the Third Circuit's prediction by upholding recovery for gratuitous nursing services. Bandel v. Friedrich, 122 N.J. 235, 239, 584 A.2d 800, 802 (1991).
121. Tyminski, 481 F.2d at 268-70.
of damages . . . when there exists no object of wrongdoing New York would have a particular interest in preventing.”  

Apparently, the court assumed New York had no interest in preventing the VA’s wrongdoing even though its medical malpractice occurred there. Although New York’s prohibition of recovery for gratuitous nursing services would not help deter medical malpractice, it might signal a valid policy not to unjustly enrich its victims or overpenalize its perpetrators.

After using the renvoi authorized in Richards to choose New Jersey over New York law, the Third Circuit applied traditional common-law renvoi to justify its choice of law. The United States alternatively argued in Tyminski that New York’s choice of law rules would look to New Jersey’s whole law rather than internal law, which in turn would refer back to New York’s internal law. The Third Circuit disposed of this argument by noting that New Jersey also employed governmental interest analysis and would, like New York, choose New Jersey law.

The court thereby used an apparent “false conflict” between New York’s and New Jersey’s choice of law rules to avoid common-law renvoi creating a result inconsistent with Richards’s statutory renvoi. Moreover, the court hypothesized, even if New Jersey applied New York law, it would also use renvoi and look to New York’s whole law. That would once again result in the selection of New Jersey internal law under

123. Id.

124. Cf. supra note 100 and accompanying text (noting that New York and other states have legitimate interest in creating a favorable business climate by limiting damage awards). Although the VA was owned and operated by the United States, that is not a reason to assume New York had no interest in limiting the VA’s exposure to damages for medical malpractice. Presumably, the VA provided jobs to New Yorkers, medical care for New York veterans, and a clientele for the New York businesses in its environs. Although the United States would pay for gratuitous nursing services in Tyminski, New York would ultimately foot the bill if its VA hospital became such a drain on federal resources that it had to be shut down.

125. See Tyminski, 481 F.2d at 267-68.

126. Id. at 267.

127. Id. at 268.

128. “A false conflict exists when the potentially applicable laws do not differ . . . or when one law . . . is not intended to apply” to a given situation. SCOTES & HAY, supra note 10, § 2.6, at 17. The kind of false conflict that exists when the potentially applicable laws simply do not differ, as in Tyminski, is not terribly meaningful because the parties will have no incentive to argue for the application of one law over another. Id. at n.8. The more significant kind of false conflict usually arises in the context of governmental interest analysis when the laws of two or more states differ, but the application of one does not impair the policy behind the law of the other. See id. at n.9; see also Lacey v. Cessna Aircraft Co., 932 F.2d 170, 187 (3d Cir. 1991) (“A false conflict exists if only one jurisdiction’s governmental interests would be impaired by the application of the other jurisdiction’s law.”).

New York's governmental interest analysis.  

Tyminski's "double renvoi" was only one in a series of progressively calculated analyses designed to assure plaintiffs more money. In Guilloiry, the Fifth Circuit ignored Texas's interest in limiting the liability of doctors in order to permit the plaintiff's recovery for love and affection under Louisiana law.  

In Loge, the Eighth Circuit ignored the District of Columbia's interest in protecting the Government from liability for its negligent undertakings, and instead allowed the plaintiffs to recover under a rule that Arkansas courts had not adopted, but that the Eighth Circuit predicted they would adopt. Finally, in Tyminski, the Third Circuit ignored New York's interest in limiting the liability of a VA hospital operating within its borders to award a New Jersey plaintiff the value of gratuitous nursing services that she rendered to her husband.

Several other circuits have also used Richards to afford the plaintiffs a higher recovery, even though the result would have been the same under the internal law construction of section 1346(b). At least two district courts have rather openly manipulated the Richards analysis to do the same, when the result would have been quite different under the internal law construction. But as another district court stated, "[i]t would be as improper to apply forum law merely because it allows a higher return as it would be improper to apply foreign law merely because it allows a lower return; and the converse is true." The only consistency among most of the cases applying Richards is that plaintiffs

130. Id.
131. See supra notes 96-103 and accompanying text.
132. See supra notes 104-15 and accompanying text.
133. See supra notes 116-30 and accompanying text.
134. See Foster v. United States, 768 F.2d 1278, 1284 (11th Cir. 1985) (choosing Illinois law under Illinois's "most significant relationship" test to permit surviving daughter to recover pecuniary damages despite her financial independence from parents prior to their death); Butler v. United States, 726 F.2d 1057, 1066 (5th Cir. 1984) (choosing Mississippi law under Mississippi's "most significant relationship" test to award plaintiff greater recovery); Hitchcock v. United States, 665 F.2d 354, 359-60 (D.C. Cir. 1981) (choosing District of Columbia law under District's interest analysis to allow plaintiff recovery that Virginia law would have completely foreclosed).
always receive a higher return than they would had the court used its discretion to choose another state’s law under the whole law of the place of negligence.

III. THE MULTIPLE PLACE OF NEGLIGENCE DILEMMA

Just as Richards led to a “double renvoi” in Tyminski, it has created a “double choice of law”—a choice of whole law in addition to choice of internal law—in cases in which the Government’s negligence occurs in more than one place.137 “Richards sheds no light on the question of which state’s law applies”138 in that situation. Unlike non-FTCA cases, in which the court always starts with the forum’s choice of law rules, the

137. Recent Case, supra note 27, at 1324; see also Hitchcock v. United States, 665 F.2d 354, 359-60 (D.C. Cir. 1981) (applying District of Columbia choice of law rules because relevant “act or omission” in case of negligent administration of rabies vaccine occurred in District of Columbia, where Government formulated procedures for vaccine, rather than in Virginia, where nurse merely administered vaccine) (see infra text accompanying notes 156-57); Bowen v. United States, 570 F.2d 1311, 1318 (7th Cir. 1978) (applying Indiana whole and internal law, even though negligence spread among Indiana, Illinois, and Arkansas, because both last and most significant negligent act having causal effect occurred there and Indiana would have chosen its own internal law under either lex loci delicti or most significant contacts rule) (see infra notes 140-55 and accompanying text); Insurance Co. of N. Am. v. United States, 527 F. Supp. 962, 966 (E.D. Ark. 1981) (applying Tennessee law under Tennessee’s and arguably Arkansas’s lex loci delicti rule, although allegedly negligent air traffic controllers located in Missouri, Tennessee, and Arkansas); Southern Pac. Transp. Co. v. United States, 462 F. Supp. 1227, 1229 (E.D. Cal. 1978) (holding that Nevada’s lex loci delicti rule would apply to case where alleged negligent acts or omissions occurred in Nevada and California); In re Silver Bridge Disaster Litig., 381 F. Supp. 931, 941-42, 944-47 & n.18 (S.D. W. Va. 1974) (applying District of Columbia, West Virginia, and Ohio choice of law rules to select law of West Virginia and Ohio, between which there was no conflict on issue of Government’s liability for collapse of bridge connecting West Virginia and Ohio, but reserving ruling on which state’s law applied to issue of damages, on which there was a difference); Kantlehner v. United States, 279 F. Supp. 122, 125-28 (E.D.N.Y. 1967) (applying internal law of either New York or Maryland, between which there was no conflict, when negligent acts and omissions occurred in any combination of nine jurisdictions, whose respective choice of law rules would select the law of those two states); cf. Emelwon, Inc. v. United States, 391 F.2d 9, 13 (5th Cir.) (applying Florida law in remanding case to district court, but suggesting that parties could show on retrial that negligence occurred elsewhere, “with the consequences described in [Richards]”), cert. denied, 393 U.S. 841 (1968); Springer v. United States, 641 F. Supp. 913, 934 (D.S.C. 1986) (applying South Carolina law when negligence occurred in both North Carolina and Maryland, because both states employed lex loci delicti and would therefore choose law of South Carolina, where plane crash occurred), aff’d, 819 F.2d 1139 (4th Cir. 1987); Suchomajcz v. United States, 465 F. Supp. 474, 477 (E.D. Pa. 1979) (applying Pennsylvania law when it was unclear whether negligence occurred in New York or Pennsylvania, because New York and Pennsylvania had identical choice of law rules that would choose law of Pennsylvania); In re Bomb Disaster at Roseville, Cal., 438 F. Supp. 769, 774 (E.D. Cal. 1977) (observing that it was unclear where acts occurred which gave rise to strict products liability claims, but finding that choice of law issue was mooted by parties’ stipulation that applicable state law would follow the Second Restatement of Torts § 402A (1965)).

138. Bowen, 570 F.2d at 1317.
place of negligence dictates the applicable choice of law rules in FTCA cases. If the place of negligence is unclear, then so is the determination of which state's choice of law rules to apply. In some cases in which the Government's negligence is spread among several jurisdictions, courts have been nearly apoplectic in attempting to arrive at not only the correct internal law under the applicable choice of law rules, but also the correct choice of law rules themselves.

The leading case on this issue is *Bowen v. United States.* In *Bowen,* the plaintiff piloted a plane from Texas to Indiana with an intermediate stop in Arkansas. His plane crashed in Indiana because of accumulated ice on its wings. The plaintiff sued the United States because the FAA failed to advise him of icy conditions from various points along his flight route. Those points included Arkansas, Illinois, and Indiana. The district court applied Indiana law upon the mistaken belief that Arkansas, Illinois, and Indiana each employed the *lex loci delicti* rule, and thus had a "false conflict" as to their choice of law rules. In fact, Indiana may have been the only one of the three to follow *lex loci delicti* by the time the court of appeals decided *Bowen,* and even that was in doubt.

The United States Court of Appeals for the Seventh Circuit reached
the same result as the district court, but by different reasoning.\textsuperscript{147} A year before the Seventh Circuit decided \textit{Bowen}, the Arkansas Supreme Court applied governmental interest analysis to select its own comparative negligence rule in an automobile accident case that arose in Missouri.\textsuperscript{148} If Arkansas's choice of law rule had applied in \textit{Bowen} because some of the FAA's negligence occurred there, then there was a chance that Arkansas's comparative negligence rule would have applied as well. That would have conflicted with Illinois's and Indiana's contributory negligence rule. The Seventh Circuit thus had to decide for the first time which state's whole law applied when the Government's negligence occurred in more than one state.\textsuperscript{149}

Because of the FTCA's exclusive focus on the place of the act or omission, the \textit{Bowen} court eliminated \textit{lex loci delicti} and the most significant relationship test as choice of whole law approaches and narrowed the alternatives to "[1] the place of the last act or omission having a causal effect, or [2] the place of the act or omission having the most significant causal effect."\textsuperscript{150} Like \textit{lex loci delicti}, the former approach would have the advantage of certainty.\textsuperscript{151} The latter, however, seemed more consistent with the FTCA's language and underlying purpose.\textsuperscript{152} Although the Seventh Circuit expressed a preference for the most significant cause approach,\textsuperscript{153} it ultimately did not have to decide the issue because Indiana was the site of both the last and most significant cause of the crash.\textsuperscript{154} The court then applied what the parties assumed to be Indiana's \textit{lex loci delicti} rule to select Indiana internal law and its contributory negligence rule.\textsuperscript{155}

The Seventh Circuit's somewhat improvised approach in \textit{Bowen} was the correct one. In the absence of Supreme Court specification in \textit{Richards} of which acts or omissions govern the choice of whole law when they occur in different states, the \textit{Bowen} court selected the only two real-
istic alternatives, and indicated a preference for the better of those two choices. The simplest way to subdue the multiple place of negligence dilemma would indeed be to choose the law of the place where the last negligent act or omission occurred that proximately caused the FTCA plaintiff's injury. The simplicity of the "last negligent cause" analysis, however, is countermanded by the possibility that the last negligent act or omission is an insubstantial cause of the injury, at least relative to other causes. In Hitchcock v. United States, 156 for example, the last negligent act occurred in Virginia, where a government nurse, untrained in proper vaccination procedures, administered a rabies vaccine. The United States Court of Appeals for the District of Columbia Circuit held "that the relevant 'act or omission' occurred in the District of Columbia [where the United States formulated procedures for administering the vaccine]. That the vaccine was actually administered in Virginia is without significance to this question." 157 Thus, the last negligent act or omission approach is convenient but substantively unhelpful.

Conversely, the most significant cause approach comports more with the substantive purpose of the FTCA's "act or omission" language, but it is often difficult to apply in practice. This is especially true in the early stages of litigation, when factual questions such as significant causation have yet to be resolved, but when courts often need to decide the applicable law for purposes of motions.158

Nevertheless, in light of the importance Congress attached to the

157. Id. at 359.
158. Compare Southern Pac. Transp. v. United States, 462 F. Supp. 1227, 1229 (E.D. Cal. 1978) ("The evidence necessary to determine the negligence of the acts amounts, in effect, to the major portion of the evidence to be presented during the trial. For that reason, it has not been possible to reach even a tentative choice of law decision under the Richards test.") and Kantlehner v. United States, 279 F. Supp. 122, 125 (E.D.N.Y. 1967) ("Since a factual issue exists as to where the allegedly negligent acts or omissions occurred, it would be impossible to determine the applicable law at this [Rule 12] stage of the proceedings . . . .") with Bowen, 570 F.2d at 1318 & n.13 (place of negligence usually can be determined from face of complaint). In Bowen, the Seventh Circuit stated:

Inasmuch the legal quality of conduct alleged to have caused injury to the plaintiff is not determined until the end of the trial, and the trier of fact must know which law is applicable in order to make that determination, the statutory phrase 'the place where the act or omission occurred' necessarily refers to the situs of conduct that is asserted to be actionable, rather than the situs of the part of that conduct that is ultimately determined to be actionable.13

... 13In the unusual case in which there is a dispute over where that conduct occurred, that fact issue would have to be decided by the trier of fact before it could be determined which law to apply.

Bowen, 570 F.2d at 1318 & n.13.
place of negligence as the place whose law would control, the most significant cause approach seems preferable to that of the last negligent act method. As previously discussed, many federal regulations direct federal employees to conform their conduct to local law. When that conduct occurs in more than one jurisdiction, it stands to reason that Congress would want the local law of the place where the most significant negligence occurred to govern federal liability for those acts.

When considering motions to dismiss a complaint for failure to state a cause of action under Rule 12(b)(6) of the Federal Rules of Civil Procedure, which should be based on the complaint alone, courts can attempt to discern the most significant cause from the specific allegations of negligence in the complaint. If the location of the most substantial cause is not readily apparent from the face of the complaint, the court can request (or the parties may volunteer) material from outside the pleadings which reveals that location. When considering summary judgment motions under Rule 56, it may be that discovery, especially depositions of expert witnesses, will reveal the most significant cause of the accident. In cases in which a dispute arises over where the most significant negligent conduct occurred, this issue would have to be decided by the trier of fact before the court could determine which law to apply.

The problem with the multiple place of negligence dilemma is not the Seventh Circuit’s creative response to it. The problem is that there did not need to be such a problem in the first place. The Supreme Court forced the Seventh Circuit and other federal courts to engage in an often difficult and confusing choice of whole law analysis in addition to a choice of internal law. Although the court of appeals experienced relatively little difficulty in Bowen because Indiana was the site of both the

159. See Bowen, 570 F.2d at 1318 ("[T]he place of the act or omission having the most significant causal effect . . . seems to us to be more consistent with the statutory language and Congress' intent.").
160. See supra note 80 and accompanying text.
161. That rule provides, in relevant part, "that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6).
162. If matters outside the pleadings are presented in a rule 12(b)(6) motion, the motion will be treated as one for summary judgment under rule 56. Id. 12(b).
163. See Bowen, 570 F.2d at 1318 (stating that "the statutory phrase 'the place where the act or omission occurred' necessarily refers to the situs of conduct that is asserted to be actionable, rather than the situs of the part of that conduct that is ultimately determined to be actionable"). For an example of a court using the allegations of the complaint to determine the most significant cause, see Hitchcock v. United States, 665 F.2d 354, 359 (D.C. Cir. 1981).
164. See supra note 162.
165. Bowen, 570 F.2d at 1318 n.13.
last and most significant cause of the plane crash, other courts have not been so fortunate.\textsuperscript{166} The double choice of law problem has led some courts to virtually ignore state choice of law rules in an effort to simplify cases.\textsuperscript{167} In one case, the district court applied the law of Tennessee, where the plane crash occurred, under the assumption that Arkansas, one of the places of governmental negligence, still followed \textit{lex loci delicti}, which the Seventh Circuit had clearly refuted in \textit{Bowen}.\textsuperscript{168} The

\begin{footnotesize}
\begin{enumerate}
\item[166.] See supra note 137.
\item[167.] See \textit{Bowen}, 570 F.2d at 1319 & n.18 (accepting parties' assumption that Indiana followed \textit{lex loci delicti}, although Seventh Circuit had previously held that Indiana followed "most significant relationship" test); see also Insurance Co. of N. Am. v. United States, 527 F. Supp. 962, 966 (E.D. Ark. 1981) (discussed infra note 168 and accompanying text); Kantlehner v. United States, 279 F. Supp. 122, 125-27 (E.D.N.Y. 1967) (creating and interpreting a series of false conflicts).
\item[168.] Insurance Co. of N. Am., 527 F. Supp. at 966. In that case, the district court distinguished \textit{Wallis v. Mrs. Smith's Pie Co.}, 261 Ark. 622, 550 S.W.2d 453 (1977) (en banc), on grounds that the latter case involved an Arkansas plaintiff, which warranted the Arkansas court to pursue its governmental interest in compensating its domiciliary by applying Arkansas's comparative negligence doctrine over Missouri's harsher contributory negligence rule. Insurance Co. of N. Am., 527 F. Supp. at 966. Unlike the facts in \textit{Wallis}, there was no Arkansas party to the plane crash in Insurance Co. of North America. In Bowen, however, there was
\end{enumerate}
\end{footnotesize}
choice of internal law under the modern choice of law approaches is difficult enough for most courts without multiplying their problems with a choice of whole law as well. One way to take a layer of complexity off the problem would be to apply the internal law of the place of negligence, so that federal courts do not face the daunting prospect of choosing the correct choice of law rules in addition to choosing the appropriate substantive law among numerous jurisdictions where the negligence occurred.

IV. COSTS AND BENEFITS OF THE INTERNAL LAW APPROACH

Although the internal law construction of section 1346(b) would eliminate the choice of whole law in the multiple place of negligence problem, it does not relieve courts from the often onerous task of distilling one place of negligence from several possibilities. Yet any construction of section 1346(b) would require such a determination, because there can be only one "place where the act or omission occurred" controlling applicable law. The stakes for this determination, however, are much greater under the internal law approach because the place of negligence is the exclusive determinant of internal law. Choosing one place of negligence among several alternatives thus takes on enormous consequences under the internal law construction of section 1346(b).

Nevertheless, the consequences are only slightly less significant under the Supreme Court's whole law construction. Under Richards, the choice of one place of negligence determines the applicable choice of law rule, which in turn dictates which state's internal law applies. In other words, the impact of the whole law interpretation of section 1346(b) is merely one step removed from the impact of the internal law approach. Yet that one extra step gives result-oriented courts an extra opportunity to achieve their desired objective by using a discretionary choice of law rule to choose internal law that is more favorable to their position. The place of negligence dilemma thus provides such courts with two opportunities to manipulate selection of internal law: (1) by permitting it to choose a place of negligence that applies one of the modern choice of law approaches instead of lex loci delicti, and (2) by permitting it to use the modern approach to select an internal law that favors one side or the other.

Even in the absence of the place of negligence dilemma and its double choice of law, the Supreme Court's whole law construction per-
mits courts to manipulate results in the second way noted above, by allowing them to use a modern choice of law approach (assuming one has been adopted by the place of negligence) to choose the internal law that achieves the desired ends. In practice, this has resulted in more and larger awards for plaintiffs. That practice has done violence not only to congressional intent in enacting the FTCA, but to the public fisc as well. The “cost” of the whole law approach is thus quite literal; courts have manipulated choice of law rules to award plaintiffs more of the taxpayers’ money.

The corresponding benefit of the internal law approach, of course, is its comparatively neutral, impartial application of the law of the place of negligence, which might favor plaintiffs in some states but the Government in others. This approach spreads the cost of waiving the United States' sovereign immunity, fairly compensating plaintiffs whenever the state where the negligence occurs does so. When the state where the negligence occurs appears not to compensate plaintiffs adequately, as arguably occurred at the district court level in Guillory, then the plaintiff is no worse off than if he had sued a private defendant and the law of the place of negligence applied. The difference, of course, is that the plaintiff would at least have a chance for a more generous law to apply in the latter case, because the forum’s choice of law rules might refer to that more generous law. That is simply a benefit that Congress did not intend to confer to plaintiffs bringing claims under the FTCA.

Another “cost” of the internal law approach is that it sacrifices the flexibility that the Supreme Court deemed so precious in embracing the whole law construction. After all, the internal law approach adopts the

169. See, e.g., Foster v. United States, 768 F.2d 1278, 1284 (11th Cir. 1985) (choosing Illinois law to permit plaintiff to recover pecuniary damages despite financial independence from her parents immediately prior to their death); Butler v. United States, 726 F.2d 1057, 1066 (5th Cir. 1984) (choosing Mississippi law of damages over Government's objections); Guillory v. United States, 699 F.2d 781, 784-87 (5th Cir. 1983) (choosing Louisiana law, which, unlike Texas law, permitted recovery for love and affection in addition to pecuniary loss); Hitchcock v. United States, 665 F.2d 354, 359-61 (D.C. Cir. 1981) (choosing District of Columbia law to permit recovery that Virginia law would have barred completely); Loge v. United States, 662 F.2d 1268, 1273-74 (8th Cir. 1981) (choosing Arkansas law to allow recovery that District of Columbia law would have barred completely), cert. denied, 456 U.S. 944 (1982); Tyminski v. United States, 481 F.2d 257, 265-68 (3d Cir. 1973) (choosing New Jersey law to permit plaintiff’s recovery for gratuitous nursing services, which New York law would have foreclosed); Reminga v. United States, 448 F. Supp. 445, 457-59 (W.D. Mich. 1978) (choosing Michigan law over Wisconsin law, which would have “substantially limited” plaintiffs' recovery), aff'd on other grounds, 631 F.2d 449 (6th Cir. 1980); Merchants Nat'l Bank & Trust Co. v. United States, 272 F. Supp. 409, 419 (D.N.D. 1967) (choosing law of North Dakota, instead of that of South Dakota or Minnesota, either of which would have limited plaintiffs' recovery).

170. See supra notes 96-103 and accompanying text for a discussion of Guillory.
internal, substantive law of the place of negligence without any possibility of having another state's law apply. The Court, however, directed the flexibility of the whole law construction toward encouraging the development of modern choice of law rules, \(^{171}\) not toward using those rules to choose law more favorable to one side or another (at least not expressly). It is up to the states, not the federal courts, to adopt more flexible choice of law rules should they so desire. The FTCA does not call for flexibility; it calls for the relative certainty of applying the law of the place where the negligence occurred. Relative certainty is the benefit that correlates to the "cost" of the inflexibility of the internal law approach.

Another downside to the internal law construction of section 1346(b) is that, like the whole law interpretation, it fails to treat the United States like a private defendant in some situations. Yet the only way the FTCA could treat the United States like a private defendant in all cases would be to allow the forum's choice of law rules to prevail.\(^{172}\) Of course, this approach would directly contravene section 1346(b)'s mandate that the United States be liable "in accordance with the law of the place where the act or omission occurred." Because of that language, no construction of section 1346(b) could treat the United States precisely as a private defendant in all cases.

Of the several costs of the internal law approach, the whole law construction matches most of them. Both require the choice of a single place of negligence when there are more than one. In both, the choice of a single place of negligence results in a significant impact on the ultimate choice of internal law, although the whole law approach has a somewhat diluted impact. Both the internal and whole law approaches fail to treat the United States like a private defendant when the plaintiff sues in the district where he resides instead of where the governmental negligence occurs.\(^{173}\)

The only "cost" of the internal law approach that the whole law interpretation seems to remedy is inflexibility. Courts certainly have no discretion under the internal law construction of section 1346(b) to choose the law of a state other than that where the negligence occurred. The question is whether that is a disadvantage or an advantage of the whole law approach. When the traditional \textit{lex loci delicti} rule predominated in this country, courts often tried to escape its consequences with devices such as characterizing an issue of law as procedural if they wanted the forum's law to control, and as substantive if they did not.

\(^{171}\) Richards v. United States, 369 U.S. 1, 12-13 (1962).

\(^{172}\) See supra notes 37-55 and accompanying text.

\(^{173}\) \textit{Id.}
When they eventually began to adopt some of the more modern and flexible approaches to choice of law, they also lost the certainty and predictability of lex loci delicti. As previously discussed, Congress never intended to give federal courts the discretion to choose internal law other than that of the place of negligence. Instead, Congress opted for the certainty and predictability of having the United States governed by the rules of the place where its employees are negligent. This certainty and predictability is a benefit that equals or outweighs any cost of inflexibility.

V. RECOMMENDATIONS AND CONCLUSION

If the choice of law provision in section 1346(b) of the FTCA more accurately articulated what Congress intended it to mean, it would authorize exclusive federal jurisdiction only "under circumstances where the United States, if a private person, would be liable in accordance with the [internal tort] law of the place where the act or omission occurred." Similarly, if the corresponding sentence in section 2674 were completed according to its intended meaning, it would read: "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances [would be liable under the internal tort law of the place where the negligence occurred]." Although the FTCA's actual language gave the Supreme Court marginal latitude for its whole law interpretation, common sense, legislative history, and the foreign country exclusion did not.

Even if the lower federal courts used the Richards rule to favor the United States, as has happened on occasion, the choice of law provision in the FTCA was never meant to favor either side. It was meant to be applied blindly and consistently, so that the liability of the United


175. See supra notes 64-91 and accompanying text.


178. See, e.g., Transco Leasing Corp. v. United States, 896 F.2d 1435, 1445, 1450-51 (5th Cir. 1990) (choosing Louisiana law, which permitted lower recovery than Texas law, to apply to damages issue); O'Rourke v. Eastern Air Lines, 730 F.2d 842, 846-51 (2d Cir. 1984) (selecting New York law, which limited plaintiff's recovery to pecuniary damages, over Greek law, which had no such limitation, although FTCA's foreign country exclusion might have impeded choice of Greek law).
States would be determined “in accordance with the law of the place where the act or omission occurred,” in the plainest sense of that language. It is only fair that federal liability be determined by the law where the federal employee’s negligence took place, as Congress intended. The simplicity of the internal law approach is preferable to the complexity and opportunity for manipulation of the Supreme Court’s whole law construction. To avoid another thirty years or more of judicial confusion and manipulation, either the Court should overrule Richards at its next opportunity, or Congress should immediately amend the FTCA to add the words “internal tort” between “the” and “law” in section 1346(b) of the FTCA.