Indian Boarding School Deaths and the Federal Tort Claims Act: A Route to a Remedy

Claire Newfeld*

INTRODUCTION

Since their founding, the United States, Canadian, and other governments have purported to act as the "protectors" of Indigenous peoples.[1] While modern federal Indian policy favors self-determination[2] and the preservation of Native culture and land, the vast majority of pre-1960s "protective" policies interpreted the Native way of life as inferior and savage,[3] aiming to forcibly assimilate Native communities into white American society.[4] In a cruel example of this policy, these governments implemented a comprehensive "re-education" effort throughout the nineteenth and twentieth

* J.D. Candidate, 2023, Sandra Day O'Connor College of Law at Arizona State University. The author thanks Dean Tamara Herrera, Professor Robert Miller, and the *Arizona State Law Journal* Executive Board for their support and guidance on this Comment. This is a scholarly paper and should not be construed as legal advice.

1. *See, e.g.*, Worcester v. Georgia, 31 U.S. 515, 518 (1832) ("[The United States] receive the Cherokee nation into their favour [sic] and protection. The Cherokees acknowledge themselves to be under the protection of the United States."); United States v. Mitchell, 463 U.S. 206, 226 (1983) ("Our construction of these statutes and regulations is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people.").

2. *See, e.g.*, Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 5301; Tribal Law and Order Act of 2010, H.R. 725 § 202(b)(3), 111th Cong. (2010) (codified in scattered sections of 25 U.S.C.).

3. *See, e.g.*, The Major Crimes Act, 18 U.S.C. § 1153 (granting jurisdiction originally held exclusively by tribes to federal courts to prosecute Indians who commit certain crimes in Indian country due to the belief that tribal justice systems were insufficient and inferior to the processes of the United States); United States v. Kagama, 118 U.S. 375, 384 (1886) (upholding the constitutionality of the Major Crimes Act due to the "weakness and helplessness" of Indians, which require them to depend on the federal government to enact statutes in their best interest).

4. *See, e.g.*, H.R. Con. Res. 108, 83rd Cong. (1953) (statement of policy to end the guardian-ward relationship between the federal government and Indians and subject Indians to the same laws, privileges, and responsibilities as other U.S. citizens).

centuries that forcibly removed Indigenous children from their tribal homes and placed them in boarding schools to become "Americanized."[5]

In the summer of 2021, North America was forced to reckon with the cruelty and inhumanity of these efforts when at least 1,308 suspected graves containing Indigenous children were recovered from the sites of former boarding schools in Canada.[6] In the United States, the remains of ten Indigenous children who died at a Pennsylvania boarding school were exhumed for investigation,[7] and Secretary of the Interior Deb Haaland announced an initiative to recover more bodies from former boarding school campuses.[8]

On May 11, 2022, Secretary Haaland released the first volume reporting the results of the first ten months of the investigation.[9] The report identified 408 boarding schools that educated Indian children across thirty-seven states and territories from 1819 to 1969 and uncovered at least fifty-three burial sites at these schools.[10] The investigation is currently still under way and is likely to produce similar, if not worse, results than the Canadian investigation[11]—as many as 40,000 Native children may have perished at

---

5. *US Indian Boarding School History*, NAT'L NATIVE AM. BOARDING SCH. HEALING COAL., https://boardingschoolhealing.org/education/us-indian-boarding-school-history/ [https://perma.cc/9KTR-THAS].

6. Tristin Hopper, *How Canada Forgot About More Than 1,308 Graves at Former Residential Schools*, OTTAWA CITIZEN (July 13, 2021), https://ottawacitizen.com/news/canada/how-canada-forgot-about-more-than-1308-graves-at-former-residential-schools/wcm/18d376d7-7abc-42b6-a459-d964dc7ca844 [https://perma.cc/396C-H92Z].

7. Ann Sturla, *Remains of Native American Children To Be Exhumed at Site of Former Boarding School*, CNN (June 23, 2021), https://www.cnn.com/2021/06/23/us/carlisle-indian-industrial-school-remains-exhumed/index.html [https://perma.cc/KW9X-VXEL].

8. Christine Hauser & Isabella Grullon Paz, *U.S. To Search Former Native American Schools for Children's Remains*, N.Y. TIMES (June 23, 2021), https://www.nytimes.com/2021/06/23/us/indigenous-children-indian-civilization-act-1819.html [https://perma.cc/C6MZ-QUK2].

9. Letter from Deb Haaland, Sec'y of the Interior (May 11, 2022), https://www.bia.gov/sites/default/files/dup/inline-files/bsi_secretarial_cover_letter_esb46-007491_signed_508.pdf [https://perma.cc/QBU2-MQ6N].

10. BRYAN NEWLAND, FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT 82, 86 (2022).

11. *See Federal Indian Boarding School Initiative*, U.S. DEP'T INTERIOR, https://www.doi.gov/priorities/strengthening-indian-country/federal-indian-boarding-school-initiative [https://perma.cc/2CW6-XWSD]; Hilary Beaumont, *Inside the US Push To Uncover Indigenous Boarding School Graves*, ALJAZEERA (Dec. 17, 2021), https://www.aljazeera.com/news/2021/12/17/inside-us-push-to-uncover-indigenous-boarding-school-graves [https://perma.cc/A6CZ-5TCZ] ("The US had at least twice the number of schools as Canada did, so [Christine] McCleave[, CEO of the Native American Boarding School Healing Coalition] said she believes at least twice as many Indigenous people passed through the institutions.").

U.S. boarding schools.[12] "Alongside the release of the investigative report's first volume, Secretary Haaland announced a year-long initiative called 'The Road to Healing,' in which she will travel the country and collect stories from boarding school survivors and their descendants."[13]

With such somber results expected from the American investigation, tribes deserve a remedy that will make them as close to whole as possible. There are several potential remedies that tribes and families can pursue, such as filing a lawsuit or lobbying for relief in Congress. The United States must listen to Native communities in determining what remedy will provide the most opportunity for healing and reparation. This Comment will attempt to contribute to that dialogue by arguing that, should the affected parties seek relief through litigation, they possess valid wrongful-death or negligence causes of action[14] under the Federal Tort Claims Act ("FTCA" or "Act").

This Comment will proceed in six parts. Part I lays out the historical background of federal Indian policy, the establishment of residential schools, and what life was like for Indian children at these schools. Part II outlines the FTCA's enactment, its major elements, and the evolution of courts' interpretation of the statute. Part III outlines why the FTCA is the ideal route to achieve a legal remedy and demonstrates that affected parties possess a valid cause of action under the FTCA. Part IV demonstrates that the cause of action can survive the available defenses. Part V discusses the potential failure of claims and settlement possibilities. Part VI concludes.

I. HISTORICAL BACKGROUND

Since the earliest days of colonization, the United States has struggled with how to handle the so-called "Indian problem."[15] It approached the "New World" from a Western, colonialist mindset, which viewed Native

12. Brad Brooks, *Native Americans Decry Unmarked Graves, Untold History of Boarding Schools*, REUTERS (June 22, 2021), https://www.reuters.com/world/us/native-americans-decry-unmarked-graves-untold-history-boarding-schools-2021-06-22/ [https://perma.cc/L9UH-HU85] ("[Preston McBride, a Dartmouth College scholar] contends that as many as 40,000 children may have died in or because of their poor care at the U.S.-run schools, but the federal government does not know or is unwilling to say how many children even attended the schools, how many died in or went missing from them, or even how many schools existed.").

13. U.S. DEP'T INTERIOR, *supra* note 11.

14. *See infra* Section III.B. The specific cause of action brought under the FTCA will depend on the individual circumstances of each plaintiff.

15. Nelson A. Miles, *The Indian Problem*, 128 N. AM. REV. 304, 304 (1879) ("After every generation has contended on deadly fields with the hope of settling the question, the home governments enacted laws, the colonies framed rules, every Administration of our Government forced to meet the difficulty, and every Congress discussed the 'Indian Question,' we are still brought face to face with the perplexing problem.").

communities already thriving on the land as an impediment to societal growth.[16] Federal Indian policy has evolved from using various strategies to destroy Indian communities (such as removal from their homelands,[17] terminating federal recognition of Indian tribes,[18] and assimilation[19]) to protecting tribal communities through self-determination and tribal sovereignty.[20] This Part sketches the history of federal Indian policy and its eventual embrace of the boarding school Indian education program. It also paints a portrait of Indian boarding schools: what life was like there, how the schools were managed, and the aftermath.

A. The Federal-Tribal Relationship: The Approach to Indian Education

Though most famous for other accomplishments, George Washington played a crucial role in early federal Indian policy. In 1783, the soon-to-be President sent a letter to Congress making recommendations for the young country's burgeoning federal Indian policy.[21] In the letter, Washington acknowledged that Indians primarily fought on behalf of the British during the Revolutionary War, but stressed that "we prefer Peace to a state of Warfare." He also urged Congress to impress upon the Indians that "their true Interest and safety must now depend on *our* friendship."[22] He stated that "the Country, is large enough to contain us all," and recommended establishing "a boundary line between them and us" that Congress would protect by keeping hunters and settlers off set-aside Indian lands.[23] Finally, Washington

16. *Id.* at 307.

17. The Removal Act of 1830, ch. 148, 4 Stat. 411 (1830) (authorizing the President to remove tribes from their land to selected reservations on federal land west of the Mississippi).

18. H.R. Con. Res. 108, 83rd Cong. (1953).

19. Dawes Act, Pub. L. No. 49-105, 24 Stat. 388 (1887) (allotting communal reservation lands to individual Indians to destroy tribalism and convert Indians to the individualistic, agrarian society exemplified by Americans at the time).

20. *See, e.g.*, Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 5301 (declaring Congressional policy that tribes should take over management and facilitation of social services and economic programs, funded by federal dollars, in Indian Country, so that tribes may achieve "the realization of self-government").

21. Letter from George Washington, then-Commander-in-Chief of the Continental Army, to James Duane, then-member of the Congress of the Confederation (Sept. 7, 1783) (on file online with the National Archives), https://founders.archives.gov/documents/Washington/99-01-02-11798 [https://perma.cc/P826-DCTJ] [hereinafter Washington Letter].

22. *Id.*

23. *Id.*

emphasized the importance of diplomatic, rather than violent, strategies when Western expansion inevitably encroached on Indian territory.[24]

The George Washington letter expressed sentiments that strongly permeated federal Indian policy for the next 150 years. First, Washington held a racist and offensive view of Native Americans, calling them "a deluded People" and "Savage as the Wolf."[25] Non-Indian settlers viewed Indians as unable to manage their own affairs, uncivilized, and an impediment to the growth of American society.[26] The letter also espoused a widely-held assumption that American expansion west of the Mississippi was inevitable.[27] The inevitability, and even predestination, of "manifest destiny" underscored the policies and treaties aimed at removing Indians from valuable land and opening up that land to settlement.[28] Finally, the letter assumed that Indians would eventually, one way or another, simply disappear.[29] A common strategy for Indian erasure was assimilating Indians into American society so they would lose all trace of what makes them "Indian."[30] Indian boarding school policy is just one example of forced "Americanization" in the name of humanitarianism.

George Washington's recommendations were immediately adopted and laid the foundations for early Congressional statutes and treaties with Indian tribes.[31] These early treaties established a guardian-ward relationship between the two parties, in which the federal government undertook a trust

---

24. *Id.* ("The Settlement of the Western Country and making a Peace with the Indians are so analogous that there can be no definition of the one without involving considerations of the other . . . policy and oeconomy [sic] point very strongly to the expediency of being upon good terms with the Indians, and the propriety of purchasing their Lands in preference to attempting to drive them by force of arms out of their Country.").

25. *Id.*

26. *See, e.g.*, United States v. Kagama, 118 U.S. 375, 384 (1886) (referring to Indians as "weak" and "helpless[]"); DONALD L. FIXICO, TREATIES WITH AMERICAN INDIANS: AN ENCYCLOPEDIA OF RIGHTS, CONFLICTS, AND SOVEREIGNTY 18 (2007) (quoting former Governor of Georgia, George Gilmer, in 1830: "[T]reaties were expedients by which ignorant, intractable, and savage people were induced without bloodshed to yield up what civilized peoples had a right to possess by virtue of that command of the Creator delivered to man upon his formation—be fruitful, multiply, and replenish the earth, and subdue it.").

27. Washington Letter, *supra* note 21.

28. *See, e.g.*, Dawes Act, Pub. L. No. 49-105, 24 Stat. 388 (1887).

29. Washington Letter, *supra* note 21 ("[T]he gradual extension of our Settlements will as certainly cause the Savage as the Wolf to retire.").

30. *See, e.g.*, H.R. Con. Res. 108, 83rd Cong. (1953).

31. *See, e.g.*, Treaty with the Wyandots, Delawares, Ottawas, Chippewas, Potawatomies, and Sacs, Jan. 9, 1789, 7 Stat. 28 (applying the ideas expressed in the Washington Letter in an early treaty with several tribes by establishing a boundary line, providing criminal punishment for Americans who intrude on Indian lands without a license, and confirming peace and friendship among the nations). *See also* DAVID GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 101 (7th ed. 2017).

responsibility to protect Indian tribes.[32] The trust relationship played a crucial role in Chief Justice John Marshall's holding in *Cherokee Nation v. Georgia* that Indian tribes were "domestic dependent nations" and thus subservient to the United States.[33] Assimilative policies, including Indian boarding school education, directly resulted from the federal trust responsibility and the paternalistic view of Indians as inferior and in need of protection.[34]

One hundred and twenty Indian treaties contained education provisions in which the United States promised to build reservation schools and teach children American trades.[35] In 1819, Congress implemented these treaty promises through the Civilization Fund Act, which authorized the President to hire "capable" teachers to teach Indians agriculture, reading, writing, and arithmetic.[36] The purpose of the law was "providing against the further decline and final extinction of the Indian tribes" and "introducing among them the habits and arts of civilization."[37] Until the late 1800s, the federal government implemented the statute by delegating Indian education to religious groups and missionaries.[38] Later, the government established day schools on reservations.[39]

Stakeholders in federal Indian policy began considering boarding school education after the Civil War. Several attempts in the first half of the nineteenth century to force Indians off their land ended in violent skirmishes,[40] and Congress had grown weary of war.[41] Many Americans believed that the government had treated Indians cruelly and that they needed to be "saved," both from white settlers and themselves.[42] Various methods of assimilating the Indians had failed,[43] and the federal government was caught in a frustrating oscillation between maintaining a paternalistic relationship

---

32. *See, e.g.*, Treaty of Hopewell, Choctaw-U.S., Jan. 3, 1786, 7 Stat. 21; Treaty with the Oto, Oto-U.S., June 24, 1817, 7 Stat. 154.

33. Cherokee Nation v. Georgia, 30 U.S. 1, 10 (1831).

34. *See* Raymond Cross, *American Indian Education: The Terror of History and the Nation's Debt to the Indian Peoples*, 21 U. ARK. LITTLE ROCK L. REV. 941, 952 (1999).

35. HENRIETTA MANN, CHEYENNE-ARAPAHO EDUCATION, 1871–1982 170 (1997).

36. Civilization Fund Act, ch. 85, 3 Stat. 516 (1819).

37. *Id.*

38. DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875–1928 6 (1995).

39. *Id.* at 28–29.

40. *See generally* JERRY KEENAN, ENCYCLOPEDIA OF AMERICAN INDIAN WARS 1492–1890 (1997).

41. Ann Piccard, *Death by Boarding School: "The Last Acceptable Racism" and the United States' Genocide of Native Americans*, 49 GONZ. L. REV. 137, 151 (2013).

42. ADAMS, *supra* note 38, at 8–9.

43. *See, e.g.*, Leonard A. Carlson, *The Dawes Act and the Decline of Indian Farming*, 38 J. ECON. HIST. 274 (1978) (characterizing the federal allotment policy implemented from 1887–1934 as a failure and discussing why).

with the tribes and wishing to offload the costs that relationship necessitated.[44] Education was much cheaper than war and targeted children, who were more impressionable than adults and were, after all, the future of the Indian population.[45] Establishing federally-run boarding schools, ideally off-reservation so children could not return home, became widely viewed as an effective way to individualize, Christianize, and assimilate Native children.[46] Boarding school policy is often summarized with the mantra "Kill the Indian, Save the man,"[47] oft attributed to Richard Henry Pratt, Superintendent of Carlisle Indian School, the flagship Indian boarding school.

The result is widely viewed as a cultural genocide[48]—children left their reservations and became wholly divested of their Native culture. There were 408 government-funded boarding schools in thirty-seven states, with the majority clustered in Oklahoma (seventy-six schools) and Arizona (forty-seven schools).[49] Due to poor recordkeeping, exact statistics are unknown, but it is estimated that by 1925, 60,889 Native children were attending boarding schools.[50] Given the potential death toll of up to 40,000 children, it is not a stretch to conclude that boarding schools also resulted in an actual genocide.

B. Indian Boarding Schools

The Indian boarding school program rapidly expanded as soon as it was launched. Schools were built on and off-reservation, with an increasing number of students attending off-reservation schools through the late 1920s.[51]

---

44. *Compare* Lone Wolf v. Hitchcock, 187 U.S. 553, 567 (1903) ("These Indian tribes *are* wards of the nation. They are communities *dependent* on the United States."), *with* Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 650 n.1 (1976) ("The objects of [the allotment] policy were to end tribal land ownership and to substitute private ownership, on the view that private ownership by individual Indians would . . . relieve the Federal Government of the need to continue supervision of Indian Affairs.").

45. R. H. Pratt, *The Advantages of Mingling Indians with Whites*, *in* PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION AT THE NINETEENTH ANNUAL SESSION HELD IN DENVER, COL., JUNE 23–29, 1892, at 56 (Isabel C. Barrows ed., 1892) ("It is a great mistake to think that the Indian is born an inevitable savage . . . . Transfer the savage-born infant to the surroundings of civilization, and he will grow to possess a civilized language and habit.").

46. *Id.* at 21–23.

47. *Id.* at 52.

48. Piccard, *supra* note 41, at 156.

49. NEWLAND, *supra* note 10, at 83.

50. *US Indian Boarding School History*, NAT'L NATIVE AM. BOARDING SCH. HEALING COAL., https://boardingschoolhealing.org/education/us-indian-boarding-school-history/ [https://perma.cc/769U-F89L].

51. ADAMS, *supra* note 38, at 58–59.

Many Indian parents, suffering from extreme government-imposed poverty, felt they had no choice but to send their children to school in the hopes that they would at least escape the dire conditions of the reservation.[52] If they did not willingly go, the government used numerous strategies to force their attendance. On some reservations, government officials engaged in "kid-catching" at the beginning of each school year to forcibly transport children to boarding schools.[53] This practice was specifically supported by Commissioner of Indian Affairs Francis Leupp.[54] In 1893, Congress approved another strategy by authorizing the Secretary of Indian Affairs to "withhold rations, clothing and other annuities from Indian parents or guardians who refuse or neglect to send and keep their children of proper school age in some school a reasonable portion of each year."[55] Although this policy was only officially sanctioned for a short time,[56] the practice continued well into the twentieth century.[57] In extreme cases, parents who refused to send their children away were sent to Alcatraz[58] or had their parental rights terminated.[59]

Boarding schools were run like military academies with strict disciplinary policies,[60] inspired by Richard Henry Pratt's experience as a prison camp supervisor of Indian prisoners during the Indian Wars.[61] As soon as children arrived, they were subject to a "cleansing" process that stripped them of their Native identities: they were referred to as "dirty Indians"; cleaned with alcohol and kerosene;[62] given haircuts if they were boys (a humiliating experience, as having long hair was culturally important in many tribes);[63]

---

52. BRENDA J. CHILD, BOARDING SCHOOL SEASONS: AMERICAN INDIAN FAMILIES, 1900–1940 15 (1998).

53. DAVID H. DEJONG, PROMISES OF THE PAST: A HISTORY OF INDIAN EDUCATION IN THE UNITED STATES 118 (1993) ("The children are caught, often roped like cattle, and taken away from their parents, many times never to return."); CHILD, *supra* note 52, at 14.

54. CHILD, *supra* note 52, at 14.

55. Act of Mar. 3, 1893, ch. 209, 27 Stat. 612, 635.

56. ADAMS, *supra* note 38, at 65 ("One thing that superintendents and Indian agents could not do after 1893 was send an Indian child to an off-reservation school without the 'full consent' of his parents.").

57. MANN, *supra* note 35, at 138 ("[In 1914,] Florence Red Eye Black was threatened with having her lease money withheld if she did not place her seven-year-old daughter Flora in school.").

58. CHILD, *supra* note 52, at 13.

59. Andrea A. Curcio, *Civil Claims for Uncivilized Acts: Filing Suit Against the Government for American Indian Boarding School Abuses*, 4 HASTINGS RACE & POVERTY L.J. 45, 57 (2006).

60. *Id.* at 67–68, 119.

61. *Id.* at 54–55.

62. WARD CHURCHILL, KILL THE INDIAN, SAVE THE MAN: THE GENOCIDAL IMPACT OF AMERICAN INDIAN RESIDENTIAL SCHOOLS 19 (2004).

63. ADAMS, *supra* note 38, at 101.

given English names;[64] and forced to change into uniforms and hand over their Native clothing and belongings.[65] While in school, they were forbidden from speaking their Native languages,[66] taught a Western-centric curriculum,[67] and forced to perform manual labor in the name of job training and skill-building.[68] To maximize the assimilative effect of boarding schools, children were often not allowed to return home for long stretches of time,[69] and some never returned home.[70] As a result, some desperate children ran away from school in escape attempts resembling prison breaks.[71] These children, dubbed "AWOLs," were hunted down, returned to school, and severely punished.[72] Some runaways perished in the harsh conditions before they were caught or made it to their reservation.[73]

Death was even more rampant inside the campuses because of disease.[74] Tuberculosis and trachoma plagued students across the country,[75] and due to poor recordkeeping, it is unknown how many children were infected with or died of these diseases.[76] The boarding schools themselves were major contributors to the spread of disease: living conditions were severely lacking and unsanitary, the exhausting regimentation wore students down physically and emotionally, and children suffered psychologically from losing their

64. *Id.* at 108. The provision of English names was not only an assimilative tactic, but also part of a larger government effort to force Indians to adapt to the United States' private property regime. "As Indians became property owners and thoroughly imbued with the values of possessive individualism, it would be virtually impossible to fix lines of inheritance if, for example, the son of Red Hawk went by the name Spotted Horse." *Id.*

65. *Id.* at 103. *See also id.* at 104–05 for the iconic images of Navajo student Tom Torlino upon his arrival at Carlisle Indian School and three years afterward.

66. CHILD, *supra* note 52, at 28.

67. Curcio, *supra* note 59, at 60–61.

68. ADAMS, *supra* note 38, at 149.

69. CHILD, *supra* note 52, at 50 (describing two situations in which parents requested their children return home to say goodbye to dying family members, only to have school administration refuse to allow their children to return home).

70. *Coalition Seeks Answers About Children Who Went Missing at U.S. Indian Boarding School via United Nations Working Group on Enforced and Involuntary Disappearances*, NAT'L INDIAN CHILD WELFARE ASS'N (May 14, 2019), https://www.nicwa.org/coalition-seeks-answers-about-children-who-went-missing-at-u-s-indian-boarding-school-via-united-nations-working-group-on-enforced-and-involuntary-disappearances/ [https://perma.cc/35CZ-DW52].

71. ADAMS, *supra* note 38, at 224–25 (describing a story where recurring runaways were locked in the school jail, the kindergarten class broke down the locked door of the jail, and the entire class escaped from campus).

72. *Id.* at 226.

73. *See, e.g.*, Bill Donovan, *50 Years Ago: Boys Freeze After Running Away from Boarding School*, NAVAJO TIMES (Jan. 11, 2018), https://navajotimes.com/50years/50years-ago-boys-freeze-running-away-boarding-school/ [https://perma.cc/2PD4-P3VF].

74. ADAMS, *supra* note 38, at 124–35.

75. *Id.* at 130.

76. Curcio, *supra* note 59, at 65.

families and communities.[77] Staff refused to engage in even basic health maintenance protocol, such as separating sick and healthy children.[78]

Native communities quickly recognized the public health crisis at boarding schools, but the government did not pay attention until the early 1900s.[79] At this point, the government commissioned several reports to survey disease rates and recommend changes to combat the problem.[80] For example, the American Red Cross conducted an investigation into boarding schools, concluding that poor diet, overcrowding, lack of sanitation, and the militaristic education system strongly contributed to the sometimes fatal effects of boarding school.[81] This report was promptly buried by the Commissioner of Indian Affairs, who expected a more positive assessment.[82] In addition, the infamous 1929 Meriam Report described a long list of problems that contributed to "deplorable health conditions" at boarding schools.[83] Several of these problems remained unchanged until at least the 1960s,[84] despite specific instructions to the contrary.[85]

The deplorable conditions, potentially astronomical death toll, repeated inaction by the government, and lack of media attention on this issue until very recently all culminate in one question: what can be done now? While it is ultimately up to affected Native communities and the federal government to make this decision, the particular facts of this situation suggest one course of action: pursuing a legal claim against the United States under the Federal Tort Claims Act. The next Part discusses this statute, its history, and its interpretation by the judiciary.

II. LEGAL BACKGROUND

This Part provides information necessary to understand the FTCA and why it is an ideal legal remedy for Indian boarding school deaths. The first Section discusses the legislative history and policy underlying the FTCA. The latter Sections discuss judicial interpretation of the FTCA, with particular

77. *Id.* at 62–63.
78. CHILD, *supra* note 52, at 63.
79. *Id.* at 62.
80. *Id.*; ADAMS, *supra* note 38, at 135.
81. ADAMS, *supra* note 38, at 135.
82. *Id.*
83. INST. FOR GOV'T RSCH., THE PROBLEM OF INDIAN ADMINISTRATION 392 (Johnson Reprint Corp. 1971) (1929). This report is commonly known as the Meriam Report after its principal investigator, Lewis Meriam.
84. *See* SUBCOMM. ON LABOR OF THE S. COMM. ON LABOR & PUBLIC WELFARE, THE EDUCATION OF AMERICAN INDIANS, S. Rep. No. 501, at 311 (1959).
85. ADAMS, *supra* note 38, at 133.

attention paid to the discretionary function exception, a critical defense to claims under the Act.

A. Foundations and Passage of the Federal Tort Claims Act

By default, the federal government is immune from lawsuits under the doctrine of sovereign immunity. Sovereign immunity is a long-recognized principle stemming from British common law that private plaintiffs cannot sue a sovereign government without that sovereign's consent.[86] Because of this, prior to the passage of the FTCA in 1946, the only way an injured party could receive a remedy for torts committed by federal government employees was to convince Congress to pass a private bill specifically providing them with relief.[87]

The private bill system was deeply flawed: it imposed a substantial burden of time and resources on Congress;[88] was highly susceptible to political favoritism;[89] and infringed on the separation of powers doctrine by tasking Congress with a judicial activity.[90] Such notable figures as John Quincy Adams,[91] Millard Fillmore,[92] Abraham Lincoln,[93] and Franklin D.

86. *See, e.g.*, Lipsey v. United States, 879 F.3d 249, 253 (7th Cir. 2018) ("The United States as sovereign is immune from suit unless it has consented to be sued."). There is evidence that American courts have relied on a flawed and exaggerated understanding of English sovereign immunity. For a full discussion of this thesis, see Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1 (2002).

87. Gray v. Bell, 712 F.2d 490, 506 (D.C. Cir. 1983) ("Prior to enactment of the FTCA, sovereign immunity did not entirely preclude redress for tortious governmental acts, but relegated injured citizens to the onerous process of securing recompense by private bill."); Roscoe Pound, *The Tort Claims Act: Reason or History?*, 486 INS. L.J. 402, 404 (1963) ("It came to be settled practice . . . for injured individuals to apply to the legislature for relief by a special Act.").

88. United States v. Muniz, 374 U.S. 150, 154 (1963) (reporting that from the sixty-eighth through the seventy-eighth Congresses, 2,000 private bills were introduced seeking compensation for tortious injury by agents of the federal government; 20% were enacted).

89. George M. Davie, *Suing the State*, 18 AM. L. REV. 814, 814 (1884) (describing lobbyists known as "claim brokers" or "parliamentary agents" attempting to influence Congress on behalf of their injured clients).

90. *See id.* at 815 ("Under this system, the loose legislative committee takes the place of a court."); 8 JOHN QUINCY ADAMS, MEMOIRS OF JOHN QUINCY ADAMS: COMPRISING PORTIONS OF HIS DIARY FROM 1795 TO 1848 480 (Charles Francis Adams ed., Philadelphia, J.B. Lippincott & Co. 1876) ("There ought to be no private business before Congress . . . . It is a judicial business, and legislative assemblies ought to have nothing to do with it.").

91. QUINCY ADAMS, *supra* note 90.

92. 5 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 91 (2004).

93. President Abraham Lincoln, First Annual Message to Congress, Dec. 3, 1861, Cong. Globe, 37th Cong., 2d Sess., pt. III.

Roosevelt[94] expressed hopes for reform, spawning debate that laid the foundations for what would eventually become the FTCA.[95]

Congress debated the contents of the Act for over a century[96] before a wartime accident finally triggered its passage. On a foggy day in 1945, U.S. Army pilot Captain William F. Smith was flying a B-25 bomber on a routine mission to transport soldiers from Massachusetts to New York City.[97] With visibility at nearly zero, air traffic controllers at LaGuardia Airport urged him not to land.[98] Possibly due to his military experience, Smith ignored the advice.[99] When he veered toward Manhattan, he crashed into the Empire State Building, killing himself, two passengers, and eleven people who worked in the building.[100] Others were severely injured.[101] The United States offered a settlement to the deceased's families, though some did not accept and instead filed workers' compensation claims.[102] Under New York's workers' compensation law, an employee whose injury stemmed from third-party negligence could file a simultaneous action for damages.[103] However, there was no way for the United States, the negligent third party, to be sued in tort.[104]

In response, and against the backdrop of the long-despised private bill system, Congress finally passed the FTCA in 1946, waiving the federal government's sovereign immunity from common law tort claims.[105] The Act aimed to resolve the private bill system's issues,[106] create a simple and easy

94. H.R. Rep. No. 2245, 77th Cong., 2d Sess. 6 (1942).

95. Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625, 684 (1985).

96. *Id.* At 650.

97. Joe Richman, *The Day a Bomber Hit the Empire State Building*, NAT'L PUB. RADIO (July 28, 2008, 11:23 AM), https://www.npr.org/templates/story/story.php?storyId=92987873?storyId=92987873 [https://perma.cc/5BHY-4NB4].

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. Comm'rs of the State Ins. Fund v. United States, 72 F. Supp. 549, 551–52 (S.D.N.Y. 1947).

103. *Id.*

104. *Id.*

105. Federal Tort Claims Act, Pub. L. No. 79-601, 60 Stat. 842 (codified at 28 U.S.C. § 1346(b)(1), § 1402(b), § 2401(b), §§ 2671–2680).

106. Gray v. Bell, 712 F.2d 490, 506 (D.C. Cir. 1983).

mechanism to compensate victims of governmental torts,[107] and deter tortious conduct by government employees.[108]

B. Judicial Interpretation I: Elements of the Federal Tort Claims Act

A cause of action under the FTCA has six elements. It must be a (1) "claim[] against the United States;" (2) "for money damages;" (3) "for injury or loss of property;" (4) "caused by the negligent or wrongful act or omission of [a Government] employee;" (5) "acting within the scope of his office or employment;" (6) "under circumstances where the United States, if it were a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[109] The claim cannot be subject to any statutory exceptions, including the oft-invoked discretionary function exception.[110] Within two years after the claim has accrued, the plaintiff must file a complaint with the defendant federal agency.[111] If the agency denies relief, or fails to respond within six months of filing, the plaintiff must appeal the complaint within six months.[112] The claim will be tried in federal court,[113] in a bench trial,[114] using the law of the state where the injury occurred.[115]

The first three elements are straightforward: the claim must be against the United States (not an individual employee or other entity),[116] for monetary relief,[117] and to redress injury or loss of property.[118] The remaining three elements are more complex. The FTCA limits causes of action to allegedly "negligent or wrongful acts or omissions," thus barring claims for strict

---

107. Collins v. United States, 783 F.2d 1225, 1233 (5th Cir. 1986) (Brown, J., concurring) (explaining that Congress enacted the FTCA "to afford easy and simple access to the federal courts for persons injured by the activities of government").

108. Loumiet v. United States, 828 F.3d 935, 941 (D.C. Cir. 2016).

109. 28 U.S.C. § 1346(b)(1).

110. *Id.* § 2680.

111. *Id.* § 2401.

112. *Id.*

113. *Id.* § 1346(b)(1).

114. *Id.* § 2402.

115. *Id.* § 1346(b)(1).

116. *See, e.g.*, Denney v. U.S. Postal Serv., 916 F. Supp. 1081, 1083 (D. Kan. 1996) (granting summary judgment to the defendant because a plaintiff may not sue an agency under the Federal Tort Claims Act, only the United States itself).

117. *See, e.g.*, Khan v. United States, 808 F.3d 1169, 1172–73 (7th Cir. 2015) (dismissing an FTCA claim because the plaintiff did not demand any money damages in her administrative claim prior to filing in court).

118. *See, e.g.*, Oregon v. United States, 308 F.2d 568, 569 (9th Cir. 1962) (dismissing an FTCA claim to recover the costs of putting out a fire negligently set by U.S. Forest Service employees because fire-fighting costs do not constitute "injury or loss of property").

liability torts[119] or intentional torts.[120] The negligent actor must be a government employee.[121] Typically, contractors do not constitute "government employees,"[122] though some jurisdictions may hold the United States liable if the contractor was given a "nondelegable" duty.[123] The government actor must be acting within the scope of employment when acting negligently, which will be determined by the law of the state in which the act occurred.[124] Finally, the FTCA does not create any new causes of action, but rather incorporates tort law as it exists in the states.[125] Thus, to allege a valid cause of action under the FTCA, the complaint must allege a tort recognized in the state where the act occurred for which a private person could be held liable.[126]

In addition to the elements of the claim, a plaintiff must also exhaust their administrative remedies before a federal court will hear their lawsuit.[127] The next Section discusses this process.

C. Administrative Exhaustion

The FTCA prohibits claimants from filing a lawsuit before they present their claims to the appropriate federal agency for an internal investigation.[128] A claimant "presents" their claims to an agency for FTCA purposes when an agency receives an executed Standard Form 95 or other written notification of the incident and a claim for a specific amount of damages.[129] This means that the agency must receive the claim within the statute of limitations period—it is not sufficient to transmit the claim (such as by mail) within the

119. *See, e.g.*, Laird v. Nelms, 406 U.S. 797, 802–03 (1972) ("Dalehite [346 U.S. 15] held that the Federal Tort Claims Act did not authorize suit against the Government on claims based on strict liability for ultrahazardous activity . . . .").

120. 28 U.S.C. § 2680(h).

121. *Id.* § 1346(b)(1).

122. *Id.* § 2671. *See also* Logue v. United States, 412 U.S. 521, 527–32 (1973).

123. *See, e.g.*, Dickerson, Inc. v. United States, 875 F.2d 1577, 1582 (11th Cir. 1989).

124. *See, e.g.*, Kelly v. United States, 924 F.2d 355, 357 (1st Cir. 1991).

125. *See, e.g.*, Feres v. United States, 340 U.S. 135, 141 (1950) ("It will be seen that [the FTCA] is not the creation of new causes of action but acceptance of liability under circumstances that would bring private liability into existence.").

126. *Id.* at 141–42 (holding that the FTCA did not allow liability for injuries arising out of military service, because there is no analogous tort for which a private person could be held liable).

127. 28 U.S.C. § 2675(a).

128. *Id.*

129. 28 C.F.R. § 14.2(a) (2022).

period.[130] Only after the agency has denied the claim in writing, or failed to render a final disposition on the claim within six months of filing, may the claimant file suit in federal court.[131] In the latter case, the plaintiff may file an FTCA claim in federal court any time after the six-month waiting period.[132]

Here, the appropriate federal agency is the Department of the Interior, which houses the Bureau of Indian Affairs ("BIA"). The BIA implemented and managed the boarding schools that caused the deaths of Indian attendees.[133] The Department of the Interior promulgates its own regulations for claim filing.[134] These regulations generally follow the uniform regulations for filing a claim with a federal agency,[135] but specifically require that claims be filed with the local BIA field office that caused the incident.[136]

If the agency denies the requested remedy, the case will proceed to federal court.[137] Plaintiffs must strictly adhere to the administrative exhaustion requirement,[138] as many FTCA cases are thrown out and forever barred simply because the plaintiff did not exhaust their administrative remedies prior to filing.[139]

---

130. *See, e.g.*, Sanchez v. United States, 134 F. Supp. 2d 211, 215 (D.P.R. 2001) (concluding that since the claim form was filled out on the day the statute of limitations expired, the claim could not have been received by the agency prior to the claim's accrual).

131. *See, e.g.*, Hui Yu v. U.S. Dep't of Homeland Sec., 568 F. Supp. 2d 231, 235 (D. Conn. 2008).

132. Parker v. United States, 935 F.2d 176, 178 (9th Cir. 1991); Zander v. United States, 786 F. Supp. 2d 880, 884–85 (D. Md. 2011) (finding that the FTCA's statutory period allowing "a plaintiff an infinite amount of time to file a suit against the Government" after the administrative claim had been "deemed denied" preempted Maryland's five-year statute of limitations).

133. For a full list of documented schools operated by the Bureau of Indian Affairs, see *Navigating Record Group 75: BIA Schools*, NAT'L ARCHIVES (Feb. 17, 2021), https://www.archives.gov/research/native-americans/bia-guide/schools [https://perma.cc/KNM2-ZC7R].

134. 43 C.F.R. § 22.1–6 (2022).

135. *Id.* § 22.3(a).

136. *Id.* § 22.3(b).

137. For a full explanation of the administrative exhaustion requirement, see Daniel Shane Read, *The Courts' Difficult Balancing Act To Be Fair to Both Plaintiff and Government Under the FTCA's Administrative Claims Process*, 57 BAYLOR L. REV. 785 (2005). A full understanding of this process is necessary to prevail on an FTCA claim, but is outside of the scope of this article.

138. *See infra* Section IV.A for a discussion of when this FTCA claim will begin accruing.

139. *See, e.g.*, Cronauer v. United States, 394 F. Supp. 2d 93 (D.D.C. 2005) (dismissing FTCA claim because plaintiffs filed with the wrong government agency on the last day of the two-year statutory period and did not file with the correct agency until after the statute of limitations had accrued); Wollman v. Gross, 637 F.2d 544 (8th Cir. 1980) (dismissing FTCA claim because neither the plaintiff nor the defendant were aware that the defendant was a federal employee acting within the scope of employment at the time of incident until after the statutory period had expired, so the plaintiff failed to timely file the administrative claim).

In addition to failing to exhaust administrative remedies, plaintiffs often find their cases doomed from the start by another defense: the discretionary function exception.[140]

D. Judicial Interpretation II: The Dominance of the Discretionary Function Exception

One statutory exception has been a major obstacle to FTCA claims since the very first lawsuit filed under the Act, *Dalehite v. United States*.[141] This suit was filed as a result of the Texas City Disaster in 1947, in which two cargo ships carrying large amounts of ammonium nitrate fertilizer exploded, causing nearly 600 deaths, 3,000 to 4,000 injuries, and $50 to $75 million (in 1947 dollars) in property damage.[142] The lawsuit failed on an issue of statutory interpretation involving the first exception to the FTCA.[143] This exception bars lawsuits for claims "based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid," or on the performance or failure to perform "a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."[144]

This provision has become widely known as the discretionary function exception ("DFE"). Perhaps fearing government liability for mass-casualty disasters, a 4–3 majority in *Dalehite* held that all of the government employee decisions and actions, however negligent, that led to the explosions "were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the Government's fertilizer program."[145] Thus, the victims were not entitled to relief under the Act, though Congress eventually granted compensation via legislation.[146]

---

140. *Cf.* Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 563–64 (2003) ("[T]he [FTCA] has a number of significant limitations. Of these, the most important is the 'discretionary function' exemption.").

141. 346 U.S. 15 (1953).

142. Hugh W. Stephens, *The Texas City Disaster: A Re-examination*, 7 INDUS. & ENV'T CRISIS Q. 189, 189 (1993).

143. *Dalehite*, 346 U.S. at 32, 41–42; 28 U.S.C. § 2680(a).

144. *Dalehite*, 346 U.S. at 32.

145. *Id.* at 42.

146. Pub. L. No. 378, 69 Stat. 707.

The *Dalehite* decision significantly narrowed the scope of the FTCA's sovereign immunity waiver, possibly limiting relief to only a subset of the claims Congress anticipated plaintiffs bringing. The DFE has served as a crucial shield to liability in FTCA litigation[147] and has dominated court interpretation of the FTCA, with other elements receiving comparatively less attention.[148]

After *Dalehite*, lower courts developed their own jurisprudence to analyze DFE defenses, making it clear that run-of-the-mill torts, such as vehicle negligence and building maintenance, could not escape liability via the DFE, but injuries resulting from more advanced matters, such as flood control and irrigation, military and foreign policy decisions, law enforcement activity, and regulatory or licensing decisions, could.[149]

Application of the DFE is currently governed by *United States v. Gaubert*.[150] The Court's opinion distilled the DFE analysis into a two-step test: first, the Court determined whether the regulation governing the action (a) mandated the action or (b) allowed the actor to choose that action.[151] If the action was mandated, and the employee followed the direction, "the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation."[152] If the action was mandated but deviated from the mandate, the DFE would not apply, because there was no room for choice in the action.[153] If the action was discretionary, there is "a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations."[154] Step two of the test can rebut this presumption: if the discretionary choice was not a choice involving policy considerations, but rather a choice of implementation of pre-determined policy matters, the DFE does not apply.[155]

---

147. Donald N. Zillman, *Protecting Discretion: Judicial Interpretation of the Discretionary Function Exception to the Federal Tort Claims Act*, 47 ME. L. REV. 365, 388 (1995) ("The courts are quite ready to find policy implicated in a wide variety of situations, especially in application of federal regulatory power.").

148. *See* Mark C. Niles, *"Nothing but Mischief": The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275, 1300–01 (2002) ("Unlike the other exceptions, the discretionary function restriction is stated in broad terms, has resulted in a substantial limitation on the liability of the United States in a wide range of circumstances, and has fostered a substantial jurisprudence.").

149. Zillman, *supra* note 147, at 369.

150. 499 U.S. 315 (1991).

151. *Id.* at 328.

152. *Id.* at 324.

153. *Id.*

154. *Id.*

155. *Id.* at 324–25.

In a typical DFE analysis, the reasoning would go something like this: if a regulation or policy mandates a certain course of action for a government employee, the DFE will not apply if the employee deviated from that course of action. If the employee followed the mandates, however, the DFE will shield the employee because the action was pursuant to some regulation with a policy purpose. If the regulation allows employee discretion, there will be a strong presumption that the employee's subsequent actions will be covered by the DFE, unless they are somehow so unrelated to the policy underlying the regulation as to overcome the presumption.

The DFE has served as a near-certain defense for the government in the seventy-five years since the FTCA was enacted: in a 1995 survey of lower court FTCA decisions, forty out of fifty-eight circuit court cases were dismissed due to the DFE.[156] Sixty-one out of eighty district court cases received the same result.[157] Thus, any plaintiff seeking to file an FTCA claim must have a detailed response to the government's almost inevitable DFE defense, in addition to the many other exceptions and defenses the government can invoke. The remainder of this Comment will demonstrate that Native American plaintiffs can bypass the difficult obstacles typically posed by FTCA litigation.

III. TRIBES, FAMILIES, AND NATIVE AMERICAN INTEREST GROUPS POSSESS A VALID CAUSE OF ACTION UNDER THE FEDERAL TORT CLAIMS ACT.

This Part discusses why the FTCA provides an ideal legal remedy for a tribe or family seeking to recover for the death of their child at an Indian boarding school. Section A outlines why the FTCA offers the best remedy available for such a death over other potential remedies. Section B discusses standing for several potential plaintiffs (tribes, families, and Native American interest groups) and concludes that most, if not all, can meet the standing requirements to file an action under the FTCA. Section C analyzes each element necessary to state a cause of action under the FTCA, concluding that potential plaintiffs can meet every single one.

A. Why the Federal Tort Claims Act

The FTCA offers the best legal remedy available for Indian boarding school deaths. Other than money damages, a highly desirable remedy for affected parties is a judgment of federal government liability. The United

156. Zillman, *supra* note 147, at 373.
157. *Id.*

States government has only formally acknowledged and apologized for its role in significant wrongdoing a handful of times, and often only after heavy scrutiny.[158] Additionally, a sovereign-issued apology may be broadly stated, poorly publicized, and attempt to avoid specific accountability. The United States government has already apologized for the horrific history of oppression Native Americans have faced,[159] but it was "buried in a defense-spending bill" and received little acknowledgment.[160] Thus, a genuine and unqualified judgment of federal government liability can likely only be achieved by pursuing a legal case. Additionally, government liability is much more desirable than federal officer or staff liability, because boarding school deaths resulted from a botched and poorly implemented federal policy. Additionally, the government has the ability to pay damages, whereas a judgment against a federal officer or staff would likely remain a paper judgment.

Additionally, when pursuing a cause of action against the United States, sovereign immunity is a huge roadblock to liability. The FTCA offers a rare waiver. Although Indians are in a unique position to access more sovereign immunity waivers than non-Indians,[161] these waivers are not as suited to this situation as the FTCA. For example, some U.S./Tribal treaties contain "bad men" clauses, in which the federal government will pay compensation under the Tucker Act[162] for "wrongs" committed by "bad men among the whites" against an Indian.[163] However, only nine treaties contain this provision,[164] leaving boarding school victims whose tribes were not party to these treaties out of options. Additionally, the claim must identify a "wrong" under the meaning of the treaty, which courts have limited to affirmative criminal acts,

158. *See* Danny Lewis, *Five Times the United States Officially Apologized*, SMITHSONIAN MAG. (May 27, 2016), https://www.smithsonianmag.com/smart-news/five-times-united-states-officially-apologized-180959254/ [https://perma.cc/LML7-FU8R] ("[D]uring the lead-up to [President Obama's visit to Hiroshima], both American and Japanese officials were careful to make sure that no one expected Obama to issue a formal apology for the bombing.").

159. S.J. Res. 14, 111th Cong. (2009).

160. Emily McFarlan Miller, *An Apology to Native Americans Was Buried in a 2010 Defense Bill. Now, Some Want the President to Say It Aloud*, WASH. POST (July 30, 2021, 5:14 PM), https://www.washingtonpost.com/religion/an-apology-to-native-americans-was-buried-in-a-2010-defense-bill-now-some-want-the-president-to-say-it-aloud/2021/07/30/2094d60a-f163-11eb-bf80-e3877d9c5f06_story.html [https://perma.cc/L3VH-DK5F].

161. *See, e.g.*, 28 U.S.C. § 1505 (granting the United States Court of Federal Claims jurisdiction over claims against the United States accruing after August 13, 1946 by any Indian tribe, band, or identifiable Indians within the territorial United States and Alaska).

162. 28 U.S.C. § 1491.

163. *See, e.g.*, Treaty of Fort Laramie art. I, Apr. 29, 1868, 15 Stat. 655.

164. Lillian Marquez, *Making "Bad Men" Pay: Recovering Pain and Suffering Damages for Torts on Indian Reservations Under the Bad Men Clause*, 20 FED. CIR. BAR J. 609, 609 (2011).

not civil actions like negligence and breach of contract.[165] It would be much more difficult to prove that an affirmative criminal act killed these children than to allege a wrongful death or negligence claim, especially since the vast majority will likely be determined to have died from diseases. A Tucker Act claim also must specify individual white men who committed the wrongs and cannot name the federal government or unnamed agents,[166] which would not achieve federal government liability.

Even if Congress or the Department of the Interior issued an unqualified, full admission of wrongdoing and apology, non-judicial remedies are best determined by the United States and tribal leaders, so a full discussion is outside the scope of this Comment. Additionally, not all tribes or Native Americans will want the same relief, so this task must be undertaken delicately, collaboratively, and with cultural identities in mind. Because the Native community may rightly demand varied and highly individualized forms of relief, this Comment will not discuss non-judicial remedies in depth.[167] But should tribes and families want to pursue a legal case, either in addition to or in lieu of non-judicial remedies, they possess a valid cause of action under the FTCA. The following Sections demonstrate this.

B. Standing

Standing is the first barrier to entry for anyone seeking to bring a civil suit in federal court. Standing is a constitutional doctrine rooted in Article III, which limits federal judicial authority to "cases" or "controversies."[168] The leading case on standing is *Lujan v. Defenders of Wildlife*,[169] which laid out three elements for claimants to meet the standing requirement. First, the plaintiff must have suffered an "injury-in-fact," defined as an "invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical."[170] Second, there must be a "fairly traceable" causal connection between the injury and the challenged conduct.[171] Finally, it must be likely, not merely speculative, that the injury will be redressed by a favorable decision.[172] The Supreme Court

165. *See* Garreaux v. United States, 77 Fed. Cl. 726, 736–37 (2007).

166. *Id.* at 737.

167. See *infra* Section V for a brief discussion of potential settlements and alternative remedies.

168. U.S. CONST. art. III, § 2.

169. 504 U.S. 555 (1992).

170. *Id.* at 560.

171. *Id.*

172. *Id.* at 561.

has further developed the standing doctrine to identify more specific standards for states,[173] organizations,[174] and other types of plaintiffs.[175]

In many cases, standing is obvious, such as when a plaintiff timely alleges that the defendant violated a statute resulting in injury to the plaintiff.[176] Standing is less clear when the plaintiff is not the injured party and when it is difficult to identify the injury or whether it is fairly traceable to the defendant's conduct.[177] Here, the directly injured parties, the boarding school attendees, are dead—many for over a century. Standing will almost certainly be a significant hurdle for any party who brings an FTCA case for boarding school deaths.

This Section identifies three types of plaintiffs who may have standing to bring such a claim: tribes, families of the deceased, and Native American advocacy groups. It then argues that tribes and advocacy groups meet the standing requirements, but family members may not.

1. Tribes have standing in their *parens patriae* capacity because they have a quasi-sovereign interest at stake.

States may meet their Article III requirements by demonstrating *parens patriae* standing.[178] *Parens patriae* literally means "parent of the country"[179] and refers to a state's right to sue to prevent or repair injury to its quasi-sovereign interests.[180] There is no explicit definition of a "quasi-sovereign

173. *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 520–27 (2007) (distinguishing a state's standing requirements from an individual's).

174. *See, e.g.*, Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977) (articulating the "borrowed member standing" theory of organizational plaintiffs).

175. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 514 (1975) ("Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute.").

176. Lujan v. Defs. of Wildlife, 504 U.S. 555, 561–62 (1992) ("[T]he nature and extent of facts . . . to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury.").

177. *Id.* at 562–78.

178. *See* Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907) ("When the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court."); *Massachusetts*, 549 U.S. at 518–19 (applying the *Tennessee Copper* standard to Massachusetts suing the EPA for abdicating its responsibility to regulate emissions under the Clean Air Act, resulting in grave threats to property on the Massachusetts coastline due to rising sea levels).

179. *Parens patriae*, BLACK'S LAW DICTIONARY 1003 (5th ed. 1979).

180. Hawaii v. Standard Oil Co., 405 U.S. 251, 258 (1972).

interest," but case law has identified two general categories that constitute such an interest: (1) the physical and economic health and well-being of a state's residents in general; and (2) not being discriminatorily denied its rightful status in the federal system.[181]

Like states, tribes may meet Article III's requirements by demonstrating *parens patriae* standing.[182] There are three elements of *parens patriae* standing.[183] First, the tribe must allege injury to a sufficiently substantial segment of its population.[184] Second, the tribe must articulate an interest apart from the interests of particular parties, i.e., the tribe must be more than a nominal party.[185] Finally, the tribe must articulate a quasi-sovereign interest.[186]

There are no definitive limits on the proportion of the population that must be affected to satisfy the first requirement.[187] By 1926, nearly 83% of Indian children were attending boarding schools.[188] While there are no exact statistics on how many children per tribe attended boarding schools or died,[189] it is reasonable to infer that a sufficiently substantial segment of any given tribe's population was injured by negligent acts of government officials.

Next, the sovereign may not assert *parens patriae* standing by taking the place of a private plaintiff, especially if an individual plaintiff filed their own claim arising out of the same incident.[190] To have standing, the sovereign must have an independent claim for injury to its status as a sovereign,[191] such as (in the case of Indian tribes) harm to trust land. Here, tribes are not "standing in" for the typical individual plaintiff in a wrongful death or

---

181. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.*, Barez, 458 U.S. 592, 607 (1982).

182. Quapaw Tribe of Okla. v. Blue Tee Corp., 653 F. Supp. 2d 1166, 1179 (N.D. Okla. 2009); Moe v. Confederated Salish & Kootenai Tribes of the Flathead Rsrv., 425 U.S. 463, 468 n.7 (1976) (acknowledging that the Court's conclusions "implicitly embrace a finding that the Tribe, Qua Tribe, has a discrete claim of injury with respect to these forms of state taxation so as to confer standing upon it apart from the monetary injury asserted by the individual Indian plaintiffs").

183. Connecticut v. Physicians Health Servs., 103 F. Supp. 2d 495, 504 (D. Conn. 2000) (citing *Alfred L. Snapp & Son*, 458 U.S. at 607).

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. ADAMS, *supra* note 38, at 27.

189. The upcoming volume(s) of the Haaland Report will hopefully shed some light on these numbers.

190. Quapaw Tribe of Okla. v. Blue Tee Corp., 653 F. Supp. 2d 1166, 1180 (N.D. Okla. 2009) ("The Tribe has the burden to demonstrate that its damages are limited to those incurred in its quasi-sovereign capacity and that it is not attempting to recover for harm to purely private interests.").

191. *Id.*

negligence action. Rather, tribes, as governing bodies, have their own interest in the deaths of a large number of their own children. While an individual plaintiff would have an interest in claims such as loss of consortium and emotional distress, tribes have distinct interests in loss of tribal members, such as ensuring the survival of the tribe or protecting its citizenry from atrocities by another government.

Finally, a tribe must express a quasi-sovereign interest. While courts have not settled on a specific definition, they have acknowledged two general categories: a quasi-sovereign interest in the physical and economic health and well-being of the tribe's citizens in general, and a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.[192] The deaths of potentially thousands of tribal children at federally-run boarding schools falls squarely within the first category: physical health of the tribe's citizens in general. Due to the pervasiveness of boarding school maltreatment and death, it is reasonable to infer that the tribe has a general interest in avoiding injury to the majority of their children in boarding schools.

Thus, although the standing analysis may vary based on a specific tribe's history, many will be able to assert *parens patriae* standing. Each tribe should analyze its own circumstances to ensure it has standing, and if not, seek out an alternative plaintiff, like one of the two discussed in the next Sections.

2. Family members' standing to pursue an FTCA claim depends on state law.

In FTCA adjudication, the law of the state where the act or omission occurred is applied,[193] meaning that the government action resulting in the plaintiff's injury must have violated state law. Thus, the wrongful death statute in the state where a child's boarding school was located will dictate standing for individual plaintiffs. For the purposes of this analysis, Pennsylvania's wrongful death statute will be used.[194]

Pennsylvania's wrongful death statute confers standing on the following plaintiffs: the spouse, children, parents, or, if none of these beneficiaries exist, personal representative of the deceased.[195] Because (1) the enumerated

192. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.*, Barez, 458 U.S. 592, 607 (1982).

193. 28 U.S.C. § 1346(b)(1).

194. The flagship Indian boarding school, Carlisle Indian School, was located in Pennsylvania. It is already known that at least 189 children are buried at the school's cemetery, ten of whom will be exhumed and returned to their families. Sturla, *supra* note 7. Thus, it is highly likely that should an FTCA claim be filed, Pennsylvania law will be invoked.

195. 42 PA. CONS. STAT. § 8301 (2022).

beneficiaries of these children are likely also deceased or never existed and (2) these children likely died intestate, individual suits by family members will likely not meet the Pennsylvania standing requirements. Other states may have broader standing requirements, such as Oklahoma, which allows the decedent's next of kin to sue.[196]. However, interested family members should check the wrongful death statutes of the state where their deceased relative attended boarding school, or consider using a different state claim, like common-law negligence, that may have easier-to-meet standing requirements.

3. Native American interest organizations and nonprofits have third-party organizational standing.

In addition to individual plaintiffs and government entities, the Supreme Court has also recognized standing in non-governmental organizational bodies under the theory of associational standing.[197] Organizations can assert associational standing in two ways: borrowed member standing theory and injury to organizational efforts theory.[198] Many Native American interest organizations, such as the National Congress of American Indians ("NCAI"), the National Native American Boarding School Healing Coalition ("NABS"), and Native American Rights Fund ("NARF"), could assert associational standing under at least one of these pathways.

Borrowed member standing theory allows organizations to sue for injuries on behalf of its members.[199] An organization may assert borrowed member standing when (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.[200]

Native American interest organizations could satisfy all three elements. The members of these organizations include tribes and family members of Native children who attended boarding school[201] and likely meet Article III's

196. OKLA. STAT. tit. 12, § 1054 (2022).

197. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 511 (1975) ("Even in the absence of injury to itself, an association may have standing solely as the representative of its members.").

198. *See* Heidi Li Feldman, Note, *Divided We Fall: Associational Standing and Collective Interest*, 87 MICH. L. REV. 733, 733 (1988).

199. Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977).

200. *Id.*

201. *See, e.g.*, *Membership*, NAT'L NATIVE AM. BOARDING SCH. HEALING COAL., https://boardingschoolhealing.org/about-us/membership/ [https://perma.cc/LL23-7MVM] (explaining that members of NABS include tribal nations, descendants, and others).

standing requirements.[202] Satisfying the second element, these organizations range from exclusively dedicated to boarding school healing to protecting tribal and Native individual rights, and all have worked on healing from boarding school atrocities and demanding government accountability.[203] Finally, because the injured parties are deceased and no living members of these organizations were involved in the matters that led to those deaths, there is no requirement that any individual members actually participate in the lawsuit.

Under the injury to organizational efforts theory of associational standing, an organization has standing to sue when their organizational efforts are sufficiently and concretely injured.[204] An organization can best demonstrate this if it has devoted specific efforts and resources to combat the challenged issue.[205] Native American interest organizations have expended significant efforts for decades to remedy the atrocities committed by the United States against boarding school attendees.[206] This outpouring of organizational

202. *See supra* Sections aa.1, aa.2.

203. *See, e.g.*, JEFFERSON KEEL, *Call for the United States To Acknowledge its Role in the U.S. Boarding School Policy and To Account for the American Indian and Alaska Native Children Who Did Not Survive as a Result*, NAT'L CONG. OF AM. INDIANS (2016), https://www.ncai.org/resources/resolutions/call-for-the-united-states-to-acknowledge-its-role-in-the-u-s-boarding-school-policy-and-to-account-for-the-american-indian-and-alaska-native-children-who-did-not-survive-as-a-result [https://perma.cc/5XA2-8QHY] (providing the NCAI's involvement in addressing Indian boarding schools); *About Us*, NAT'L NATIVE AM. BOARDING SCH. HEALING COAL., https://boardingschoolhealing.org/about-us/ [https://perma.cc/X97Z-MHM3] (explaining that NABS was formed to address the effects of the U.S. Indian Boarding School policy).

204. Havens Realty Corp. v. Coleman, 455 U.S. 363, 375 (1982).

205. *See, e.g.*, Access Living of Metro. Chi. v. Uber Techs., 958 F.3d 604, 608–12 (7th Cir. 2020) (holding that a disability advocacy organization had standing to claim that Uber violated the Americans with Disabilities Act by contracting with an insufficient number of drivers owning wheelchair-accessible vehicles, forcing it to divert resources to combat the discrimination); Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay, 868 F.3d 104, 109–11 (2d Cir. 2017) (holding that an organization devoted to ending discrimination against Latino immigrant workers had standing to challenge an ordinance that prohibited stopping a vehicle for the purpose of soliciting employment, because it had devoted attention, time, and employees to prepare its response to the ordinance); OCA–Greater Houst. v. Texas, 867 F.3d 604, 610–12 (5th Cir. 2017) (holding that a non-profit organization dedicated to protecting the rights of Asian Americans had standing to challenge a Texas voting law that affected the ability of voters with limited English abilities to rely on interpreters when voting, because it redirected some of its resources to educate members and the public on how to comply with the law).

206. *See, e.g.*, *Boarding School Healing*, NATIVE AM. RTS. FUND, https://www.narf.org/cases/boarding-school-healing/ [https://perma.cc/A3T6-G9S4] (explaining the Native American Rights Fund's efforts to address the aftermath of the Indian boarding school system).

resources has resulted in a concrete injury by diverting resources away from positive efforts to uplift and empower Native tribes and individuals.[207]

If an organization seeks to assert standing under the injury to organizational efforts theory, it must demonstrate that it suffered a concrete injury, such as by having to divert resources to address the challenged action. The Supreme Court has been careful to avoid allowing suits in which organizations merely have a "special interest" in the problem because their mission is to combat the challenged actions.[208] Thus, the organization should emphasize resource allocation and other concrete impacts of the challenged action, rather than on the fact that its mission statement is in direct contrast with the violations at issue.

C. Indian Boarding School Deaths Satisfy Every Element of the FTCA.

This Section applies the facts of the Indian boarding school crisis to each element of the FTCA, concluding that each element is met. The first three elements—(1) a claim against the United States; (2) for money damages; (3) for injury or loss of property[209]—are undisputed. This will be a claim against the United States for actions of the Department of the Interior, which implemented and oversaw federal Indian boarding schools. It will be a claim for money damages, to be calculated after sufficient investigation is concluded. It is difficult to calculate sum certain damages when there are so many unknowns, such as the number of bodies that will be recovered and from which tribe. The alleged injury is negligence or wrongful death. Family members will be the most likely to allege wrongful death if they meet the standing requirements in the state they are filing.

The final three elements of the FTCA require further exploration. The remainder of this Section discusses each one. The first Subsection argues that the injury was caused by the negligent or wrongful act or omission of a government employee, discussing the definition of "government employee" and analyzing elements of negligence. The second Subsection argues that the employees were acting within the scope of employment when the injuries occurred. The third Subsection briefly argues that the United States would be liable for the injuries if it were a private person.

---

207. *See id.*

208. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727, 739 (1972) (holding that the Sierra Club did not have standing to challenge the construction of a proposed ski resort and recreation area in a national game and refuge forest merely because it is an environmental organization committed to protecting national game and refuge forests from human impact).

209. 28 U.S.C. § 1346(b)(1).

1. The injury was caused by the negligent or wrongful act or omission of a government employee.

Plaintiffs may only collect under the FTCA for negligence, not intentional torts.[210] While some boarding school deaths may have resulted from intentional torts,[211] the vast majority will likely be attributed to disease.[212] Government employees' negligence directly caused the rampant spread of disease that resulted in the deaths of likely thousands of Indian children.

Many boarding schools were entirely staffed and managed by government employees.[213] Although the earliest schools on reservations were predominantly staffed by government contractors, Congress and the Bureau of Indian Affairs ("BIA") made a conscious effort to remove funding from these institutions and centralize operations.[214] On-the-ground employees, such as teachers and school superintendents, were hired through the United States Civil Service Commission,[215] a now-defunct government agency that hired employees to work in federal service.[216] Those higher in the bureaucracy, such as officials charged with implementing boarding school policies (including the Commissioner of Indian Affairs), worked in the BIA.[217]

About one-third of boarding schools were managed by churches.[218] This may muddy the analysis of whether "government employees" negligently caused children's deaths. Some churches have apologized for their participation in Indian boarding schools, but due to lack of records, even the churches themselves are unsure of the exact roles they played.[219] Thus, it is

---

210. 28 U.S.C. § 2680(h).

211. Curcio, *supra* note 59, at 69 ("A 1919 Report of the Indian Rights Association discusses 40 cases in which employees who engaged in proven 'misconduct, dishonesty, incompetency, immorality, intemperance, unfitness and brutality (such as stripping three girls to the waist and cruelly flogging them)' were not fired.").

212. *See supra* Section I.B.

213. *See* Curcio, *supra* note 59, at 89. *See also Past*, CARLISLE INDIAN SCH. PROJECT, https://carlisleindianschoolproject.com/past/ [https://perma.cc/3L3H-SHJP].

214. ADAMS, *supra* note 38, at 66.

215. *Id.* at 84.

216. Pendleton Civil Service Reform Act, ch. 27, 22 Stat. 403 (1883) (codified as amended in scattered sections of 5, 18 & 40 U.S.C.).

217. *See* ADAMS, *supra* note 38, at 61.

218. Mary Annette Pember, *Churches Starting To Face Facts on Boarding Schools*, INDIAN COUNTRY TODAY (Jan. 10, 2022), https://indiancountrytoday.com/news/churches-starting-to-face-facts-on-boarding-schools [https://perma.cc/L3M3-TTFR].

219. *See, e.g.*, Off. of Pub. Affs., *Statement on Indigenous Boarding Schools by Presiding Bishop Michael Curry and President of the House of Deputies Gay Clark Jennings*, EPISCOPAL CHURCH (July 12, 2021), https://www.episcopalchurch.org/publicaffairs/statement-on-indigenous-boarding-schools-by-presiding-bishop-michael-curry-and-president-of-the-house-of-

very difficult to determine if church-affiliated boarding school staff would be considered government employees, contractors, or something entirely differently; further inquiry must be conducted to make these determinations.[220] Potential plaintiffs whose children attended church-run boarding schools, such as Red Cloud Indian School,[221] should consider this when pondering whether to pursue an FTCA claim. Plaintiffs could instead pursue a state law negligence claim against the church in charge of the school, which would remove the FTCA requirement that the actor be a government employee. However, there are currently inadequate records available of churches' management of these schools to perform the negligence analysis.[222] Potential plaintiffs may need to engage in substantial discovery to obtain enough information to prevail on a claim, and the government should continue to investigate church-run schools through the BIA's Indian boarding school inquiry or other investigations.

Negligence has four elements: (1) duty of care, (2) breach of duty, (3) causation, and (4) damages.[223] Government employees' actions leading to the deaths of hundreds of children meets every element of the negligence analysis.

a. Duty of Care

Boarding school employees owed a duty of care to students for two reasons: first, the students are Indians to whom the government owes a trust responsibility, and second, the students are children in schools, imposing a special duty on school staff who have custody over them.

---

deputies-gay-clark-jennings/ [https://perma.cc/2PJX-NBX7] (apologizing for participation of the Episcopal Church in the Indian boarding school system); Leslie Scanlon, *Painful Legacies: Acknowledging the Church's Role in Atrocities at Indigenous Boarding Schools*, PRESBYTERIAN OUTLOOK (Oct. 11, 2022), https://pres-outlook.org/2021/09/painful-legacies-acknowledging-the-churchs-role-in-atrocities-at-indigenous-boarding-schools/ [https://perma.cc/5KD7-JCY8] ("'Officially, we don't have a number,' . . . said Irvin Porter, the associate for Native American Congregational Support for the PC(USA). 'We need more documentation. We need to know the exact names and locations of those schools that the church was responsible for. We need to understand what happened at those schools.'").

220. *Cf.* Pember, *supra* note 218 (noting that the role of Christian organizations in boarding schools is somewhat unknown and disputed).

221. *History*, RED CLOUD INDIAN SCH., https://www.redcloudschool.org/page.aspx?pid=429 [https://perma.cc/S99U-LTUW].

222. *See, e.g.*, Scanlon, *supra* note 219 (explaining that the Native American Congregational Support for the PC(USA) lacks sufficient documentation of boarding school operations).

223. *See* Sawyer v. Wight, 196 F. Supp. 2d 220, 226 (E.D.N.Y. 2002).

i) Trust Responsibility

A trust relationship creates a fiduciary obligation cognizable as a duty of care under tort law.[224] Whether the United States owed a duty of care to Indian plaintiffs under the FTCA depends on (1) whether the government held a trust responsibility to provide quality Indian education, and (2) whether the trust responsibility creates a cognizable duty under state law.[225]

It is a widely accepted general principle that the federal government owes a trust responsibility to tribes and individual Indians.[226] As stated above, one hundred twenty treaties that established a trust relationship with Indians contain provisions stating that the government will provide education for Indian children.[227] For example, one treaty acknowledged "the necessity of education" and promised to employ a competent teacher "who will reside among said Indians" and "faithfully discharge his or her duties as a teacher."[228] It imposed "the duty of the [BIA] agent for said Indians to see that this stipulation is strictly complied with."[229] In treaties such as these, the government obligated itself as trustee to provide quality education to the Indian beneficiaries.

The FTCA only imposes liability on the United States when a private person would owe a duty to the plaintiff under state law in a similar circumstance.[230] Under common law, a trustee owes a duty to exercise reasonable care to protect the beneficiary's interests.[231] Indians have successfully invoked the trust responsibility in FTCA claims, despite the fact that the trust responsibility arises out of federal law, not state law. For example, in *Marlys Bear Medicine v. United States ex rel. Secretary of the Department of the Interior*, a member of the Blackfeet Tribe of Montana was crushed and killed during a BIA-managed timber operation.[232] The plaintiff argued that the federal trust responsibility imposed a duty on the BIA to maintain adequate safety measures.[233] Despite the government's claims that

224. *See, e.g.*, Accident & Inj. Med. Specialists, P.C. v. Mintz, 279 P.3d 658, 663 (Colo. 2012) ("A fiduciary relationship imposes on one party a duty of care that supports a tort action independent of any contractual action.").

225. *See* 28 U.S.C. § 1346(b)(1).

226. *See* United States v. Mitchell, 463 U.S. 206, 225–26 (1983).

227. MANN, *supra* note 35.

228. Treaty with the Kiowa and Comanche art. 7, Oct. 21, 1867, 15 Stat. 581.

229. *Id.*

230. *In re* Marjory Stoneman Douglas High Sch. Shooting FTCA Litig., 482 F. Supp. 3d 1273, 1280 (S.D. Fla. 2020).

231. RESTATEMENT (SECOND) OF THE L. OF TRS. § 174 (AM. L. INST. 1959).

232. 241 F.3d 1208, 1212 (9th Cir. 2001).

233. *Id.*

the trust relationship did not create a cognizable duty under state law, the Ninth Circuit referenced several Montana state law holdings that recognized fiduciary duties under tort law regardless of the source of the duty: "In short, Montana courts hold that the United States' fiduciary relationship to the Indians creates a greater level of responsibility for its acts or omissions resulting in harm to Indians, rather than a lesser level of responsibility as the Government argues."[234]

The court then determined that the government held a trust responsibility over timbering operations that gave rise to the underlying injury.[235] It relied on *United States v. Mitchell*, a Supreme Court case that determined that the government's Indian trust responsibility over timber management stemmed from its all-encompassing Indian timber regulatory scheme: "Virtually every stage of the process is under federal control."[236] The court in *Bear Medicine* applied this reasoning to its instant case: "The BIA, with its 'pervasive' and 'comprehensive' control over the Blackfeet timbering operations, had a duty to ensure that basic safety practices were communicated and used at the logging site."[237]

Here, from the moment that BIA agents stepped onto Indian reservations to gather children for the long ride to boarding school, to the moment they left those campuses, the BIA exerted "pervasive" and "comprehensive" control over boarding schools.[238] Thus, under *Bear Medicine* and *Mitchell*, the BIA owed a trust responsibility to Indians under control of that scheme. Additionally, tort liability for breach of fiduciary duty is a long-established common law remedy recognized by appellate courts of many states.[239] While plaintiffs should check the applicable laws of the relevant state for variation, the majority of states should recognize that the United States owed a fiduciary duty under the trust responsibility to Indian children in boarding schools.

ii) Custodial Duty of Ordinary Care

Even without the students' status as Indians, the government still owed them a duty of care because of the relationship between students and teachers or school staff. A special duty of care to take reasonable measures to protect the plaintiff from harm arises when there is a "special relationship" between

234. *Id.* at 1218–20.
235. *Id.*
236. United States v. Mitchell, 463 U.S. 206, 222 (1983).
237. *Marlys Bear Med.*, 241 F.3d at 1219–20.
238. *See supra* Section I.B for a full discussion.
239. *See, e.g.*, Zastrow v. J. Commc'ns, Inc., 718 N.W.2d 51, 54 (Wis. 2006); *In re* Olson, 868 N.W.2d 851, 857 (N.D. 2015); State Res. Corp. v. Laws. Title Ins. Corp., 224 S.W.3d 39, 48 (Mo. Ct. App. 2007).

the defendant and the plaintiff, including custodial situations.[240] Several courts have held that this includes school staff taking "custody" of students during the school day.[241] Thus, the government owed a duty to protect children in BIA custody at boarding schools.

The next section discusses how the government breached its duty of ordinary care, owed under the trust responsibility and a special relationship, to Indian boarding school students who died in its care.

b. Breach of Duty

The government breached its duty to protect boarding school attendees because its conduct did not fulfill its duty of reasonable care. The breach of duty analysis considers the foreseeability of the harm that occurred, the foreseeable severity of the harm, and the burden of the precautions necessary to prevent the harm.[242]

In a negligence action, a defendant who owes a duty of care to the plaintiff is only liable for that plaintiff's injury if the injury was reasonably foreseeable.[243] Foreseeability is easily demonstrated here. Given the existence of numerous reports and investigations throughout the early twentieth century, the government was well aware of the dangerous and "deplorable" conditions contributing to death at boarding school.[244] And yet, these conditions persisted until at least the late 1960s.[245] While it is true that public health and medical science were still unsophisticated at this point in history, basic recommendations understood at the time, like separating infected students from healthy students, were still ignored.[246] Had boarding schools implemented these basic policies many children could have been spared. In addition, these policies were not burdensome to implement. The BIA often argued that Congress had not appropriated sufficient money to maintain healthier living and schooling conditions,[247] but never implemented simple steps that did not require additional funds. Instead, the BIA clung to far-fetched theories that Indians were simply more disease-prone or came

240. RESTATEMENT (SECOND) OF TORTS § 320, cmt. a (AM. L. INST. 1965).

241. *See, e.g.*, Doe YZ v. Shattuck-St. Mary's Sch., 214 F. Supp. 3d 763, 783–84 (D. Minn. 2016); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654–55 (1995).

242. *See* RESTATEMENT (SECOND) OF TORTS § 281 cmts. c–g (1965).

243. Gonzalez v. S. Huntington Free Sch. Dist., 112 N.Y.S.3d 151, 153 (N.Y. App. Div. 2019).

244. *See supra* Section I.B.

245. *See supra* Section I.B.

246. *See supra* Section I.B.

247. ADAMS, *supra* note 38, at 132.

from "dirty" communities.[248] Thus, the government did not meet even the most minimal obligations that its duty to care for these children imposed.

c. Causation

Causation contains two prongs: factual cause and proximate cause.[249] Disease-caused death can be directly attributed to the negligent management, supervision, and childcare administered by boarding school employees, thus satisfying the factual cause prong. Proximate cause is determined by the reasonable foreseeability analysis.[250] While case law is sparse on negligence claims for the spread of disease in schools, existing decisions emphasize whether or not the school followed appropriate medical procedure after becoming aware of the illness.[251] As stated above, although medicinal science was much less sophisticated than it is now, the government knew and understood the seriousness of the problem and directed specific changes to be made at the schools.[252] Thus, it was reasonably foreseeable that if these medical procedures were not followed, many vulnerable children would die. When school administrators refused to follow these procedures for decades,[253] they proximately caused the widespread death of Indian students.

d. Damages

Hundreds, and potentially thousands, of children died as a result of contracting diseases that the government allowed to run rampant through boarding schools. Thus, the plaintiffs can clearly assert they suffered damages.

2. The government employees' negligent conduct was within the scope of employment.

Plaintiffs can also prove that all negligent acts or omissions would have been committed during the scope of employment. The scope of employment is determined by the respondeat superior doctrine of the state in which the negligent act occurred.[254] For example, in Arizona, an employee's conduct is within the scope of employment if and only if (1) it is the kind of the conduct they are employed to perform; (2) the conduct occurs substantially within the

248. *Id.*
249. Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 103 (N.Y. 1928).
250. RESTATEMENT (SECOND) OF TORTS § 281 cmt. h (AM. L. INST. 1965).
251. *See, e.g.*, Tepper v. Red River Acad., L.L.C., 157 So. 3d 1142, 1146 (La. Ct. App. 2015).
252. *See supra* Section I.B.
253. *See supra* Section I.B.
254. *See, e.g.*, Kelly v. United States, 924 F.2d 355, 357 (1st Cir. 1991).

authorized time and space, and; (3) the conduct is motivated, at least in part, by a purpose to serve the employer.[255] First, ensuring the safety of attendees is exactly the kind of conduct boarding school employees were employed to perform. Second, lack of supervision, neglect, and abusive childcare practices would all have occurred while the employees were working, not in their individual capacity.

Finally, the motivation factor distinguishes between whether the purpose of the act was to serve an employer's interest or a personal interest. While it is possible that there was some individual purpose advanced by failing to protect Indian children from the spread of disease, as long as there is "at least in part" a motivation to advance an employer's purpose, the act will fall within the scope of employment.[256] The motivation factor is most often discussed in negligence claims against employers for sexual assaults by employees.[257] An Alaska case, *Doe v. Samaritan Counseling Center*,[258] held that an inappropriate sexual relationship arising out of therapy sessions was within the scope of the employee's employment because the conduct arose out of and was 'reasonably incidental' to the employee's legitimate work activity—namely, therapy.[259] Here, plaintiffs should analogize to sexual assault cases to demonstrate that failing to maintain proper living conditions in dormitories was "reasonably incidental to" and motivated, at least in part, by an employer purpose—supervising Indian children and providing their education.

Though the respondeat superior doctrine may differ slightly from state to state, these three elements provide very strong evidence that the boarding school employees' negligent conduct was within the scope of employment.

3. The United States would be liable under state law if it were a private person.

Every state recognizes common-law negligence claims and has a wrongful death statute.[260] Though judicial interpretation and statutory schemes vary throughout the country, general principles remain the same. In Pennsylvania, a plaintiff may recover damages for the death of an individual caused by "the

255. State, Dep't of Admin. v. Schallock, 941 P.2d 1275, 1281 (Ariz. 1997) (en banc).

256. *See id.* at 1283.

257. *See, e.g.*, *id.* (applying the motivation factor in a negligence claim against an employer for sexual assaults by its employees).

258. 791 P.2d 344 (Alaska 1990).

259. *Id.* at 348.

260. *Wrongful Death*, US LEGAL, https://death.uslegal.com/wrongful-death/ [https://perma.cc/3HRE-LDR2].

wrongful act or neglect or unlawful violence or negligence" of another if the deceased individual did not recover the same damages during their lifetime.[261] Thus, if the United States were a private person, it would be liable under this law for the actions that caused the death of boarding school children.

IV. DEFENSES TO THE FTCA

One of the most difficult hurdles to prevailing on FTCA claims is responding to the defenses that the government may assert. Because the FTCA is a waiver of sovereign immunity, plaintiffs must strictly adhere to all of its statutory and court-imposed requirements.[262] The most likely defenses the government will assert against claims for Indian boarding school deaths are statute of limitations and the discretionary function exception.[263] This Part discusses both defenses and how plaintiffs can respond to them.

A. Statute of Limitations

The statute of limitations ("SOL") for filing an administrative claim with the appropriate agency under the FTCA is two years from the date of accrual.[264] Typically, the SOL begins to accrue on the date of injury.[265] Thus, because many of these deaths occurred in the early 1900s, the government will almost certainly claim that the SOL has long run on these deaths.

There are multiple responses that plaintiffs can make to SOL defenses. The Supreme Court has held that if the plaintiff is unaware of the injury and its cause, accrual cannot begin until the discovery of both.[266] Student deaths at boarding schools were only sporadically recorded,[267] children had little to no contact with their families while at school, and children often never returned home. As a result, one response plaintiffs can advance is that they are not aware of the injury (death) and the causation (disease or other ailment caused by the government's negligence) to advance a cause of action until the bodies are recovered and returned to them.

---

261. 42 PA. CONS. STAT. § 8301(a) (1976).

262. *See* KEVIN M. LEWIS, CONG. RSCH. SERV., R45732, THE FEDERAL TORTS CLAIM ACT (FTCA): A LEGAL OVERVIEW 33–35 (2019).

263. *See id.* at 18, 33–35.

264. 28 U.S.C. § 2401(b).

265. K.E.S. v. United States, 38 F.3d 1027, 1029 (8th Cir. 1994).

266. United States v. Kubrick, 444 U.S. 111, 120–22 (1979).

267. ADAMS, *supra* note 38, at 130.

Another theory available to plaintiffs is tolling for fraudulent concealment. Tolling is a common law doctrine that freezes the SOL if the defendant intentionally concealed legal or factual elements necessary to establish a cause of action.[268] The Supreme Court held in *Irwin v. Department of Veterans Affairs* that tolling is available in suits against the government,[269] extending this holding in *United States v. Wong* to FTCA claims.[270] Here, plaintiffs may argue that the government intentionally prevented them from establishing a cause of action under the FTCA. School administrators failed to keep records to the point where it is impossible to determine infection and death rates at boarding schools, despite BIA rules requiring meticulous record keeping.[271] The government buried deceased children's bodies on boarding school grounds rather than sending their bodies back to their families.[272] It deliberately cut off contact between the school and families back on the reservation.[273] These actions demonstrate intent to conceal the truth about what was happening to children at boarding schools.

B. The Discretionary Function Exception

The discretionary function exception ("DFE") is the first of several enumerated exceptions to the FTCA.[274] It states that there is no waiver of sovereign immunity for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved [is] abused."[275] The purpose of the DFE is to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an

---

268. *See* Hohri v. United States, 782 F.2d 227, 250–52 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987) (finding that government concealment of evidence that the internment of Japanese Americans during World War II did not have basis in any legitimate military strategy tolled the statute of limitations by concealing an essential element of the former internees' claims).

269. 498 U.S. 89, 95–96 (1990).

270. 575 U.S. 402, 412 (2015).

271. OFF. OF INDIAN AFFS., RULES FOR INDIAN SCHOOLS, WITH COURSE OF STUDY, LIST OF TEXT-BOOKS, AND CIVIL SERVICE RULES 12 (1892), https://content.wisconsinhistory.org/digital/collection/tp/id/59938 [https://perma.cc/MS4X-RAHT] [hereinafter RULES FOR INDIAN SCHOOLS].

272. *See* Sturla, *supra* note 7.

273. Mary Annette Pember, *Death by Civilization*, ATL. (Mar. 8, 2019), https://www.theatlantic.com/education/archive/2019/03/traumatic-legacy-indian-boarding-schools/584293/ [https://perma.cc/9SYP-VKHV] ("Contact with family and community members was discouraged or forbidden altogether.").

274. 28 U.S.C. § 2680(a).

275. *Id.*

action in tort."[276] As discussed in Section II.D *supra*, the DFE is likely to be the single biggest threat to an FTCA claim for Indian boarding school deaths.

As stated above, the Supreme Court has fashioned a two-part test for determining whether the DFE applies.[277] First, the court must ask whether the challenged action was discretionary, meaning it involved some element of judgment or choice.[278] The first prong, the "discretionary act" prong, will not apply to the DFE if the government actor violated a mandatory directive.[279] But if the challenged action involved some level of judgment or choice by a government actor who was given discretion to make such choices, the DFE is presumed to apply,[280] even if the actor abused that discretion.[281] This presumption can be overcome by the second prong, dubbed the "policy judgment prong," if the court determines that the discretion was not the kind of judgment the DFE was designed to protect.[282] If the challenged action was "susceptible" to an objective policy analysis, the DFE will apply, but if the judgment was not a policy judgment, the DFE will not apply.[283]

Applying the analysis to Indian boarding school deaths, plaintiffs can invoke the plethora of policies adopted by both Congress and the BIA that boarding school staff violated for decades. For starters, although engaging in "kid-catching" and bringing children to boarding school without the "full consent" of the parents was statutorily and executively authorized for a short period of time, it was repealed quickly thereafter.[284] Despite this, these practices continued for decades after the repeal, resulting in children being forced into deplorable conditions and abusive environments, with many dying. In 1899, a BIA official admitted that the agency had overzealously attempted to pack boarding schools with students, resulting in agents forcing sick children to leave their reservations and mix with healthy students at school.[285] This official made a promise: "we are little less than murderers if we follow the course we are now following after the attention of those in charge has been called to its fatal results."[286] The situation would not significantly change until at least the late 1960s.[287] In 1892, after identifying

276. United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Vadig Airlines), 467 U.S. 797, 814 (1984).
277. Berkovitz v. United States, 486 U.S. 531, 536–37 (1988).
278. *Id.* at 536.
279. *Id.* at 536, 544.
280. *Id.* at 536–37.
281. 28 U.S.C. § 2680(a).
282. *Berkovitz*, 486 U.S. at 536.
283. Gonzalez v. United States, 814 F.3d 1022, 1032–34 (9th Cir. 2016).
284. *See supra* Section I.B.
285. Curcio, *supra* note 59, at 69.
286. *Id.*
287. *See supra* Section I.B.

that poor diet and building maintenance were primary factors in the spread of disease, the BIA published Rules for Indian Schools,[288] which included specific instructions about serving children an adequate diet[289] and keeping the buildings in good condition.[290] These guidelines were disregarded.[291] The Department of the Interior promulgated regulations mandating discovery and monitoring procedures for diseases at boarding school.[292] There are ample sources for demonstrating that Department or Congressional policy said one thing, and government employees did the opposite.

Several of these policies did not instruct school administrators to make judgments about how to implement them, nor did they have room for discretion. For example, the Rules of Indian Schools stated, "[t]he superintendent cooperating with the physician and matron must see that all cases of infectious and contagious diseases are isolated, and that toilet articles used by pupils having inflamed eyes, skin diseases, or other such disorders, are not used by other people."[293] A footnote instructed administrators to especially heed this instruction with students infected with pulmonary tuberculosis.[294] Another rule required superintendents to keep records of students' personal information, including if the student had died.[295] Thus, because school administrators violated these mandatory directives, the DFE will not apply.

Even for policies that did allow for some discretion, the DFE will still not apply because the authorized discretion was not the kind the DFE was designed to protect. The DFE was designed to protect policy judgments, but not judgments that are purely implementing a course of action that has already been determined as a matter of policy.[296] Here, policymakers determined courses of action and handed them to school administrators to implement them. For example, a 1938 regulation promulgated by the Department of the Interior directed that "[students] who develop pulmonary tuberculosis . . . shall be sent to a sanitorium, a general hospital with provisions for treating tuberculosis, or to their homes. Other exclusions shall be enforced at the discretion of the Indian Service physician."[297] The regulation clearly granted the Indian Service physician discretion, but the

288. RULES FOR INDIAN SCHOOLS, *supra* note 271, at 12.
289. *Id.* at 20.
290. *Id.* at 22.
291. *See supra* Section I.B.
292. 25 C.F.R. § 84.44–84.55 (1938).
293. RULES FOR INDIAN SCHOOLS, *supra* note 271, at 12.
294. *Id.*
295. *Id.*
296. Whisnant v. United States, 400 F.3d 1177, 1181 (9th Cir. 2005).
297. 25 C.F.R. § 84.46 (1938).

judgment could only be exercised to implement the established policy of combatting disease spread through isolation. It might be a policy decision to use an isolation strategy to combat disease, but it is not a policy decision to implement, or fail to effectively implement, the isolation strategy. The *Marlys Bear Medicine* court stated, "The decision to adopt safety precautions may be based in policy considerations, but the implementation of those precautions is not . . . . The Government cannot claim that both the decision to take safety measures and the negligent implementation of those measures are protected policy decisions."[298] Thus, the overwhelming policy decisions to take specific safety measures reflected in the promulgated rules and regulations prevent the DFE from applying even to discretionary judgments by school administrators.[299]

V. SETTLEMENT POSSIBILITIES AND ALTERNATIVE ROUTES

The FTCA is a daunting statute. Navigating the procedural requirements, ensuring every element is met and every defense debunked, and sifting through the complex statute can be very difficult. It is easy to make a mistake that bars the claim forever. However, failed litigation can still yield a positive outcome via settlements or publicity that comes from lawsuits surrounding such tragic and horrifying cases. This Part discusses possible settlements or alternatives that plaintiffs might consider requesting should trial prove to be an uphill battle. This Part is particularly important in light of the current political climate, in which the first Native American is serving as the Secretary of the Interior, and Indigenous issues have finally become more widely understood in the public consciousness.

While adjudication of liability is ideal, an acknowledgement of wrongdoing by the United States would be a step in the right direction. In Canada, the Minister of Indian Affairs acknowledged the federal government's role in developing and managing Indian residential schools and apologized to victims of sexual and physical abuse.[300] The government made this apology after several lawsuits were filed and survivor groups formed.[301]

---

298. 241 F.3d 1208, 1215 (9th Cir. 2001).

299. It is worth noting that the BIA's stated reason for failing to implement health and safety measures was due to lack of sufficient funding from Congress. ADAMS, *supra* note 38, at 132. Several circuits have held that the existence of budgetary parameters does not automatically make decisions about how to spend that money discretionary. *See, e.g.*, ARA Leisure Servs. v. United States, 831 F.2d 193, 195–96 (9th Cir. 1987); Phillips v. United States, 956 F.2d 1071, 1075 (11th Cir. 1992).

300. Rosemary Nagy, *The Truth and Reconciliation Commission of Canada: Genesis and Design*, 29 CAN. J.L. & SOC'Y 199, 205 (2014).

301. *Id.* at 204.

However, the apology fell short of acknowledging the violence of the residential school system as a whole, and instead framed the boarding school abuse as a series of isolated incidents.[302] The U.S. government has a responsibility to acknowledge and apologize for the full scale of violence it perpetrated with federal Indian residential education.

A further step forward would be establishing a Truth and Reconciliation Commission. The Canadian government established the Truth and Reconciliation Commission ("TRC") to settle several lawsuits filed by boarding school survivors and advocacy organizations.[303] While the TRC was an imperfect blend of government and tribal interests,[304] the central goal was to start a national dialogue and promote public education on Indigenous issues and healing. The U.S. could use the Canadian TRC as a starting point to build an appropriate, collaborative campaign to heal and remedy the injuries caused by the boarding school system. The Truth and Healing Commission on Indian Boarding School Policies Act has already been introduced in both the House[305] and the Senate[306] and provides for the establishment of a TRC and its powers, duties, and membership. These duties include further investigation into the history and impact of federal Indian boarding school policy, protecting unmarked graves, supporting identification of bodies uncovered and repatriation to their tribal communities, and discontinuing modern-day removal of American Indian children from their homes.[307]

VI. CONCLUSION

This Comment set out to demonstrate that tribes, families, and Native American interest organizations possess a valid cause of action under the Federal Tort Claims Act for Indian boarding school deaths. Of course, the FTCA is a highly regimented statute with strict procedural requirements. There are a lot of elements to meet, many of which depend on state law. The discretionary function exception looms large and has the ability to quickly smite any effort to obtain relief. While the preceding analysis has shown broadly how various plaintiffs can navigate these stormy waters, FTCA claims are highly fact-specific, and the analysis may vary by tribe, boarding school, and relevant state law.

---

302. *Id.* at 205.
303. *Id.* at 209.
304. *Id.* at 214.
305. H.R. 5444, 117th Cong. (2021).
306. S. 2907, 117th Cong. (2022).
307. *Id.*

Ultimately, the success of these claims, or any attempt to reconcile this dark history, relies on the fact-finding efforts of Congress, the Department of the Interior, churches, and independent organizations. Secretary Deb Haaland has honorably taken the first step to fully account for this period in history. If nothing else, tribes deserve a complete understanding of what happened at boarding schools, and the impetus should justifiably fall on the federal government to provide that accounting.

There are currently four Bureau of Indian Education-operated off-reservation boarding schools in the United States: Riverside Indian School in Anadarko, Oklahoma; Sherman Indian High School in Riverside, California; Chemawa Indian School in Salem, Oregon; and Flandreau Indian School in Flandreau, South Dakota.[308] Three additional boarding schools are tribally-operated.[309] Federal boarding school policy has arguably shifted to promote culturally significant education, tribal sovereignty, and self-determination.[310] Still, debate continues about their efficacy and whether they are serving a noble purpose.[311] Modern-day boarding schools are emblematic of the complex relationship between paternalism, self-determination, federal accountability, and trust responsibility that encompasses federal Indian law. While it is unlikely that these tensions will be resolved any time soon, exploration into the history of boarding schools is the first and most important step to achieving reconciliation. The Department of the Interior's boarding school initiative will hopefully be this first step.

---

308. *Testimony of Mark Cruz, Deputy Assistant Secretary—Policy and Economic Development, Indian Affairs, U.S. Department of the Interior, Before the Subcommittee for Indigenous Peoples of the United States*, U.S. DEP'T OF THE INT., OFF. OF CONG. & LEGIS. AFFS. (May 16, 2019), https://www.doi.gov/ocl/indian-boarding-schools [https://perma.cc/F9JL-NR8A].

309. *Id.*

310. *See About Us*, U.S. DEP'T OF THE INT., BUREAU OF INDIAN EDUC., https://www.bie.edu/topic-page/bureau-indian-education [https://perma.cc/9DSQ-KDXB].

311. *See e.g.*, Aaron Schrank, *Today's Remaining Native American Boarding Schools Are a Far Cry from Their History*, WYO. PUB. RADIO (Feb. 26, 2016, 5:20 PM), https://www.wyomingpublicmedia.org/open-spaces/2016-02-26/todays-remaining-native-american-boarding-schools-are-a-far-cry-from-their-history [https://perma.cc/DA9Y-8LDK] (contrasting positive accounts of attending modern Native American boarding schools with their problematic history).