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## Federal Tort Claims Act - Some Aspects

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[I]t is of the very essence of the separation of power and function that each organ is primarily concerned with and responsible for the performance of its own function; and if in its opinion it must to perform it properly exercise a certain discretion or make a certain judgment it will do so regardless of . . . presumptive limitations.<sup>120</sup>

We do not propose that the courts should annex the foreign office. Usually the issue touching on foreign affairs will be involved only incidentally in a litigation in which the court is ultimately responsible for the judgment. Only rarely will there be an issue of direct interference with the executive. An examination of some of the cases does show . . . that a formulistic résumé will not succeed.<sup>121</sup>

The judiciary is charged with the decision of litigations brought before it in a given way. It decides these conflicts by a technique which it has developed by projecting particular litigations into the entire scheme of the legal and social order. The judiciary, of course, is not alone in its concern with the legal and social order. The executive and the legislature each in its own way have like aims and purposes, but there will surely be places where one mode of procedure offers larger gains than another, and in the last analysis it is for the particular organ to decide this. If its own mechanisms seem superior, it will and should ignore . . . presumptive limitations.<sup>122</sup>

<sup>120</sup> Jaffe, *JUDICIAL ASPECTS OF FOREIGN RELATIONS* 234 (1933).

<sup>121</sup> *Id.* at 39.

<sup>122</sup> *Id.* at 234-35.

## FEDERAL TORT CLAIMS ACT—SOME ASPECTS

### INTRODUCTION

The concept of sovereign immunity developed from the common law in England. The present status of the concept in America is to some extent inexplicable. In medieval times, the king was immune from suit on the ground that he was in power by divine right. Because he was considered the organ of God, he was deemed incapable of doing wrong. In about the thirteenth century, the king's immunity became predicated upon his position as highest lord in the feudal system. Later the king was thought to be human, fallible and subject to God and the law. Even with this change the king retained his immunity from suit. As chief of the feudal system no court had enough power to enforce a judgment against him. After the breakdown of the feudal system, the king's immunity from suit persisted and the maxim that the "king could do no wrong" came to stand for the notion that a sovereign was incapable of doing wrong.<sup>1</sup>

"Just how an immunity, which had its roots in feudalism and in a political philosophy associated with the divine right of kings, was trans-

<sup>1</sup> Borchard, *Governmental Responsibility in Tort*, 36 *YALE L.J.* 1 (1926).

planted to the new republic in America remains something of a mystery."<sup>2</sup> A partial solution to this mystery is found by an examination of the financial condition of the states in the years immediately after the Revolution. Certainly the young republic could not financially afford tort liability.<sup>3</sup>

The English notion that a sovereign was incapable of doing wrong was repudiated in America. However, sovereign immunity, in the sense that the government is immune from any suit to which it has not consented, became part of American Jurisprudence.<sup>4</sup>

It is important to note the development of the law which has slowly waived sovereign immunity in America. The United States abandoned the principle of immunity from suit in contract cases, at first, by allowing parties injured to recover by appeal to Congress, and then, by enactments giving Courts of Claims and District Courts jurisdiction to decide these cases.<sup>5</sup> Soon after the waiver of immunity in contract cases, suits against the federal government for patent infringements and maritime torts were authorized.<sup>6</sup> Further, federal agencies were given the power to settle claims for property damage in amounts up to \$1,000. Though the waiver of sovereign immunity to this extent came during the nineteenth century, the waiver of immunity from suit for tort claims was slow in coming.<sup>7</sup>

If one were damaged through the negligent or tortious act or omission of a government employee, his only recourse was to seek relief by appealing directly to Congress.<sup>8</sup> To so restrict one injured by tort was justified in the name of public policy. The view was that servants of the government were but servants of the law who acted for public good. However, when they departed from its authority, they were without power to bind their master.<sup>9</sup> Therefore, by referring to public benefit and public policy, the retention of sovereign immunity in tort cases was justified by courts and legislative bodies.<sup>10</sup>

Because appeal to Congress was the sole remedy for damages inflicted by government employees acting within the scope of their employment, the expansion of government enterprises caused claims for damages to

<sup>2</sup> 2 HARPER & JAMES, *THE LAW OF TORTS* 1609 (1956).

<sup>3</sup> 47 COLUM. L. REV. 722 (1947).

<sup>4</sup> *Feres v. United States*, 340 U.S. 135 (1950).

<sup>5</sup> Annot., A.L.R. 2d 222, 224 (1948).

<sup>6</sup> 35 U.S.C.A. § 68, 46 USCA §§ 741, 742 (1958).

<sup>7</sup> Unsuccessful attempts to pass a general tort claims act were made in 1929, 1940, and 1942. Note, *The Federal Tort Claims Act*, 56 YALE L.J. 534 (1947).

<sup>8</sup> *German Bank v. United States*, 148 U.S. 573 (1893); *Whiteside v. United States*, 93 U.S. 247, 23 Wall. 882 (1876).

<sup>9</sup> *Moffat v. United States*, 2 U.S. 24 (1884).

<sup>10</sup> *Supra* note 7.

burden Congress. To relieve itself of the burden and to effectuate the principle that the loss should fall on he who can best bear it, Congress, in 1946 passed the Federal Tort Claims Act.<sup>11</sup>

With certain exceptions the FTCA may be said to be a general waiver of governmental immunity insofar as it affects liability for claims arising from the negligence of governmental employees.<sup>12</sup> While the federal government has consented to being sued, consideration must be given to the procedural and substantive requirements which limit that consent. Remnants of the abandoned sovereign immunity continue in the limitations of the FTCA. The procedural and substantive limitations, imposed by Congress and fortified by judicial decision, present a formidable obstacle to one seeking recovery under the FTCA. In the following pages of this article an analysis of the limitations and interpretations thereof will be given.

#### THE GENERAL WAIVER OF IMMUNITY

The FTCA, passed in 1946, waived the immunity of the federal government insofar as it existed with respect to liability for a torts of officers or employees. The act amounted to the consent to be sued under the modern concept of sovereign immunity. In 28 U.S.C. § 1346 (b), exclusive jurisdiction for Tort Claims against the government was conferred upon Federal District Courts.

[C]ivil actions or claims against the United States, for money damages . . . for injury or loss of property, or for personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person would be liable to the claimant in accordance with the law of the place where the act of omission occurred, are to be brought in the District Courts of the United States.<sup>13</sup>

That the damages be caused by a "negligent or wrongful act or omission" is implicit of a broader waiver than in reality has been given. Express exceptions to the waiver preclude actions for all but negligent torts.<sup>14</sup> In 28 U.S.C. § 2680 (h) the waiver is said to be inapplicable to suits involving assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.<sup>15</sup> After once narrowing the waiver so that it amounts

<sup>11</sup> Federal Tort Claims Act, 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 (1958).

<sup>12</sup> Englehardt v. United States, 69 F. Supp. 451 (D.C. Md. 1947).

<sup>13</sup> Federal Tort Claims Act, 63 Stat. 101 (1951), 28 U.S.C. § 1346 (b) (1958).

<sup>14</sup> Ekberg v. United States, 76 F. Supp. 99 (Ct. Cl. 1948); Bell v. Hood, 71 F. Supp. 813 (S.D. Cal. 1947).

<sup>15</sup> Federal Tort Claims Act, 64 Stat. 1038 (1950), 28 U.S.C. § 2680 (h) (1958).

to consent to be sued only for negligence, analysis becomes somewhat less complex.

Actions may be brought against the federal government for the negligence of officers or employees. Who are officers or employees within the meaning of the act is a question requiring solution. The act defines "Employees of the Government" as including officers or employees of any federal agency, members of the military or naval forces, and persons acting in an official capacity, temporarily or permanently in the service of the United States, whether serving with or without compensation.<sup>16</sup>

In *Campbell v. United States*,<sup>17</sup> a sailor traveling pursuant to government orders accidentally injured an elderly woman. The sailor bumped into her as he ran to catch a train. The court held that the sailor was acting within the scope of his employment within the contemplation of the FTCA. Whether one is acting in an official capacity or within the scope of his employment is a question of fact which is often difficult to resolve. The diversity of roles played by members of the military has caused the necessity to determine their status. Courts have held that members of the National Guard who have not been called into the active service are not employees within the meaning of the FTCA.<sup>18</sup> On the other hand, members of the armed forces assigned to colleges and universities to carry out the Reserve Officers Training Corp program, are employees within the purview of the FTCA<sup>19</sup>

The government's liability under the Federal Tort Claims Act is derived from the doctrine of respondent superior.<sup>20</sup> The relationship necessary to cause government liability is that of master and servant.<sup>21</sup> While the United States Government may not be held liable under the FTCA for the negligence of an independent contractor,<sup>22</sup> the government is liable for its own negligence in the same manner that an employer of an independent contractor is liable for his own negligence under applicable

<sup>16</sup> Federal Tort Claims Act, 63 Stat. 106 (1949), 28 U.S.C. § 2671 (1958).

<sup>17</sup> 75 F. Supp. 181 (E.D. La. 1948).

<sup>18</sup> *Storer Broadcasting Co. v. United States*, 251 F. 2d 268 (5th Cir. 1958); *Gross v. United States*, 177 F. Supp. 766 (E.D. N.Y. 1959); *Larkin v. United States*, 118 F. Supp. 435 (N.D. N.Y. 1952); *Lederhouse v. United States*, 126 F. Supp. 217 (W.D. N.Y. 1954); *Smart v. United States*, 111 F. Supp. 907 (W.D. Okla. 1953); *Clark v. United States*, 109 F. Supp. 213 (D.C. Ore. 1952); *United States v. Parger*, 251 F. 2d 266 (5th Cir. 1958).

<sup>19</sup> *Bellview v. United States*, 122 F. Supp. 97 (D.C. Vt. 1954); *Bombard v. United States*, 122 F. Supp. 294 (D.C. Vt. 1954); *Leonard v. United States*, 131 F. Supp. 694 (D.C. Wyo. 1955).

<sup>20</sup> *National Mfg. Co. v. United States*, 210 F. 2d 263 (8th Cir. 1954); *Brooks v. United States*, 152 F. Supp. 535 (S.D. N.Y. 1957).

<sup>21</sup> *Noe v. United States*, 136 F. Supp. 639 (E.D. Tenn. 1956).

<sup>22</sup> *Hopson v. United States*, 136 F. Supp. 804 (W.D. Ark. 1956); *Strangi v. United States*, 211 F. 2d 305 (5th Cir. 1954).

local law.<sup>23</sup> The problem of determining the relationship between the negligent party and the government is made more difficult by the existence of quasi-governmental agencies. Generally, employees of such agencies are not considered governmental employees within the meaning of the FTCA. Public benefit corporations (quasi-governmental agencies), as for example the Civil Air Patrol, are not considered federal agencies and their employees are not government employees.<sup>24</sup>

The phrase which indicates that the United States should be liable if a private person would be liable is capable of being misunderstood. It was thought in the past that this phrase limited the liability of the United States to situations where only a private person would be liable, *i.e.* where no private person conducted similar activity the government could not be liable. Since no one but the government maintained an army, it was reasoned that liability could not attach from this operation.<sup>25</sup> This early misconception was corrected in *Indian Towing Co. v. United States*.<sup>26</sup> The court decided that the provision in the FTCA imposing liability in the same manner and to the same extent as a private individual under like circumstances does not exclude liability in performance of activities which private persons do not perform.

The liability of municipal, state, and local governments has been determined on the distinction between the function giving rise to the cause of action. That is, there can be no liability for a purely governmental function whereas liability attaches when the cause of action arises from a proprietary function. In *Rayonier Inc. v. United States*,<sup>27</sup> the court denied the need to distinguish between governmental and proprietary functions under the FTCA. Although the purpose of the FTCA was to accept liability in circumstances where private liability already existed, the results from case law were that causes of action were created where none had theretofore existed.<sup>28</sup>

A claim or suit under the FTCA can only be based on an act or wrong which, under the law of the place of its commission, gives rise to a cause of action.<sup>29</sup> This language establishes local law as the determinant

<sup>23</sup> *Benson v. United States*, 150 F. Supp. 610 (N.D. Cal. 1957).

<sup>24</sup> *Pearl v. United States*, 230 F. 2d 243 (10th Cir. 1956).

<sup>25</sup> *Feres v. United States*, 340 U.S. 135 (1950).

<sup>26</sup> 350 U.S. 61 (1955).

<sup>27</sup> 352 U.S. 315 (1957).

<sup>28</sup> *United States v. Massachusetts Bonding & Ins. Co.*, 227 F. 2d 385 (1st Cir. 1955); *Sir Transp. Associates v. United States*, 221 F.2d 467 (9th Cir. 1955); *Rayonier Inc. v. United States*, 352 U.S. 315 (1957).

<sup>29</sup> *McMullan v. United States*, 75 F. Supp. 164 (E.D. N.Y. 1947); *Campbell v. United States*, 75 F. Supp. 181 (E.D. La. 1948); *Wade v. United States*, 75 F. Supp. 729 (D.C. Mass. 1948); *Eastern Air Lines, Inc. v. Union Trust Co.*, 221 F. 2d 62 (U.S. App. D.C. 1955).

in analyzing whether or not the negligent or wrongful act is actionable. In the case of *Spall v. United States*<sup>30</sup> the law of Florida, made it the duty of the operator of an automobile on a highway at night to stop his car, if because of the bright lights of an approaching car, he could not see another automobile on the highway ahead of him. Florida law deems failure to comply with this duty to be actionable negligence. This statute was held applicable in an action against the United States where a motorist was fatally injured in a collision with a navy bus operated on a Florida highway.

This direction of the FTCA to apply local law presents serious difficulty where a conflict of laws question arises. In *Eastern Air Lines v. Union Trust Co.*<sup>31</sup> the government was held liable for death of airplane passengers, arising from a collision over the District of Columbia proximately caused by the negligence of a government tower operator in Virginia. The general conflict of laws rule disregards the law of the place of the negligent act or omission and instead uses the law of the place of injury. The rule under the FTCA has been interpreted to use the law of the place where the negligent act occurred.

While the application of state law has been illustrated in a great number of cases, the act supercedes local law where that law is in direct conflict with the provisions of the act.<sup>32</sup> In *Burkhardt v. United States*<sup>33</sup> the court permitted a suit for wrongful death to be brought more than a year after the commission of the wrong. The action was allowed even though the state law provided that the bringing of suit within a twelve-month period should be a condition precedent to recovery. The state law conflicted with the provision for limitations in the FTCA in that the FTCA provided that actions were to be brought within one year of the injury or within one year of the passage of the act, whichever was later.<sup>34</sup>

To summarize: the waiver of immunity provides remedies for negligent acts of officers or employees who act within the scope of their employment. The remedy is to be based on the law of the place where the negligent act was perpetrated. The limitation that the government is liable only where an individual would be liable does not preclude recovery where the activity carried out by the government is not carried on by individuals. An analysis of the waiver is incomplete without considering the express and implied exceptions of the act.

<sup>30</sup> 72 F. Supp. 731 (S.D. Fla. 1947).

<sup>31</sup> 221 F. 2d 62 (1955); *Grey v. United States*, 77 F. Supp. 869 (D.C. Mass. 1948).

<sup>32</sup> *Kohn v. United States*, 75 F. Supp. 689 (N.D. Cal. 1948).

<sup>33</sup> 165 F. 2d 869 (4th Cir. 1947).

<sup>34</sup> 2 HARPER & JAMES, *THE LAW AT TORTS* 165-67 (1956).

## EXPRESS EXCEPTIONS TO WAIVER

At present there are thirteen express exceptions to the waiver of immunity under the FTCA.<sup>35</sup> One of the exceptions, limiting the actions to those sounding in negligence has already been mentioned.<sup>36</sup> Of the remaining, the one pertaining to the military will be dealt with subsequently as a separate subject.<sup>37</sup> The exceptions to the waiver of immunity have resulted from either or both of the following two theories: (1) The retention of some degree of sovereign immunity, (2) that liability should not arise under this act when the government provides compensation under separate acts.

The first exception to the waiver of immunity consists of two parts. The first part denies liability for "any claim based upon an act or omission of an employee of the government, exercising due care, in the execution of a statute of regulation, whether or not such statute or regulation be valid. . . ." The second part of this first exception denies liability 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 be abused."<sup>38</sup> Interpretations to the first part of this first exception have caused many problems. In *Powell v. United States*<sup>39</sup> Federal Range Agents appropriated, sold and destroyed Indians' horses while purporting to act under authorization from federal statutes. They did this with complete disregard for the property rights of the Indians. The government denied liability on the ground that the Range Agents were acting under a statute. Though injuries caused by the enforcement or administration of statutes do not generally give rise to a cause of action, where that enforcement or administration is without "due cause" the government may be held liable. Due care requires at least minimum concern for the rights of others. The Range Agents gave no notice and acted beyond their authority; they did not show the required minimum concern and were held to be acting without due care. The government was held liable under the FTCA.

This first part of the first exception to the waiver of immunity has been criticized and attacked as unnecessary. It is apparent that to hold officers or employees for doing their duty would frustrate the governmental

<sup>35</sup> Federal Tort Claims Act, 64 Stat. 1038 (1950), 28 U.S.C. § 2680 (1958).

<sup>36</sup> Federal Tort Claims Act, 64 Stat. 1038 (1950), 28 U.S.C.A. § 2680 (h) (1958); *United States v. Taylor*, 236 F. 2d 649 (6th Cir. 1956); *Anglo American & Overseas Corp. v. United States*, 144 F. Supp. 635 (S.D. N.Y. 1956).

<sup>37</sup> Federal Tort Claims Act, 64 Stat. 1038 (1950), 28 U.S.C. § 2680 (j) (1958).

<sup>38</sup> Federal Tort Claims Act, 64 Stat. 1038 (1950), 28 U.S.C. § 2680 (a) (1958).

<sup>39</sup> 233 F. 2d 851 (10th Cir. 1956).

process. However, it is not apparent that to hold the government liable for injuries arising from the administration of law frustrates anything. By holding the government the loss generally falls on the one who can best bear it.<sup>40</sup>

The second part of this first exception which excludes liability arising out of the performance of discretionary functions has given rise to controversy. "No one contends, that liability should extend to the consequences of a legislative or executive decision of a political nature, or that the propriety of such a decision should be reviewed by the courts."<sup>41</sup> Acts of Congress are discretionary and are excepted from the waiver of immunity. So long as the act of Congress is carried out with due care, the government retains immunity. The confusion results in trying to classify governmental functions as discretionary or non-discretionary. While conceding that acts of Congress are discretionary and that acts of the janitor raking leaves on the Capitol lawn are non-discretionary, borderline cases present frustrating problems. The borderline cases have caused inconsistency to appear in the decisions.

A test suggested, distinguishes between the decision to perform work, on the policy level and the decision of how to perform on the operational level. The decisions of the policy level are said not to give rise to governmental liability while decisions on the operational level are said to be within the purview of the waiver. When one decides to enter into a project just what does he decide? Surely the decision to so enter is generally accompanied by decisions concerning the method of completing the project. Do the decisions as to the methods of completing fall within the discretionary acts contemplated in the exception to waiver?

In *Dalehite v. United States*<sup>42</sup> plaintiff's husband was killed when a ship exploded during the loading of fertilizer pursuant to a federal agricultural rehabilitation plan. The Court held that the discretionary function or duty includes more than the introduction of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision, there is discretion. The *Dalehite* case held discretionary not only the high-level policy decision to use ammonium nitrate for fertilizer and to ship it abroad for agricultural rehabilitation after the war, but also the decisions (1) to refrain from further experiments to determine whether the fertilizer was explosive, (2) to use a certain type bag and to pack at a certain temperature, (3) to load without warning of danger. The damages for which the government

<sup>40</sup> 2 HARPER & JAMES, THE LAW OF TORTS 1656-57 (1956).

<sup>41</sup> *Id.* at 1657.

<sup>42</sup> 346 U.S. 15 (1953).

would have been liable perhaps influenced the Court. To allow recovery in the *Dalehite* case would have opened the door to numerous claims for large amounts of money.<sup>43</sup>

The *Dalehite* decision has been criticized on the ground that the denial of recovery was based on apprehensions of subsequent litigation and not a proper interpretation of the act.<sup>44</sup> However, it had continued to represent the view the Court takes when large amounts on threatened suits are involved. In *Bartholomae Corp. v. United States*<sup>45</sup> the Court held that the second part of this first exception includes as discretionary, determinations made by executives in establishing plans or schedules or operations. The Court further commented that where there is room for policy, judgment and decision there is *discretion*. The *Bartholomae* case involved damage caused by atomic testing. The public benefit from such testing and the possibility of litigation and expense if recovery was allowed seemed to prompt the Court to apply the rule from the *Dalehite* case.

The limitation of government liability indicated in *Dalehite* and *Bartholomae* seems greater than it is. Other cases of the same period adopt a more liberal distinction between discretionary and non-discretionary and extend governmental liability. In *Indian Towing Co. v. United States*<sup>46</sup> the Coast Guard failed to discover and repair a non-functioning lighthouse and otherwise failed to warn ships. The Court held that the decision to maintain the lighthouse was discretionary while the decisions made as to maintenance were non-discretionary. Because the damages were incurred from the negligent performance of non-discretionary functions the government was held liable. The distinction drawn between discretionary and non-discretionary, that is, that the former involves decisions to undertake a project and the latter involves lower level decisions on the operational level, has been sanctioned by a number of cases.<sup>47</sup>

Important in this first exception to the waiver of immunity are: (1) the requisite "due care" in the exercise of statutes or regulations. Without this due care the exception would not apply and the government would be liable despite the fact that the employees purported to act under a statute or regulation. (2) In the second part, the difference between discretionary and non-discretionary has caused inconsistency in

<sup>43</sup> See *In re Texas City Disaster Litigation*, 197 F. 2d 771 (5th Cir. 1952).

<sup>44</sup> 66 HARV. L. REV. 488 (1953); Comment, *The Discretionary Function Exception in the Federal Tort Claims Act*, 52 MICH. L. REV. 733 (1944).

<sup>45</sup> 135 F. Supp. 651 (S.D. Cal. 1955).

<sup>46</sup> 350 U.S. 61 (1955).

<sup>47</sup> *Eastern Air Lines Inc. v. Union Trust Co.*, 221 F. 2d 62 (10th Cir. 1955); *Friday v. United States*, 239 F. 2d 701 (9th Cir. 1957); *Dahlstrom v. United States*, 228 F. 2d 819 (8th Cir. 1956).

the cases. Though courts have disagreed in result, the decisions of policy level officers or employees are said to be discretionary and the decisions of operational level officers or employees are non-discretionary.<sup>48</sup>

The second exception to the waiver of immunity derives governmental liability for "any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter."<sup>49</sup> It has been suggested that this second exception is superfluous in that it could have been implied from the first part of the first exception.<sup>50</sup> The suggestion was based on the fact that postal employees act pursuant to statutes and their negligence would not cause liability. Part one of the first exception in effect retains immunity from suit where the damage arises from the administration of a statute while exercising due care.<sup>51</sup> The suggestion of the superfluous aspect of this second exception apparently does not consider "due care." Whether or not due care is shown, the government is immune from suit under this second exception.

The third exception to the waiver of immunity denies liability for "any claim arising in respect of the assessment of collection of any tax, customs duty, or the detention of any goods or merchandise by any officer of customs or excise on any other law enforcement officer."<sup>52</sup> This exception has also been called superfluous.<sup>53</sup> Such a contention seems to be without merit in that the first part of the first exception requires due care to relieve the government of liability and here the government is relieved without consideration of due care.

The fourth exception to the waiver of immunity denies governmental liability for certain admiralty claims for which remedies are provided by separate statutes.<sup>54</sup> The fifth exception denies governmental liability for claims arising out of the administration of 50 U.S.C. §§ 1-31.<sup>55</sup> This exception was made so that in the administration of the National Security Act the requirement of due care should not be necessary. The sixth exception denies recovery on any claim caused by the imposition or establish-

<sup>48</sup> *Indian Towing Co. v. United States*, 350 U.S. 61 (1955).

<sup>49</sup> Federal Tort Claims Act, 64 Stat. 1038 (1950), 28 U.S.C. § 2680 (b) (1958).

<sup>50</sup> Comment, 56 *YALE L.J.* 534 (1947).

<sup>51</sup> Federal Tort Claims Act, 64 Stat. 1038 (1950), 28 U.S.C. § 2680 (a) (1958).

<sup>52</sup> Federal Tort Claims Act, 64 Stat. 1038 (1950), 28 U.S.C. § 2680 (c) (1958); *Alliance Assur. Co. v. United States*, 252 F. 2d 529 (2d Cir. 1958).

<sup>53</sup> Comment, 56 *YALE L.J.* 534 (1947).

<sup>54</sup> Federal Tort Claims Act, 64 Stat. 1038 (1950), 28 U.S.C. § 2680 (d) (1958). The remedies provided appear in 46 U.S.C. §§ 741-52, 781-90 (1958).

<sup>55</sup> Federal Tort Claims Act, 64 Stat. 1038 (1950), 28 U.S.C. § 2680 (e) (1958); 50 U.S.C. §§ 1-31.

ment of a quarantine by the United States.<sup>56</sup> The seventh exception was referred to earlier as limiting claims to those arising from negligence.<sup>57</sup> The eighth exception to the waiver of immunity denies liability for claims arising from the fiscal operations of the treasury or from the regulation of the monetary system.<sup>58</sup> The ninth exception applies to the military and will be dealt with separately.

The tenth exception to the waiver denies liability for "any claims arising in a foreign country."<sup>59</sup> The term "foreign country" refers to all lands other than those for which Congress is the supreme legislative body. Claims arising in such foreign countries cannot be recovered regardless of how much control over that country has been exercised by the executive.<sup>60</sup> A country occupied by our military forces is still a foreign country.

The eleventh and twelfth exceptions deny liability for claims arising from the activities of the Tennessee Valley Authority<sup>61</sup> and the Panama Canal Company.<sup>62</sup> The thirteenth exception to the waiver denies liabilities for claims arising from the activities of federal land banks, federal intermediate credit banks or banks for cooperatives.<sup>63</sup>

The exceptions to the waiver of sovereign immunity expressly provided for should be narrowly construed so as to allow all claims contemplated by Congress.<sup>64</sup> Claims not expressly excluded from the operation of the act must be held to have been intended to be included.<sup>65</sup>

#### THE MILITARY

Since 1946 and the passage of the FTCA, the claims have to a great extent involved the military forces of the United States. Claims of civilian third parties arising out of the combatant activities of the military, naval forces, or the Coast Guard during time of war do not give rise to a cause

<sup>56</sup> Federal Tort Claims Act, 64 Stat. 1038 (1950), 28 U.S.C. § 2680 (f) (1958); *Harris v. United States*, 154 F. Supp. 46 (W.D. Ky. 1957).

<sup>57</sup> Federal Tort Claims Act, 64 Stat. 1038 (1950), 28 U.S.C. § 2680 (h) (1958).

<sup>58</sup> Federal Tort Claims Act, 64 Stat. 1038 (1950), 28 U.S.C. § 2680 (i) (1958).

<sup>59</sup> Federal Tort Claims Act, 64 Stat. 1038 (1950), 28 U.S.C. § 2680 (k) (1958).

<sup>60</sup> *Straneri v. United States*, 77 F. Supp. 240 (S.D. Pa. 1948); *Spelar v. United States*, 75 F. Supp. 967 (E.D. N.Y. 1948).

<sup>61</sup> Federal Tort Claims Act, 64 Stat. 1038 (1950), 28 U.S.C. § 2680 (l) (1958).

<sup>62</sup> Federal Tort Claims Act, 64 Stat. 1038 (1950), 28 U.S.C. § 2680 (m) (1958).

<sup>63</sup> Federal Tort Claims Act, 74 Stat. 389 (1959), 28 U.S.C. § 2680 (n) (1958); *Brunnell v. United States*, 77 F. Supp. 68 (S.D. N.Y. 1948).

<sup>64</sup> *Employers' Fire Ins. Co. v. United States*, 167 F. 2d 655 (9th Cir. 1948); *Jefferson v. United States*, 74 F. Supp. 209 (D.C. Md. 1947); *Insurance Co. of No. America v. United States*, 76 F. Supp. 951 (E.D. Va. 1948).

<sup>65</sup> *Wojciuk v. United States*, 74 F. Supp. 914 (E.D. Wis. 1947).

of action under the FTCA.<sup>66</sup> However, claims by civilian third parties will be allowed for damages arising from the training or practice for combat even during time of war.<sup>67</sup> The term "combatant activities" as used in the express exception to the waiver of immunity in reality refers to actual conflict. Where there is no actual conflict the government is liable for negligent action of members of the military or naval forces which causes damage to civilians.<sup>68</sup>

The ability of members of the military or naval forces to recover for injuries under the FTCA presents another question. Servicemen can recover under the FTCA for injuries not incident to their service.<sup>69</sup> On the other hand, servicemen cannot recover under the FTCA for injuries sustained in combat.<sup>70</sup> The inability of servicemen to recover under the FTCA, for injuries from combatant activities, is based on the existence of government insurance. Injuries to servicemen sustained outside the scope of their duty and inflicted by a negligent officer or employee of the government give rise to a remedy under the FTCA. When servicemen are so injured they cannot recover under the FTCA for amounts received as military benefits. That is, servicemen so injured cannot benefit twice.<sup>71</sup> Though in certain instances servicemen are precluded from recovery under the FTCA because of their status they are not precluded from recovering for consequential damages for injuries to their wives or children.<sup>72</sup>

The position of military personnel in relation to the FTCA has been discussed extensively and yet the cases are not consistent.<sup>73</sup>

#### NEW AND UNPRECEDENTED LIABILITY

The purpose of the FTCA was to waive the government's traditional all encompassing immunity from tort action and to establish novel and unprecedented government liability.<sup>74</sup> In *Friedman v. Lockheed Aircraft*

<sup>66</sup> Federal Tort Claims Act, 64 Stat. 1038 (1950), 28 U.S.C. § 2680 (j) (1958); *United States v. Hambleton*, 185 F.2d 564 (9th Cir. 1950); *United States v. Taylor*, 236 F.2d 649 (6th Cir. 1956).

<sup>67</sup> *Skeels v. United States*, 75 F. Supp. 372 (W.D. La. 1947).

<sup>68</sup> *Jefferson v. United States*, 74 F. Supp. 209 (D.C. Md. 1947).

<sup>69</sup> *United States v. Brown*, 348 U.S. 110 (1954).

<sup>70</sup> *Buer v. United States*, 241 F. 2d 3 (7th Cir. 1956).

<sup>71</sup> *Knecht v. United States*, 242 F.2d 929 (3d Cir. 1937); *Feres v. United States*, 340 U.S. 135 (1950).

<sup>72</sup> *Messer v. United States*, 95 F. Supp. 512 (D.C. Fla. 1951); *Costley v. United States*, 181 F.2d 723 (5th Cir. 1950); *Herring v. United States*, 98 F. Supp. 69 (D.C. Colo. 1951).

<sup>73</sup> Annot., A.L.R.2d 1448 (1958); Annot., 25 A.L.R.2d 203 (1952); Annot., 64 A.L.R.2d 679 (1959).

<sup>74</sup> *Rayonier Inc. v. United States*, 352 U.S. 315 (1957).

*Corp.*<sup>75</sup> the court held that the government could be found liable under FTCA<sup>76</sup> for wilful, wanton or gross negligence, but could not be held for punitive damages.

Though the government may be liable for wilful, wanton or gross negligence the cases have held that the government cannot be liable under the theory of absolute liability.<sup>77</sup> That is, the government cannot be liable for the maintenance of an inherently dangerous activity. On the other hand, the government could be held for claims arising from damages from atomic testing.

The advent of the atomic bomb and its propensity to do damage has resulted in claims under the FTCA. In two cases recovery under FTCA was denied for damages from atomic explosions. However, by way of dicta it was suggested that under a proper set of facts recovery could be had. In *Bullock v. United States*<sup>78</sup> and in *Bartholomae Corp. v. United States*<sup>79</sup> the dicta indicated that there could be recovery under the FTCA if the negligent conduct was on the operational level. The court found that the alleged negligence arose from the policy level decisions and was not actionable. Implied in the decisions was the fact that if the operational level employees were negligent, recovery would be allowed. If an atomic blast was caused by a negligent employee, the government would be liable under the FTCA unless the court chose to deny such liability because of threatened financial burdens or litigation. It seems unlikely that recovery would be had, considering the view of *discretion* expressed in the *Dalehite* decision.<sup>80</sup> The courts have not followed the *Rayonier* case.<sup>81</sup> In that case the court held that the possibility of composing a heavy burden on the public treasury is no justification to read exceptions into the waiver of immunity beyond those provided by Congress.

#### FTCA—APPLIED

Where the claim against the United States does not exceed \$2,500, the FTCA confers authority upon the head of each federal agency or his designee to consider, ascertain, adjust, determine and settle the claim. The award or determination so made is said to be final, except where procured

<sup>75</sup> 138 F. Supp. 530 (E.D. N.Y. 1956).

<sup>76</sup> Federal Tort Claims Act, 62 Stat. 983 (1948), 28 U.S.C. § 2674 (1958).

<sup>77</sup> *Porter v. United States*, 128 F. Supp. 590 (E.D. S.C. 1955); *Rayonier Inc. v. United States*, 352 U.S. 315 (1957).

<sup>78</sup> 133 F.Supp. 885 (D.C. Utah 1955).

<sup>79</sup> 253 F. 2d 716 (9th Cir. 1957).

<sup>80</sup> *Dalehite v. United States*, 346 U.S. 15 (1953).

<sup>81</sup> *Rayonier Inc. v. United States*, 352 U.S. 315 (1957).

by fraud.<sup>82</sup> The head of the agency may, as part of an award determine and allow reasonable attorney fees. If the award is \$500 or more the fees shall not exceed ten percent of such award. The fees are to be paid out of, but not in addition to the award. Any attorney who charges more than ten per cent may be fined up to \$2,000, or imprisoned up to one year, or both.<sup>83</sup>

The FTCA grants original jurisdiction to the Federal District Courts. The jurisdiction conferred includes jurisdiction to determine any set off, counterclaim, or other claim or demand of the United States against any plaintiff.<sup>84</sup> The court is to sit without a jury.<sup>85</sup> Successful claimants are allowed to recover costs for fees paid to the clerk, and fees actually incurred for witnesses.<sup>86</sup> The court rendering judgment for a plaintiff may as part of such judgment allow reasonable attorney's fees. If the judgment is over \$500 not more than twenty percent of the judgment may be allowed. The fees allowed are to be payable out of, but not in addition to, the judgment. Any attorney who charges more than twenty percent may be fined up to \$2,000, or imprisoned up to one year, or both.<sup>87</sup>

Where a claim has been presented to a federal agency, no suit may be instituted until that agency has made final disposition of the claim. However, a claimant may on fifteen days written notice withdraw the claim from the agency and commence suit in the proper District Court.<sup>88</sup> The suit then cannot be in excess of the claim withdrawn from the agency except where the increased amount of the claim is shown to be based on newly discovered evidence or on intervening facts.<sup>89</sup>

Though the Judiciary Act<sup>90</sup> requires that the amount in controversy in suits in District Courts be \$10,000 it is not operative to preclude actions under the FTCA for less. Congress expressly gave the court jurisdiction to hear cases under the act and indicated that the amount in controversy should not control.<sup>91</sup> Where the FTCA does not provide procedure, the

<sup>82</sup> Federal Tort Claims Act, 64 Stat. 987 (1950), 28 U.S.C. § 2678 (1958).

<sup>83</sup> Federal Tort Claims Act, 62 Stat. 984 (1948), 28 U.S.C. § 2678 (1958).

<sup>84</sup> Federal Tort Claims Act, 72 Stat. 348 (1958), 28 U.S.C. §1346 (1958).

<sup>85</sup> Except in tax cases all actions against the United States are tried without juries, 68 Stat. 589 (1954), 28 U.S.C. §2412 (195).

<sup>86</sup> Federal Tort Claims Act, 62 Stat. 973 (1948), 28 U.S.C. § 2412 (1958).

<sup>87</sup> Federal Tort Claims Act, 62 Stat. 984 (1948), 28 U.S.C. § 2678 (1958).

<sup>88</sup> Federal Tort Claims Act, 63 Stat. 107 (1949), 28 U.S.C. § 2675 (a) (1958).

<sup>89</sup> Federal Tort Claims Act, 63 Stat. 107 (1949), 28 U.S.C. § 2675 (b) (1958).

<sup>90</sup> 72 Stat. 415 (1958), 28 U.S.C. §133 (1958).

<sup>91</sup> *Bates v. United States*, 76 F. Supp. 57 (D.C. Neb. 1948).

Federal Rules of Civil Procedure apply.<sup>92</sup> The joinder of parties under the act is governed by the Federal Rules on Civil Procedure.<sup>93</sup>

Neither the FTCA or the Federal Rules on Civil Procedure precludes the joinder of equitable plaintiffs or subrogees.<sup>94</sup> While the status of subrogees and others who intervene is settled where they join in a pending action, their right to proceed on their own has been questioned. Some courts have denied assignees or subrogees the right to sue in their own names on the ground that to allow such actions would be in violation of a federal anti-assignment statute.<sup>95</sup> Other courts have allowed subrogees to sue in their own names on the ground that the anti-assignment statute applies only to voluntary assignees. Subrogees are assignees by operation of law and are not within the contemplation of the anti-assignment statute.<sup>96</sup> The latter view, allowing suits by subrogees, has been accepted by a majority of the cases.<sup>97</sup> Suits by subrogees have been successful. While subrogees have been allowed recovery, in states where a tortfeasor would not be liable to the insurer subrogee in a suit in its own name the United States would not be liable to the insurer subrogee in a suit in its own name.

Unless appropriate action is taken under the act within the time therein prescribed, the District Court is without jurisdiction.<sup>98</sup> Claims under the act are barred unless proceeded on within one year from their accrual. That is, suit must be filed or the claim presented to an agency within the year following the injury. In the event a claim is made to the head of an agency, the statute of limitations is extended for six months after the claimant receives final determination or withdraws the claim from the agency.<sup>99</sup> Final judgments by district courts are appealable to courts of appeal, under the Federal Rules of Civil Procedure.<sup>100</sup> If notice of appeal filed in the district court has affixed thereto, the written consent on behalf of all the appellees, that appeal may be taken to the court of claims.<sup>101</sup>

<sup>92</sup> See generally 28 U.S.C. (1958).

<sup>93</sup> Englehardt v. United States, 69 F. Supp. 451 (D.C. Md. 1947).

<sup>94</sup> Grace v. United States, 76 F. Supp. 174 (D.C. Md. 1948).

<sup>95</sup> Aetna Cas. & Sur. Co. v. United States, 76 F. Supp. 333 (E.D. N.Y. 1948).

<sup>96</sup> Insurance Co. of No. America v. United States, 76 F. Supp. 951 (E.D. Va. 1948).

<sup>97</sup> Niagra Fire Ins. Co. v. United States, 76 F. Supp. 850 (S.D. N.Y. 1948); Bewick v. United States, 74 F. Supp. 730 (N.D. Tex. 1947); Cascade County v. United States, 75 F. Supp. 850 (D.C. Mont. 1948); Hill v. United States, 74 F. Supp. 129 (N.D. Tex. 1947).

<sup>98</sup> Federal Tort Claims Act, 63 Stat. 62 (1949), 28 U.S.C. § 2401 (1958); Turkett v. United States, 76 F. Supp. 769 (N.D. N.Y. 1948).

<sup>99</sup> Federal Tort Claims Act, 63 Stat. 62 (1949), 28 U.S.C. § 2401 (1958).

<sup>100</sup> 72 Stat. 348 (1958), 28 U.S.C. § 1291 (1958).

<sup>101</sup> 28 U.S.C. § 1504 (1958).