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gress adopt some code or policy which will protect the rights of witnesses and demonstrate that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."[50]

DISCRETIONARY ACTS OF FEDERAL EMPLOYEES UNDER THE FEDERAL TORT CLAIMS ACT

The enactment of the Federal Tort Claims Act[1] on August 2, 1946, swept away in broad language the immunity of the Government to suits in tort. The Act states that the government shall be liable in money damages only for "... injury or loss of property, or personal injury or death, caused by the negligent or wrongful act, or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[2]

The tort obligation of the United States became actual instead of moral. Injured parties were given resort to the courts in lieu of the former method of a petition to Congress which that legislature at its option and in its benevolence could have responded to by the granting of relief in a private bill.[3]

Government growth and spread into new fields had made federal con-

mony at a televised congressional hearing. On August 10, 1951, the United States Senate voted 38 to 13 to certify these men to the United States Attorney for the District of Columbia as being in contempt of that body. 97 Cong. Rec. 10013 (August 10, 1951). However a reading of the Senate debate which preceded the balloting indicates that both Senators Kefauver and O'Conor were of the opinion that television was involved in neither of these instances because the committee chairman, when the witnesses refused to testify, offered to discontinue focusing the television cameras on them. This position, however, seems subject to serious queston because the cameras had been on the witnesses for about half an hour at the time of the offer and the focusing of the cameras on some other participant in the hearings would continue to permit the replies of the witnesses to be audible to the television audience.

[50] Missouri, K. & T. Ry. Co. v. May, 194 U.S. 267, 270 (1903). Many have expressed the opinion that Congress should be permitted to conduct its investigations as it sees fit with little or no interference from the courts. For example see Frankfurter, Hands Off The Investigations, 38 New Rep. 329 (1925); Jackson J. dissenting in Eisler v. United States, 338 U.S. 189, 196 (1949).

[1] 60 Stat. 843 (1946). New title: 62 Stat. 992 (1948), 28 U.S.C.A. §§ 1346(b), 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671–2680 (1948).

[2] 62 Stat. 933 (1948), 28 U.S.C.A. § 1346(b) (1948).

[3] The Special Senate Committee which reported on Title IV of the Legislative Reorganization Bill of 1946 stated: "It [the Federal Tort Claims Act] is complementary to the provision in title I banning private bills and resolutions in Congress, leaving claimants to their remedy under this title [the Act]." Sen. Rep. No. 1400 (on S. 2177), 79th Cong., 2d Sess. 29 (1946).

tacts with private parties infinitely more numerous. Congress has always realized that governmental immunity to suit in tort was masking many wrongs committed by federal employees and, that a petition for relief was not only unsatisfactory and inadequate, but burdensome and time-consuming on the part of the legislature.[4] As an attempted solution Congress waived by this Act the immunity to suits for torts and placed jurisdiction in the district courts to hear tort claims against the United States.[5]

There are, however, several express exceptions[6] to the government's waiver of immunity. These exceptions leave the tort liability of the government something considerably less than that of "a private person... liable to the claimant in accordance with the law of the place where the act or omission occurred."[7]

One of the most significant of these exceptions, the one which is the subject of this comment, is Section 2680(a), which states:

> The provisions... [making the government liable for torts]... shall not apply to—(a) Any claim 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 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.[8]

The legislative intent behind the exception is apparent: whenever an act is discretionary on the part of a federal employee, no tort action will lie for his choice in performing it one way rather than another.[9] The courts are at great pains to carry out this intent,[10] and quickly dismiss cases involving discretionary acts by saying they are without jurisdiction.[11]

One problem presented by the "discretionary function or duty" exception is how broadly the exception is to be construed. Although the Government as a matter of defense has argued that statutes waiving sovereign im-

[4] See comment in note 3 supra.

[5] 62 Stat. 933 (1948), 28 U.S.C.A. § 1346(b) (1948).

[6] 60 Stat. 845, 846 (1946), as amended 28 U.S.C.A. §§ 2671–2680 (1948).

[7] See text 120.

[8] 62 Stat. 984 (1948), 28 U.S.C.A. § 2680 (a) (1948).

[9] "It is neither desirable nor intended that . . . the propriety of a discretionary administrative act, be tested through the medium of a damage suit for tort." Hearings before House Committee on the Judiciary on the changes made in H.R. Rep. No. 5373 by H.R. Rep. No. 6463, 77th Cong. 2d Sess. 44 (1942).

[10] E.g., Toledo v. United States, 95 F. Supp. 838 (P.R., 1951); Coates v. United States, 181 F. 2d 816 (C.A. 8th, 1950). Both quote the language cited in note 9 supra. Also Yellow Cab v. United States, 340 U.S. 543 (1951), which quotes the legislative reports on the Federal Tort Claims Act at great length.

[11] This is the disposition made of cases falling within the "discretionary function" exception. E.g., Thomas v. United States, 81 F. Supp. 881 (W.D. Mo., 1949); Old King Coal Co. v. United States, 88 F. Supp. 124 (S.D. Iowa, 1949).

munity must be strictly construed in favor of the Government,[12] the Supreme Court has stated that "when authority [waiving immunity] is given, it is liberally construed."[13]

Liberal construction of the Act in favor of claimants is the more logical test for the courts in determining jurisdiction, as the broad language of the Act indicates,[14] and the courts have admitted.[15] It would seem to follow that the specifically enumerated exceptions in a general statutory waiver of sovereign immunity should be strictly construed against the Government.[16] The courts, however, show definite reluctance to construe these exceptions, especially the "discretionary function" exception in a manner favorable to the claimant.[17] While admitting that a construction of the "discretionary function" exception to include all acts of government employees involving any discretion would defeat the purpose of the Act,[18] the courts are unwilling to probe into the situations normally recognized as involving official discretion. Indeed, the judicial opinions say the exception is a clear instance of an area of governmental activity where Congress intended no waiver of immunity.[19] Section 2680 is construed as being restrictive on the over-all scope of the Act, not to be nullified by liberality of construction.[20]

The courts are justified, perhaps, in refusing to test discretionary acts of federal employees, for Congress made clear its intent that the propriety of discretionary acts was not to be subject to the Act, even though the discretion be abused.[21] The existence of discretion in the employee is sufficient to make the wisdom or reasonableness of his action immune from judicial scrutiny.[22] Congress evidently realized many injuries would occur

[12] United States v. Yellow Cab Co., 340 U.S. 543 (1951).

[13] Ibid., at 555 quoting as applicable to the Federal Tort Claims Act Judge Cardozo's statement in Anderson v. John L. Hayes Construction Co., 243 N.Y. 140, 147, 153 N.E. 28, 29-30 (1926).

[14] See text at note 1 supra. For a detailed analysis of the terms of the Act and its history, see Gottlieb, The Federal Tort Claims Act—A Statutory Interpretation, 35 Geo. L.J. 1 (1946).

[15] Authorities cited in note 10 supra. Contra: Kendrick v. United States, 82 F. Supp. 430 (N.D. Ala., 1949).

[16] In interpreting Section 2680, the courts do not go by any rule of construction generally, other than determining legislative intent. See authorities cited in note 10 supra.

[17] E.g., Coates v. United States, 181 F. 2d 816 (C.A. 8th, 1950); Toledo v. United States, 95 F. Supp. 838 (P.R., 1951).

[18] Toledo v. United States, 95 F. Supp. 838 (P.R., 1951).

[19] Coates v. United States, 181 F. 2d 816 (C.A. 8th, 1950); Oman v. United States, 179 F. 2d 738 (C.A. 10th, 1949).

[20] E.g., Toledo v. United States, 95 F. Supp. 838, 840 (P.R., 1951).

[21] See comment in note 9 supra.

[22] "The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have

from unreasonably exercised discretion, but as the lesser of two evils preferred these wrongs to go unremedied rather than risk the curtailment of the freedom of choice of action by federal employees because of their fear of litigation in which their exercise of discretion might be subjected to criticism. The purpose of the exception, then, is to allow free exercise of discretion by federal employees, thus allowing them to act efficiently and unhampered by any such concern.

An examination of the cases reveals various instances where the courts have ruled on the nature of acts done by federal employees. In *Denny v. United States*[23] the army medical service failed to dispatch promptly an ambulance for the pregnant wife of an officer, and as a result her child was still-born. The applicable army regulation stated that medical attendance was to be afforded officers' wives whenever practicable. The court dismissed the suit saying the obligation of the government to furnish medical service was clearly discretionary, and any negligent breach in failing to extend prompt service was not actionable under the Act.

The same court in *Costley v. United States*[24] allowed recovery when a master sergeant's wife was admitted to the maternity section of an army hospital and mistakenly administered a harmful drug instead of a spinal anesthetic, causing permanent paralysis. The court distinguished the *Denny* case, saying that in the *Costley* case the employees were not exercising a discretionary function because they had already exercised it in admitting Mrs. Costley to the hospital and undertaking her delivery. Thereafter they were under a duty to attend and treat her, and no longer had any discretion with regard to her careful treatment. In these two cases the court draws a rough line and says that once the discretion is exercised, the performance of the particular course of action decided upon is within the scope of the Act, and if carried out without due care can be the basis for recovery thereunder.[25]

This also seems to be the rule followed in *Hambleton v. United States*,[26] where a sergeant in the Criminal Investigation Department grilled a woman unnecessarily long and in a harsh manner and she suffered a mental collapse. The court said that after he had exercised his discretion as to whether or not to interrogate Mrs. Hambleton, and decided to do so, he was bound to apply reasonable, prudent methods, use due and ordinary care, and to refrain from excessive grilling.

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a discretion. Questions in their nature political, or which are, by the Constitution and laws, submitted to the executive, can never be made in this court." Chief Justice Marshall in Marbury v. Madison, 1 Cranch (U.S.) 137, 170 (1803), quoted as applicable to Section 2680 in Coates v. United States, 181 F. 2d 816, 818 (C.A. 8th, 1950).

[23] 171 F. 2d 365 (C.A. 5th, 1948).

[24] 181 F. 2d 723 (C.A. 5th, 1950).

[25] Cf. Griggs v. United States, 178 F. 2d 1 (C.A. 10th, 1949).

[26] 87 F. Supp. 995 (W.D. Wash., 1949).

In *Coates v. United States*[27] the plaintiff sought damages for injury to his land and crops due to the alleged negligence of certain federal agencies in changing the course of the Missouri River and creating a new waterway.[28] The court said that the choice by the agencies of a method to be used to create the waterway was discretionary, and no action could lie for negligence in deciding on any particular method. Significantly, the court pointed out that the complaint could not be interpreted as charging negligence in a mere job of work involved in carrying out the river project.[29] Had the complaint stated that the method decided upon was being carried out in a negligent manner, the court probably would not have dismissed the suit as falling within the "discretionary function" exception. Instead, the court refused to go beyond the complaint to assume jurisdiction, and sustained the trial court's dismissal.[30]

Toledo v. United States,[31] one of the most recent decisions that a claim was within the "discretionary function" exception of the Act, is somewhat confusing. In this case plaintiff parked his car in the parking lot of an experimental station maintained by the United States Department of Agriculture. His auto was damaged when a tree infected with internal rot fell upon it. Since the tree was part of an experimental research program, the court felt that the course to be pursued in experimenting with the tree was a matter within the discretion of the station employees. Until the discretion had been exercised as to whether to continue research on the tree or to remove it, no action would lie for failure to remove it. The court could just as logically have taken jurisdiction on the ground that the complaint spelled out a charge of experimentation in a negligent manner, and tried the case on its merits. But after pointing out that the internal rot was almost impossible to detect from an external examination,[32] the court dismissed the complaint for lack of jurisdiction. The case illustrates a strict construction in favor of the Government, which, as has been noted above, seems to be the general practice of the courts when considering Section 2680(a).[33]

[27] 181 F. 2d 816 (C.A. 8th, 1950).

[28] Accord: Thomas v. United States, 81 F. Supp. 881 (W.D. Mo., 1949); Olson v. United States, 93 F. Supp. 150 (N.D., 1951); Boyce v. United States, 93 F. Supp. 866 (E.D. Iowa, 1951). But cf. North Dakota v. Przybylski, 98 F. Supp. 18 (Nev., 1951), distinguished from the Coates case because the plaintiff had already got a court order restraining the Bureau of Indian Affairs from the act complained of.

[29] 181 F. 2d 816, 819 (C.A. 8th, 1950).

[30] Ibid., at 820.

[31] 95 F. Supp. 838 (P.R., 1951).

[32] Some courts show a tendency to further justify dismissal of a case as within Section 2680 by saying the case on its merits does not make out tortious conduct. Cf. Kendrick v. United States, 82 F. Supp. 430 (N.D. Ala., 1949) (mental patient released from government hospital killed plaintiff's intestate); Sickman v. United States, 184 F. 2d 616 (C.A. 7th, 1950) (plaintiff's crops damaged by migratory waterfowl which were protected by federal game laws).

[33] See comments in notes 9 and 10 supra.

The question as to when an act is discretionary rather than ministerial, or an absolute duty,[34] can be answered only by examination of the applicable statutes and the particular facts of each case.[35] Although the exact limits of the "discretionary function or duty" exception are as yet uncharted by the courts, the cases indicate that the courts are aware of the manifest intent of Congress to pay for the negligent performance of routine duties by federal employees, but just as importantly not to inhibit the action of employees exercising genuine executive discretion and responsibility, and the courts are determined to carry out that intent.

MORALITY UNDER NATURALIZATION AND IMMIGRATION ACTS

Few topics have caused more consternation and discussion throughout the history of man than the problem of right and wrong. Legal scholars and commentators have been in the thick of this controversy. The question was highlighted by Chief Justice Vinson of the United States Supreme Court, when in a recent case he stated: "Nothing is more certain in modern society than the principle that there are no absolutes."[1] This theory might evoke surprise among lay people, but it should be no stranger to lawyers.[2]

Such a view, far from being an idle bit of philosophical by-play,[3] has a direct and vital effect upon two of the most important pieces of federal legislation: the Naturalization Act and the Immigration Act.

The Naturalization Act makes one desiring to become a citizen prove that he has been "a person of good moral character" during the five years

[34] Costley v. United States, 181 F. 2d 723 (C.A. 5th, 1950); State of Maryland v. Manor Real Estate and Trust Co., 176 F. 2d 414 (C.A. 4th, 1949) (F.H.A. had absolute, not discretionary, duty to safeguard health of tenants); Oman v. United States, 179 F. 2d 738 (C.A. 10th, 1949). (No government employee is granted the discretion to induce third parties to interfere with exclusive grazing privileges granted by the United States.)

[35] E.g., Old King Coal Co. v. United States, 88 F. Supp. 124 (S.D. Iowa, 1949) (Secretary of the Interior took over operation of a coal mine under an Executive Order empowering him to run it in such manner as he deemed necessary in the interest of the war effort. Held, that the power was discretionary).

[1] Dennis et al. v. United States, 341 U.S. 494, 508 (1951).

[2] "It is no longer news that law has lost its connection with philosophy. In place of its traditional foundations of morals and metaphysics it now rests either on some pragmatic expendiency or on an historic evolution evidenced by custom, or it is deemed to consist of nothing but facts and therefore rests on no basis at all." McKinnon, Law and Philosophy, 26 Can. Bar Rev. 1045 (1948).

[3] "We have arrived at the point historically where we can no longer proceed with any health or happiness on the blithe assumption that it doesn't matter what any of us believe—or whether there is really anything to believe." This quotation is from a speech delivered by Henry R. Luce, editor-in-chief of Time, Life and Fortune magazines, at the opening of Southern Methodist University's new legal center. A full text of the speech can be found in 43 Fortune, No. 6, at 85 (June, 1951).