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RECOVERY FROM THE UNITED STATES UNDER THE FEDERAL TORT CLAIMS ACT

By Leslie L. Anderson *

The immunity of the United States from general tort liability has finally been waived by Congress in the enactment of the Federal Tort Claims Act. Even many proponents of this sort of legislation may not be pleased that the statute denies trial by jury although government may have it when it sues the individual, or that the statute reflects upon the legal profession by putting practical obstacles in the way of adequate representation of injured persons by counsel, or with the manner in which it expresses the hands of various government agencies for whom exceptions in the law have been inserted. Passage of the Act, aside from these provisions however, accompanies naturally the general public change of attitude toward various immunities which the government has long enjoyed. It comes as a far cry from the reactionary state-

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A general court of claims bill was passed by the 70th Congress. It failed of enactment because of a pocket-veto by President Coolidge. H. R. 9285, 70th Cong., 2nd Sess.; 70th Cong. Rec. 4836. The reason for the veto apparently related to administrative features in that bill. McGuire, "Tort Claims against the United States," 19 Geo. L. Jour. 133 (1931).


ment of the liberal Mr. Justice Holmes that "a sovereign is exempt from suit... on the... ground that there can be no legal right as against the authority that makes the law on which the right depends."

Congressional conservatism in waiving general tort immunity, whereas Congress had long consented to suit against the United States in contract, was related in part to a zeal to control government expenditures and the budget generally. Torts occur despite legislation and are not so mathematically predictable in advance as is the contract cost of any project for which Congress makes provision. Yet such is the problem confronting privately-owned insurance companies, and they survive. Actuaries have access to data by which to prophesy government tort damage in the fiscal year ahead. The ardency of Congress for budgetary control has dwindled noticeably, moreover, during the periods of the depression and the war.

More than perhaps any other factor impelling agitation for consent to suit in tort against the federal government has been the growth of government business and in the number of employees to conduct it. On every occasion in which government took over a function previously performed by private industry, the possibility of tort damage to the public remained as great while the right to recover for it was taken away. It has been argued against governmental tort liability that the tremendous increase in number of government employees together with their widening variety of functions makes it too unwieldy to control their actions and too difficult to obtain proof as to their conduct to justify holding the government for it. Such argument could be made by any large corporation or insurance company for itself. Tort liability should be one of the natural penalties for conducting one's self so as to endanger others. In the case of a project for the general public good, the burden for damage done can more easily and fairly be borne by the many to be benefited by the project than if it were left to lie wholly upon the shoulders of the innocent injured person.

The United States had consented to be sued in certain cate-

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gories of tort cases prior to the Federal Tort Claims Act. Provision had also been made for administrative settlement in fields of tort limited as to specified causes, amounts that could be paid, and nature of the damage to be allowed. Administrative settlements were referred to as gratuitous. The department was authorized, but not obliged, to pay anything. It did pay within limitations as a matter of grace. Such settlement had a public relations value for the federal agency involved as well as providing a method for accomplishing substantial justice to injured persons without undue expense to the government for handling it. Outside the terms of these statutes, recourse of injured persons could be to Congress only.

This latter procedure sounds of political favoritism. There is


6 A number of these are specifically listed in Sec. 424 of the Federal Tort Claims Act.

“Congressman KEFAUVER. . . . the ordinary injured claimant who does not have political connections is likely not to get justice. It is a haphazard method. We are using a forum which is not set up for the giving of real consideration to the merits of private claims bills. . . .

“The CHAIRMAN. I have often been aggrieved when a claim, which had had consideration by the House committee and by the House, came over to the Senate and had consideration by the Senate Claims Committee, and then came up under unanimous consent in the Senate, and a figure had been arrived at that a man who was hit by a Government truck and had lost a leg . . . should have $2,500, but because some Senator, who was not a member of the committee, and only had an opportunity to read the report as the calendar was being called thought the amount excessive—I have seen the person in charge of the bill willing to reduce the amount by $1,000 in order to obviate the single objection which would throw the bill over and perhaps defeat it. . . . It seems to me obvious on the face of it the present procedure is not the way to secure a judicial determination of the right of private claimants.

“Congressman KEFAUVER. Senator LaFollette, at the conclusion of the last Congress I saw this happen: A claim bill passed the House for $5,000. I think it was a death case. The Senate allowed $500. The Congressman who had sponsored the bill in the House agreed to accept the reduced amount of the Senate on the theory that the Congress was about to adjourn and unless he got it through for $500 he feared he would not get anything. Of course, that is not doing justice to a claimant.

“The VICE CHAIRMAN. That is a case of our great Government taking advantage of a widow who is suffering a real loss.”—Hearings before the Joint Committee on the Organization of Congress, March 13 to June 29, 1945, 67-69.
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evidence that practical requirements made such favoritism frequently unavoidable; and it has been generally distasteful to persons who believe that justice should be obtainable as a matter of right. It suggests a lack of protection for one not acquainted with his Congressman. Commendation must here be expressed to the Committees on Claims of both Houses of Congress, however, for the general regard for fairness which they attempted to show in recommending allowance of claims in practically all cases where files persuaded them that recovery against the United States would have been obtained had it not been for the immunity against suit for tort. Procedure before these committees required no personal appearance by injured persons. It included investigation by the executive department involved together with its recommendation as to whether there was liability or not. The departmental report was compared with statements from the claimant, and the conclusion drawn therefrom. 

Determination of large numbers of ordinarily small claims hardly seems a proper function, on the other hand, for men chosen to legislate on national and world problems. The Committees on Claims have accordingly been abolished by the Legislative Reorganization Act of 1946. 

This Act is divided into five titles. The Federal Tort Claims Act is Title IV of it. Tort damage must generally be investigated extensively enough now to prepare the government for trial. This is a burden heavier than could reasonably have been borne in connection with the large number of claims arising out of the activities of the armed forces during World War II. the efficient

8Congressman KEFAUVER. As it works, the departments actually pass on these claims. As the chairman has said, Members of Congress, because of the stress of other matters, simply do not have time to give them judicial consideration.

"So what happens is that a claims bill is sent to the department and if the department is against it the chances are the claim bill is not passed, and if the department is for it the claim bill is usually passed through both Houses."—Ibid, 69.

9Congressman VOORHIS. It is too obvious to require long exposition that the central function of any national legislature should be the devising of a national legislative program with all that that implies."—Ibid, 29.

"Senator TAYLOR. I am on the Claims Committee. As a new member, it strikes me that it is absolutely a very poor proposition to ask Senators to spend their time pouring over these claims . . . you are absolutely at a loss if you have not gone through the case yourself.

"So I have found that I had to go through them personally when I was supposed to be familiarizing myself with Dumbarton Oaks, Bretton Woods, or Manpower, and many other things. I find I have to spend hours pouring through these claims."—Ibid, 218-219.

handling of which has been highly praised.11 The practical needs brought about by the new statute should properly call for an increase within the government of trained legal personnel for the handling of tort claims.

**What Federal Agency Includes**

Recovery under the Act is based upon loss or damage of property or personal injury or death caused by negligent or wrongful conduct by any government employee acting within the scope of his office or employment. An employee of the government includes military or naval personnel and persons acting in behalf of a federal agency. The agency may be acting temporarily or permanently in the government service and with or without compensation. Federal agency includes the executive departments and independent establishments of the United States.

Under this statute, it also includes corporations whose primary function is to act as, and while acting as, government instrumentalities and agencies, whether or not they are authorized to sue in their own names. Language of the statute does not require that such a corporation be one which the government owns. Its conduct and primary function, rather than a requirement that the corporation is a creature of the government and is owned by it, determine governmental responsibility. The statute expressly provides, however, that federal agency shall not be construed to include a contractor with the United States.12

All government-owned corporations do appear to be included within the statutory definition of a federal agency. The attempted division, recognized in the field of municipal corporations between proprietary and governmental functions, does not apply to the federal government.13 Whatever that government does constitutionally is governmental and its corporations would seem at all times, accordingly, to be acting as instrumentalities of the United States and performing governmental functions. When such corporations are expressly given power to sue and to be sued, this

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11Drafting of pertinent legislation and the organization of the Army claims service were under the charge of Ralph G. Boyd of Boston, then Colonel and Chief of the Claims Division in the Office of The Judge Advocate General of the Army. For a discussion of settlement of claims during the war, Boyd, War Department Claims, (1945) 6 Fed. Bar Jour. 434; Stewart, (1945) Claims by and Against the Government.

12Sec. 402 of the Legislative Reorganization Act of 1946. Other references to sections only will relate to sections in this Act.

power was certainly broad enough prior to the Tort Act to constitute a consent by Congress that they be sued in tort.

Regional Agricultural Credit Corporation, on the other hand, is a creature of Reconstruction Finance Corporation, and the Federal Home Loan Board, an unincorporated body, is progenitor of federal savings and loan associations. Both of these parents were creatures of Congress. None of the charters of the corporate children specified authority to sue or be sued. Yet in Keifer & Keifer v. Reconstruction Finance Corporation, the Supreme Court held that at least the Regional Agricultural Credit Corporation was subject to be sued in contract, and suggested that probably it was open to suit against it in tort. Question may be raised whether such corporation brought into existence by a creature of Congress, but not itself a direct offspring of Congress or of a general incorporation law, should be treated as acting at all times primarily as an instrumentality or agency of the United States.

The Tort Act, in any event, takes away the right to sue a corporation for tort if its primary function is to act as a government instrumentality or agency, and if the wrongful conduct complained of occurred while so acting. The suit must be against the United States itself; or the agency has power to settle smaller claims by the administrative process. The authority of the federal agency to sue and be sued is not to be construed to authorize suits against the agency which are cognizable under this statute. The remedy against the United States by suit in tort so far as it does come under this statute is exclusive.

Basis of Liability

Mr. Justice Brandeis stated in Erie Railroad Company v. Tompkins that "except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." Government contracts are made only pursuant to the Constitution or to authority from Congress. They are governed, accordingly, by federal law. A body of federal tort law had developed prior to the Erie Railroad case, and the plaintiff in that case hoped the federal law would be applied. That suit was by an injured person against a privately-owned railroad company. The Supreme Court held that the state law where the injury occurred would determine recovery. Action against the federal gov-

\[14(1938)\ 306 U. S. 381, 59 Sup. Ct. 516, 83 L. Ed. 784.\]
\[15\text{Sec. 423.}\]
\[16(1938)\ 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188.\]
ernment for tortious conduct by its employees with government-owned machines operated pursuant to an act of Congress would seem to call for application of the same law, on the other hand, that is applied in government contract cases.

As a matter of practical psychology, however, persons about to be injured do not examine statutes in advance or even consider whether an instrumentality about to do wrongful damage to them is owned privately or by the government. There is something shocking to them in being denied recovery by application of the federal law when, contrary to the *Erie Railroad* case, the law of the situs would have required that they be compensated had private persons caused the injury. The administrative *practice* in handling gratuitous tort claims prior to the Federal Tort Claims Act was to conform customarily, although not universally, as it was practicable to do so, to the law of the state where the damage occurred, except where a federal statute or specific government policy conflicted with the law of the situs.

One such federal government policy was that contributory negligence always bars recovery. This was firmly intrenched in government administrative practice even without such requirement being specifically set forth within the statutes under which administrative settlement was made. The Military Claims Act,\(^\text{17}\) under which most claims were filed arising out of Army conduct in the United States during World War II, did specifically provide that no claim should be allowed under it if damage, injury or death was caused in any part by the negligence or wrongful act of the claimant. Thus the position that contributory negligence barred recovery could not be relaxed under the Military Claims Act where the policy was set forth within the statute, even in states adhering to doctrines of last clear chance and comparative negligence. It was not relaxed in such states as a matter of established *practice* under other federal statutes authorizing administrative settlement.

The concept of contributory negligence in any small degree as being some sacred bar to recovery from the federal government has now been dissipated by the new Tort Act. The law of the state where the damage or injury occurs will now determine whether doctrines of last clear chance or comparative negligence might not be applied. Recovery under the new statute is based upon

damage, loss, injury or death caused by the negligent or wrongful conduct of any government employee under circumstances where the United States, if it were a private person, would be liable in accordance “with the law of the place where the act or omission occurred.”

DAMAGES

The statute under which tort claims were administratively settled by most departments of the government prior to the new Tort legislation was the Negligence Act. That statute gave authority to the departments and independent establishments to determine claims not in excess of one thousand dollars. After such determination, however, the department would certify its claims to Congress, by practice through the Bureau of the Budget from which they would find their way to the Appropriations Committee of the House of Representatives, and Congress would then provide for final payment of the claims in a deficiency appropriation statute. Damage compensable under the Negligence Act was only that to private property caused by the negligence of a government officer or employee. Personal injury or death claims could not be handled administratively under this statute. If a government truck should collide with another motor vehicle, the executive department involved, if within the purview of the statute, could determine the claim administratively; but if it ran over and crippled a child for life, his recourse would be by private bill in Congress to be sponsored by his Congressman.

The Military Claims Act, to illustrate a more liberal provision for damages, was enacted on July 3, 1943, giving authority to the Secretary of War or his designee to finally settle claims not in excess of one thousand dollars. It allows payment, not only for damage to or loss or destruction of property, but for personal injury or death as well. That Act contains no requirement that such loss or injury be a result of wrongful conduct. It states only that it must have been caused by War Department or Army personnel or be otherwise incident to noncombat activities of the War Department or of the Army. Recovery for personal injury or death as permitted by the statute is limited specifically to reimbursement for medical, hospital and burial expenses actually incurred. It does not cover pain and suffering. This statute was a long-forward step toward fair compensation to persons injured by

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38Sec. 403 (a), 410 (a).
the government; yet it came far from the rules the courts impose when private tort feasors are involved.

The Federal Tort Claims Act, however, finally contains but little limitation as to the kinds of tort damage for which compensation will be made other than that recovery may be for damage, loss, injury or death in accordance with the law of the place of the wrongful conduct. This broadly-stated rule for damages relates both to claims administratively adjusted and to those on which suit is brought in court. Punitive damages are expressly disallowed. Costs may be had by the successful claimant the same as if the United States were a private litigant, but may not include attorney fees. The usual rule in tort actions prevails that the government shall not be liable for interest prior to judgment.29

**Subrogation Claims**

Assignment of a claim against the government before the claim has been allowed and a warrant issued for its payment is prohibited expressly by what is known as the Assignment of Claims statute,21 still effective, but not to be confused with limited provisions authorizing assignments in connection with financing government contracts. An attorney, for instance, may represent a claimant; but he may not proceed in his own name by reason of a claim against the government assigned to him by an injured person. The statute prohibiting assignment of such claims is for the sole benefit of the United States, and under some conditions officers of the government may waive its requirements.22 This statute has been held not to apply to a change of ownership occurring by operation of law. An executor of an estate or a trustee in bankruptcy, as examples, may properly make claim in their own names in their representative capacities.23

Subrogation, accordingly, has been regarded as outside the limitations of the Assignment of Claims statute. Congress, even so, has frowned upon it in tort cases. The Committees on Claims maintained a rule, from which they seldom deviated, refusing to compensate on subrogation claims. A casualty insurance com-

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29 Sec. 403 (a), 410 (a).
pany, for example, might make compensation to an insured for damage done by a third person to his automobile. In the event the third person is a private individual, the company's procedure thereafter is to proceed against him under the subrogation provisions of the insured's policy. If, on the other hand, the third person is the government, the insurance company was unable prior to the Tort Act to recover its subrogation claim in Congress. The usual reason given for denial of such claims was that insurance companies are paid a premium for assuming risks while the government is not, and that the one who undertakes the risk for profit should be the one to bear the loss. The Congressional policy, however, disregarded the fact that the government was the wrongdoer.

In 1922, however, the Negligence Act, heretofore referred to, became effective, authorizing any executive department or establishment to determine administratively property damage claims not in excess of one thousand dollars caused by the negligent conduct of a government employee. Subrogation claims were not allowed even administratively at first under this statute, although it contained no express provision against such claims. The Attorney General ruled in 1932, however, that such subrogation claims should be allowed under the Negligence Act.24

The Military Claims Act was enacted subsequently and during World War II, applicable only to the War Department, and giving authority to the Department to make administrative settlement for property damage or personal injury or death within a limited amount caused by Department personnel acting within the scope of their employment or otherwise incident to noncombat activity. This statute again made no specific mention of subrogation claims: It was the apparent position of the Department that such claims could be paid under the Act, but that it was desirable not to be obliged to deal with more than one person with relation to a single loss. Settlement under Army Regulations would be only with the insured rather than with both insured and insurer.25 No inquiry would be made into the relative interests of the two. The entire claim, including any portion thereof insured against or even paid for already by the company, could be paid to the insured. The subrogee could thereafter recover from him as it was able.

The Committees on Claims in Congress, however, as to claims

25 Par. 21, AR 25-25, 29 May 1945.
submitted to Congress for special legislation, continued to inquire as to losses against which claimants were insured. Neither the portion of claims insured against nor subrogation claims were recognized there as compensable. In short, claims insured against could be paid in limited amounts by administrative determination. Such claims outside the administrative statutes would not be paid by Congress. Tort subrogation claims against the United States were nuisances and frequently losses to the companies. They have clearly benefited by the elimination of Congressional handling of most tort claims and by the passage of the new Tort Act. It does not mention subrogation or insurance. Subrogation claims or those covered by insurance may now be settled administratively by all the federal agencies and may be pressed against the government by suit in tort. The companies, moreover, can now go back to January 1, 1945, and recover against the government for such claims as were not allowed prior to the Act.26

**Administrative Adjustment**

Claims of one thousand dollars or less are authorized by the Federal Tort Claims Act to be settled administratively by the head of each federal agency, or his designee, acting on behalf of the United States.27 The award so made is conclusive as against the government, except for fraud.28 Acceptance of it by the claimant is final as to him and constitutes a complete release of any claim against either the government or the employee of the government whose act or omission may have given rise to the claim.29

Should suit be instituted on a claim cognizable under the Act, arbitration, compromise or settlement may be made by the Attorney General with the approval of the court in which the suit is pending.30 The authority to arbitrate is substantially new in matters involving governmental controversies, except that such authority does appear in the Contract Settlement Act of 1944 as to war contracts with the government.31 An award made administratively by a federal agency, or an arbitration award, compromise or settlement by the Attorney General after suit is started, is to be paid by the head of the agency involved out of appropria-

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26Morris, Tort Claims Against the United States, (1946) 19 Ohio Bar 487.
27Sec. 403 (a).
28Sec. 403 (b).
29Sec. 403 (d).
30Sec. 413.
3158 Stat. 649 (1944), 41 U. S. C. (1940), Supp. IV.
The head of the agency is directed to report annually to Congress the claims the agency has paid, including the name of every claimant, the amount claimed and the amount awarded, together with a brief description of the claim. Osten-
sibly, the General Accounting Office is relegated to determin-
ing that payments are made only as awarded and to discovery of fraud. Its past procedures suggest, however, that it will also scrutinize transactions and report to Congress abuses it may find.

Jurisdiction over suits against the United States under the Tort Act rests exclusively in the United States district courts sitting without a jury. Action may be tried either in the district where the plaintiff resides or in that in which the act or omission complained of occurred. The statute specifies no jurisdictional amount to be involved. Claims may be sued upon regardless of amount, including smaller claims in amounts which the federal agencies are empowered to adjust administratively. Suit may not be commenced upon a claim that has been presented to such an agency until the agency has made final disposition of the claim. To this limitation, there are two provisos. One is that a claimant may withdraw his claim from administrative consideration upon fifteen days written notice to the federal agency, and thereafter commence action. The second proviso is that as to any claim administratively disposed of or withdrawn from administrative consideration, an amount sued upon shall not be in excess of the amount presented to the agency, unless the increased amount is based upon newly discovered evidence or upon evidence of intervening facts relating to the amount of the claim.

Thus there are two strings to the bow. On the one, the federal agency may deny a claim. On the other, the claimant has his second shot by suit in the United States district court. Language of the statute compels the further conclusion that the claimant need not even resort to the administrative remedy, and that suit may be brought directly. Whether opening the United States courts to trial of tort suits in amounts not in excess of one thousand dollars without first seeking administrative settlement will prove to be a nuisance to the courts remains to be determined. Had it been

Sec. 403 (c).
Sec. 404.
Sec. 410 (a).
Sec. 410 (b).
necessary to prepare for trial the multitude of tort claims in such amounts arising from the conduct of the armed forces during World War II. and had the courts been obliged to entertain such claims in litigation without at least an administrative buffer, the burden might have been considerably to the public detriment. As to larger claims, Congress has been hesitant to leave them to administrative determination; and in justice they should be presented where determination can be made on the basis of legally-recognizable right.

It may be noted that upon trial the administrative disposition of a claim is not proper evidence of either liability or amount of damages. This does not mean, however, that evidence filed with the federal agency is not admissible; and this fact may deter the making of claims for administrative disposition. Judgment after trial is a complete bar to action on the same subject matter by the claimant against the government employee who may wrongfully have caused the injury or damage. Further rights by the government itself against the employee after judgment so obtained are not within the purview of this analysis.

As to procedure, the federal rules are followed. Provisions for counterclaim and set-off and for interest upon judgments and payment of them as they are provided for within the Tucker Act are extended to this statute. The requirement within the statute that the district court try the case without a jury has probably been a consequence in part of a fear that juries are more open to passion and prejudice than a judge. The requirement otherwise comes naturally, however, in that the United States Court of Claims proceeds without a jury, and trial by judges is a procedure in suits against the government to which the federal government is accustomed.

Appeal may be in one of two directions. It may be to the circuit court of appeals as in the usual case of appeals from the district courts. Or, by way of departure, appeal may be in these cases to the Court of Claims. The appellee must consent in writing if the latter direction is to be pursued, and the appeal must be taken within three months after entry of judgment in the district court. There is a particular advantage to appealing in the Court of Claims:

36Sec. 410 (b).
37Sec. 410 (b).
39Sec. 412.
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for that Court is a specialized one, trying only cases against the United States and accustomed to guarding interests of both parties when the government is involved.

Statute of Limitations

The period of limitations for presenting or suing on any claim is one year after the claim shall have accrued or one year after the enactment of this statute, it having been approved August 2, 1946. If this period had no exception to it, a federal agency to which a claim shall have been submitted could arbitrarily refuse to make disposition of it until the period for bringing suit on the claim shall have expired. An exception has been made, accordingly, as to claims not in excess of one thousand dollars presented to a federal agency within the allotted time, that the period within which suit may be instituted shall be extended for six months from the date the agency mails notice to the claimant as to final disposition of the claim or from the date of withdrawal of it. To this exception, there is a further requisite, that the period will not be so extended in the event the time to sue had not otherwise expired at the time of such administrative disposition or withdrawal of the claim.40

Exceptions in the Act

Not all conduct ordinarily regarded as a tort as between private litigants or otherwise giving rise to recovery under the statutes authorizing administrative settlement is covered by this Tort Act. Numerous exceptions appear within it, and one could well argue that they show to too great an extent the influence upon Congress of government departments or agencies which have been reluctant to concede that certain conduct can be wrong or to relinquish full control over disposition of tort claims. Various such claims give rise to recovery under other statutes. Government employees, for example, have rights against the United States under the new Act, at least while not on duty, as extensive as those of any private citizen. In the event the facts are such that an employee should have rights under one of the Federal Employees' Compensation Acts as well, it is probable that he may elect to proceed under either the Tort Act or a Compensation Act, but that if he once elects to accept compensation under the latter he cannot there-

40Sec. 420.
after recover under the Tort Act.\textsuperscript{11} Such claim thus seems to be excepted from the purview of the Tort Act even though the exception is not expressly stated in it. Other exceptions are mentioned specifically within the Act.\textsuperscript{12}

Congress, for instance, does not appear to consider the conduct of a government employee to be tortious when he exercises due care in the execution of a federal statute or regulation, even though the statute or regulation ultimately proves invalid. The employee has at least performed the will of Congress enacted for the general public good. Congress specifically excepts such conduct from the purview of this Act, and also excepts the performance or failure to exercise a discretionary function or duty by a federal agency or employee, even if the discretion be abused. These exceptions protect the government from liability under the Act, but they do not purport to lend added protection to the agency or employee.

An example of the exceptions last mentioned arises in connection with taking or damaging of private property for a public purpose and the protections to be afforded under the Fifth Amendment to the Constitution.\textsuperscript{13} If there is a taking by the government pursuant to statute under such circumstances that a contractual relationship can be made out between the government and him whose property is taken, he can recover under the Tucker Act. A more difficult problem arises when private property is only damaged or the taking by the government has been done tortiously. In event of damage, distinction must be made between the natural harmful consequences of such a statute or regulation on certain persons and the consequences that flow from negligent or other wrongful execution of it. If the former, there will be no recovery, at least under the Tort Act; but if the latter, there may be recovery. As to the wrongful taking, the Supreme Court has wavered from time to time, but has usually stated that there may be no recovery because the Tucker Act does not bring tort claims within its purview. The Tucker Act gives jurisdiction to federal courts over


\textsuperscript{12}Sec. 421.

\textsuperscript{13}For a general discussion of this subject as treated by the federal courts, Anderson, Tort and Implied Contract Liability of the Federal Government, (1946) 30 Minn. L. Rev. 133.
claims “founded upon the Constitution . . . or any law of Congress” or “upon any contract . . . with the Government . . . or for damages . . . in cases not sounding in tort.” It is a hopeful sign that, in this day of expanding governmental functions, Mr. Justice Douglas has finally said for the present Supreme Court in United States v. Causby:

“We need not decide whether repeated trespasses might give rise to an implied contract . . . If there is a taking, the claim is ‘founded upon the Constitution’ and within the jurisdiction of the Court of Claims to hear and determine.”

The Tort Act, moreover, specifically excepts from its purview claims arising out of the loss, miscarriage or negligent transmission of mail. This surely does not mean that the government is not liable for damage of property other than mail or injury caused by the negligent handling of post office trucks. Mail claims have been of a peculiar category in the administrative handling of claims prior to this statute. They relate strictly to losses in the mails, as to postal matter lost or spoiled in transit. The morale-building factor of mail to the public has been highly regarded in American life, and ordinary mail is handled at a remarkably inexpensive rate. If this rate is to be maintained, the costs to the government of handling it must be maintained as low as possible. Government must be able to assume that most mail lacks more than nominal value. If it has a special value, it should be to the interest of senders to insure or register it or otherwise to pay an extra charge for special treatment of it. The sender, in short, has ways of making sure of its speedy or safe delivery. It would be impractical for government otherwise to know what mail has special value, and it is only fair that the sender asking special treatment pay slightly extra for it. Moreover, a sender of an item of value would seem himself contributorily at fault for sending such mail in the ordinary course. From that angle alone he should not be able to recover even if this exception were not written expressly into the Act.

Admiralty claims against the United States may be pressed under this Act only if they do not come within the terms of two

46 Sup. Ct. 1062 (1946). But see Atchley v. Tennessee Valley Authority, (N.D. Ala. 1947) 69 F. Supp. 952, in which improper judgment of government officials in impounding water so that crops were destroyed by the resulting flood was not considered an actionable wrong, no taking having occurred, even though the Tennessee Valley Authority was empowered to sue and be sued.

45 E.g., par. 5, AR 25-25, 29 May 1945.
other designated statutes. Claims arising in foreign countries could not practicably be handled in our own country and are excepted; but, as to damage or injury caused by military personnel in foreign countries, such claims may be handled administratively within the foreign theaters under the Military Claims Act and the Foreign Claims Act.

No nation makes a general policy of providing for payment of claims arising from the direct impact of combat by military forces, other than to its own government personnel. Congress, by like accord, naturally has made no provision for recovery on claims arising out of combatant activities of the armed forces during time of war. The hands of the Treasury Department and the Federal Bureau of Investigation are indicated in the exemption of the government from liability for conduct by law-enforcement officers as to claims arising from assessment or collection of taxes or customs duties or from any detention of personal property. Along the same line, there is an exception of probably too great breadth of claims arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, or interference with contract rights. Further exceptions include conduct by the government under the Trading with the Enemy Act, damages from a governmental quarantine, damages caused by the fiscal operations of the Treasury Department, damages or injury of vessels, passengers and cargo in Canal Zone waters, and claims arising from the activities of the Tennessee Valley Authority. It is believed the fear that prompted various of these exceptions overlooked the fact that courts are bound to recognize various privileges in the government despite its waiver of immunity from suit and to declare that fault exists on the part of claimants in instances where no fault would have been declared to have existed had a private tort feasor been defendant.

Attorney Fees and Their Effect on Representation

Almost within the category of exceptions from the statute is the provision in it limiting attorney fees. Such limitations in this


48 Sec. 422.
FEDERAL TORT CLAIMS ACT

Act are only cumulative to indicate the desirability for a review by the bar associations with the proper committees in Congress of fees to be allowed pursuant to statute. In the field of bankruptcy, the restriction is simply that the legal charge to be allowed by the court be reasonable, and it is proper that fees be controlled by the courts with care to avoid recurrence of past scandals. The standard of reasonableness gives opportunity to the court to consider all the factors involved.

Handling of claims before the Veterans Administration, as a different type of case, calls for sympathetic treatment by attorneys, and nobody would fairly advocate that this should be a field in which attorneys could expect especially to profit. However, the limitation under the applicable statute of a charge of ten dollars per claim\(^4\) for veterans would not ordinarily cover overhead. Many veteran problems involve substantial sums of money, and questions of such a nature that the veteran concerned needs good, rather than simply inexpensive, counsel.\(^5\) The fact of being a veteran, moreover, is not a necessary indication of poverty, and the attorney to whom he confides is usually best able to determine whether a reasonably fair charge can be made. Yet Veterans Administration itself is ordinarily the protector of the ex-serviceman, and his need for outside counsel is not ordinarily so great as when he seeks counsel for other legal matters.

Again, prior to the Tort Act, Congress made a practice of limiting fees to be paid attorneys for presenting claims to be allowed by private bill to ten per cent of the amount finally appropriated. One reason for this limitation had relation to the busy life of Congressmen; and attorneys were not to be encouraged to take the time of Congressional committees by personally pressing private claims before them. Executive departments, moreover, had much to say as to whether an appropriation would or would not be made. Committees were not so dependent as the courts are now upon a proper presentation of the law and facts by attorneys representing claimants.

The Federal Tort Claims Act, however, anticipates adequate representation by counsel and the vigorous presentation of claims against the government by him. It has been indicated heretofore in this article that this Act now makes it necessary for the government to investigate most claims extensively enough to prepare for


\(^{5}\)Some discussion on this subject by the author in book review (1946) 32 Va. L. Rev. 692.
trial. Nor is there expectation that the Department of Justice will not throw its force against the allowance of many claims regardless of the cost to the government of doing so, or that it will not appeal in any case where it disagrees with a decision of the court. The need for thorough preparation by the claimant’s counsel is apt to be greater, in fact, because the government is involved. An anomaly assuredly exists in the wise consent by Congress that the United States be suable in tort and its about face at this point in throwing obstacles in the way of the claimant to the best of legal representation. First, the Act provides in effect that only contingent fees may be paid attorneys regardless of the fact that an appeal may be involved. Secondly, the allowance of fees paid by the claimant may be made a part of the judgment, award or settlement. Third, the statute states that the fee allowed must be reasonable; yet it must not exceed ten per cent of an administrative settlement or twenty per cent of a recovery in court. These limitations are quite apt to accomplish exactly the opposite from the objective of Congress which, according to the apparent intention, is the protection of claimants from the attorneys representing them. Violation of these limitations constitutes a misdemeanor, and the penalty is a fine not in excess of two thousand dollars or imprisonment for not more than one year, or both. The result is apt to be that attorneys who will handle such cases will ordinarily do so only when the case is clear.

SUPERSEDED STATUTES

Statutes authorizing administrative settlement of claims which were in effect at the time of the enactment of the Tort Act are repealed by it only to the extent that the subject matter covered by the old statute is also covered in the new. The Negligence Act, heretofore referred to, gave authority to determine claims administratively for property damage negligently caused by the government not in excess of one thousand dollars. The new Tort Act empowers the federal agencies to make exactly the same sort of settlement, but on a more liberal basis. It would seem, therefore, that the Negligence Act is wholly superseded.

The Military Claims Act, as a further example, authorizes settlement of claims for damage or injury even though not caused by the negligent or wrongful conduct of a government employee but which is incident to noncombat activities of the War Depart-

51 Sec. 424.
ment or of the Army. It has no geographical limitation, and applies in all countries, except as to inhabitants of such a foreign country in which an accident or incident occurs under circumstances whereby the inhabitants are covered by the Foreign Claims Act. Such claims exceeding one thousand dollars may be processed within the War Department but be reported under the Act to Congress for appropriation. None of these three categories of claims under the Military Claims Act is covered by the Federal Tort Claims Act. To that extent, the Military Claims Act does not appear to be superseded and continues in effect; and it also still applies to any claims within its full purview that may have accrued prior to January 1, 1945.

As to private bills, the Legislative Reorganization Act of 1946 provides that they shall not be received in either House of Congress as to payment of any claim for which suit is authorized to be instituted under the new Tort Act. 52

**Suitability of States**

Commentaries upon the right to sue the federal government ought properly not disregard reference to the prejudice to which most states still cling against opening themselves to suit by persons to whom actually they owe an obligation. Local governments may be sued in many instances in tort. At the other extreme, the federal government, which is the highest of our governments and relates to all the American people, is now subject to tort suit. In between, most states, for reasons quite unsatisfactory, insist upon immunity as to almost all causes of action. Some trend is found by way of a gradual waiver of immunity by some states from suit in some cases, although not generally in tort, while brief is obviously as strong for waiver in parallel cases arising within the same states in which claimants may not yet be heard in court.

The federal government is now suable whether under the Constitution or act of Congress, in tort or contract. Both New York and Illinois have courts of claims with jurisdiction over suits in

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52Sec. 131.

"Congressman KEFAUVER. . . . The second reason a bill of this sort has not been passed in the past is we fear that even after the claim has been considered by the court, some Congressman, upon the behest of an injured person, would still try to get a private claims bill through the Congress. That could be taken care of by providing in the law that this would be his exclusive remedy and a claimant should be estopped or precluded from asserting a claim in any other way except in a court established for the consideration of it."
both tort and contract against those states.\textsuperscript{53} Minnesota, as an example, consistent with the situation in various other states, has waived immunity from suit in certain limited instances only. These include suit on contracts for the construction or repair of state trunk highways entered into by the commissioner of highways or by his authority;\textsuperscript{54} suit to quiet title or foreclose mortgages or liens on property, to obtain an adjudication touching any mortgage or lien claimed by the state, and to determine boundary lines between state property and land contiguous thereto;\textsuperscript{55} and suit for damages caused by the location, construction, reconstruction, improvement or maintenance of the trunk highway system.\textsuperscript{56} These few categories under the Minnesota statutes include claims in contract, tort, and to enforce a bit of a provision of the state Constitution.

No satisfactory reason can be perceived for the waiver of immunity against suit on highway contracts and not on other contracts with the state. Why should suit be authorized for damage caused by construction of state highways and not for damage caused by all other state projects for the general public good? Can one detect consistency between consent to suit for damage to private property in highway cases and the denial of such suit generally in eminent domain cases not commenced by the state by way of condemnation proceedings? No justification appears why one may sue for damage to his property in isolated cases, but no recourse in court as a matter of right is open to a child maimed and handicapped for life because of the wrongful conduct of a state employee engaged in some project for the benefit of the people generally.\textsuperscript{57}

The correction of the existing evil within the states should be by legislation opening themselves to suit the same as private persons are, whether under their constitutions or acts of legislature, in contract, express or implied, quasi contract, or in tort. Such legislation recognizes justice to be a thing of right, a realistic recognition of good morals in the relationship of state and citizenry.\textsuperscript{58}


\textsuperscript{54}Minn. Stat. 1945, Sec. 161.03, Subd. 17.

\textsuperscript{55}Minn. Stat. 1945, Sec. 582.13.

\textsuperscript{56}Minn. Laws of 1945, Chap. 612.

\textsuperscript{57}"It is certainly not in accord with American democracy to permit the state to take private property by other than legal means and then to defend itself by a plea of nonsuitability."—Gallagher, Henry M., C. J., in Benson v. Bentley, (1943) 216 Minn. 146, 160, 12 N. W. (2d) 347, 355.

\textsuperscript{58}"If I were a member of the legislative branch of the government considering the advisability of establishing a court of claims with tort jurisdic-
CONCLUSION

The especial contribution of the Federal Tort Claims Act is, not that it extends adequate enough protection to injured persons, but that it has pierced through the ancient prejudice that there is something inconsistent between the sovereignty of the government and any right to sue the government for wrongs it has done and which it ought in good morals to pay. It leaves behind the fiction that the king can do no wrong, from which even most monarchies of Europe have departed, and adopts what is more realistically consistent with the concept of democracy. The Act increases to some extent the securities which surround the life of the individual and the enjoyment of his property. More remains to be accomplished.

Whenever substantial changes occur in the economic or social or governmental life of the nation, it is probable that the courts and legislative bodies will be obliged to go back later to tuck in odd ends of injustice to conform society to the changes that have occurred. This is a normal process of governmental and social adjustment.

The wide expansion of activity by the federal government, for instance, into fields formerly recognized to be functions of the states and the rapid increase of federal employees made it necessary to change long-standing rules and by a balancing process make federal employees subject to state income taxation and make various transactions with the federal government taxable which were previously considered immune from state taxation. Had this change not occurred, the federal government might have withdrawn so much of persons and transactions and property from the jurisdiction of the states to tax that operations of state governments could have been seriously crippled.

The federal government has taken over much land in the various states. Jurisdiction over the federal reservations so action upon existing tribunals as against the state, the reasons advanced by the majority would be persuasive. Functions now performed by the state seem to demand legislation of that character. —Loring, J. (now Chief Justice), in State v. Stanley, (1933) 188 Minn. 390, 395, 247 N. W. 509, 511.


60We have recognized that the Constitution presupposes the continued existence of the states functioning in co-ordination with the national government . . . And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government . . .”—Stone, C. J., in Penn Dairies v. Milk Control Commission, (1942) 318 U. S. 261. 270, 63 Sup. Ct. 617, 621, 87 L. Ed. 748, 754. Alabama v. King & Boozer, (1941) 314 U. S. 1, 63 Sup. Ct. 43, 86 L. Ed. 3.
quired is exclusively within the United States where the states have given consent to the purchases. The result is that tremendous amounts of land have been removed from the jurisdiction of the states in which the land is situated, and states have lost control for many purposes, including that of taxation, over the reservations and occurrences and persons within them. Dangers in this regard became apparent; whereupon, the Supreme Court ruled in recent years that states may consent to federal acquisitions with limitations, reserving to themselves concurrent jurisdiction over the property so acquired.61 A still further example is found in the field of labor law where legislation, such as the National Labor Relations and Norris-LaGuardia Acts, suddenly opened the way to tremendous advancement for the cause of organized labor. Experience, however, has revealed some abuses that have occurred in the transition. Congress has gone back to make the rough places plain, giving serious consideration to means of eliminating the abuses without harm to the major objective.

The vast extension in the sphere of governmental activity, both state and federal, by like token, has resulted in much confiscation and damage of private property and injury to persons, for which adequate compensation has not been made. Protection to the individual has not kept reasonably apace in the transition. Justice, as this change occurs, becomes increasingly less a matter of right within the courts and increasingly more a matter for personal determination by governmental officers. There is some trend toward correction of this evil. The federal government has led the states, so far as providing recourse within the courts is concerned, by supplementing the Tucker Act, long in effect, with the Tort Claims portion of the new Legislative Reorganization Act of 1946.

61"The possible importance of reserving to the State jurisdiction for local purposes which involve no interference with the performance of governmental functions is becoming more and more clear as the activities of the Government expand and large areas within States are acquired."—Hughes, C. J., in James v. Dravo Contracting Co., (1937) 302 U. S. 134, 148, 58 Sup. Ct. 208, 215, 82 L. Ed. 155, 166.