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## FTCA in a Nutshell

Orville J. Weaver\*

THE FEDERAL TORT CLAIMS ACT<sup>1</sup> is a partial waiver of sovereign immunity. In *Rayonier, Incorporated v. United States*,<sup>2</sup> the United States Supreme Court stated: "The purpose of the Federal Tort Claims Act was to waive the government's traditional all encompassing immunity from tort action and to establish novel and unprecedented governmental liability." This legislation does not create a new cause of action, but merely means that the United States is liable for certain negligent acts in the same manner as is anyone else.

The Act met with great opposition before it was finally passed in 1946 by the 79th Congress. It was, however, the result of widespread feeling that the government should assume the obligation to pay damages for the misfeasance of its employees in carrying out its work.<sup>3</sup>

Prior to the passage of the Act, it was necessary for a claimant to file a bill in Congress for redress in a tort claim against the government. The Supreme Court, in *Dalehite v. United States*,<sup>4</sup> said that the private bill had been notoriously clumsy. In each of the 74th and 75th Congresses, more than 2,300 private claim bills had been introduced, seeking more than \$100,000,000. In the 76th Congress approximately 2,000 private bills were introduced, of which 315 were approved for a total of \$826,000. In the 76th Congress, of the 1,829 private claim bills introduced and referred to the Claims Committee, 593 were approved for a total of \$1,000,253.30. In the 78th Congress, 1,644 bills were introduced and 549 were approved for a total of \$1,355,767.12.<sup>5</sup>

This method was slow as well as clumsy. The private bills further burdened an already over-burdened legislature. Con-

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The views expressed are those of the author and not necessarily those of the United States Treasury Department.

<sup>1</sup> 28 U. S. C. A. Secs. 2671-2780, 1346(b). See, Wright, *Federal Tort Claims Act Analyzed and Annotated* (1957).

<sup>2</sup> *Rayonier, Inc. v. U. S.*, 77 S. Ct. 374, 352 U. S. 315 (1957).

<sup>3</sup> *Dalehite v. U. S.*, 346 U. S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953).

<sup>4</sup> *Dalehite v. U. S.*, *Ibid.* n. 3.

<sup>5</sup> House of Representatives Report No. 1287, 79th Congress, First Session, page 2.

gress, in its hearings, recognized the need for such an Act. In the hearings before the House Judiciary Committee for the 77th Congress,<sup>6</sup> the following statement was made: "From the Committee hearings we learn that the previous 85 years had witnessed a steady encroachment upon the originally unbroken domain of sovereign immunity from legal process for the delicts of its agents. Yet a large and highly important area remains in which no satisfactory remedy has been provided for the wrongs of Government officers or employees, the ordinary 'common law' type of tort, such as personal injury or property damage caused by the negligent operation of an automobile."

### Exceptions to the Act

The exceptions to the Act, drafted as a clarifying amendment to the House bill, were intended "to assure protection for the Government against tort liability for errors in administration or in exercise of discretionary functions."<sup>7</sup> A House of representatives Report<sup>8</sup> stated: "This is a highly important exception, intended to preclude any possibility that the bill might be construed as authorizing suits against the government for damages growing out of an authorized activity such as irrigation flood control with no negligence on the part of any government employee shown, and the only grounds for suit is that the same act by a private individual would be tortious. It is also intended to preclude application to claims against regulatory bodies . . . based upon alleged abuse of discretionary authority, whether or not negligence is alleged."

Stromswold has stated:<sup>9</sup> "And none could be expected to foresee at that time the monstrous joker now threatening to engulf the entire Act in a twilight zone—the vague and ambiguous exceptions from federal liability for 'due care in the execution of a statute' and 'performance of discretionary function'."

The Supreme Court, in the *Dalehite* case,<sup>10</sup> said that, in interpreting the exceptions to the generality of grant by the Act

<sup>6</sup> Hearings before the House Committee of Judiciary, 77th Congress, 2d Session, on H. R. No. 5373 and H. R. 6463—page 24.

<sup>7</sup> *Dalehite v. U. S.*, n. 3, above.

<sup>8</sup> House of Representatives Report No. 1287, 79th Congress.

<sup>9</sup> Hugh C. Stromswold—"The Twilight Zone of The Federal Tort Claims Act"—4 *Intramural L. R. of Amer. Univ.* (2) 41 (1955); and see, Matthews, F. T. C. A.—Proper Scope of the Discretionary Functions Exception, 6 *Amer. U. L. R.* 22 (1957).

<sup>10</sup> *Dalehite v. U. S.*, n. 3, above.

of right to sue the government for negligence of its employees, courts must include only those circumstances which are within the words and reason of the exception. In *Marbury v. Madison*,<sup>11</sup> the Supreme Court long ago had said: "Discretion referred to is not that of the judge, a power to decide within the limits of positive rules of law subject to judicial review. It is the discretion of the executive or administrator to act according to one's judgment of the best course, a concept of substantial historical ancestry in American law."

In the *Dalehite* case,<sup>12</sup> the Court held that there was no liability on the Government for an explosion of highly explosive fertilizer, manufactured by a Government corporation. This was a discretionary act, and therefore the Court held it to be within the exceptions. A recent case, *Indian Towing Co. v. United States*,<sup>13</sup> held that the test established by the Tort Claims Act for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred. The Court further stated: "We expressly decided . . . that the United States' liability is not restricted to the liability of a municipal corporation or other public body, and that an injured party cannot be deprived of his rights under the Act by resort to an alleged distinction, imported from the laws of municipal corporations, between the Government's negligence when it acts in a 'proprietary' capacity and its negligence when it acts in a 'uniquely governmental' capacity. To the extent that there was anything to the contrary in the *Dalehite* case it was necessarily rejected by *Indian Towing*." In the *Rayonier* case, the Government was held liable for the negligence of its firefighters for losses sustained in a forest fire. The Court further stated that "there is no justification for this Court to read exemptions into the Act beyond those provided by Congress."

In *United States v. Yellow Cab Co. and Capital Transit Company*,<sup>14</sup> the Supreme Court held that the Government may be sued for contribution, and also may be impleaded as a third party defendant. And, in the same case, stated: "The Federal Tort Claim Act merely substitutes the District Courts for Con-

<sup>11</sup> *Marbury v. Madison*, 1 Cranch 137, 170, 2 L. Ed. 60 (1803).

<sup>12</sup> *Dalehite v. U. S.*, n. 3, above.

<sup>13</sup> *Indian Towing Company v. U. S.*, 350 U. S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955).

<sup>14</sup> *U. S. v. Yellow Cab Co.; Capital Transit Co. v. U. S.*, 340 U. S. 543, 71 S. Ct. 399, 95 L. Ed. 523 (1951).

gress as the agency to determine validity and amount of claims against the Government . . . Authority to sue the sovereign should be liberally construed."

In the *Yellow Cab Company* case, the action arose as a result of a collision between a taxicab and a United States mail truck. The cab company was sued by its passengers. The cab company impleaded the United States as a third party defendant and charged that negligence of the mail truck driver made the United States liable for all or part of the claims against the cab company. In the *Capital Transit* case, a transit car was involved in a collision with a jeep, driven by a soldier acting within the scope of his duties. Passengers sued the transit company, which impleaded the United States as a third party defendant. The Court held that the Act empowers a United States District Court to require the United States to be impleaded as a third party defendant, and to answer the claim of a joint tort-feasor for contribution, as if the United States were a private individual.

In *United States v. Aetna Casualty and Surety Company*<sup>15</sup> it was said: "In argument before a number of District Courts and Courts of Appeal, the Government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the Congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in *Anderson v. John L. Hayes Construction Company*:<sup>16</sup> "The exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to the rigor by refinement or construction, where consent has been announced.' . . ."

*Brooks v. United States*<sup>17</sup> held that the Federal Tort Claims Act, giving District Courts jurisdiction over "any claim" against the United States founded on negligence, includes claims for injury or death of members of armed forces not incident to military service, in view of the language, framework and legislative history of the Act. On the other hand, a Circuit Court held the Government to be liable in a case where a sailor, traveling under Government orders, while running to catch a slow moving train bumped an elderly woman, causing her to sustain serious

<sup>15</sup> *U. S. v. Aetna Casualty and Surety Co.*, 338 U. S. 366, 70 S. Ct. 207, 94 L. Ed. 171 (1949).

<sup>16</sup> *Anderson v. John L. Hayes Construction Co.*, 243 N. Y. 140, 153 N. E. 28 (1926).

<sup>17</sup> *Brooks v. U. S.*, 33 U. S. 49, 69 S. Ct. 918, 93 L. Ed. 1200 (1949).

injuries. The Court held that the sailor was acting in line of duty at the time of the accident.<sup>18</sup>

### Procedure

The FTCA authorizes the head of each federal agency, or his designee for the purpose, acting on behalf of the United States, to consider, ascertain, adjust, determine, and settle any claim for money damages of \$1,000 or less against the United States, accruing 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.<sup>19</sup> This section further states that the acceptance by the claimant shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

Section 2674 states that the Government shall not be liable for interest prior to the judgment, nor for punitive damages. Claims in excess of \$1,000 must be forwarded to Congress after a determination is made either by settlement or trial.

During the fiscal year ending June 30, 1955, 977 actions were commenced in the District Courts,<sup>20</sup> and in the fiscal year ending June 30, 1956, 934 tort actions were commenced.<sup>21</sup> These actions were disposed of as follows:

|      | Dismissed for<br>want of<br>prosecution | Default<br>Judgment                           | Consent Judgment<br>Before<br>Trial | Judgment<br>During or<br>After Trial |
|------|-----------------------------------------|-----------------------------------------------|-------------------------------------|--------------------------------------|
| 1955 | 17                                      | 1                                             | 95                                  | 6                                    |
| 1956 | 29                                      | 1                                             | 121                                 | 8                                    |
|      | Consent Dismissal<br>Before<br>Trial    | Consent Dismissal<br>During or<br>After Trial | Transfers                           | Other<br>Dispositions                |
| 1955 | 432                                     | 11                                            | 12                                  | 96                                   |
| 1956 | 411                                     | 17                                            | 8                                   | 34                                   |

<sup>18</sup> *Campbell v. U. S.*, 75 F. Supp. 181 (D. C. La. 1948), cert. den. 337 U. S. 957, 69 S. Ct. 1532, 93 L. Ed. 1757 (1948).

<sup>19</sup> 28 U. S. C. A. Sec. 2672.

<sup>20</sup> Annual Report of the Director of the Administrative Office of the United States Courts, Table C4 (1955).

<sup>21</sup> *Ibid.*, n. 21, Report for the year 1956, Table C4.

| Remanded                    |                                                                           |                                        |                                                                  |       |
|-----------------------------|---------------------------------------------------------------------------|----------------------------------------|------------------------------------------------------------------|-------|
| 1955                        | 1                                                                         |                                        |                                                                  |       |
| 1956                        | 4                                                                         |                                        |                                                                  |       |
|                             | Contested Judgment<br>Judgment by<br>Decision of<br>Court Before<br>Trial | Judgment<br>After<br>Non-Jury<br>Trial | Judgment by<br>Court During<br>Jury Trial<br>Directed<br>Verdict | Other |
| 1955                        | 49                                                                        | 247                                    | 1                                                                | -0-   |
| 1956                        | 74                                                                        | 223                                    | 1                                                                | -0-   |
| Judgment of<br>Jury Verdict |                                                                           |                                        |                                                                  |       |
| 1955                        | 7                                                                         |                                        |                                                                  |       |
| 1956                        | 5                                                                         |                                        |                                                                  |       |

If the claim against the Government is not settled with the agency against which it was made, or if the amount of the claim exceeds \$1,000, the action may then be brought in the United States district court. Title 28, United States Code Section 2402 provides that a jury trial is denied in actions against the United States. This provision in the Act might in some cases result in smaller awards than those granted by juries. Counsel for the claimant has the burden, in this type of case, to aid the Court in making findings of fact. Obviously, in a trial to the court without a jury, the attorney usually must depend upon facts and law, rather than upon appeals to the sympathies of jurors.

Of interest to the attorney is the matter of fees allowed under the Act. As stated below, the attorney is limited to 20 per centum of the amount recovered, and this amount is to be paid out of the amount recovered, and not in addition to the amount recovered. Title 28 U. S. C. Section 2678 provides that any attorney who charges, demands, receives or collects for services rendered in connection with a claim under the Act, any amount in excess of that allowed under this section, shall be fined not more than \$2,000 or imprisoned not more than one year, or both. This provision may limit the attorney to a fee which is considerably less than that to which he would be entitled in a tort action in a state court. He therefore must risk his time and efforts for a possible fee which is less than that to which he may be accustomed. The attorney nevertheless is still obliged to make a thorough investigation of the facts, as in any case. The Government has on its side the various official investigative organizations and agencies. For instance, the Treasury Department's investigators investigate all of the circum-

stances of any accident involving tort claims against that Department. These investigators are thorough, and it is probable that any person who has any knowledge of the event will have been questioned long before the attorney is retained. The government's agents thus can have all of the facts advantageously available for the government attorney who will try the case. This points up the fact that the attorney who takes a case against the government under the FTCA often is gambling against heavy odds. If his client cannot afford the expense of the investigation, the attorney himself must be ready and able to meet that expense. Such investigations are expensive, particularly when the attorney may be taking a chance that he may never recover.

If the attorney is successful in prosecuting his client's claim, and the court awards a sum of money to the client, there is still the possibility of an expensive appeal. The Government's staff attorneys prepare the case for appeal to the Court of Appeals as a routine part of their job. But what about the plaintiff's attorney? The appeal may be so costly as to make his fee inadequate. The Government can also appeal the cases to the Supreme Court—indeed a costly appeal for the claimant.

### Key Sections of the Act

The F. T. C. A. sections of greatest importance provide as follows (in outline and with notes from leading cases interpreting the sections):

*Section 1346* is the first section which deals with torts. This section defines the United States as a defendant. Part (b) states: District courts shall have exclusive jurisdiction of civil actions on claims against the United States for money damages, accruing on or after January 1, 1945, 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 would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Prior to enactment of former Section 931 of this title, the United States could not be sued on a tort claim, whether by original suit or counterclaim, in absence of specific congressional authority authorizing such suit.<sup>22</sup>

<sup>22</sup> U. S. v. Dugan, 36 F. Supp. 109 (E. D. N. Y., 1941).



Damages in tort were not allowed in an action against the United States caused by overflow of a river because of construction of a dam.<sup>23</sup>

In light of unmistakable language of report of House Judiciary Committee about jurisdiction under F. T. C. A. and in light of judicial construction of former Section 41(20), suits under F. T. C. A. are subject to the same rigid rule of construction in favor of government as any other waiver statute.<sup>24</sup>

The purpose of former Section 931 of this title was to relieve Congress of burden of determining merits of tort claims against the United States.<sup>25</sup>

*Section 1402(b)* states that any action on a tort claim may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.

*Section 1504* sets forth that the Court of Claims shall have jurisdiction to review by appeal final judgments in the District Courts in civil actions based on tort claims brought under Section 1346(b) of this title, if the notice of appeal filed in the District Court has affixed thereto the written consent on behalf of all the appellees that the appeal be taken to the Court of Claims.

*Section 2110* provides that the appeal to the Court of Claims in tort claims cases shall be taken within 90 days after the final judgment of the District Court.

*Section 2401(b)* states that a tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues or unless, if it is a claim not exceeding \$1,000, it is presented in writing to the appropriate agency within two years after such claim accrues. If a claim not exceeding \$1,000 has been presented in writing to the appropriate agency within that period of time, suit thereon shall not be barred until the expiration of a period of six months after either the withdrawal of such claim from the agency or the date of mailing notice by the agency of final disposition of the claim.

Subsection (b) of this section, providing that a tort claim against the United States shall be forever barred unless action is begun within two years after the claim accrues, limits the substantive rights created by F. T. C. A. Sections 1346 and 2671-268 of Title 28, and is not merely a procedural requirement.<sup>26</sup>

<sup>23</sup> *Christman v. U. S.*, 74 F. 2d 112 (7th Cir., 1934).

<sup>24</sup> *Uarte v. U. S.*, 7 F. R. D. 705 (S. D. Cal., 1948).

<sup>25</sup> *Van Wie v. U. S.*, 77 F. Supp. 22 (N. D. Iowa, 1948).

<sup>26</sup> *Foote v. Public Housing Comm.*, 107 F. Supp. 270 (W. D. Mich., 1952).

*Section 2402.* Jury trial: Any action against the United States under Section 1346 shall be tried by the court without a jury.

*Section 2411(b)* states: "Except as otherwise provided in subsection (a) of this section, on all final judgments rendered against the United States in actions instituted under section 1346 of this title, interest shall be computed at the rate of 4 per centum per annum from the date of the judgment up to, but not exceeding, thirty days after the approval of any appropriation Act provided for payment of the judgment." In this connection, it should be noted that claims over \$1,000 must be transmitted to Congress after a determination has been made, either by settlement or by trial. The Congress is presented with these claims by "Proposed Supplemental Appropriations To Pay Claims For Damages, Audited Claims, And Judgments Rendered Against The United States." Publication of these claims is made in House and Senate Documents.

*Section 2412* treats of "Costs." Subsection (b) provides: "In an action under subsection (a) of section 1346 or section 1491 of this title, if the United States puts in issue plaintiff's right to recover, the district court or Court of Claims may allow costs to the prevailing party from the time of joining such issue. Such costs shall include only those actually incurred for witnesses and fees paid to the clerk." Subsection (c) states: "In an action under subsection (b) of section 1346 of this title, costs shall be allowed in all courts to the successful claimant, but such costs shall not include attorneys' fees."

Costs could not be assessed against the United States in the absence of a statute directly and specifically so authorizing.<sup>27</sup>

Costs on appeal to the Supreme Court, in a case in which the United States was a party, should not have on reversal been granted to the United States because of former Supreme Court Rule 29 giving costs to the prevailing party, since it did not apply where the United States was a party.<sup>28</sup>

*Chapter 171* sets forth procedural rules (see *Procedure*, above.)

*Section 2671* defines the term "federal agency" as including the executive departments and independent establishments

<sup>27</sup> U. S. v. Knowles' Estate, 58 F. 2d 718 (9th Cir., 1932).

<sup>28</sup> Oregon & C. R. Co. v. U. S., 37 S. Ct. 443, 243 U. S. 549, 61 L. Ed. 890 (1917).

of the United States, and corporations primarily acting as instrumentalities or agencies of the United States; but does not include any contractor with the United States. And "employees of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation. "Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States, means acting in "line of duty."

This section, defining the term "federal agency" as including executive departments and independent establishments of the United States and Government corporations, defines the term only in connection with Section 2674 of this title relating to administrative adjustments of certain claims, and does not apply to Section 2674 of this title so as to extend liability of the United States in respect to tort claims.<sup>29</sup>

*Section 2672* is titled "Administrative adjustment of claims of \$1,000 or less." This section provides that the head of each agency may consider, ascertain, adjust, determine, and settle any claim for money damages of \$1,000 or less. Such settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the Government whose act or omission gave rise to the claim, by reason of the same subject matter.

*Section 2674* defines the liability of the United States relating to tort claims, and provides that the Government shall not be liable for interest prior to the judgment, nor for punitive damages. Where the law of the place where the act or omission occurred provides for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such injury or death to the persons, respectively, for whose benefit the action was brought.

*Section 2675(a)*: "An action shall not be instituted upon a claim against the United States which has been presented to a federal agency, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of an employee of the government while acting

<sup>29</sup> *Douffas v. Johnson*, 83 F. Supp. 644 (D. C. D. C., 1949).

within the scope of his authority, unless such federal agency has made final disposition of the claim." However, Subsection (b) provides that the claimant may, upon fifteen days written notice, withdraw such claim from consideration of the federal agency and commence action thereon. And, action under Section 2675 shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

*Section 2676* provides that the judgment in an action under Section 1346 (b) shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the Government whose act or omission gave rise to the claim.

These sections must be strictly construed, since claims presented to a federal agency rely on a limited waiver of sovereign immunity. No power is given to claimants to alter rights thereunder.<sup>30</sup>

*Section 2678*: Reasonable attorney fees may be allowed by the court or agency. If the recovery is \$500 or more, the fee shall not exceed 10 per centum of the amount recovered under section 2672, or 20 per centum of the amount recovered under section 1346 (b), to be paid out of, but not in addition to the amount of judgment, award, or settlement recovered. However, any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under section 2678, shall be fined not more than \$2,000 or imprisoned not more than one year, or both.

Less than 20% was held to be a reasonable sum to be allowed plaintiff's attorneys.<sup>31</sup>

*Section 2680* defines the exceptions to which the provisions of Chapter 171 and section 1346 (b) shall not apply. Subsection (a) of this section states: "Any claim based upon an act or omission of an employee of the Government, exercising due care, in

<sup>30</sup> Carlson v. U. S., 88 F. Supp. 337 (N. D. Ill., 1949); Satterwhite v. Bocelato, 130 F. Supp. 825 (E. D. N. C., 1955); Gitman v. U. S., 206 F. 2d 846 (9th Cir., 1953), affd., 347 U. S. 507, 74 S. Ct. 695, 98 L. Ed. 898 (1953).

<sup>31</sup> Hampton v. U. S., 121 F. Supp. 303 (D. C. Nev., 1954); Cotant v. U. S., 103 F. Supp. 770 (D. C. Idaho, 1952); Hodges v. U. S., 98 F. Supp. 281 (S. D. Iowa, 1948); Bandy v. U. S., 92 F. Supp. 360 (D. C. Nev., 1950).

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 be abused." This subsection is the one upon which the courts have held the Government not to be liable in a number of cases.<sup>32</sup>

The other twelve subsections define the other exceptions to the Act. These other exceptions are rather specifically spelled out, so that there need be little, if any, interpretation or construction. It is the "discretionary" acts which have caused the trouble in the interpretation of the Act.

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<sup>32</sup> Dalehite case, n. 3, above; *Feres v. U. S.*, 340 U. S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950).