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Joshua M. Levin

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COMMENTS

ORGANIZED CRIME AND INSULATED VIOLENCE: FEDERAL LIABILITY FOR ILLEGAL CONDUCT IN THE WITNESS PROTECTION PROGRAM

*The Mob is being squeezed. From within, old age and illness are weakening its tired family bosses; impatient younger Mafiosi are killing each other in their brutal reach for power. From without, federal and state authorities seem to be putting aside old rivalries to gang up on the gangsters in a new drive to put their leaders behind bars. . . .*¹

I. INTRODUCTION

Success in the government's new push against "La Cosa Nostra" will require a heightened dependence on "inside" information, provided by first-hand witnesses to organized criminal activity.²

All citizens, including insiders, have a duty to testify on civil or criminal matters when required by law.³ Not even the threat of death is a legal excuse not to testify.⁴ Yet historically, fear of retri-

¹ *Hard Days for the Mafia: The Feds Turn the Screws*, TIME, March 4, 1985, at 25.

² *Id.* at 28 ("mobsters worried about informants who might cooperate with prosecutors to lessen their own penalties").

³ Courts of justice are entitled to "every man's evidence." 8 J. WIGMORE, EVIDENCE § 2192, at 70 (McNaughton rev. ed. 1961). According to Professor Wigmore, the duty to testify when directed by a court to do so comes as an "indispensable element of civilized life," one necessary for the preservation of law and order. *Id.* at 72-73.

The sole exception to this canon exists in the several testimonial privileges granted by law. Historically, the right not to testify as to matters within one's knowledge could be granted when courts perceived that a relationship society wished to foster could be damaged by forced disclosure. *Id.* § 2285, at 527. Generally, however, the threat to the relationship had to exceed society's need for information before the privilege would be granted. *Id.* Privileges between attorneys and clients, physicians and patients, clergymen and penitents, and husbands and wives have been recognized on this basis. See Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101 (1956). For the classical formulation of the factors which should govern creation of a testimonial privilege, see 8 J. WIGMORE, EVIDENCE § 2285 at 527.

⁴ *Piemonte v. United States*, 367 U.S. 556, 559 n.2 (1960).

sal has deterred many would-be informants from providing information to law enforcement authorities,⁵ particularly when the information has concerned organized crime.⁶

Since 1970, the Justice Department's Witness Protection Program (hereinafter "WPP"),⁷ has provided an important testimonial incentive to persons with knowledge of criminal conduct of interest to the government. Established by Title V of the Organized Crime Control Act of 1970,⁸ the WPP authorizes⁹ the Attorney General to

⁵ See, e.g., *United States v. Gravel*, 605 F.2d 750, 752 (5th Cir. 1979) (cocaine dealer refused to tell grand jury of source, for fear of reprisal); *United States v. Patrick*, 542 F.2d 381, 388 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977) (threatened reprisal did not excuse witness from duty to testify about associate's gambling activities). A report by the Department of Justice's Criminal Division has noted that:

Because discouraging witnesses with the use of violence is such an effective tool for neutralizing law enforcement, the most cruel and inhuman torture before death is not uncommon. Those suspected of cooperating with law enforcement officials have been beaten, burned, blown up, shot, drowned, and/or garrotted. The hits are typically well-planned and executed by professionals who leave few traces, and on the rare occasion where there are witnesses, as soon as the word goes out that it was a mob hit, the witnesses become very reticent. . . .

U.S. DEPT. OF JUSTICE, WITNESS SECURITY PROGRAM REVIEW COMM. REPORT, DRAFT 7, *reprinted in Witness Protection Program: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Judiciary Comm.*, 95th Cong., 2nd Sess. 276 (1978) [hereinafter cited as *1978 Hearings*].

⁶ The likelihood of reprisal against those who testify is uncertain. Compare *J. ALBINI, THE AMERICAN MAFIA* 267-69 (1971) (a participant in organized crime will probably be killed for revealing facts which "might be legally devastating to important syndicate participants. . . ." Exceptions occur when social conditions, including the likelihood of a police crack-down, warrant against it) with *F. IANNI & E. REUSS-IANNI, A FAMILY BUSINESS* 146-49 (1972) (study of one Italian-American crime family revealed no use of "coercive sanctions" for violations of secrecy). See also *United States v. Mastrangelo*, 662 F.2d 946, 949 (2nd Cir. 1981) *cert denied*, 456 U.S. 973 (1982) (government witness killed on his way to testify about drug importation).

⁷ The Witness Protection Program is also called the Witness Security Program (WSP), or WITSEC.

⁸ Pub. L. No. 91-452, §§ 501-04, 84 Stat. 922, 933-34, *repealed by* Continuing Appropriations, 1985-Comprehensive Crime Control Act of 1984, §§ 1207-10, 98 Stat. 1837, 2153-63. Original authorization for the WPP is reprinted at 18 U.S.C. prec. § 3481 (1976).

⁹ 18 U.S.C. prec. § 3481 (1976) read in full:

Sec. 501. The Attorney General of the United States is authorized to provide for the security of Government witnesses, potential Government witnesses, and the families of Government witnesses and potential witnesses in legal proceedings against any person alleged to have participated in an organized criminal activity.

Sec. 502. The Attorney General of the United States is authorized to rent, purchase, modify, or remodel protected housing facilities and to otherwise offer to provide for the health, safety, and welfare of witnesses and persons intended to be called as Government witnesses, and the families of witnesses and persons intended to be called as Government witnesses in legal proceedings instituted against any person alleged to have participated in an organized criminal activity whenever, in his judgment, testimony from, or willingness to testify by, such a witness would place his life or person, or the life or person of a member of his family or household, in jeopardy. Any person availing himself of an offer by the Attorney General

provide witnesses with short-term or permanent protection. Such protection may include 24-hour supervision, or outright relocation. Under the program, witnesses and their families have received wholly new identities, credit card and work histories, and indefinite subsistence payments. Between 1970 and 1983, over 4,000 witnesses and 8,000 family members entered the program.¹⁰ With annual program costs in excess of \$30.9 million,¹¹ the WPP currently is regarded as an indispensable tool in federal organized crime fighting efforts.¹²

to use such facilities may continue to use such facilities for as long as the Attorney General determines the jeopardy to his life or person continues.

Sec. 503. As used in this title, "Government" means the United States, any State, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department agency, or instrumentality thereof. The offer of facilities to witnesses may be conditioned by the Attorney General upon reimbursement in whole or in part to the United States by any State or any political subdivision, or any department, agency, or instrumentality thereof of the cost of maintaining and protecting such witnesses.

Sec. 504. There is hereby authorized to be appropriated from time to time such funds as are necessary to carry out the provisions of this title.

¹⁰ COMPTROLLER GENERAL OF THE UNITED STATES, CHANGES NEEDED IN WITNESS SECURITY PROGRAM, 8 (1983), [hereinafter cited as *GAO Report*], reprinted in *Hearings on H.R. 7309 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 97th Cong., 2d Sess. 309 (1982)* [hereinafter cited as *1982 House Hearings*].

¹¹ Witnesses' enrollment and annual program costs between 1970 and 1985 were as follows:

Fiscal Year	Admitted	Program Costs (millions)
1970-73	647	NA
1974	324	\$ 3.1
1975	371	11.4
1976	466	12.6
1977	469	12.0
1978	441	11.6
1979	427	19.9
1980	334	21.5
1981	287	24.4
1982	324	28.4
1983	333	28.0
1984	290	29.0
1985	360(est.)	30.9

Telephone interview with Jerry Bullock, Public Affairs Office, United States Marshals Service (Mar. 15, 1985); telephone interview with Bill Dempsey, Public Affairs Office, United States Marshals Service (Sept. 20, 1985).

¹² H.R. REP. NO. 767, 98th Cong., 2d Sess. 11 n.1 (1984) [hereinafter cited as *1984 House Report*]. "In general, the contribution of these [government witnesses] to the war on organized crime cannot be overestimated. . . ." *Witness Security Program: Hearings Before the Permanent Subcomm. on Investigation of the Senate Comm. on the Governmental Affairs, 96th Cong., 2d Sess. 2 (1980)* (opening statement of Sen. Nunn) [hereinafter cited as *1980 Senate Hearings*]. In recent years, protected witnesses with personal histories in

Yet society has paid a heavy price for the WPP's successes. While maximizing witness security by removing witnesses from their previous lives, the program has also given witnesses a chance to escape existing civil or criminal obligations. Specifically, the WPP has enabled divorced witnesses to keep their new identities from spouses. Many witnesses consequently have violated standing custody or visitation decrees, depriving former spouses of all access to their children for several years.¹³ Furthermore, as a rule the WPP has placed witnesses in communities across the country without alerting state and local officials to the witnesses' personal history, or even their presence. Many protected witnesses are themselves criminals,¹⁴ and have committed new crimes after their admission to the WPP, including murder.¹⁵

This Comment examines the accomplishments of the WPP to date and argues that the courts and the Department of Justice have struck an improper balance in weighing a witness' right to protection with the security interests of society. To an extent, an inherent tension must exist between the rights of a protected witness and the surrounding community: the anonymity that increases a witness' safety from reprisal necessarily diminishes access to a witness for law-abiding persons as well. WPP officials, however, consistently have made decisions to admit and shield witnesses without attempting to enforce child custody and visitation obligations, and without evaluating a witness' credibility or threat of harm.¹⁶ Numerous citi-

organized crime have credited the program both for saving and refocusing their lives. See 1980 Senate Hearings at 6 ("The program is super. Based on what it is designed to do, it does it well. It's designed to keep people alive and give them a new start in life, and it accomplishes this program in a damn good fashion.") (statement of anonymous witness). It is estimated that 10,000 criminals have been convicted as a result of testimony provided by federally protected witnesses. Moreover, these criminals have received sentences two times longer than those of defendants in similar cases without protected witness testimony. See Coates, *Another Bad Apple Sours Image of Witness Protection Program*, Chicago Tribune, Mar. 2, 1986, at 8, col. 5.

¹³ See *infra* notes 170-98 and accompanying text.

¹⁴ See 1980 Senate Hearings, *supra* note 12, at 255 (statement of Howard Safir, Assistant Director for Operations U.S. Marshals Service) ("When it [the program] was originally constructed it was designed primarily for those people who were involved in criminal activity and it is not structured for non-criminal people. . . . [Any non-criminal] who would come into this program . . . would find considerable trauma. . . .") *Id.* Over 95% of all WPP witnesses have criminal records. *Id.* at 280. In fact, some are released from current prison terms and are given protection in exchange for inside testimony. See *infra* notes 134-51 and accompanying text.

¹⁵ Between 1978 and 1982, 200 witnesses in the WPP were rearrested on new criminal charges. See GAO Report 17, reprinted in 1982 House Hearings, *supra* note 10, at 318. Protected witnesses have committed 10 murders since the program's start. See 1984 House Report, *supra* note 12, at 28 n.23.

¹⁶ See, generally Part III, *infra*.

zens have sued the federal government for injuries suffered at the hands of WPP witnesses;¹⁷ courts repeatedly have found, however, that federal decisions concerning the selection and protection of witnesses are discretionary acts for which the government cannot be liable.¹⁸ Often, these courts have misconstrued the breadth of government discretion, and wrongly removed an important means for suing the government for its negligent acts.

This Comment posits that the WPP can operate effectively without the unlimited freedom traditionally enjoyed by both administrators and witnesses. Indeed, in October 1984, Congress recognized the need to control WPP excesses by passing the first legislative reform of the program in its history.¹⁹

Part I of this Comment examines the history and structure of the WPP, emphasizing the numerous administrative problems which have contributed to failures in protection and selection. Part II considers the suitability of the Federal Tort Claims Act as a means of imposing federal liability in the WPP. Part III examines the courts' extraordinary deference to the government in the WPP, by considering cases in which federal actions have been challenged. Part IV considers the strengths and limitations of the new federal statute governing the WPP—the Witness Security Reform Act of 1984—²⁰ as a means of correcting the balance between the rights of protected witnesses and the community at large.

This Comment contends that an equitable WPP must include the mandatory assessment of a witness' risk to a community before admission to the program; must hold witnesses to all their existing civil obligations; and must impose liability on the federal government when its negligent administration of the WPP allows protected persons to commit illegal acts. These reforms would preserve society's legitimate interest in controlled access to a protected witness, without significantly damaging the governmental interest in inside information.

I. CURRENT STRUCTURE OF THE WPP

A. ORIGINAL PROGRAM FORMATION

Long before the formation of a centralized witness protection

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See *infra* notes 207-10 and accompanying text.

²⁰ Continuing Appropriations, 1985-Comprehensive Crime Control Act of 1984, §§ 1207-10, 98 Stat. 1837, 2153-63. The Witness Security Reform Act is Congress' preferred means of referring to Title XII, part F, subpart A of the massive FY 1985 continuing appropriations law.

program, federal investigators recognized organized crime's capacity to "eliminate anyone who stands in the way of its success and destroy anyone who betrays its secrets."²¹ For decades, however, federal officials made only erratic, *ad hoc* attempts to protect threatened witnesses. The Department of Justice developed a variety of means to safeguard witnesses, including many in use today,²² but no formal standards existed to determine the kind of witness who would be eligible, or the kind or duration of services to be provided. This absence of structure deterred²³ and inconvenienced²⁴ would-be witnesses.

The 1967 Task Force on Organized Crime²⁵ declared that existing provisions for protection inadequately protected witnesses from reprisal.²⁶ The Task Force urged Congress to create residential facilities, or "safe houses," for the protection of witnesses; witnesses desiring such protection could live at such a federal residence while the organized crime litigation was pending.²⁷ Congressional legislation addressing the Commission's proposal passed without debate in 1970.²⁸

In addition to the "safe houses" urged by the Task Force, Title V of the 1970 Organized Crime Control Act empowered the Attorney General to "otherwise provide for the health, safety, and wel-

²¹ U.S. DEPARTMENT OF JUSTICE, REPORT OF THE WITNESS SECURITY PROGRAM REVIEW COMM. DRAFT 3, reprinted in 1978 Hearings, *supra* note 5, at 272 (findings of the Kefauver Committee).

²² "The assistance varied and included arranging for relocation to a new residence, assisting in establishing a new identity, or obtaining employment. Often, the assistance was little more than a bus ticket to some distant location." GAO Report 5, reprinted in 1982 House Hearings, *supra* note 10, at 306. State and local officials relocated witnesses as well, working both with and apart from the Department of Justice. *Id.*

²³ Commentators on Senate Bill 30, the legislation that served as the foundation for the 1970 Organized Crime Control Act, noted that the certainty of a witness' safety directly affected the odds that the witness would testify. See *Organized Crime Control: Hearings Before Subcomm. No. 5 of the House Committee on the Judiciary*, 91st Cong., 1st Sess. 430 (1970) (statement of Aaron M. Kohn, U.S. Chamber of Commerce [hereinafter cited as 1970 Hearings]); *id.* at 496 (statement of Lawrence Speiser, American Civil Liberties Union).

²⁴ *Id.* at 430 (statement of Aaron M. Kohn, U.S. Chamber of Commerce). In 1962, the Justice Department protected one witness by transporting him to the Canal Zone.

²⁵ The Task Force on Organized Crime was established by President Lyndon Johnson's Commission on Law Enforcement and Administration of Justice.

²⁶ U.S. DEPARTMENT OF JUSTICE, REPORT OF THE WITNESS SECURITY PROGRAM REVIEW COMM. DRAFT 4, reprinted in 1978 Hearings, *supra* note 5, at 273.

²⁷ *Id.*

²⁸ Senate Bill 30, the proposed Organized Crime Control Act, was introduced by Sen. John McClellan (D-Ark.) on January 15, 1969. F. GRAHAM, THE ALIAS PROGRAM 43, 44 (1977); H.R. REP. NO. 1549, 91st Cong., 2d Sess. 1, reprinted in 1970 U.S. CODE CONG. & AD. NEWS 4007.

fare" of all protected witnesses.²⁹ Until 1984, this clause provided the sole statutory authority for the re-identification of witnesses.³⁰

Ironically, two factors suggest that Congress' grant of such broad authority to the WPP was inadvertent. First, Title V was a seemingly innocuous measure, lost amidst other more controversial reforms contained in the OCCA. These other sections of the legislation received extensive debate.³¹ Second, as originally drafted, the Act only permitted creation of the temporary residential facilities.³² The bill's sponsor acceded to a private Justice Department request to broaden the WPP's authority several months after the bill's introduction.³³ The Justice Department, however, did not tell Congress how this change would affect the WPP at the time of the Act's passage.³⁴

As passed, Title V of the OCCA authorized the Attorney General to "rent, purchase, or construct protected housing facilities and to otherwise offer to provide for the health, safety, and welfare" of witnesses.³⁵ Persons eligible for protection were those whom the government intended to call as witnesses in proceedings against persons "alleged to have participated in organized criminal activity."³⁶ Families of witnesses also were eligible for protection. Both the offer and acceptance of protection was voluntary. The only precondition for an offer of protection was the judgment of the Attor-

²⁹ Pub. L. No. 91-452, § 502, 84 Stat. 933.

³⁰ See *supra* note 20 and accompanying text.

³¹ See GRAHAM, *supra* note 28, at 44. The Organized Crime Control Act also proposed changes in the inquisitorial powers of grand juries, increased penalties for habitual offenders, and reduced witness freedom from self-incrimination. See generally H.R. REP. NO. 1549, 91st Cong., 2d Sess. 1, reprinted in 1970 U.S. CODE CONG. & AD. NEWS 4007-91.

³² Similar facilities previously had been used by the Department of State to debrief defectors and agents. U.S. DEPT. OF JUSTICE, REPORT OF THE WITNESS SECURITY PROGRAM REVIEW COMM. DRAFT 5, reprinted in 1978 Hearings, *supra* note 5, at 274; GRAHAM, *supra* note 28, at 43.

³³ In the spring of 1969, Sen. McClellan received a letter from then Attorney General John Mitchell requesting that funds be given to the Department of Justice "for the care and protection of such witnesses, to be used in whatever manner is deemed most useful under the special circumstances of each case." GRAHAM, *supra* note 28, at 43. The Department wrote the text which was added to the bill. *Id.*

³⁴ Attorney General Mitchell informed a committee of the House of Representatives in May 1970 that the change would enable the Department of Justice to relocate and provide jobs for witnesses. *Id.* at 44. One observer of the WPP concluded that Congress remained unaware of the Justice Department's program for renaming witnesses until 1973. *Id.* at 44-45. "[I]n many ways, [the WPP] represented a culmination of abuses within the executive branch that only reached their apex in the Nixon administration; excessive secrecy, deception, contempt for Congress, institutionalized lying, and bureaucratic arrogance." *Id.* at 45.

³⁵ Pub. L. No. 91-452, § 501, 84 Stat. 933.

³⁶ *Id.*

ney General that the lives “or person(s) of the witness, his family, or his household were jeopardized by the witness’ willingness to testify.”³⁷ Once begun, protection could be continued as long as the Attorney General determined that risk existed.³⁸

The Justice Department adopted few administrative procedures for the WPP in the first years after the Act’s passage.³⁹ These established an admissions process for the program,⁴⁰ and described minimum background information to be required of all new entrants.⁴¹ Such background information included general personal information about a prospective witness’ name, number of family members, employment, and criminal history. It provided standards for measuring the value of a witness to the Justice Department. These standards required a description of the significance of the witness’ case; a summary of the testimony; and a listing of other prospective witnesses.⁴² The purpose of collecting data was to enable the Department of Justice to decide if “it would be advantageous to the federal interest” for protection to be offered.⁴³ The Justice Department

³⁷ *Id.* Confining the WPP to voluntary participants was the sole recommendation made by commentators in congressional hearings on S. 30. See 1970 Hearings, *supra* note 23, at 496 (statement of Lawrence Speiser, American Civil Liberties Union).

³⁸ Pub. L. No. 91-452, § 502, 84 Stat. 933. In 1975, a Justice Department manual further specified that a witness had to be “essential [to] a specific case that is important in the administration of criminal justice” to be accepted. U.S. ATTORNEYS’ MANUAL ¶9-9-21.100, in 1982 House Hearings, *supra* note 10, at 259.

³⁹ U.S. Dept. of Justice, Justice Department Order OBD 2110.2: Witness Protection Maintenance Policy and Procedures (Jan. 10, 1975) [hereinafter *Justice Order OBD 2110.2*], reprinted in 1982 House Hearings, *supra* note 10, at 284.

⁴⁰ Authority to request government witness protection was entrusted to one of three persons: the U.S. Attorney for the district in which the witness resided; an Assistant Attorney General from either the criminal or civil division of the Justice Department (depending on the case at trial); and a designee of the Assistant Attorney General. *Id.*, reprinted in 1982 House Hearings, *supra* note 10, at 285-86.

⁴¹ *Id.*; U.S. ATTORNEYS’ MANUAL 9-9-21.400 (April 16, 1981), reprinted in 1982 House Hearings, *supra* note 10, at 261-63.

⁴² Requests for admission were required to contain information in 13 separate areas relating to the candidate: the witness’ name, address, date and place of birth, and police record; the importance of the case, as measured by power of the illegal organization and the suspect on trial; a summary of the testimony to be provided by the witness; determination of the degree of threat posed to the witness, including the names of suspects; names, dates and places of birth, and relationship to the witness of all other persons recommended for relocation; a full listing of a witness’ assets and liabilities, including real and personal property, debts, alimony, and child support orders; preliminary interviews of the witness and family; an estimate of each trial date in which the witness would be asked to appear; names of other individuals to whom protection would be offered; medical problems experienced by the witness or family; parole restrictions; employment history; and likely subsistence needs. *Id.*; *Justice Order OBD 2110.2*, reprinted in 1982 House Hearings, *supra* note 10, at 285-86.

⁴³ *Justice Order OBD 2110.2*, reprinted in 1982 House Hearings, *supra* note 10, at 285. The

did not address the effect of protection on *other* interests, including those of communities to which witnesses would be sent.

B. GROWTH AND CHANGE IN WPP DESIGN

An increase in the number of program entrants⁴⁴ forced limited structural reforms on the WPP in the first years following its creation, particularly in the provision of witness services. Three reforms are especially noteworthy: the replacement of temporary "safe houses" with permanent relocation;⁴⁵ creation of a protection bureaucracy to meet witness needs;⁴⁶ and the required preparation of a memorandum between government and witness, enumerating a new entrant's rights and duties in the WPP.⁴⁷ While clarifying the extent of the government's responsibility to protected witnesses, these reforms did little to enforce witnesses' responsibilities to persons outside the program.

Replacement of Safe Houses. From their inception, safehouses were criticized because they required continued monitoring and servicing, and because they had the effect of incarcerating witnesses and their families for the duration of protection.⁴⁸ Further, by exposing witnesses to each other, safehouses increased the likelihood of government probes being disclosed without authorization.⁴⁹

As an alternative to safehouses, nondescript government-purchased housing gradually became the preferred means by which WPP witnesses were protected. Instead of guarding witnesses to ensure their safety, WPP officials "hid" witnesses by minimizing the government's contact with them.⁵⁰ This change in policy increased witnesses' freedom of movement; at the same time, it damaged the government's ability to detect and prevent illicit witness conduct.

Creation of WPP Bureaucracy. Subjecting witnesses to live with

Justice Department Order assigns responsibility for determining a witness' eligibility to the appropriate Assistant Attorney General. *Id.* at 286.

⁴⁴ See *supra* note 11.

⁴⁵ See *infra* note 48-50 and accompanying text.

⁴⁶ See *infra* notes 51-54 and accompanying text.

⁴⁷ See *infra* note 55-61 and accompanying text.

⁴⁸ 1978 Hearings, *supra* note 5, at 91 (statement of William E. Hall, Director, U.S. Marshals Service).

⁴⁹ *Id.*

⁵⁰ According to one Assistant U.S. Attorney, even the role of a federal agent assigned to a witness is limited.

[B]asically [the agents] find them a place to live and the people are on their own. It's (not) as if you have (an agent) . . . hanging out at the home or something like that. They just get them set up and leave them alone and then if there is a protective problem, (the agent is there).

Bergmann v. United States, 689 F.2d 789, 795 (8th Cir. 1982).

new identities prompted the WPP to expand witness services. An Office of Enforcement Operations was created to review witness backgrounds prior to admission and to schedule witness appearances at trial.⁵¹ Responsibility for the daily protection of witnesses was entrusted to the United States Marshals Service (USMS).⁵² Gradually, marshals and their deputies received training in law, psychology, and counseling to help witnesses adjust to their new lives.⁵³ Notwithstanding this training, USMS agents often remained unwilling to perform their newly-assigned tasks.⁵⁴

Memorandum of Understanding. In the WPP's early years, witnesses commonly received misleading or unauthorized promises from federal agents, often in an overzealous attempt to elicit testimony.⁵⁵ In 1977, a Justice Department committee recommended the introduction of a standardized memorandum as the sole means of communicating federal responsibilities to witnesses.⁵⁶ The resulting Memorandum of Understanding (MOU)—one drafted by the Justice Department and signed by each protected witness prior to admission—stipulated such things as the witness' agreement to accept a name change,⁵⁷ and the government's willingness to pay subsistence income⁵⁸ and assist the witness' job search.⁵⁹ The MOU also informed witnesses of two forms of proscribed behavior that

⁵¹ GAO Report 11, reprinted in 1982 House Hearings, *supra* note 10, at 312.

⁵² In 1973, 28 C.F.R. § 0.111(c) was adopted to instruct the Marshals Service Director to make "[p]rovision[s] for the health, safety and welfare of government witnesses and their families pursuant to §§ 501-504 of Pub. L. 91-452". 28 C.F.R. § 0.111(c) (1982).

⁵³ Marshals Service specialists receive training in courses ranging from bomb identification to stress management at the Federal Law Enforcement Training Center in Glynco, Georgia. See 1978 Hearings, *supra* note 5, at 204-13 (reproduction of training school curriculum).

⁵⁴ For example, beginning in 1975 Justice Department guidelines required USMS agents to help identify potential job opportunities for protected witnesses. See *infra* note 123. The program's early years, however, were marked by instances in which this duty was ignored. *Id.* Similarly, USMS agents commonly failed to visit protected witnesses in their homes, despite their promises to do so. See *infra* note 124 and accompanying text.

⁵⁵ U.S. DEPT. OF JUSTICE, REPORT OF THE WITNESS SECURITY PROGRAM REVIEW COMM. DRAFT 47, reprinted in 1978 Hearings, *supra* note 5, at 316.

⁵⁶ *Id.*

⁵⁷ See 1978 Hearings, *supra* note 5, at 234, 250.

⁵⁸ *Id.* at 235.

⁵⁹ Acquisition of gainful employment is the responsibility of the protected witness. EACH WITNESS IS EXPECTED TO ACQUIRE EMPLOYMENT WITHIN SIXTY (60) DAYS FOLLOWING HIS OR HER PERMANENT RELOCATION. The United States Marshals Service will assist the witness in attempting to locate one job opportunity. The United States Marshals Service can give no assurance that a job opportunity which may be located, will be equal to the witness' last job in either type, prestige, or pay. . . . If the witness fails to accept this job opportunity, he or she will be terminated from subsistence.

Id. at 237 (emphasis in original).

would jeopardize their inclusion in the WPP. First, the United States refused to "shield" witnesses from the claims of creditors; all witnesses had to settle civil obligations in advance of entrance.⁶⁰ Second, criminal conduct or other "wilful acts" endangering witness security after admission subjected the witness to automatic WPP termination.⁶¹

Although laudable, the MOU suffered from a lack of enforceability. The document was neither codified nor incorporated into federal regulations. Justice officials emphasized that its terms did not constitute a contract with a witness.⁶² Consequently, enforcement of the MOU required the cooperation of individual WPP agents; when they were unable or unwilling to invoke the MOU to enforce a witness' civic duties, an outside party could do little.⁶³

C. ADEQUACY OF EXISTING WPP DESIGN

Until 1984, the above reforms of the WPP failed to provide efficient internal management, harmonious relations with other government agencies, or satisfactory witness services.⁶⁴ These failures

⁶⁰ "Arrangements must be made with creditors immediately, to settle all debts. Failure to do so will jeopardize participation in the Witness Protection Program since the United States Marshals Service *WILL NOT SHIELD* witnesses from legitimate creditors. Failure to settle debts may result in the disclosure of location to creditors." *Id.* at 236 (emphasis in original) (other emphasis omitted).

⁶¹ Wilful acts on the part of the witness or family members, which jeopardize the witness' security, *WILL BE GROUNDS FOR TERMINATION* . . . since the Marshals Service will be unable to provide adequate protection. Such actions as . . . involvement in criminal activity will result in *IMMEDIATE TERMINATION* from the Witness Protection Program. Likewise, the United States Marshals Service *WILL NOT SHIELD* witnesses from civil or criminal litigation initiated prior to or subsequent to entry into the Program.

Id. at 233 (emphasis in original).

⁶² In a November 1982 letter to Rep. Robert W. Kastenmeier (D-Wis.), Associate Attorney General Rudolph W. Giuliani stressed that imposing a contractual relationship between a protected witness and the government, "whereby the witness would agree to provide testimony in return for program services and financial assistance" would be a violation of law. See 1982 *House Hearings*, *supra* note 10, at 220 (letter from Assoc. Attorney General Giuliani). The law cited by Giuliani, 18 U.S.C. § 201(h), proscribes graft and bribery among public officials, in general, and prohibits the payment or promise of anything of value "for or because of the testimony . . . to be given by [a] person as a witness . . ." in particular. 18 U.S.C. § 201(h) (1977). Giuliani has characterized the WPP's services and payments to witnesses as being incidental to and not in exchange for witness testimony. 1982 *House Hearings*, *supra* note 10, at 220.

⁶³ In *Melo-Tone Vending, Inc. v. United States*, 666 F.2d 687 (1st Cir. 1981), for example, the court found no federal liability when the government refused to provide a plaintiff with a witness' new identity, so that the plaintiff could collect a \$5,000 debt. For further discussion of *Melo-Tone*, see *infra* notes 88-93 and accompanying text.

⁶⁴ For a general criticism of the program's recent administration, see U.S. DEPARTMENT OF JUSTICE, WITNESS SECURITY PROGRAM REVIEW COMM. REPORT, DRAFT AND COMMENTS, reprinted in 1978 *Hearings*, *supra* note 5, at 256.

had direct and indirect bearing on the WPP's ability to enforce witnesses' civic duties.

1. Direct Effects

Ambivalence of U.S. Marshals. A tension emerged between policy-makers and implementers of the WPP, due to long-standing organizational divisions in the program's administrative office, the United States Marshals Service (USMS). Determining the services to be promised witnesses in the MOU, and other program formulation, rests with a Chief of Witness Security, appointed by the Attorney General.⁶⁵ Yet historically, only a small proportion of USMS personnel assigned to the protection of witnesses have answered to this official.⁶⁶ Most USMS agents are deputy marshals, working under a U.S. marshal whom the President appoints to a four-year term.⁶⁷ By law, U.S. marshals can supplement these deputies with untrained assistants, known as "contact deputies." U.S. marshals also have authority to veto the witness security chief's placement of a relocated witness in their district.⁶⁸ Witness oversight falters from the use of untrained staff and conflicting lines of authority.⁶⁹

State and Local Governments. Despite the large proportion of former criminals in the WPP, the program has never required that state or local officials be notified that witnesses are to be placed in their communities.⁷⁰ According to WPP policy, "necessary security precautions preclude . . . notification of local law enforcement authorities of the presence of protected witnesses within their jurisdiction...unless and until it appears that the witness has become involved in an illegal activity."⁷¹ Theoretically, this policy permits USMS officials to share witness information with local officials after any alleged illegal act. In practice, however, local officials are noti-

⁶⁵ 1978 Hearings, *supra* note 5, at 91-94 (statement of William E. Hall, Director, United States Marshals Service).

⁶⁶ It was estimated in 1980 that 65 percent of the WPP's field personnel were outside the control of the Chief of Witness Security. 1980 Senate Hearings, *supra* note 12, at 48 (statement of Gregory Baldwin, Senate Permanent Subcommittee on Investigations).

⁶⁷ See 28 U.S.C. §§ 561-62 (1977). Every U.S. marshal retains jurisdiction for one judicial district in the United States. *Id.* § 561.

⁶⁸ 1980 Senate Hearings, *supra* note 12, at 48 (statement of Gregory Baldwin). It has been observed that "the U.S. marshal often functions as an entirely separate entity responsible basically to no one." *Id.*

⁶⁹ Even trained deputy marshals have a reputation for laxness. In the WPP's early days, one witness' identity was jeopardized when he was booked by his deputy marshal into a hotel run by the Mafia; the deputy marshal casually mentioned the witness' identity to an undercover federal agent, posing as a prostitute. *Id.* at 56.

⁷⁰ See 1982 House Hearings, *supra* note 10, at 222 (letter from Assoc. Attorney General Giuliani).

⁷¹ *Id.*

fied only "when a witness is arrested and his fingerprints are sent to the FBI for identification."⁷² Consequently, local officials must request FBI assistance to learn about the criminal past of a suspicious person. Otherwise, federal agents are free to decide when, and if, to contact local officials about the background of a criminal suspect.⁷³

2. *Indirect Effects*

To the extent that the WPP has failed to fulfill witnesses' expectations for new jobs, homes, and security, it has encouraged their discontent, and may have contributed to many witnesses' subsequent illegal acts. Employment, for example, is one means of discouraging witness crime.⁷⁴ Yet witnesses rarely get help finding work before they have completed their testimony, and many have been unemployed for years.⁷⁵ Under WPP rules, witnesses must accept available jobs or lose financial assistance from the program, regardless of their interest in the work found.⁷⁶ Additionally, in the

⁷² *Id.* The FBI provides the WPP background information on witnesses with criminal records. It also is the agency primarily responsible for divulging witness' criminal records with state officials. Justice Department regulations require all adult WPP participants to be fingerprinted upon their entry into the program. These prints are kept on file with witnesses' prior criminal histories. If a protected witness later becomes a suspect in an investigation, and fingerprints are requested from the FBI, that agency notifies the USMS, which also provides state agents with additional information relevant to their investigation. *Id.* at 218.

⁷³ See, e.g., *infra* notes 144-45 and accompanying text.

⁷⁴ See S. REP. NO. 300, 97th Cong., 1st Sess. 7 (1981) ("Finding employment is the most essential objective the successfully relocated witness must realize.").

⁷⁵ One relocated witness recounted that

When it came down to employment, I was constantly asking, because we were told again when we started the program . . . that I would have to have a job in 90 days, joining the program. . . . After almost [two] years, I was still asking the marshals, 'When are we going to start looking for a job?' They said, 'We don't want to get you a job until you testify, because we don't want you taking time off from work to go testify.'

1980 *Senate Hearings*, *supra* note 12, at 73-74 (testimony of Gary Haak).

⁷⁶ The relocated witness, appearing to have been born yesterday . . . cannot independently seek any type of worthwhile employment in our sophisticated society. He must accept what the marshals service can find for him. . . . Normally, some menial-type job can be found for the witness. One difficulty is the fact that many [criminal witnesses lack] legitimate job skills. . . . [S]ome witnesses are highly educated and formerly held high-salaried, responsible positions. The Marshals Service has neither the expertise, the flexibility, nor the funds to effectively assist witnesses in these broad categories.

Id. at 10 (testimony of Gregory Baldwin and Raymond Worsham, Senate Permanent Subcommittee on Investigations). The WPP maintains a "Headquarters Employment Assistance Section." This office was established to develop national contacts with employers willing to hire protected witnesses. *Id.* at 259-60 (testimony of Howard Safir, Director for Operations, USMS). In 1980, however, this office had only three staff positions, two of which had been vacant for six months. *Id.* at 263.

WPP's first years, overzealous deputy marshals made exaggerated promises about rewards, like new homes, that witnesses could expect. Rarely were these promises met.⁷⁷ Introduction of the MOU has partially alleviated this problem.⁷⁸

III. GOVERNMENT LIABILITY FOR WITNESSES' ILLEGAL ACTS

Placement in the WPP automatically insulates a witness from his or her prior responsibilities. Serious questions arise regarding the federal government's responsibility when witnesses abuse their newfound freedom by violating the law. Witnesses typically hide behind their new identities in three situations: when evading debtor responsibilities; when evading state court orders governing child custody and visitation; and when committing violent crimes.⁷⁹ At issue in all three situations is whether the government should be made liable to third parties for its failure to foresee the effect of a witness' admission to the program, or its failure to ensure a witness' compliance with the law while in the program. In response to this question, courts have reached conflicting conclusions as to the extent of government responsibility and liability for witnesses' illegal acts.

A. CIVIL JUDGMENTS WITHIN THE WPP

Since the country's inception, America's courts have abided by the principle that a sovereign body cannot be sued without its consent.⁸⁰ Yet because this doctrine has little basis in the words of the

⁷⁷ Commenting on informal assurances he allegedly received before entering the WPP, one witness has noted that:

I was told that my family and I would initially be placed in a hotel in the city to which we would be relocated. The stay in the hotel was to be very brief. . . . We stayed there for approximately two months. . . . Although I had been told . . . my contact Marshal in my place of relocation would help me find another place to live so that we could get out of the motel, this never happened. In fact, my wife and I finally had to go out and find our own place to rent . . . without any assistance from our Marshal.

Id. at 64 (testimony of Gary Haak).

⁷⁸ See text accompanying *infra* note 237. Notwithstanding its unenforceability, the mere existence of the MOU has served to curb the promises made and expectations placed in the WPP. For an examination of the effect of Congress' 1984 reforms on the WPP's management, see generally *infra*, Part IV.

⁷⁹ See generally *infra*, Part IV, and notes and accompanying text.

⁸⁰ See THE FEDERALIST NO. 81, at 548 (A. Hamilton) (J. Cooke ed. 1961) ("It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without his consent*") (emphasis in original). The Supreme Court's first formal recognition of sovereign immunity came in *United States v. Clarke*, 33 U.S. (8 Pet.) 436 (1834). In *Nichols v. United States*, 74 U.S. (7 Wall.) 122, 126 (1869), the court declared the doctrine "fundamental" to the performance of governmental duties, but offered little elaboration as to why this was the case. *Id.* An "element of faith" acceptance of the sovereign immunity rule was also espoused by the Court in *Hans v. Louisiana*, 134 U.S. 1, 21 (1890) ("It

Constitution,⁸¹ Congress and the Supreme Court periodically have challenged and limited the doctrine of sovereign immunity.⁸²

By the Act of February 24, 1855,⁸³ Congress first gave courts authority to determine money damages for citizens injured by federal conduct.⁸⁴ This and later modifying statutes,⁸⁵ however, were only jurisdictional; they created neither a right to sue the United States nor a right to money damages, even for alleged constitutional violations.⁸⁶ Plaintiffs had to rely on a specific provision of federal law mandating compensation to receive a court judgment.⁸⁷

The absence of a provision authorizing compensation in the WPP helped defeat creditors' attempts to sue the federal government for money owed by debtors in the program. In *Melo-Tone Vending, Inc. v. United States*,⁸⁸ the First Circuit upheld a declaratory judgment against a creditor seeking to recover a loan made to a government witness prior to his protection. The court rejected arguments that the WPP had created a "direct and foreseeable

is not necessary that we should enter upon an examination of the rule. . . . It is enough for us to declare its existence.").

⁸¹ The Constitution granted the federal judiciary power over all "Cases, in Law and Equity, arising under this Constitution the Laws of the United States, . . . [and] to Controversies to which the United States shall be a party. . . ." U.S. CONST. art. III, § 2, cl. 1. The Eleventh Amendment to the Constitution bar suits in federal court, without consent, against "one of the United States by Citizens of another State. . . ." U.S. CONST. amend. XI.

⁸² See, e.g., *Owen v. City of Independence*, 445 U.S. 622, 645 (1980) (sovereign immunity called a "somewhat arid fountainhead"). In *Owen*, the Court noted that

it has never been understood how the doctrine of sovereign immunity came to be adopted in the American democracy. . . . [The doctrine] was never completely accepted by the courts, its underlying principle being deemed contrary to the basic concept of the law of torts that liability follows negligence, as well as foreign to the spirit of the constitutional guarantee that every person is entitled to a legal remedy for injuries he may receive in his person or property. . . .

Id. at 645-46 n.28.

⁸³ Ch. 122, 10 Stat. 612 (1855).

⁸⁴ The act created a Court of Claims to "hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States. . . ." *Id.* § 1.

⁸⁵ Originally, the Court of Claims' decisions were subject to the approval of Congress. The 1887 Tucker Act, 24 Stat. 505 (current version at 28 U.S.C. § 1491 (1977)) gave the Court of Claims the power of law but explicitly confined its jurisdiction to contract, admiralty, and other disputes not sounding in tort. See 1 L. JAYSON, *HANDLING FEDERAL TORT CLAIMS*, § 53 at 2-9 to 2-14, § 54 at 2-15 to 2-17 (1984).

⁸⁶ The fifth amendment of the United States Constitution prohibits any taking of "private property . . . for public use, without just compensation." U.S. CONST. amend. V. However, the Supreme Court has ruled that the Constitution or the language of a statute or regulation must specifically mandate compensation before a cause of action for money damages will lie. *United States v. Testan*, 424 U.S. 392, 401-02 (1976).

⁸⁷ *Testan*, 424 U.S. at 402.

⁸⁸ 666 F.2d 687 (1st. Cir. 1981).

interference” with the appellant’s property,⁸⁹ and that the WPP’s refusal to reimburse the loan or divulge the debtor’s whereabouts constituted an unlawful taking.⁹⁰ The court found that the WPP had only inconvenienced, not removed, appellant’s right to property.⁹¹ Furthermore, neither the WPP’s authorizing statute, nor any other statute required compensation for injury or loss resulting from the WPP’s administration.⁹² The absence of a WPP provision permitting money damages for uncompensated takings continues to obstruct creditors’ attempts to recover from protected witnesses.⁹³

B. TORT SUITS WITHIN THE WPP

Tortious conduct by WPP officials is more susceptible to suit than the kind of conduct addressed in *Melo-Tone*. In the 1946 Federal Tort Claims Act (FTCA),⁹⁴ Congress gave citizens a right to sue the United States, “in the same manner and to the same extent as a

⁸⁹ *Id.* at 689.

⁹⁰ *Id.* at 688.

⁹¹ “[T]he governmental action here was not directed at or toward the plaintiff’s property right, and any interference with that right . . . is at most an indirect consequence of the exercise of lawful governmental power.” *Id.* at 689.

⁹² *Id.* at 690.

⁹³ The plaintiff in *Melo-Tone* did not attempt to sue the WPP for breaching its Memorandum of Understanding with the witness. That document required entering witnesses to settle debts before entering the WPP, and warned that the government could expose to creditors those witnesses failing to do so. *See supra* note 60. The Memorandum was neither a statute nor a formal regulation and it did not mandate compensation to creditors in the event of breach. Further, the document provided that “no agency relationship” existed between the witness and the WPP in settlement of a witness’ debts. The program “assume[d] no responsibility for expenses incurred in concluding these arrangements.” 1978 *Hearings, supra* note 5, at 240. Thus, breach of the MOU alone could not have been a basis for a claim in *Melo-Tone*.

The Memorandum of Understanding became statutorily required in 1984. *See infra* note 239 and accompanying text. At this time, it is unknown whether the document will eventually contain new language, and whether it will specifically mandate compensation to creditors. Telephone interview with Gerald Elston, attorney, Office of General Counsel, United States Marshals Service, March 15, 1985; *see also infra* notes 240-41 and accompanying text.

⁹⁴ Act of August 2, 1946, Chapter 753, Title IV, 60 Stat. 842 (principally contained in 28 U.S.C. §§ 1346(b), 2671-80 (1976 and supp. IV 1980)). The FTCA replaced Congress’ previous practice of permitting citizens relief from governmental agents’ torts only through private bills and statutes authorizing relief in isolated fields of law. For example, the Act of March 4, 1913, 37 Stat. 843, authorized the Secretary of Agriculture “to reimburse owners of horses, vehicles, and other equipment lost, damaged, or destroyed while being used for necessary fire fighting. . . .” The Act of July 11, 1919, 41 Stat. 109, allowed the Army to settle claims not exceeding \$250 for “damages to persons and private property resulting from the operation of aircraft at home and abroad.” *See generally* 1 L. JAYSON, HANDLING FEDERAL TORT CLAIMS § 55 at 2-18 to 2-45 (1984). Private relief bills were plagued by an absence of uniformity and neglect of precedent: similar types of claims often received opposite treatments in successive Congresses. *See* 1 L. JAYSON, § 66.03 at 3-10, 3-11.

private individual under like circumstances” could be sued, for the negligent or wrongful acts of its employees.⁹⁵ Exempted from tort liability, however, were all acts of government employees

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 a part of the federal agency or an employee of the Government, whether or not the discretion involved be abused.*⁹⁶

Determining the breadth of the “discretionary function exemption” is critical to courts’ finding government tort liability in the WPP. Yet despite several Supreme Court cases defining the exemption,⁹⁷ consistent standards do not exist to distinguish discretionary acts from negligent, actionable ones.⁹⁸ Generally, Congress intended the FTCA to make federal actors accountable for conduct exceeding permissible limits of policy; Congress did not intend to allow citizens to use the FTCA to test the validity of policymaking itself.⁹⁹

The distinction between policymaking and policy implementation is often unclear, however. Government agents may act under general authority which requires them to make subjective decisions after considering unique sets of facts. These decisions may themselves be governed by informal rules, unique to an agency. Amidst uncertainty, courts have employed one of four different tests to determine the degree of discretion permitted in a given act. These can be thought of as the “absolutist,” “due care,” “statutory authority,” and “post discretion” tests of governmental discretion. Almost without exception, the test granting government agents the greatest discretion, the “absolutist” test, has governed courts’ evaluation of negligent federal conduct in the WPP.

⁹⁵ Act of August 2, 1946, *supra* note 94, at 60 Stat. 844, § 410(a). The United States is liable for injuries 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.” 28 U.S.C. § 1346(b) (1977). The “law of the place” clause requires a plaintiff to show an alleged tortious act under federal statute, or the tort law in a given state. Judgments stemming from the Act generally serve as a complete bar to any further action by a claimant. 28 U.S.C. § 2676.

⁹⁶ 28 U.S.C. § 2680(a) (1976) (emphasis added).

⁹⁷ See *infra* notes 99-108 and accompanying text.

⁹⁸ For a commentary on courts’ varying interpretations of the exemption, see *Blessing v. United States*, 447 F. Supp. 1160 (E.D. Pa. 1978); see also *Dupree v. United States*, 247 F.2d 819, 825 (3d Cir. 1957) (FTCA “confusing” in meaning and application); *Hernandez v. United States*, 112 F. Supp. 369, 370 (D. Hawaii 1953) (meaning “not crystal clear.”).

⁹⁹ See 1 L. JAYSON, *HANDLING FEDERAL TORT CLAIMS* § 71 at 3-24.

1. The "absolutist" interpretation

The Supreme Court first interpreted the reach of the discretionary function exemption in *Dalehite v. United States*.¹⁰⁰ *Dalehite* addressed the personal injury claims of several hundred people, killed or injured by an explosion of ammonium nitrate fertilizer. The explosion occurred as the fertilizer was being shipped to Europe as part of the American foreign aid program following World War II. The Court found that decisions regarding the packaging and shipment of the fertilizer were policy related. Consequently, neither the shipment's planners, nor the lower government agents who manually carried out the plans, were subject to liability.¹⁰¹ Federal immunity, the Court found, extended beyond an initial decision to pursue a course of action, and included all "determinations made by executives or administrators in establishing plans [or] specifications."¹⁰²

Under an absolutist reading of *Dalehite*, the government should be exempt from liability for any policy decisions, and acts carrying them out, that have not been statutorily barred. As long as governmental policy is being implemented, the theory goes, a government agent cannot be subject to tort liability. Several courts addressing alleged negligence in the WPP have adopted such a view.¹⁰³ Alternative interpretations of *Dalehite*, however, have been premised on the theory that some element of choice accompanies nearly every act.¹⁰⁴ Courts espousing this view have addressed the reasonableness and "due care" present in a governmental action as well as its relationship to policy.

2. The "due care" test

The Supreme Court helped introduce the "due care" test in *Indian Towing Co. v. United States*.¹⁰⁵ *Indian Towing* addressed the claims

¹⁰⁰ 346 U.S. 15 (1953).

¹⁰¹ Lower-level planners approved procedures which resulted in the volatile material being stored at too high a temperature and shipped without combustion experiments or proper warning labels. *Id.* at 38-44.

¹⁰² *Id.* at 35-36. "Where there is room for policy judgment and decision there is discretion." *Id.*

¹⁰³ See *infra* notes 147-51 & 175-82 and accompanying text.

¹⁰⁴ As one court has commented,

Most conscious acts of any person whether he works for the government or not, involve choice. Unless government officials . . . make their choices by flipping coins, their acts involve discretion in making decisions. . . .

If the Tort Claims Act is to have the corpuscular vitality to cover anything more than automobile accidents in which government officials were driving, the federal courts must reject an absolutist interpretation of *Dalehite*. . . .

Smith v. United States, 375 F.2d 243, 246 (5th Cir. 1967).

¹⁰⁵ 350 U.S. 61 (1955).

of a plaintiff whose ship was damaged by the Coast Guard's failure to maintain a local lighthouse. The Coast Guard acknowledged that it had failed to implement policy; nonetheless, the agency sought to avoid tort liability on grounds that the FTCA did not reach to government acts which private individuals did not perform.¹⁰⁶ Rejecting this argument, the Court held that the FTCA imposed a duty upon federal agencies to behave as a private person would, regardless of the uniqueness of a governmental function.¹⁰⁷ The Coast Guard, like a private person, could thus be held to a standard of due care.¹⁰⁸ Though not explicitly overruling *Dalehite*, *Indian Towing* refocuses government actors' liability upon a reasonable person standard and away from an actor's exercise of authorized discretion.

3. "Statutory authority" test

Functions performed under a statute or regulation expressly giving employees discretion to act generally are placed within the discretionary function exemption.¹⁰⁹ Often, the exemption will be permitted by courts even in the absence of express statutory language. Some jurisdictions, for example, exempt government agents from FTCA liability if an agency is authorized by law to act "as [it] shall determine."¹¹⁰

4. The "post-discretion" test

In a final, fourth test, courts occasionally invoke FTCA liability on grounds that the negligence of federal employees has occurred after the exercise of discretionary planning.¹¹¹ In *Logue v. United States*,¹¹² for example, the decision to remove a suicidal federal prisoner from a hospital to a county jail, where he subsequently killed

¹⁰⁶ *Id.* at 64.

¹⁰⁷ The Court found that the "hornbook tort law [requires] . . . one who undertakes to warn the public of danger . . . to perform his 'good Samaritan' task in a careful manner, even when such an act is performed only by government officials." *Id.* at 64-65.

¹⁰⁸ *Id.* at 69.

¹⁰⁹ *See, e.g.*, *Newberg v. Federal Sav. & Loan Ins. Corp.*, 317 F. Supp. 1104 (D. Ill. 1970) (statute authorizing agency discretionary purchase of saving and loan association assets barred FTCA liability for unnecessary purchase).

¹¹⁰ *See Blaber v. United States*, 212 F. Supp. 95 (E.D. N.Y. 1962), *aff'd*, 332 F.2d 629 (2d Cir. 1964) (Atomic Energy Commission, vested with authority to act "as the Commission shall determine," not liable for negligent nuclear components manufacturing).

¹¹¹ *See, e.g.*, *Logue v. United States*, 334 F. Supp. 322 (S.D. Tex. 1971), *rev'd on other grounds*, 459 F.2d 408 (5th Cir. 1972), *reh'g denied*, 463 F.2d 1340 (5th Cir. 1982), *vacated on other grounds*, 412 U.S. 521 (prison guard responsible for negligently supervising suicidal prisoner); *Hambleton v. United States*, 87 F. Supp. 994 (W.D. Wash. 1949), *rev'd on other grounds*, 185 F.2d 564 (9th Cir. 1950) (Army sergeant responsible for emotional distress caused by overzealous interrogation).

¹¹² 334 F. Supp. at 322.

himself, was found to be discretionary. The court found, however, that the federal agent lacked discretion with respect to guarding the prisoner; the agent's failure to provide reasonable care to prevent a second suicide attempt was held to be actionable.¹¹³

Courts possess considerable flexibility through these four rival tests to determine the scope of the discretionary function in the WPP. Usually, however, they have chosen to adopt an absolutist reading of *Dalehite*, and have immunized all official acts conducted by agents in the program.¹¹⁴ Courts have interpreted the WPP's sparse authorizing language to give U.S. agents broad discretion to decide not only how to protect witnesses, but also to whom protection may be offered. The negligent discretionary decisions of agents — decisions, for example, not to enforce existing custody decrees or not to warn local communities of a witness' presence — have been exempted from liability, regardless of the lack of wisdom and care with which they were made.¹¹⁵

IV. FEDERAL DISCRETION IN THE WPP

A. WITNESSES' COMMISSION OF CRIMES

Courts' deference to governmental discretion in the face of witnesses' illegal acts is well illustrated by an Eighth Circuit decision, *Bergmann v. United States*.¹¹⁶ In *Bergmann*, the USMS admitted Benjamin Rosado and his family into the WPP, so that Rosado might testify against underworld figures. Rosado's personal criminal record was long and well known to the assistant U.S. attorney requesting his protection.¹¹⁷ Nonetheless, the Justice Department found that Rosado met the agency's minimal requirements for WPP admission.¹¹⁸ The USMS soon changed Rosado's name, relocated him,¹¹⁹ and provided him with all necessary documentation; the USMS,

¹¹³ *Id.* at 325.

¹¹⁴ See *infra* notes 147-51 & 175 and accompanying text.

¹¹⁵ Reliance on non-absolutist interpretations of *Dalehite* could have led to opposite conclusions. Under the *Indian Towing* "due care" test, individual agents' performances would simply have been judged according to the duty of a private person under the same circumstances. Under a "post-discretion" test, WPP agents' protection of particular witnesses might have been deemed non-discretionary acts occurring after the discretionary WPP decision to protect. A finding of negligence in such a case would expose the agents to FTCA liability.

¹¹⁶ 526 F. Supp. 443 (E.D. Mo. 1981), *rev'd*, 689 F.2d 789 (8th Cir. 1982).

¹¹⁷ Between 1957 and 1976, Rosado was charged with burglary, car theft, armed and unarmed robbery, rape, sodomy, incest, and grand larceny. 526 F. Supp. at 446.

¹¹⁸ Specifically, the Department found that Rosado had agreed to be a witness, that his life appeared to be in immediate danger, and that evidence suggested it was "advantageous" to the government to protect him. *Id.*

¹¹⁹ Rosado was moved from New York City to St. Charles, Missouri. *Id.* at 446-47.

however, neither monitored Rosado's activities in his new city, nor notified local police of his presence. Three months after his entry into the WPP, Rosado shot and killed a police officer, Fred Bergmann, while committing a burglary.

The policeman's widow brought a wrongful death action against the United States government.¹²⁰ The district court found that the USMS was negligent in its failure to protect the outside community from Rosado and imposed liability under the FTCA.¹²¹ The court held that the WPP's policy formulation concerning the selection and supervision of witnesses was exempt from liability.¹²² It imposed liability, however, for WPP agents' acts which had deviated from informal Justice Department guidelines¹²³ and plans.¹²⁴ The district court also imposed liability under state tort law¹²⁵ for the government's failure to protect third persons from the potentially harmful acts of parties with whom it had a "special relationship."¹²⁶ The court found that such failure was a "substantial factor" leading to Bergmann's death.¹²⁷

The district court read the "discretionary function exemption" narrowly by refusing to apply it to actions inconsistent with informal

¹²⁰ 526 F. Supp. at 443. Rosado was charged and convicted of murder in August 1977. The state court sentenced him to life imprisonment. *Id.* at 445.

¹²¹ *Id.* at 451.

¹²² *Id.* at 450.

¹²³ The Justice Department WPP guidelines specified that "[j]ob assistance, when necessary, will be provided by the Witness Security Division of the U.S. Marshals Service, but will be limited to assisting the protected person in locating one reasonable job opportunity. . . ." *Justice Department Order OBD 2110.2, reprinted in 1982 House Hearings, supra* note 10, at 284. The USMS, however, set up no job interviews for Rosado during his protection. 526 F. Supp. at 447.

¹²⁴ A USMS agent testified that he intended to contact Rosado on a weekly basis, but had failed to do so. 526 F. Supp. at 448.

¹²⁵ To impose liability under the FTCA, the court had to find the government liable "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. §1346(b) (1977); *see supra* note 94 and accompanying text.

¹²⁶ 526 F. Supp. at 448-49. Missouri imposes a duty to protect others from the intentional or reckless acts of third persons when "one should realize through facts within his knowledge or a special relationship that an act or omission exposes someone to an unreasonable risk of harm." *See Schiebel v. Hillis*, 531 S.W.2d 285 (Mo. 1976) (en banc). *See also* RESTATEMENT (SECOND) OF TORTS § 302B and Comments. Such a "special relationship" was created when "one . . . (took) charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled. . . ." RESTATEMENT (SECOND) OF TORTS § 319. The "special relationship" standard has been extended to federal defendants in several similar cases. *See, e.g., Rieser v. District of Columbia*, 563 F.2d 462, 475 (D.C. Cir. 1977) (government liable for negligent supervision of murderer on work parole); *Fair v. United States*, 234 F.2d 288 (5th Cir. 1956) (Air Force released psychotic officer from base hospital).

¹²⁷ 526 F. Supp. at 450.

government policy.¹²⁸ The Eighth Circuit, by contrast, only judged the USMS's actions according to the WPP's statutory authority and formal regulations. On this basis, it reversed the lower court.¹²⁹ The Eighth Circuit found that the WPP was required to protect only the witness, not the community.¹³⁰ Indeed, it noted, any acts that increased community security at the expense of the witness might themselves be violations of the government's discretionary function.¹³¹ The court found that the USMS was not negligent to presume that Rosado would avoid committing future crimes. Rosado knew that such conduct would have terminated his protection and threatened his own life.¹³²

The Eighth Circuit correctly extended the reach of the discretionary function exemption to include the non-disclosure of Rosado's name and location to outside parties. The WPP's long-standing policy had been to withhold witness identities to safeguard their anonymity, and to include felons in this program as long as they obeyed the law. Such a program was fully within the government's authority and discretion. At the time of his admission, nothing set Rosado apart from other felons in the WPP. Nothing indicated he was mentally unstable, or otherwise unable to abide by the standard arrangement made with other felons. It thus was neither negligent nor an abuse of discretion for USMS authorities to enroll Rosado into the WPP.

It can be argued that no such discretion should exist where evidence suggests that witnesses *are* unstable or that their testimony

¹²⁸ The district court awarded Mrs. Bergmann \$69,077.91, applying Missouri statutory law governing damages for medical treatment, funeral expenses, loss of services, and loss of companionship and consortium. *Id.* at 451; *see* MO. ANN. STAT. § 537.090 (Vernon 1985).

¹²⁹ 689 F.2d at 795.

¹³⁰ *Id.* On this ground, the court dismissed the argument that the government had breached its responsibility to warn outside parties. *Id.* at 796 (“[I]n the absence of a statute, there is no legally enforceable duty on the part of the government to warn or compensate victims of criminal activity.”) (citing *Redmond v. U.S.*, 518 F.2d 811, 816 (7th Cir. 1975)).

¹³¹ 689 F.2d at 796. The court downplayed the Justice Department's guidelines requiring employment assistance. The court noted that the witness had ultimate responsibility for obtaining employment. *Id.* The court also disregarded attempts to correlate Rosado's unemployment and his crime, noting that Rosado had been receiving about \$1,000 a month in maintenance payments from the government at the time of the Bergmann murder.

¹³² *Id.* at 797. The court established a test for determining negligence. The test examined “whether the act of placing Rosado in the program and relocating him with a new identity increased the risk that [he] would harm another person to a degree which was unreasonable.” *Id.* The court concluded that any added freedom Rosado was given to harm an outside party was overcome by the risks he faced in doing so. *Id.*

will be unreliable. A second case, *Taitt v. United States*,¹³³ however, illustrates some courts' tendency to insulate from liability any official act performed in the WPP, regardless of its inconsistency with stated policy, or the existence of evidence of witness instability.

The *Taitt* case, like *Bergmann*, involved the murder of an outside party by a convicted felon formerly in the WPP. What distinguishes *Taitt* from *Bergmann* is evidence suggesting that the *Taitt* killer was emotionally unstable,¹³⁴ and represented a likely threat to third persons at the time of his admission to the WPP. Yet this evidence was ignored by the USMS from the time the murderer entered the WPP until he killed his victim, Anthony Taitt.¹³⁵

Taitt's murderer, Marion Albert Pruett, was serving a thirty year prison sentence¹³⁶ when he agreed to testify about the slaying of his prison cellmate.¹³⁷ Pruett's statements helped convict a fellow inmate, Allen Benton;¹³⁸ they also won Pruett an "unsupervised" parole after a brief hearing before the United States Parole Commission,¹³⁹ and led to Pruett's placement in the WPP.

Pruett and his wife, Michelle, were relocated and given new names.¹⁴⁰ Pruett apparently engaged in no new criminal activities until March 1, 1981. On that date, however, Michelle informed a local USMS officer, Ruben G. Chavez,¹⁴¹ that Pruett had threatened her life. Michelle disappeared on March 2, 1981;¹⁴² her charred

¹³³ No. 83-2142, slip op. (D. Colo. Aug. 12, 1983), *aff'd in part, rev'd in part*, No. 83-2142, slip. op. (10th Cir. Aug. 14, 1985).

¹³⁴ See *infra* note 152 and accompanying text.

¹³⁵ Anthony Taitt, a 21-year old grocery clerk in Loveland, Colorado, was killed at work on the night of October 16, 1981. Six months earlier, his murderer had left the WPP voluntarily following his implication in another crime. See *infra* note 144 and accompanying text.

¹³⁶ Pruett initially was sentenced to 15 years in prison for bank robbery in 1971. While on "furlough" in 1975, he was arrested for armed robbery and received a second 15-year term. *Taitt v. United States*, No. 83-2142, slip op. at 1 (D. Colo. Aug. 12, 1983).

¹³⁷ William Rhett Zambito was murdered on March 3, 1978. According to U.S. Attorneys' records, after agreeing to testify Pruett was placed in an "emergency protection" program within the prison from May 1978 until he testified in August 1979. Pruett was paroled September 15, 1979. See Brief for Appellees at 7-9, *Taitt v. United States*, No. 83-2142 (transcript of July 1, 1983 hearing, and conversation between Judge Richard Matsch and Assistant U.S. Attorney John Barksdale).

¹³⁸ See *United States v. Benton*, 637 F.2d 1052 (5th Cir. 1981).

¹³⁹ Pruett has stated that his parole hearing lasted "about five minutes or ten minutes." Brief for Appellant at 13 n.8, *Taitt v. United States*, No. 83-2142 (quoting Pruett Deposition at 130).

¹⁴⁰ Pruett and his wife were moved to Rio Rancho, New Mexico and given the names Charles "Sonny" and Michelle Lynn Pearson.

¹⁴¹ Chavez was a deputy United States Marshal. Upon receiving Michelle Pearson's March 1 phone call, he made an appointment to see her on March 3.

¹⁴² See *Taitt v. United States*, No. 83-2142, slip op. at 2; (D. Colo. Aug. 12, 1983). *Papers Indicate Pruett Boasted Of Killing Second Wife, Her Lover*, Rocky Mountain News, Jan.

body was found in the desert on April 17.¹⁴³ Local police detained Pruett over the next three days in connection with Michelle's death, and Ruben Chavez told them of Michelle's fear of Pruett. Chavez, however, said nothing of Pruett's status as a felon or protected witness.¹⁴⁴ Consequently, the police released Pruett for insufficient evidence. He quickly quit the WPP on his own volition, left town, and began a spree of four murders, including that of Anthony Tait.¹⁴⁵ Pruett subsequently confessed to having killed his wife.¹⁴⁶

In August 1983, federal district court Judge Richard Matsch dismissed a suit by Tait's parents alleging that the government had acted negligently in admitting Pruett into the WPP. The suit also alleged that the WPP had been negligent in failing to act upon notice of the threats to Michelle's life, in failing to advise local sheriffs of Pruett's background before or after Michelle's death, and in failing to provide the parole commission with adequate information about Pruett's emotional instability, prior to his release from prison.¹⁴⁷ Matsch gave "complete discretion" to the Justice Department to decide "when, to whom, how and for how long to provide protection."¹⁴⁸ The judge found it "difficult to believe" that, had local officials known of Pruett's criminal and WPP record, they would have linked him to Michelle's killing.¹⁴⁹ Even if local officials could have drawn such a link, Matsch ruled, federal agents were entitled to FTCA immunity whenever they had to "perform[] . . . statutory duties . . . without reliance upon a fixed or readily ascertainable standard."¹⁵⁰ No such ascertainable standards governed the WPP, Matsch found.¹⁵¹

21, 1983; Letter from Ruben G. Chavez, U.S. Marshals Service, to Jerry Ferrara, Sheriff, Sandoval County (April 20, 1981) (notice of Michelle Pearson's threat).

¹⁴³ See Tait v. United States, No. 83-2142, slip op. at 2 (D. Colo. Aug. 12, 1983).

¹⁴⁴ *Id.* In Chavez' April 20 letter to Ferrara, he recalled only that Mrs. Pearson stated that she felt her husband was going to kill her: "he had mentioned killing her to a girl friend of hers. . . . I informed her to contact the police department and make a report. She responded she did not trust the police and she would not contact them." Letter from Chavez.

¹⁴⁵ *Pruett Seeking Aid in Suit Filed by Parents of the Victim*, Denver Post, Nov. 13, 1982. In addition to Tait, Pruett murdered a second Colorado store clerk, and persons in Mississippi and Arkansas after leaving New Mexico.

¹⁴⁶ Rocky Mountain News, Jan. 21, 1983.

¹⁴⁷ Tait v. United States, No. 83-2142, slip op. at 2 (D. Colo. Aug. 12, 1983). The Tait suit was dismissed for failure to state a claim. *Id.* at 9.

¹⁴⁸ *Id.* at 5.

¹⁴⁹ *Id.* at 7-8. Matsch added that, even if a duty had existed to warn local officials, Tait was "a random victim of a continuing course of criminal conduct" whose death was not a foreseeable consequence of federal neglect. *Id.* at 8.

¹⁵⁰ *Id.* at 3 (quoting Barton v. United States, 609 F.2d 977 (10th Cir. 1979)).

¹⁵¹ *Id.* In August 1985, the Tenth Circuit Court of Appeals affirmed Judge Matsch's finding that WPP officials had acted within their discretion when they admitted Pruett

Even under its own logic, the district court opinion is flawed, for the court overlooks several readily ascertainable standards by which Marshal Chavez's acts could have been measured.

First, Pruett's Memorandum of Understanding, like that of all WPP entrants, warned that the USMS would not shield him from criminal or civil litigation "initiated prior to or subsequent to entry into the program. . . ." ¹⁵² Local sheriffs had contacted USMS Marshal Chavez specifically in connection with an investigation that could have led to Pruett's criminal indictment. Although Chavez had no duty to report Pruett's threats to his wife while she was alive, after her murder Chavez clearly disregarded his duty to notify "local law enforcement authorities of the presence of protected witnesses [when] it appears that the witness has become involved in an illegal activity." ¹⁵³ Chavez' failure to inform local police of Pruett's background was directly responsible for his release, and indirectly enabled Pruett to continue his acts of violence. ¹⁵⁴

Second, assuming *arguendo* that the USMS was justified in withholding Pruett's history while he was under protection, no justification existed for not disclosing this history once Pruett voluntarily quit the WPP and fled. Even if the WPP's authorizing statute granted the Justice Department the broadest possible discretion to protect witnesses, the department possessed no authority to grant a former witness the special privilege of keeping his status private after he abruptly left the WPP. ¹⁵⁵ Conceivably, disclosing Pruett's identity upon his quitting the WPP would have prevented Pruett from completing his shooting spree.

Third, Pruett had a history of psychiatric disturbance, but apparently received little treatment for this illness from prison authorities or the WPP. ¹⁵⁶ It is unclear whether the Parole Commission

into the WPP. See *Taitt v. United States*, No. 83-2142, slip. op. at 11 (filed Aug. 14, 1985). The Tenth Circuit also agreed that the WPP, and USMS officer Chavez, could not be held liable for the failure to notify local officials of Pruett's history following the killing of his wife. *Id.*

The Tenth Circuit, however, reversed a portion of Judge Matsch's ruling on other grounds. Specifically, the appellate court found, among other things, that WPP officials might have committed tortious acts not protected by the FTCA, if it could be shown that they failed to provide Pruett's psychological history to the United States Parole Commission upon request. *Id.* at 10, 12. The court ruled that Judge Matsch had improperly granted the motion to dismiss, because he lacked information concerning the WPP's actions in this area. *Id.* at 11.

¹⁵² See *supra* note 61 and accompanying text.

¹⁵³ See *supra* note 71 and accompanying text.

¹⁵⁴ See Brief for Appellants at 35, *Taitt v. United States*, No. 83-2142.

¹⁵⁵ *Id.* at 36.

¹⁵⁶ *Id.* at 14 n.9 (citing Pruett Deposition at 24-33). According to his deposition,

knew of Pruett's emotional instability when it had its hearing and released Pruett from prison.¹⁵⁷

Finally, it is possible that Pruett's testimony was not only unnecessary, but also false, and that the government made little inquiry into its veracity prior to his WPP admission. Pruett recently has asserted that he, not Benton, killed his cellmate, and that he offered perjured testimony at trial.¹⁵⁸ According to Pruett, certain government officials knew of his role in this crime but agreed to prosecute Benton to block Benton's scheduled release from prison.¹⁵⁹

Regardless of the truth of Pruett's recantation, it is evident that the USMS exercised minimal care in its decision to offer Pruett protection.¹⁶⁰ The recommendation that Pruett be admitted into the

Pruett was diagnosed as needing psychiatric treatment in 1971, but never received treatment thereafter.

In its August 1985 decision, the Tenth Circuit ruled that evidence showing the government had negligently administered psychological care to Pruett might serve as an independent basis for an FTCA claim. *Taitt v. United States*, No. 83-2142, slip op. at 11 (10th Cir., Aug. 14, 1985). Appellants, the Taitts, were subsequently given the opportunity to obtain evidence to make such a showing.

¹⁵⁷ Judge Matsch, in his August 1983 Memorandum Opinion, dismissed the *Taitt* case without knowing whether the Parole Commission had requested or received information about Pruett's mental history, prior to its decision to release him. *See Taitt v. United States*, No. 83-2142, slip. op. at 5-7 (D. Colo. Aug. 12, 1983).

On appeal, the Tenth Circuit reversed this portion of Judge Matsch's decision. The Tenth Circuit concluded that dismissal could not occur without learning what information the Parole Commission had requested from the WPP. *Taitt v. United States*, No. 83-2142, slip. op. at 10 (10th Cir., filed Aug. 14, 1985). If the Commission asked for government records about Pruett's medical history, the WPP's negligent failure to provide such records could serve as the basis for an FTCA claim, the court concluded. *Id.*

¹⁵⁸ Brief for Appellants at 10 n.7, *Taitt v. United States*, No. 83-2142. At trial, Pruett reported he was asleep in his cell when Zambito was murdered. *United States v. Benton*, 637 F.2d at 1055.

¹⁵⁹ Pruett testified two agencies (sic) of the FBI . . . came to him . . . and told him that they would see to it that he go down to the Federal Witness Protection Program, if, in fact, he testified that Benton killed Zambito; the reason being, Benton was about to be released in a year to eighteen months. The government did not want him released as he was one of the largest cocaine dealers on the East Coast. Brief for Appellants at 9 n.6, *Taitt v. United States*, No. 83-2142 (quoting Hearing on Renewed Motion to Dismiss at 7) (statement of Appellants' Attorney AuCoin).

¹⁶⁰ If false, Pruett's statement underscores his lack of credibility. If true, the statement may expose federal agents to civil or criminal liability for their part in obtaining knowingly perjured testimony. Under one federal statute, any person who has "procured" another to commit perjury can be found guilty of subornation of perjury, and be subject to both fines and imprisonment. 18 U.S.C. §1622 (1977). *See Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (federal agents can be liable in damages for violating commands, when such violation infringes on constitutional rights); *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.").

There is reason to believe the jury paid little attention to Pruett's original testimony

program could have been delayed until a review of his stability and credibility was complete. The requirement for such a review was inferable from the WPP's regulatory standard that a witness be "essential . . . in a specific case that is important in the administration of criminal justice."¹⁶¹ Such a review, however, was not performed on Pruett.¹⁶² The district court implicitly held in *Taitt* that even a minimum review of a witness' veracity was not required prior to admission. This holding gave WPP administrators free reign to select entrants without justification or accountability. Only the most absolutist reading of the reach of the FTCA's discretionary function exemption — one that extends government agents' discretion to include any acts not specifically barred by statute or formal regulation¹⁶³—could justify such an extreme result.¹⁶⁴

B. WITNESSES' VIOLATION OF CUSTODY/VISITATION ORDERS

When the WPP separates children from a noncustodial parent, the government's interest in suppressing organized crime is pitted against a parent's competing claim to the children. Courts have recognized that noncustodial parents possess some constitutional right to their children.¹⁶⁵ Yet the Supreme Court has never clarified the

against Benton, and may have suspected Pruett's personal role in the slaying. Benton was convicted not of murder, the charge Pruett testified about, but of *conspiracy* to murder. See *Benton*, 637 F.2d at 1052.

¹⁶¹ See U.S. ATTORNEYS' MANUAL ¶ 9-9-2100 in 1982 *House Hearings*, *supra* note 10, at 259; see also *supra* note 37 and accompanying text.

¹⁶² See *supra* notes 135 and accompanying text.

¹⁶³ See *supra* notes 100-04 and accompanying text.

¹⁶⁴ While deputy marshal Chavez should have been found liable for his negligence, the decision of the Parole Commission to release Pruett to the WPP was not actionable even though the the board may have had incomplete information on his history. See *United States v. Addonizio*, 442 U.S. 178, 188 (1979) ("the decision as to when a lawfully sentenced defendant shall actually be released [from prison] has been committed by Congress, with certain limitations, to the discretion of the Parole Commission."). Even if the Parole Commission failed to request Pruett's medical records at the time of its hearing, it relied in good faith on the USMS providing it with an adequate record, and had authority to act as it did. If, however, the Commission requested but never received medical records from the USMS, the USMS could be found liable for a negligent act under the FTCA. See *supra* note 156.

¹⁶⁵ The Constitution does not mention specifically the appropriate degree of protection to which the relationship between a parent and child is entitled. Since 1923, the Supreme Court has interpreted the Due Process Clause to protect a parental liberty interest to one's child. See *Meyer v. Nebraska*, 262 U.S. 390 (1923) (arbitrary government action may not interfere with liberty interest to establish a home and bring up children). Such an interest has its source in "intrinsic human rights." *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 845 (1977) [hereinafter cited as *OFFER*]. The Court later refined the scope of this liberty interest by recognizing the importance of a child's companionship to a parent, even when the child was born out of wedlock. See *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), *reh'g*

protection to which noncustodial parents are entitled. In early cases involving administration of the WPP, courts gave non-custodial parents little protection against the threat that their children would be relocated without notice; the relocation was justified as long as it was rationally related to the WPP's administration, and the wishes of the protected, custodial parent.¹⁶⁶ More recently, courts have asserted a stronger constitutional interest on behalf of the noncustodial parent, one requiring the showing of a compelling governmental interest.¹⁶⁷

The status of parents' custodial relationship with their children similarly has affected their ability to sue the government under the FTCA for acts damaging their parent-child relationship. Early cases found that the WPP had unlimited discretion to remove children from noncustodians in accordance with the custodian's wishes.¹⁶⁸

denied, 453 U.S. 927 (1981) (parent's desire for companionship is "an important interest that . . . 'absent a powerful countervailing interest, [requires] protection.'") (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)) (dicta). This right may be less strong when parental access is impeded than it is when terminated altogether. Dissenting in *Lassiter*, Justice Blackmun distinguished the absolute termination of parental access from lesser forms of impediment, such as reduced or difficult visitation: "A termination of parental rights is both total and irrevocable. Unlike other custody proceedings, it leaves the parent with no right to visit or communicate with the child, to participate in . . . any important decision affecting the child []. . . ." *Id.* at 39 (Blackmun, J., dissenting). See also *Stanley v. Illinois*, 405 U.S. 645, 652 (1972) (interest of unwed father in the companionship of child "come[s] to this Court with a momentum for respect"); see generally, Note, *The Witness Protection Program: Investigating the Right to Companionship, Due Process, and Pre-emption*, 59 NOTRE DAME L. REV. 431 (1984).

The mere existence of a biological relationship between parent and child does not trigger a protected parental interest. *OFFER*, 431 U.S. at 843. The Supreme Court has suggested that such an interest grows along with the parent's responsibility and support for the child. See, e.g., *Lehr v. Robertson*, 463 U.S. 248 (1983) (unwed father deserved less due process protection when no custodial, personal, or financial relationship was created); *Quilloin v. Walcott*, 434 U.S. 246 (1978), *reh'g denied*, 453 U.S. 918 (1981) (state may deprive a putative father of authority to approve child's adoption without violating Due Process Clause, when father has not lived with child but adopting parent has).

Once a parent has established a relationship with a child, a constitutional protection exists that is stronger than that for parents never acquiring such a relationship. In *Santosky v. Kramer*, 455 U.S. 745 (1982), for example, the Court found that the state could remove a child from parental care in response to charges of parental neglect only with clear and convincing evidence that such neglect existed. *Id.* at 769. If a "clear and convincing evidence" test is appropriate for the removal of children from unfit parents, it is logical to apply an equally stringent standard when state actions separate children from fit parents. This is the situation in most of the cases involving parent-child separation in the WPP.

¹⁶⁶ See *infra* notes 169-81 and accompanying text.

¹⁶⁷ See, e.g., *Ruffalo v. United States*, 590 F. Supp. 706 (W.D. Mo. 1984); see *infra* notes 180-98 and accompanying text; see also *Franz v. United States*, 707 F.2d 582, 608 (D.C. Cir. 1983).

¹⁶⁸ See *infra* notes 169-81 and accompanying text.

More recently, courts have questioned whether Congress intended the WPP's discretionary function to extend this far.¹⁶⁹

A 1973 case, *Leonhard v. Mitchell*¹⁷⁰ typifies courts' original deference to the government and custodial parents in the relocation of children in the WPP. In *Leonhard*, a divorced father sued to compel the Justice Department to reveal the location of his three children. The children's mother and custodian had married an underworld figure, Pascal Calabrese, who had entered the WPP.¹⁷¹ Because Leonhard was a noncustodian, the department rebuffed his attempts to discover his children's location through his ex-wife or the official in contact with her.¹⁷² Leonhard subsequently obtained a revised divorce decree from a state court awarding him exclusive custody of his children; the Justice Department nonetheless rejected his request a second time.¹⁷³

Both the trial and appellate courts rejected Leonhard's mandamus suit to compel disclosure.¹⁷⁴ In his first suit, Leonhard alleged that the relocation of his children without notice constituted a due process violation.¹⁷⁵ The Second Circuit, however, found that as a noncustodian, Leonhard had "no clear constitutional right" to custody or visitation;¹⁷⁶ thus, a rational relationship rather than a compelling interest test determined the constitutionality of the department's decision.¹⁷⁷ The court added that the same test allowed the government to continue withholding the children's iden-

¹⁶⁹ See, e.g., *Franz v. United States*, 712 F.2d 1428, 1434-35 (addendum opinion) (Bork, J., concurring in part, dissenting in part); *Ruffalo v. Civiletti*, 590 F. Supp. at 710-11.

¹⁷⁰ 473 F.2d 709 (2d Cir. 1973), cert. denied, 412 U.S. 949.

¹⁷¹ The underworld figure accepted federal protection in 1968, prior to the formal creation of the WPP.

¹⁷² Only one Justice Department agent, Thomas Kennelly, was kept informed of the Leonhard family's whereabouts. *Id.* at 711.

¹⁷³ Calabrese reportedly warned his federal contact that if his new family's whereabouts was revealed, "they would move . . . without advising [the contact] of their new location." *Id.*

¹⁷⁴ *Id.* at 712. Leonhard sought relief under 28 U.S.C. § 1361 (1962).

¹⁷⁵ *Id.* at 713. Leonhard may have lost his case in the pleadings by arguing that the Due Process Clause of the Fourteenth Amendment protected him from any governmental interference in raising his children. *Id.*

¹⁷⁶ The court in *Leonhard* denied that any parent possessed a constitutional right to custody or visitation. *Id.* Even the absolute termination of parent-child access might not have stirred the *Leonhard* court to impose a more stringent due process test. One explanation for the court's holding may be that *Leonhard* preceded several Supreme Court cases strengthening the due process associated with a parental liberty interest. See *supra* notes 161-62.

¹⁷⁷ Information possessed by the Justice Department indicated that "murder contracts" had been placed on the heads of Pascal Calabrese, his wife, and her children. In light of such information, the decision to withhold the family's location was neither "groundless or irrational." *Leonhard*, 473 F.2d at 714.

tity from Leonhard once he became legal custodian, because his custodial change occurred after the children entered the WPP.¹⁷⁸

In a second suit on behalf of his children,¹⁷⁹ Leonhard raised an FTCA claim stemming from the relocation. Leonhard alleged that the government had acted negligently in arranging for the children to live with Calabrese; Calabrese was a dangerous felon, and reportedly had abused the children during their time with him.¹⁸⁰ The court dismissed Leonhard's FTCA claim on grounds that his ex-wife, not the government, had exercised her custodial prerogative to entrust her children to Calabrese.¹⁸¹ The court added that the government was not responsible for Calabrese's conduct which could not have been foreseen.¹⁸²

In *Ruffalo v. Civiletti*,¹⁸³ by contrast, both the Western District of Missouri and the Eighth Circuit found that a non-custodian had a constitutionally protected liberty interest in notice prior to the relocation of children by the WPP. These courts also held that the infringement of such an interest was actionable under the FTCA.¹⁸⁴ In *Ruffalo*, a divorced woman sought the return of her son after he had been placed with his father in the WPP. The woman based her claim on the fifth amendment's due process clause, and alleged that

¹⁷⁸ The court stated that

Kennelly's present refusal to disclose the location of the Calabrese family is grounded in his sense of obligation to them, both because of his agreement never to disclose their location and of his continued belief that the lives of the children and [Calabrese and wife] would be endangered if this information should become known.

Id. The court added, however, that Leonhard was "free, of course, to pursue enforcement of New York's custody order in the courts of that state." *Id.*

¹⁷⁹ In 1975, Leonhard's ex-wife reconsidered her decision to separate Leonhard from his children, and helped reunite them. In *Leonhard v. United States*, 633 F.2d 599 (2d Cir. 1980), *cert. denied*, 451 U.S. 908 (1981), Leonhard sued federal and local officials on behalf of the children, alleging that they had been deprived of their constitutional right to his companionship without a hearing.

¹⁸⁰ Leonhard argued that, in consigning his children to the care of Calabrese, who allegedly "assaulted, battered, [and] deprived [them] of proper care," the Justice Department violated the WPP requirement to "provide for the health, safety, and welfare of . . . families of witnesses. . . ." *Id.* at 622-623; *see supra* note 9 § 502.

¹⁸¹ "The government did not impose the requirement that the children live with Calabrese; they were already part of the same family unit. . . ." 633 F.2d at 625.

¹⁸² The court noted that, despite Leonhard's assertion that Calabrese was a convicted felon, he had no history of child abuse or neglect. *Id.* This fact distinguished *Leonhard* from cases in which the government easily could have foreseen dangerous conduct. *Id.* n.39. *See, e.g., United States v. Muniz*, 374 U.S. 150 (1963) (federal prisoner beaten by other prisoners); *Downs v. United States*, 522 F.2d 990 (6th Cir. 1975) (pilot killed after FBI rejects hijacker's demands).

¹⁸³ 522 F. Supp. 778 (W.D. Mo. 1981), *reh'g.*, 539 F. Supp. 949 (W.D. Mo. 1982), *aff'd and remanded*, 702 F.2d 710 (8th Cir. 1983), *reh'g.*, 565 F. Supp. 34 (W.D. Mo. 1983), *reviewed sub nom.*, *Ruffalo v. United States*, 590 F. Supp. 706 (W.D. Mo. 1984).

¹⁸⁴ 590 F. Supp. at 708-13.

she had been deprived of a liberty interest without a hearing.¹⁸⁵ Despite evidence that the woman had cared little for her son prior to his departure,¹⁸⁶ the district court ruled that the Constitution required notice prior to the termination of any parental access to a child.¹⁸⁷

The district court in *Ruffalo* also found that in some situations, actions by WPP agents denying a parent's constitutional right will serve as the basis for a separate FTCA claim.¹⁸⁸ The government had claimed that the FTCA discretionary function exemption insulated it from any tort liability arising from the deprivation of Mrs. Ruffalo's visitation rights.¹⁸⁹ The court found that Congress had the power to authorize the WPP so as to immunize it from tort liability stemming from the termination of parental rights.¹⁹⁰ No such authorization, however, existed in the WPP's originating statute.¹⁹¹ Because the government's decision to prevent visitation violated existing legal rights created by state courts,¹⁹² an intentional interference with those rights was actionable under state tort law and the

¹⁸⁵ Under the terms of their divorce, Donna Ruffalo retained legal custody of her child, while physical possession was assigned to her husband, Michael. Because of her marked indifference towards her son's welfare, however, the court treated Mrs. Ruffalo as a non-custodian for purposes of identifying the reach of her constitutional right. *See* 590 F. Supp. at 710 n.5. As a result, Donna Ruffalo lost her request for her son's return and was granted visitation instead.

¹⁸⁶ "[W]ith Donna's permission or on her initiative, her children have lived with other individuals, and not with her, for much of their lives." 565 F. Supp. at 36. Furthermore, evidence suggested that organized crime had paid Donna Ruffalo to instigate the suit to retrieve her son, in hopes of gaining revenge against her former husband. *Id.* at 36-37.

¹⁸⁷ *Ruffalo*, 539 F. Supp. at 952. *Ruffalo* is not the only case to recognize such a right. *See Morrison v. Jones*, 607 F.2d 1269, 1275 (9th Cir. 1979) (noncustodial mother has constitutional claim to child access).

¹⁸⁸ *See infra* notes 184-85 and accompanying text.

¹⁸⁹ *Ruffalo*, 590 F. Supp. at 710.

¹⁹⁰ "[I]f visitation or communication rights were terminated because the marshals had made a mistaken appraisal of danger, such conduct would not be actionable under the FTCA. But a wholly unjustified violation of state law rights involves more than an abuse of discretion, unless it is deemed that Congress intended to grant the Marshals Service complete authority to override state court orders and all aspects of parental rights recognized by state law, for any reason or for no reason. I do not accept such an inference of total preemption.

590 F. Supp. at 710-11. *See also 1978 Hearings, supra* note 5, at 123 (in which William E. Hall, Director of the USMS, testified that "I don't think that we would ever want to be in a posture of telling one parent: 'We have relocated your children; you are out of luck forever.'").

¹⁹¹ *See Ruffalo*, 590 F. Supp. at 710-11.

¹⁹² An assistant chief for planning and evaluation of the USMS witness security division revealed at trial that the USMS, as a rule, had not required contact between children in the program and parents outside the program. *Id.* at 709. Noting that visitation rights "almost universal(ly)" were mandated by state law, the court found that the WPP's admission procedures, *de facto*, "had the effect of destroying a pre-existing legal right." *Id.*

FTCA,¹⁹³ the court held. By insisting that the WPP be administered pursuant to specific authority, the court in *Ruffalo* adopted a non-absolute interpretation of the discretionary function exemption.

A third case has challenged the notion that the WPP's original authorization barred a federal preemption of state custody orders. In *Franz v. United States*,¹⁹⁴ the District of Columbia Circuit found that in creating the WPP, Congress intended "the Attorney General to act, on occasion, in a manner that might be at odds with visitation rights. . . . Its implementation of the Witness Protection Program might adversely affect the rights of third parties (such as creditors and noncustodial parents)."¹⁹⁵ The District of Columbia Circuit, unlike the Eighth Circuit, found that WPP policy permitted maximum USMS discretion regarding the relocation of children in the program.¹⁹⁶ The Circuit Court's decision prompted the district court, on remand, to bar Franz's¹⁹⁷ FTCA suit for tortious interference with visitation rights.¹⁹⁸

¹⁹³ *Id.* at 711. Missouri and other states have long imposed liability for tortious interference with custody. See, e.g., *Lloyd v. Loeffler*, 694 F.2d 489 (7th Cir. 1982); *Kramer v. Leineweber*, 642 S.W.2d 364 (Mo. App. 1982); *Kipper v. Vokolek*, 546 S.W.2d 521 (Mo. App. 1977); *Wood v. Wood*, 338 N.W.2d 123 (Iowa 1983). Few jurisdictions have recognized similar liability for visitation interference, however. The Vermont Supreme Court has recognized a cause of action for denying a non-custodial parent "personal contact or other communication." *Sheltra v. Smith*, 136 Vt. 472, 392 A.2d 431 (1978). *But cf.* *McGrady v. Rosenbaum*, 62 Misc. 2d 182, 308 N.Y.S. 2d 181, *aff'd*, 37 A.D.2d 917, 324 N.Y.S. 2d 876 (1970) (rejection of damage claim for interference with visitation rights). *McGrady* is critically examined in *Wood*, 338 N.W.2d at 125 n.1.

¹⁹⁴ 526 F. Supp. 126 (D.D.C. 1981), *rev'd*, 707 F.2d 582 (D.C. Cir. 1983), *modified*, 712 F.2d 1428 (D.C. Cir. 1983), *remand*, 591 F. Supp. 374 (D.D.C. 1984). In *Franz*, a father of three abruptly lost contact with his children in February 1978, after four years of regular visitation. 707 F.2d at 589. Franz claimed that by completely severing his non-custodial relationship with his children, the government had abridged a constitutionally protected companionship right.

¹⁹⁵ 712 F.2d at 1429. The majority earlier noted that "[a]ssuming, *arguendo*, that the Attorney General needed [congressional] authority to effect the kind of incidental, *de facto* displacement of state law at issue here, he possessed it." 707 F.2d at 586 n.5.

¹⁹⁶ Judge Bork filed a separate opinion in *Franz* questioning the majority assumption that Congress intended for the WPP to override state custody or visitation orders. Domestic relations, Bork stated, had "long been regarded as a virtually exclusive province of the States." *Id.* at 1435 (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)) (Bork, J., concurring in part, dissenting in part). Bork noted that federal legislation could oust state law where evidence of congressional intent was explicit, or implicit. The evidence of intent could be found in pervasive federal regulations in the area, dominance of the federal interest, or the inconsistency of state and federal law. *Id.* Bork voted to remand *Franz*, in part, to determine fully the extent of Congress' delegation in the WPP.

¹⁹⁷ In his addendum statement in the Court of Appeals opinion, Judge Bork expressed a preference for imposing FTCA liability upon a showing that the law of the state where the alleged violations occurred, Pennsylvania, recognized a tort of interference with visitation rights. 712 F.2d at 1435 (Bork, J., concurring in part, dissenting in part).

¹⁹⁸ "Given the broad range of the duties involved in the administration of the Pro-

While it precludes suits by non-custodians under the FTCA, *Franz* increases the amount of due process protection available to such a parent. The D.C. Circuit took the position, previously expressed in *Ruffalo*,¹⁹⁹ that notice was required prior to the termination of any parent's access to a child.²⁰⁰ In addition, the court asserted that a parent's right to a child could not be deprived merely by the government's assertion of its need to protect a witness and the child. Rather, the government had to make a "particularized showing" at the time of protection that "the governmental interest would be promoted in ways sufficiently substantial to warrant overriding basic human liberties."²⁰¹ *Franz* eventually was returned to the district court for consideration of such a showing.²⁰²

V. LEGISLATIVE REFORM OF THE WPP

The statutes governing the WPP had not changed in over a decade as Congress entered its 98th Term. Congress had previously revealed disenchantment with the program's status quo.²⁰³ Two legislative measures were introduced in 1982, to require the disclo-

gram, a decision to refuse visitation on the basis of the custodial parent's wishes, or the wishes of the children, is within a federal official's scope of authority." 591 F. Supp. at 380-81.

¹⁹⁹ See *supra* note 183 and accompanying text.

²⁰⁰ 707 F.2d at 608. The court expressly declined to consider whether a parent had a right to a hearing when visitation privileges were only temporarily impaired. *Id.* at 602.

²⁰¹ *Id.* at 607. The court did not specify the content or form of such a "particularized showing." It suggested that each decision to relocate children in the WPP might require a pre-relocation hearing before a neutral arbitrator to determine the degree of danger a family would face if noncustodial access were allowed. *Id.* at 609. For Judge Bork's critique of this approach, see 712 F.2d at 1440 (Bork, J., concurring in part, dissenting in part). Bork recognized a procedural due process right to notice, *id.* at 1438, but found it inappropriate for his colleagues to do what the Supreme Court had never expressly done, i.e., assert a noncustodian's substantive right to visit his children. *Id.* Bork added that "[t]he government can hardly be expected to make public its case against the leader of organized crime in advance of his prosecution and to explain what the witness will testify to and why a conviction is impossible without that testimony." *Id.* at 1441. Bork's critique of the majority's opinion was itself attacked by the majority. See *id.* at 1428-34.

²⁰² *Franz v. United States*, 591 F. Supp. 374 (D.D.C. 1984).

²⁰³ Congressional hearings have addressed the WPP's efficiency and effectiveness at least since 1978. See *supra* notes 5 & 10. Criticisms and legislative proposals have increased in the last four years, however. In 1981, one member of Congress pointedly attacked the WPP's failure to develop consistent criteria for admission or require psychological evaluations of dangerous entrants. The member also criticized the WPP's failure to consider a witness' threat to a community or to notify local officials. See 1982 *House Hearings*, *supra* note 10, at 28 (testimony of Hon. Virginia Smith). Criticism of the WPP was not limited to Congress. In a 1982 letter to the parents of a 24-year old man killed by a protected witness, Associate Attorney General Rudolph W. Giuliani confessed that "frankly . . . in the past, the Department has been too liberal in its intake policies. As a result, program services may have been extended to witnesses who, for one or more reasons, simply did not merit such treatment." *Id.* at 33.

sure of a witness' identity to local officials in specific settings,²⁰⁴ and to limit federal agents' immunity from FTCA liability for witnesses' illegal acts.²⁰⁵ Neither bill passed.²⁰⁶

In 1984, however, Congress passed legislation that repealed the WPP's original statutory basis²⁰⁷ and reformed most phases of the WPP's administration. The Witness Security Reform Act²⁰⁸ prescribed factors to be weighed prior to the admission of any witness; codified and strengthened the legal force of the Memorandum of Understanding; strengthened a non-custodial parent's access to children; and created a Victim's Compensation Fund for families or victims injured or killed by protected witnesses.²⁰⁹ The law does

²⁰⁴ See H.R. 7039, 97th Cong., 2nd Sess. § 101 (creating 18 U.S.C. § 3521(b)(1)(F) (1982)). The bill required the Attorney General, "upon the request of State or local law enforcement officials, [to] provide relevant information to such officials concerning a criminal investigation or proceeding relating to the person protected." *Id.*

²⁰⁵ See S. 2420, 97th Cong., 2nd Sess. §§ 401, 402 (amending 28 U.S.C. §§ 1346, 2680 (1982)). The measure would have given district courts

exclusive jurisdiction of any civil action on a claim against the United States for damages . . . for personal injury or death directly caused by any dangerous offender charged with or convicted of a federal offense who is released from, or who escapes from, lawful custody of an employee of, or any person acting as the lawful agent of, the United States as a result of the gross negligence of such employee or person.

Id. at § 401(b)(2)(A). Section 402 proposed to withdraw from the FTCA's discretionary function exception "actions constituting gross negligence for purposes of [§ 401(b)(2)(A)]." *Id.* at 402.

²⁰⁶ Senate bill 2420 passed the Senate by voice vote on September 14, 1982. See 128 CONG. REC. S11439 (1982). The bill contained the FTCA liability revision, and a separate title enumerating permissible means by which witness protection could be offered. See S. 2420 § 202 (creating 18 U.S.C. §§ 3521-22). In its own consideration of S. 2420, the House replaced the Senate's version with one of its own. See Comprehensive Victim and Witness Protection Assistance Act, 128 CONG. REC. H8212 (1982). This version strengthened federal law enforcement efforts in areas unrelated to the WPP. For example, the bill imposed new criminal penalties for the intimidation and coercion of witnesses. However, the House omitted sections of the Senate bill revising the WPP and FTCA. *Id.* The Senate subsequently adopted the House substitute; Senator John Heinz, one of the Senate bill's original sponsors, acknowledged that its WPP reforms had been deleted because of their controversy. See 128 CONG. REC. S13062 (daily ed. Oct. 1, 1982) (remarks of Senator Heinz). For a general review of the Senate bill's provisions, see S. REP. NO. 582, 97th Cong., 2nd Sess. (1982).

²⁰⁷ Title V of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, §§ 501-04, 84 Stat. 922, 933-34; see *supra* notes 8-9.

²⁰⁸ Pub. L. No. 98-473, Title II, part F, subpart A, §§ 1207-10, 98 Stat. 2153-63 (creating 18 U.S.C. §§ 3521-28) (1984). P.L. 98-473 was an omnibus act to continue federal spending in lieu of appropriation legislation. It was introduced as House Joint Resolution 648 on September 17, 1984. Congress approved the act on October 10 and 11, and President Reagan signed it into law on October 12. See 2 CONG. INDEX (CCH) 34,583-84 (Nov. 21, 1984). The Witness Security Reform Act was added to P.L. 98-473 through a Senate amendment shortly before it became law. See H.R.J. Res. 648, 98th Cong., 2d Sess., 130 CONG. REC. S13520, S13538 (1984).

²⁰⁹ An earlier measure, House Bill 4249, the U.S. Marshals Service and Witness Security Reform Act, passed only the House on May 22, 1984. See H.R. 4249, 98th Cong.,

not address every valid concern over federal agents' responsibility for witnesses' illicit acts.²¹⁰ Nonetheless, the Act limits government discretion over the admission and maintenance of protected witnesses. Of equal importance is the fact that the Act exposes the government to limited liability for witnesses' acts, reflecting congressional awareness of the program's contribution to such acts.

A. PROVISIONS OF THE WITNESS SECURITY REFORM ACT

Admission Procedures. The Attorney General is authorized to protect and relocate witnesses and their families who are threatened with violence, intimidation, or other retaliation.²¹¹ These conditions expand the WPP's original entrance criteria, which required that the life or person of a witness or household be jeopardized.²¹² The WPP may now protect witnesses testifying about "an organized criminal activity or other serious offense. . . ."²¹³ Officially, the WPP previously was confined to testimony on organized crime.²¹⁴ The change in law may enable victims of violent assaults to receive protection in exchange for testimony.²¹⁵

The Witness Security Reform Act imposes new duties on the Justice Department to evaluate both a witness' stability and importance to a case prior to admission. Before providing protection, the Attorney General must "to the extent practicable, obtain information relating to the suitability of the person for inclusion in the program, including the criminal history, if any, and a psychological

2nd Sess. (1984). See also 128 CONG. REC. H4279 (1984). This legislation was largely identical to the "Witness Security Reform Act."

²¹⁰ See *infra* notes 241-52, and accompanying text.

²¹¹ The Act permits protection whenever violence, "an offense set forth in Chapt. 73 of [18 U.S.C.]," or a state offense that is similar in nature to either appears likely. Pub. L. No. 98-473, § 1208, 98 Stat. 2153 (1984) (creating 18 U.S.C. 3521 (a)(1)). Chapter 73, which made witness intimidation a federal crime, was enacted in current form in 1982. See 18 U.S.C. §§ 1503-15 (Supp. 1984).

²¹² See *supra* note 9. The changes in the WPP were made to correspond to the U.S. Code's new sanctions against witness intimidation, see *supra* note 207.

²¹³ Pub. L. No. 98-473, § 1208, 98 Stat. 2153 (creating 18 U.S.C. § 3521(a)(1)) (emphasis added).

²¹⁴ See *supra* note 9. Even prior to the 1984 reforms, the WPP occasionally accepted witnesses testifying about matters not officially related to "organized crime." For example, during an 18-month period in 1979-80, the WPP admitted 38 persons to testify specifically about organized crime, and 60 others to testify generally about narcotics, smuggling, arson, murder, prostitution, and other crimes. *GAO Report, reprinted in 1982 House Hearings, supra* note 10, at 308. These acts, too, may have been planned by organized crime; the WPP classifies witnesses according to the purpose of a probe (e.g., arresting a smuggler vs. identifying syndicate members), not according to the type of criminal responsible for a given crime.

²¹⁵ See *infra* notes 247-49 and accompanying text.

evaluation, of the person.”²¹⁶ The case’s seriousness, the risk to persons and property in the witness’ new community, alternative sources of testimony, and the likelihood that protection “will substantially infringe upon the relationship between a child who would be relocated” and a non-relocated parent also must be considered before admission.²¹⁷ Protection is prohibited where the need for a person’s testimony is outweighed by the risk of danger to the public.²¹⁸

Disclosure of Witness Identity. The Attorney General may now “disclose or refuse to disclose the identity or location of the person relocated or protected,”²¹⁹ after weighing the risk to the witness from disclosure to the witness against the public benefit from such disclosure.²²⁰ The Attorney General, however, must comply with court orders and state or local requests for information—including a witness’ identity, location, criminal records, and fingerprints—whenever the witness commits a major felony.²²¹ The new law contrasts with the original statute, which did not authorize witness disclosure at all.²²²

Child Custody. The Witness Security Reform Act does not authorize release of the witness’ new identity to a non-relocated parent, but attempts to preserve domestic relationships through other means. A witness will not be admitted to the WPP where the admission would destroy an existing parent-child relationship.²²³ The Attorney General must bring an action in federal district court to

²¹⁶ Pub. L. No. 98-473, § 1208, 98 Stat. 2155 (creating 18 U.S.C. § 3521(c)).

²¹⁷ *Id.*

²¹⁸ *Id.* The Act permits temporary protection without such an assessment where the Attorney General concludes that imminent harm to a witness exists. *Id.* at 98 Stat. 2156 (creating 18 U.S.C. § 3521(d)(3)). In such an event, the rigid assessment of a witness’ importance must begin “without undue delay after protection.” *Id.* Emergency admissions such as these were common in the WPP even prior to the 1984 reforms. *See* U.S. DEPT. OF JUSTICE, REPORT OF THE WITNESS SECURITY PROGRAM REVIEW COMM. DRAFT 11, reprinted in 1978 Hearings, *supra* note 5, at 280.

²¹⁹ Pub. L. No. 98-473, § 1208, 98 Stat. 2154 (creating 18 U.S.C. § 3521(b)(1)(G)).

²²⁰ *Id.*

²²¹ *Id.* The Act requires such a disclosure whenever a witness “is under investigation for or has been arrested for or charged with an offense that is punishable by more than one year in prison or that is a crime of violence.” *Id.* This provision is a codification of the Department of Justice’s informal practice of disclosing criminal records to local officials, upon request. *See* S. REP. No. 225, 98th Cong., 1st Sess. 411 n.6 (1983), reprinted in 1984 U.S. CODE CONG. & AD. NEWS 3549. As drafted, the section denies state or local officials any legal right to a witness’ history before the witness becomes a suspect in a new investigation.

²²² *See supra* note 9. The only other standards previously developed for disclosure of a witness’ identity were those placed in the Memorandum of Understanding, *see supra* notes 60-61.

²²³ *See supra* note 217 and accompanying text.

modify a previous custody or visitation order, if the order's performance is "substantially impossible."²²⁴ In such an event, the court must provide alternative arrangements that are substantially equivalent to the original rights of the non-relocated parent.²²⁵ The Justice Department must pay all transportation and security costs for visitation.²²⁶

Parents may initiate hearings to alter visitation or custody under the Act.²²⁷ Federal district courts are charged with creating hearing formats which will maximize a witness' privacy and keep a witness' new identity from a non-custodial parent, if possible.²²⁸ Hearings are to be conducted by mediators, to be followed by arbitrators if no resolution has occurred within 60 days.²²⁹

Victim Compensation. The Attorney General may now pay restitution to victims, or families of victims, injured or killed by WPP witnesses.²³⁰ Congress designated one million dollars for the relief of victims and their families. Relief money is available as a last resort; a victim first must seek recovery under existing federal or state tort law. Federal restitution is available only to the extent the victim

²²⁴ Pub. L. No. 98-473, § 1208, 98 Stat. 2161 (creating 18 U.S.C. § 3524(e)(1)). The Attorney General must show the impossibility of preserving an existing relationship through "clear and convincing evidence." *Id.*

²²⁵ "Substantially" equivalent has been found to mean, for example, that an order providing for four hours of visitation once a week could be replaced by another insuring one full-day visit each month, in a neutral, safe location. *See* H.R. REP. No. 767, 98th Cong., 2d Sess. 27 (1984).

²²⁶ Pub. L. No. 98-473, § 1208, 98 Stat. 2159 (creating 18 U.S.C. § 3524(c)). The Justice Department, however, need not pay for visitation in excess of 30 days a year. *Id.* Additional visitation may be paid for by the Department of Justice in extraordinary circumstances. The Attorney General has the discretion to provide security on occasions when visitation is being paid voluntarily by the parent. *Id.*

²²⁷ "[A]n action to modify [an original custody or visitation] order may be brought by any party to the court order in the District Court of the District of Columbia or in the district court for the district in which the child's parent resides who has not been relocated. . . ." Pub. L. No. 98-473, § 1208, 98 Stat. 2160 (creating 18 U.S.C. § 3524(d)(1)). *See also id.* at 98 Stat. 2161 (creating 18 U.S.C. § 3524(f)).

²²⁸ Pub. L. No. 98-473, § 1208, 98 Stat. 2160 (creating 18 U.S.C. § 3524(d)(1)).

²²⁹ *Id.* (creating 18 U.S.C. § 3524 (d)(3)). Additionally, the law allows a court to hold in contempt any protected witness who violates a custody or visitation order. Once held in contempt, the witness must comply with the court order within 60 days or face termination of support payments and disclosure of his or her identity to the non-relocated parent. *Id.* at 98 Stat. 2160-61 (creating 18 U.S.C. § 3524(d)(5)). Notably, the new law's penalties for violating custody orders do not include the termination of protection. In this respect the act differs from earlier legislative proposals. *See* H.R. 4249, 98th Cong., 2d Sess. (1984).

²³⁰ The Attorney General may pay restitution to, or in the case of death, compensation for the death of any victim of a crime that causes or threatens death or serious bodily injury and that is committed by any person during a period in which that person is provided protection. . . . Pub. L. No. 98-473, § 1208, 98 Stat. 2162 (creating 18 U.S.C. § 3525(a)).

“has not otherwise received [damages], including insurance payments, for the crime involved.”²³¹ Payments arising from a victim’s death may not exceed \$50,000.²³² Significantly, a payment under the Victim Compensation Fund does not constitute federal admission of culpability for a witness’ illegal acts; the law states that the fund’s formation does not create a cause of action against the United States.²³³

Settlement of Unpaid Debts. Under the new law, creditors suing protected witnesses for outstanding debts may serve the witness through the Justice Department.²³⁴ Witnesses who fail to comply with judgments against them risk disclosure of their identities to creditors.²³⁵ Creditors may appeal Justice Department decisions not to reveal a witness’ identity; in such an event, the identity may instead be shared with a court-appointed agent for the creditor.²³⁶

Codification of the Memorandum of Understanding. Since 1977, the Memorandum of Understanding between the USMS and new witnesses has enumerated the limits of the government’s commitment to witnesses entering the WPP.²³⁷ The new statute requires for the first time that such a document be prepared in every instance of witness protection.²³⁸ The terms of the memorandum required by the new law resemble those previously found in such documents, i.e., the witness must promise to testify, “take all necessary steps to avoid detection by others . . .,” and abide by all laws in exchange for protection.²³⁹ However, Congress’ placement of the MOU into statute affects the WPP by narrowing the discretion of USMS agents responsible for its administration. Because the law now requires that the federal government specify the form and content of its protective services prior to a witness’ protection, government agents

²³¹ *Id.* (creating 18 U.S.C. § 3525(c), (d)).

²³² *Id.* Only \$25,000 may be recovered for murders occurring prior to the act’s passage; no recovery is available for other crimes committed prior to the law’s enactment.

²³³ *Id.* (creating 18 U.S.C. § 3525(e)).

²³⁴ Pub. L. No. 98-473, § 1208, 98 Stat. 2157 (creating 18 U.S.C. § 3523 (a)).

²³⁵ *Id.* The statute states that

[i]f the Attorney General determines that the [witness] has not made reasonable efforts to comply with the judgment, the Attorney General may, after considering the danger to the [witness] and upon the request of the person holding the judgment disclose the identity and location of the person to the plaintiff entitled to recovery pursuant to the judgment.

Id. A creditor who learns the identity of a protected witness may reveal this identity to others “only if essential to . . . efforts to recover under the judgment, and only to such additional persons as is necessary to effect the recovery.” *Id.*

²³⁶ *Id.* at 98 Stat. 2158 (creating 18 U.S.C. § 3523(b)(3)).

²³⁷ See *supra* notes 59-62 and accompanying text for a full description of the MOU.

²³⁸ Pub. L. No. 98-473, § 1208, 98 Stat. 2155 (creating 18 U.S.C. 3521(d)(1)).

²³⁹ *Id.* (creating 18 U.S.C. 3521 (d)(1)(c)).

have less discretionary authority to deviate from the terms of the MOU once protection begins. The MOU's codification may provide more success to plaintiffs using the Federal Tort Claims Act to sue the government for WPP negligence which contributes to witnesses' illegal acts.²⁴⁰

B. ANALYSIS OF THE WITNESS SECURITY REFORM ACT

The Witness Security Reform Act's most significant improvement to the administration of the WPP comes through its required pre-screening of prospective witnesses. By stipulating that the government assess both the need for a witness' testimony and the risks of offering protection, the new law ensures an improved process for selecting both witnesses and cases for which protection will be offered. One consequence of this pre-screening requirement may be an end to cases like *Leonhard*. No longer will WPP administrators have the freedom to assert the privacy of organized crime fighting at the expense of a family's constitutional right to companionship; some accommodation of this right will have to be settled in advance of protection. Another notable achievement of the new law is its Victim's Compensation Fund. The fund is not an admission of federal culpability for witnesses' unauthorized acts, but it does recognize the governmental role as an accessory to such acts.²⁴¹

At least four issues remain unresolved in the wake of the enactment of the "Witness Security Reform Act," however. All concern questions central to the administration of the WPP, and warrant prompt consideration by the program's officials.

First, while the Act asserts the need to preserve family bonds — and prohibits witness protection from commencing when these bonds are jeopardized²⁴²—it provides no mechanism for the airing of child custody grievances once protection has begun. Under the law, federal district courts are charged with creating a procedure allowing protected witnesses to mediate child custody grievances

²⁴⁰ See *supra* notes 57-62 and accompanying text.

²⁴¹ The House of Representative's Committee Report on H.R. 4249, legislation that served as the basis for the witness protection provisions of P.L. 98-473, explained one of Congress' purposes in starting the fund. According to the report, the provision was included because of

the overwhelming evidence that the federal government has a special and unique responsibility for the conduct of protected witnesses. [The WPP's ability to rename and relocate witnesses] frequently serves to hide the protected person's background from friends, neighbors, and the law enforcement officials in the new community. Thus, more than in any other case of a Federally supervised offender, *the government has played a role in 'facilitating the commission of the offense. . . .'*

H.R. REP. NO. 767, 98th Cong., 2d Sess. 27-28 (1984) (emphasis added).

²⁴² See *supra* note 216-17 and accompanying text.

with non-protected ex-spouses. This procedure is intended to ensure communication between the parties, without exposing a protected witness' location or identity. Courts have already questioned the feasibility of structuring custodial hearings without damaging witness anonymity, however.²⁴³ It shall be difficult for any custodial hearing or arrangement to be devised which will not expose a witness' identity at some point in the course of protection.²⁴⁴

Second, the new law creates ambiguity in the power given to state and local governments to obtain witness information. The Attorney General is newly authorized to disclose a witness' identity to local officials, after weighing the value and risk of such disclosure.²⁴⁵ However, state and local officials lack authority to compel disclosure of witness information, except in connection with specific investigations or pursuant to court order.²⁴⁶ Non-federal officials thus have an opportunity under the new law to receive witness information even if a witness is not implicated in an offense under state or local investigation; they merely need to persuade federal authorities or the courts of the value of their receiving such information. State or local officials can be expected to devote increasing efforts towards making such a showing.²⁴⁷

Third, it is unclear whether the WPP will become a common vehicle for obtaining testimony in cases not involving organized crime. Congressional drafters of the Witness Security Reform Act

²⁴³ See, e.g., *Franz*, 712 F.2d at 1440 (Bork, J., concurring in part, dissenting in part) (critique by Judge Bork of the practicability of a hearing which can balance a parent's constitutional right to a child with the government's need for witness testimony).

²⁴⁴ Even if the mediation and arbitration authorized by the new law are conducted without exposing a witness' identity, see *supra* note 229, the WPP must also address the likelihood that children will readily share a witness' new identity and location with their non-protected parent.

²⁴⁵ See *supra* notes 219-20 and accompanying text.

²⁴⁶ See *supra* note 221 and accompanying text.

²⁴⁷ State and local officials may have had an easier time persuading the Justice Department of the need to share witness information prior to passage of the Witness Security Reform Act. Because the WPP contained so few guidelines and requirements concerning the admission of new witnesses, local officials had justification in questioning the harmlessness of witnesses placed in their communities. However, the new law's requirement that a full assessment of a witness' safety risk precede WPP admission may diminish the need to exchange witness information. This is because under the new law, a witness' potential for harm presumably is calculated by the federal government prior to admission. A witness who passes such federal scrutiny arguably is entitled to the same privacy from local exposure that ordinary citizens enjoy.

At the same time, the new law does not forbid the admission of witnesses who pose a threat to a community. It only requires that the value of witness testimony outweigh the threat to a community. Thus, dangerous persons may still enter the WPP without local officials' knowledge. Consequently, state and local officials are still justified in seeking the information needed to prevent such a possibility.

noted that a witness may be threatened by organized and nonorganized criminals alike.²⁴⁸ Temporary relocation, or relocation without a change of name, might be plausible ways to elicit testimony in several types of non-organized crimes, such as blackmail or rape.²⁴⁹ It is impossible to gauge the extent to which the promise of relocation will prompt targets of these offenses to testify. It is equally unclear whether the WPP can satisfactorily meet its original purpose, the protection of witnesses in organized criminal cases, as long as it accepts this new one.

Finally, while federal liability for witness' illegal acts remains expressly limited by the new law,²⁵⁰ the WPP now has statutorily prescribed standards against which its agents' job performance can be measured. Courts previously have chosen to exempt WPP agents from FTCA liability because of the lack of such "ascertainable standards."²⁵¹ Now, when a WPP agent fails to complete a psychological evaluation of a witness, or admits a witness without preparation of the Memorandum of Understanding, the barrier to FTCA liability is removed.²⁵²

Exposing all admission decisions to FTCA liability, of course, could have a chilling effect on federal agents' use of the WPP. For example, the Justice Department could discontinue the enrollment of custodial parents into the WPP, if it feared that non-custodians would use the FTCA to challenge allegedly negligent decisions affecting existing domestic relations. Whether a particular witness relocation alters or destroys a familial bond is a judgment call. In part, success in the WPP depends upon program administrators' ability to exercise appropriate discretion to make such a call.

Thus, while there remains a need to expose federal agents in

²⁴⁸ [T]here is no reason to deny protection to a witness who is in danger of retaliation, simply because the nexus between the offense and organized criminal activity is lacking. For instance, a rape victim fearing retaliation from her assailant may not be willing to testify unless relocation or protection is made available. That a further assault will subject the attacker to further prosecution is cold comfort in such a situation. Protection or relocation should be available. . . .

1984 U.S. CODE CONG. & AD. NEWS at 3547.

²⁴⁹ Heretofore, the Justice Department rarely has relocated a witness without providing new identification. Temporary relocation without a name change, however, might become common practice in rape cases, where an assailant's resources and interests in pursuing a victim out of town are likely to be less than those of a member of organized crime.

²⁵⁰ See *supra* notes 230-32 and accompanying text. The new law's \$50,000 ceiling on payments to families of victims falls far short of adequate compensation for many victims of crime.

²⁵¹ See *supra* note 150 and accompanying text.

²⁵² Even under an absolutist interpretation of the federal discretionary function, these would constitute acts contravening explicit statutory requirements.

the WPP to FTCA liability, Congress should adopt a standard which preserves governmental tort immunity for conduct arising from federal agents' ordinary negligence. Specifically, Congress should amend the WPP's authorization so that federal agents are exposed to liability for conduct stemming from their gross negligence. A "gross negligence" liability standard was proposed for the WPP in Congress in 1982.²⁵³ It would expose federal agents to liability only when their acts signified indifference to their legal duty, and disregard for their legal obligations to third persons.²⁵⁴ Such a standard would obligate WPP administrators to perform the substantial witness evaluations now required by statute, even as it reserved them wide discretion to make admission and protection decisions in light of these evaluations. At the same time, a "gross negligence" standard would hold WPP officials responsible for flagrant derelictions in their now dual duties: consideration of the security interests of third persons alongside the national interest in challenging organized crime.

VI. CONCLUSION

Since its creation in 1970, the Witness Protection Program has had an undeniable, positive impact on federal efforts to expose and eliminate organized crime. Sadly, however, innocent persons have had to pay a heavy price for the program's accomplishments. Relocated witnesses, acting under the protection of new identities provided at government expense, have been able to hide their children from former spouses in violation of standing child custody decrees. Witnesses have abrogated their protection arrangements prior to their own commission of violent crimes. Such illegal acts were natural by-products of the WPP's poorly-conceived authorizing legislation. Title V of the 1970 Organized Crime Control Act focused almost exclusively on protecting witnesses from the wrath of organized criminals. The legislation largely ignored society's need to be protected from the wrath of the witnesses themselves.

In the wake of Congress' 1984 reform of the WPP, there is rea-

²⁵³ See S. 2420, 97th Cong., 2d Sess. § 401 (amending 28 U.S.C. § 1346(b)). This unenacted legislation would have given federal district courts exclusive jurisdiction for damage claims against the United States, by persons injured as a result of the "grossly negligent" release of a prisoner from federal custody.

²⁵⁴ See, e.g., *Western Mining Corp., Ltd. v. Standard Terminals*, 577 F. Supp. 847, 851 (W.D. Pa. 1984) ("gross negligence" is a want of even scant care, but something less than intentional indifference to consequences); *Fidelity Leasing Corp. v. Dun & Bradstreet, Inc.*, 494 F. Supp. 786, 790 (E.D. Pa. 1980) ("gross negligence" is performance so reckless as to justify a presumption of wantonness); see also PROSSER AND KEETON, *THE LAW OF TORTS* § 34 (5th ed. 1984).

son to hope that such tragedies will end. The WPP's new authorization for the first time requires federal officials to conduct psychological testing of prospective witnesses prior to the initiation of protection. The WPP is required to balance the government's need for a witness' testimony against the risk which the witness may pose to family and community. State and local officials possess new statutory authority to learn the real identities of protected witnesses upon the commission of a major crime. Such measures, and others, go far towards crafting a proper balance between the rights of a protected witness and the security interests of society as a whole.

More remains to be done, however. The agents and administrators of the WPP continue to possess autonomy and discretion far in excess of the amount needed to maintain the program. Specifically, WPP officials continue to retain sole access to witness' true identities, prior to their commission of crimes. Moreover, WPP officials may be held accountable only for the limited number of tasks they are required by law to perform, e.g., performance of psychological testing prior to witness admission; balancing the costs and benefits of witness enrollment. Other forms of witness supervision continue to remain insulated from liability, under the cloak of sovereign immunity.

It is true that effective administration of the WPP requires program officials to possess some ability to make admission and operational decisions with impunity. Permitting unlimited claims against WPP personnel under the Federal Tort Claims Act would have a chilling effect on the program, and on federal efforts to combat organized crime.

At a minimum, however, government agents must be made accountable to victims of witnesses' illicit conduct, when such conduct is the by-product of the agents' gross negligence. Such a standard would in no way diminish the government's legitimate right to manage the WPP without needless encumbrance.

A "gross negligence" liability standard, however, does not appear likely to become part of the Witness Protection Program in the near future. Until it does, the federal campaign to combat organized crime will have the ironic and needless effect of creating additional organized crime victims.

JOSHUA M. LEVIN