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RECOVERY BY FEDERAL PRISONERS UNDER THE FEDERAL TORT CLAIMS ACT

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May a federal prisoner, who has been injured due to the negligence of a federal employee while incarcerated in a federal prison, recover from the United States under the Federal Torts Claims Act?[1] The act provides for district court jurisdiction over:

> [C]laims against the United States . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred[2] . . . [and that] the United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances. . . .[3]

Whether a federal prisoner may recover under the act depends upon the interpretation given this language, since no express exception precludes application of the act.[4]

APPLICABLE FEDERAL CASES

At the time of this writing, this question has not yet been before the United States Supreme Court. However, it has been presented to the courts of appeal for the seventh[5] and eighth[6] circuits and to various federal district courts. The circuit court decisions and all but one of the few reported district court decisions[7] denied relief on the ground that the act was not intended to cover this situation, citing *Feres v. United States*[8] as controlling.

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[1] The Federal Tort Claims Act was enacted as Title IV of the Legislative Reorganization Act of 1946, 60 Stat. 842, and the relevant provisions are now found in 28 U.S.C. §§ 1346(b), 2671-80 (1958).

[2] 28 U.S.C. § 1346(b) (1958).

[3] 28 U.S.C. § 2674 (1958).

[4] 28 U.S.C. § 2680 (1958).

[5] Jones v. United States, 249 F.2d 864 (7th Cir. 1957).

[6] Lack v. United States, 262 F.2d 167 (8th Cir. 1958).

[7] Berman v. United States, 170 F. Supp. 107 (E.D.N.Y. 1959); Van Zuch v. United States, 118 F. Supp. 468 (E.D.N.Y. 1954); Shew v. United States, 116 F. Supp. 1 (M.D.N.C. 1953); Sigmon v. United States, 110 F. Supp. 906 (W.D. Va. 1953). Lawrence v. United States, 193 F. Supp. 243 (N.D. Ala. 1961), is the sole case in which relief has been granted.

[8] 340 U.S. 135 (1950).

The *Feres* decision involved a consolidation of three cases, all of which concerned claims under the act by servicemen or their dependents for injuries sustained while on active duty, allegedly caused by the negligence of an employee of the Government. In denying relief, the Supreme Court held that Congress had not intended the act to cover injuries to servicemen sustained while on active duty.[9] Diverse grounds were provided by the Court. One was that the act did not create new causes of action but rather accepted liability "under circumstances that would bring private liability into existence,"[10] and "plaintiffs can point to no liability of a 'private individual' even remotely analogous to that which they are asserting against the United States. [There is] . . . no American law which has ever permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving."[11] Furthermore, "like circumstances" means "all the circumstances" and therefore must include the "status of the wronged and the wrongdoer"[12] and not just that one was a landlord and the other his tenant in one case, and that one was a doctor and the other his patient in the other cases. Therefore, allowing recovery in this action would cause "novel and unprecedented liabilities"[13] which was not the purpose of the act. "[N]o private individual has the power to conscript or mobilize a private army with such authority over persons as the Government vests in echelons of command."[14]

Another ground provided by the Court was that Congress did not intend liability to be dependent upon the varying laws of the several states in this sort of a case, since unlike others, a serviceman has no choice where he goes, and, therefore, he has no choice as to what laws shall govern him. Furthermore, the "relationship between the Government and members of its armed forces is 'distinctively federal in character' . . . [and] the scope, nature, legal incidents and consequences of the relation between persons in the service and the Government are fundamentally derived from federal sources and governed by federal authority."[15] Finally, reasoned the Court, statutory relief has already been provided for servicemen,[16] and the failure of Congress to provide

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[9] A serviceman may recover under the act if the injury occurred while he was on leave. Brooks v. United States, 337 U.S. 49 (1949).
[10] Feres v. United States, 340 U.S. 135, 141 (1950).
[11] *Ibid.*
[12] *Id.* at 142.
[13] *Ibid.*
[14] *Id.* at 141-42.
[15] *Id.* at 143-44, quoting from United States v. Standard Oil Co., 332 U.S. 301 (1947).
[16] Soldiers and Sailors Relief Act of 1940, 54 Stat. 1178, 50 U.S.C. App. §§ 501-90 (1952).

for an adjustment in the act is indicative of an intent for the act not to apply.[17]

Between 1950 and 1955, three district court decisions were reported concerning actions under the act by federal prisoners for injuries sustained while incarcerated in federal prisons and caused by the negligence of governmental employees. In all three cases, upon the basis of the *Feres* decision, the actions were dismissed for failure to state a claim.

In the first of these cases, *Sigmon v. United States,*[18] the court admitted that the act, if broadly construed, would cover this action, but interpreted the act so as to exclude it. The court said Congress, in providing relief for prisoners or their dependents for injuries sustained in prison industry,[19] apparently intended that such relief should be exclusive. A contrary interpretation would result in claims too numerous and detrimental to penal discipline. Furthermore, allowance of recovery would establish a new and novel procedure. Apparently, the court was not impressed with the fact that the entire act was extremely novel. The most important ground, previously set forth by the *Feres* case, was that the "like circumstances" test of the act includes consideration of the relationship between the claimant and the United States. A private person, declared the court, would not find himself "under like circumstances" "because no private individual has the legal right to hold any other private individual in penal servitude."[20] Finally, the act makes liability depend upon the law of the place where the act or omission occurred. The proposition that Congress intended the act to apply in these cases is inconsistent with the fact that Congress had enacted many statutes for the purpose of establishing a *uniform* penal system. It is unlikely that Congress would also intend something which would disrupt this uniformity.

The reasoning of the *Sigmon* case was adopted in *Shew v. United States,*[21] although this was unnecessary to the decision since the court found, as a matter of law, that the plaintiff's injury was not caused by the defendant's negligence.

[17] Feres v. United States, 340 U.S. 135, 144 (1950). An additional ground was that one of the exceptions in 28 U.S.C. § 2680 might imply exclusion since it excepts "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." It was also stated that one purpose of the act was to do away with the plague of private bills in Congress for relief, and since there had never been a plague of private bills from servicemen, those claims were not intended to be covered by the act.

[18] 110 F. Supp. 906 (W.D. Va. 1953).

[19] 18 U.S.C. § 4126 (1958).

[20] Sigmon v. United States, 110 F. Supp. 906, 910 (W.D. Va. 1953).

[21] 116 F. Supp. 1 (M.D.N.C. 1953).

Subsequently, in *Van Zuch v. United States*,[22] the reasoning of the *Sigmon* case was again followed and the *Feres* decision cited as controlling. Special attention was drawn to the portion of the *Feres* opinion which stated that Congress did not intend the federal penal system to be controlled by the laws of the various states in any way. The court rejected the plaintiff's argument that since the negligence alleged was, *inter alia*, failure to provide adequate medical care, the "like circumstances" test of the act was satisfied since, as a matter of accepted substantive law, doctors are liable for injuries caused by their malpractice. Just as an individual could not conscript and mobilize a private army, countered the court, so also an individual does not have the power "to imprison a person privately for a crime."[23] Further, the federal prisoner-government relationship, like the serviceman-government relationship, was "distinctively federal in character." The United States acts as a sovereign in dealing with offenders, which is distinguishable from actions such as making contracts and buying and selling property—conduct capable of being performed by private persons. The fact that statutory relief has been provided for federal prisoners in some situations[24] provided additional persuasion. However, this court apparently reserved some doubt as to the validity of its holding, for it declared at the conclusion of the opinion, that as a matter of law, proof of negligence had been insufficient.

It would seem that these decisions indicated the expectable treatment to be given such actions in the future, and the federal courts would continue to restrict the application of the act.[25] However, in two subsequent cases, the Supreme Court indicated a limit to the *Feres* case, and possibly a contrary trend in interpreting the act.[26] In *Indian Towing Co. v. United States*,[27] the Court allowed a barge charterer and others to recover under the act when a tug towing the barge went aground due to the negligent operation of a lighthouse by the Coast Guard. The Court rejected the Government's contention that the "like circumstances" requirement of the act must be read as excluding liability for injuries sustained in the performance of activities which private persons do not perform—that the United States is not liable for

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[22] 118 F. Supp. 468 (E.D.N.Y. 1954).
[23] *Id.* at 472.
[24] 18 U.S.C. §4126 (1958).
[25] See also, Dalehite v. United States, 346 U.S. 15 (1953).
[26] See Peck, *The Federal Tort Claims Act—A Proposed Construction of the Discretionary Function Exception*, 31 WASH. L. REV. 207 (1956); Peck, *Absolute Liability and the Federal Tort Claims Act*, 9 STAN. L. REV. 433 (1957).
[27] 350 U.S. 61 (1955).

injuries resulting from the negligent performance by its employees of "uniquely governmental functions." This, declared the Court, would amount to interpreting the act to read "under the *same* circumstances"[28] while the act states "under like circumstances." "All the circumstances," or the "status" of the parties was not deemed material here, contrary to the reasoning in the *Feres* case. Rather, reasoned the Court, just as an individual's conduct which induces reliance by others creates a duty on his part, under certain circumstances, to act with due care regarding those persons, so must employees of the United States exercise due care when they cause reliance under similar circumstances, and failure to perform this duty, resulting in injury to the relying party, should render the United States liable under the act, the same as an individual.[29] Furthermore:

> [A]ll Government activity is inescapably 'uniquely governmental' in that it is performed by the Government. . . . On the other hand, it is hard to think of any governmental activity on the 'operational level' . . . which is 'uniquely governmental,' in the sense that its kind has not at one time or another been, or could not conceivably be, privately performed.[30]

The *Feres* case was found to be inapplicable since "without exception, the relationship of military personnel to the Government has been governed exclusively by federal law."[31]

In 1957, the Court decided in *Rayonier, Inc. v. United States*[32] that a person whose land had been damaged due to the negligent handling of a fire by the Forest Service could recover under the act. The Court said the test of liability of the United States under the act, as laid down by the *Indian Towing Co.* case, was "whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred."[33] The Court did not indicate whether it was relying upon the fact that private firefighting organizations do exist, or

[28] *Id.* at 61.

[29] The Court also rejected the proposed adoption of the "governmental v. nongovernmental functions" theory used to determine liability of municipal corporations due to the confusion which exists in that body of law.

[30] Indian Towing Co. v. United States, 350 U.S. 61, 67-68 (1955).

[31] *Id.* at 69, quoting from Feres v. United States, 340 U.S. 135, 146 (1950).

[32] 352 U.S. 315 (1957).

[33] *Id.* at 319. Again the Court rejected adoption of the "governmental v. nongovernmental functions" distinction. The Court admitted "that it is 'novel and unprecedented' to hold the United States accountable for the negligence of its firefighters, but the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability." The Court apparently declined to assume the responsibility of protecting the public treasury, and said that if the act is to be altered from its plain meaning, that would be the job of Congress.

whether it would be content if the ordinary tort principles of negligence were satisfied.[34]

The two circuit court decisions with regard to whether a federal prisoner could recover under the act were rendered subsequent to both the *Indian Towing Co.* and *Rayonier* cases. In the first, *Jones v. United States*,[35] the seventh circuit, following the *Feres* case, held an individual would never be under circumstances like the United States here since just as a private individual cannot conscript or mobilize a private army, neither does he have a legal right to hold another individual in penal servitude.[36] The eighth circuit, in *Lack v. United States*,[37] also denied relief to a federal prisoner, relying particularly upon the reasoning that the federal prisoner-government relationship, like the serviceman-government relationship, is governed exclusively by federal law, and therefore Congress could not have intended this situation to be covered by the act. *Indian Towing Co.* and *Rayonier* were recognized as a limitation upon further restriction of the act; however, the court characterized the situation of the federal prisoner to be more like the one in the *Feres* case, since private persons can and do fight forest fires as a business, and conceivably could be allowed to run lighthouses, while "it is far less likely that private persons could operate armies or prisons."[38] More significant was the court's note that since the passage of the act, Congress has passed several private bills to provide relief for injured federal prisoners,[39] and because these private bills are usually passed only when the person has no other means to gain relief, it is at least inferable that Congress now considers the act to exclude this situation. Of course, it is the intent of Congress at the time of the passage of the act which is determinative of its meaning, but, considered the court, this provides at least some evidence of what that intent likely was. The court further reasoned that since Congress was aware of the interpretation being given the act by the lower federal courts, it would subsequently have made its intent clear by legislation if it disagreed.

In 1959, another district court denied relief to a federal prisoner,

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[34] In both *Indian Towing Co.* and *Rayonier*, Mr. Justice Reed vigorously dissented; Justices Burton, Minton and Clark concurred with him in *Indian Towing Co.* and Mr. Justice Clark concurred with him in *Rayonier*. Of these dissenters, only Mr. Justice Clark remains on the bench.

[35] 249 F.2d 864 (7th Cir. 1957).

[36] *Id.* at 866.

[37] 262 F.2d 167 (8th Cir. 1958).

[38] *Id.* at 170.

[39] See Act of July 14, 1956, Private Law 773, ch. 615, 70 Stat. A124. With reference to this bill, the Senate Committee on the Judiciary reported that the bill was advisable since the prisoner could not recover under the Federal Tort Claims Act, citing the *Sigmon* and *Van Zuch* cases. S. REP. No. 1976, 84th Cong., 2d Sess. 2 (1956).

deeming the *Feres* case as controlling.[40] The prisoner was injured while assigned to a public health hospital for drug addiction treatment under circumstances which apparently would result in governmental liability but for his being a federal prisoner. Apparently the court was not favorably impressed with the fact that the person was injured in a situation related only incidentally to being a prisoner, since relief was denied solely because of that status. The absurd appeared to be approaching rapidly.

When an even tougher case arose, however, the absurd result was avoided. In *Lawrence v. United States*,[41] a federal prisoner recovered under the act for injuries sustained in a motor vehicle collision. At the time of the accident, the plaintiff was riding on the body of a government truck being driven on an air force base by a federal employee within the scope of his employment. Another passenger, rather than the driver, was charged with supervision of the plaintiff. A government vehicle driven by another federal employee acting within the scope of his employment rounded a corner and collided with the vehicle upon which the plaintiff was riding. Apparently it was not disputed that the injuries which resulted from the collision were caused by the negligence of one of the drivers. In allowing relief under the act, the court reasoned:

> While it is rational to conclude that in the sphere of private individuals there is no equivalent of the jailer-prisoner relationship, it is running a good principle into the ground to declare in terms of a categorical imperative that a federal prisoner, by virtue of his status alone, may not sue the United States under the provisions of the Federal Tort Claims Act where his claim is based upon the alleged negligence of a federal employee completely disassociated from his status. Compare Panella v. United States, 2 Cir., 1954, 216 F.2d 622, wherein the question was left open. Nothing in the rationale or the holding of Feres v. United States, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152, conceding that its vitality as an analogy to federal prisoner cases under the Tort Claims Act has not been impaired by Rayonier, Inc. v. United States, 352 U.S. 315, 77 S.Ct. 374, 1 L.Ed.2d 354, or Indian Towing Co., Inc. v. United States, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48, sanctions such a rule cast in absolute terms.[42]

From this survey, it seems safe to surmise that denial of relief is the expectable result in future district or circuit court decisions, except perhaps, in any which like the *Lawrence* case, involve an injury sustained

[40] Berman v. United States, 170 F. Supp. 107 (E.D.N.Y. 1959).
[41] 193 F. Supp. 243 (N.D. Ala. 1961).
[42] *Id.* at 245.

in a manner totally unrelated to the injured person's status as a prisoner. The question remains as to what the Supreme Court will decide.

BACKGROUND OF THE FEDERAL TORT CLAIMS ACT

Modernly, it is accepted without question that the federal and state governments may not be sued by their citizens unless the government has given its consent. This concept was inherited from English common law, although it also existed in continental law and, more anciently, Roman law. In England, the basis for this doctrine lay in the peculiar nature of the Crown. In the first place, feudalism precluded suits by subjects against their lord or king for the very practical reason that it was impossible for a person to be a party to an action in a court which he was conducting.[43] In the second place, jurisprudence of the Middle Ages, influenced by ecclesiastic doctrines, advanced the theory of the "divine right of Kings" according to which kings owed no duty to the laws of man but only to the laws of God.[44] From this theory arose the often repeated maxim, "the King can do no wrong." Although contention continued whether the correct basis of the doctrine of sovereign immunity was the result of feudalism or the theory of the "divine right of Kings," or both, it became well settled by Blackstone's time that the Crown was immune from suit for torts committed personally or by an agent of the Crown.[45] This principle persisted in England without substantial change until the enactment of the Crown Proceedings Act of 1947, culminating a centuries-old battle to restrict or abolish the doctrine.[46]

A similar trend advocating relief for injuries caused by the tortious conduct of persons in their capacity as governmental agents had been taking place elsewhere in the world. Several countries of the Commonwealth preceded England in providing relief.[47] In Germany, the trend evolved to the point that the scope of governmental liability became greater for governmental than for non-governmental acts (or, as they are characterized in Germany, "corporate acts").[48] French judisprudence advanced to the extreme of allowing governmental responsibility

[43] STREET, GOVERNMENTAL LIABILITY 1 (1953).
[44] Blachly and Oatman, *Approaches to Governmental Liability in Tort: A Comparative Survey*, 9 LAW & CONTEMP. PROB. 181, 182 (1942).
[45] BLACKSTONE, COMMENTARIES 242 (17th ed. 1830).
[46] Crown Proceedings Act, 1947, 10 & 11 Geo. 6, c. 44.
[47] Australia provided for relief against the Government at the turn of the century, Australia Constitutional Act, 1900, 63 & 64 Vict. c. 12, 78; the Union of South Africa in 1910, Crown Liabilities Act, 1910, § 2; and Canada in 1927, Canadian Petition of Right Act, CAN. REV. STAT. c. 158 (1927). Subsequently, New Zealand has caused the Crown to be suable in tort under its Crown Proceedings Act, Act No. 54 of 1950, § 6.
[48] STREET, *op. cit. supra* note 43, at 20.

with the only exception being actions for injuries resulting from governmental functions, using that term in its most limited sense.[49]

The English concept of the doctrine of sovereign immunity at the time of the adoption of the United States Constitution was arrogated by the federal courts into the United States common law, notwithstanding the same reasons for its adoption did not exist.[50] Through the years, little authority existed to point out the true basis for the doctrine in the United States, since the courts proceeded no further than to repeat the doctrine, and, aside from passing some private relief bills, Congress did not express its views until 1946. The passage of these private bills accords with the doctrine that the Government cannot be sued without its consent but does not aid in ascertaining the substance and limitations of the doctrine. Considerable variance of opinion exists concerning the proper basis for the doctrine and whether it ought to continue as a part of American jurisprudence. Discontent with the doctrine grew, evidenced by a large body of writing on the subject. Most of this writing seeks in various ways to point out that the doctrine cannot validly be characterized as substantive law; but rather, the doctrine only identifies the procedural predicament that no method has been provided for bringing an action against the Government for torts committed by its agents. One of the functions of government is to provide the mechanics of redress, and until the United States has provided a means of redress against itself, no such action can be brought.

Against this background, the first of a series of bills was introduced into Congress in 1942, culminating in the passage of the Federal Tort Claims Act in 1946.[51] Application of the act by the federal courts has not always been consistent and some of the trends originating soon after its passage apparently have already been changed.[52] Some of the fundamental rules of the act have yet to be developed. Whether a federal prisoner may recover under the act for injuries caused by the negligent or wrongful act or omission of a federal employee while he is in a federal prison must await a decision by the United States Supreme Court. Meanwhile, the lower federal courts will most probably continue to deny relief on the basis of arguments patterned after those

[49] See STREET, *op. cit. supra* note 43, at 56-76.

[50] The practical problem in feudalism which prevented the lord from being sued in his own court does not exist modernly, nor does the theory of the "divine right of Kings" bear any weight. However, rationale for the doctrine in our law has one or the other of these theories as its origin, which can be detected in opinions such as Justice Holmes' in Kawanakoa v. Polybank, 205 U.S. 349 (1907).

[51] The basic provisions of the act are now found in 28 U.S.C. §§ 1346(b), 2671-80 (1958).

[52] *E.g.*, from the *Dalehite* case to the *Indian Towing Co.* and *Rayonier* cases.

presented by thoroughly capable defense-minded government attorneys and which appear in the existing cases.[53]

ANALYSIS OF THE PROBLEM

Recovery by prisoners for injuries sustained while in federal prisons is not precluded by any of the express exceptions from coverage of the act.[54] This factor has particular significance in the case of the Federal Tort Claims Act. The purpose of the act, at least in part, was to relieve Congress of the onerous task of providing relief against the Government by means of private relief bills. Prior to the passage of the act, Congress had provided relief in this manner to federal prisoners on several occasions,[55] which indicates a congressional awareness of the need. Congress expressed itself in detail, in itemizing definite types of claims to be precluded from coverage of the act. Claims of federal prisoners fall in none of these, which, by application of the maxim *expressio unius,* raises the inference that Congress did not intend to preclude these claims.[56] The question remains, however, whether Congress intended that federal prisoners should be allowed to recover under the act. Again, the act is not specific regarding claims of federal prisoners. However, the act does not provide relief for any particular type of claim. The requirement in the act is merely that the claimant must have been injured by a "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[57] . . . [and that] the United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances. . . ."[58] This merely constitutes a statement of general policy, to which specific exceptions were listed. Congress clearly was not attempting to direct the outcome of specific types of actions.

Since nothing specific can be found in the act regarding recovery by federal prisoners, resort must be had to the statutory interpretation

[53] Lack v. United States, 262 F.2d 167 (8th Cir. 1958); Jones v. United States, 249 F.2d 864 (7th Cir. 1957); Berman v. United States, 170 F. Supp. 107 (E.D.N.Y. 1959); Van Zuch v. United States, 118 F. Supp. 468 (E.D.N.Y. 1954); Shew v. United States, 116 F. Supp. 1 (M.D.N.C. 1953); Sigmon v. United States, 110 F. Supp. 906 (W.D. Va. 1953).

[54] 28 U.S.C. § 2680 (1958).

[55] Brief for Appellee, Lack v. United States, 262 F.2d 167 (8th Cir. 1958), according to WRIGHT, THE FEDERAL TORT CLAIMS ACT 34 (1959 Supp.).

[56] WRIGHT, THE FEDERAL TORT CLAIMS ACT 31 (1959 Supp.); Note, 63 YALE L.J. 418 (1954).

[57] 28 U.S.C. § 1346(b) (1958).

[58] 28 U.S.C. §2674 (1958).

process. In doing this, it is wise first to observe that courts employ different techniques of statutory interpretation when a statute is detailed, specific, and mechanically applicable, than when it is of a general nature, the limits of which are governed by broad, vague standards. In applying the former type of statute, the judicial function is largely limited to characterizing the problems presented by the facts and projecting the statute upon these problems—a mechanical function devoid of what is often referred to as "judicial legislation." In applying the latter type of a statute, the generality of the statute causes the courts to perform a different function. Essentially, the courts make policy decisions here, or engage in "judicial legislation," when interpreting these statutes. Usually the courts say they are doing something else, however, because the attitude prevails in American jurisprudence that policy decisions represent a legislative function which may not and should not be performed by other bodies of government because of the doctrine of separation of powers.

Performance of this "legislative" function by the courts should not be considered contrary to American jurisprudence. Delegation of Congress' rule-making power to executive agencies, subject to limitations, is accepted as a necessary means of reducing the work-load of Congress in a period of increasing volume and complexity of legislative functions.[59] Private bills for the relief of persons injured due to the negligence of government employees under circumstances in which the Government should be responsible became so voluminous that Congress had to delegate this function to another body. In so doing, Congress had to decide how much of the decision making function, with respect to determining the category of claimants who should be allowed to recover under the act, should be delegated. Should Congress specify the types of claims and categories of claimants in detail, thus delegating only the function of deciding the merits of the individual cases? If Congress had decided to take this course, it most probably would have constructed a detailed and specific statute. A contrary and generalized construction of the act was utilized instead, showing an intent by Congress to delegate to the federal courts the more "legislative" function of determining what claims and claimants the act should benefit, subject only to the guide lines set forth in sections 1346(b) and 2674 and the specific exclusions in section 2680 of the act.

In determining what claims and claimants should benefit by the act,

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[59] Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940). See also DAVIS, ADMINISTRATIVE LAW §§ 2.01 - 2.16 (1959).

the federal courts will have to make some basic inquiries concerning the doctrine of sovereign immunity. Reasons for retaining sovereign immunity must be weighed against the reasons for abrogating it to the extent allowed by the act, and the answer should reflect the general tenor of the act.

A variety of jurisprudential reasons for continuing the doctrine of sovereign immunity has been suggested. A fair representation of these reasons has been compiled by Harper and James:[60]

> (1) funds devoted to public purposes should not be diverted to compensate for private injuries; (2) "the public service would be hindered, and the public safety endangered, if the superior authority could be subjected to suit at the instance of every citizen, and, consequently, controlled in the use and disposition of the means required for the proper administration of the Government"; (3) that liability would involve the government "in all its operations, in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests"; and (4) that unlike private enterprises, the government derives no profit from its activities.

On the other hand, the general tenor of the act shows a congressional desire for liberal interpretation and application of the act. The general tenor, rather than the "dictionary interpretation" of the act is the crucial thing in determining its meaning and purpose. When Congress constructs a statute in which courts are given certain powers, and the scope of these powers are limited by broad, general terms, the courts must look to the general tenor of the statute in deciding particular cases. Judge Hand has stated, "statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."[61]

In discussing the problem of statutory interpretation, Judge Frank compared the function of statutory interpretation with the work of a musician interpreting a musical score.[62] Some composers include precise directions concerning the execution of every portion of their composition. This music will sound very much the same regardless of who is conducting its performance. Other composers' directions will be merely something like "play this with tenderness," or "play this with

[60] 2 HARPER & JAMES, TORTS § 29.3 (1956), quoting in (2), The Siren, 7 U.S. (Wall.) 152, 154 (1868), and quoting in (3), Murdock Parlor Grate Co. v. Commonwealth, 152 Mass. 28, 32, 24 N.E. 854, 856 (1890), quoting STORY, AGENCY § 319 (9th ed. 1882).

[61] Frank, *Words And Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259, 1263 (1947), quoting Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945).

[62] Frank, *supra* note 61.

determination."[63] Judge Frank's theory is that when Congress desires "judicial legislation," it will construct a statute with general and vague standards which would be, in effect, a direction to the courts to "play this statute with tenderness" or "play that statute with determination."[64] According to this theory, it would appear Congress directed the federal courts to apply the Federal Tort Claims Act with liberality, and the federal courts should give effect to the mandate to restrict the application of the doctrine of sovereign immunity in determining who may recover under the act and upon what claims.

If the act is construed and applied with liberality, federal prisoners should be able to recover for injuries sustained by a negligent or wrongful act or omission of a government employee acting within the scope of his employment while the prisoner was in a federal prison. Since the *Feres* and *Dalehite* cases, which appeared for some time to be the beginning of a trend toward a conservative application of the act, the United States Supreme Court, through the *Indian Towing Co.* and *Rayonier* cases, has shown a definite intent to construe and apply the act with liberality.[65] If this trend toward liberality is forcibly presented to the lower federal courts, then different results might be expected because these courts traditionally attempt to "follow new 'doctrinal trends' in the court above them."[66]

A liberal construction of the act would be beneficial to the public as a whole. The argument that public funds should not be used to compensate private injuries[67] is rebutted by pointing out the resulting unfairness to a person who is injured due to the fault of another and yet has to bear his or her own loss. "[S]ince the public purposes involve injury producing activity, the injuries thus caused should be viewed as a part of the activity's normal costs, and no one suggests that it is a diversion of public funds to pay to [*sic*] cost of public enterprise even

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[63] *Id.* at 1267.

[64] *Ibid.*

[65] The majority of the present Court appears to favor a liberal interpretation of the act. Mr. Chief Justice Warren and Justices Douglas and Harlan joined in the majority opinions in both the *Indian Towing Co.* and *Rayonier* cases. Mr. Justice Black joined the majority in the *Indian Towing Co.* case, and wrote the majority opinion in the *Rayonier* case. Mr. Justice Frankfurter joined the dissent in the *Dalehite* case, wrote the majority opinion in the *Indian Towing Co.* case, and joined the majority in the *Rayonier* case. Mr. Justice Clark, on the other hand, has shown apparent sympathy with a conservative construction of the act by joining the dissent in both the *Indian Towing Co.* and *Rayonier* cases. Even with the positions of Justices Whittaker and Stewart being unpredictable at this time, a liberal construction of the act appears to be the expectable result in the future.

[66] Frank, *supra* note 61, at 1271.

[67] 2 HARPER & JAMES, *op. cit. supra* note 60.

if payment is made to private persons."[68] Presumably, we consider it fundamental to our system of government that all people join in paying the costs of government, and yet a cost involved in an injury to a federal prisoner caused by the Government through the negligence of one of its agents will currently have to be born by the injured party alone. Further, the present situation is inconsistent with current theories of treatment of criminals. Federal prisoners are deprived of many rights because of their failure to conform to certain social requirements, but nothing indicates that Congress intended them to withstand all risks of harm. No comparable deprivation of the right to be treated with the care which an ordinary prudent man would exercise under the circumstances[69] exists regarding prisoners in state prisons.

There is a sufficient number of federal prisoners to warrant concern. The average number of federal prisoners in Bureau of Prison Institutions for the fiscal year ending June 30, 1959, was twenty-one thousand, eight hundred and ninety-one.[70] At present there is no *adequate* system of compensation for injured federal prisoners. A compensation statute exists to provide relief for prisoners injured while working for the Federal Prison Industries,[71] but this is inadequate for those affected, and these prisoners do not represent the majority of the prison population. According to the Bureau of Prisons report of 1956,[72] only about eighteen per cent of the total number of federal prisoners were engaged in the Federal Prison Industries while about forty per cent were engaged in prison maintenance, which is not substantially less hazardous work. Even for the eighteen per cent of prisoners covered by this "workmen's compensation" statute,[73] the compensation provided is inadequate because the "compensation may not exceed the amount that would be paid under the Federal Employees' Compensation Act. Although the Federal Employees' Compensation Act is a liberal workmen's compensation act, the benefits under it are based on the worker's pay at the time of the injury which, in the case of prisoners, is notoriously low."[74] These statistics show a real need to

[68] *Id.* at 1612. Contrary to popular belief, allowing federal prisoners to recover under the act would not cause a great drain on the federal treasury. The effect of New York's position is a good example. According to one report, from 1955 to 1958, only five judgments in favor of state prisoners were rendered in New York under its tort claim statute. Comment, *Remedies Available to Penal Inmates for Injuries Received While Incarcerated,* 34 IND. L.J. 609, 620 n. 84 (1959).

[69] PROSSER, TORTS § 31 (1955); RESTATEMENT, TORTS § 283 (1934).

[70] 1959 BUREAU OF PRISONS ANN. REP.

[71] 18 U.S.C. § 4126 (1958).

[72] 1956 BUREAU OF PRISONS ANN. REP.

[73] 18 U.S.C. § 4126 (1958).

[74] WRIGHT, *op. cit. supra* note 56, at 29, citing 5 U.S.C. §§ 751-95.

provide relief for injured federal prisoners, and nothing in the general tenor of the act, or in the circumstances attending its enactment, evince a congressional desire for the courts to deny relief to federal prisoners.

Government attorneys have argued[75] that the special statutory relief provided for prisoners injured while working in the Federal Prison Industries[76] is the exclusive remedy against the United States for those claimants. A forceable argument can be made against this by indicating that some other federal compensation statutes, such as the Veteran's Act,[77] have been construed as non-exclusive, and a subsequent recovery under the Federal Tort Claims Act would merely be reduced by the recovery under the other statute.[78] Compensation statutes which have been construed to be exclusive, such as the Federal Employees' Compensation Act,[79] are not analogous. Contrary to the statute providing compensation for federal prisoners injured while working in the Federal Prison Industries,[80] these statutes deal with large classes of persons rather than segments of a more distinct group,[81] which evinces a congressional desire that they be exclusive remedies.

Another argument which might have to be overcome by a federal prisoner's attorney is that the relationship between a jailer and his prisoners precludes the existence of a duty on the part of the jailer to exercise the care of a reasonably prudent man;[82] to impose such a duty would unduly interfere with prison discipline. The basis for this argument is that the jailer's job of keeping people restricted is so hazardous and requires so much discipline that he should not be expected to exercise the care which would be required under different circumstances. This is really nothing more than a plea for a different standard of care for jailers. Since the circumstances control the standard of care, of course a jailer would not properly be expected to exercise the same care in some functions as he would in other situa-

[75] Berman v. United States, 170 F. Supp. 107 (E.D.N.Y. 1959); Lack v. United States, 262 F.2d 167 (8th Cir. 1958); Jones v. United States, 249 F.2d 864 (7th Cir. 1957); Van Zuch v. United States, 118 F. Supp. 468 (E.D.N.Y. 1954); Shew v. United States, 116 F. Supp. 1 (M.D.N.C. 1953); Sigmon v. United States, 110 F. Supp. 906 (W.D. Va. 1953).

[76] 18 U.S.C. § 4126 (1958).

[77] 38 U.S.C. §§ 701-88 (1958).

[78] United States v. Brown, 348 U.S. 110 (1954); Brooks v. United States, 337 U.S. 49 (1949).

[79] 5 U.S.C. §§ 751-95 (1958).

[80] 18 U.S.C. § 4126 (1958).

[81] The Veteran's Act, though encompassing a large and distinct group of persons, was of a nature which would infer that Congress intended liberal benevolence toward veterans, which is not found in the normal workmen's compensation statute.

[82] This is the standard of conduct by which negligence is determined. PROSSER, *op. cit. supra* note 69; RESTATEMENT, TORTS, *supra* note 69.

tions, such as if he were a hotel manager. Nevertheless, he would have to exercise the care required of a reasonably prudent jailer under the same or similar circumstances.

It is significant that the majority of the states which have passed upon the question have granted prisoners recovery against jailers for injuries caused by the jailers' negligence.[83] Assume that a trustee-prisoner of a state prison were injured while delivering state prison-farm produce to a federal prison within that state, and the injury was caused by the negligence of a guard at the federal prison while acting within the scope of his employment. Assume further that the law of that state permits prisoners to recover against jailers on the theory of negligence. Would this state prisoner be able to recover under the act? It would seem so. Then why should a federal prisoner who is injured under similar facts be precluded from recovery? If a state prisoner could recover from his jailer for a negligently caused injury in that state, a federal prisoner should be granted relief under the act,

[83] States which allow recovery: California, Fernelius v. Pierce, 22 Cal. 2d 226, 138 P.2d 12 (1943); Colorado, People *ex rel.* Coover v. Guthner, 105 Colo. 37, 94 P.2d 699 (1939); Georgia, Kendrick v. Adamson, 51 Ga. App. 402, 180 S.E. 647 (1935); Idaho, Jacobson v. McMillan, 64 Ida. 351, 132 P.2d 773 (1943) (Idaho has not decided the question directly but has cited the Washington position with approval); Indiana, Magenheimer v. State, 120 Ind. App. 128, 90 N.E.2d 813 (1950); *In re* Jenkins, 25 Ind. App. 532, 58 N.E. 560 (1900); Iowa, Smith v. Miller, 241 Ia. 625, 40 N.W.2d 567 (1950); Kansas, Bukaty v. Berglund, 179 Kan. 259, 294 P.2d 228 (1956); Topeka v. Boutwell, 53 Kan. 20, 35 Pac. 819 (1894); Kentucky, Lamb v. Clark, 282 Ky. 167, 138 S.W.2d 350 (1940); Ratliff v. Stanley, 224 Ky. 819, 7 S.W.2d 230 (1928); Louisiana, St. Julien v. State, 98 So. 2d 284 (La. App. 1957); Honeycutt v. Bass, 187 So. 848 (La. App. 1939); Mississippi, Farmer v. State, 224 Miss. 96, 79 So. 2d 528 (1955); Missouri, Nixa v. McMullin, 198 Mo. App. 1, 193 S.W. 596 (1917) (this case but weakly supports this position); Nebraska, O'Dell v. Goodsell, 149 Neb. 261, 30 N.W.2d 906 (1948); Nevada, Gurley v. Brown, 65 Nev. 245, 193 P.2d 693 (1948) (dicta); New York, Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E. 2d 534 (1958); North Carolina, State *ex rel.* Hayes v. Billings, 240 N.C. 78, 81 S.E.2d 150 (1954); Ohio, Justice v. Rose, 102 Ohio App. 482, 144 N.E.2d 303 (1957); Oklahoma, Allen v. Cavin, 179 Okl. 460, 66 P.2d 40 (1937); Taylor v. Slaughter, 171 Okl. 152, 42 P.2d 235 (1935); Hixon v. Cupp, 5 Okl. 545, 49 Pac. 927 (1893); Tennessee, State *ex rel.* Morris v. Nat'l Surety Co., 162 Tenn. 547, 39 S.W.2d 581 (1937); Texas, Browning v. Graves, 152 S.W.2d 515 (Tex. Civ. App. 1941); Asher v. Cabell, 50 Fed. 818 (1892); Utah, Richardson v. Capwell, 63 Utah 616, 176 Pac. 205 (1918) (dicta); Virginia, Dabney v. Talioferro, 4 Rand. 256 (1826); Washington, Eberhart v. Murphy, 113 Wash. 449, 194 Pac. 415 (1920); Kusah v. McCorkle, 100 Wash. 318, 170 Pac. 1023 (1918); Riggs v. German, 81 Wash. 128, 142 Pac. 479 (1914); West Virginia, Smith v. Slack, 125 W. Va. 812, 26 S.E.2d 387 (1943). Note that some of these states based liability on statutes, but no distinction should be drawn on this point because most of these statutes were enacted at a time when the mistaken opinion that jailers and sheriffs had no standard of care toward prisoners, save "wanton misconduct," was prevalent.

States which deny recovery: Illinois, Bush v. Babb, 23 Ill. App.2d 285, 162 N.E.2d 594 (1959); Maryland, Cocking v. Wade, 87 Md. 529, 40 Atl. 104 (1898); Clark v. Ferling, 220 Md. 109, 151 A.2d 137 (1959); Massachusetts, O'Hare v. Jones, 161 Mass. 391, 37 N.E. 371 (1894).

In federal actions, the limitation expressed in Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), would exist.

For a general discussion in this area, see *Remedies Available To Penal Inmates For Injuries Received While Incarcerated,* 34 IND. L.J. 609 (1959).

since the act expressly provides that liability of the United States is to be based upon local law.[84]

In the State of Washington, it will be interesting to see whether the recently enacted statute,[85] waiving the state's immunity from suit in actions for damages arising out of its tortious conduct, will receive a liberal construction by the Washington Supreme Court. A liberal construction should result in recoveries by state prisoners since Washington numbers among those states which recognize that jailers and other custodians of prisoners owe some duty of care toward their prisoners.[86] If this comes to pass, a disparity between the judicial application of

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[84] 28 U.S.C. §1346(b) (1958). See Williams v. United States, 350 U.S. 857 (1955).

[85] Wash. Sess. Laws 1961, ch. 136.

[86] However, there is a substantial danger that chapter 136 will not provide relief for state prisoners against the State of Washington for injuries sustained due to the negligent conduct of a state agent or employee acting within the scope of his employment while the prisoner is incarcerated in one of the state prisons.

First, recovery may be denied because chapter 136 did not cause the State of Washington to be liable for damages resulting from its tortious conduct. The argument would be that for recovery to be allowed, the legislature must enact a statute which provides for state *liability* for torts of its agents and employees, and that a statute which merely provides "any person or corporation having any claim against the State of Washington shall have the right to begin an action against the state" (RCW 4.92.010), or "the state of Washington... hereby consents to the maintaining of a suit or action against it for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation" (chapter 136), does not accomplish this purpose. In support of the argument that a consent to liability by the state is necessary as well as a consent to suit, to effect a waiver of sovereign immunity, the proponent may cite Billings v. State, 27 Wash. 288, 67 Pac. 583 (1902); Riddoch v. State, 68 Wash. 329, 123 Pac. 450 (1912); Cook v. State, 192 Wash. 602, 74 P.2d 199 (1937); Automobile Club of Washington v. Seattle, 55 Wn.2d 161, 346 P.2d 695 (1959). The conclusion advanced would be that since chapter 136 does not contain the word "liability," it does not waive the state's sovereign immunity from suits based upon tort principles.

The effect of this argument awaits judicial interpretation. It ought not be embraced by the Washington court since the notion that the legislature must consent to "liability" as well as to suit to effect a waiver of its sovereign immunity is without historical foundation in the evolution of the doctrine. Further, the statute should be given a liberal construction since it is remedial. Johnson v. Ottomeier, 45 Wn.2d 419, 275 P.2d 723 (1954).

State prisoners may face another hurdle in attempting to obtain relief under chapter 136. It may be impossible to satisfy any judgment obtained under the statute out of the state treasury. No special appropriation attended the statute. Therefore, since the Washington Constitution, art. VIII, § 4 (amendment 11) (1922), prohibits paying any money out of the state treasury except pursuant to an appropriation, funds may be unavailable to pay a judgment. However, if any appropriation, made to fund other matters covered by some other statute, is sufficiently broad to permit payment of money to satisfy a judgment obtained by a state prisoner under chapter 136, this would cause no problem. Another possible but less probable solution is that a technique may be devised by some ingenious counsel for attaching money in one of the local funds of which the state treasurer is the custodian only. Unless this solution is available, the local funds will be beyond the grasp of a judgment creditor who has recovered under chapter 136, since there is no method at this time for such a person to compel the state treasurer to issue a warrant on these funds.

Finally, there is the danger that the Washington Supreme Court may adopt the reasoning of those federal cases which deny relief under the Federal Tort Claims Act to federal prisoners. To prevent this, the error in the federal position must be vigorously and accurately exposed.

the Washington act and the Federal Tort Claims Act would be vividly illustrated.

The phrase in the act which provides for United States liability "where the United States, if a private person, would be liable"[87] places the United States in the position of its prison guards and employees for purposes of ascertaining liability on the part of the United States. Yet Government attorneys argue that Congress could not have intended that the "federal" relationship of a federal prisoner to the Government should be in any way governed by the varying laws of the states. The tenor of this argument is appealing under the receptive light of the contemporaneous trend toward exclusive federal activities. However, it ignores the fact that the act, which causes state law to apply, was intended by Congress to apply to the vast majority of governmental activities, thus making many federal activities dependent upon state law. It does not appear that the Supreme Court has been impressed with this argument in other situations, however. In any event, no real burden would be placed upon the federal prison system. Of the states which recognize that a jailer or other custodian of prisoners owes a duty of care toward his prisoners, the standard would probably vary little between the states. The only difference would be between those prisons in states which do recognize the existence of this duty of care, and those which do not. However, little difference in treatment should be expected between these two groups of prisons, since we should be able to assume that the present care in federal prisons is uniformly humane.

Another factor which federal courts will have to consider in determining whether federal prisoners may recover under the act is that one purpose of the act was to relieve Congress of the onerous function of providing relief for persons who theretofore could not recover for injuries sustained because of the doctrine of sovereign immunity. The brief of the Government in the *Lack* case[88] calls attention to twenty-four private bills introduced into Congress to relieve federal prisoners. These bills were introduced before and after the act was passed.[89] This suggests not only that Congress was aware of the need for relief before it enacted the act, but also that the purpose of the act is not being satisfied.[90] The *Lack* opinion discloses a report of the Senate Committee on the Judiciary concerning a private bill for relief of a federal

[87] 28 U.S.C. § 1346(b) (1958).
[88] Lack v. United States, 262 F.2d 167 (8th Cir. 1958).
[89] WRIGHT, *op. cit. supra* note 56, at 31.
[90] *Ibid.*

prisoner which was introduced after the passage of the act. This report states that because the claimant could not recover under the act, he could receive compensation by private legislation. The court in the *Lack* case deduced that this report constituted a congressional statement that at the time of the passage of the act, it had not intended it to provide relief to federal prisoners.[91] This deduction does not necessarily follow. It appears from the report that the committee's conclusion was based upon the *Van Zuch* and *Sigmon* decisions. Therefore, an equally valid deduction from the report is that since the *Van Zuch* and *Sigmon* decisions indicated to Congress that the federal courts were declining to relieve Congress of its burden of providing relief to injured federal prisoners, which was one of the purposes of the act, then Congress would have to take up the burdensome practice again.

Perhaps if Congress were to become besieged with requests for private bills to compensate federal prisoners for injuries sustained while incarcerated, a definitive legislative statement, correcting or affirming the federal courts' present position, might ensue.

CONCLUSION

Neither the Federal Tort Claims Act nor the *Feres* case presents a bar to a federal prisoner's action under the Federal Tort Claims Act for injuries sustained due to a negligent or wrongful act or omission of a federal employee acting within the scope of his employment. The reasoning of the *Feres* case which may have survived the trend caused by the *Indian Towing Co.* and *Rayonier* cases is not properly applicable to a federal prisoner case. Recovery by a federal prisoner was not expressly precluded by the act, and allowance of recovery would accord with the general tenor of the act. The trend of a liberal construction and application of the act, evidenced in part by the *Indian Towing Co.* and *Rayonier* cases, dictates that the lower federal courts should allow relief to the federal prisoner. The number of federal prisoners is large enough to create serious problems unless there is a comprehensive and adequate system of compensation for injuries sustained due to the fault of the Government's employees. Allowing recovery would terminate the injustice of a single individual's having to bear the entire cost of a certain cost of government—his injury. Allowing recovery would also cause the law of the place where the prisoner was injured to govern the standard of care owed to him by those

[91] Lack v. United States, 262 F.2d 167 (8th Cir. 1958).

to whose charge he has been commended. Finally, Congress would be relieved of the time-consuming function of determining the merits of each claimant in a period replete with more momentous problems.

Notwithstanding this reasoning, injured federal prisoners will probably not receive favorable treatment in federal courts. Perhaps the *Lawrence* case will provide an impetus for granting recovery under the act, at least in cases where the injury is sustained under circumstances quite unrelated to the person's status as a prisoner. Until the Supreme Court considers the matter, however, denial of recovery will be the expectable result in the lower federal courts. Meanwhile, probably very few actions will be commenced by federal prisoners because of the twenty per cent maximum attorney's fee limitation set by the act and because the prospect of a denial of recovery at the trial and appellate levels will indicate a poor return to the attorney for his work in the ordinary case.