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STATE LAW VERSUS A FEDERAL COMMON LAW OF TORTS

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The Statute, Its Scope and Basic Standard

Section 421(k) of the Federal Tort Claims Act excludes from its coverage "any claim arising in a foreign country."[1] The Foreign Claims Act[2] which was passed by the 77th Congress and amended by the 78th Congress has specific application to foreign countries, including places located therein which are under the temporary or permanent jurisdiction of the United States.

Court test of the territorial scope of the Federal Tort Claims Act arose in a series of cases decided in 1948,[3] culminating in *United States v. Spelar*,[4] where the issue of possible foreign coverage was definitely ruled out. As a result of the foregoing cases, conflict of laws problems involving the domestic law of foreign nations do not arise in the administration of the statute. Of course, Alaska, the Canal Zone, the Virgin Islands, Territory of Hawaii, Puerto Rico, Guam and *all island possessions* of the United States fall within the coverage of the statute.[5]

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1. 28 U.S.C.A. § 2680(k) (1950). Some of the earlier bills carried the above exception modified by the words "in behalf of an alien." See, *e.g.*, H.R. 5299, 77th Cong., 1st Sess. § 303(12) (1941); H.R. 7236, 76th Cong., 3d Sess. § 303(12) (1939); S. 2690, 76th Cong., 1st Sess. § 303(12) (1939). At the suggestion of the Department of Justice the words "in behalf of an alien" were deleted from all subsequent legislative drafts. *Hearings before Committee on the Judiciary on H.R. 5373 and H.R. 6463*, 77th Cong., 2d Sess. 26, 30, 35, 43, 61 (1942).

2. 55 STAT. 880 (1942), *as amended*, 61 STAT. 501 (1947), 31 U.S.C.A. § 224(d) (Supp. 1953).

3. Brewer v. United States, 79 F. Supp. 405 (N.D. Cal. 1948) (Okinawa, under American military occupation); Lenhardt v. United States, S.D. Cal., June 22, 1948 (American occupied zone of Germany); Denahey v. Isbrandtsen Co., 80 F. Supp. 180 (S.D.N.Y. 1948) (Japan); Brunell v. United States, 77 F. Supp. 68 (S.D.N.Y. 1948) (Saipan under military occupation); Straneri v. United States, 77 F. Supp. 240 (E.D. Pa. 1948) (Port of Ghent, Belgium under military control of American forces).

4. 338 U.S. 217, 221, 70 Sup. Ct. 10, 94 L. Ed. 3 (1949). The *Spelar* case involved a flight engineer by the name of Mark Spelar, an employee of American Overseas Airlines who was killed in a take-off crash at Harmon Field, Newfoundland, one of the air bases leased for 99 years by Great Britain to the United States. Spelar's administratrix brought suit against the United States in the district of her residence, the Eastern District of New York. Negligent operation of the air field was alleged. The law relied upon was the Newfoundland Wrongful Death Statute. Newfoundland Consol. Stat., 3d Series, c. 213.

5. See 28 U.S.C.A. § 1346(b) (1950) (express mention is made of the district courts for Alaska, the Canal Zone and the Virgin Islands). The language of Section 410(a) of The Federal Tort Claims Act gives exclusive jurisdiction

The law applicable to suits under the Federal Tort Claims Act is that of the place where the act or omission occurred. Accordingly, the Act provides for jurisdiction of the district courts of the United States over "civil actions on claims against the United States, for money damages . . . 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."[6] It is thus apparent that the statute embodies the basic principle in Anglo-American law of Torts that liability-creating conduct shall be measured by the *lex loci delicti*.[7] Applying this criterion, it has been held that the substantive tort law of the state determines the existence of a cause of action against the sovereign.[8]

Because of the recurrent nature of such issue, the main thrust of the ensuing discussion will deal with a series of variant situations in which the focal problem relates to the application of state or federal law in fields where the former might, upon superficial considerations, seem applicable.

Parenthetically, it may be observed that the Fourth Circuit Court of Appeals in the *Burkhardt*[9] case, reversing the District Court, disregarded the time limitation of the Maryland law for the bringing of wrongful death actions by and against private individuals, holding that the federal law, prescribed its own time limitation which should govern, once a cognizable cause of action was stated. This ruling was then open to criticism as giving to an individual a *greater*

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to the United States District Court wherein the plaintiff resides or where the act or omission complained of occurred, including the United States District Courts for the territories and possessions of the United States. 60 STAT. 843, 844 (1946). This section is now codified. 28 U.S.C.A. §§ 1346(b), 1402(b) (1950).

6. 28 U.S.C.A. § 1346(b) (1950). "The liability of the United States will be the same as a private person under like circumstances, in accordance with the local law, except that no punitive damages and no interest prior to judgment may be recovered." SEN. REP. No. 1400, 76th Cong., 2d Sess. 32 (1946). See also Comment, 56 YALE L.J. 534, 553 (1947). *See* Wells v. Simonds Abrasive Co., 345 U.S. 514, 520, 73 Sup. Ct. 856, 97 L. Ed. 1211 (1953) (dissenting opinion).

7. Western Union Telegraph Co. v. Brown, 234 U.S. 542, 34 Sup. Ct. 955, 58 L. Ed. 1457 (1914); American Banana Co. v. United Fruit Co., 213 U.S. 347, 29 Sup. Ct. 511, 53 L. Ed. 826 (1909); Slater v. Mexican Nat. R.R., 194 U.S. 120, 126, 24 Sup. Ct. 581, 48 L. Ed. 900 (1904); Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918) (opinion by Cardozo); 1 BEALE, CONFLICT OF LAWS § 378.2 (1934); RESTATEMENT, CONFLICT OF LAWS §§ 377-79 (1934); *see* Wells v. Simonds Abrasive Co., *supra* note 6, at 520 (dissenting opinion).

8. Young v. United States, 184 F.2d 587, 21 A.L.R.2d 1458 (D.C. Cir. 1950); Maryland, to the use of Burkhardt v. United States, 165 F.2d 869 (4th Cir. 1947).

9. Maryland, to the use of Burkhardt v. United States, 165 F.2d 869 (4th Cir. 1947), *reversing* 70 F. Supp. 982 (D. Md. 1947).

right against the United States than against another private individual under state law, especially in those thirteen states, including Maryland, where the time limit was regarded as an integral part of the right as distinguished from the remedy.[10]

The problem (as to limitations on actions for death, personal injury or property damage) was, in any event, resolved by legislation which applies a now uniform two-year limitation from the date of accrual of the cause of action to eliminate the conflict of varying state statutes of limitation.[11]

Implicit in the treatment of local law as the measure of substantive liability in tort is the historic principle that such cause of action is transitory,[12] and ordinarily may be brought against the wrongdoer wherever he may be found, assuming jurisdiction in the forum over the subject matter and over the parties.[13] This general principle has

10. *Cf.* Maryland, for Use of Dunnigan v. Colburn, 171 Md. 23, 187 Atl. 881, 107 A.L.R. 1045 (1936) (A.L.R. annotation lists states). See Atlantic Coast Line R.R. v. Burnette, 239 U.S. 199, 201, 36 Sup. Ct. 75, 60 L. Ed. 226 (1915); Davis v. Mills, 194 U.S. 451, 454, 24 Sup. Ct. 692, 48 L. Ed. 1067 (1904); *The Harrisburg*, 119 U.S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358 (1886); Lewis v. RFC, 177 F.2d 654 (D.C. Cir. 1949); 3 SUTHERLAND, STATUTORY CONSTRUCTION § 7205 (3d ed., Horack, 1943).

11. 28 U.S.C.A. § 2401(b) (1950). For application of the two-year period to personal injury actions under the Federal Tort Claims Act, see Levitch v. United States, 114 F. Supp. 572 (W.D. Mo. 1953); Whalen v. United States, 107 F. Supp. 112 (E.D. Pa. 1952); Sweet v. United States, 71 F. Supp. 863 (S.D. Cal. 1947). As to diversity of citizenship actions not under the Federal Tort Claims Act or not under other federal laws having their own express limitations, this conflicts problem presently may be resolved by the law of the forum (where the forum has its own express limitation differing from that of the *lex loci delicti*), as being consonant with the full faith and credit clause of the Constitution. Wells v. Simonds Abrasive Co., 345 U.S. 514, 73 Sup. Ct. 856, 97 L. Ed. 1211 (1953). The dissent, however, is substantial and well-reasoned. *Id.* at 519 *et seq.* In non-diversity cases, under the maritime law, where death results from a maritime tort committed on navigable waters within a state (*e.g.*, Kentucky) whose statutes give a one-year right of action on account of wrongful death, a federal court sitting within such state may extend the time limitation of the local law which it is applying when the point of departure may be characterized as a "mere procedural nicety" as to which it need not achieve uniformity with local *"elegantia juris."* Levinson v. Deupree, 345 U.S. 648, 73 Sup. Ct. 914, 97 L. Ed. 1319 (1953); *cf.* Mejia v. United States, 152 F.2d 686, 688 (5th Cir. 1945), *cert. denied*, 328 U.S. 862 (1946).

12. McKenna v. Fisk, 1 How. 241, 11 L. Ed. 117 (U.S. 1843); Rafael v. Verelst, 2 Black W. 983, 96 Eng. Rep. 579 (K.B. 1775); Mostyn v. Fabrigas, 1 Cowp. 161, 98 Eng. Rep. 1021 (K.B. 1774); 3 STREET, FOUNDATIONS OF LEGAL LIABILITY 91-92 (1906) (doctrine well-established by 14th century). Date of accrual has been construed in Carnes v. United States, 186 F.2d 648 (10th Cir. 1951), and in Oahu Ry. and Land Co. v. United States, 73 F. Supp. 707 (D. Hawaii 1947).

13. Slater v. Mexican National R.R., 194 U.S. 120, 126, 24 Sup. Ct. 581, 48 L. Ed. 900 (1904); Barrow Steamship Co. v. Kane, 170 U.S. 100, 112, 18 Sup. Ct. 526, 42 L. Ed. 964 (1898) (suit by a resident of New Jersey in federal court in New York against a foreign corporation doing business in New York for a personal tort committed in Ireland); Texas & Pacific Ry. v. Cox, 145 U.S. 593, 604, 605, 12 Sup. Ct. 905, 36 L. Ed. 829 (1892) (suit in federal court in Texas for damages for wrongful death of plaintiff's husband in Louisiana under death statute of latter state); Dennick v. Railroad Co., 103 U.S. 11, 26

been subject to much attrition over the years, especially where the particular type of litigation conflicted with the public policy of the forum, the doctrine of *forum non conveniens* being but one of the better known examples of effective check upon the unrestrained exercise of the plaintiff's choice of the forum in the interest of avoiding so-called "tramp litigation."[14]

Suits under the Federal Tort Claims Act also carry a geographic limitation on the transitory nature of tort suits insofar as the sovereign is concerned and may only be prosecuted in the judicial district in which the plaintiff resides or wherein the act or omission complained of occurred.[15] This provision, formerly a part of Section 410(a) of the original statute[16] was placed under Chapter 87 of the Judicial Code, which chapter deals with venue in the district courts. Since many of the actions against the United States under the Tort Act involve multiple plaintiffs, frequently residing in different parts of the country, there appears to be little doubt, despite the restrictive language of Section 1402(b), that on motion of defendant the courts may transfer such suits pursuant to Section 1404(a)[17] of the Judicial Code to either of the two forums allowing prosecution of the action, since the "place of suit" provision of the law, by analagous statutory construction, apparently relates to venue, not jurisdiction.[18]

L. Ed. 439 (1880) (suit in federal court in New York on diversity grounds for damages under New York wrongful death act by plaintiff, a New York appointed administratrix, against defendant, a New Jersey corporation, for injuries and death of plaintiff's intestate occurring in New Jersey). *See* Milwaukee County v. M. E. White Co., 296 U.S. 268, 272, 273, 56 Sup. Ct. 229, 80 L. Ed. 220 (1935).

14. *Ex parte* Collett, 337 U.S. 55, 69 Sup. Ct. 944, 93 L. Ed. 1207 (1949) (*forum non conveniens* held to apply to FELA actions by virtue of § 1404(a) of the Judicial Code). Legal writers have dealt copiously with the history and application of the doctrine. *Id.* at 68 n.28.

15. 28 U.S.C.A. § 1402(b) (1950).

16. 60 STAT. 843 (1946).

17. 28 U.S.C.A. § 1404(a) (1950).

18. In Hoiness v. United States, 335 U.S. 297, 301-02, 69 Sup. Ct. 78, 93 L. Ed. 16 (1948), involving an action against the United States under the Suits in Admiralty Act, 41 STAT. 525 (1920), 46 U.S.C.A. §§ 741 *et seq.* (1944), the Court, construed Section 2 of the Act as relating to venue, not jurisdiction, and held that the right to object to improper venue was waived by defendant by failing to object before pleading to the merits. The place of suit proviso of the Tucker Act, 28 U.S.C.A. § 1402(a) (1950), providing for suit against the United States in the district courts in matters of contract has also been construed as relating to venue, which may be waived in the absence of objection before pleading to the merits. United States v. Hvoslef, 237 U.S. 1, 11-12, 35 Sup. Ct. 459, 59 L. Ed. 813 (1915); Thames and Mersey Marine Ins. Co., Ltd. v. United States, 237 U.S. 19, 24, 35 Sup. Ct. 496, 59 L. Ed. 821 (1915). The *Hoiness* case further points out that the place of suit provisions of the Jones Act, 41 STAT. 1007 (1920), 46 U.S.C.A. § 688 (1944), has also been construed as relating to venue. See Panama R.R. v. Johnson, 264 U.S. 375, 384-85, 44 Sup. Ct. 391, 68 L. Ed. 748 (1924). See also Canadian Aviator, Ltd. v. United States, 324 U.S. 215, 224, 65 Sup. Ct. 639, 89 L. Ed. 901 (1945) (Public Vessels Act). The legislative history of Section 1402 of the Judicial Code also supports this construction. "Section consolidates the venue provisions of section 762 of title 28, U.S.C., 1940 ed., with the venue provisions of section

Adverting further to the state law to be applied in cases arising under the Federal Tort Claims Act, the determination of what constitutes substantive as distinguished from procedural law under *Erie R.R. v. Tompkins*[19] in diversity cases has raised a host of vexatious problems as numerous and ill-defined as the sprites which escaped from Pandora's Box. Although it is not possible within the limits of this paper to explore such a broad field of the law, a caveat is necessary at this point. These concepts frequently differ according to the conflicts rule of the state in which the federal court is sitting[20] and are only somewhat unified as to procedural aspect by the Federal Rules of Civil Procedure.[21] These problems, arising in diversity cases, do not affect the United States as a statutory defendant,[22] except possibly as to joinder of other defendant tortfeasors. Section 411 of the original Tort Claims Act[23] makes the Federal Rules of Civil Procedure applicable to suits against the United States.[24] Section 411 was not embodied in the new Judicial Code since Rule 1 of the Federal Rules amply covers this point.[25] Liberal construction as to the right of suit is indicated in *United States v. Aetna Cas. & Surety Co.*,[26] where the Supreme Court cites with approval the statement of Judge Cardozo in *Anderson v. John L. Hayes Construction Co.:*

931(a) of such title, the latter provisions relating to tort claims cases. The jurisdictional provisions of such section 931(a) are incorporated in section 1346(b) of this title." H.R. REP. No. 308, 80th Cong., 1st Sess. A131 (1947). See also United States v. Acord, Civil No. 4694, 10th Cir., January 14, 1954.

19. 304 U.S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487 (1938).

20. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 61 Sup. Ct. 1020, 85 L. Ed. 1477 (1941).

21. Merrigan, *Erie to York to Ragan—A Triple Play on the Federal Rules*, 3 VAND. L. REV. 711 (1950); *see* Wells v. Simonds Abrasive Co., 345 U.S. 514, 519, 73 Sup. Ct. 856, 97 L. Ed. 1211 (1953) (dissenting opinion). For a general treatment on distinctions between substance and procedure under the rules, see Clark, *The Tompkins Case and the Federal Rules*, 1 F.R.D. 417 (1940), 24 J. AM. JUD. SOC'Y 158 (1941); Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333 (1933); Morgan, *Choice of Law Governing Proof*, 58 HARV. L. REV. 153, 195 (1944).

For the difficulty in distinguishing substance and procedure, see, *e.g.*, Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 69 Sup. Ct. 1233, 93 L. Ed. 1520 (1949); Woods v. Interstate Realty Co., 337 U.S. 535, 69 Sup. Ct. 1235, 93 L. Ed. 1524 (1949); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 Sup. Ct. 1221, 93 L. Ed. 1528 (1949); Guaranty Trust Co. v. York, 326 U.S. 99, 65 Sup. Ct. 1464, 89 L. Ed. 2079 (1945).

22. See note 52 *infra;* Thomsen, *"The Law of the Place" Provisions of the Act*, 33 A.B.A.J. 959 (1947) (federal courts under the Act are not bound by diversity rules and may on their own conflict rules determine whether a particular question is one of substance or procedure). See also Field v. United States, 107 F. Supp. 401 (N.D. Ill. 1952); Bach v. United States, 92 F. Supp. 715 (S.D.N.Y. 1950).

23. 60 STAT. 843 (1946).

24. United States v. Reynolds, 345 U.S. 1, 6, 73 Sup. Ct. 528, 97 L. Ed. 727 (1953); United States v. Aetna Cas. & Surety Co., 338 U.S. 366, 372, 380, 70 Sup. Ct. 207, 94 L. Ed. 171 (1949).

25. See H.R. REP. No. 308, 80th Cong., 1st Sess. A204 (1947).

26. 338 U.S. 366, 70 Sup. Ct. 207, 94 L. Ed. 171 (1949).

> "The exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor by refinement of construction, where consent has been announced."[27]

Since the main current of the ensuing discussion herein pertains to the application of state or federal law to given situations, rather than to a choice of applicable state law, such treatment does not in strict nomenclature fall within the classic definition of conflict of laws[28] although the close kinship will probably permit such generic coverage. The relationship becomes all the more apparent when it is noted that insofar as the prosecution of any claim under the Federal Tort Claims Act is concerned, local law applies not only to the merits thereof, but also to the defenses of contributory negligence, willful misconduct, aggravation of damages, and the distribution or disposition of the judgment in cases of death.[29]

Employee of the Government

Section 2671 of the Judicial Code contains a definition of "Employee of the government" for purposes of the Act.[30] In dealing with employees of the Government, certain statutory provisions are encountered at the threshold. Every person elected or appointed to the

27. 243 N.Y. 140, 153 N.E. 28, 29-30 (1926).

28. The *Restatement* defines the field as covering that part of the law of each state which determines whether in dealing with a legal situation the law of some other state will be recognized, be given effect or applies. RESTATEMENT, CONFLICT OF LAWS § 1(2) (1934). Section 2 of the *Restatement* defines a state as a territorial unit in which the general body of law is separate and distinct from the law of any other territorial unit. Comment *c*, under Section 2 of the *Restatement*, points out that although the United States is not a state in the legal sense, because each state of the Union, Territory and the District of Columbia has its own law and the legislation of Congress is a portion of the law of each state, nevertheless, the sovereign is a state in the political sense.

29. The coverage of local law was expressly enunciated in recommending the deletion of certain sections of the bills being considered before the House Judiciary Committee. *Hearings before Judiciary Committee on H.R. 5373 and H.R. 6463*, 77th Cong., 2d Sess. 5, 30, 61 (1942) (§ 204, payment of death award to survivor; § 302, defense of contributory negligence; § 304, aggravation of damages due to claimant's unreasonable neglect; § 308, payment of claim to survivors). *See* Wells v. Simonds Abrasive Co., 345 U.S. 514, 522, 73 Sup. Ct. 856, 97 L. Ed. 1211 (1953) (dissenting opinion; designation of "substantive matters"). See also Porto Rico Gas & Coke Co. v. Frank Rullan & Assoc., 189 F.2d 397, 404 (1st Cir. 1951) (Puerto Rican rule as to affirmative defense held to be substantive and determinative since Puerto Rico was place of tort).

30. This section, in pertinent part, reads as follows: " 'Employee of the government' includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation. 'Acting within the scope of his office or employment', in the case of a member of the military or naval forces of the United States, means acting in line of duty." 28 U.S.C.A. § 2671 (1950).

civil or military or naval service of the United States (excepting the President) must take the prescribed oath of office.[31]

Members of the federal judiciary and employees of the federal courts, who must also take an oath of office, are members of the independent judiciary and are not employees of the Government for purposes of the Federal Tort Claims Act.[32] Members of the National Guard of the several states may not be considered employees of the Government under the mentioned section unless called into the active service of the United States in time of war.[33] As to unit caretakers in the state National Guard, there is a conflict of holdings, the better reasoned cases holding such individual, though charged with the custody of federal property loaned to the Guard units, are not employees of the United States.[34] The rationale supporting the conclusion that such persons are not employees of the Government is that their caretaker function, an integral part of their service in the state Guard units, is essentially and primarily for the benefit of the state Guard units and any benefit to the United States is secondary, incidental and remote.[35] Reasoning by analogy, it could hardly be contended

31. REV. STAT. §§ 1756-57 (1875), 5 U.S.C.A. § 16 (1927). In addition the employee must within 30 days of his appointment file an affidavit that he has not given any consideration for his appointment. 44 STAT. 918, *as amended*, 5 U.S.C.A. § 21(a) (Cum. Supp. 1950). These papers must be filed with the agency to which the office pertains. REV. STAT. § 1759 (1875), 5 U.S.C.A. § 21 (1927). No salary may be paid until the affidavit is filed. 44 STAT. 919, 5 U.S.C.A. § 21(b) (Cum. Supp. 1950). Copies of papers appointing employees are customarily maintained in the agency personnel office. Settlement of account of deceased officers or employees is prescribed by statute under the supervision of the Comptroller General. 64 STAT. 395 (1950), 5 U.S.C.A. §§ 61(f) *et seq.* (Cum. Supp. 1950).

32. *E.g.*, Cromelin v. United States, 177 F.2d 275 (5th Cir. 1949), *cert. denied*, 339 U.S. 944 (1950) (district judge and trustee in bankruptcy not officers within FTCA).

33. Williams v. United States, 189 F.2d 607 (10th Cir. 1951); Satcher v. United States, 101 F. Supp. 919 (W.D.S.C. 1952); Glasgow v. United States, 95 F. Supp. 213 (N.D. Ala. 1951); Nietupski v. United States, Civil No. 2095, W.D. Wis., May 8, 1950; Mackay v. United States, 88 F. Supp. 696 (D. Conn. 1949). *But cf.* O'Toole v. United States, 206 F.2d 912 (3d Cir. 1953) (member of D.C. Guard held to be an employee of the Government; no "intervening sovereignty" by state ousts this relationship and leaves only the federal chain of command).

34. Williams v. United States, 189 F.2d 607 (10th Cir. 1951); Glasgow v. United States, 95 F. Supp. 213 (N.D. Ala. 1951); Nietupski v. United States, Civil No. 2095, W.D. Wis., May 8, 1950. *Contra:* Elmo v. United States, 197 F.2d 230 (5th Cir. 1952); United States v. Duncan, 197 F.2d 233 (5th Cir. 1952); United States v. Holly, 192 F.2d 221 (10th Cir. 1951). See Rose, *The National Guard and the Federal Tort Claims Act*, 6 VAND. L. REV. 370 (1953).

35. The ruling of the Comptroller General, B.-117150, Sept. 28, 1953, covering civilian employees of the state National Guard units under the old age benefit provisions of the Social Security Act effects no change in their status as state employees since this is merely a fiscal arrangement for such payment by the United States from moneys annually appropriated to the maintenance of the state Guard units. Such coverage does not import a master-servant relationship in the law because of the broad coverage of the Social Security Act. See Ewing v. McLean, 189 F.2d 887, 892 (9th Cir. 1951); United States v. Silk, 155 F.2d 356, 358 (10th Cir. 1946), *aff'd in part, rev'd in part*, 331 U.S.

that a bailee in taking care of the property bailed became the employee of the bailor. It may also be pointed out that state employees, engaged in carrying out state or local responsibilities under programs authorized by federal statute, even where the Federal Government makes substantial contributions in money or in materials are without the coverage of Section 2671.[36]

The legislative history of Section 402(b) of the basic statute[37] which became Section 2671 of the Judicial Code, also makes clear that it does not purport to cover any person in the protective services engaged in civilian defense, such as an air raid warden, a fire warden or any person acting in a similar capacity under supervision of the Office of Civilian Defense, who is not also an officer or employee of the Office of Civil Defense, duly appointed as such.[38] The mentioned legislative history related to World War II, but there is little reason to believe that it would not be construed to cover similar periods of future emergency or actual hostilities.

Although the Federal Tort Claims Act was only intended to cover the torts of the executive departments and independent agencies, including their corporate arms, as defined in Section 2671 of the Judicial Code[39] the Comptroller General has interpreted the administrative settlement provisions of the law (empowering administrative settlement by the agency involved of tort claims up to $1,000)[40] to permit such settlement by the Library of Congress, which is regarded as a part of the legislative branch of the Government.[41] This ruling is based upon a liberal construction of "employees of the Government," and a subordination of the "federal agency" portion of Section 2671. While such interpretation may well bind the United States as to the disbursement of its own money as a fiscal matter, since the Attorney General is the chief law officer of the Government,[42] the position taken in any actual suit against the United States may conceivably be otherwise.

704, 711, 712 (1947); O'Leary v. Social Security Board, 153 F.2d 704, 707 (3d Cir. 1946).

36. 28 U.S.C.A. § 2671 (1950). See Weltha v. United States, Civil No. 1-296, S.D. Iowa, December 8, 1953 (state employee driving federal vehicle loaned to soil conservation district and performing state functions under federal soil conservation program); Lavitt v. United States, 87 F. Supp. 149 (D. Conn. 1948) (potato inspector employed by local association of borrowers under federal potato loan program); *cf.* Glasgow v. United States, 95 F. Supp. 213, 214 (N.D. Ala. 1951) (in era of subsidies federal assistance does not per se create a legal master-servant relationship).

37. 60 STAT. 843 (1946).

38. Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation,* 35 GEO. L.J. 1, 11, 12 (1946).

39. *See* Keifer & Keifer v. RFC, 306 U.S. 381, 390, 59 Sup. Ct. 516, 83 L. Ed. 784 (1939).

40. 28 U.S.C.A. § 2672 (1950).

41. 26 Comp. Dec. 891 (1947).

42. *See* Booth v. Fletcher, 101 F.2d 676, 681 (D.C. Cir. 1938), *cert. denied,* 307 U.S. 628 (1939).

The mere assignment, furnishing or loan of a vehicle by the Federal Government, or even the loan of a federally compensated driver, plus the vehicle to a state or local government, or instrumentality thereof for the carrying out of a state or local program (even assuming federal financial grants-in-aid of such activity) does not make such person an employee of the United States, although it might well constitute such employee a "loaned servant" for whose torts the borrower is liable.[43]

Even where an individual is paid benefits under the Federal Employees' Compensation Act,[44] such payment may not, however, be regarded as a legal determination that the recipient was an employee of the United States, since it is merely an administrative determination, without provision for court review,[45] binding only on the fiscal officers of the Government without affecting the legal rights of the parties.[46] The broad coverage of this beneficial statute with its prime objective of compensating the injured worker completely negates the legal definition of the master-servant relationship.[47] Hence, it is irrelevant to determine the status of the recipient of compensation under this statute as an employee of the Government and the determination may probably be excluded from use in evidence in a legal proceeding under the Federal Tort Claims Act.[48]

The foregoing discussion relating to the determination of who is an employee of the Government, as distinguished from the related problem as to whether the employee is acting within the scope of his employment, invariably raises the following basic inquiries which must be answered in reaching a legal conclusion:

(1) Who actually hired the person involved in the delict?

(2) What records are available to show employment?

(3) Was such person at the time of the accrual of the claim still an employee of the Government, or of another?

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43. Fries v. United States, 170 F.2d 726, 731 (6th Cir. 1949), *cert. denied*, 336 U.S. 954 (1949); Mackay v. United States, 88 F. Supp. 696, 697 (D. Conn. 1949); Cobb v. United States, 81 F. Supp. 9 (W.D. La. 1948); *cf.* Perucki v. United States, 76 F. Supp. 34 (M.D. Pa. 1948); see Denton v. Yazoo & Miss. R.R., 284 U.S. 305, 52 Sup. Ct. 180, 76 L. Ed. 310 (1932); RESTATEMENT, AGENCY § 227 (1933).

44. 39 STAT. 742 (1916), as amended, 5 U.S.C.A. §§ 751 *et seq.* (1927).

45. Dahn v. Davis, 258 U.S. 421, 42 Sup. Ct. 320, 66 L. Ed. 696 (1922); Dierssen v. Woolever, 3 F.R.D. 342 (D. Conn. 1944).

46. Dawnic Steamship Corp. v. United States, 90 Ct. Cl. 537, 578, 579 (1940); Barnett v. United States, 16 Ct. Cl. 521; McKnight v. United States, 13 Ct. Cl. 292, *aff'd*, 98 U.S. 179 (1878).

47. Hartford Acc. & Indemnity Co. v. Cardillo, 112 F.2d. 11, 17 (D.C. Cir.), *cert. denied*, 310 U.S. 649 (1940); Bethlehem Steel Co. v. Parker, 64 F. Supp. 615 (D. Md. 1946); *Administrative Procedure in Government Agencies*, SEN. Doc. No. 8, 77th Cong., 1st Sess. 166 (1941).

48. See note 35 *supra*.

(4) Who has immediate and direct supervision of his activities?

(5) Who has the power to discharge such person?

(6) Who pays him his compensation?

(7) Are deductions made from his pay for retirement purposes by the United States?

(8) Is he subject to the Federal Employees' Compensation Act?[49]

Thus, regardless of the statutory admonition of Section 1346(b)[50] that the liability of the United States is to be determined according to the standards applicable to a private individual under local law, the eight factors listed above make necessary recourse to federal law, federal regulations and federal evidentiary materials for the purpose of determining the status of the person alleged to be an employee of the Government. Considerations of state or local law to affect, or even analogize the status of such person to those privately employed within the state would obviously be erroneous, confusing and non-probative. Hence, federal law must govern.[51] This conclusion also points up the interesting fact that *Erie R.R. v. Tompkins,* notwithstanding, there is unquestionably emerging a body of federal common law of torts[52] which no doubt has been accelerated and augmented

49. 39 STAT. 742 (1916), as amended, 5 U.S.C.A. §§ 751 *et seq.* (1927). Except for a master or member of the crew of any vessel, the federal employee is precluded from relief under any statute other than the Compensation Act. 58 STAT. 312 (1944), 5 U.S.C.A. § 757(b) (Cum. Supp. 1950). See Johansen v. United States, 343 U.S. 427, 72 Sup. Ct. 849, 96 L. Ed. 1051 (1952); *cf.* Sasse v. United States, 201 F.2d 871 (7th Cir. 1953). In Underwood v. United States, 207 F.2d 862 (10th Cir. 1953), it was held that the exclusionary provisions of the Compensation Act bar recovery by a husband for loss of consortium under FTCA, even though a private individual might be permitted recovery under Colorado law.

50. 28 U.S.C.A. § 1346(b) (1950).

51. That there is a federal common law of contracts has been well-established. United States v. Standard Oil Co., 332 U.S. 301, 308 and n.10, 67 Sup. Ct. 1604, 91 L. Ed. 2067 (1947). Dealing with the field of contracts, the Court spoke of the existence of a "federal common law" or a "law of independent federal judicial decision" outside the constitutional realm, untouched by the *Erie decision.* See also National Metropolitan Bank v. United States, 323 U.S. 454, 65 Sup. Ct. 354, 89 L. Ed. 383 (1945); Clearfield Trust Co. v. United States, 318 U.S. 363, 63 Sup. Ct. 573, 87 L. Ed. 838 (1943).

52. *E.g.,* Feres v. United States, 340 U.S. 135, 146, 71 Sup. Ct. 153, 95 L. Ed. 152 (1950); United States v. Standard Oil Co., 332 U.S. 301, 305, 67 Sup. Ct. 1604, 91 L. Ed. 2067 (1947); Stepp v. United States, 207 F.2d 909 (4th Cir. 1953); United States v. Sharpe, 189 F.2d 239, 241 (4th Cir. 1951); Foltz v. Moore McCormack Lines, Inc., 189 F.2d 537, 540 (2d Cir.), *cert. denied,* 342 U.S. 871 (1951); United States v. Eleazer, 177 F.2d 914, 916 (4th Cir. 1949); Hubsch v. United States, 174 F.2d 7, 9 (5th Cir. 1949); Van Zuch v. United States, Civil No. 8514, E.D.N.Y., January 20, 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); Field v. United States, 107 F. Supp. 401, 403 (N.D. Ill. 1952); Williams v. United States, 105 F. Supp. 208, 209 (N.D. Cal. 1952); Notes, 59 HARV. L. REV. 966 (1946), 41 ILL. L. REV. 551 (1946). See also 2 SUTHERLAND, STATUTORY CONSTRUCTION § 4602 (3d ed., Horack, 1943) (federal common law of statutory construction).

by the current of decisions rendered by the federal courts under the Federal Tort Claims Act.

Scope of Employment

The Federal Tort Claims Act has two definitions of "scope of employment." That pertaining to military personnel appears at Section 2671 and prescribes "acting in line of duty" as the legal criterion to be applied.[53] As to civilian employees, the traditional language without modification is found in Section 1346(b). Far from being words of art, having settled meaning in the law, this highly indefinite phrase is but a bare formula to cover the vicarious liability of the master for those acts of the servant by which the law measures the responsibility of the former.[54] What conduct is within the scope of employment in certain situations frequently differs according to what state law is applied; however, it is the *lex loci delicti* which normally determines whether the particular delict falls within the scope of employment of the alleged tortfeasor.[55] As previously stated herein, Section 1346(b) of the Act is a statutory adoption of this principle.[56] Since the United States is a sovereign body politic, it can only act through the medium of its duly authorized officers and agents, with such delegation of authority as may be necessary to effectuate its sovereign powers and duties.[57] Hence, its liability in tort is necessarily vicarious.[58] In the field of contract law, the United States has no general agents empowered to bind it by their acts or statements and any persons purporting to act for it are special agents with limited powers having foundation in law.[59] It is also well established that the United States can only be bound by persons legally authorized to act in its behalf and that unauthorized commitments of officers or employees assuming to act for it cannot bind the sovereign.[60]

53. 28 U.S.C.A. § 2671 (1950).
54. PROSSER, TORTS 475-76 (1941); RESTATEMENT, AGENCY § 228, comment *a* (1933).
55. RESTATEMENT, CONFLICT OF LAWS § 387 and comment *b* (1934). Since "scope of employment" goes to the very essence of responsibility for any liability-creating conduct, it is undeniably substantive in nature. *Cf. id.* § 584 and comment *b*. See Field v. United States, 107 F. Supp. 401, 405 (N.D. Ill. 1952).
56. See notes 6 and 29 *supra*.
57. United States v. Tingey, 5 Pet. 115, 8 L. Ed. 66 (U.S. 1831); 40 OPS. ATT'Y GEN. 225 (1942).
58. PROSSER, TORTS 471 (1941).
59. *E.g.*, REV. STAT. § 3679 (1875), as amended, 31 U.S.C.A. § 665 (Supp. 1953); REV. STAT. § 3732 (1875), 41 U.S.C.A. § 11 (1952). These statutes restrict the contractual authority of Government agencies to specific statutory appropriation.
60. Fulmer v. United States, 83 F. Supp. 137, 149 (N.D. Ala. 1949); Wright v. United States, 86 Ct. Cl. 290, *cert. denied*, 305 U.S. 609 (1938); *cf.* Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 68 Sup. Ct. 1, 92 L. Ed. 10 (1947); Fries v. United States, 170 F.2d 726, 730 (6th Cir. 1948); Felder v. Federal Crop Ins. Corp., 146 F.2d 638 (4th Cir. 1944); The Ship Construction & Trading

These principles in the field of contract law cannot, of course, in their entirety be imported into the law of torts, where privity has no necessary relation to the adventitious nature of liability-creating conduct—most wilful torts being excluded by Section 2680(h)[61]—but by permissive analogy they serve to underscore the *strict necessity* that the employee of the Government be properly acting within the scope of his employment to fix liability for his acts under the doctrine of *respondeat superior*.[62]

Criticism of the Government for the advocacy of such strict application of the *respondeat superior* doctrine in automobile cases has been voiced.[63] The necessarily valid defense to such criticism is that since the Act represents a limited waiver of sovereign immunity from suit, it must be strictly construed and cannot be extended beyond the plain language of the statutory authorization.[64] Nor does any representative of the United States have the power to waive the conditions or limitations of the statute.[65]

Underlying most of those cases just cited, wherein the Government avoided liability on the grounds that the employee was not acting within the scope of his employment is the rationale that the appli-

Co. v. United States, 91 Ct. Cl. 419, 456 (1940), *cert. denied*, 312 U.S. 699 (1941).

61. 28 U.S.C.A. § 2680(h) (1950).

62. Dalehite v. United States, 346 U.S. 15, 27, 28 n.17, 73 Sup. Ct. 956, 97 L. Ed. 1427 (1953); Feres v. United States, 340 U.S. 135, 71 Sup. Ct. 153, 95 L. Ed. 152 (1950); Murphey v. United States, 179 F.2d 743 (9th Cir. 1950); United States v. Eleazer, 177 F.2d 914, 918 (4th Cir. 1949), *cert. denied*, 339 U.S. 903 (1950); United States v. Campbell, 172 F.2d 500, 503 (5th Cir.), *cert. denied*, 337 U.S. 957 (1949); Cropper v. United States, 81 F. Supp. 81 (N.D. Fla. 1948); Long v. United States, 78 F. Supp. 35 (S.D. Cal. 1948); Rutherford v. United States, 73 F. Supp. 867 (E.D. Tenn. 1947), *aff'd per curiam*, 168 F.2d 70 (6th Cir. 1948).

63. Note, 61 YALE L.J. 435 (1952). The Government is a hard bargainer. *Id.* at 439. As a result, the Act has failed to realize the congressional purpose of placing the United States in the same position as a private employer. *Id.* at 441. Some states apply a strict interpretation of "scope of employment." *E.g.*, Collins v. Dollar S.S. Lines, Inc., 23 F. Supp. 395 (S.D.N.Y. 1938); Hutchens v. Covert, 39 Ind. App. 382, 78 N.E. 1061 (1906); La Bella v. Southwestern Bell Tel. Co., 224 Mo. App. 708, 24 S.W.2d 1072 (1930); *cf.* Rhodes v. United States, 79 Fed. 740 (8th Cir. 1897) (soldier contracted a disease before enlistment; was cured and again contracted it while in the service. To be in line of duty, the court held the service must have been the cause of the disease, not merely coincident with it in time. The act, to be in line of duty, must have relation of causation, mediate or immediate to the duty owed by the actor.).

64. Dalehite v. United States, 346 U.S. 15, 31, 73 Sup. Ct. 956, 97 L. Ed. 1427 (1953); United States v. United States F. & G. Co., 309 U.S. 506, 60 Sup. Ct. 653, 84 L. Ed. 894 (1940); United States v. Shaw, 309 U.S. 495, 60 Sup. Ct. 659, 84 L. Ed. 888 (1940); Munro v. United States, 303 U.S. 36, 41, 58 Sup. Ct. 421, 82 L. Ed. 633 (1938); United States v. Michel, 282 U.S. 656, 659, 51 Sup. Ct. 284, 75 L. Ed. 598 (1931); Price v. United States and Osage Indians, 174 U.S. 373, 375-76, 19 Sup. Ct. 765, 43 L. Ed. 1011 (1899).

65. Munro v. United States, 303 U.S. 36, 41, 58 Sup. Ct. 421, 82 L. Ed. 633 (1938); Reid v. United States, 211 U.S. 529, 539, 29 Sup. Ct. 171, 53 L. Ed. 313 (1909); Finn v. United States, 123 U.S. 227, 8 Sup. Ct. 82, 31 L. Ed. 128 (1887); Wallace v. United States, 142 F.2d 240, 242, 243 (2d Cir. 1944).

cable provisions of federal law or departmental regulations[66] clearly placed the actions of the employee outside of the scope of his employment or line of duty, albeit provisions of state law may have dictated a different result.

The necessity for the aforementioned application of federal, as distinguished from state law, relating to scope of employment in suits under the Federal Tort Claims Act is somewhat clarified by discussion of a few of the cases in which this principle emerges.

In *United States v. Sharpe*,[67] the court in applying federal law to the fact situation in the case[68] to determine scope of employment within the meaning of the statute, reached the conclusion that there was involved a question of statutory construction as to which the federal courts were *not* bound by local decisions but could apply their own standards.[69] The court stated:

> "We look to the federal law and decisions to determine whether or not the person who inflicted the injury was an 'employee of the Government' * * * *'acting within the scope of his office or employment'*. We look to the local law for the purpose of determining whether the act with which he is charged gives rise to liability. The Tort Claims Act adopts the local law for the purpose of defining tort liability, not for the purpose of determining the relationship of the government to its employees." [italics supplied][70]

The court properly found no tenable basis for distinguishing this case

66. Regulations promulgated by the Secretary of the Army have the force and effect of law. Standard Oil Co. v. Johnson, 316 U.S. 481, 62 Sup. Ct. 1168, 86 L. Ed. 1611 (1942); United States v. Eliason, 16 Pet. 291, 302, 10 L. Ed. 968 (1842); Sherman v. United States, Civil No. 52-355, S.D.N.Y., May 19, 1950; United States v. Standard Oil Co. of Cal., 21 F. Supp. 645 (S.D. Cal. 1937), *aff'd*, 107 F.2d 402, 410 (9th Cir. 1939), *cert. denied*, 309 U.S. 654 (1940); Cassarello v. United States, 271 Fed. 486 (M.D. Pa. 1919), *aff'd*, 279 Fed. 396 (3d Cir. 1922).

67. 189 F.2d 239, 341 (4th Cir. 1951).

68. Sgt. Thompson, a member of a paratroop company stationed at Fort Bragg, North Carolina, was the tortfeasor who injured the plaintiffs in a collision in South Carolina, between his own personal car and that in which plaintiffs were passengers. At the time, he was enroute from Fort Bragg to the new station to which he had been ordered at Elgin Field, Florida. The movement of the entire company was accomplished by truck convoy and air transport, but Sgt. Thompson and a few others who owned automobiles obtained permission to drive them to Elgin Field, traveling at their own expense and responsibility and without allowance of mileage and under passes which imposed no duty on them except to report to Elgin Field at midnight on September 10, 1948. Thompson, in driving his own car, was subject to no orders with respect thereto. He had been given a briefing, which was no more than general information as to the best available route to follow, but he was under no duty to follow this route so long as he report upon the expiration of his pass.

69. In so doing, the court relied on Feres v. United States, 340 U.S. 135, 71 Sup. Ct. 153, 95 L. Ed. 152 (1950); United States v. Standard Oil Co., 332 U.S. 301, 67 Sup. Ct. 1604, 91 L. Ed. 2067 (1947); D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447, 62 Sup. Ct. 676, 86 L. Ed. 956 (1942); Deitrick v. Greaney, 309 U.S. 190, 60 Sup. Ct. 480, 84 L. Ed. 694 (1940).

70. United States v. Sharpe, 189 F.2d 239, 241 (4th Cir. 1951).

from *United States v. Eleazer*,[71] and observed that plaintiff's reliance rested on cases holding the master liable for the negligence of a servant operating an automobile *in the master's business*, even though the vehicle belonged to the servant. Thus the basic question raised was *in whose service* and *about whose business* was the tortfeasor at the time of the occurrence. *A fortiori*, the only competent sources for making such a determination, factually and legally, were federal in nature.[72] Implicit in this decision, was the court's reference to federal sources to ascertain the existence and nature of the soldier-Government relationship before applying the appropriate principles of agency law to the fact elements thus involved.[73]

It would appear necessary to note at this point that in touching upon cases involving military or naval personnel, the phrase, "acting in line of duty"[74] has a permissively *broader* scope where applied to the relationship of soldier-Government *inter se*, since that concept is the basis for payment of *benefits* for death, injury and disability to the serviceman or his dependents and survivors.[75] It is in this respect analogous to state workmens' compensation benefits, social security coverage or compensation for federal employees,[76] all of

71. 177 F.2d 914 (4th Cir. 1949). In the *Eleazer* case, the only pertinent factual variation was that the tortfeasor, a Marine Corps officer, was driving his own outomobile on a trip home while on deferred leave. There the court aptly observed that the Government had no right to direct his driving, and when he elected to drive his own car instead of availing himself of commercial transportation, he was acting in furtherance of his own purposes, not those of the Government. *Id.* at 917.

72. The court also observed that the law in South Carolina, as elsewhere, imposed no liability on the master where the servant operated the car for his own purposes. See RESTATEMENT, AGENCY § 235 (1933).

73. Agency is a mixed question of fact and law and it is the function of the triers of fact to determine its existence unless the inference is clear and beyond doubt, in which case the court may make the finding. RESTATEMENT, AGENCY § 220(2) and comment b (1933). The alleged agent himself may not testify against the principal as to the existence or scope of his authority unless and until established by other evidence. This is especially true where the existence or scope of the agency is an "operative" or "ultimate" fact determining the fixation of liability, in which case it becomes substantive rather than procedural. *Id.* § 284 and comment c, § 285, comment d. See Note 55 *supra*. See also Brownell v. Tide Water Associated Oil Co., 121 F.2d 239, 244 (1st Cir. 1941); Ralston Purina Co. v. Novak, 111 F.2d 631, 637 (8th Cir. 1940); Nichols v. Republic Iron & Steel Co., 89 F.2d 927, 929 (5th Cir. 1937); United States Smelting, Refining & Mining Exploration Co. v. Wallapai Mining & Development Co., 27 Ariz. 126, 230 Pac. 1109 (1924); Ennis v. Smith, 171 Wash. 126, 18 P.2d 1 (1933). *Contra:* Garford Trucking Corp. v. Mann, 163 F.2d 71 (1st Cir. 1947).

74. 28 U.S.C.A. § 2671 (1950).

75. See, *e.g.*, 10 U.S.C.A. § 903 (1927) (payment of six months pay to serviceman's widow); 38 U.S.C.A. §§ 151 *et seq.*, 501, 701, 706, 718, 725, 731, 740, 741 (1942); Feres v. United States, 340 U.S. 135, 139, 140, 144, 71 Sup. Ct. 153, 95 L. Ed. 152 (1950); O'Neil v. United States, 202 F.2d 366 (D.C. Cir. 1953); Archer v. United States, 112 F. Supp. 651 (S.D. Cal. 1953); Pettis v. United States, 108 F. Supp. 500 (N.D. Cal. 1952); *cf.* Brooks v. United States, 337 U.S. 49, 53, 54, 69 Sup. Ct. 918, 93 L. Ed. 1200 (1949).

76. See *supra* p.214 and n.49 (federal employees compensation), p.212 (social security); Moore v. United States, 48 Ct. Cl. 110 (1913); 32 OPS. ATT'Y GEN.

which radically deviate from the accepted legal requirements for creation of the master-servant relationship, since they fall into the category of "social legislation." To use this broad aspect of the "line of duty" concept involving the soldier-Government relationship *inter se* as the basis of vicarious liability—involving relations of the military to *third persons* outside of Government—would obviously produce astounding and clearly unintended results of a fantastic nature.[77] This was made clear in *United States v. Campbell*,[78] where the court illustrates the *reductio ad absurdum* of such contention by adverting to an article by Commander Horace Bird in a popular magazine humorously entitled "How Beulah Sank the Admirals."[79]

In *Rutherford v. United States*,[80] wherein the defendant's motion for summary judgment was granted, we find reasoning akin to that employed in *United States v. Sharpe*. The court found that although concededly the tortfeasor was a member of the United States naval forces at the time of the accident, he was not acting within the scope of his employment; upon completion of the recruiting broadcast his duty was finished, and he was on his own and was then using his own private automobile for his own private purpose.

In *Hubsch v. United States* and *Schweitzer v. United States*,[81] on the basis of the facts found by the court of appeals from record in

193 (1920); 32 OPS. ATT'Y GEN. 12 (1919).

77. The doctrine of "equitable construction" may be used to avoid the imposition of liability based on such misconstruction. Matson Navigation Co. v. United States, 284 U.S. 352, 52 Sup. Ct. 162, 76 L. Ed. 336 (1932); Church of the Holy Trinity v. United States, 143 U.S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226 (1892); 3 SUTHERLAND, STATUTORY CONSTRUCTION § 6006 (3d ed., Horack, 1943).

78. 172 F.2d 500 (5th Cir. 1949).

79. The author, Commander Bird, quotes from a letter supposed to have been written to an unnamed Congressman: " 'I had a heap of trouble with a girl last summer, and she was having a baby in August, and me and her old man got into a quarrel and he shot me in the left shoulder. The boys tell me that I can get retired and paid by the navy for disability for injury received *in line of duty*. Since I was *in line of duty* when it first happened, though I didn't get shot until later, can I get the money?' (Emphasis supplied.)" *Id.* at 502 n.4.

80. 73 F. Supp. 867 (E. D. Tenn. 1947), *aff'd per curiam*, 168 F.2d 70 (6th Cir. 1948), 36 GEO. L.J. 276. The undisputed facts indicated that the tortfeasor, a Navy petty officer, assigned to recruiting activities in designated Tennessee counties, including that of the situs of the tort, injured the plantiff in an automobile collision in Knoxville on a Sunday morning in March, 1946. At the time, Petty Officer Winniger had completed his part in a Navy recruiting and reserve radio broadcast and was proceeding in his personally owned car toward his home outside Knoxville to spend the balance of the day with his family. The car was used exclusively for the private and personal purposes of Winniger and his family. In connection with his recruiting duties, he was furnished with a Government-owned station wagon which was used in that activity.

81. 174 F.2d 7 (5th Cir.), *cert. granted*, 338 U.S. 814, *remanded for settlement*, 338 U.S. 440 (1949). The tortfeasor, an Army lieutenant stationed at Key Largo, some 60 miles from Miami, Florida, drove an Army jeep, temporarily assigned to him from his station at Key Largo, to the Miami Air

the lower court, it was determined that Government should not be held liable, since the officer was not acting within the scope of his employment as required by Section 1346(b). The court stated that "the Government has not consented to be sued or to be liable for injuries caused by the negligent acts of its employees who are in and about their own personal and private enterprises."[82] More importantly, however, the court again ruled out the application of the Florida permissive use statute imposing liability on the owner of a vehicle for its negligent operation by another, with his knowledge and consent, even though the Florida law had been construed to make a private owner liable for injuries caused by its negligent operation, regardless of whether or not the driver was about the business of the owner. Because of the provisions of the federal law,[83] the court held that the Florida doctrine of liability for negligent operation outside the scope of the owner's business could have no application; nor could any presumptious arising out of such doctrine prevail against the United States as a statutory defendant.[84] The recent application in a diversity action of this same statute to a private individual by the same federal district court which decided the *Hubsch* case serves to underscore the distinction.[85]

Depot to pick up a jeep regularly assigned to him, which had been left for repairs. Because it was Saturday afternoon (July 13, 1946) when he arrived, he was unable to accomplish the purpose of his trip; he proceeded to Miami Beach where he spent the night, and after having consumed considerable alcohol, was, on Sunday morning, going to breakfast when the collision occurred. The officer had intended to stay over until Monday morning and then go to the Miami Air Depot to obtain the repaired jeep regularly assigued to him.

82. *Id.* at 9.

83. 28 U.S.C.A. § 1346(b) (1950).

84. In so ruling, the court cited with approval other cases in which local law would have made the United States liable, had it been applied. *E.g.*, Clemens v. United States, 88 F. Supp. 971 (D. Minn. 1950) (driver of Army automobile injured the plaintiff while taking another soldier into town to meet the latter's girl friend); Cropper v. United States, 81 F. Supp. 81 (N.D. Fla. 1948) (soldier, assigned to drive Army staff car for chaplain, disregarded chaplain's instructions to return car to motor pool for further assignment and drove to a city 45 miles away where he had an accident); Murphey v. United States, 79 F. Supp. 925 (N.D. Cal. 1948), *rev'd on other grounds*, 179 F.2d 743 (9th Cir. 1950) (soldier was authorized to carry men from radar station near town of Klamath into town for entertainment when men were off-duty; this authority required vehicle to remain parked in town to return the men to post after evening's entertainment; special permission was required for use of car to go elsewhere; accident occurred when two sergeants and their lady companions were using car to attend an Indian ceremonial dance held a short distance from the center of town); Long v. United States, 78 F. Supp. 35 (S.D. Cal. 1948) (civilian driver of Army staff car drove some 20 miles beyond instructed designation where a collision occurred injuring plaintiff; California law being in derogaton of the *respondeat superor* qualification of the federal law, was held inapplicable); Rutherford v. United States, 73 F. Supp. 867 (E.D. Tenn. 1947). See Forrester v. Jerman, 90 F.2d 412 (D.C. Cir. 1937) (lists 20 states having similar statutes).

85. Mark v. City of Ormond Beach, 113 F. Supp. 504 (S.D. Fla. 1953). In this case the court held that the statute established a presumption of the

In *Parrish v. United States*,[86] no permissive use statute was involved, but the court took judicial notice of applicable Army regulations[87] forbidding the use of Government vehicles for the private or personal purposes of military personnel. In this case, the court denied liability of the United States under Section 1346(b), where the driver of the Army car at the time of the alleged tort was transporting the personal household goods of an Army officer under an arrangement whereby the officer paid per diem and all expenses of the Army driver as well as for gas and oil. The court found this venture clearly out of the scope of employment of the Army driver, notwithstanding the purported authorization for the trip by order of the Commanding Officer of the appropriate military district.[88]

In *Bach v. United States*,[89] the plaintiffs sustained injuries in an automobile collision in New York. The car with which they collided was driven by a naval officer on week-end leave who was returning from a visit to Philadelphia. The officer was under no particular orders from 4:30 P.M. Friday until 8:00 A.M. Monday; such leave was commonly referred to as an off-duty status. The court had no difficulty under this simple state of facts in finding that the naval officer was not acting within the scope of his employment and that the purpose of the trip was personal. It did, however, look to the law of the state where the act occurred, New Jersey, first to determine the liability of a master-employer for the negligence of a servant-

owner's liability which presumption touching upon burden of proof was substantive and hence could not be taken away from the plaintiff.

86. 95 F. Supp. 80 (M.D. Ga. 1950).

87. See note 66 *supra*.

88. By conceivable analogy to the local law of private employment, the principal might be held liable under a theory of ratification. RESTATEMENT, AGENCY § 218 (1933) (assuming the authorizing official of the private firm ordinarily exercised comparable authority). In Greenwood v. United States, 97 F. Supp. 996 (D. Ky. 1951), the lack of authority of Private Rayno to take an Army truck off the Ft. Knox Reservation was the basis for the court's finding him not acting in line of duty when he collided with plaintiff's car on U. S. Highway 60, on his way to a liquor store to buy whiskey for his personal use. There was considerable, but inconclusive, evidence that Private Reyno was intoxicated at the time. Nevertheless, the case turned on *unauthorized* use of the vehicle, in no way connected with the business of the United States. The court relied upon the authority of Parrish v. United States, 95 F. Supp. 80 (M.D. Ga. 1950), in support of its conclusion. King v. United States, 178 F.2d 320 (5th Cir. 1950), was another case where use of Government property without authority, knowledge or consent was a basis for finding the operator not acting in line of duty. The instrumentality involved was an Air Force AT-6 training plane which was taken over the city of San Antonio, Texas, on a low-level flight by an Air Force cadet in training at Randolph Field. The cadet, shortly after midnight, while under the influence of liquor, took off in the plane and crashed into plaintiff's home, set it on fire and destroyed it. It thus appears that lack of authority to use the particular Governmental instrumentality will in practically all cases exculpate the United States. See notes 59 and 60 *supra*.

89. 92 F. Supp. 715 (S.D.N.Y. 1950).

employee.[90] It thereafter cited *United States v. Eleazer,* and other cases under the Federal Tort Claims Act which applied federal common-law principles of agency.

At this point, it is essential to note that despite some dicta that local law controls,[91] it is the federal rule as to scope of employment which correctly governs cases under the Federal Tort Claims Act. This principle underlies many of the cases thus far decided, but it has not been emphasized because there are few instances of divergence between the federal and the local rule. The situation is discussed by the court in *United States v. Lushbough*:

> "There is an apparent conflict between the decisions of the courts of appeals, in some instances a conflict more apparent than real, on the question whether Federal courts are bound by the law of the State in which the injury or damage was sustained in determining whether at the critical time and place the employee of the United States was acting within the scope of his office or employment. In the Fourth Circuit the rule is that in such actions local law is not controlling. United States v. Eleazer, 4 Cir., 177 F.2d 914, 916; United States v. Sharpe, 4 Cir., 189 F.2d 239, 241. . . . And see Williams v. United States, D. C., 105 F. Supp. 208, 209; Hubsch v. United States, 5 Cir., 174 F.2d 7, 9; Problems Under the Federal Tort Claims Act. Yankwich, 9 F.R.D. 143, 150-152, 155-159. Decisions under the Act in which Federal courts apparently applied State law in determining the issue under discussion are Murphey v. United States, 9 Cir., 179 F.2d 743; United States v. Johnson, 9 Cir., 181 F.2d 577; United States v. Wibye, 9 Cir., 191 F.2d 181; and Christian v. United States, 6 Cir., 184 F.2d 523."[92]

Absent any controlling federal authority, it would seem that the federal courts must evolve their own rule of law.[93]

The fact situation in *United States v. Lushbough* is somewhat different in that it involved civilian rather than military personnel.[94]

90. The district court, in so doing gave only lip service to the normal conflict of laws rule applicable to private individuals in diversity of citizenship cases. See note 55 *supra.*

91. *See* United States v. Lushbough, 200 F.2d 717, 720 (8th Cir. 1950); United States v. Wibye, 191 F.2d 181, 183 (9th Cir. 1951); Christian v. United States, 184 F.2d 523, 525 (6th Cir. 1950); United States v. Johnson, 181 F.2d 577, 580, 581 (9th Cir. 1950); Murphey v. United States, 179 F.2d 743, 746 (9th Cir. 1950); United States v. Campbell, 172 F.2d 500, 503 (5th Cir. 1949); Bach v. United States, 92 F. Supp. 715, 716 (S.D.N.Y. 1950).

92. 200 F.2d 717, 720 (8th Cir. 1952).

93. See note 52 *supra.*

94. The tortfeasor was a student at the Missouri School of Mines, Rolla, Missouri, who during his summer vacation was engaged to work for the United States Geological Survey under the general supervision of the project engineer. He was attached to a field party under the immediate supervision of one of the older trainees, known as the party chief. During August, 1950, Hoffman, the tortfeasor, was shifted from the party in Sturgis, South Dakota, to Belle Fourche, about 32 miles away, exchanging units with one Brucker, formerly in the Belle Fourche party. Because of this swap, both men left some of their personal items at their original stations. On the night of August 11, 1950, Hoffman received permission from his party chief at Belle Fourche to use the Survey truck to return to Sturgis to retrieve his laundry.

The court found the Government driver was engaged exclusively upon a personal errand in no manner connected with the work he was doing for the United States; hence he was not within the scope of his employment. It observed that the same result would follow regardless of whether it applied local or federal law.

Another recent case under the Federal Tort Claims Act, also involving a civilian employee, sharply points up the choice of federal vis-a-vis state law in the determination of scope of employment. In *Field v. United States*,[95] the plaintiff sued for damages to his automobile resulting from a collision with a Government vehicle being driven by an employee of the War Assets Administration. Upon trial, the Government admitted ownership of the car driven by its employee. The testimony of the driver of plaintiff's automobile, that the employee at the time of the accident, stated that he was on Government business, was admitted by the court as being within the *res gestae* exception to the hearsay rule. Nevertheless, the court in its considered opinion after review of the evidence rules held the statement incompetent to establish agency.[96] Plaintiff introduced no further evidence on the question of agency. The court found, on the basis of other evidence, that the employee's negligence caused the accident.

The court refused to allow plaintiff the benefit of the Illinois permissive use statute, under which a rebuttable presumption would have arisen in his favor (upon proof of defendant's ownership of the vehicle) not only that the driver was the agent of the owner, but also that the agent was acting within the scope of his employment. The court regarded the nonconclusive presumption of the Illinois statute as procedural rather than substantive, since it did not shift the burden of proof (which it properly characterized as substantive), but only the burden of going forward with the evidence; the ultimate risk of non-persuasion of the court or jury was still upon the plaintiff. The court further noted the standard of state law as the prescribed measure of liability under the federal statute, and its necessary restriction, where applicable, within the boundaries of *Erie R.R. v. Tompkins*. It quite correctly and properly pointed out, however, that the *Erie* doctrine, although applicable in diversity cases, was by its own terms[97] made inapplicable to matters governed

He also took along a pair of shoes Brucker had left at Belle Fourche. He was accompanied on this trip by Daniel Knock, another trainee. They left Sturgis at about 12:30 A.M. on August 12 and on this return trip collided with a car driven by plaintiff. The court found that Hoffman was not acting within the scope of his employment under either federal or local law.

95. 107 F. Supp. 401 (N.D. Ill. 1952).

96. See note 73 *supra*.

97. "*Except in matters governed by the Federal Constitution, or by Acts of Congress*, the law to be applied in any case is the law of the State." Erie

by the Constitution and federal statutes. Hence, its refusal to follow the state permissive use statute in this case finds ample support in the federal statutes and in legal authority. As a logical sequitur to this reasoning, the court adverted to the statutory definition of scope of employment found in Section 2671 of the Judicial Code and the uniquely federal sources governing the federal employer-employee relationship, which led it to properly conclude that federal, not state, law was the criterion to measure scope of employment under such circumstances.

The discussion of this topic necessarily includes *McConville v. United States,*[98] since the court, apart from its consideration of frolic, detour and return to scope of employment, starts out with an observation that the driver of the Army truck was in fact authorized to use it pursuant to Army regulations. It thereby sought to differentiate this case from *United States v. Eleazer,*[99] *Rutherford v. United States,*[100] *King v. United States*[101] and *Parrish v. United States.*[102] The court noted that the Army driver was engaged in a permissible activity for the Army when he pased the sentry at the Field Gate.[103] It affirmed the decision of the district court by stating that it could not, as a matter of law, say the district court erred in holding the driver "reasonably proximate to the scope of his employment" when he had completed two of the seven miles back toward the warehouse.

While the court purported to apply New York law to ascertain when the driver was again back in line of duty or scope of employment, it appears that New York cases indicate that he had not yet entered the scope of his employment.[104] This decision seemingly based

R.R. v. Tompkins, 304 U.S. 64, 78, 58 Sup. Ct. 817, 82 L. Ed. 1188 (1938) (italics added).

98. 197 F.2d 680 (2d Cir.), *cert. denied,* 344 U.S. 877 (1952).

99. 177 F.2d 914 (4th Cir. 1949), *cert. denied,* 339 U.S. 903 (1950).

100. 73 F. Supp. 867 (E.D. Tenn. 1947).

101. 178 F.2d 320 (5th Cir. 1949), *cert. denied,* 339 U.S. 964 (1950).

102. 95 F. Supp. 80 (M.D. Ga. 1950).

103. Sergeant Anderson, the driver of the colliding Army car was stationed at Mitchel Field, Hempstead, Long Island. On the evening of the accident, he had been drinking beer at the WAC Recreation Hall. Shortly after returning to his duties in charge of the quartermaster warehouse, a lieutenant requested a bed and mattress. There were none available. Hence, it was necessary for him to go over to the warehouse, about two miles away from the field to get the needed equipment. The motor pool issued him a truck for this purpose. He then took four other soldiers along and was cleared by the sentry at the West Gate at about 12:30 A.M. After leaving the field, he drove the truck for a short distance southeast in the direction of the warehouse. Sergeant Anderson then turned southwest to a bar where he and his companions drank beer. Thereafter, he drove some seven miles away from Mitchel Field and the warehouse to visit another bar. His four companions remained at this bar and Sergeant Anderson proceeded toward the warehouse alone. The collision occurred at 2:00 A.M. when he had completed about two miles of his return trip.

104. Cohen v. City of New York, 215 App. Div. 382, 213, N.Y. Supp. 710 (1st Dep't), *aff'd,* 243 N.Y. 561, 154 N.E. 605 (1926); Carty v. Acker, Merral

only upon the mental attitude of the wayward servant seems peripheral, at best, under local law and serves to underscore the need for application of a uniform rule of federal common law. The employment relationship of Government and soldier together with its incidents involving the scope, nature and consequences is distinctively federal in character.[105] *United States v. Standard Oil Co.*[106] points out that the incidents of such relationship have no locus in any one state, but must be measured by resort to federal law and decisions to insure uniformity. The authority of the military to issue regulations governing servicemen[107] is but another example of the impropriety of using local law to guage this relationship. This same principle is applicable with equal force to civilian employees of the Government, who likewise are subject to federal laws and departmental regulations governing their status *vis-a-vis* the United States as the employer. This point is fully treated in Part II, dealing with Employee of the Government. The *McConville* case thus stands at variance with the large and rapidly growing body of decisions calling for application of federal common law to govern the characteristics and incidents arising from employer-employee relationships having their roots in federal sources.[108]

Other Exceptions from Local Law

In this treatment of exceptions from the law of the place criterion prescribed by the Federal Tort Claims Act, it is apposite to note that these exceptions underscore the general rule that substantive state law continues to be the determinative factor in the existence of a cause of action against the United States within the framework of the statute.[109] It has been shown in the preceding discussion that

& Condit Co., 210 App. Div. 789, 206 N.Y. Supp. 773 (1st Dep't 1924); Graves v. Utica Candy Co., 209 App. Div. 193, 204 N.Y. Supp. 682 (4th Dep't 1924); Walter v. Upson, 206 App. Div. 652, 198 N.Y. Supp. 955 (4th Dep't 1923), *aff'd*, 237 N.Y. 541, 143 N.E. 755 (1924); Campbell v. Warner, 200 App. Div. 888, 192 N.Y. Supp. 404 (1st Dep't 1922), *rev'd*, 234 N.Y. 645, 138 N.E. 481 (1923). In Riley v. Standard Oil Co., 231 N.Y. 301, 305, 132 N.E. 97 (1921), it was held that re-entry is not accomplished by mental attitude alone, but by a combination of attitude and reasonable connection in time and space with the servant's work.

Lowe v. United States, 83 F. Supp. 128 (W.D. Mo. 1949), is distinguishable from the *McConville* case in that the civilian employee operating the Army bus had returned to the immediate vicinity of his route at the time of the collision.

105. See Feres v. United States, 340 U.S. 135, 141-43, 71 Sup. Ct. 153, 95 L. Ed. 152 (1950); United States v. Standard Oil Co., 332 U.S. 301, 305, 67 Sup. Ct. 1604, 91 L. Ed. 2067 (1947).

106. 332 U.S. 301, 305, 67 Sup. Ct. 1604, 91 L. Ed. 2067 (1947).

107. See note 66 *supra*.

108. See notes 52, 84 *supra*.

109. See notes 6 and 29 *supra*. The essential fairness of this approach is nowhere more manifest than in the field of damages, where the sovereign accords its humblest citizen the same right of restitution for personal injury

it is only where the unique relationship of the Federal Government to its employees, military and civilian, requires application of federal standards that departure from local law is proper. Such exceptions constitute inevitable recognition that there exist certain areas where Government *qua* Government can never divest itself of its sovereign capacity.[110]

Perhaps it is this concept, though often unrecorded in published decision, as well as the express limitations of the law,[111] which tacitly influences judicial thinking in terms of governmental liability.[112]

Absolute Liability

Prior to enactment of the Federal Tort Claims Act, the sovereign could not be sued in tort, except in those isolated instances where Congress might, by special act, waive immunity for a particular case. In making the United States amenable to suit in tort, the Congress conditioned liability upon the existence of a negligent or wrongful act or omission on the part of an employee of the Government. Thus, the court's finding of such an act or omission constituting proximate causation was the touchstone and the *sine qua non* of any recovery under the new tort law.

Nevertheless, the same section of the law provided that the United States should be liable in the same manner and to the same extent as a private individual under local law. Earlier discussion herein has shown the nonapplicability of certain aspects of state law to the sovereign, especially the state permissive use statutes relating to the operation of automobiles.

Another important conflict has developed in the field of aviation law where the state law provides for absolute liability, without fault or negligence on part of the operator of the plane which causes damages to persons or property on the ground. It appears that twenty-three states have adopted Section 5 of the Uniform Aeronautics Act[113]

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or property damage against it which the injured party would have against any other resident of that jurisdiction. The need for such remedy due to "larger" Government is shown in Keifer & Keifer v. RFC, 306 U.S. 381, 390-92, 59 Sup. Ct. 576, 83 L. Ed. 784 (1939). Also see *Hearings before Subcommittee of Committee on the Judiciary on S. 2690,* 76th Cong., 3d Sess. 18 (1940) ("Rule of Thumb" practice which Act superseded).

110. The committee reports on the Act and its predecessor bills all carry language in the exceptions clause excluding from coverage "claims which relate to certain governmental activities which should be free from threat of damage suit." See, *e.g.*, SEN. REP. No. 1400, 79th Cong., 2d Sess. 33 (1946); H.R. REP. No. 1287, 79th Cong., 1st Sess. 6 (1945); H.R. REP. No. 2245, 77th Cong., 2d Sess. 10 (1942).

111. See notes 62, 63 and 64 *supra.*

112. *Cf.* Dalehite v. United States, 346 U.S. 15, 43-45, 73 Sup. Ct. 956, 97 L. Ed. 1427 (1953); Feres v. United States, 340 U.S. 135, 142, 71 Sup. Ct. 153, 95 L. Ed. 152 (1950).

113. For a listing of the twenty-three states with statutory citations, see

providing for absolute liability, although four of them have removed this proviso and now base liability upon the rules of torts applicable to accidents on land.[114]

This doctrine, in states having such a law, has been applied to commercial planes operating as common carriers *for profit*,[115] but such application only serves to underscore the impropriety of holding the Government responsible under a similar standard. The analogy is especially persuasive in favor of a different standard for the sovereign where it operates military, naval or Civil Aeronautics Agency planes, not for profit and not as common carriers, but in the interest of national defense, national security and flying safety operations. Additionally, it would seem reasonable that the sovereign, until recently immune from suit at all, should not be held unconditionally and absolutely liable under a limited statutory waiver of immunity conditioned upon the existence of a negligent or wrongful act or omission. *A fortiori*, the step from no liability to absolute liability would, on its face, be subject to caveat.

Nevertheless, the Fourth Circuit Court of Appeals in its November 9, 1953, decision in *United States v. Praylou*[116] has squarely raised this issue by holding the United States absolutely liable for personal injuries and property damages caused by a crash of a military plane on the plaintiff's land in South Carolina, which state has an absolute liability law modeled upon Section 5 of the Uniform Aeronautics Act.[117] The absolute liability problem was also the subject of an earlier

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RHYNE, AVIATION ACCIDENT LAW 66 n.14 (1947). Section 5 of the Uniform Aeronautics Act provides: "Damage on Land—The owner of every aircraft which is operated over the lands or waters of this state is absolutely liable for injuries to persons or property on the land or water beneath, caused by the ascent, descent or flight of the aircraft, or the dropping or falling of any object therefrom, whether such owner was negligent or not, unless the injury is caused in whole or in part by the negligence of the person injured, or of the owner or bailee of the property injured. If the aircraft is leased at the time of the injury to person or property, both owner and leasee shall be liable, and they may be sued jointly, or either or both of them may be sued separately. An aeronaut who is not the owner or leasee shall be liable only for the consequences of his own negligence. The injured person, or owner or bailee of the injured property, shall have a lien on the aircraft causing the injury to the extent of the damage caused by the aircraft or objects falling from it." 11 U.L.A. 161, 162 (1938).

114. RHYNE, *op. cit. supra* note 113, at 66 n.13; 14 J.D.C. BAR ASS'N 435 (1947).

115. See, *e.g.*, Smith v. Pennsylvania Central Airlines Corp., 76 F. Supp. 940 (D.D.C. 1948); McCusker v. Curtis-Wright Flying Service, 269 Ill. App. 502, [1933] U.S. AV. REP. 105.

116. 208 F.2d 291 (4th Cir. 1953).

117. S.C. CODE § 2.6 (1952). It should be noted that the Uniform Aeronautics Act, including Section 5, was withdrawn in 1943 from active promulgation pending further study by the National Conference of Commissioners on Uniform State Laws. 9 U.L.A. xvi (1951). See also note 113 *supra*. The government plans to petition the Supreme Court to take certiorari in the *Praylou* case because of conflict with other courts of appeals decisions and with the recent decision of the Supreme Court in the *Dalehite* case. A

ruling by Judge Moore in *Parcell v. United States*,[118] which involved property damage caused by the crash of two Air Force jet fighter planes in West Virginia. Although that state is not one of the twenty-three jurisdictions having an absolute liability statute, the court nevertheless found the Government liable under this doctrine predicated upon its participation in an ultra-hazardous activity. It further found a basis for liability under trespass *quare clausum fregit*.[119] It applied the doctrine of *res ipsa loquitur* and decided that the evidence adduced by defendant failed to overcome the presumption of negligence involved in the defendant's operations.[120] It should be noted in the early consideration of the concept of absolute liability that but for singular deviations, such as found in *Green v. General Petroleum Corp.*,[121] and implicit in *Exner v. Sherman Power Construction Co.*,[122] that no respectable support for such postulate exists in Anglo-American law.[123]

Other decisions under the Federal Tort Claims Act, moreover, are in direct conflict with the *Praylou* case. The Supreme Court in *Dalehite v. United States*,[124] expressly ruled out the application of such doctrine as a basis for liability on the part of the United States under the Federal Tort Claims Act, pointing out that the statute expressly

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ruling by the Supreme Court would be of great aid in clarifying the law in a field where this question is bound to recur with increasing frequency.

The American Law Institute, feeling that the rules stated in *Restatement, Torts* concerning absolute liability for airplane crashes were undesirable, have cooperated with the Commissioners on Uniform State Laws in drafting a proposed act based on negligence rather than absolute liability. [1938] HANDBOOK OF NAT. CONF. OF COMM'RS ON UNIFORM STATE LAWS 71; [1948] *id.* at 147, 149. Several states have adopted "this more modern view" that the ordinary standards of care rather than absolute liability apply to aircraft accidents. Kadylak v. O'Brien, [1941] U.S. AV. REP. 8 (W.D. Pa.); Johnson v. Central Aviation Corp., 103 Cal. App.2d 102, 229 P.2d 114, 120 (1951); Herrick v. Curtiss Flying Service, [1932] U.S. AV. REP. 110, 113, 117, 118, 122, 131 (N.Y. Sup. Ct.); see also RHYNE, AVIATION ACCIDENT LAW 64-65 (1947).

118. 104 F. Supp. 110 (S.D. W. Va. 1951). This case was compromised for a relatively small sum prior to any appellate ruling, however, and was dismissed as moot.

119. The early English common law imposed liability for invasion of land in possession of another without regard to fault or harm. RESTATEMENT, TORTS § 166, comment *d* (1934); *cf. id.* § 65. See Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 392-95 (1951). *Cf.* Dalehite v. United States, 346 U.S. 15, 44, 45, 73 Sup. Ct. 956, 97 L. Ed. 1427 (1953).

120. For application of *res ipsa loquitur* in other aircraft Tort Claims cases, see, *e.g.*, Chapman v. United States, 194 F.2d 974, 977 (5th Cir. 1952); United States v. Gaidy, 194 F.2d 762 (10th Cir. 1952); United States v. Kesinger, 190 F.2d 529, 531-33 (10th Cir. 1951); D'Anna v. United States, 181 F.2d 335, 337 (4th Cir. 1950). A reading of these cases leaves one with the impression that the *res ipsa* doctrine has often been used to reach a determination equivalent to absolute liability without express reliance upon this principle.

121. 205 Cal. 328, 270 Pac. 952 (1928).

122. 54 F.2d 510 (2d Cir. 1931).

123. Gregory's criticism of these two cases emphasizes their unique status in the law. Gregory, *supra* note 119, at 388-95.

124. 346 U.S. 15, 73 Sup. Ct. 956, 97 L. Ed. 1427 (1953).

requires a negligent act.[125] A number of other decisions following the *Dalehite* case have ruled out absolute liability under the Act.

At this point, the advocates of absolute liability might also wish to consider potential liability engendered by the development of the atomic energy program.[126]

Since the cases adverted to under the absolute liability topic fall within that section of the statute dealing with exceptions from its coverage, *viz.*, Section 2680(a), it is appropriate to note another recent ruling fitting under a related clause of the same section. In *Stepp v. United States*,[127] the plaintiff in seeking to avoid the exception of Section 2680(h)—assault and battery—pleaded the Alaska law classifying this tort as an "assault with a dangerous weapon" rather than assault and battery since Alaska law defines assault and battery as an act committed by one "not being armed with a dangerous weapon." The court, however, in rejecting this contention stated:

> ". . . where the United States excepts itself from certain liabilities, as in Section 2680 of the Federal Tort Claims Act, such exceptions must be interpreted under the general law rather than under some peculiar interpretation of a State or Territory."[128]

In *Duenges v. United States*,[129] the court relied upon the exception to coverage by the federal law of claims arising out of "false arrest"

125. Heale v. United States, 207 F.2d 414 (3d Cir. 1953) (blasting case, remanded to district court for findings as to existence of negligence); Harris v. United States, 205 F.2d 765 (5th Cir. 1953) (damage to crops of adjoining landowner resulting from airplane spraying chemical herbicide to destroy willow growth on Government-owned land); United States v. Inmon, 205 F.2d 681 (5th Cir. 1953) (injury to 14 year-old boy from explosion of Army blasting cap found by him on private property formerly leased by United States for Army camp; the land had been released to the owner and had changed hands four times before the injury occurred); Danner v. United States, 114 F. Supp. 477 (W.D. Mo. 1953) (plaintiff's land flooded as a result of collapse of embankment built by Corps of Engineers in emplementation of Government flood control program); Flores v. United States, 105 F. Supp. 640, 642 (D. N. Mex. 1952) (plaintiff searching for scrap materials injured by explosion of undetonated bomb fuse on land formerly leased by United States for practice bombing range; land was decontaminated before release by Government; this ruling preceded the *Dalehite* case).

126. The Thirteenth Semiannual Report of the Atomic Energy Commission, SEN. Doc. No. 3, 83d Cong., 1st Sess. 87, 88 (1953), indicates a healthy number of concussion damage claims from each of the therein described series of blasts. Albeit, none of these claims exceeded $1,000 in amount and 89% were adjusted administratively by the Commission under Section 2672 of the Judicial Code.

127. 207 F.2d 909 (4th Cir. 1953). This case involved a suit for the alleged wrongful death of a civilian seaman, who in June of 1948 was serving on an L.S.T. operated by the Army Transport Service. While the ship was docked at Anchorage, Alaska, at about 2:00 A.M., the decedent approached the dock to board ship. The dock was guarded by a sentry whose duty it was to challenge all persons coming on the dock and prevent any member of the crew from carrying intoxicants upon the dock. In the enforcement of this duty, the sentry, after due warning to Stepp, shot him when he failed to stop running away.

128. *Id.* at 911.

129. 114 F. Supp. 751 (S.D.N.Y. 1953).

and "false imprisonment"[130] to hold the United States not liable for the arrest and imprisonment of the plaintiff subsequent to his honorable discharge from the service, thereby denying his claim for mental anguish, loss of freedom and loss of earnings during the period of his wrongful detention. The plaintiff, in an effort to by-pass the statutory exception, vainly sought to predicate his cause of action upon the negligent keeping of the Government's records, alleging this to be the actionable basis of his claim. In rejecting this proffered basis of liability, the court correctly observed that in an action for negligence, "damage" was the very essence of the plaintiff's case, since the negligent keeping of records would only become an actionable wrong upon the event of subsequent injury directly attributable thereto.[131]

In *Jones v. United States*,[132] the plaintiffs sought recovery of the difference in the value of their oil stock, based upon the actual return from the sale thereof and its value, predicated upon present authoritative estimates of the production capacity of the oil producing lands involved. The complaint charged the Geological Survey with negligently and deceitfully giving to the plaintiffs an incorrect estimate of the oil reserves.

The court of appeals, in sustaining the lower court's dismissal of the complaint, invoked that part of the exception of Section 2680(h) listing "misrepresentation" and "deceit" as torts not covered by the sovereign waiver of immunity from suit. As to the second charge of the complaint, "deceit," the court, citing *Silverton v. United States*,[133] found the statutory language a clear bar.

As to the first charge, "negligent misrepresentation," the court reasoned that since "deceit" meant fraudulent misrepresentation, "misrepresentation" must have encompassed negligent misrepresentation.

130. 28 U.S.C.A. § 2680(h) (1950).

131. Such ruling accords with a basic concept in the law of torts that damage must proximately result from the defendant's negligent act. Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928); McCORMICK, DAMAGES 100 (1935).

132. 207 F.2d 563 (2d Cir. 1953). In October of 1946 the plaintiff, Clayton Jones, wrote to the United States Geological Survey for information on the estimated oil bearing capacity of certain Government-owned land in Wyoming which had been leased to the Empire State Oil Company of Thermopolis, Wyoming. The company had issued common stock upon their oil producing rights in the leased land. The Geological Survey by letter of November 29, 1946, gave to Jones an estimate of the oil reserves at the rate of 17,400 bbls. per acre at a time when it had sufficient information available for accurate computation of ultimate oil recovery from this land. The plaintiffs, fourteen months after receipt of this letter from the Geological Survey and in reliance upon this estimate, sold their stock at $1.72 per share. The Geological Survey estimate was in error by about 300 per cent and by 1951 the barrel-per-acre yield had exceeded the 17,400 bbl. per acre estimate of the Geological Survey. By the time of suit this stock had a value of $5.16 per share.

133. 200 F.2d 824 (1st Cir. 1952).

This construction was adopted to avoid interpretation of the latter term as duplicative of the former,[134] the court thereby following a cardinal rule in the field of statutory construction.[135] In reaching its conclusion the court tacitly adopted the contention of the defendant that even if the complaint did state a claim upon which relief could be granted against a private individual, the prohibition of the federal law was insurmountable and hence must govern. By analogy with the exception pertaining to "libel," also contained in the same section, it concluded that negligent or intentional misrepresentations were both covered.

By a parity of reasoning and with express reliance upon the decision in the *Jones* case the United States District Court for the Southern District of New York dismissed the complaint in *Panella v. United States,*[136] without passing upon the grounds urged by the Government in the defendant's motion for summary judgment. The court held plaintiff's cause of action to fall within the exception of Section 2680(h), which preserved sovereign immunity for claims arising out of certain intentional torts including assault and battery. As in *Jones v. United States,* the court found the gravamen of the complaint undeniably stated a cause of action on the mentioned grounds, rather than upon negligent supervision and control, as urged by the plaintiff.[137] It further emphasized the separate and distinct coverage of the terms, "assault" and "battery," by noting the "intentional" aspect of the term "assault" to prevent its consideration as merely duplicative of the term "battery" in the statutory sense of "*ejusdem*

134. The Government's brief carefully pointed out that in most jurisdictions, since Derry v. Peek, 14 App. Cas. 337 (1889), it was recognized that the common-law action of deceit would not lie for mere negligent misrepresentation.

135. Words of a statute are not to be construed as surplusage but each is to be given a meaning consonant with rational legislative intent. McDonald v. Thompson, 305 U.S. 263, 266, 59 Sup. Ct. 176, 83 L. Ed. 164 (1938); D. Ginsberg & Sons v. Popkin, 285 U.S. 204, 208, 52 Sup. Ct. 322, 76 L. Ed. 704 (1932); Hurley v. United States, 192 F.2d 297, 300 (4th Cir. 1951); United States v. Montgomery Ward & Co., 150 F.2d 369, 379 (7th Cir. 1945).

136. 117 F. Supp. 119 (S.D.N.Y. 1953). The facts and holding are listed under the style, United States v. Wilcox. Actually the *Panella* and *Wilcox* cases with *Blond v. United States* were simultaneously considered by the court for the purpose of disposing of defendant's motions for summary judgment pending in each case. The *Wilcox* and *Blond* cases, in which defendant's motions were denied, in the opinion of the court, raised an issue of fact as to whether each of the servicemen therein was acting in line of duty at the time of his respective death. In the *Panella* case, however, the plaintiff was an inmate of the United States Public Health Service Hospital at Lexington, Kentucky, who sued for damages because of injuries sustained when he was set upon and stabbed by another inmate of the facility. This plaintiff alleged negligence of the defendant in failing to provide sufficient guards to assure proper supervision and control in the locked room in which the injury occurred. Plaintiff was patient at the hospital who had selected treatment at the facility in lieu of twelve months incarceration or probation after conviction as a user of narcotics by the Kentucky state court.

137. See note 131 *supra.*

generis."[138] It also rejected the plaintiff's connotation of the statutory term "wrongful" as expanding the normal concept of negligence as limited by the law.[139] It found absurd a construction of these two exceptions which would exculpate the Government for assaults by its own employees, who were under its direct supervision and control, and make it liable for like acts on the part of third persons not subject to such close supervision and control. It finally pointed out that Congress could have provided, had it desired such limitation, a provision reading "assault *or* battery by an employee of the government," instead of the more sweeping language of the existing exception.[140] This decision like that in the *Jones* case, essentially represents the application of federal common-law rules of tort,[141] necessary for the achievement of a uniform standard in a field where sovereign immunity still prevails.

Although many of the cases treated in this paper may, upon first impression, indicate a questionable departure from the commonly accepted law of the place standard prescribed by the Act, careful analysis will, however, reveal that such necessary application of a federal common-law rule best serves the basic purpose of a conflict-of-laws doctrine—assurance of uniformity of treatment, regardless of the adventitious circumstances determining the forum.[142]

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138. See note 135 *supra*. *Cf.* Gooch v. United States, 297 U.S. 124, 56 Sup. Ct. 395, 80 L. Ed. 522 (1936); United States v. Ryan, 284 U.S. 167, 52 Sup. Ct. 65, 76 L. Ed. 224 (1931).

139. In this respect, the court was proceeding upon sound principles of statutory construction. Dalehite v. United States, 346 U.S. 15, 45, 46, 73 Sup. Ct. 956, 97 L. Ed. 1427 (1953).

140. Such conclusion finds support in strict construction of sovereign waivers of immunity. See note 64 *supra*.

141. *Cf.* Paige v. State, 269 N.Y. 352, 199 N.E. 617 (1936) (state held liable for injuries to an inmate of a private correctional institution subject to state inspection and supervision). And see Moos v. United States, 22 U.S.L. WEEK 2334 (U.S.D. Minn. Jan. 15, 1954), 7 VAND. L. REV. 283 (assault and battery exception of Section 2680(h) applied to negligence of VA hospital which operated on the veteran's right instead of his injured left leg; a broad construction was given to the statutory terms equivalent to and beyond that permissible under state law).

142. *Cf.* Lauritzen v. Larsen, 345 U.S. 571, 583, 591, 73 Sup. Ct. 921, 97 L. Ed. 1254 (1953).