

# THE FEDERAL TORT CLAIMS BILL

WALTER P. ARMSTRONG\* AND HOWARD COCKRILL\*\*

At this writing there is good reason to expect the House of Representatives to pass a bill "To provide for the adjustment of certain claims against the United States and to confer jurisdiction in respect thereto on the district courts of the United States, . . ." If enacted the bill provides that the Act may be cited as the "Federal Tort Claims Act."<sup>1</sup>

On January 14, 1942, President Roosevelt sent to the Senate a message endorsing the principle of the measure, and urging the passage of such a bill.<sup>2</sup> The message began,

"In these critical days of our national defense effort, I feel there should be a joint endeavor on the part of the Congress and of the heads of the executive branch of the Government to divest our minds as far as possible of matters of lesser importance which consume considerable time and effort. We should grant the responsibility for handling such matters to those equipped with year-round facilities and time to dispose of them."

The President continued, pointing out the enormous number of private claim bills introduced in each Congress, and decried the expense and delay to the Congress in continuing the unwieldy procedure.<sup>3</sup> He quoted statistics based upon the mounting volume of private bills introduced before the country was at war, making it obvious that the number would increase by reason of the defense and war program.

\* A.B., 1906, LL.B., 1908, Yale University. Member of the Tennessee Bar. President, American Bar Association, 1941-1942. Member of Council of the American Law Institute; member of the General Council of the American Bar Association, 1929-1931, and of the House of Delegates since 1939; member of the Board of Editors of the *American Bar Association Journal*, 1934-1941; President of the Tennessee State Bar Association, 1936; City Attorney, Memphis, 1920-1924. Contributor to legal periodicals.

\*\* B.S., 1931, University of Virginia; LL.B., 1933, George Washington University. Member of the Arkansas Bar. Assistant Prosecuting Attorney, Little Rock, Ark., 1942. Secretary, Committee on Jurisprudence and Law Reform, American Bar Association, 1939-1942, Chairman for Arkansas, 1936-1937. Contributor to legal periodicals.

<sup>1</sup> Recently, a majority of the House Judiciary Committee has, with some amendments, favorably reported on S. 2221, introduced by Senator van Nuys and passed by the Senate on March 30, 1942. H. Rep. No. 2245, to accompany S. 2221, 77th Cong., 2d Sess. (1942) (hereinafter referred to as "*Report*"). Similar bills, H. R. 7236 and S. 2690 were before the 76th Congress in its first session. While H. R. 7236 passed the House, S. 2690 was never reported out of the Senate Judiciary Committee. In the first session of the 77th Congress, Congressmen Hobbs and Allen introduced H. R. 5299 and H. R. 5373, on July 14th and 21st, 1941, identical with those preceding them. In the second session, the Committee held hearings on H. R. 6463, introduced by Congressman Cellar, see *Hearings before the Committee on the Judiciary on H. R. 5373 and H. R. 6463*, 77th Cong., 2d Sess. (1942) (hereinafter referred to as "*Hearings*").

<sup>2</sup> 88 Cong. Rec., Jan. 14, 1942, at 323; see *Claims Bill is given big Push by President*, American Law and Lawyers, Jan. 24, 1942, p. 3, col. 4.

<sup>3</sup> 6,300 private claim bills introduced in last three Congresses, at cost of over \$144,000 per Congress exclusive of salaries of Congressmen; figures yield average of 2,000 bills per Congress at a cost of \$200 per bill passed. Less than 20% of bills become law.

After approving the general provisions of the Tort Claims Bill, the message concluded:

"The passage of such legislation would be of real assistance to the Congress and to the President at a time when matters of grave national importance demand an ever-increasing share of our attention. It would also make available a means of dispensing justice simply and effectively to tort claimants against the Government and give them the same right to a day in court which claimants now enjoy in fields such as breach of contract, patent infringement, or admiralty claims."

While the bill thus recommended failed of enactment in the first session of this Congress, the same bill in amended form has been passed by the Senate<sup>4</sup> and awaits action by the House. It appears, therefore, that with Presidential sanction, a measure agitated for over twenty years during peacetime has become of vital importance during a war period, and will probably become law. The same bill in a similar version<sup>5</sup> had been recommended for passage since 1938 by the successive Attorneys General of the United States,<sup>6</sup> and has had the endorsement of the American Bar Association and the approval of important state and local bar associations.<sup>7</sup>

#### GENERAL EFFECT AND PROVISIONS

The purpose of the proposed legislation is to confer on the district courts of the United States exclusive jurisdiction over certain classes of property damage and personal injury claims against the United States which are now barred by reason of the long-standing immunity of the Government to actions sounding in tort. The only relief now open to these claimants in most instances is the unsatisfactory procedure of a private bill in Congress, which is manifestly unfair to both the Government and to the claimant. The passage of the bill will amount to a waiver of immunity by the Government and consent to be sued, with certain limitations wisely attached. While the bill cannot end, of course, the practice of private bills, it will relieve Congressmen from the pressure for such bills by substituting orderly court proceedings.

Subject to the exception of specific types of claims from the bill, the measure vests exclusive jurisdiction in the federal district courts sitting without a jury to adjudicate tort claims up to \$10,000, arising from the negligence of officers or employees of the Government. To facilitate the handling of small claims, the heads of each federal agency or their designees are authorized to settle conclusively claims occasioned by the negligent acts of their employees up to \$1,000. "Federal agencies" are defined to include governmental corporations and the several departments and establishments of the Government. Accordingly, it is provided that even though a federal agency may generally be sued, that this is no longer true in respect of tort claims for which, under the bill, the United States is itself answerable.

<sup>4</sup> See *supra* note 1, see 88 Cong. Rec., 77th Cong., 2d Sess. at 3267.

<sup>5</sup> See *Hearings*, 7.

<sup>6</sup> REP. ATT'Y GEN. (1938) 10, *id.* (1939) 9; letter of Att'y General Biddle to Congressman Summers, *Report*, at 12.

<sup>7</sup> 64 A. B. A. REP. 209 (1939). An able brief supporting the legislation was prepared in 1940 by Mr. Jenner of the Association's Committee on Jurisprudence and Law Reform, and distributed among the members of the Judiciary Committees of Congress.

If the claim exceeds \$1,000 or if it is for a lesser amount and either settlement is not reached or the claimant prefers to sue at once, he may bring suit in a district court of the district in which he resides or in which injury occurred. After a claim has been submitted to a federal agency for an administrative settlement, no suit may be brought unless the claim is finally disposed of by the agency or is withdrawn from it by the claimant upon 15 days' notice. In either case the claimant is limited in his suit to the sum claimed originally from the agency, unless an increased amount is justified by newly discovered evidence or intervening facts. After suit is brought, the Attorney General "with a view to doing substantial justice" may settle the claim.

While the bill passed by the Senate vests exclusive appellate jurisdiction in the Circuit Courts of Appeal the House Judiciary Committee's version provides that, if the parties so agree, the Court of Claims shall take the place of the Circuit Court of Appeals as a court of review. This novel provision if enacted, promises to revive discussions<sup>8</sup> of the proper place, in the hierarchy of federal tribunals, of the Court of Claims as a "legislative" court. It is not easy to see why such concurring appellate jurisdiction should be established.<sup>9</sup> Certainly, the Circuit Courts of Appeal are more familiar with the all-important local law and are within easier reach of the claimant than the Court of Claims sitting in Washington.

Practice and procedure in such suits is expressly made subject to the Rules of Civil Procedure for the District Courts of the United States. The provisions for counterclaims, set-off, and payment of judgment are the same as those applicable to contract suits in the district courts under the Tucker Act.

With regard to substantive law, the bill expressly provides for the application of the law of torts of the place where the negligent or wrongful act occurred, in other words, the United States is made liable to the claimants as a private individual would be under like circumstances. The local law is thus applicable to the merits of the claim and to defenses such as contributory negligence and wilful misconduct, and also determines the effect of the claimant's death on his cause of action.

However, the rule of local law is qualified by important restrictions. Thus, the United States will not be liable for punitive damages, interests, or costs.<sup>9a</sup> The acceptance of an award by the claimant in an administrative settlement or the recovery of judgment will release not merely his claims against the United States but against the negligent employee as well. This protection afforded the tortfeasor does not, of course, prevent the taking of disciplinary measures against him if those are indicated. In the event some other party be jointly liable with the Government, the bill limits recovery against the United States to its proportionate liability, rather than the usual

<sup>8</sup> Cf. *Hearings*, 18.

<sup>9</sup> The Committee Report refers to the President's Message to Congress as indicating the desirability of having the Court of Claims exercise appellate jurisdiction, see *Report*, at 11. A prior bill had vested exclusive appellate jurisdiction in the Court of Claims to achieve "uniformity of administration," *Hearings*, 21, 22.

<sup>9a</sup> The House Committee's version permits recovery of costs, not including attorney's fees, see *Report*, 2, 7.

recovery of joint and several judgment against joint tort feasons.<sup>9b</sup> The following specific claims are expressly excepted: (1) loss or miscarriage of postal matter, (2) claims arising in respect to collection of any tax or goods held by any law enforcement officer, (3) admiralty claims, (4) property seized under Trading with the Enemy Act, (5) quarantine claims, (6) injury to vessels, cargo, crew and passengers while in the Panama Canal Zone waters, (7) compensation under Federal Employees' Compensation Act and Veterans' Act, (8) assault, battery, false imprisonment, malicious prosecution, libel, slander, misrepresentation, deceit, or interference with contract rights, a nuisance not involving negligence,<sup>9c</sup> (9) damages by Treasury Department in fiscal operations, (10) activities of armed forces in war time, and (11) any claim arising in a foreign country in behalf of an alien.<sup>9d</sup>

In addition, a general clause precludes the application of the act to:

"(1) Any claims based upon—

"(a) The exercise or performance [of] or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused; or

"(b) An act or omission of an employee of the Government, exercising due care, whether or not alleged to be wrongful in the execution of a program, project, statute or regulation, valid or invalid."

At first blush, it would seem that a claim based upon an act or omission of an employee "exercising due care" would fail to state a cause of action and that therefore the provision is redundant. However, the intent<sup>10</sup> seems to have been to preclude absolute liability of the Government for injuries arising in the course of lawful activities like flood control, dam or irrigation projects, a liability which might be imposed on an individual engaged in comparable work. But this is not the only purpose of the provision. For the denial of the claim even where the statute or regulation under which the Government employee acted was invalid might indicate a second legislative intent: to preclude the creation of a "governmental tort" doctrine based on the idea of governmental action without constitutional or statutory authority. This purpose is further made clear by the first paragraph of the section which denies liability for the results of the exercise of, or failure to exercise any discretionary function or duty on the part of a government agency or employee even where the discretion is abused. In the Congressional committee hearings the Government representative summarized<sup>11</sup> this purpose of the section in the following words:

"It is neither desirable nor intended that the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act, should be tested through

<sup>9b</sup> The House Committee's version lets the local law decide the liability of the United States in the case of joint tortfeasance, see *Report*, 12.

<sup>9c</sup> The House Committee's version omitted the exclusion of claims based on a "nuisance not involving negligence" because it deemed the general exclusion of claims based on authorized acts by government officers or employees exercising due care sufficiently broad to include this particular problem, *ibid.*

<sup>9d</sup> The House Committee also excluded claims arising out of activities of the Tennessee Valley Authority or of persons "in the protective services engaged in civilian defense" unless they are "also an officer or employee of the Office of Civilian Defense duly appointed as such," *Report*, 1, 4, 12.

<sup>10</sup> *Hearings*, 33.

<sup>11</sup> *Ibid.*

the medium of a damage suit for tort. The same holds true of other administrative action not of a regulatory nature, such as the expenditure of Federal funds, the execution of a Federal project, and the like."

A limitation of one year is placed on all actions unless suit is filed or written claim presented to the particular agency head, and in the latter instance an additional period of six months is granted the claimant from the date of mailing of notice by the agency as to the final disposition of the claim or from the date of his withdrawal of the claim from the agency. Fees of claimants' attorneys are limited to a maximum of 20% recovered by suit and 10% under awards from the agency heads with severe penalties for violations; this restriction, however, does not apply to recoveries of less than \$500. The percentages allowed as maximum fees were not commented on by President Roosevelt in his message to the Congress of January 14, 1942, and may be said, therefore, to have his tacit consent and approval. The bill repeals all existing acts giving department heads power to pay claims based on tortious conduct, but saves all those where such power of settlement for claims where non-tortious conduct is involved.

#### GOVERNMENTAL IMMUNITY

Under present conditions, the Government enjoys total immunity from tort actions, and is suable under any circumstances only by consent. This concept is a judicial misconstruction of the ancient maxim that "The King can do no wrong," carried over from the English common law, but wholly inapplicable to our form of government. The idea has become too firmly entrenched in our judicial system now, however, to be reversed by judicial decision, and requires this remedial legislation.

Like all rules of law, the idea has been rationalized.

"It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission. The doctrine rests on reasons of public policy,—the inconvenience and danger which would follow from any different rule." 26 R. C. L. 1458, United States, §63.<sup>12</sup>

In recent decisions, the Court announces the principle in a single sentence as requiring no explanation or citations.

"The United States, as sovereign, is immune from suit save as it consents to be sued." *United States v. Sherwood*, 312 U. S. 584 (1940).

In the case of *Keifer & Keifer v. Reconstruction Finance Corporation*<sup>13</sup> Mr. Justice Frankfurter tersely criticizes the origin of the doctrine:

"As to the States, legal irresponsibility was written into the eleventh amendment; as to the United States, it is derived by implication. . . . For present purposes, it is academic

<sup>12</sup> "It is better for the individual to suffer than for the public to be inconvenienced." *Russell v. Men of Devon*, 2 T. R. 667 (1788), 100 Eng. Repr. 359.

" . . . (The government) does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments and difficulties, and losses which would be subversive of the public interests." *Robertson v. Sickel* 127 U. S. 507 (1886), quoting from Story, COMMENTARIES ON THE LAW OF AGENCY (8th ed. by Green. 1874) §319.

<sup>13</sup> 306 U. S. 381, 388 (1938).

to consider whether this exceptional freedom from legal responsibility rests on the theory that the United States is deemed the institutional descendant of the Crown, enjoying its immunity but not its historical prerogatives . . . or on a metaphysical doctrine 'that there can be no legal right as against the authority that makes the law on which the right depends.'"

The probable origin of the doctrine of governmental immunity is thoroughly discussed in a series of articles beginning in 1924 by Professor Edwin M. Borchard,<sup>14</sup> and is analytically criticized by Mr. Alexander Holtzoff, Special Assistant to the Attorney General, in a forceful article supporting the Tort Claims Bill of 1939.<sup>15</sup> With this comprehensive treatment of the fundamental subject already contributed to the storehouse of legal lore, further elucidation of the principle would be repetition. Professor Borchard has been a persistent advocate of remedial legislation for over 25 years, and the Committees of Congress have recognized the evil of the existing system.<sup>16</sup> In fact, the need for reform may be said to have been judicially recognized in a fairly recent opinion by Mr. Justice Douglas, wherein he said:<sup>17</sup>

" . . . we start from the premise that such waiver by Congress of governmental immunity in case of such federal instrumentalities should be liberally construed. This policy is in line with the current disfavor of the doctrine of governmental immunity from suit, as evidenced by the increasing tendency of Congress to waive the immunity where federal governmental corporations are concerned."

Prior to the introduction of the 1939 Tort Claims Bill, Mr. Justice Frankfurter commented on the growing dissatisfaction with the doctrine of immunity, specifically pointing out an earlier Tort Claims Bill,<sup>18</sup> saying:<sup>19</sup>

"Acting on these views, Congress passed a general Court of Claims bill, which, however, at the close of the session failed of enactment by Coolidge's pocket-veto. . . . Congress has thus clearly manifested an attitude which serves as a guide to the scope of liability implicit in the general authorization it has conferred on governmental corporations to sue and be sued. We should be denying the recent trend of Congressional policy to relieve Regional from liability."

<sup>14</sup> Borchard, *Government Liability in Tort* (1924) 34 *YALE L. J.* 1, 129, 229; Borchard, *Governmental Responsibility in Tort* (1924) 36 *YALE L. J.* 1, 757, 1039; Borchard, *Governmental Responsibility in Tort* (1928) 28 *COL. L. REV.* 577; Borchard, *Theories of Governmental Responsibility in Tort* (1928) 28 *COL. L. REV.* 734.

<sup>15</sup> *Tort Claims against the United States* (1939) 25 *A. B. A. J.* 828.

<sup>16</sup> "In other words, it may be said that Congress has recognized the general liability of the Government within maximum amounts for the negligence of officers and employees of the United States, but the machinery for determining that liability is defective and results in overburdening the Claims Committee of Congress and Congress itself with the consideration of tort liability claims and with injuries to the claimants." Senate Report No. 1699, 70th Cong., 2d Sess. 4. See also Senate Report No. 658, 72nd Cong., 1st Sess. 3.

<sup>17</sup> *Federal Housing Administration v. Burr*, 309 U. S. 242, 245 (1939).

<sup>18</sup> H. R. 9285, S. 4377, 70th Cong., 2d Sess., which passed both Houses in 1929 "only to be given a pocket veto by President Coolidge, presumably because of the Attorney General's objection to that provision of the bill, as then drafted, 'enabling the Comptroller General to 'settle' and determine the validity of the claim and act as counsel for the United States. . . . Inasmuch as the Attorney General has customarily been the only legal official to defend the United States in the Court of Claims, this innovation was considered objectionable by him." Borchard, *The Federal Torts Claim Bill* (1933) 1 *U. OF CHI. L. REV.* 1. See also McGuire, *Tort Claims against the United States* (1931) 19 *GEO. L. J.* 133.

<sup>19</sup> *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U. S. 381, 397 (1938).

While the above cases seem to be liberalizing the doctrine of immunity in allowing suits against governmental corporations on the ground that the statutes creating them conferred power "to sue and be sued," the Court earlier indicated that this right to be sued might be limited if "interference" were shown.<sup>20</sup>

"In the present case it does not appear that the attachment would directly interfere with any function performed by petitioner as a federal instrumentality. We reserve the question whether a different result would be required if such an interference were shown."

The line of demarcation, anticipated above, was drawn very recently by the Court, wherein it called a halt on its liberal construction of the Congressional intent to make government corporations amenable to suit, and refused to extend its liberality to permit state taxation of the corporation.<sup>21</sup>

#### NECESSITY FOR ENACTMENT OF BILL

Although the doctrine of governmental immunity from suit does not appear in the Constitution or statute-law, and in spite of the fact that in the body of unwritten law it is derived by implication only, nevertheless remedial legislation is required to change the law.<sup>22</sup>

"The general principle of immunity of a sovereign state from suit without its express consent is too deeply imbedded in our law to be uprooted by judicial decision."

The enactment of the bill would not be in the nature of an innovation, as the Government's immunity to suit has been waived by Congress through various Acts since 1855 when the Court of Claims was established (10 Stat. 612). All subsequent amendments to the first Act<sup>23</sup> have continued to restrict the permissible claims to those founded upon implied contract or a federal statute, and jurisdiction is restricted to cases "not sounding in tort." The Court's decisions have further limited the actions to contracts implied in fact and not implied in law, and a claimant whose action sounds in tort may not waive the tort and sue in assumpsit on the theory of *quasi* contract.<sup>24</sup> This state of the law leads to the unwholesome conclusion that the more wanton and careless the conduct of the government employees, the less danger of incurring actionable liability on the part of the Government.<sup>25</sup>

Furthermore, Congress has permitted admiralty and maritime claims against the United States without limitation as to amount,<sup>26</sup> and suits for patent infringement against the Government are allowed.<sup>27</sup> These concessions do not appear to have been

<sup>20</sup> Federal Land Bank v. Priddy, 295 U. S. 229, 237 (1934).

<sup>21</sup> Federal Land Bank v. Bismark Lumber Co., 314 U. S. 95 (1941).

<sup>22</sup> The Pesaro, 277 F. 473 (S. D. N. Y. 1921); see excellent collection of authorities cited there.

<sup>23</sup> 24 Stat. 505 (1887), 36 Stat. 1136 (1911), 28 U. S. C. §250 (1934), 28 U. S. C. §41 (20) (1934).

<sup>24</sup> Great Falls Mfg. Co. v. U. S., 16 Ct. Cl. 160, aff'd 112 U. S. 645 (1884), U. S. v. Minnesota Mutual Investment Co., 271 U. S. 212 (1925).

<sup>25</sup> "The more flagrant and unjustifiable the Government's act, the less becomes its liability, hardly a commendable principle of law." Borchart, *Government Liability in Tort* (1924), 34 YALE L. J. 1, 31.

<sup>26</sup> 41 Stat. 525 (1920), 46 U. S. C. §742 (1934).

<sup>27</sup> 35 U. S. C. §68 (1934), 36 Stat. 851 (1910), 40 Stat. 705 (1918), Crozier v. Fried. Krupp Aktiengesellschaft, 224 U. S. 290 (1912).

abused by claimants, and have functioned satisfactorily. Beginning with 1912, there have been numerous Acts passed permitting departmental adjustment of personal injury and property damage claims not exceeding \$1,000.<sup>28</sup> This limit is probably wise considering the non-judicial manner of departmental adjustment of small claims, and is retained in the proposed legislation. Under existing law the claimant is given no alternative, however, and cannot appeal from the treatment accorded. The bill affords the claimant "his day in court," and does not force him to rely solely upon the discretion of administrative officers. There is no basis in fact for allowing small claims to be paid and denying larger ones *in toto*, nor is there any valid distinction between the present system of allowing admiralty and patent infringement claims and denying other torts. The Tort Claims Bill extends the salutary features to all claims of the existing<sup>29</sup> partial regulation to all claims.

The limitations contained in the pending bill are discussed at length above. Their very number indicates an effort to achieve safeguards against possible abuse. After the legislation becomes law and the new system thoroughly tested, other possible amendments may become the subject of consideration by Congress.

President Roosevelt in his message to Congress has pointed out the defects of private claim bills. Suffice it to say that they are highly unsatisfactory both from the standpoint of Congress and the claimant. The Tort Claims Bill provides for a sensible and comprehensive system under which the handling of tort claims in an orderly judicial manner may be accomplished. The passage of the bill will greatly improve the administration of justice.

<sup>28</sup> Comprehensive Act permitting department heads to make settlement, 42 Stat. 1066 (1922), 31 U. S. C. §215 (1934). Postmaster General, limited to \$500, 42 Stat. 63 (1921), 48 Stat. 1207, 5 U. S. C. §392 (1934). Secretary of War, 5 U. S. C. A., §208, 31 U. S. C. A., §§223, 224. For criticism of red-tape and unsatisfactory manner of these adjustments, see *Administration of Tort Claims in the War Department* (1942) 10 GEO. WASH. L. REV. 473. Secretary of Interior, 25 U. S. C. A., §388; Secretary of Agriculture, 46 Stat. 387; Attorney General, 5 U. S. C. A., §300(b); Director of Coast and Geodetic Survey, 33 U. S. C. A. §853.

<sup>29</sup> For a list of statutes to be repealed by the enactment of the bill, see *Report*, 13.