LIMITATIONS AND EXCEPTIONS UNDER THE FEDERAL TORT CLAIMS ACT

Smithmoore P. Myers*

For many years during our life as a nation, citizens have protested the injustice inherent in the doctrine of federal sovereign immunity. "It is as much the duty of government to render prompt justice against itself in favor of citizens as it is to administer the same between private citizens."[1] So spoke Abraham Lincoln during his presidency, and he spoke for a developing climate of opinion. It was not until 1946, however, that Congress, through the Federal Tort Claims Act, effected the first significant waiver of sovereign immunity in the field of tort law.[2] The only substantial amendments to the act became effective in 1967. The act made possible suits against the government in a great number of cases where they were formerly barred; such actions are presented to our courts in great and increasing volume.

It should not be supposed, however, that Congress has completely waived sovereign immunity in this field. There remain limitations as to the individuals who can present claims; there are exceptions as to the type of claims which can be presented. The purpose of this survey is to emphasize how extensive are these limitations and exceptions.

Limitations as to Parties

Even though a claim is of the type which may normally be asserted against the United States under the Federal Torts Claims Act, under certain circumstances the claim may not be maintainable because of the identity and occupation of the claimant. If a federal employee driving an automobile in the course of his employment injures another person through negligence the claim of the injured party would ordinarily be cognizable under the Torts Claims Act. If, however, the injured party were himself a civilian federal employee, engaged in the performance of duty at the time of the ac-

* A.B., Gonzaga University, 1936; J.D., Gonzaga University, 1939; Instructor and past Dean, Gonzaga University School of Law.

[1] The New Republic, August 16, 1969, at 11.

[2] On August 2, 1946, 60 Stat. 843 was enacted.

cident, he could not recover under the act. The same would be true if the injured party were a member of the armed forces and the injured were incident to his military service. These are the two principal limitations as to parties, although others exist.[3]

CIVILIAN EMPLOYEES

The Federal Employees Compensation Act (F.E.C.A.) provides a broad and comprehensive plan for compensation of most government employees injured on the job.[4] With certain exceptions,[5] the act contemplates compensation regardless of fault of employees injured in the performance of their duties. The liability of the United States for the injury or death of an employee is specifically made exclusive.[6] Therefore, for any injury or death compensable under the F.E.C.A., an action under the Torts Claims Act is barred.

In one case, a civilian employee of the government received severe injuries when crushed beneath a nine-ton field piece. He was compensated under the F.E.C.A. Then he and his wife brought an action under the Tort Claims Act, asserting that he had been rendered permanently impotent and that the F.E.C.A. did not compensate him for such an injury. The action was dismissed on the grounds that he was limited exclusively to a recovery under the F.E.C.A.[7] In another case, where one deputy United States Marshal accompanied another on a trip escorting prisoners and was injured through the negligence of the second deputy, his remedy was held to be exclusively under the F.E.C.A., and a tort action against the government was dismissed.[8]

In the absence of a specific statutory restriction, the F.E.C.A. does not abrogate the common law right of an injured civilian employee to sue a negligent fellow employee.[9]

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[3] For example, a federal prisoner injured in the performance of an assigned prison task, and compensated under the prison compensation law [18 USC § 4126 (1961)] is barred from recovery under the Tort Claims Act. United States v. Demko, 385 U.S. 149 (1966).

[4] 5 U.S.C. § 8101 *et seq.* (1967).

[5] 5 U.S.C. § 8102 (1966). The principal exceptions are injuries caused intentionally or by the wilful misconduct of the employee, or proximately caused by his intoxication.

[6] 5 U.S.C. § 8116(c) (1967).

[7] Posegate v. United States, 288 F.2d 11 (9th Cir. 1961).

[8] Gilliam v. United States, 407 F.2d 818 (6th Cir. 1969).

[9] Allman v. Hanley, 302 F.2d 559 (5th Cir. 1962). One important statutory restriction is in the Federal Driver's Act, 28 U.S.C. § 2679(b)-(e) (1961), which protects government drivers from personal liability for claims arising in the course of their employment. A federal employee injured on the job in a motor vehicle accident caused by a fellow employee in the course of his employment is barred from suing either the United States or the negligent fellow employee. Van Trease v. United States, 400 F.2d 853 (6th Cir. 1968).

The F.E.C.A. has been made the exclusive remedy only for the personal injury or death on the job of a federal civilian employee.[10] Where loss of, or damage to property results from the negligence of a fellow employee within the course of his employment, an action under the Tort Claims Act has been held appropriate.[11]

Military Personnel

Since the 1950 decision of the United States Supreme Court in *Feres v. United States*,[12] it has been clear that the government is not suable under the Tort Claims Act for injury to or death of a serviceman sustained "incident to the service." the *Feres* opinion covered three consolidated cases, in each of which a serviceman on active duty had been injured through the negligence of another in the military service. In two cases, medical malpractice was alleged; in one, the death by fire of a serviceman was claimed to be the result of negligence in knowingly quartering him in an unsafe barracks. Although neither the Tort Claims Act nor any other statute specifically bars such an action by a serviceman, the court reasoned that such a result is required by an analysis of the Act, and of the nature of military service.[13]

Where an injury to a serviceman is not so incident to military service, he is not precluded from an action under the Torts Claims Act. In such case, however, the amount payable under serviceman's benefit laws should be deducted from the recovery under the Tort Claims Act.[14] The decisive question in any such case is whether the injury is "incident to service." Such a determination is, of course, dependent upon all the surrounding facts applicable to each particular injury. An illustrative case in *United States v. Carroll*,[15] where a military reservist, in uniform and subject to military discipline, was injured while traveling by military transportation to a scheduled reserve drill. He was considered to have been engaged in an activity incident to military service, even though not actually traveling under orders. His action under the Tort Claims Act was dismissed.

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[10] 5 U.S.C. § 8116(c) (1967).

[11] Holcombe v. United States, 176 F. Supp. 297 (E.D. Va. 1959).

[12] 340 U.S. 135 (1950).

[13] "We conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. Without exception the relationship of military personnel to the Government has been governed exclusively by federal law. We do not think that Congress, in drafting this Act, created a new cause of action depending on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express Congressional command." *Id.* at 146.

[14] Brooks v. United States, 337 U.S. 49 (1949).

[15] 369 F.2d 618 (8th Cir. 1966).

In a somewhat similar situation, a soldier injured on leave was admitted to an army hospital and surgery was performed. He later sued under the Tort Claims Act, claiming negligence in the course of the operation, in that a drill was left in his body near the orbital wall of his left eye. His action was dismissed, the court holding that when the plaintiff entered the army hospital he was no longer on leave and the subsequent injuries were incident to his military service.[16]

A different result was reached where a military aircraft crashed and burned a few feet from the off-base trailer home of a sergeant who was off duty and asleep in the trailer. His resulting injuries were held not to be service connected or incident to his military service, and he was not precluded from an action under the Tort Claims Act.[17] *Brown v. United States*[18] offers another interesting application of the rule. A sailor on active duty was granted a period of about three days' leave or liberty. During that time he went swimming at a pool maintained at another navy installation—a navy station. There he was drawn into a drainage pipe and drowned because of the negligent operation of the pool. His death was held not to be incident to his military service and an action under the Tort Claims Act was held proper.[19]

Specific Exceptions as to Types of Claims

Congress was careful in enacting the Tort Claims Act to limit its waiver of sovereign immunity. It excepted claims of many types from the operation of the statute.[20] The Act does not apply, for example, to claims arising out of the loss, miscarriage, or negligent transmission of postal matter;[21] or to claims for damages caused by the imposition of a quarantine by the United States;[22] or to claims arising from the activities of the Tennessee Valley Authority.[23] There are numerous others.

This summary will not attempt a discussion of each of the many exceptions. It will emphasize instead those exceptions which are most often the subject of litigation.

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16 Buer v. United States, 241 F.2d 3 (7th Cir. 1956).

17 Sapp v. United States, 153 F. Supp. 496 (W.D. La. 1957).

18 99 F. Supp. 685 (S.D. W. Va. 1951).

19 The court found it significant that the sailor was not on duty at the time of his death, was not under compulsion of any orders and was not on any military mission.

20 28 U.S.C. § 2680 (1959).

21 28 U.S.C. § 2680(b) (1959).

22 28 U.S.C. § 2680(f) (1959).

23 28 U.S.C. § 2680(e) (1959).

Acts or Omissions in the Execution of a Statute or Regulation

Congress has specifically excepted from the operation of the Tort Claims Act, any claim based upon an act or omission of an employee of the government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid.[24] A primary purpose of this statutory exception is to prevent a litigant from using a tort action for damages, as a vehicle to test the legality of a statute or regulation, or the legality of official action under the authority of such statute or regulation.[25] There appears to be an analogy to the situation of a judge who in deciding a case before him applies a statute or regulation, possibly upholding its validity. His decision can be tested through the appellate process; it cannot be attacked by suing him in a tort action. The same logic would apply, under this exception, to an employee of the Securities and Exchange Commission, or other federal agency. If, exercising due care, he acts to enforce an applicable statute or regulation, he does not render the government liable in tort.[26] The validity of the statute or regulation may not be so tested.

One of the clearest examples of this exception occurred when the Coast Guard, relying on existing regulations, refused to give a licensed ship's master a security clearance. As a result, he was barred from employment in the Merchant Marine and sued under the Tort Claims Act for loss of income and other damages. While his action was pending, the regulations which had governed the Coast Guard's actions were held invalid in another separate action. Even so, his action was held not maintainable.[27] Citing *Dalehite v. United States*,[28] the Supreme Court emphasized that where government employees act pursuant to statute or regulation, resulting harm is not compensable under the act, except where the employees do not exercise due care.

A similar case concerned an action for damages for the alleged wrongful withholding of a radio operator's license under Coast Guard regulations. There was no allegation of lack of due care, and the dismissal was upheld under this statutory exception.[29]

This exception applies whether or not the statute is ultimately

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[24] 28 U.S.C. § 2680(a) (1959).

[25] Dalehite v. United States, 346 U.S. 15 (1953).

[26] *Id.* at 33.

[27] Dupree v. United States, 247 F.2d 819 (3d Cir. 1957).

[28] 346 U.S. 15 (1953).

[29] Peltzman v. Smith, 404 F.2d 335 (2d Cir. 1968).

held valid, but the government employee must use due care in the execution of the statute or regulation. In one case[30] federal agents in Utah to control illegal grazing on public lands, seized and destroyed horses and burros belonging to plaintiffs, Indians who lived on public lands. This action was taken under authority of the Utah Abandoned Horse Statute.[31] The Federal Range Code[32] permitted such action, but only after service of a notice and order of removal on the alleged violator, with subsequent failure to comply. No such notice and order were ever served in this case, although the federal agents knew plaintiffs owned the animals. The United States Supreme Court held an action for destruction of the animals maintainable under the Tort Claims Act. Even though the agents acted under the Utah Abandoned Horse Statute, they failed to act with due care because they made no attempt to give notice to the owner, as required by federal regulations. "Due care," the court said, "implies at least some minimal concern for the rights of others. Here the agents proceeded with complete disregard for the property rights of the petitioners."[33]

THE DISCRETIONARY FUNCTION EXCEPTION

Another specific statutory exception from liability under the Tort Claims Act relates to any claim based upon the exercise of a discretionary function or duty by a federal employee.[34] It would appear that more litigation has resulted from this exception, than from any other, and it cannot yet be said that judicial interpretation has made clear the meaning of the statutory language.

> The Tort Claims Act does not define 'discretionary function,' and each case must be measured against the broad spectrum of administrative power which ranges from the establishment of programs, issuance of regulations, and the granting of licenses, to narrow decisions where administrative discretion stops and liability in tort begins.[35]

Perhaps the leading case interpreting this exception is *Dalehite v. United States*, decided by the United States Supreme Court

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30 Hatahly v. United States, 351 U.S. 173 (1956).

31 UTAH CODE ANN. § 47-2 (1953).

32 43 C.F.R. #161.1 *et seq.*

33 Hatahly v. United States, 351 U.S. 173, 181 (1956).

34 28 U.S.C. § 2680 (1959): "The provisions of the chapter and section 1346(b) of this title shall not apply to—

(a) Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

35 White v. United States, 317 F.2d 13, 16 (1963).

in 1956.[36] Plaintiffs sued for wrongful death under the Torts Claims Act. They claimed negligence

> . . . substantially on the part of the entire body of federal officials and employees involved in a program of production of the material—Fertiltzer Grade Ammonium Nitrate (F.G.A.N.) hereafter—in which the original fire occurred and which exploded. This fertilizer had been produced and distributed according to the specifications and under the control of the United States.[37]

The allegations of negligence covered the drafting and formation of the fertilizer export plan by the government, as well as specific claimed acts of negligence in the manufacturing process. It was also contended that the Coast Guard failed properly to police the loading of the fertilizer aboard the ship. The Supreme Court held that even if there were negligence in these respects, the discretionary function exception barred suit under the Tort Claims Act. Referring to the statute creating the exception, the court said:

> It excepts acts of discretion in the performance of governmental functions or duty "whether or not the discretion involved be abused." Not only agencies of government are covered, but all employees exercising discretion. It is clear that the just quoted clause as to abuse connotes both negligence and wrongful acts in the exercise of the discretion . . .[38]

The following quotations from the opinion fairly present the decision:

> The 'discretion' protected by the section is not that of the judge—a power to decide within the limits of positive rules of law subject to judicial review. It is the discretion of the executive or administrator to act according to one's judgment of the best course, a concept of substantial historical ancestry in American law.[39]
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> It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be

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[36] 346 U.S. 15 (1953). *Dalehite* was a test case, representing about 300 personal injury and property claims, arising from the devastating explosion of ammonium nitrate fertilizer in Texas City, Texas, in 1947.

[37] *Id.* at 18.

[38] *Id.* at 33.

[39] *Id.* at 34.

> actionable. If it were not so, the protection of #2680(a) would fail at the time it would be needed, that is, where a subordinate performs or fails to perform a causal step, each action or non-action being directed by the superior, exercising perhaps abusing, discretion.[40]

Of course, most acts which constitute torts involve an element of discretion. The careless, though intentional, firing of a rifle by a military sentry involves an act of choice, as does speeding by a postal employee. If claims based upon such acts were barred by the discretionary function exception there would be little substance left to the Tort Claims Act. The cases do not recognize that such claims are so barred. A distinction is commonly applied between discretion at the planning level and at the operational level.[41] Thus it has been held that a decision to destroy willow trees by spraying chemicals, constitutes the exercise of a discretionary function.[42] Similarly, a decision to change the course of a river has been held within the exception,[43] as has a decision to establish a proving ground at a specific location, and to test a large cannon at that location.[44]

On the other hand, where a special agent of the Federal Bureau of Investigation, seeking to make an arrest, chose to drive his car at an excessive rate of speed in a congested area, the statutory exception was held not to apply. The United States could be sued under the Tort Claims Act.[45]

These examples seem clear, but not all cases are so easy of decision. The problem has been the subject of much critical discussion, including two articles of interest in the Washington Law Review, each pointing up difficulties in the distinction.[46] No simple rule has been developed to permit us to determine whether or not a particular act or omission involves the exercise or performance of a discretionary function or duty within the statute. The line must be drawn in a case, according to each factual situation, and the decision is often a difficult one.

A Wisconsin statute required that buildings open to the public be as free from danger as the nature of the place would reasonably permit. A violation of this standard was stated to constitute negli-

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[40] *Id.* at 35.

[41] *See* United States v. State of Washington, 351 F.2d 913 (9th Cir. 1965); Swanson v. United States, 229 F. Supp. 217 (N.D. Cal. S.D. 1964).

[42] Harris v. United States, 205 F.2d 765 (10th Cir. 1953).

[43] Coates v. United tates, 181 F.2d 816 (8th Cir. 1950).

[44] Barroll v. United States, 135 F. Supp. 441 (D. Md. 1955).

[45] Sullivan v. United States, 129 F. Supp. 713 (N.D. Ill. E.D. 1955).

[46] Peck, *The Federal Tort Claims Act—A Proposed Construction of the Discretionary Function Exception*, 31 WASH. L. REV. 207 (1956); Comment, 41 WASH. L. REV. 340 (1966).

gence. The United States erected a post office which had no handrails on certain wide stone steps. A seventy-year-old woman using the steps was injured in a fall and sued the United States. The government's claim that it was protected in its decision not to install handrails was rejected by the court of appeals.[47]

In a situation where a statute and supplemental regulations authorized free medical care for the families of military personnel whenever practicable, an army hospital failed to dispatch an ambulance for a serviceman's wife who was in labor. The child was stillborn, and suit followed under the Tort Claims Act. In holding for the United States, the court of appeals emphasized that the function of providing medical service to military dependents is clearly discretionary. It follows, in the view of the court, that any failure to extend promptly the gratuitous medical services requested, could not have subjected the government to liability.[48]

Where, however, it was alleged that the failure to admit an eligible veteran to a veteran's hospital was the result of an improper medical examination and faulty diagnosis, following which failure he suffered a convulsion and died, the complaint was held to state a claim for relief against the United States. Under the alleged facts the claim was not based on the exercise of a discretionary function.[49]

While many acts of a supervisory government official would involve discretion at the planning level, it has been held that the decision of a supervisor to require a subordinate to work continuously through the night, and then drive a government vehicle on a public highway in an exhausted condition, was negligence on an operational rather than a planning level.[50]

Specifically Excepted Torts

Claims arising from any of eleven named torts are excepted from the Tort Claims Act, under Title 28, United States Code, Section 2680(h).[51] These torts, for the most part, involve intentional

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[47] American Exchange Bank v. United States, 257 F.2d 938 (7th Cir. 1958). "Undoubtedly there was an exercise of discretion in deciding whether and where a post office building should be located in Madison, Wisconsin, but whether a handrail should be installed as a safety measure on wide stone steps involves action at the operational level and would seem to involve no more discretion than fixing a sidewalk on post office grounds that might be in need of repair." *Id.* at 941.

[48] Denny v. United States, 171 F.2d 365 (5th Cir. 1948).

[49] Supchak v. United States, 365 F.2d 844 (3d Cir. 1966).

[50] Friday v. United States, 239 F.2d 701 (9th Cir. 1957).

[51] The named torts are assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit and interference with contract rights.

acts. Their exclusion from the operation of the Tort Claims Act means the retention of the doctrine of sovereign immunity in another major area.

Assault and Battery

Assault is defined as an intentional, unlawful offer of corporeal injury to another by force, with the apparent present ability to execute the attempt.[52] An act of a sentry, in intentionally shooting another party, is an assault and battery if it constitutes the use of excessive force under the circumstances.[53] For such a tort, the government has excepted itself from liability. We thus face the unusual situation that if a government employee in the course of his duties intentionally shoots a citizen, the United States cannot be held liable. If, however, the employee accidentally shoots a citizen, through negligence, the United States may be held liable.[54]

An unusual fact situation was presented in a case arising in Washington—*United States v. Hambleton*.[55] An army investigator had allegedly questioned plaintiff for about three and one-half hours, the interrogation being intense, pressing, and in some respects, personal beyond any requirements of the investigation. This resulted in severe mental and emotional distress on the part of the plaintiff requiring hospitalization and psychiatric care. The court held that if the interrogation constituted a tort, it would be an assault, and therefore within the excepting clause of the Tort Claims Act.

Where an Air Force plane departed from its assigned mission and made two low level high speed passes over the courthouse in the pilot's home town, disintegrating and crashing after the second one, the government defense that this tort constituted an assault, was rejected by the court in *United States v. Taylor*.[56]

It has been held to constitute an assault and battery within the statutory exception for medical employees of the Veterans Administration to perform an unauthorized operation upon plaintiff.[57] If an authorized operation were negligently performed, however, it

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[52] Albright v. State, 214 So. 2d 887 (Fla. App. 1968).

[53] *See* Lewis v. United States, 194 F.2d 689 (3d Cir. 1952), where a sentry shot a purchasee of military surplus equipment, who drove away from the sentry gate against orders. If the force used was not excessive under the circumstances, there would of course, be no assault or battery.

[54] *See, e.g.*, Cerri v. United States, 80 F. Supp. 831 (N.D. Cal. S.D. 1948).

[55] 185 F.2d 564 (9th Cir. 1950).

[56] 236 F.2d 649 (6th Cir. 1956). The court noted, however, that it would be possible to commit an assault in the operation of an airplane.

[57] Moos v. United States, 118 F. Supp. 275 (D. Minn. 1954).

seems clear that the tort would be malpractice, not assault or battery.

False Arrest, False Imprisonment, Malicious Prosecution, Abuse of Process

It should be noted that these four torts, as to which the government has excepted itself from liability, all may be related to the government's function of law enforcement. Thus, where an honorably discharged veteran charged in his complaint that he had been wrongfully arrested and imprisoned for desertion, it was held that the torts alleged were false arrest and false imprisonment, rather than negligence, and the complaint was dismissed.[58]

The plaintiff in *Tinkoff v. United States*[59] alleged that his conviction of income tax evasion had resulted from a conspiracy of government officials to effect his conviction by means of perjured testimony. These allegations were considered to state a claim for false imprisonment or malicious prosecution, and the United States was held exempt from suit under the Tort Claims Act.

Libel and Slander

Section 2680(h) insulates the government from actions based upon libel or slander by government employees. The leading case seems to be *DiSilvestro v. United States*.[60] As part of an action involving plaintiff's claimed pension and disability rights, he sought recovery on the grounds that information given investigating United States Senators by Veterans Administration employees was knowingly false and defamatory. Summary judgment of dismissal was granted defendant, the court pointing out that the government has simply not consented to be sued for libel or slander.

Where a seaman was court-martialed and punished as a result of allegedly false and malicious statements that he had removed all his personal effects from his vessel, and had deserted, he was held to be precluded from any action under the Tort Claims Act by its express reservation of sovereign immunity against claims based on libel or slander.[61]

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[58] Duenges v. United States, 114 F. Supp. 751 (S.D. N.Y. 1953). A similar result was reached in Klein v. United States, 268 F.2d 63 (2d Cir. 1959), where plaintiff alleged wrongful detention after he went aboard an incoming vessel with the detention resulting in his exposure to the elements, as well as causing mental suffering.

[59] 211 F.2d 890 (7th Cir. 1954).

[60] 181 F. Supp. 860 (E.D. N.Y. 1960).

[61] Foster v. United States, 156 F. Supp. 421 (S.D. N.Y. 1957). *See also* Teplitzky v. Bureau of Compensation, 288 F. Supp. 310 (S.D. N.Y. 1968).

Misrepresentation and Deceit

Whether a false representation is made knowingly and intentionally or is made negligently, it may be included within the category of excepted torts under 28 USC Section 2680(h). The common-law action of deceit requires that the false statement be made knowingly,[62] but the term "misrepresentation" includes as well, false representations negligently made.[63]

The exception normally applies to a business transaction. *United States v. Nevstadt*[64] was an action by the purchaser of a home who had been induced by a negligently excessive Federal Housing Administration appraisal to pay more than the true value of the house. Plaintiff's contention that the essence of the tort was in the negligent appraisal rather than the misrepresentation was rejected, and the United States Supreme Court held the action was barred under 28 USC Section 2680(h).[65]

In a similar case, plaintiff was a stockholder in a company which held oil leases from the government. He asked the Geological Survey for information and received an estimate of the ultimate recovery of oil from the land covered by the leases. The estimate was about one third of the true figure, calculable from figures then available to the Geological Survey. Having sold his stock at a price based on the erroneous estimate, plaintiff sought recovery in a tort action against the government. He alleged both wilful and negligent misrepresentation, and the court held that in either case, the claim was barred under the exclusion.[66]

While claims arising out of misrepresentation usually involve business transactions, there are numerous instances where this is not so. An employee of a contractor for the government was injured when the bucket of a drag-line he was operating struck a thirty inch natural gas pipeline. He sued under the Tort Claims Act, asserting that a government location map erroneously showed the

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62 PROSSER, THE LAW OF TORTS 699 (3d ed. 1964).

63 Hungerford v. United States, 307 F.2d 99 (9th Cir. 1962).

64 366 U.S. 696 (1961).

65 *Id.* The court pointed out that the exception applies both to intentional and negligent misrepresentation. Admitting that the government had a duty to obtain and communicate the information carefully, the court nevertheless concluded, in an extended analysis, that the negligently incorrect communication was within the exception.

66 The exception was held applicable to an action by one who bought adulterated tomato paste in reliance on "release notices" by the Food and Drug Administration which implied that the paste was of acceptable quality. Anglo-American & Overseas Corp. v. United States, 242 F.2d 236 (2d Cir. 1957). Where a party seeks relief against the United States in a counterclaim rather than a claim in the complaint, the exception is still applicable. United States v. Gill, 156 F. Supp. 955 (W.D. Pa. 1957).

pipeline in a different area from where plaintiff was to work, and that the government failed to inform plaintiff or his employer of the true location. It was held that the claim arose out of misrepresentation and hence was not maintainable under the Tort Claims Act.[67]

Clark v. United States[68] was an action for damages which occurred when the Columbia River, in flood stage, broke through an embankment and inundated a large housing project. One of plaintiff's theories of liability was that employees of the Housing Authority had issued false assurances of safety to the residents of the project. Even assuming that statements issued constituted assurances of safety and that the House Authority was a federal agency, it was held that the claim arose out of misrepresentation and therefore was not maintainable under the Tort Claims Act.

In a number of cases the government has attempted to defend medical malpractice cases by an assertion that a claim based upon a faulty diagnosis is actually based upon misrepresentation, since the diagnosis is communicated to the patient. The courts have usually found a duty to render proper care for the treatment of the patient, and have held that the misrepresentation exception does not cover such a situation.[69]

A Federal Aviation Agency aircraft controller failed, in violation of regulations, to warn an incoming airplane that visibility had decreased from one mile to three-quarters of a mile following the communication of an earlier report. This was held to be the proximate cause of the plane's crash, and the United States claimed the misrepresentation exception applied. This contention was rejected in *Ingham v. Eastern Airlines, Inc.*[70] The court found that the aircraft controller had a duty to provide information and warnings to aircraft. "Where the gravamen of the complaint is the negligent performance of operational tasks, rather than misrepresentation, the government may not reply upon § 2680(h) to absolve itself of liability."[71]

Interference with Contract Rights

This exception is normally applied to cases alleging interference with existing contract rights. *Radford v. United States*[72] illustrates this application. Plaintiff asserted there was a conspiracy between

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[67] Vaughn v. United States, 259 F. Supp. 286 (N.D. Miss. 1966).
[68] 218 F.2d 446 (9th Cir. 1954).
[69] Beech v. United States, 345 F.2d 872 (5th Cir. 1965).
[70] 373 F.2d 227 (2d Cir. 1967).
[71] *Id.* at 239.
[72] 264 F.2d 709 (5th Cir. 1959).

the United States and some of its employees which resulted in her discharge from a government position. Jurisdiction was found lacking. As to individual defendants, the court found neither diversity nor federal-question jurisdiction. As to the United States itself, the court found no jurisdiction under the Tort Claims Act since the complaint alleged interference with contract rights.[73]

A number of cases held the exclusion applicable not only to tortious interference with existing contracts, but also to acts interfering with prospective contractual relations, including employment. Where a licensed shipmaster alleged interference with his right to obtain future employment, through the erroneous withholding of a security clearance by the commandment of the Coast Guard, his suit was held barred under this exception.[74]

A dentist sued under the Tort Claims Act, alleging that he was erroneously called to active military duty which interfered with and damaged his dental practice. The court considered that it lacked jurisdiction of such an action against the United States, saying:

> The exemption extends not only to an action for the unlawful interference with existing contracts, but also to actions for the unlawful interference with prospective contractual relations. . . . The latter action is the equivalent of one for the unlawful interference with business.[75]

This view is not universally accepted. In *Builder's Corporation of America v. United States*,[76] doubt is expressed that interference with a prospective contractual advantage falls within the statutory exception.[77]

CONCLUSION

Congress has provided, in 28 USC Sec. 1346, that the district courts shall have jurisdiction of actions on claims against the United

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[73] In a similar case, the operator of a school under contract with the Veterans Administration sued under the Tort Claims Act, alleging that through gossip and misstatements to veterans, the government caused plaintiff to lose students, and to lose prestige. This was held to charge an interference with contract rights as to which the government has expressly protected itself from liability. Fletcher v. Veterans Administration, 103 F. Supp. 654 (E.D. Mich. S.D. 1952).

[74] Dupree v. United States, 264 F.2d 140 (3d Cir. 1959). Pointing out that the complaint failed to allege "intentional" interference which is an essential ingredient of an action of this type, the court emphasized that in any event the government had not consented to be sued on such a claim.

[75] Small v. United States, 333 F.2d 702, 704 (3d Cir. 1964).

[76] 259 F.2d 766 (9th Cir. 1958).

[77] In a concurring opinion Mr. Justice Pope said: "What the plaintiff had here was a right to negotiate for leases; a right to seek customers; a right of expectation of business dealings with those people. This was not strictly speaking a contract right because no such contracts had been made . . . Tortious conduct destructive of appellant's 'right to negotiate' for tenants may well be something not within the stated exception relating to 'contract rights.'" *Id.* at 773 (concurring opinion).

States for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his 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."

At first reading, this would seem to indicate that the United States has completely waived its sovereign immunity in tort cases, and has agreed to liability in any situation where a private person would be liable. As has been seen herein, however, this is by no means true; the government's waiver of sovereign immunity in the Tort Claims Act is indeed a limited one.