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The Federal Tort Claims Act: A Substantive Survey

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THE FEDERAL TORT CLAIMS ACT– A SUBSTANTIVE SURVEY

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THE enactment of the Federal Tort Claims Act (FTCA) on August 2, 1946, provided the most comprehensive waiver of sovereign immunity encountered in the Federal Claims System.[1] Subject to several exceptions and limitations,[2] the provisions of FTCA[3] provide for:

a. The payment of money damages,[4]
b. For injury or loss of property, either real or personal, or for personal injury or death,[5]
c. Caused by the negligent or wrongful act or omission,[6]
d. Of any employee of the Government,[7]
e. Acting within the scope of his office or employment,[8]

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1 Actually, there are more than forty statutes which provide a remedy for the tortious conduct of an employee of the United States. Only the FTCA is examined here as it is the basic remedy against the sovereign for tort.

2 *See* 28 U.S.C. § 2680 (1970).

3 Because the provisions of the FTCA are scattered throughout various sections of the United States Code, the sections comprising the Act are for convenience assembled in this footnote: 22 U.S.C. § 2504(h) (1970) (Tort claims of Peace Corps volunteers); 28 U.S.C. § 1291 (1970) (Appeal from final decision of district court); 28 U.S.C. § 1346 (1970) (Juridiction of district court when United States is defendant); 28 U.S.C. § 1402 (1970) (Venue when United States is defendant); 28 U.S.C. § 1504 (1970) (Appeal to Court of Claims); 28 U.S.C. § 2110 (1970) (Time for appeal to Court of Claims in tort claims cases); 28 U.S.C. § 2401 (1970) (Time for commencing action against United States); 28 U.S.C. § 2402 (1970) (Jury trial in actions against United States); 28 U.S.C. § 2411 (1970) (Interest); 28 U.S.C. § 2412 (1970) (Costs); 28 U.S.C. § 2414 (1970) (Payment of judgments and compromise settlements); 28 U.S.C. § 2671 (1970) (Definitions); 28 U.S.C. § 2672 (1970) (Administrative adjustment of claims of $2,500 or less); 28 U.S.C. § 2674 (1970) (Liability of United States); 28 U.S.C. § 2675 (1970) (Disposition by federal agency as prerequisite; evidence); 28 U.S.C. § 2676 (1970) (Judgment as bar); 28 U.S.C. § 2677 (1970) (Compromise); 28 U.S.C. § 2678 (1970) (Attorney fees; penalty); 28 U.S.C. § 2679 (1970) (Exclusiveness of remedy); 28 U.S.C. § 2680 (1970) (Exceptions).

4 *See* 28 U.S.C. § 1346(b) (1970).

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

f. Under circumstances where the United States, if a private person, would be liable,[9]

g. In accordance with the law of the place where the act or omission occurred.[10]

In this article the various sections of the United States Code will be dealt with in the most general manner along with a small portion of the decisional law within the framework of the most common issues encountered under FTCA. The sole object is to provide a starting point for the practitioner's research.

I. Proper Claimants

The provisions of FTCA are silent concerning the identity of proper party claimants. Therefore, it might erroneously be assumed that any person can sue the United States under FTCA for the negligent acts or omissions of its employees provided his claim is otherwise covered by the Act. However, through judicial construction certain classes of claimants have been excluded from the Act's coverage. In this section, the identity of certain individuals who may find themselves excluded from the Act's coverage will be explored with emphasis on the factors which affect or limit their right to sue.

A. *Active Duty Military Personnel*

There is no express exclusion of or limitation on the claims of servicemen under the Act; in fact, there is no mention of service members except as they are included among the possible tortfeasor employees for whose negligence or wrongful acts or omissions the United States is liable.[11] The Supreme Court of the United States, shortly after FTCA became law, considered the question in *Brooks v. United States*[12] whether servicemen are barred from recovery under FTCA.

In *Brooks* the Supreme Court held that servicemen are not barred from recovery under the Act for injuries which have no relationship to their military service, *i.e.*, not "incident to service." Two servicemen on leave from their military installation and in a no-duty status at the time of their collision with a Government driver on an off-post

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9 *Id.*

10 *Id.*

11 *See* 28 U.S.C. § 2671 (1970).

12 337 U.S. 49 (1949).

public highway were respectively injured and killed. The fact that the servicemen were entitled to compensation, disability, and gratuity payments from the United States did not bar their recovery under the Act. However, the value of the benefits received reduced the amount recovered. The Court expressly reserved opinion upon whether the result would be the same if a serviceman sustained death or injuries as an incident to his service.[13]

That very issue, however, was promptly presented in *Feres v. United States*,[14] a case consolidating three separate actions under FTCA. In *Feres*[15] an Army officer was burned to death while sleeping in his regularly assigned barracks located on the military installation. The fire was allegedly caused by the negligent maintenance of a defective heating unit and the negligence of a military fire guard. In *Griggs*[16] a Lieutenant Colonel met his death allegedly due to medical malpractice in an Army hospital. In *Jefferson*[17] an Army surgeon negligently left an eighteen by thirty inch towel with the words "Medical Department U.S. Army" thereon in a serviceman's abdomen after an operation. Months after the surgery and subsequent to his discharge the towel was discovered and removed. In all of these consolidated cases the Supreme Court ruled that the claimants could not maintain suit under FTCA for their injuries or death sustained "incident to their service."

The Court stated four reasons for its decision:

(1) There is no private liability in like circumstances to which the *Feres* situations could be analogized.

(2) Military discipline would be disrupted if one serviceman were permitted to recover for injury or loss incident to service caused by the negligence of another serviceman.

(3) Claims incident to service should be determined by Federal law rather than by local law because of the relationship between servicemen and the Government.

(4) A "simple, certain, uniform system of compensation" is avail-

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13 "Were the accident incident to the Brooks' service, a wholly different case would be presented. We express no opinion as to it . . . ." Brooks v. United States, 337 U.S. 49, 52 (1949).

14 340 U.S. 135 (1950).

15 Feres v. United States, 177 F.2d 535 (2d Cir. 1949).

16 Griggs v. United States, 178 F.2d 1 (10th Cir. 1950).

17 Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949).

able to servicemen, their dependents or survivors for losses incident to service.

The private person analogy is probably not significant. To state that no private person runs an Army; therefore, there should be no liability, makes no sense when other analogies could more sensibly be made. Private persons may be liable for medical malpractice or the negligent maintenance of defective heating units.

It would appear to be more disruptive of discipline if a serviceman were not permitted to recover for the tortious conduct of another military member, particularly when injured by another service member in a situation that would not have occurred if the claimant had not been on active duty.

The servicemen in the *Brooks* case had the same simple, certain, uniform system of compensation available to the claimants in *Feres*, yet it was no barrier to recovery under the Act in that case.

The unique relationship between the serviceman and the Government seems to be all that is valid in the *Feres* rationale.

The "incident to service" rule as expressed by the Supreme Court's language, "where the injuries arise out of or are in the course of activity incident to service," [18] makes the test extremely difficult to apply when a serviceman is injured in a situation other than actual performance of duty. Tort recovery for a serviceman on pass returning to the base by automobile to report for duty has been allowed under the *Brooks* rationale,[19] but another tort claim by a serviceman on leave returning from Germany to the United States on a space available basis was disallowed as occurring incident to service under the *Feres* doctrine.[20] A serviceman, who was qualified for military service despite a disqualifying heart ailment, was forced to participate in rigid training which aggravated his condition. Although the training caused his subsequent hospitalization and discharge, the serviceman was denied recovery.[21] A naval reservist enlisted man, ordered to active duty for one day to

[18] *See* Feres v. United States, 340 U.S. 135, 146 (1950).

[19] *See* Knecht v. United States, 144 F. Supp. 786 (E.D. Pa. 1956), *aff'd*, 242 F.2d 929 (3d Cir. 1957). *See also* Rich v. United States, 144 F. Supp. 791 (E.D. Pa. 1956); Barnes v. United States, 103 F. Supp. 51 (W.D. Ky. 1952).

[20] *See* Fass v. United States, 191 F. Supp. 367 (E.D.N.Y. 1961).

[21] *See* Healy v. United States, 192 F. Supp. 325 (S.D.N.Y. 1961), *aff'd*, 295 F.2d 958 (2d Cir. 1961).

report for his physical examination, was barred by the rule of *Feres* when his left ear was punctured by a negligent corpsman.[22]

Whether the practitioner's particular case falls under the *Brooks* or the *Feres* doctrine will often be difficut to determine. However, it can be stated with certainty that the United States will not be liable for the negligent acts or omissions of its employees which arise out of or in the course of activities incident to the serviceman's military service.

B. *National Guard Personnel*

The National Guard is both a reserve component of the United States Army and an important part of the state militia. Because of the dual character of the National Guard and the lack of case law, the circumstances under which the members thereof may recover under FTCA for injuries or loss caused by other federal employees is unclear.

National Guard members injured in activity not incident to their service as Guardsmen would in all probability not be barred from recovery under the Act under the rationale of the *Brooks* case. On the other hand, Guardsmen whose units have been activated into federal service should not be expected to recover for injuries or losses arising incident to their service because of the guidelines laid down in *Feres*. However, the difficult situation is when a Guardsman sustains injury or loss incident to his service as a Guardsman when his unit has not been activated into federal service. In *Layne v. United States*,[23] a Guardsman whose unit had not been activated into active federal service was killed in the crash of a plane owned by the United States but used by his unit. The claim was barred under the *Feres* doctrine because the accident arose out of his dual capacity with the United States and his home state, therefore, incident to his service. In the only other case in point, *Colleta v. United States*,[24] the court applied *Feres* and denied a Guardsman recovery when he was injured on the firing range during a fifteen day training period.

C. *Civilian Employees*

Compensatory benefits, similar to the more familiar benefits under Workmen's Compensation, are provided by the Federal Employees' Compensation Act (FECA), to be paid from appropriated funds, for

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22 *See* Knoch v. United States, 316 F.2d 532 (9th Cir. 1963).

23 295 F.2d 433 (7th Cir. 1961), *cert. denied*, 368 U.S. 990 (1962).

24 300 F. Supp. 19 (D.R.I. 1969).

the death or disability of a civilian federal employee resulting from injuries sustained while in the performance of his duty.[25] FECA provides for the exclusive liability of the Government and its instrumentalities to a federal employee injured in the course of his employment.[26] If the claim of a federal employee is compensable under FECA, that Act's benefits are the sole remedy and no recovery may be obtained under FTCA. However, the exclusive remedy provision of FECA does not apply to property damage claims as their coverage is excluded from the Act. Therefore, recovery may be had under FTCA for the property damage of a civilian employee sustained while in the performance of duty.[27]

The compensation statute governing nonappropriated funds provides employees specific exclusive benefits, similar to FECA, for death or personal injury,[28] but affords no benefits for property loss.[29]

D. *Other Parties*

Although most common issues encountered under FTCA concerning proper parties plaintiff involve civilian employees, military members, and National Guardsmen, other exclusions and limitations have occasionally arisen. Members of the Civil Air Patrol,[30] Reserve Officers' Training Corps,[31] and District of Columbia employees[32] compensated by FECA have been held not entitled to sue the United States under FTCA. However, recovery has been permitted under FTCA to aliens,[33] infants,[34] corporations,[35] Indians,[36] and veterans.[37]

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25 *See* 5 U.S.C. § 8102(a) (1970).

26 *See* 5 U.S.C. § 8116(c) (1970).

27 See Gilliam v. United States, 407 F.2d 818 (6th Cir. 1969).

28 *See* United States v. Forfari, 268 F.2d 29 (9th Cir.), *cert. denied*, 361 U.S. 902 (1959).

29 *See* 5 U.S.C. §§ 8171-73 (1970).

30 *See* 5 U.S.C. § 803 (1970).

31 *See* Cobb v. United States, 81 F. Supp. 9 (W.D. La. 1948). *See also* 5 U.S.C § 802(a) (1970).

32 *See* 5 U.S.C. § 751 (1970).

33 *See* United States v. South Carolina State Highway Dep't, 171 F.2d 893 (4th Cir. 1948).

34 *See* Baker v. United States, 226 F. Supp. 129 (S.D. Iowa 1964), *aff'd*, 343 F.2d 227 (8th Cir. 1965).

35 *See* Indian Towing Co. v. United States, 350 U.S. 61 (1955).

36 *See* Hatahley v. United States, 351 U.S. 173 (1956).

37 *See* United States v. Brown, 348 U.S. 110 (1954).

II. Administrative Submission of Claims and the Statute of Limitations

An absolute condition precedent to the institution of an FTCA suit in a federal district court is the administrative submission by the claimant of his tort claim in writing to the appropriate federal agency.[38] The opportunity must be afforded the United States to settle the claim administratively without suit. Failure to do so is jurisdictional.

The period for filing an administrative claim is within two years after the claim accrues.[39] A second condition precedent to the filing of suit, after the administrative submission of a claim within the two year period, is a denial of that claim by the federal agency to which the claim was submitted.[40]

A denial may occur in one of three ways:

(1) The claim may be disapproved in writing by the agency to which it was presented and sent by registered or certified mail to the claimant.[41]

(2) The federal agency to which the claim was submitted may make an offer to the claimant less than the amount claimed.

(3) Inaction by the federal agency for a period of six months; the failure of the agency to finally dispose of the claim within six months after it is filed may be deemed, at the option of the claimant, a constructive denial for the purpose of permitting suit.[42]

Once the claim is administratively filed within the two year period and the federal agency denies the claim, suit must be commenced in the federal district court within six months after that denial.[43]

A claim may be time-barred before two years after it accrues. If a claimant presents his claim for administrative consideration seven months after it accrues, and it is denied four months thereafter, it will be time-barred six months later, or seventeen months after it accrues. Also, the time period for filing suit may extend well beyond the two year period. If a claimant presents his claim for administrative consideration twenty-

38 *See* 28 U.S.C. § 2401(b) (1970).

39 *Id.* Although federal law determines the period for filing an administrative claim, state law is determinative of the cause of action and when the time begins to run.

40 *Id.*

41 *Id.*

42 *See* 28 U.S.C. § 675 (1970).

43 *See* 28 U.S.C. § 2401(b) (1970).

three months after it accrues, and it is denied six months thereafter, it will be time-barred six months later, or thirty-five months after it accrues.

The practitioner must be cautioned that the amount recoverable may not exceed the amount for which the claim was first administratively presented except on proof of newly discovered evidence, or of intervening facts relating to the amount of the claim.[44]

III. Territorial Application

The Act excludes "[a]ny claim arising in a foreign country." [45] Considerable litigation has evolved from this apparently clear exclusion. In *United States v. Spelar*,[46] a claim arising from a plane accident at an Air Force base in Newfoundland leased by the United States for a period of 99 years was barred by the foreign country exclusion. Even though the Supreme Court had previously held the base was a possession of the United States for purposes of the Fair Labor Standards Act, it decided that the area was a "foreign country" for FTCA purposes and that federal tort liability did not arise therein. The Court measured the foreign country exclusion by two tests: (1) Newfoundland was a foreign sovereign in the international law sense, and (2) the governing substantive tort law was foreign in source. The court in *Burna v. United States*[47] barred a claim arising in Okinawa after the signing of the peace treaty with Japan, although the treaty conferred authority over Okinawa upon the United States. It was suggested that the reasons stated by the Supreme Court in *Spelar* may not be the only ones that influenced Congress to exclude claims arising in a foreign country. The Court suggested that the absence of United States courts in Okinawa, the problems of venue, and the difficulty of transporting witnesses were among the factors considered in applying the foreign country exclusion. The exclusion also barred a claim arising on the premises of the American Embassy in Bangkok, Thailand.[48] A passenger on an Air Force plane,

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44 *See* Huber v. United States, 244 F. Supp. 537 (N.D. Cal. 1965). In this case, the claimant suffered both property damage and personal injury. The claim was for property damage only and the form stated that he was still under the doctor's care for his personal injuries. He accepted the amount asked for as property damage. The United States was granted summary judgment on his subsequent claim for personal injury.

45 *See* 28 U.S.C. § 2680(k) (1970).

46 338 U.S. 217 (1949).

47 142 F. Supp. 623 (E.D. Va. 1956), *aff'd*, 240 F.2d 720 (4th Cir. 1957).

48 *See* Meredith v. United States, 330 F.2d 9 (9th Cir. 1964).

who sustained a permanent loss of hearing and speech when his plane was negligently flown at an altitude above reasonably safe limits on a flight from Saudi Arabia to Eritrea, was denied recovery based upon the exclusion.[49]

It is suggested that the same area might be considered domestic for some purposes and foreign for purposes of federal tort claims. The test is whether the area is foreign in the international law sense; if so, the United States has not waived its immunity from suit in that foreign country.

IV. Cognizable Claims

Claims cognizable under FTCA extend only to the loss of real and personal property, personal injury, and death.[50] The law of the place where the act or omission occurred determines the liability of the United States.[51] If the law of that State does not classify certain acts or omissions as a tort, the United States is not liable for those acts or omissions of its employees.[52]

V. Tortfeasors

Tortfeasors for whose conduct the United States is liable are defined by statute as "any employee of the Government . . . acting within the scope of his office or employment. . . ." [53] An 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." [54] It should be noted that FTCA specifically excludes "any contractor with the United States" from the definition of federal agency.[55]

Although FTCA appears to be explicit in defining those persons for whose conduct the United States is liable, a bulk of litigation has arisen concerning the specific exclusion of "any contractor with the United States" from the definition of the term "federal agency." Judicial de-

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49 *See* Pignataro v. United States, 172 F. Supp. 151 (E.D.N.Y. 1959).
50 *See* 28 U.S.C. § 1346 (1970).
51 *Id.*
52 *See* Myers v. United States, 323 F.2d 580 (9th Cir. 1963).
53 *See* 28 U.S.C. § 1346 (1970).
54 *See* 28 U.S.C. § 2671 (1970).
55 *Id.*

cisions have interpreted the exclusion to mean that the term "federal agency" does not include "any independent contractor" with the United States. Therefore, any independent contractor with the United States is not an employee for whose negligent act or omission the Government is liable.

Courts have incorporated into FTCA much of the law of agency concerning the liability of the employer of an independent contractor for the torts of that contractor. A suit against the United States for the death of a contractor's employee killed during the manufacture of a solid fuel propellant in the contractor's plant was dismissed.[56] In *Anderson v. United States*,[57] a government contract directed the contractor to dump mud and silt on the claimant's realty. The contractor performed according to the terms of the agreement. The Government was liable for trespass. Liability arose not from the manner in which the work was done, but because of the nature of the thing contracted to be done.

The United States may also be liable for the acts or omissions of an independent contractor while he is performing an inherently dangerous activity which could reasonably have been anticipated.[58] In *Maloof v. United States*,[59] the United States contracted to have a road built. The government reserved the power to control certain details of the operation, including the size of the fires, whether or not to suspend burning, and the use of safety equipment. After the claimant's property was destroyed by fire, the court held that although the contractor was an independent contractor with respect to the job as a whole, he was not an independent contractor as to the aspect of the work which caused the damage. Therefore, the United States was liable.

VI. Scope of Employment

Under FTCA, to impose liability upon the United States for his negligent acts or omissions, an employee of the Government must be acting on behalf of a federal agency and within the scope of his office or employment. The applicable section of FTCA[60] states that "acting within the scope of his office or employment," in the case of a member

56 *See* United States v. Page, 350 F.2d 28 (10th Cir. 1965).

57 259 F. Supp. 148 (E.D. Pa. 1966).

58 *See* Stancil v. United States, 196 F. Supp. 478 (E.D. Va. 1961).

59 242 F. Supp. 175 (D. Md. 1965).

60 28 U.S.C. § 2671 (1970).

of the military or naval forces of the United States, means acting in the line of duty. However, the Supreme Court in *Williams v. United States*[61] held that the reference to "line of duty" for military or naval members has the same meaning as scope of employment. The Court also held that the scope of employment is to be determined by the law of the place where the act or omission occurred.

In *Mider v. United States*,[62] a motorpool sergeant issued himself a trip-ticket for one of the motorpool vehicles. While he and another soldier were on a drinking tour, they were involved in an accident. The United States was subsequently sued for the negligent acts of its employees. Overruling the district court, the circuit court held that although the sergeant had authority to dispatch the vehicle as part of his normal employment, he did not have authority to dispatch the vehicle to himself for the purpose of touring the bars. Therefore, he was not within the scope of his employment and no liability was imposed upon the United States. Inherent in any court's determination of whether the conduct of a federal employee is within the scope of his employment, is the degree to which the purposes of the United States are being served at the time of the incident and the amount of control exercised by the United States over that employee.

Some difficult issues concerning scope of employment have arisen in cases involving military members on temporary duty travel or permanent change of station travel. Judgment for the plaintiff was granted in *Myers v. United States*,[63] when the claimant's automobile was struck by a member of the Air Force who was driving his privately owned automobile in a negligent manner. The tortfeasor was authorized to travel on his temporary duty in his privately owned vehicle and was carrying military equipment to his new temporary duty station. The court held that the scope of employment was determined by the law of Colorado.

The cases generally hold that service members travelling to temporary duty stations are in the scope of their employment for purposes of imposing FTCA liability upon the United States. However, the decisions are not so consistent when the military member is involved in a permanent change of station travel. In *Kunkler v. United States*,[64]

61 350 U.S. 857 (1955).

62 322 F.2d 193 (6th Cir. 1963).

63 219 F. Supp. 71 (W.D. Mo. 1963).

64 295 F.2d 370 (5th Cir. 1961).

an airman was to move from his permanent station in Mississippi to another permanent station in Alabama. However, he was granted an official delay enroute and permitted to take leave before reporting to his new duty station. He travelled from Mississippi to Vermont and from Vermont back to Florida for a visit. While enroute from Florida to Alabama, still in the Florida vicinity, he operated his vehicle in a negligent manner and was involved in an accident. The court held that because his deviation as to time and distance was more than slight he was not within the scope of his employment. Therefore, the United states was not liable for his acts.

To be compared with *Kunkler* is *United States v. Culp.*[65] In that case a serviceman involved in an accident caused by his own negligence was held to be within the scope of his employment. The basis of the court's decision was the fact that the service member was traveling pursuant to permanent change of station orders and would subsequently receive a travel allowance for his trip. Although *Culp* seems to be in conflict with *Kunkler*, there was no deviation as to time and distance by the service member in *Culp.*

In *Witt v. United States*,[66] it was held that when under state law an employer is not liable if an employee serves his own interests, a federal employee is not within the scope of his employment for purposes of FTCA liability when he serves his own purposes rather than those of the government. In *Witt* two servicemen were flying an airplane from Colorado to Washington state. After completion of their mission they decided not to return immediately to their home station. Instead, they flew to Oregon to visit the family of one of the servicemen. While in Oregon, they were practicing touch and go flights for training purposes. During these flights in the vicinity of a mink farm, damage was caused to the farmer's mink. The court held that the two servicemen were outside the scope of their employment and judgment was awarded the defendant. Under Oregon law an employer is not held responsible when an employee serves his own interests.

FTCA applies only to those torts that are caused by a federal employee while acting within the scope of his employment or office. Scope of employment is determined by the local rules of respondeat superior. Counsel preparing an FTCA case must be aware of the law of the place of the act or omission for the following issues in determining whether

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65 346 F.2d 35 (5th Cir. 1965).

66 319 F.2d 704 (9th Cir. 1963).

an employee is within the scope of his employment: (1) the control to be exercised by the master over the employee before it can be stated with certainty that the employee is within the scope of his employment; (2) the degree to which the master's purposes are being served at the time of the act or omission; (3) whether an employee has the power by his own acts to place himself within the scope of his employment; (4) whether an employee is within the scope of his employment when he serves his own purposes in addition to those of his master; (5) what deviations are necessary to remove the conduct of the employee from within the scope of his employment; and (6) when an employee's deviation is so substantial that he is placed outside the scope of his employment, regardless of whether that employee has returned to the purposes of his employer at the time of the act or omission.

VII. The Law of the Place of the Act or Omission

An essential element of FTCA is that the United States shall be liable in accordance with the law of the place where the negligent or wrongful act or omission occurred. It therefore becomes imperative to discuss the applicable law when the act or omission occurs in an area under federal jurisdiction, whether exclusive or concurrent, or in an area over which the United States either possesses only a proprietorial interest or no federal jurisdiction of any form.

When a federal employee's tortious activity occurs in an area under exclusive jurisdiction of the United States, the state law as of the time the federal government acquired jurisdiction is applicable,[67] unless that law has been later modified by a federal statute. In *Arlington Hotel Co. v. Fant*,[68] the personal property of guests lodging in a hotel in a national park was destroyed by fire. At the time the United States acquired exclusive jurisdiction over the national park, the law made the innkeeper an absolute insurer of his guest's property in the event of fire. Subsequently, the legislature of the state in which the national park was located relieved the innkeepers of that liability. The Supreme Court granted judgment in favor of the plaintiff, stating that the determination of property damage was governed by the law of the state when jurisdiction was granted to the federal government.

Even today a claim for property damage arising in an area under exclusive federal jurisdiction is governed by the law of the surrounding

67 *See* Arlington Hotel Co. v. Fant, 278 U.S. 439 (1929).

68 *Id.*

state at the time the United States acquired its exclusive jurisdiction. But in accordance with the exception to the rule, a federal statute[69] has changed the applicable law in personal injury and wrongful death claims arising in areas under exclusive federal jurisdiction. This section of the Conservation Act, in federal enclaves over which the United States has exclusive jurisdiction, has rendered applicable the current law of the state as to wrongful death and personal injury claims. Therefore, the courts are faced with the unique situation that personal injury and wrongful death claims occurring in areas under exclusive federal jurisdiction are governed by the current surrounding state law while claims for property damage occurring in that same area are governed by the surrounding state law at the time the United States acquired exclusive jurisdiction.

When the United States possesses an interest in an area other than exclusive federal jurisdiction, such as a proprietorial interest or concurrent jurisdiction, the current surrounding state law applies to personal injury, wrongful death, and property damage claims.

When the tortious conduct of a federal employee occurs in an area within the state not under federal jurisdiction of any kind, the liability of the United States is to be measured by the law of the place where the act or omission occurred. *Richards v. United States*[70] is the classic case in point. In that instance an airplane crashed in Missouri which had a wrongful death limit of $35,000. It was determined that the negligent acts or omissions which caused the crash in Missouri took place in Oklahoma. In Oklahoma there was no limit as to the amount recoverable in a wrongful death action. The Court was faced with the task of reconciling two separate elements of FTCA: the law of the place of the negligent act or omission, and the proposition that the United States was to be liable as any individual would be under like circumstances. The Court decided to apply the law of the place of the negligent conduct. However, it determined that the whole law of that place must be applied, and under the Oklahoma law of conflicts, the matter was referred to Missouri law. Therefore, the wrongful death limit of $35,000 was held applicable in this case.

VIII. Exceptions to Liability

If the particular facts of an FTCA case fall within any of the numer-

69 *See* Conservation Act, 16 U.S.C. § 457 (1970).

70 369 U.S. 1 (1962).

ous exceptions listed under the Act,[71] then no liability is imposed upon the United States. Only two of the exceptions are discussed in this article because almost all judicial decisions affecting any of the exceptions to FTCA liability involve those discussed herein.

The United States is not responsible for "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." [72] In *United States v. Hambleton*,[73] a claimant who suffered severe emotional distress after a prolonged interrogation by a U.S. Army investigator was denied recovery under FTCA. The court applied the assault exclusion, stating that mere words could constitute an assault and therefore no responsibility existed on the part of the United States. In *Lane v. United States*,[74] a surgeon operated on his patient's knee, but unfortunately, he operated on the wrong one. The court held the assault exclusion inapplicable and stated that it could not be contended that the doctor intended to operate on the wrong knee. Since there was no intentional wrong, there was no assault and the plaintiff was granted recovery.

A most interesting set of facts was presented in *Blitz v. Boog*.[75] The claimant went to a Veterans Administration Hospital for out-patient treatment to which she was entitled, but the hospital refused to accept her as a veteran. The patient was immediately removed to a psychiatric ward at Bellevue Hospital and subsequently suffered severe beating. After eight days at Bellevue, the patient left and entered another Veterans Hospital for treatment of her fever. Immediately she was put under psychiatric care. When suit was brought by the claimant against the United States for false imprisonment, the court held that the United States was not liable because false imprisonment was one of the excepted torts under FTCA.

In *Gamage v. United States*,[76] an officer who was ordered to report to the post hospital by his commander for an automobile license examination was confined to the facility and subsequently retired for disability. His complaint against the United States was dismissed under the wilfull tort exception. The court found that the facts constituted

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71 *See* 28 U.S.C. § 2680 (1970).
72 *See* 28 U.S.C. § 2680(h) (1970).
73 185 F.2d 564 (9th Cir. 1950).
74 225 F. Supp. 850 (E.D. Va. 1964).
75 328 F.2d 596 (2d Cir. 1964).
76 217 F. Supp. 381 (N.D. Cal. 1962).

defamation, assault, battery, false imprisonment and deceit, all of which are listed as exceptions under which no liability may be imposed upon the United States.

Pendarvis v. United States[77] carried the use of this exception one step further. A farmer near a military installation had allowed his property to be used for maneuvers. Some of the troops thought the farmer was one of the aggressors participating in the war games. Failing to convince the soldiers of his real identity, he was manhandled. There is no doubt at this point, based upon the previously noted decisions, that the battery and false imprisonment exceptions to FTCA liability would apply. However, after being beaten, the farmer was transported to the hospital at the military installation where he became a victim of medical malpractice. In a subsequent suit against the United States for medical malpractice, the court held that there was no liability for claims "arising out of" the situations listed in the statute.

FTCA also prohibits "[a]ny . . . claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty, . . . whether or not the discretion involved be abused." [78] Since discretionary acts are excepted from FTCA liability, it must be determined what is a discretionary function or duty. In *Coates v. United States*,[79] through flood control and irrigation projects, the flow of the Missouri River was negligently changed over a period of twenty years. The plaintiff was denied recovery in a decision based upon the discretionary function exception. It was held to be a discretionary function of the Congress whether to engage in flood control and irrigation projects. However, in *United States v. Hunsucker*,[80] the court failed to apply the discretionary function exception when a hazard resulted from negligence occurring at the operational level. In *Hunsucker* there was damage to the claimant's land which adjoined a U.S. Air Force base. The damage was caused by the installation of a drainage ditch and sewage disposal system. The court held that although the decision to activate the base occurred at the planning level, the negligence occurred in the construction of the drainage ditch and sewage disposal system at the operational level. Therefore, the discretionary function exception did not apply and the United States was held liable.

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[77] 241 F. Supp. 8 (E.D.S.C. 1965).

[78] *See* 28 U.S.C. § 2680(a) (1970).

[79] 181 F.2d 816 (8th Cir. 1950).

[80] 314 F.2d 98 (9th Cir. 1962).

In *Schubert v. United States*,[81] the discretionary function exception was applied and the case against the United States was dismissed. In that case damage was caused to the plaintiff's property by the testing of jet engines at a nearby naval air station facility. It appeared that the location of the station and the decision to test jet engines there was a matter of discretion. However, it is interesting to observe that had the damage to plaintiff's property been caused by the negligent design of the station or jet engines themselves, the negligence may have been considered to have occurred at the operational rather than the policy level, and consequently the discretionary function exception would not have barred recovery. The problem, then, has evolved from determining what is a discretionary function to applying the distinction between the planning and operational levels in a close factual situation.

It should be noted that FTCA lists numerous other exceptions under which no liability will be imposed upon the United States for the negligent act or omissions of its employees. The practitioner should always consult the statute to determine if his particular factual situation falls within one of those exceptions.

IX. Conclusion

In this era of increased federal activity, when the United States Government owns and operates thousands of vehicles and other equipment which could be involved in accidents, and employs hundreds of thousands of military and civilian personnel for whose negligent acts or omissions the United States might be liable, it is no wonder that the incidence of federal tort claims is high.

As previously stated, the sole object of this article has been to familiarize the practitioner with the general substantive law of the Federal Tort Claims Act. It was meant to be only a general survey. The statutes and the judicial decisions should be consulted for details. It is hoped that this article will at least enable the reader to recognize that he has or does not have a potential FTCA case.

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[81] 246 F. Supp. 170 (S.D. Tex. 1965).