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"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—OLIVE WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

Comments

CUMULATIVE VOTING VERSUS CLASSIFICATION OF DIRECTORS IN MISSOURI

For some time it has been thought that a conflict exists between statutory or constitutional provisions for mandatory cumulative voting for directors in...
a corporation and statutes which permit classification of directors.2 The provision for cumulative voting in Missouri is contained in the constitution and reads as follows:2

In all elections for directors or managers of any corporation, each shareholder shall have the right to cast as many votes in the aggregate as shall equal the number of shares held by him, multiplied by the number of directors or managers to be elected, and may cast the whole number of votes, either in person or by proxy, for one candidate, or distribute such votes among two or more candidates; and such directors or managers shall not be elected in any other manner; provided that this section shall not apply to co-operative associations, societies, or exchanges organized under the law.

It will be noticed the section provides for mandatory cumulative voting and all other voting methods are prohibited.

By statute Missouri permits a classified board. The pertinent provision reads as follows:2

The number of directors of a corporation shall be not less than three nor more than twenty-one, to be elected by ballot by the shareholders in such corporation. Any corporation may elect its directors for one or more years, not to exceed three years, the time of service and mode of classification to be provided for by the bylaws of the corporation; provided, however, that there shall be an annual election for such number or proportion of directors as may be found upon dividing the entire number if directors by the number of years composing a term.

The apparent conflict between the statutory provision allowing “staggered” elections and the constitutional provision commanding cumulative voting for directors becomes obvious when we consider the mechanics of the cumulative voting system.4 If no provision for cumulative voting is made, the right does not exist, and a shareholder controlling fifty-one percent of the voting stock could elect his entire slate of directors.5 If cumulative voting is allowed, however, the stockholder is entitled to votes equal to the number of his shares, multiplied by

1. For historical background see WILLIAMS, CUMULATIVE VOTING FOR DIRECTORS (1951), which also provides an excellent discussion of the whole subject of cumulative voting. For the problem in general, see Ballantine, 1 U. OF CHI. L. REV. 367 (1934); Bowes and De Bow, 22 MINN L. REV. 351 (1937); Curren, 32 MICH. L. REV. 743 (1934); Luce, 50 MICH. L. REV. 1291 (1952); 56 DICK. L. REV. 330 (1952); 27 ST. JOHN'S L. REV. 357 (1953).
2. Mo. Const. art. 11, § 6. The corresponding statutory provision is Mo. REV. STAT. § 351.245 (1949).
4. A detailed discussion of the mechanics of the cumulative system is beyond the scope of this note. For those seeking more detailed information, see Cole, Legal and Mathematical Aspects of Cumulative Voting, 2 S.C.L.Q. 225 (1950); Gerstenberg, the Mathematics of Cumulative Voting, J. OF ACCOUNTING (Jan. 1910); Williams, op. cit. supra note 1.
5. 13 AM. JUR. § 487; 5 FLETCHER, PRIVATE CORPORATIONS § 2048 (perm. ed. rev. repl. 1952).
the number of directors to be elected, which the shareholder may cast for a single
director or distribute among the other candidates as he sees fit. In this manner
it is sought to give the minority shareholders representation in proportions roughly
equivalent to the percentage of their voting stock. It is evident that any decrease
in the number of directors to be elected would require an increase in the per-
centage of stock necessary to elect a director. Thus if nine directors are to be
elected, the percentage of votes necessary to elect one director would be ten percent,
plus one share. If only three directors are to be elected, however, the percentage
necessary to elect one director has increased to twenty-five percent, plus one share. 6 Consequently a provision which allows less than all the directors of a
corporation to be elected at the same time increases the difficulty in securing mi-
nority representation through cumulative voting.

In view of the fact that twenty-one states have either a statutory or constitu-
tional provision for mandatory cumulative voting, it is somewhat surprising
that the validity of the provisions for staggered terms found in a number of
these states have given rise to so little litigation. To date only two cases have
raised the issue. 7

In Humphrys v. Winous Company 8 the conflict was between different sections
of the same act. The section which gave shareholders the right to cumulate their
votes concluded: "Such right to vote cumulatively shall not be restricted or
qualified by any provisions in the articles or regulations." Another section 9 of
the act provided that the articles or regulations of the corporation might provide
for classification of directors, whose terms were not to exceed three years. At
the annual meeting of shareholders, the code of regulations of the Winous Com-
pany were amended by vote of the shareholders to provide for classification of
the three directors so that each should have a three-year term and be elected in
successive years. The plaintiff controlled over forty percent of the voting stock.
The practical effect of the amendment was, of course, to nullify completely plaint-
iff's chances to elect one of the three directors by cumulating his votes.

On first appeal the court of appeals held that the prohibition against restrict-
ing or qualifying the right of cumulative voting by code regulations was specific
in character and therefore restricted or modified the applicability of the general
provision for classification. The court did not hold that the provision for classi-

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6. For a state by state breakdown see Williams, op. cit., supra note 1, at
8-10.
County, Pennsylvania (1944), three judges said there was doubt as to the con-
stitutionality of the staggered voting system, but did not pass on the question.
In Cohen v. A.M. Byers Co., 363 Pa. 618, 70 A.2d 837 (1950), the court avoided
passing on the issue.
8. 125 N.E.2d 204 (Ohio 1955); rev'd 165 Ohio St. 45, 133 N.E.2d 780
(1956).
10. OHIO REV. CODE § 1701.64 (1956).
fication was necessarily void, but rather the court suggested that it was modified only to the extent that it qualified the right to vote cumulatively. The court emphasized that in the instant case the cumulative right was completely destroyed by the classification of the three-director board. In view of the specific prohibition against restricting or qualifying the cumulative voting privilege by the articles, however, it would appear that under the court of appeals' decision, any attempt at classification would be invalid, because the effect would necessarily be to "qualify" the shareholders' right to cumulate their votes.

On further appeal, the Supreme Court of Ohio reversed the court of appeals. The court's handling of the problem was centered around the answers to two questions: Did the General Assembly intend to guarantee that the right to vote cumulatively should not be restricted or qualified, or did it intend to guarantee that the effectiveness of cumulative voting should not be restricted or qualified? The court assumed that the General Assembly in enacting the two statutes intended to give effect to both; and the court determined that if the section providing for staggered terms were to have any effect, the cumulative provision must be construed as merely guaranteeing the right to vote cumulatively rather than insuring minority representation on the board of directors. The court stated: "But we are of the opinion that the throwing of an aura of uncertainty and confusion around the statutory provision for classification of directors is not required by the construction of the statutory provision for cumulative voting." The court undoubtedly had reference here to the possibility that classification might yet, under the court of appeals' decision, be permitted under some circumstances; but it is not altogether improbable that the court was also foresightedly meditating on the probability of other suits seeking, by an extension of the doctrine of the court of appeals' decision, to prevent a reduction of the number of directors on the board, or other devices which would have the effect of "qualifying" the cumulative voting right.

In Wolfson v. Avery the conflict was between a constitutional provision which provided that directors or managers were to be elected cumulatively and in no other manner and a statutory provision which allowed classification of directors. The constitutional provision for cumulative voting reads as follows:

The General Assembly shall provide, by law, that in all elections for directors or managers of incorporated companies every stockholder shall have the right to vote, in person or by proxy, for the number of shares of

11. 165 Ohio St. 45, 133 N.E.2d 780 (1956).
12. Id. 133 N.E.2d at 789.
13. "Can it be said that the legislative intent in enacting Section 1701.58, Revised Code, was to limit Section 1701.64, Revised Code, and not limit Section 1701.68, Revised Code, and other sections of the corporation act?" Id. at 788.
14. 6 Ill.2d 78, 126 N.E.2d 701 (1955); noted in 103 U. Pa. L. Rev. 822 (1955).
15. ILL. CONST. art. 11, § 3.
16. ILL. BUS. CORP. act § 35.
stock owned by him, for as many persons as there are directors or managers to be elected, or to cumulate said shares, and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them on the same principle among as many candidates as he shall think fit; and such directors or managers shall not be elected in any other manner.

The board of directors was divided into three classes of three directors each, and one class was to be elected each year for a term of three years. The defendant contended that the constitutional guarantee extended only to the directors "to be elected," i.e., that the right to vote cumulatively was not absolute but was dependent upon a number of factors, including the number of directors in the corporation. While recognizing that the constitutional provision does not insure a voting strength in exact proportion to the number of shares held, the majority of the court nevertheless held that the statute authorizing classification was a substantial denial of the constitutional right of the shareholder to cumulate his votes. It is interesting to note that the Illinois Legislature attempted to avoid the conflict by providing for a minimum of three directors in each class.17 Thus while the effectiveness of cumulative voting could be modified, it could not be destroyed by classification.

Evaluating these two cases, it would appear that had the appeal court's decision in the Humphrys case been allowed to stand, the case would have offered little authority for a case arising under Missouri law. The Ohio Court of Appeals was able to avoid a direct holding that classification necessarily conflicted with the cumulative voting privilege by statutory interpretation. Although based on statutory interpretation, the Ohio Supreme Court's decision lends persuasive force to the argument that the cumulative right—whether given by statute or constitution—does not extend to guaranteeing the effectiveness of the cumulative right.18 While it is true that the court in the Wolfson case based its opinion in part on the language of the Illinois Constitution, the case also offers the first clear-cut holding that classification is void as being contrary to the purpose of the cumulative provision. The two cases illustrate two essentially divergent views: In the Humphrys case the right was distinguished from the effectiveness of the exercise of that right; whereas in the Wolfson case the court looked upon the right as guaranteeing minority representation.19 Whether classification should be void as contrary to the Missouri Constitutional provision for cumulative voting constitutes the problem of this paper.

In the vast majority of law review comments on the subject the invalidity of classification has been assumed. In some of these comments this conclusion

17. Ibid.
18. OHIO REV. CODE § 1701.57 was enacted after the court of appeals' decision to provide for at least three directors in each class.
19. Wolfson v. Avery, supra note 14, 126 N.E.2d at 707: "The guaranty of minority representation prohibits any law which in effect defeats or nullifies it, even though such law does not in express terms attempt to nullify the right."
has been reached with little consideration of the factors involved.\textsuperscript{20} The shareholder is given the right to vote cumulatively. Classification destroys or qualifies this right. Since the cumulative right is given by the constitution, classification is void. This technique of reasoning fails to consider that the right to vote cumulatively exists only by virtue of a statutory or constitutional provision and that the extent of that right may only be determined with reference to the specific provision in question. The Missouri provision, on its face, only purports to guarantee the right to vote cumulatively in elections for more than one director. A guarantee of the right to vote cumulatively is not a guarantee of the right of minority representation.\textsuperscript{21} Few would argue that a corporation may not within the statutory limit determine the number of directors,\textsuperscript{22} although to reduce the number of directors from nine to three just as effectively destroys the effectiveness of cumulative voting as would classification of a nine-director board into three classes. Classification does not, in a technical sense, eliminate the right to vote cumulatively; although, in a practical sense, it can make the right an empty one for smaller minority groups.\textsuperscript{23} It is undoubtedly true that the drafters of the provision might have made the right an absolute one so that any device which destroyed or weakened the right would be void. An examination of devices which have the effect of either destroying or qualifying the right to vote cumulatively reveals a most interesting probability.

It is submitted that whether or not a particular device will be struck down as violative of the purpose of the constitutional provision should depend, and to a large extent does depend, on whether the device is useful only as a means of avoiding the effect of the cumulative provision or whether or not the device has some intrinsically useful and legitimate purpose. It is submitted that the cases support this hypothesis.

Thus in Wright v. Central California Colony Water Co.,\textsuperscript{24} the court held that a resolution permitting separate elections for each of the corporation's seven directors was violative of the cumulative voting provision. In Alliance Co-op. Ins. Co. v. Gasche\textsuperscript{25} the court held that where the statute and bylaws provide for cumulative voting, it is proper for the presiding officer to refuse to put a motion to

\textsuperscript{20} See 24 U. Cin. L. Rev. 560, 567 (1955), where the author states: "Fundamentally, then, when a Hegelian dialectic problem arises from the co-existence of a constitutional provision guaranteeing cumulative voting rights and a statute permitting the use of staggered voting, the court may reach a synthesis merely by asking itself: 'Do we choose to enforce the constitutional mandate or not?' Concurrence must \textit{inevitably} (emphasis added) fall in favor of the superiority of the constitutional provision."

\textsuperscript{21} Maddock v. Vorclone Corporation, 17 Del. Ch. 39, 147 Atl. 255 (1929).

\textsuperscript{22} But see Bowes and De Bow, \textit{supra} note 1, at 386 (suggesting contra but citing no cases).

\textsuperscript{23} Williams, \textit{op. cit.} \textit{supra} note 1.

\textsuperscript{24} 67 Cal. 532, 8 Pac. 70 (1885).

\textsuperscript{25} 93 Kan. 147, 142 Pac. 882 (1914).
elect them singly. Obviously no useful purpose is served by having separate elections for each director, and for this reason the device is void as being contrary to the cumulative voting right. Similarly in In re Rogers Imports, Inc. a bylaw authorizing removal without cause was held to violate the cumulative voting provision in the corporation charter. Again the device has no useful purpose other than to frustrate the cumulative voting provision by removing directors elected by a minority. Contrariwise, in Horton v. Wilder where a statute authorized cumulative voting and another statute required that at least three directors be residents of the state, the court held that the three directors receiving a very few cumulative votes were elected over non-residents receiving more cumulative votes. Obviously the state has a definite interest in insuring a certain number of resident directors, and thus, although the effect is to weaken the effectiveness of the cumulative right, the useful purpose served justifies the imposition. Reducing the number of directors, likewise, may be motivated by legitimate reasons. A large board may be found to be too cumbersome or expensive. No case has been found which has held that a board reduction violates the cumulative voting provision of the state, although the effect is to reduce the efficacy of the shareholder's right to vote cumulatively.

Viewed in this light, it would seem that classification would not be inconsistent with the cumulative voting provision. It is not without significance that of 1000 domestic corporations listed on the New York Stock Exchange, 142 elect their directors by classes and, of these, 61 have cumulative voting. Classification insures that at all times there will be some experienced directors. Classification contributes to stability and continuity of corporate policy. These are very real and important considerations to many corporations. An extension of the logic of the decided cases would indicate no incompatibility between classification and cumulative voting for classification has a legitimate purpose irrespective of its effect on cumulative voting.

At first impression, the Wolfson case would seem to contradict the foregoing analysis. However, the Wolfson case was based on the particular wording of the Illinois Constitution. A careful examination of the Illinois and Missouri provisions reveals what may be significant differences.

27. 48 Kan. 222, 29 Pac. 565 (1892).
29. Williams op. cit. supra note 1, at 49.
30. Id.
31. A difference which was once commented on by the Illinois court in People ex rel. Watskeka Telephone Co. v. Emmerson, 302 Ill. 300, 134 N.E. 707 (1922), a case in which the court held that their cumulative provision prohibited the issuance of preferred non-voting stock. It is interesting to note that in State v. Swanger, 190 Mo. 561, 89 S.W. 872 (1905), 17 Kan. City L. Rev. 66 (1948), the Missouri Supreme Court gave a more flexible interpretation of the cumulative provision in upholding the right of the corporation to issue non-voting preferred stock.
The Illinois Constitution gives the shareholder the right "to cumulate said shares, and give one candidate as many votes as the number of directors multiplied by the number of his shares." "Directors," it was argued, referred back to "directors or managers to be elected," and where the section speaks of the number of directors, it means the number of directors to be elected. It should be noticed that the Illinois provision is divided into two clauses. The first gives the shareholder the right to vote his stock for the directors to be elected, and the second provides for cumulative voting. Thus the court was able to construe "number of directors" in the second clause without the qualifying phrase "to be elected" of the first clause being read in. The court held, therefore, that when the constitution states that shares multiplied by directors equals votes, it must mean the total number of directors shall be the multiplier; for it would be a strained construction to say that directors meant more than one but less than the whole. It would also be illogical to suppose, the majority thought, that the total number of directors should be used in computing the number of votes without also holding that the total number of directors should be elected at the same time.

The Missouri Constitution gives the cumulative right in all elections for directors. The use of the plural suggests that the cumulative provision shall apply only to those elections where more than one director is to be elected. This seems realistic when it is remembered that cumulative voting has no advantages when only one director is to be elected.

The section then provides that the shareholder may distribute such votes among two or more candidates. The particular wording used provides some basis for arguing that the shareholder has a right to vote cumulatively for two or more candidates. In other words, it is arguable that in all cases the shareholder has the right to vote for at least three candidates. A more likely argument, however,

32. MO. REV. STAT. § 351.320 (1949) purports to give directors the right to fill vacancies on the board of directors until the holding of a stockholder election. Several questions of interest arise under this section. Does the appointment by surviving directors violate the cumulative voting provision of the constitution? The answer would seem to be no. The cumulative provision, on its face, does not purport to cover anything but stockholder elections for directors. But see People ex rel. Weber v. Cohn, 339 Ill. 121, 171 N.E. 59 (1930), where the Illinois court again gave an extremely broad interpretation to the cumulative provision in denying the validity of such appointments. Does the Missouri statute authorize a special election? There are no cases on this, but the reference to "an" election indicates that the shareholders need not wait until the next annual election. If the statute authorizes a special election to fill a vacancy, would that violate the cumulative provision of the constitution? If only one vacancy exists, the answer is clearly no. If there are two vacancies, it is arguable that cumulative voting must be used. These problems are beyond the scope of this paper except in so far as they emphasize the historically different approaches of the Illinois and Missouri Supreme Courts' interpretations of their respective cumulative provisions.

33. Notice that although the Missouri statute provides for a minimum number of three directors, the constitution puts no minimum limit on the number of directors.
would seem to be that the words are directory in telling the shareholder how he may distribute his votes if there are more than two candidates. It should be emphasized that a candidate is not a director. There may be a number of candidates for one directorship. If the drafters of the constitution wished to provide that the minimum number of directors must be more than two, this was indeed a strange and doubtful manner of doing so. The prohibitive section which follows, that such directors or managers shall not be elected in any other manner, must be construed along with the first line in the section. That line, it is submitted, sets out the limits of the mandatory cumulative provision, i.e., the provision only applies in an election for directors, not in an election for a director. Thus the use of the plural throughout the section merely refers to the fact that the cumulative provision applies only to cases where more than one director is up for election.

Not only does a fair interpretation of the Missouri Constitutional provision not require all directors to be elected at one time, but also it would seem that the provision affirmatively contemplates that less than the whole may be elected at one time. The Missouri provision specifically states that the manner of determining the number of votes shall be the number of shares multiplied by the number of directors to be elected. If the Illinois Court was able to construe "number of directors" without the qualifying phrase "to be elected," the Missouri Court will find that task impossible. If "to be elected" is to have any meaning, it is difficult to avoid the conclusion that this meaning embraces the possibility of less than the whole number of directors being elected at one time. It is possible to argue that the words "to be elected" are neutral and are merely used to describe persons in future elections, so that if a corporate board is increased or decreased in size, the new number of directors rather than the original number is to be chosen. 34 This argument fails to explain how the words "directors to be elected" are a more clear indication that the number of corporate directors at the time of election is intended than is the single word "director". 35

Consider the reasoning adopted in the Wolfson case that it would be an unnatural interpretation to say that the provision contemplated that the whole number of directors be used in computing the number of votes per share and not also hold that the provision contemplated election of the total number of directors. Applying this reasoning conversely, it would be an unnatural interpretation to hold that the Missouri provision contemplates that the number of directors to be elected shall be used in computing votes per share and not also hold that the section contemplates that if less than all the directors may be used in computing votes, then less than all the directors may be elected at that election.

34. An argument which the Illinois court apparently did not accept.
35. Mo. Const. 1875, art. 12 § 6 and Mo. Rev. Stat. § 351.245 (1949) use the words "to be elected at such election." It is doubtful that the deletion of "at such election" by the 1945 Constitution is significant.
The view here presented may be summarized as follows:

1. In all elections for more than one director cumulative voting shall be used. In an election for one director, cumulative voting is not required.

2. The constant reference to directors and managers in the plural has no significance beyond the fact that the cumulative provision has no application in an election where only one vacancy exists.

3. The provision that the shareholder shall have the right to cast his votes for one candidate or distribute such votes among two or more candidates does not give the shareholder an absolute right to have more than two candidates for which to cast his votes; rather the language is directory in informing the shareholder how he may distribute his votes if there are two or more candidates up for election.

4. The Illinois and Missouri provisions are distinguishable. The Missouri provision does not prohibit classification.

5. The language which gives the shareholder a number of votes equal to the number of shares held multiplied by the number of directors to be elected indicates that the section affirmatively contemplates that less than the whole number of directors may be elected at one time.

The fact that the cumulative provision occurs in the Missouri Constitution signifies a strong state policy toward the right. The wisdom of making the right a constitutional one is dubious. By so doing any changes to meet new circumstances are bound to be slow and uncertain. It is submitted that an inflexible interpretation of the constitutional provision is undesirable. An interpretation consistent with the language of the section is adequate and would enable the legislature to meet the abuses of classification by appropriate and speedy legislation. Policy considerations to not require a rigid and stultifying construction. Both the cumulative voting right and the provision for classification serve useful ends. Their simultaneous existence is to be desired.

WALTER F. MOUDY

36. For statutes limiting the right of classification to protect cumulative voting rights, see CAL. CORP. CODE §§ 805, 2235, WIS. BUS. CORP. LAWS, 1951, § 180.33; Luce, Trends in Modern Corporation Legislation, 50 MICH. L. REV. 1291, 1307 (1953). Only Alabama, California, and Wyoming insist that a full slate of directors be elected annually.
FEDERAL TORT CLAIMS ACT: A MORE LIBERAL APPROACH INDICATED

I. GOVERNMENTAL IMMUNITY AND WAIVER

In the sixteenth century it became fully established at common law that the king was immune to suit for his wrongs, although this immunity was generally qualified by the responsibility of some minister for the king's action. When the concept of the individual sovereign was replaced in this country by the idea of a sovereign republican state within a sovereign federal republic, the principal of the immunity of the sovereign remained. The basis for the continuance of this principle seems to be the idea that to permit the government to be sued without its consent would be inconsistent with the concept of supreme executive power. Provision was expressly made in the United States Constitution to protect the several states from suit without their consent. As a matter of international comity, this immunity has been extended to foreign nations, including their ministers, agencies, and public property, and to the United Nations. It has also

1. For a general discussion of governmental immunity to tort liability, see Borchard, Governmental Liability in Tort, 34 YALE L.J. 1, 129, 221 (1934); 36 YALE L.J. 1, 757, 1039 (1936); 28 COL. L. REV. 577, 734 (1938); Blachly and Oatman, Approaches to Government Liability in Tort: A Comparative Survey, 9 LAW & CONTEMP. PROB. 191 (1942).

2. HOLDSWORTH, HISTORY OF ENGLISH LAW, Vol. 3, pp. 462-469, Vol. 6, pp. 226-267 (4th Ed. 1935). The rule appears to have been based upon the then prevailing idea that the King could do no wrong, seemingly derived from the concept of rule by divine right.


4. As Mr. Justice Holmes so aptly put it, in Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907): "... a sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal rights as against the authority that makes the law on which the right depends." See also Briggs v. Light Boat Upper Cedar Point, 11 Allen (Mass.) 157, 162 (1866).

5. U.S. CONST. amend. XI.


been extended to political subdivisions below the level of the state, including municipal corporations when acting in their "governmental" or "political" capacities, but not when acting in their "corporate" or "proprietary" capacities.11

A variety of reasons have been advanced to explain why a government should not be liable for its torts. The immunity has been based upon considerations of public policy, upon the idea that no matter what the wrongful act of the agent, he is outside his scope of employment for the state, upon the theory that whatever the state does must be lawful, and upon the impossibility of a wrong committed by an entire people.12 Unquestionably, however, there is a need for legislative waiver of this immunity today as there has never been in the past. Governments, their agencies and subdivisions, are today operating the instrumentalities of our advanced technical civilization in carrying out their greatly enlarged multiplicity of functions, and, as a consequence, they are subjecting the public at large to their torts in unprecedented numbers. This has created a definite social demand for a governmental responsibility which cannot be achieved by adhering to outmoded principles of law from another era.13

The legislatures of a few states have moved to answer this demand by enacting statutes creating general state liability for tort, the procedural mechanics set up by these statutes varying greatly.14 However, in many states, even where the legislature has purported to remove this cloak of immunity by statute, the courts

1. 18 MCQUILLIN, MUNICIPAL CORPORATIONS, § 53.23 (3d Ed. 1950); Smith, Municipal Tort Liability, 48 Mich. L. Rev. 41 (1949).

The immunity of the state was first determined to include municipal corporations in Russell v. Men of Devon, 2 Term Rep. 687, 100 Eng. Rep. 359 (1798).

There has always been a great difficulty confronting the courts when making a distinction between "governmental" and "proprietary" functions, and the tests employed in the various jurisdictions to make the distinction have not been altogether uniform. Neither have the results been consistent. For examples of disharmony, see Haley v. Boston, 191 Mass. 291, 77 N.E. 888 (1906); Williams v. City of New York, 57 N.Y.S.2d 39 (Sup. Ct. 1945); Irvin v. Greenwood, 89 S.C. 511, 72 S.E. 228 (1911); Borchard, supra note 1, 34 YALE L.J. at 129. See also Indian Towing Co. Inc. v. United States, 250 U.S. 61 (1955) note 1.


13. "It is bad social engineering to administer justice to a blueprint of a society of the past as a means of maintaining the jural postulates of civilization in a different society of the present." POUND, CONTEMPORARY JURISTIC THEORY 83 (1940).

President Lincoln was moved by much the same considerations to propose legislation to create federal tort liability in his annual message to Congress, Dec. 3, 1861, when he said: "It is as much the duty of the Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals." RICHARDSON, 6 MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, 51 (1898).

14. Nutting, Legislative Practices Regarding Tort Claims Against the State, 4 Mo. L. Rev. 1 (1939). See also Leflar and Kantrowitz, supra note 3; Shumate, Tort Claims Against State Governments, 9 LAW & CONTEMP. PROB. 242 (1942).
have adhered to the former reasoning set forth in the above paragraph, and have refused to hold the state liable in tort.\(^{15}\)

II. THE FEDERAL TORT CLAIMS ACT\(^{16}\)

A. General Legislative History

Although prior to the enactment of the Federal Tort Claims Act, the federal government had waived certain of its immunities in other fields of claims and litigation, it was perfectly clear that it had not done so in the general field of tort liability.\(^{17}\) Instances of hardship and injustice due to torts committed by the federal government and its agencies were relieved only by the haphazard and often injudicious method of special appropriation legislation, which also constituted a burden on the legislators.

Beginning with President Lincoln's recommendations in 1861 that the government's tort immunity be waived,\(^{18}\) there has been almost constant activity in support of the waiver of the immunity of the federal government in tort, and toward the creation of a judicial process to dispose of claims arising against the United States.\(^{19}\) The first bill providing for such waiver reached the Congressional floor

15. Thompson v. State, 4 Ill. Ct. Cl. 26 (1921); Shear v. State, 117 Neb. 865, 223 N.W. 130 (1929); Miller v. State, 231 App. Div. 363, 247 N.Y.Sup. 399 (3rd Dep't. 1931); Smith v. State, 227 N.Y. 405, 125 N.E. 841 (1920). See Note, 5 CORN. L.Q. 340 (1920), where it is suggested that perhaps the claimant was authorized to sue under such a statute for his own self amusement, in view of the fact that its purpose was apparently not to create liability.

16. 28 U.S.C. §§ 1291, 1346 (b) (c) (d), 1402 (b), 1504, 2110, 2401, 2402, 2411, 2412, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680 (1952).


17. Hill v. United States, supra note 3; Sultzback Clothing Co. v. United States, supra note 3; Gottlieb, Tort Claims Against the United States, 30 GEO. L.J. 462 (1942); Holtzoff, The Handling of Tort Claims Against the Federal Government, 9 LAW & CONTEMP. PROB. 311 (1942).

18. Supra note 13.

in 1919, and between 1925 and 1935, some eighteen such bills were introduced in Congress.

In 1946, the Federal Tort Claims Act was at last enacted into positive law as Title IV of the Omnibus Legislative Reorganization Act of that year. Its alleged purpose was two-fold, to constitute a waiver of federal tort liability immunity, and to alleviate the burden of private relief bills imposed upon Congress. Since its passage, it has been substantially amended four times, once in 1947, twice in 1949, and once as a part of the Public Vessels and Suits in Admirality Act of 1920 and 1925.

B. Statutes Other than the Federal Tort Claims Act Which Affect the Tort Liability of the United States

1. Maritime Claims

When the Federal Tort Claims Act was first enacted, the United States was liable under its provisions for certain claims arising out of maritime incidents. Since 1948, however, the Public Vessels and Suits in Admirality Act has been made the exclusive remedy for claims of this nature.

2. Claims of Federal Employees

The Federal Employees Compensation Act was liberalized by amendment in 1949, with a view to making it the exclusive remedy for claims of that nature. It has been interpreted to preclude a federal employee from any remedy, including relief under the Federal Tort Claims Act, other than the administrative process described in that Act.

28. 20 U.S.C. § 2680 (d) (1952) provides that the act shall not extend to "any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States."
C. Construction of the Federal Tort Claims Act

1. Jurisdiction

Original jurisdiction is granted to the district courts exclusively to entertain suits involving the tort liability of the United States under the Act. This includes jurisdiction to adjudicate any set-off or counterclaim by the United States.

Suits, under the Act, are authorized to be filed only in the district wherein the claimant resides, or within the district wherein the actionable wrong occurred. The courts are expressly denied jurisdiction of claims arising in foreign countries.

This latter provision has given rise to the problem of ascertaining when the claim has arisen in a foreign country. The Supreme Court, in United States v. Spelar, has seemingly ruled that the determination should be based upon sovereignty: i.e. if the United States merely has possession of the soil (even for an extended period) where the claim arises, then it is in a foreign country; but if the United States is sovereign on that land, then the claim falls without the exclusion and is actionable.

The question has also been presented for determination as to whether or not the availability of a remedy and relief from the government under another statute

32. 28 U.S.C. § 1346 (b) (1952), provides that “... the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction on claims against the United States ...” (Emphasis added) Under the definitive section, courts of the United States include those of Hawaii and Puerto Rico, and thus jurisdiction under the Act is extended to the district courts in those two jurisdictions. 28 U.S.C. § 451 (1952).

33. 28 U.S.C. § 1346 (c) (1952).

34. 28 U.S.C. § 1402 (b) (1952).


36. United States v. Spelar, 338 U.S. 217 (1949). Here, claimant filed suit in her resident district court to recover damages for the death of her husband who was killed at a United States air base in Newfoundland, basing her action upon a Newfoundland wrongful death statute. The air base had been leased for a period of 99 years from Britain. The action was dismissed by the trial court for want of jurisdiction based on 28 U.S.C. § 2680 (k). Spelar v. United States, 75 F. Supp. 987 (E.D. N.Y. 1948), reversed 171 F.2d 208 (2d Cir. 1949).

37. The court also based its conclusion in the case upon the legislative history of the act and upon a canon of construction which “teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States. ...” 338 U.S. at 223.

The court of appeals apparently had based its decision upon Vermilya Brown Co. v. Connel, 335 U.S. 377 (1948), which had construed a similar statutory provision contained in the Fair Labor Standards Act, 29 U.S.C. § 201 (1952), as not to preclude its application to a base on similar lease in Bermuda.

For a general exhortation on the applicability of Congressional enactments to foreign soil possessed or controlled by the United States, see 68 Harvard L. Rev. 781 (1955).
deprives the district courts of jurisdiction to entertain a claim based upon the same cause of action under the Federal Tort Claims Act. As has already been pointed out, in the case of claims falling within the scope of the Public Vessels and Suits in Admiralty Act, there can be no recovery under the former act. This is based upon an express exclusion contained in the Federal Tort Claims Act itself.\(^2\)

In the case of Underwood v. United States, already mentioned, it was held that cases covered by the Federal Employee's Compensation Act were excluded from the Federal Tort Claims Act,\(^3\) but in this instance the result was rested upon the intent of Congress,\(^4\) and not upon an express exclusion. A contrary result was reached in United States v. Brown,\(^5\) where a veteran was allowed recovery for injuries due to negligent treatment by a Veterans Administration physician, although he had received an award for the same injury under a veterans compensation statute.\(^6\) The Brown case pointed out that, of course, the amount of recovery was reduced by the amount he received under the other award. It would at least seem arguable that the canon expressio unius est exclusio alterius is applicable, and that Congress, by expressly excluding claims which fall within the coverage of the Public Vessels and Suits in Admiralty Act from the operation of the Federal Tort Claims Act,\(^7\) indicated an intention that the Federal Tort Claims Act should cover all other claims which might also fall within the scope of other remedial statutes where cases under them are not expressly excluded in the Federal Tort Claims Act itself.\(^8\) On the other hand, it may be claimed that all other acts giving tort jurisdiction should preclude recovery under the Federal Tort Claims Act, since Title 28, section 1346 (b) of the United States Code relates only to cases over which district courts have exclusive jurisdiction and the district courts would not have exclusive jurisdiction within the meaning of that section.

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38. See note 28, supra.
39. See note 31, supra.
40. See note 30, supra.

A like result was reached, based on Congressional intent, where plaintiffs had received recovery under the Military Claims Act, 31 U.S.C. § 223 (b) and (c) (1952), in United States v. Wade, 170 F.2d 298 (C.A. Mass. 1948).

The dissent, in the Brown case, argued that Feres v. United States, 337 U.S. 49 (1949), controlled. The Feres case had held that military personnel cannot be compensated under the F.T.C.A. for injuries received in the course of duty. Assuming the Feres case to be sound, however, the argument is implausible. Even though the injuries originated out of World War II, the claim sought damages for an injury which was due to the negligence of a V.A. physician, which arose long after the soldier-government relationship had ceased. Notwithstanding that the government was gratuitously providing this service, no relationship existed other than patient-physician, and the usual common law was applicable to the claim if the compensation statute did not preclude the suit.

where other statutes give other bodies jurisdiction. In light of these two conflicting possibilities of construction of the Federal Tort Claims Act, it would appear that the court has, in so far as it can be determined, reached a sound position in deciding that, in the absence of an express exclusion in the Federal Tort Claims Act itself, the congressional intent in passing another remedial statute should determine whether or not that remedial statute creates a sole remedy to the exclusion of recovery under the Federal Tort Claims Act. Under this position the Congressional intent may be discovered either expressly or by implication in the remedial statute itself, from the legislative records and history of its legislative journey.

2. Parties

The Federal Tort Claims Act authorizes any claimant to become a party plaintiff where that claimant has an action authorized under the liability provisions of the statute. The Act has been construed, in light of the Federal Assignment Act, to permit a suit to be maintained by a subrogee of the claimant in his own name as subrogee, if the assignment was involuntary.

Clearly, under the provisions of the Act, the United States is required to be a party to all litigation brought by authority of the Act. Thus, even though a federal corporation has authority to sue and be sued in its own name, for the purposes of claims based on the Federal Tort Claims Act, it must be sued as an agency of

45. See note 32 supra.
46. 28 U.S.C. § 1346(b) (1952) authorizes the district court to take jurisdiction of civil actions on claims against the United States for injury or loss of property, or personal injury or death caused in a certain manner. 28 U.S.C. § 1402(b) authorizes the plaintiff under the former provision to prosecute his action in prescribed jurisdictions. 28 U.S.C. § 2874 (1952) makes it clear that where one is injured by the death of another, within the meaning of any wrongful death statute, he is entitled to be a party plaintiff.
48. United States v. Aetna Cas. & Surety Co., 338 U.S. 366 (1949). Here, the insurance company, who had insured a claim for injuries suffered by reason of the negligence of a postal worker was allowed to sue the United States in its own name on its subrogation of the bank employee's claim.

The case has been cited by the court as authority for a liberal construction of the Act in United States v. Yellow Cab Co., supra note 19.

Insurance Co. of North America v. United States, 76 F. Supp. 951 (D.C. Va. 1948), held that the failure to include subrogated insurers in the exceptions contained in § 2680 of the Act evidenced Congressional intent not to exclude such insurers from suit under the Act. See also the Chicago, Rock Island and Pacific Railway Co. v. United States, 220 F.2d 939 (7th Cir. 1955).
49. The titles of various sections of the act make this clear: e.g. § 1346, United States as defendant; § 1402, United States as defendant; § 2401, Time for commencing action against United States; and etc.

The government may be named as a third party plaintiff or as a third party defendant where liability arises under the Act. United States v. State of Arizona, 214 F.2d 389 (C.A. Ariz. 1954).
the federal government, and the United States must be named as a party defendant to the action.\(^{50}\)

It has been determined that the United States may be impleaded as a third-party defendant and held liable for contribution as a joint tortfeasor where such a joinder is permitted by the local law.\(^{51}\) The United States may receive contribution on the same basis from a citizen who is a joint tortfeasor.\(^{52}\)

Where, however, the government is sued under the Act for the negligence of one of its employees, it may not lodge a third-party complaint against the negligent employee in order to recover indemnification for its liability, nor may it sue to recover from the employee in a separate action.\(^{53}\)

\(^{50}\) Wickman v. Inland Waterways Corporation, 78 F. Supp. 284 (D.C. Minn. 1948).


In the Yellow Cab case, a taxicab collided with a mail truck, and a streetcar collided with a military vehicle. Suits were brought in both cases by passengers, and the United States was impleaded as a third party defendant. The court rejected any implication from the legislative history that such a result was not contemplated by Congress, and pointed out the injustice which would be inherent in a situation where the United States could join a citizen and the citizen could not do the same. The opinion concluded that the F.T.C.A. made the federal rule for third party practice applicable in the case at bar.

It has been held that the Act, in providing that the United States is to be treated as any other tortfeasor, made the federal rules of civil procedure applicable to the government. Bently v. United States 16 F.R.D. 237 (D.C. Ga. 1954); Evans v. United States, 10 F.R.D. 255 (D.C. La. 1950).

The Yellow Cab case has been cited as authority for the converse proposition that jurisdiction exists under the Act to allow an affirmative judgment for the United States on a counterclaim. United States v. New York City Omnibus Corp., 128 F. Supp. 86 (S.D. N.Y. 1955).


In the Gilman case, a federal employee injured complainant, who sued the government. The government filed a third party complaint against the employee and recovered judgment over against the latter for the amount of its liability. The Circuit Court of Appeals reversed this judgment on the basis of § 2076 of the Act, which provides for the extinguishment of the liability of the employee upon recovery of judgment against the United States. 206 F.2d 846 (9th Cir. 1953).

It might be noted that § 2076 only purports to extinguish this liability as to the claimant. The decision of the court of appeals is criticized by Prof. Seavey in 67 Harv. L. Rev. 994, 1001 (1954).

On appeal, the court, by unanimous decision, affirmed the court of appeals, but upon a different basis. Determining that there was no express authority for such indemnity given by Congress, the court concluded that it could not be found by reference to the common law due to the unique relationship between the government and its employees.

This overruled an earlier district court decision to the contrary in Burks v. United States, 116 F. Supp. 337 (D.C. Tex. 1953).
3. Limitation and Bars to Action

(a) Statute of Limitations

The original one year limitation contained in the Act was amended in 1949, and extended to two years in order to make it more in accord with other prevailing statutes of limitation. Thus, while a claimant sues the United States on the basis of local negligence law under the Federal Tort Claims Act, the duration accorded to him in which he may bring an action is controlled by the two year limitation provision contained in the Act, excluding any application of a local time limit. The action, for this purpose, is viewed as accruing on the date of the injury, and not when the act of negligence occurs, if there is any discrepancy between these two occurrences. The time limitation contained in this provision, however, does not apply to the bringing of a counterclaim where suit is filed by the government; and where a proper party has already filed suit, the real party in interest may enter that suit after two years has run.

There has been a conflict in the decisions of the lower courts regarding whether or not the statute of limitations continues to run against a claim when the claimant is prevented from bringing his action for various reasons, such as disability or absence from the United States. One district court has held that the two-year statute applies without exception. In another district, however, it has been held that a claimant has three years after the termination of his disability in which to bring his action. These two decisions cannot be reconciled, and a

54. 63 STAT. 62 (1949), 28 U.S.C. § 2401 (b) (1952), providing: "A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later, . . ."

55. It was found by the House Committee on Judiciary that the then combined average of state statutes of limitation (including the District of Columbia) was 2.92 years, and that those contained in other federal tort statutes averaged 2.2 years. U.S. CODE CONG. SERV. 1949, Vol.2, p. 1226., 81st Cong., H. R. 276, March 21, 1949.


57. Garnes v. United States, 186 F.2d 648 (10th Cir. 1951), where the act complained of took place on March 22, 1944, but the injury thereby caused did not arise until February 2, 1945. Held, the action accrued on the latter date. See also Bizer v. United States, 124 F. Supp. 949 (D.C. Cal. 1954).


61. Glenn v. United States, 129 F. Supp. 914 (S.D. Cal. 1955). This result was achieved by construing together 28 U.S.C. § 2401 (a), which provides for a general six year limitation on civil actions against the United States, but which also makes provision for persons under a disability or beyond the seas, when the claim accrues, to sue within three years after the termination of the disability, and 28 U.S.C. § 2401 (b), which provides the two year tort limitation. The court indicated that a revision, which combined the two once independent provisions, demanded that they be read together.

The result in the instant case seems manifestly more just than that in Whalen v. United States, supra note 60, although the reasons presented are not strong.
decision by a higher court will be required to determine the problem.

If a claimant, on a claim for less than $1000, properly presents it for administrative adjustment with the proper agency, then he has six months after final disposition of the claim by the agency, or withdrawal of the claim from the agency's consideration, in which to begin his action.63

(b) Other limitations

When a claim has been filed for administrative adjustment, action may not thereafter be brought on that claim unless it is withdrawn first, by giving fifteen days notice to the agency.64

Where a claim has been submitted to an agency for administrative adjustment, an action may not thereafter be instituted for a sum in excess of the claim presented to the agency, unless there is new evidence not reasonably discoverable at the time the claim was presented to the agency.65

(c) Bars to action

Any judgment received on a claim under the act constitutes a complete bar to a subsequent action on the same subject matter, both for the government and for the employee.66 Any administrative award, compromise, or settlement has the same effect.67 Where a release is given, the validity of that instrument should be determined under the law of the locale where it is given, unless it was given with a view to performance somewhere else.68

4. The Basis of Liability

In order to create liability on the part of the United States, two distinct and reasonably separable elements must appear from the Federal Tort Claims Act. First, the wrongful conduct complained of must have been committed by an employee of the government while acting within the scope of his office or employment. Secondly, he must have caused some injury to person or property, or death, by some negligent or wrongful act or omission under circumstances where if a private person had committed a like act or omission, he would be liable in accordance with

67. See Air Transport Associate v. United States, 221 F.2d 467 (9th Cir. 1955); Rushford v. United States, 204 F.2d 831 (2d Cir. 1953).
the law of the place wherein it occurred.\(^a\)

(a) Agency

Liability having been made dependent upon the offending person being an employee of the government, the Federal Tort Claims Act has defined "employee of the government" as "... officers or employees of any federal agency, members of the military ... and persons acting on behalf of any federal agency in an official capacity, ... ''.\(^b\)

(1) Federal agency

This limitation of the applicability of the Act to employees of federal agencies, of course, raises the problem as to what is a federal agency. It is defined in the Act as encompassing almost any instrumentality of the government except independent contractors.\(^c\) This definition has been held to be applicable to the administrative adjustment provision of the Federal Tort Claims Act only, however, and is considered inapplicable to the liability provisions.\(^d\) Thus, in distinguishing between a federal agency and an independent contractor, the determination has been left largely to the courts. The results in the various adjudications concerning this issue tend to indicate that two factors mainly regulate the identification of an instrumentality of the federal government. These are that it has the power of direction and control over the activity, and that it is the beneficiary or object of the service rendered.\(^e\)

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68. 28 U.S.C. §§ 1346(b), 2674 (1952).
70. 28 U.S.C. § 2671 (1952) provides that the term is to include "executive departments and independent establishment of the United States, and corporations primarily acting as instrumentalities or agencies of the United States."
72. (a) Cases where the federal government does not derive enough benefit, nor exercise sufficient control over the activity to make the instrumentality a governmental agency within the meaning of the act are: Clark v. United States, 218 F.2d 446 (9th Cir. 1954), where a railroad was seized by executive order for the sole purpose of preventing strikes during a period of emergency; Lauvitt v. United States, 177 F.2d 627 (C.A. Conn. 1949), where inspectors were appointed by a local committee to inspect stored crops in connection with application to the Department of Agriculture and Marketing Administration for the purpose of making a loan thereon; Faleni v. United States, 125 F. Supp. 630 (E.D. N.Y. 1949), involving a Navy ship service department; and McCranie v. United States, 199 F.2d 581 (5th Cir. 1952); Dover v. United States, 192 F.2d 431 (5th Cir. 1951); Williams v. United States, 189 F.2d 607 (10th Cir. 1951); Lederhouse v. United States, 128 F. Supp. 217 (W.D. N.Y. 1954); Stacher v. United States, 101 F. Supp. 919 (W.D. S.C. 1952); Glasgow v. United States, 95 F. Supp. 213 (N.D. Ala. 1951); and Mackay v. United States, 88 F. Supp. 686 (D.C. Conn. 1949), involving National Guard units not called up by the federal government, but which are under the direction of their respective states.
(b) Cases where the federal government does derive the benefit of the service and does exercise sufficient control over the conduct of the activity are: State of
(2) Employee of the government

The problem of determining whose employee the offending person is has been presented in a number of cases. Since the Federal Tort Claims Act only defines the term as an employee of a federal agency, this determination has also been left largely to the courts. The decisions have been in accordance with the common law principles of agency for the most part. It has been held that the "loaned servant" doctrine is applicable under the Act, but there has been some conflict concerning this.72 Apparently the test is whether or not the employee is primarily serving the federal government when the tort is committed.73

It has also been held that the United States may be liable where the negligence of some employee is proven, but the employee is not identified, on the basis of res ipsa loquitur.74

Md. for Use of Pumphrey v. Manor Real Estate & Trust Co., 176 F.2d 414 (C.A. Md. 1949), where a real estate firm was engaged to take charge of apartment houses leased by the Federal Public Housing Authority and was subject to detailed supervision by the Authority; O'Toole v. United States, 206 F.2d (3d Cir. 1953), involving the National Guard of the District of Columbia, which is under the federal chain of command; and Wickman v. Inland Waterways Corporation, supra note 50, involving the Inland Waterways Corporation, a federal corporation.

(c) Cases which indicate that mere financial sponsoring of the activity is not a controlling factor are cases involving instrumentalities sanctioned by the government, but not directly financed by Congressional appropriation, or the so called "nonappropriated fund" activities. It has been held that a military base exchange is an agency for the purposes of the act. Daniels v. Chanute Air Force Base Exchange, 127 F. Supp. 920 (E. D. Ill. 1955). It has also been ruled by the Comptroller General that Post Exchanges and similar nonappropriated fund activities are instrumentalities of the United States. 24 Comp. Gen. 771 (1945). A civilian swimming pool on an Air Force base, which was constructed, maintained and operated by government agents, was held to be a government agency. Brewer v. United States, 108 F. Supp. 889 (D. C. Ga. 1952).

73. Fries v. United States, 170 F.2d 726 (6th Cir. 1948). See also Cobb v. United States, 81 F. Supp. 9 (W.D. La. 1948), where an R.O.T.C. instructor was considered as a servant loaned to the school where he taught.


In Roger v. Elrod, 125 F. Supp. 62 (D. C. Alaska 1954), where an airman was acting for the base exchange, the government was held liable because he was an employee of the United States, and not because the exchange was a governmental agency.

74. Where a member of the National Guard is paid out of federal funds and is primarily concerned with the maintenance of government owned equipment assigned to the unit, then he is a federal employee. United States v. Duncan, 197 F.2d 233 (5th Cir. 1952); Elmo v. United States, 197 F.2d 230 (5th Cir. 1952); United States v. Holly, 192 F.2d 221 (10th Cir. 1951).

Where, however, such an employee is actually performing a duty for the National Guard unit, he is not, during that time, an employee of the government. Watt v. United States, 123 F. Supp. 906 (E.D. Ark. 1954).

It has been determined that a federal district judge and his trustees in bankruptcy are not employees of the government within the contemplation of the F.T.C.A. Cromelin v. United States, 177 F.2d 275 (C.A. Ga. 1949).

75. United States v. Hull, 195 F.2d 64 (1st Cir. 1952).
(3) Scope of employment

Since the only definition of scope of employment provided by the Act deals with military personnel acting in the line of duty, a question which obviously could not be determined under local law, it would seem fairly clear that local law should control the determination of whether or not the employee, not a member of the military personnel, was acting in the scope of employment when the tort was committed under the liability provisions of the Federal Tort Claims Act. There is a conflict among the courts of appeals, however, which has not been resolved by the Supreme Court, as to whether local or federal law should control this determination.

Clearly, the United States cannot be held liable under the Act unless the employee was acting within the scope of employment, and for the purpose of determining liability under the Act, "line of duty" and "scope of employment" are synonymous. It must be affirmatively established that the negligent employee was acting within the scope of employment, and a mere showing of negligence

77. 28 U.S.C. §§ 1346(b) and 2674 (1952), provides that the United States shall be liable in the same manner and to the same extent as a private individual under like circumstances.

Three circuits have indicated that the federal law should govern: Fourth Circuit: United States v. Eleazer, 177 F.2d 914 (1949), and United States v. Sharpe, 189 F.2d 239 (1951); Fifth Circuit: Hubsch v. United States, 174 F.2d 7 (1949); Tenth Circuit: Williams v. United States, supra note 72, and United States v. Holly, supra note 74.

It is noteworthy that in Williams v. United States, 215 F.2d 800, 807 (9th Cir. 1954), the court cited a case favoring the application of federal law. The Supreme Court granted certiorari, 348 U.S. 926 (1955), and remanded the case for consideration of the state law on respondeat superior. 350 U.S. 867 (1956). This may serve to indicate what the court may do when it is finally confronted with a case requiring the determination of this question.

For an exhortation on this problem, see Scope of Employment Under the Federal Tort Claims Act, 23 TENV. L. REV. 270 (1954).
in the use of a government owned instrumentality is not sufficient. The dangerous instrumentality and owners’ liability doctrines have not been allowed to relieve the plaintiff of this burden.

Where a privately owned instrumentality is used for the purpose of carrying out an official duty, it does not prevent the employee from having acted within the scope of employment, if the government can reasonably be assumed to have contemplated its use. Where, however, this assumption cannot reasonably be made, the United States will not be liable.

In the case of a deviation from instructions by an employee, if the deviation is not a substantial one, the United States will be held liable. Where, however, the deviation is so substantial that the employee has ceased to serve the master, the government is relieved of liability. After such a deviation, a re-entry into the scope of employment will renew the government’s liability, but only if the employee is fit to resume his duties.

The government may be liable for the use of force by the employee, and such force will not remove the employee from the scope of employment, where the government may have reasonably contemplated that force would be used.

Misleading actions of agents lawfully authorized to bind the United States may estop the government from denying the effectiveness thereof, if they are within the scope of authority. But persons dealing with government agents are held to have notice of the limits of their authority, and the government is not bound by acts of agents beyond the scope thereof, nor is it liable to pay for benefits derived therefrom.

82. Curtis v. United States, 117 F. Supp. 312 (D.C. Cal. 1954). See also Rolon v. United States, supra note 81, where proof that a mortar shell was abandoned in a public road was not enough, in absence of showing that it was left there by a government agent acting in the scope of employment.

83. Hubsch v. United States, supra note 78.


86. Murphey v. United States, supra note 78.


89. Rosa v. United States, 119 F. Supp. 623 (D.C. Hawaii 1954), where a military driver, upon his re-entry into the limitations of employment, was sleepy due to his drinking of beer. Held, the United States was not liable.


91. Smale & Robinson, Inc. v. United States, 123 F. Supp. 457 (D.C. Cal. 1954). Here, the Director of Internal Revenue, who had authority to make rules concerning the formalities to be observed in filing for a refund of excess profits tax paid, misled a taxpayer into believing that a certain formality did not need to be complied with. When the Director refused to make a refund because of non-compliance, it was held that the government was estopped to assert the formality.
(b) The tort

Title 28, Section 1346 (b) of the United States Code provides that the district courts shall have jurisdiction of claims against the United States for injury "caused by the negligence or wrongful act or omission of any employee of the government . . . 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." Section 2674 of that title provides: "The United States shall be liable . . . in the same manner and to the same extent as a private person under like circumstances . . . ."

One of the areas which has created the greatest confusion under the Federal Tort Claims Act has been the construction and effect to be given to these two provisions. It seems fairly clear that Section 1346 (b) was intended to serve as a test of liability only and does not go to the jurisdiction.22

(1) Construction

The purpose of these provisions was to make the government liable, with exceptions, for common law torts committed by its agents where a private individual would be liable.22 They were meant to describe the kind of liability intended and not the limits of liability under Federal Tort Claims Act,24 as some decisions have erroneously supposed.25 Thus, although it has been suggested that the provisions should be given a narrow construction favorable to the sovereign,26 it seems sounder to hold that, in light of their beneficial purposes and definitive rather than limiting nature, they should be given a liberal construction and the exceptions should be strictly construed.27

(2) Law governing

While federal law controls the time within which one must sue and when a cause of action arises under the Act, these provisions make it clear that the tort law of the place where the tort is committed is to control the substantive determination of whether such a cause exists, the nature and extent of recovery permitted

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23. Senate Hearings before the Subcommittee of the Committee on Judiciary on S. 2690, 76th Cong., 3d Sess. 34 (1940).
and the substantive merit of a counterclaim, but not the right to counterclaim, which is a procedural matter."

It has been held that where there was a negligent act in Virginia which caused damage and injury in the District of Columbia, the law of Virginia should control the measure of liability, over a dissent proclaiming that this was in conflict with the general conflicts law."

(3) Theory of liability

The Supreme Court has held that there must be a "negligent" or "wrongful" act in order to create governmental liability because of the usage of those terms in Section 1346 (b) of the Act, and that therefore there can be no recovery without proof of such an act under the doctrine of Rylands v. Fletcher or any other theory of strict liability. If the Federal Tort Claims Act is to be construed with any liberality at all, this decision is, at best, unimaginative. The purpose of these provisions being primarily to define generally the liability of the government, rather than to limit it narrowly, emphasis should be placed upon "if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred" and "in the same manner and to the same extent as a private person under like circumstances." Further, Section 1346 (b) is concerned primarily with jurisdiction, while Section 2674 is entitled as and is primarily concerned with a definition of liability. The latter provision makes no mention of a "negligent" or "wrongful" act and, in case of a substantive difference in the two provisions, should prevail as to matters of liability. Neither is there any indication that Congress used the term "wrongful act or omission" in a strict sense. Moreover, while the activity involved in a strict liability situation is not


100. Dalehite v. United States, 346 U.S. 15 (1953), involving litigation arising out of the Texas City disaster of 1947. To a charge based upon the inherently dangerous character of certain nitrates being loaded by the government, the court said, 346 U.S. at 45: "... the statute requires a negligent act. So it is our judgment that liability does not arise by virtue either of United States ownership of an 'inherently dangerous commodity' or property, or of engaging in an 'extra-hazardous' activity ... the Act does require some brand of misfeasance or nonfeasance, and so could not extend to liability without fault ..." See Heuser, Dalehite v. United States, A New Approach to the Federal Tort Claims Act? 7 VAND. L. REV. 175 (1954); notes in 66 HARV. L. REV. 488 (1953); 45 ILL. L. REV. 791 (1953); 27 IND. L.J. 121 (1951); 52 MICH. L. REV. 733 (1951).

101. Emphasis added.
technically a wrongful act, in the sense that it is the act which creates liability, it is wrongful. Such a construction does not seem unreasonable in the light of Congress' expressed intention to create liability for common law torts.

The Court, in a subsequent holding, has denied certiorari in a case where the government was held liable on a theory of statutory absolute liability. There seems to be no valid distinction between statutory and common law absolute liability, and this decision may indicate that the Court will not adhere to the former doctrine in the future.

The greatest difficulty, however, has turned on the phrases "if a private person would be liable" and "in the same manner and to the same extent as a private person under like circumstances." The only clear examples of what was contemplated by Congress are found in automobile accident cases, but it seems perfectly clear that the provisions were not intended to be limited to these. The difficulty has arisen principally out of situations where the tort was committed in the course of performing a function peculiar to the government, or where there was a distinctively governmental relationship involved.

In *Feres v. United States*, military personnel received injuries out of their service, and it was held that there could be no recovery because of the "distinctively federal" nature of their relationship to the government, and that the purpose of the Federal Tort Claims Act was not to create "novel unprecedented liabilities." It seems clear that, absent the military relationship, liability would be imposed up-

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102. United States v. Praylou, 208 F.2d 291 (4th Cir. 1953), *cert. denied*, 347 U.S. 934 (1954), where plaintiff recovered under a South Carolina statute imposing strict liability for damages caused by an airplane crash upon the owner of the aircraft. It was attempted to be distinguished from the Dalehite case, *supra* note 99, on the basis that the court's decision had directed at possession of dangerous property rather than at a specific statute imposing strict liability. Much emphasis was placed upon the language of the F.T.C.A. imposing the liability of a private individual under like circumstances upon the government. *Cf.* Parcell v. United States, 104 F. Supp. 110 (S.D. W. Va. 1951).

Before the denial of certiorari in the Praylou case, the Dalehite theory was followed in Strangi v. United States, 211 F.2d 305 (5th Cir. 1954).


104. 340 U.S. 135 (1950) affirming *Feres v. United States*, 177 F.2d 535 (2d Cir. 1949), involving the death of an Army officer due to negligence in quartering him in unsafe barracks; Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949), involving a negligent operation by an Army surgeon upon a military person; and reversing Giggs v. United States, 178 F.2d 1 (10th Cir. 1949) involving similar malpractice. *Cf.* Archer v. United States, 217 F.2d 548 (9th Cir. 1954).

See also Sigmon v. United States, 110 F. Supp. 906 (D.C. Va. 1953), where the Feres reasoning was followed to deny recovery to injured federal prisoners, as it was in Shew v. United States, 116 F. Supp. 1 (D.C. N.C. 1953).
on the government. In Dalekite v. United States it was held that the government could not be liable for negligence in firefighting because there was no analogous liability in private tort law and because there could be no theory of governmental liability under the Federal Tort Claims Act arising from "acts of governmental nature or function."

These decisions have presented four possible theories of liability: (1) that the United States, like municipal corporations, is liable for torts committed while performing a "proprietary" function, but not for those committed while performing a "governmental" function; (2) that the government is liable where a private person would be so liable under exactly the same circumstances, while performing exactly the same act under local law; (3) that the United States is liable where a private person would be liable under like or analogous circumstances or for doing the same act, but not where there is no analogous private circumstance or relationship giving rise to liability; and, (4) that the government is liable for all wrongs committed by it except where an exception is specifically made in the Act on the basis of expressio unius est exclusio alterius.

After nearly a decade of unclear and indecisive action on the part of the Supreme Court, during which it has been justly complained that the Federal Tort Claims Act has been limited to a motor vehicle accident law by judicial interpretation, the Court has finally admitted that the Act was intended to constitute a waiver of governmental tort immunity. The Court, in Indian Towing Company, Incorporated v. United States, seemingly has finally settled this area of law

105. In Brooks v. United States, supra note 21, it was held that servicemen could recover for injuries received from other military personnel when the relationship did not exist because they were on leave; in Costly v. United States, 181 F.2d 723 (6th Cir. 1950), a non-military patient was allowed recovery for malpractice suffered at a military hospital; and in Brown v. United States, 99 F. Supp. 685 (D.C. W. Va. 1951), a sailor on leave who drowned in government swimming pool was allowed recovery.

106. Supra note 99. See also Rayonier v. United States, 225 F.2d 642 (9th Cir. 1956) where recovery was denied for negligent fire fighting on the same basis; and National Manufacturing Co. v. United States, 201 F.2d 263 (8th Cir. 1954), cert. denied 347 U.S. 967 (1954), where recovery was denied for injuries arising from an erroneous flood forecast. But see Mid-Central Fish Co. v. United States, 112 F. Supp. 792 (D.C. Mo. 1953).


108. For the difficulties and inconsistencies of this theory, see note 11, supra.


110. See Gellhorn and Lauer, supra note 16, 29 N.Y. U. L. Rev. at 1326.

111. Note 11 supra. The action had been dismissed in the district court as being cognizable only under the Suits in Admiralty Act, and this judgment was affirmed by the Court of Appeals, Indian Towing Co. v. United States, 211 F.2d 886 (6th Cir. 1954). Cerbiorari was granted "because the case presented an important aspect of the still undetermined extent of the government's liability" under the F.T.C.A., 348 U.S. 810 (1954). In the first hearing, it was affirmed by an equally divided court, 349 U.S. 902 (1955). A petition for rehearing was granted, 349 U.S. 926 (1955), and the prior judgment was vacated. Noted in: 1 Howard L.J. 128 (1955); 42 A.B.A.J. 68 (1956); 26 Fordham L. Rev. 167 (1956); 2 Howard L.J. 159 (1956); 54 Mich. L. Rev. 875 (1956); 27 Miss. L.J. 252 (1956); 2 N.Y.L. Forum 223 (1956); 31 Notre Dame L. Rev. 306 (1956); 30 St. John's L. Rev. 301 (1956); 9 F.R.D. 143 (1956).
under the Act and adopted the third theory above. The Indian Towing Company case held that the government was liable for the negligent operation of a lighthouse even though a statute made such operation an exclusively governmental act.112 The court emphasized that liability "as a private individual under like circumstances" does not depend upon the presence or absence of identical private activity and, recognizing that the Act has specific limits, decided that "all governmental activity is inescapably 'uniquely governmental' in that it is performed by the government."113 Thus, the Court rejected any theory of liability for torts committed in the performance of a "proprietary" function only, and made the test of liability dependent upon whether there was an analogous or "like" liability in private tort law. The court also rejected the second theory above, stating that Congress did not intend to "predicate liability upon such a completely fortuitous circumstance . . . the presence or absence of identical private activity."

Voluntarily undertaking to give warning of dangerous conditions, upon which warnings the public comes to rely, will involve liability against the volunteer in nearly all American jurisdictions and at common law, where he negligently performs the undertaking.114 Even though only the government may operate a lighthouse, there is no reason why it should not be liable on the same basis under the language of the Federal Tort Claims Act. Unlike the Feres and Dalehito cases, here there would be liability on the part of a private individual under "like" circumstances.115

Thus, the liability of the United States, as with any private individual, is dependent upon the tort law of the jurisdiction wherein the tort occurred, and it follows therefore that the usual test as to duty of care and causation are to be applied to subject the government to liability when a private individual would be liable under like circumstances.

112. 14 U.S.C. § 83 (1952) prohibits private individuals from operating navigational aids and makes such operation an exclusively governmental function.
114. A case indicating the close analogy is Erie Railway Co. v. Stewart, 40 F.2d 885 (6th Cir. 1930), where defendant undertook to warn the public of dangers at its crossing and then, without notice to the public, withdrew the warning. Held, defendant was liable to plaintiff for damages thereby sustained Cf. Revilocqua v. United States, 122 F. Supp. 493 (D.C. Pa. 1954).
115. The Argument of the Feres case has been distinguished or denied, and the government held liable under the P.T.C.A. for: exploding a nuclear device, Bullock v. United States, 133 F. Supp. 885 (D.C. Utah 1955); negligently guarding a sunken vessel, Somerset Sea Food Co. v. United States, 193 F.2d 631 (4th Cir. 1951); negligently protecting a parking lot, Carr v. United States, supra note 90; and negligently operating an airport control tower, Air Transport Associates v. United States, supra note 67, and Eastern Airlines v. Union Trust Company, supra note 99.
Certiorari was denied in the last mentioned case upon the basis of the Indian Towing Co. case, Union Trust Company v. United States, supra note 99.
See also Eastern Transport Co. v. United States, 272 U.S. 675 (1927), where the United States was held liable for the performance of a purely "governmental" function.
(4) Special doctrines of negligence

Since the United States is liable in accordance with the substantive private tort law of the locale where the tort was committed, it has been determined that a number of state special doctrines involving liability for negligence are applicable to the government.

It has been held that the common law maxim that one must so sue his property so as not to injure that of another is applicable to the United States, and sufficient to raise an inference of failure to use due care so that the burden of going forward with the evidence is shifted to the government.116 It has also been determined that the burden of going forward with the evidence may be shifted by local doctrines of res ipsa loquitur.117 The doctrine of imputed negligence is also applicable to the government.118

Where the plaintiff was within the class of persons intended to be protected, and the harm was such as was intended to be prevented, violation of a state statute may, of itself, be sufficient negligence upon which to predicate the government's liability.119

It has also been held that the liability of the United States may be predicated upon the doctrine of last clear chance,120 and upon this basis it may be expected that the humanitarian doctrine and other similar rules of law may be the bases of federal liability.


117. United States v. Johnson, 181 F.2d 57 (C.A. Ga. 1950); D'Anna v. United States, 181 F.2d 335 (C.A. Md. 1950); Hampton v. United States, 121 F. Supp. 303 (D.C. Nev. 1950). In Williams v. United States, 218 F.2d 473 (5th Cir. 1955), plaintiff did not sufficiently make out a res ipsa case when he showed that the defendant had exclusive control of the thing causing injury and superior knowledge or means of information, but failed to show that the accident would not have occurred in the ordinary course of events if the defendant had exercised due care. Apparently, the three elements usually necessary in res ipsa cases are required:

1. that the defendant be in a better position to show what happened;
2. that the defendant have exclusive control of the instrumentality; and
3. that the injury would not ordinarily occur in the course of events but for negligence.


119. Stewart v. United States, 186 F.2d 627 (7th Cir. 1951), violation of a statute providing means to be employed in the storage of explosives; Desch v. United States, 186 F.2d 623 (C.A. Ill. 1951), where a truck was driven in violation of the maximum width permitted by statute; Combs v. United States, 122 F. Supp. 280 (D.C. N.C. 1954), where statute providing for speed zone through construction area was violated.

120. Combs v. United States, supra note 119.
It has also been held that the attractive nuisance doctrine may be invoked to hold the government liable where children were attracted to the nuisance.¹²¹

The government may come into special relationships with claimants which will impose a duty of care and liability upon it accordingly. Thus, the United States may become liable as a bailee to exercise the degree of care required of such a bailee in the state wherein the bailment existed.¹²² Recovery, on the other hand, has been denied for the death of a passenger in a government aircraft on the ground that he was a gratuitous passenger.¹²³ Also, the government's liability as a possessor of land, and the duty and degree of care owed by it to persons coming upon the land, is dependent upon the classification of the claimant's relationship to the government at the time of the accident.¹²⁴

5. Defenses and Exceptions to Liability

(a) Defenses

Title 28, Section 2674 of the United States Code only waives immunity from suit in cases based on tort claims in the same manner and to the same extent as a private individual under like circumstances, and does not deny to the United States available defenses which a private individual may have under like circum-

¹²¹ Meara v. United States, 119 F. Supp. 662 (W.D. Ky. 1952). The doctrine has been applied even where the parents were contributorily negligent, Beasley v. United States, 81 F. Supp. 518 (E.D. S.C. 1948); but not where there was no showing of knowledge of the dangerous condition or of negligence on the part of the government, United States v. Inmon, supra note 98.


¹²³ Cf. Archer v. United States, 217 F.2d 548 (9th Cir. 1954), cert. denied 348 U.S. 953 (1956), involving the death of a West Point Cadet while on leave. The court also relied upon the doctrine of the Feres case. See also United States v. Westfall, 197 F.2d 765 (C.A. Wash. 1952), where the passenger in a government vehicle was not considered as a guest and denied recovery.

¹²⁴ The cases indicate that the usual classifications of this relationship are generally adhered to, and the liability imposed accordingly. A "trespasser" or "licensee" may only recover for injuries when they were sustained by reason of wanton or willful negligence, or intentionally inflicted, Firfer v. United States, 208 F.2d 524, 95 U.S. App. D.C. 216 (1953), involving a hole in a grass plot; Lem v. United States, 89 F. Supp. 815 (D.C. D.C. 1950), involving a hole abutting a concrete gutter. See also Ford v. United States, supra note 98; Denny v. United States, 186 F.2d 108 (10th Cir. 1950); Floras v. United States, 105 F. Supp. 640 (D. N.M. 1952). An "invitee" or "business guest" is owed a duty of reasonable or ordinary care, Gaitskill v. United States, 129 F. Supp. 621 (D.C. Kan. 1955), involving a snow covered ramp; Brewer v. United States, supra note 72, involving unsafe conditions about a government swimming pool; Phillips v. United States, 102 F. Supp. 943 (D.C. Tenn. 1952), and Blaine v. United States, 102 F. Supp. 161 (D.C. Tenn. 1952), involving dangerous conditions on government premises. See also White v. United States, 97 F. Supp. 12 (D.C. Cal. 1951). It has also been held that an employee of an independent contractor is owed the degree of care due to an invitee, Clarke v. United States, 115 F. Supp. 14 (D.C. Md. 1953).
Thus, contributory negligence may constitute a valid defense to an action under the Federal Tort Claims Act, except where the government is charged with wanton or wilful negligence. Likewise, if the claimant can be found to have assumed the risk, his action will thereby be defeated. Although no cases appear to have considered the question, and it is probably decided by the Federal Employees Compensation Act, it would follow that the fellow servant doctrine would be applicable. Also a suit may be defended upon the basis that the injury was caused by an Act of God.

(b) Exceptions

(1) Generally

Title 28, Section 2680 of the United States Code contains a number of specific exceptions to the liability of the United States in tort. Other than the discretionary exception which is included in the first of these, they have, as a whole, presented little difficulty to the courts.

Among the more important of these exceptions, which have not already been discussed, is the bar to claims based on the so-called intentional torts. This exception does not preclude recovery against the United States for negligence in the failure to supervise a ward who commits an assault against the claimant, since it only applies to assaults made by an employee of the government. It has

129. State Road Department of Fla. v. United States, supra note 116 involving damage caused by a severe wind.
132. Held to be assaults within the meaning of the exclusion were: operating without the claimant's consent by a government surgeon, Moos v. United States, 225 F.2d 705 (8th Cir. 1955); the use of excessive force in the making of an arrest by a government agent, Stepp v. United States, 207 F.2d 909 (C.A. Va. 1953), cert. denied 347 U.S. 933 (1954), and Lewis v. United States, 194 F.2d 689 (C.A. N.J. 1952); use of third degree tactics by a government agent, United States v. Hambleton, 185 F.2d 564 (C.A. Wash. 1950).
been held that this exclusion precluded recovery for damages suffered by reason of inaccurate flood reports because they constituted a misrepresentation.\footnote{133} Other important exceptions to liability include false arrest and imprisonment,\footnote{134} and interference with contract rights.\footnote{135}

The government cannot be held liable for the act or omission of any employee committed in the execution of any statute or regulation with due care, whether or not the statute or regulation is valid.\footnote{136}

Actions for the torts of the Tennessee Valley Authority,\footnote{137} and claims arising out of the combat activities of the armed forces during time of war\footnote{138} are also precluded from the scope of liability under the Act; and since the Panama Canal Company operates out of its own earnings rather than appropriated funds, and is subject to suit in tort as well as contract as a corporation, Congress excluded it from the operation of the Federal Tort Claims Act.\footnote{139}

\footnote{133} National Mfg. Co. v. United States, \textit{supra} note 106. The exception has been held to include negligent misrepresentations, Clark v. United States, 218 F.2d 446 (9th Cir. 1954); and wilful misrepresentation and deceit, Jones v. United States, 207 F.2d 563 (C.A. N.Y. 1953), \textit{cert. denied} 347 U.S. 921.


\footnote{135} For general application, see Nicholson v. United States, 177 F.2d 768 (C.A. Ga. 1949); Fletcher v. Veterans Administration, 103 F. Supp. 654 (D. C. Mich. 1952).


\footnote{137} For general application of this exception, see U.S. \textit{ex rel.} and for Use of Tennessee Valley Authority v. Lacy, 116 F. Supp. 15 (D.C. Ala. 1953).

\footnote{138} "Combatant Activities" within the meaning of this exception have been variously defined as: both physical violence and activities necessary to, and in direct connection with, actual hostilities, Brooks v. United States, 337 U.S. 49 (1949); activities which by their very nature should be free from the hindrance of a possible damage suit, Johnson v. United States, 170 F.2d 767 (C.A. Wash. 1948). See also Trover v. United States, 79 F. Supp. 558 (D.C. Mo. 1947), \textit{appeal dismissed}, 170 F.2d 480 (8th Cir. 1948). However, in the face of the fact that the wrongful act complained of was that of a Veterans Administration doctor in his examination of the complainant, it has been held, in an extremely doubtful decision, that the claim fell within the exclusion because the injury was originally a combat injury and therefore arose out of combatant activities during time of war. Perucki v. United States, 80 F. Supp. 959 (D.C. Pa. 1948).

(2) The discretionary exception

Undoubtedly the most important exception contained in the Federal Tort Claims Act, and at the same time, the most confusing and baffling exception in its application, has been the discretionary exclusion.\textsuperscript{140} Generally, what Congress had in mind was to prevent the use of the Federal Tort Claims Act to test the "propriety of a discretionary administrative act,"\textsuperscript{141} and to prevent its application to plans and programs formulated by high executives from being subjected to suit when they go amiss. However, Congress neglected to define a "discretionary function" and left little record of what it was intended to include, other than that the decisions of regulatory agencies were discretionary functions.\textsuperscript{142} Consequently, the problem of finding a workable test for determining what is and what is not a discretionary function has been left largely to the courts. Seemingly, this problem has proven too much for them, for as yet they have utterly failed to produce a comprehensive and fair definition thereof by the judicial process, and the decisions, as a result, stand in a state of irreconcilable confusion.\textsuperscript{143}

\textsuperscript{140} 28 U.S.C. § 2680 (1952), provided: "The provisions of this chapter . . . 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 . . . whether or not the discretion involved be abused."

\textsuperscript{141} Hearings before Committee on the Judiciary on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess. 44 (1942).


\textsuperscript{143} A large number of cases have applied the exclusion to preclude the government’s liability. Instances where liability has been precluded on this basis are: supervision of migratory workers at a reception center established under federal statute where claimant’s property was stolen, Goodwill Industries of El Paso v. United States, supra note 95; inaccurate weather reporting, National Mfg. Co. v. United States, supra note 106; releasing dangerous mental patients, Smart v. United States, 207 F.2d 841 (10th Cir. 1953), and Kendrick v. United States, supra note 136; corporate losses due to Securities Exchange Commission investigation, Schmidt v. United States, 198 F.2d 32 (7th Cir. 1952); Changing flow of a river and creating a new waterway, thereby damaging claimant’s land, Coates v. United States, 181 F.2d 816 (8th Cir. 1950); Temporary suspension of regulation banning shipments of explosives through port, Pennsylvania Railway Co. v. United States, 124 F. Supp. 52 (D. N.J. 1954); dredging operations to permit berthing of aircraft carriers after launching, F. & M. Schaefer Brewing Co. v. United States, 121 F. Supp. 322 (E.D. N.Y. 1954); inaccurate prediction of flood conditions on river, Western Mercantile Co. v. United States, 111 F. Supp. 799 (W.D. Mo. 1953); Spraying herbicide, Harris v. United States, 106 F. Supp. 288 (E.D. Okla. 1952); aff’d. 205 F.2d 765 (10th Cir. 1953); Decision to remove dead snag, Toledo v. United States, 85 F. Supp. 388 (D. P. R. 1951); Decision of how much water to let over a dam, Olson v. United States, 93 F. Supp. 150 (D. N.D. 1951). One decision which illustrates the danger of the \textit{ad hoc} means of adjudication employed is Dahlstorm v. United States, 129 F. Supp. 772 (D. Minn. 1955), which employed the exception to prevent liability for flying at 100 feet over claimant’s farm, frightening livestock, pursuant to orders to survey. By this decision, it would be a discretionary function to determine whether to drive on the left or right hand side of a busy highway. See notes in 22 GEO. WASH. L. REV. 496 (1954); 23 GEO. WASH. L. REV. 716 (1955).

A large number of cases have also denied the applicability of this exclusion and determined the liability upon local law. Among them are: abandoning a
This confusion led the Supreme Court to a decision in the once leading Dalehite case,144 the inferences of which could completely destroy all governmental liability based on the Federal Tort Claims Act. There, when the government failed to warn subsequent handlers of ammonium nitrate of its dangerous characteristics known to the government, it was held that the United States was not liable because the choice of whether to act or not to act involved discretion. Since every wrongful act of misfeasance or nonfeasance involves not only the discretionary choice of whether to act or not, but also the choice of how to act, if this startling test for the application of the exclusion were to be adhered to, the effectiveness of the Act would be at its obvious end. It seems noteworthy that Congress indirectly expressed its disapproval of the Dalehite decision shortly after its final disposition by assuming compassionate responsibility for the losses involved.145

In the subsequent Indian Towing case,146 the court indicated that some limitation would be observed in applying the exception, but persisted in failing to explain what the limitation would be. There, although they had previously affirmed the court of appeals decision to the contrary, both the majority and minority held, without explanation, that failure to inspect a light-house fell without the exclusion of liability. This decision may probably be regarded as substantially overruling the radical language, if not the holding, in the Dalehite case.147

Perhaps the most intelligible suggestions on this problem have come from legal writers. It has been suggested that the duty to act is inconsistent with the choice of whether to act or not, and that once that duty is found, the discretionary exemption disappears.148 It has also been suggested that a distinction may be made between a primary executive decision as to the undertaking of a course of action, and the subsequent minor decisions involved in the execution of the undertaking, and that Congress only intended that the former decision should be protected by

Coast Guard Tower which was used by children to play where the government should have known of the danger, McGill v. United States, 200 F.2d 873 (3d Cir. 1952); improperly marking a sunken vessel, Somerset Sea Food Co. v. United States, supra note 115; failure to set warning signals during road construction, Hernandez v. United States, 112 F. Supp. 369 (D. Hawaii 1953).


144. Supra note 99. It might be noted that an aggregate of over $2,000,000 worth of claims depended upon the outcome of this case, and the court may have been somewhat motivated by this fact.


146. Supra notes 11, 111.

147. This is borne out by the court's treatment of United States v. Union Trust Co, supra note 99, shortly after the decision in the Indian Towing case, when it was held that the discretionary exclusion would not prevent the government from being held liable for the negligence operation of an airport control tower resulting in a collision of airplanes.

the application of the discretionary exception. Another writer has presented
the proposition that the confusion and inconsistency in the cases can only be
eliminated by looking to the factors which influence the decisions, maintaining
that "discretionary function" defies formal definition.

6. Damages and Judgment

(a) Damages

While there is no limit placed upon the amount of damages which one may
recover under the Federal Tort Claims Act, a claimant may recover only com-
penatory damages which are actually directly suffered by him. There may,
under Section 2674 of the Act, be no recovery for punitive damages although
Congress provided one exception to this when it was discovered that the wrongful
death statutes of two states were interpreted to be of a punitive nature. In
these states, the United States may be liable for punitive damages measured by
the claimant's actual pecuniary injuries.

Damages are to be reduced by any amount which the claimant has received
as compensation therefor under any other remedy from the United States.

It has been held that a maximum limit under a state wrongful death statute
may be applied to limit the liability of the United States.

A reviewing court has the power and duty to review findings as to damages
and to modify them if they are clearly "erroneous" as in any case tried without a
jury.

149. See Comment, 36 MARQ. L. REV. 88, 91 (1952). This solution has been
criticized as merely rephrasing the problem into a question of what is the distinc-
tion between a decision to act and a decision to execute. 66 HARV. L. REV. 448
(1963).

150. See Comment, 66 HARV. L. REV. 488 (1952), indicating that the following
factors are important:

(a) the language of the statute under which the official acts;
(b) the type of discretion involved;
(c) the position which the government employee occupies;
(d) the repercussions of the activity;
(e) the discretionary function as it is defined in other contexts;
(f) the presence of a "governmental function."


152. Heath v. United States, 85 F. Supp. 196 (D.C. Ala. 1949). These may, of
course, include damages which will be suffered in the future, Stuuk v. United

153. Littleton v. Vitro Corp. of America, 130 F. Supp. 774 (D.C. Ala. 1955);

Cong. (1947).


It has been held that the Federal Tort Claims Act, by waiving the government's tort immunity, thereby authorizes the hearing of an action for a declaratory judgment involving the liability of the government under the Act.\textsuperscript{158}

A final judgment against the United States allowing one of several possible remedies constitutes an election of remedies and prohibits any further action against either the government, or the negligent employee.\textsuperscript{159}

III. CONCLUSIONS

After years of legislative struggle, the Federal Tort Claims Act was finally enacted to answer the definite social need which had demanded its birth. Since it was first enacted in 1946, the construction of the Act has undergone enormous liberalization. This liberalization has been attributable in part to the variety of situations which have been presented to the courts in its decade-long history, and in part to the gradual realization by judicial personnel that the ancient principles of sovereign immunity are no longer applicable. The limitations which had been placed upon it by the \textit{Dalehite} case and its predecessors have been erased by the most significant \textit{Indian Towing Company} case. A theory of liability is becoming crystallized which follows the liberal principles that Congress intended to breathe into the Act, and the much abused exemption for discretionary functions at last promises to be limited.

The history of the Act indicates that a more liberal application of it may be expected in the future, so that it will fill the gap in the American juristic system which inspired its creation.

\textbf{RAYMOND R. ROBERTS}

\textsuperscript{158} Pennsylvania Railroad Co. v. United States, 111 F. Supp. 80 (D. N.J. 1953).
STANATORY IMMUNITY AND ITS CONSTITUTIONALITY

The United States Constitutional provision of the Fifth Amendment, "nor shall (any person) be compelled in any criminal case to be a witness against himself . . . ," has been presented in an ever increasing number of important and serious matters. These cases include considerations of the validity of immunity statutes, and their relation to the self-incrimination clause. This problem is not a new one, one of the first and most important cases upholding such an act being decided in 1896. The most recent development is the case of Ullmann v. United States. This decision is not unique in causing controversy, as the self-...

1. If one were to question this, or the reason therefor, it might best be answered by a quotation from the words of Dean Griswold, in his book, THE FIFTH AMENDMENT TODAY (Harvard News Service, 1955) when, at pp. 8-9, he said: "Where matters of a man's belief or opinions or political views are essential elements in the charge, it may be most difficult to get evidence from sources other than the suspect or accused himself. Hence, the significance of the privilege over the years has perhaps been greatest in connection with resistance to prosecution for such offences as heresy or political crimes. In these areas the privilege against self-incrimination has been a protection for freedom of thought and a hindrance to any government which might wish to prosecute for thoughts and opinion alone."

2. The immunity statute presently to be considered is the Immunity Act of 1954, 68 STAT. 745, 18 U.S.C. § 3486 (Supp. II) 18 U.S.C.A. § 3486. Section (c), the pertinent section, reads as follows: "Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by a witness, in any case or proceeding before any grand jury or court of the United States involving any interference with or endangering of, or any plans or attempts to interfere with or endanger, the national security or defense of the United States . . . is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the Court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to any penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence; nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in subsection (d) hereof) against him in any court." (emphasis added)

3. One of the first such statutes upheld was in Brown v. Walker, 161 U.S. 591 (1896). That statute, the Act of February 11, 1893, c. 83, 27 STAT. 443, reads in part: "... no person shall be excused from attending and testifying or from producing books ... and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding."

incrimination clause has been an important issue in many controversial decisions. In the past decade that has become increasingly true, and indications are that this development will continue. Thus, a review of this specific problem relating to the immunity statute would seem to be in order.

A short résumé of the facts of the principal case will present the problem so that its important effect might better be understood and appreciated. In accordance with the provisions of the Immunity Act of 1954, the United States Attorney for the Southern District of New York filed an application for an order requiring Ullmann to testify before a grand jury. Ullmann had appeared before the grand jury, pursuant to subpoena, concerning an investigation of matters relating to "attempts to endanger the national security by espionage and conspiracy to commit espionage." In answer to questions of his knowledge of such activities and of Communist Party membership, Ullmann invoked the privilege against self-incrimination. Proceedings were taken under the Immunity Act of 1954 to require him to answer. The defense offered attacked the constitutionality of the act. The district court sustained the constitutionality of the act, and ordered Ullmann to testify under the authority of the Immunity Act. The Court of Appeals for the Second Circuit dismissed the appeal from the district court order. Ullmann reiterated his refusal to answer questions before the grand jury, and he was then charged and convicted of contempt in the district court. Relying on Brown v. Walker for their opinion, the district court said that it was not their place to overrule authority that "remains unimpaired and its principle . . . firmly imbedded in our Constitutional Law." Before the district court, one of the alleged grounds of constitutionality of the statute was that it afforded no protection against state prosecution based on the forced evidence thus discovered, the reasoning being that since that factor was present, the immunity was an inadequate substitute for the constitutionally guaranteed protection of the Fifth Amendment. In answering this contention, the court relied on United States v. Murdock. It was there quite properly stated that the privilege against self-incrimination cannot be invoked before a federal tribunal where the incrimination would exist under state law. Thus the conclusion was drawn by the court that the immunity need be only as broad as the privilege, and thus there was no need to protect the witness against state prosecution. The remainder of the district court opinion dealt with matters that will later be more fully discussed.

The Court of Appeals for the Second Circuit again affirmed the district court. In affirming, the court said that regardless of any merit the arguments advanced might have, its opinion on the matter was insignificant. The court felt that it could not modify a supreme court doctrine without some trends in that

5. Id. at 499.
7. Id. at 621.
8. 284 U.S. 141 (1931).
9. 221 F.2d 760 (2d Cir. 1955).
direction from the opinions of the court on which to rely. Apparently they found no such trends. It is interesting to note, however, that when the case was last before the court of appeals both concurring opinions expressed doubt as to the validity of the act being reviewed, the opinions, however, resting on different grounds.10

The case was then brought to the Supreme Court because of the importance of the question to be decided, and the decision below, upholding the constitutionality of the act in question, was affirmed. It is the opinion of the Supreme Court that will receive primary consideration in reviewing this problem.

The Supreme Court, in its majority opinion written by Mr. Justice Frankfurter, raised what it considered to be four major issues in making its decision. They were:11 (1) "Is the immunity provided by the Act sufficiently broad to displace the protection afforded by the privilege against self-incrimination?" (2) Assuming arguendo a positive answer to the first question, "Does the Act give the district judge discretion to deny an application for an order requiring a witness to answer relevant questions put by the grand jury, and if so, is the court thereby required to exercise a function that is not an exercise of "judicial power"?" (3) "Did Congress provide immunity from state prosecution for crime, and if so, is it empowered to do so?" (4) "Does the Fifth Amendment prohibit compulsion of what would otherwise be self-incriminating testimony no matter what the scope of the immunity statute?"

In any approach to the problem, there are certain considerations as applied to the privilege against self-incrimination provided by the Fifth Amendment that should be remembered. This provision, the Supreme Court has repeatedly said, is to be given a liberal interpretation.12 And as was stated in the case of Maffie v. United States, if the privilege is thought to be undesirable or outmoded, then the thing to do is to take it out of the Constitution by proper processes, and not by "whittling it down by the subtle encroachments of judicial opinion."13

As to the breadth of the act, and whether it can properly replace the privilege against self-incrimination afforded by the Constitution, much controversy exists. The Court in the Ullmann case relied heavily throughout its opinion on the deci-

10. Id. at 768.
11. See note 4, supra at p. 500.
13. 209 F.2d 225 (1st Cir. 1954). A similar opinion was expressed by Senator Albert J. Beveridge in an address before the American Bar Association, appearing in 45 Reports of American Bar Ass'n 138 at 216 (1920), when he said: "If liberty is worth keeping and free representative government worth saving, we must stand for all American fundamentals—not some, but all . . . We cannot hold fast to some only, and abandon others that, for the moment, we find inconvenient . . ."
sion of Brown v. Walker,14 decided in 1896 on a similar act.15 That act related to the commerce field, while the act under discussion involves "any interference with or endangering of... the national security or defense of the United States..."16 The court intimated that the ultimate purpose of the privilege against self-incrimination is achieved by the act in question—that one is no longer subject to criminal prosecution on the basis of any testimony he might be required to give. The court went on to reason that when the object of the constitutional question is satisfied, then that is all that is required. Such an argument as this, of course, presupposes the ultimate issue of whether the immunity granted does in fact provide the same protection guaranteed in our Constitution. The act in question, as a reminder, states that upon certain facts being found by the United States attorney, approved by the Attorney General, the court may order a witness to testify notwithstanding the possibility of self-incrimination. But in such case, the act provides that "no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled... to testify or produce evidence" and such evidence shall not be used in "any criminal proceeding... in any court."17 It may thus be seen that any argument based on the objects and purposes of the self-incrimination clause of the Fifth Amendment, as advanced by the court here, necessarily rests on a finding by the court that the objects of the Fifth Amendment guarantee against self-incrimination—whatever they may be—are satisfied. The question of what the objects of the constitutional provision might be is not dealt with extensively by the courts in any of the cases decided after Brown v. Walker, but instead that case is merely cited as authority for the proposition that when the statute precludes a conviction based on the evidence a witness is forced to provide, then that is all that is required. This feeling that a prohibition against prosecution is a sufficient protection probably stemmed originally from certain language in the case of Counselman v. Hitchcock,18 decided in regard to the first immunity statute. The court there found the Immunity Act unconstitutional. The provisions of the act provide that forced evidence could not be used in a subsequent prosecution, but gave no protection against a subsequent prosecution based on related evidence, or on evidence discovered as a result.

15. Act of February 11, 1893, 27 Stat. 443. See note 3 supra. The wording of this act makes it "the duty of the several district attorneys... whenever the attorney general shall direct... to institute... proceedings." The only notable difference, then, may be seen that in the 1954 Act presently under discussion, the United States Attorneys are given more authority in instigating proceedings of this nature. There would not seem to be any notable difference in the authority given the courts, as in the Act of 1893 it is said that "the... court shall have the power to compel... attendance..." similar to the power given the court in the 1954 Act. (See note 2 supra.)
17. Ibid.
18. 142 U.S. 547 (1892).
of the forced testimony. The opinion included language to the effect that a legislative act that afforded absolute immunity against future prosecution for the offense to which the evidence related would be valid. This language was the basis for the subsequent enactment of the immunity act upheld in Brown v. Walker. The court, in deciding Brown v. Walker, relied on the language in Counselman v. Hitchcock to decide that a statute that did afford absolute immunity would be sufficient to compel a witness to testify in spite of the privilege afforded him by the Fifth Amendment.

The courts, in upholding a substitute for the privilege against self-incrimination such as is provided by the immunity acts, have relied on what they considered analogous situations to sustain the holding. Thus, under situations where the Statute of Limitations protects the person under questioning, or where a pardon for a particular crime has been granted, or where a witness voluntarily testifies, the Fifth Amendment protection is said no longer to apply. The argument is that there is no reason for its application, as no criminal prosecution could come of the questioning and the answers. It is comparable to the reasoning that when the reason for the rule is non-existent then the rule itself disappears.

It is argued that the effect of the immunity is to remove criminality from the act, and that is all the constitutional privilege provides. It is contended that the object of the constitutional provision is to secure the witness from criminal prosecution, and a statute absolutely securing to him that immunity from prosecution would satisfy any demands. The mere possibility that evidence might tend to disgrace one, or bring him into disrepute does not justify the use of the constitutional privilege against self-incrimination. The argument continues that the immunity provided need go no farther.

The issue of the scope of the protection of the self-incrimination clause is one of the phases most strongly urged by the advocates of unconstitutionality. They contend that there is no protection against state prosecution resulting from the evidence thus obtained in the proceedings in the federal courts. They grant that the fear of state prosecution alone would be insufficient on which to base a reliance on the Fifth Amendment protection. Nevertheless, evidence thus obtained may be used in obtaining leads for other evidence not otherwise obtainable.

19. See Wigmore on Evidence § 2280a (3d Ed. 1940): "An Executive pardon for a past offense protects completely against any prosecution before the Judiciary. This has never been questioned." In support of this statement, see Queen v. Boyes, 1 B. & S. 311 (1861). As to the Statute of Limitations, that apparently is equally clear. Mahanke v. Cleland, 76 Iowa 401, 41 N.W. 53 (1888); Weldon v. Burch, 12 Ill. 374 (1850); Simpson v. Brooks, 189 S.W.2d 364 (Mo. 1945); In re Filo and In re Christy, 11 N.J. 8, 93 A.2d 176 (1952). That a voluntary waiver of the privilege may avoid any controversy relating to its application seems almost unnecessary of much discussion.

But see United States v. St. Pierre, 132 F.2d 837 (2d Cir. 1942); 8 Wigmore on Evidence § 2276 (3d Ed. 1940).
that might lead to a conviction in the state courts. They contend that if the witness were permitted to remain silent, as he could when relying on the self-incrimination clause without the immunity act, this possibility of state conviction based on the evidence he provides would not exist. Thus, the conclusion is that the scope of the act is not equal to the protection provided by the constitutional privilege.21

The minority opinion in the Ullmann case further made issue of the fact that the constitutional privilege gives a person the right to remain absolutely silent and has put the matter beyond legislative control. Thus, it was contended, any legislative act that gives less protection than absolute silence would provide is incomplete, and thus invalid.

The minority opinion further contended that there is no protection, under the act, against disabilities enforced by federal and state governments, and from the public generally. The real possibility of loss of job, expulsion from labor unions, and general public opprobrium, is sufficient to indicate that the scope of the act does not provide the same protection provided under the Fifth Amendment and is thus reason for the unconstitutionality—that there is no true immunity.22 By this argument is raised a far reaching issue that deserves attention, though probably no answer can be definitely arrived at—that being the purposes and extent of the protection the Fifth Amendment provides. This is indicated in the strong dissent written by Mr. Justice Douglas, when he quoted with approval a statement from United States v. James:23 "... the privilege of silence against a criminal accusation, guaranteed by the Fifth Amendment, was meant to extend to all the consequences of disclosure." And, as he went on to say, "the critical point is that the Constitution places the right of silence beyond the reach of government."24 Authority may be found to support either contention as to the scope and purposes of the Fifth Amendment privilege against self-incrimination.24 The

20. The application of this problem in regard to subsequent prosecutions in state courts will be more thoroughly discussed later. See p. 83.
21. An example of the reaction that these circumstances create is illustrated very vividly in State v. Sheiner, 6 Fla. Supp. 127 (1954).
22. 60 Fed. 257 (D.C.N.D. Ill. 1894).
23. 76 Sup. Ct. 497 at p. 515 (1956).
24. Those favoring the statute may look to the language of Mr. Justice Brown in the opinion of the court in Brown v. Walker, when he said: "The clause of the Constitution in question is obviously susceptible of two interpretations. If it be construed literally, as authorizing the witness to refuse to disclose any fact which might tend to incriminate, disgrace or expose him to unfavorable comments, then as he must necessarily to a large extent determine upon his own conscience any responsibility whether his answer to the proposed question will have that tendency ... the practical result would be, that no one could be compelled to testify to a material fact in a criminal case, unless he chose to do so, or unless it was entirely clear that the privilege was not set up in good faith. If, upon the other hand, the object of the provision be to secure the witness against a criminal prosecution, if no such prosecution be possible—in other words, if his testimony operate a complete pardon for the offense to which it relates—a statute absolutely securing to him such immunity from prosecution would satisfy the demands of the clause in question."
debate has raged for decades—whether it is only a criminal prosecution that is protected by the Fifth Amendment, or whether something additional, such as public opprobrium, or infamy, is to be considered as included within the Fifth Amendment privilege. An examination of note 24, supra will reveal further quotations and citations of authorities on this problem for the interested reader.

Argument against constitutionality is further advanced that the privilege against self-incrimination permits absolute silence on evidence of a nature that might tend to incriminate. On the other hand, the immunity provided in the act requires that the evidence of the crime be furnished, with the granting of immunity a defense in any subsequent prosecution for the crime so "confessed." This, as was pointed out in the opinion of Mr. Justice Douglas, is different, as the person becomes subject to the prosecution, being forced to rely on a defense that he might not be able to prove.

Advocates of the constitutionality of the act answer this by merely saying that the argument is not valid, the difference being insignificant, and the dangers involved improbable. They argue that the witness' position is no different from that of any other person in being subjected to defending against an unjust charge of which he is innocent. In such case, he is merely forced to present his available defense to avoid a conviction. It is contended that the defense given him by the immunity act makes him no more subject to conviction than if he were innocent of the charge.

In answer to this allegation, it is emphasized that there is a significant difference between the two situations, as the innocent person was not placed in that position by the use of his own forced evidence. Also, to prove the immunity suffi-

Those viewing the constitutional interpretation differently may rely equally well upon the very forceful language of Mr. Justice Grosscup, when in his opinion in United States v. James, 60 Fed. 257 at p. 264 (D.C.N.D. Ill. 1894), he wrote: "Did they originate such privilege simply to safeguard themselves against the law-inflicted penalties and forfeitures? Did they take no thought of the pains of practical outlawry? The stated penalties and forfeitures of the law might be set aside; but was there no pain in disfavor and odium among neighbors, in excommunication from church or societies that might be governed by the prevailing views, in the private liabilities that the law might authorize, or in the unfathomable disgrace, not susceptible of formulation in language, which a known violation of law brings upon the offender? Then, too, if the immunity was only against the law-inflicted pains and penalties, the government could probe the secrets of every conversation or society, by extending compulsory pardon to one of its participants, and thus turn him into an involuntary informer. Did the framers contemplate that this privilege of silence was exchangeable always, at the will of the government, for a remission of the participant's own penalties, upon a condition of disclosure, that would bring those to whom he had plighted his faith and loyalty within the grasp of the prosecution? I cannot think so."

However valid either argument may be, and we are not here to determine that, the decided cases seem to strongly adopt the former view as expounded in the majority opinion of Brown v. Walker. A collection of the cases may be found in 8 WIGMORE ON EVIDENCE § 2255 (8d Ed. 1940).
ciently for acquittal there must be competent evidence to support the contention. It is thus argued that there is the possibility of the defendant being unable to prove his defense, and that in any such case of doubt as to the protection that is provided, the act should be declared unconstitutional as inconsistent with the Fifth Amendment. Further discussion on this point may be found upon examination of the minority opinion in the Ulmann case.25

In regard to the matter of presenting a defense in the event of a subsequent prosecution, the protection given by the immunity act is to any proceeding relating to the evidence offered. What is within that protection of any proceeding has to be determined, of necessity, at a later time by a different court. Other matters that would likewise have to be later determined would be such things as whether the United States attorney properly brought the proceedings under the act, with the approval of the Attorney General, in a case where the witness has invoked the Fifth Amendment. Who can say positively that the intended protection will in fact be provided? This would clearly show the defect of the immunity statute, in providing less than it takes away.

That both sides to this controversy can obtain competent and convincing authority on which to base their contentions as to the proper interpretation and application of the Fifth Amendment is unquestioned. The only issue thus presented seemed to be which of the opposing contentions the Supreme Court would adopt. It would appear that this has been decided in favor of proponents of the act. All of the acts presented since Brown v. Walker was decided in 1896 that contain language substantially the same as that of the present act under discussion have been upheld. This is true on both the federal and state level.

As for the second issue raised concerning the giving of discretion to the district judge in the form of a non-judicial power, less attention has been directed. The court avoided any determination of whether the act would be invalid if it gave the district judge discretion by its holding that a fair reading of Article (c) of the Immunity Act does not give discretion to the district judge. The pertinent part of Article (c) reads: "Whenever in the judgment of a United States attorney the testimony of any witness . . . in any case or proceeding . . . involving any interference with . . . the national security or defense of the United States . . . is necessary, he upon approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provision of this section, and upon order of the court such witness shall not be excused from testifying . . . on the ground that the testimony . . . may tend to incriminate him . . ."26 (emphasis added) The issue is thus resolved by a matter of interpretation. The court pointed out that their interpretation of the clause in question was that the only duty of the district judge is to determine whether the

statutory requirements had been complied with. If he so finds, then the court shall instruct the witness to answer the pertinent questions directed to him. This conclusion would seem to do away with any necessity to deal at any length with the issue. Perhaps it might fairly be assumed that if the act did in fact give to the judge discretion, and thus a non-judicial function, then the act might be found invalid. But, such a holding was here avoided. The court was guided by its well recognized principle that when the constitutionality of a legislative act is raised, the court will first ascertain "whether a construction of the statute is fairly possible by which the question may be avoided."

On the issue of whether state prosecution has been precluded by this act, and if so, whether Congress has the power to preclude state prosecution, varying problems are presented. Also presented are collateral issues that will be dealt with in this discussion.

Before discussing this matter, it is interesting to note that as to state prosecution the legislators themselves apparently were not convinced of their power. The Committee Report of the Judiciary Committee of the House of Representatives reveals that, when it was said: "Even though the power of Congress to prohibit a subsequent state prosecution is doubtful, such a constitutional question should not prevent the enactment of the recommended bill . . . The language . . . is sufficiently broad to ban a subsequent state prosecution if it be determined that Congress has the constitutional power to do so . . .".

In determining whether there was coverage as to state prosecution, an examination of whether there was an intent to include state prosecution within the scope of the act was made. The court, in finding that it was so intended, relied upon legislative discussions to base its finding. In so doing, the court quoted: " . . . The language . . . is sufficiently broad to ban a subsequent state prosecution if it be determined that the Congress has the constitutional power to do so . . . the committee believes that the fullest protection that can be afforded the witness will be achieved." A review of the wording of the act would not seem to cause serious conflict that Congress intended the act to be worded as broadly as possible. The act provided that the immunity was to extend to "any penalty or forfeiture for or on account of any transaction, matter or thing . . . in any such case or proceeding." Again, the court relied upon Brown v. Walker to justify its conclusion. Quoting that opinion: "The immunity is intended to be general, to be applicable whenever and in whatever court such prosecution may be had." It might be

29. From the Report of the Committee on the Judiciary of the House of Representatives, id.
noted that the language of the present act was quite similar to the act involved in Brown v. Walker. As the court decided in Adams v. State of Maryland, the congressional intent is clear from the language. It might be remembered, however, that the Adams case went only so far as to say that the forced evidence could not be used in the state courts, taking no position apparently against the use of discovered evidence in those courts. The court in the Adams case reached the conclusion it did by saying that there could be only one purpose in Congress including the words "any court or proceeding" to extend the coverage of the act to its fullest extent. Such an interpretation was there said to be in accord with popular understanding—that it applied to state courts as well.

Those arguing to the contrary as to congressional intent make mention of the fact that, if they had so intended, Congress could have been more specific in applying the act to state courts. The contention is that the failure to so do should be interpreted as a lack of intent that it so apply. This lack of intent, in turn, should govern the courts in their interpretation of the statute.

However, primary reliance is made on the contention that even if congressional intent is to be found, there was still lacking the power to so apply the act.

Proponents of the act advance a very ingenious argument in support of their position. They contend that this is an area within which Congress is authorized to legislate, as it relates to the national defense and security. Proceeding from this basic premise, they argue that under the "necessary and proper" clause, Congress is authorized to enact such legislation as it may deem necessary and proper in furthering their granted powers, it here being the general defense and national security that is involved. They contend that Congress has felt it necessary for proper legislative purposes to be fulfilled within this field, that immunity be granted as to criminal prosecution in certain cases so that investigations will not be impeded. The court did not feel that it could overthrow this claim that Congress had indicated as to the necessity of the testimony, and that therefore, the legislation is authorized under the Constitution. They then contend, that in making an application of the immunity binding on the state courts, the Supreme Law of the Land provision of the Constitution could properly be invoked.

33. This contention, of course, is based on U.S. Const. art. 1, § 8, para. 1, reading in part: "The Congress shall have power . . . to . . . provide for the common Defense and general Welfare of the United States . . . ."
34. This authorization would be found in U.S. Const. art. I, § 8, para. 18, reading: "(The Congress shall have Power) . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution . . . ."
35. This contention rests upon U.S. Const. art. VI, para. 2 reading: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."
The argument of congressional authority, and its application to the states, suggested above, was first advanced in *Brown v. Walker*. In nearly every decision on the matter since that case, it has been reiterated.

In *Jack v. Kansas*, the court said that while a state immunity statute could not prevent a prosecution of the same party under a United States statute, that was no objection to its validity. In its opinion, the court referred to *Brown v. Walker* in its approval of the language to the effect that a bare possibility of prosecution by another sovereignty was not a real and probable danger, and need not be taken into account. The court then felt justified in finding the immunity statute constitutional.

The problem of self-incriminatory evidence received under a state immunity statute being used in federal courts was presented in *Feldman v. United States*. The Court there said that the Fifth Amendment had no application to prevent the use of such evidence.

But, in 1954, under a slightly different version of the act presently under consideration, the Court held that the immunity act barred the use in a state prosecution of testimony previously compelled under the act in question. However, it was also stated that the act did not bar prosecution based on evidence discovered because of the forced disclosure. In that respect the *Ullmann* case, in its ultimate effect, would extend that situation as well, prohibiting any state prosecution of related crimes. The Adams case clearly presented the problem of state prosecution based on the forced evidence under the immunity statutes.

In *United States v. Murdock*, it was said that immunity against state prosecution was not essential to the validity of the act. They there stated that this rule applied equally to state statutes in regard to federal prosecution. The court went on to state that *full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against self incrimination*. One may find this idea repeatedly suggested in the cases sustaining the validity of immunity statutes.

Again, in *Hale v. Henkel*, it was stated that the Fifth Amendment gave protection only against prosecution and not protection against damages to the reputation. The court, referring to the possibility of state prosecution, stated that it was of no importance that no protection was afforded against prosecution in state courts. In making this statement, we find another often repeated statement made use of. The court also stated that the same rule applied in the reverse situation where the state statute was in question. It may thus be observed that often

36. 199 U.S. 372 (1905).
40. 201 U.S. 48 (1906).
the courts have upheld the constitutionality of the Immunity Act with a holding that application to other sovereignties was unnecessary.

A forceful argument supported by a long line of authority may be presented in a case to support the constitutionality of such an act. Even though to change the apparently existing rule a reversal of the cases reviewed would have to be made, there is still a vigorous attack made upon the constitutionality of the acts by members of the bar and others. Perhaps then, the cases thus far presented are not alone the final and conclusive answer to the problem.

As mentioned before, the Court has repeatedly advanced the argument in its decisions that even if the act does not apply to the states, it is not necessary that it do so. They contend that (1) the scope of the privilege against self-incrimination does not dictate such an application, and (2) that prosecution by the state is an imaginary possibility based on exaggeration of words, and of no weight. We have earlier seen an application of these arguments in the cases reviewed.

On the other side of the picture, there are arguments that the federal government by its legislation cannot control prosecution by the states—that they are completely without power to do this. It is argued that Congress cannot create state courts, it cannot establish rules of law to govern those courts, and that it cannot prescribe penalties to be imposed in those courts. Likewise, by analogy, it cannot prescribe rules of proceeding, as is here being attempted.

In regard to the argument that the prosecution by the states is imaginary, it is pointed out by opponents of the act that there are cases where that very thing happens. It might be noted that the Adams case, relied upon by the majority opinion on the immunity act's application to state courts, is just such a case. It seems likely that such a practice would become quite common, rather than being imaginary, or improbable. The decisions and opinions on this matter, when prosecution by the state is attempted, is that the prosecution is not playing fair, or that they should not do that, but the courts then decided that there is nothing that can be done to prevent it.41 Thus, the contention is that the fear is a very real one.

Also advanced is a related argument, in that the act creates the very real possibility of collusion between federal and state authorities—that the federal government will provide immunity against prosecution and then the states, with the evidence thus procured, will commence prosecution. Such an argument presumes the inapplicability of the act to the states. To an argument that such practices would not occur, perhaps reference should be made to cases arising from the enforcement of prohibition. When the issue was there the constitutional pro-

41. See Jack v. Kansas, 199 U.S. 372 (1905): "We do not believe that in such case there is any real danger of a federal prosecution, or that such evidence would be availed of by the government for such purposes." An examination of the cases revealed the lack of foresight of the court as a prophet on this issue.
tection against an unlawful search and seizure, an examination of the cases will reveal the very thing occurring that has here been suggested as a possibility under the present immunity act.

The fourth issue raised for determination—that of whether the constitutional provision against self-incrimination precludes the immunity act, regardless of its scope or application, again raises serious question. Those challenging the act very forcefully contend that the Constitution does preclude the immunity statutes. One of the contentions is that this immunity provided by the act is nothing but a pardon, the exercise of which is vested in the executive branch of government beyond legislative control.42 Those favoring the act under this argument by calling this a type of amnesty, a right of the legislative branch to grant. They concede that there is no practical difference in effect, the only important difference being that the legislature can enact as to the one.

The argument is also advanced by nearly all writers suggesting the act to be unconstitutional, and by most of the dissenting opinions where the act has been sustained, that immunity statutes are merely efforts to circumvent the Constitution with a compliance with the amending process provided. It would seem that this argument is the very crux of the entire problem, because all other arguments would fail if it were to be accepted. Perhaps the soundness of the argument is the reason that little if anything was mentioned in the majority opinion in the Ullmann case discrediting it. A careful reading of that opinion will reveal only the following: "Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process."43 Certainly no quarrel would be made with such a statement. In fact, perhaps that is the very basis on which this argument rests. Actually it is very clear. The Constitution has, by a specific provision, provided that a witness shall not be forced to give testimony tending to incriminate himself. This right thereby granted is not conditioned or qualified by any other provision. It is absolute. Is it unreasonable to conclude that other powers derived from the constitution adversely affecting this individual right must be subordinated to it? If not, then the constitutional authority of a legislative act derived from the granted power to protect the national security, and implied in this case from the necessary and proper clause, would then seem to fall within that prohibition. If such were the case, then the argument that legislative authority to provide immunity is derived from the Constitution must fail. There would then be left open the possibility of arguing by analogy that other apparently absolute rights are interpreted, without causing excess controversy, to be relative. Such would be the position of the freedoms—freedom of speech, freedom of religion, freedom of press, and the right of assembly—all protected by the First Amendment.44 For purposes of discussion,

42. U.S. Const. art. II, § 2, para. 1, reads: "The President ... shall have Power to grant Reprieves and Pardons for Offenses against the United States . . . ."
43. 76 Sup. Ct. 497, 501 (1956).
44. U.S. Const. Amend. I.
take the freedom of speech provision. No one would seriously question the right of the federal government to restrict abuses of this right. The courts, in determining the validity of restraints placed thereon, have stated that they are to be exercised with some restraint. 45 During wartime, perhaps under the very situation underlying the present problem—national defense and security—restraints in the form of censorship are imposed. And, as an example traditional in this respect, one would not be justified under an exercise of the freedom of speech provision of the Constitution to rush into a crowded theatre and falsely shout, "Fire!"

By what authority are such rights restricted? The courts, in interpreting the provisions of the First Amendment, have referred to the fact that it states that "Congress shall make no law" affecting those rights. It has been decided that by this an absolute right was not granted, but instead a limitation on governmental interference, so long as the freedoms are properly exercised within recognized bounds. 46

However, such a result would not follow from a proper interpretation of the Fifth Amendment protection against self-incrimination. It is made as an absolute grant—one wholly without the possibility of legislative interference. It is thus suggested that the difference in wording of the two constitutional provisions lends credit to different interpretations. The First Amendment, as mentioned above, provides a prohibition against legislative authority, interpreted to mean a relative prohibition. However, the Fifth Amendment does not suggest limitations on legislative acts, nor does it even impliedly anticipate such, but rather covers an absolute individual right. This might be interpreted to mean that it is not conditional—that rights of innocent third persons, though adversely affected by the protection thus conferred, are not superior to the rights derived under the Fifth Amendment provision against self-incrimination. Perhaps it might be said that the question resolves itself into one depending on the purposes of the Fifth Amendment, and the extent to which it is to be applied. To justify a difference in interpretation, it is necessary to recognize the background existent at the time these protections were included in the Constitution. At the time of the adoption of the First Amendment, there was little question but that it would not destroy actions based on an abuse of the right of free speech—such as libel and slander. It was apparently adopted with the knowledge and intent that it be relative. However, there was a difference in the existing background as applied to the Fifth


Amendment. There were no qualifications to the right against self-incrimination existent, and none were anticipated. It was not then adopted with the intent that it be relative, as was true in regard to the First Amendment. The setting in which these two amendments came into existence would then seem to substantiate a distinction in their interpretation. Thus, if the distinction can properly be made, we have presented for determination a legislative act amending the constitutional provision. This is clearly improper.

Such a distinction as herein suggested has apparently not been mentioned, or at least given much attention, by the courts. Perhaps it is a distinction without a difference. But, if it could be said to be valid, as would seem entirely reasonable, then the present act should be held unconstitutional.

Somewhat in line with this suggestion, though not going so far as to distinguish the cases where restraints in constitutionally guaranteed rights are existent is the following statement of Mr. Justice Blatchford, quoted with approval in the dissenting opinion of *Brown v. Walker,* fully presenting the problem, when he said: "The constitutional provision distinctly declares that a person shall not 'be compelled in any criminal case to be a witness against himself;' and the protection of section 860 is not coextensive with the constitutional provision. Legislation cannot detract from the privilege afforded by the Constitution. It would be quite another thing if the Constitution had provided that no person shall be compelled in any criminal case to be a witness against himself, unless it should be provided by statute that criminating evidence extracted from a witness against his will should not be used against him. But a mere act of Congress cannot amend the Constitution, even if it should engraft thereon such a proviso."

The complexity of the problem which this and similar cases present is self-evident. The immense consideration and conflict that go into making a decision on a factual situation thus presented may likewise be readily seen.

From a reading of the many arguments advanced by both groups on this problem, it may be concluded that considerable thought and reflection is being given to the proper determination of the issue. If judicial precedents are to be weighed at all in reaching any type of conclusion, there is only one determination that could be made—that the immunity acts are, and will be, sustained. But a reading of earnest, thought provoking dissenting opinions would lead one to the conclusion that all may not be as well settled as it might appear at first blush. Perhaps more decisions will be necessary following the *Ullman* case to be able to foresee any definite trend indicating the extent to which the court will go in applying the doctrines it has set forth. It would seem, however, that pending such litigation,

careful attention might be given to this problem, it being one both of extreme importance and vital interest."

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49. Probably the most important suggestions or remedies that have not been discussed in this paper are those relating to statutes of comity between the states and the federal governments. It apparently is felt by many imminent authorities that that is the only proper and practical solution to the problem. Mr. Morgan seems to say that it is unnecessary that both state and federal immunity be granted to sufficiently protect the defendant, and submitted that the minority view to the contrary was unsound. The real issue, he indicated, was one of comity and policy. This line of attack may be pursued further in 34 MINN. L. REV. 1 (1949), an article by Mr. Morgan, *The Privilege Against Self-Incrimination*. In light of more recent opinions—particularly the Adams v. State of Maryland and the principal case (Ullmann), it would seem that the only need for comity—if this is to be pursued—would be by the federal government, recognizing immunity statutes of each of the forty-eight states—a result highly unlikely.

Arguments have been submitted on both sides of this general problem and useful discussion thereof may be found in Griswold, *The Fifth Amendment Today* (Harvard News Service 1955); 8 WIGMORE ON EVIDENCE § 2250 et seq. (3d Ed. 1940); 39 ILL. L. REV. 184 (1944); 53 YALE L. J. 364 (1944); 30 CORNELL L.Q. 255 (1944). A related discussion of this problem as it affects the Fifth Amendment constitutional guarantee more directly may be found in 21 MO. L. REV. 66 (1956).