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THE FEDERAL TORT CLAIMS ACT AND THE  
"DISCRETIONARY FUNCTION" EXCEPTION:  
THE SLUGGISH RETREAT OF AN  
ANCIENT IMMUNITY\*

FLEMING JAMES, JR.\*\*

The older pattern of governmental immunity is familiar.<sup>1</sup> Almost no one contends that it is fully defensible, yet almost no one contends that there should be compensation for all the ills that result from governmental operations. No one, for instance, suggests that there should be liability for the injurious consequence of political blunders such as the unwise imposition of tariff duties or the premature lifting of OPA controls. As long, at least, as liability is to be rested on *fault* there is a very good reason why the courts should not inquire into such matters. Fault here would mean an unreasonable mistake in legislative or executive action. The separation of powers in our form of government and a decent regard by the judiciary for its co-ordinate branches should make courts reluctant to sit in judgment on the wisdom or reasonableness of legislative or executive political action. Moreover, courts are not particularly well suited to pursue the examinations that would be necessary to make this kind of judgment.

There is little doubt that if an American government were to consent to tort liability by broad legislation the courts would nevertheless fashion exceptions to it because of this principle. American courts will not review the wisdom of political decisions, or whether executive discretion has been wisely exercised. For example, the New York courts have declined to do so, though the New York

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<sup>1</sup>See, in general, 2 HARPER and JAMES, *TORTS* c. XXIX (1956), and authorities cited therein; see also Davis, *Tort Liability of Governmental Units*, 40 MINN. L. REV. 751 (1956).

Court of Claims Act waives governmental immunity in sweeping terms.<sup>2</sup>

The Federal Tort Claims Act did not leave this limitation upon governmental liability to be worked out by the courts. Congress itself tried to formulate it, in section 2680 (a).<sup>3</sup> The second and most important provision of this section excludes liability for any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused." This language clearly excludes liability for the injurious consequences of decisions of policy, or regulatory decisions, or quasi-judicial rulings, even if they are mistaken or unreasonable. Perhaps this is as far as the provision was meant to go, for in sponsoring the act Assistant Attorney General Shea told Congress that this section would do no more than the courts would probably do without it.<sup>4</sup>

The courts have, however, construed this section as preserving governmental immunity in many situations that are not legislative or regulatory or political in nature but in which discretion or judgment is nevertheless involved. But discretion is a very broad term. Even the manner of driving a nail or the speed of operating a post-office truck involves choice and judgment and hence, in a sense, discretion. No one has contended that the section preserves immunity for all such acts. The actual contentions and decisions have been based on interpretations that fall somewhat short of this.

Until recently the Government has tried to import into this field a distinction between "uniquely governmental functions," on the one hand, and activities that are the counterpart of those performed by private individuals, on the other. Immunity was claimed for all conduct that constituted the "end-objective" of the particular governmental activity. This claim was grounded in part on the implications of section 2680 (a). The theory, for example, would exclude liability for negligence of Coast Guard personnel in maintaining a light to warn navigators of off-shore shoals, or for negli-

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<sup>2</sup>E.g., *Murray v. Wilson Line, Inc.*, 270 App. Div. 372, 59 N.Y.S.2d 750 (1st Dep't 1946), *aff'd*, 296 N.Y. 845, 72 N.E.2d 29 (1947); *Goldstein v. State*, 281 N.Y. 396, 24 N.E.2d 97 (1939).

<sup>3</sup>28 U.S.C. §2680 (a) (1952).

<sup>4</sup>*Hearings Before the House Committee on the Judiciary*, 77th Cong., 2d Sess., ser. 13, at 29 (1942).

gence of the personnel in the control tower of an airport in giving landing instructions to approaching planes. This governmental-proprietary dichotomy was upheld by some courts<sup>5</sup> until the Supreme Court laid it finally to rest in 1955.<sup>6</sup>

It has also been contended, and some courts have held, that when the project or activity is itself discretionary there is immunity for conduct performed in the furtherance of that activity. Thus the District Court for the Northern District of Florida has found that it lacked jurisdiction to inquire whether negligence caused the explosion of a strato-jet bomber on a secret experimental mission.<sup>7</sup> Another district court refused to examine the negligence of the Government in maintaining a dangerously rotten tree overhanging a parking lot, because the tree had been planted experimentally by the Department of Agriculture. "That being so, the course to be pursued in experimenting with this tree . . . and determinations to be made with respect to continuing or terminating such experimentation"<sup>8</sup> were the kind of discretionary functions shielded from liability by section 2680 (a). This position seems to be a variant of the first one and has presumably fallen with it.<sup>9</sup>

Another position that seems to be emerging has been described in a recent district court decision as one that "distinguishes between acts or omissions arising from the exercise or performance of a discretionary function and those occurring within the scope or area of the discretionary function but which themselves do not involve

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<sup>5</sup>See, e.g., *Indian Towing Co. v. United States*, 211 F.2d 886 (5th Cir. 1954), *rev'd*, 350 U.S. 61 (1955); *National Mfg. Co. v. United States*, 210 F.2d 263 (8th Cir.), *cert. denied*, 347 U.S. 967 (1954).

<sup>6</sup>*Indian Towing Co. v. United States*, 350 U.S. 61 (1955), *reversing* 211 F.2d 886 (5th Cir. 1954); *United States v. Union Trust Co.*, 350 U.S. 907, *affirming* 221 F.2d 62 (D.C. Cir. 1955). See also *Air Transp. Associates, Inc. v. United States*, 221 F.2d 467 (9th Cir. 1955) (governmental liability based on negligence of control tower personnel at Air Force base). The Supreme Court reaffirmed its 1955 decisions in *Rayonier, Inc. v. United States*, 77 Sup. Ct. 374 (1957).

<sup>7</sup>*Williams v. United States*, 115 F. Supp. 386 (N.D. Fla. 1953). Upon the point in question the court of appeals, although affirming on other grounds, 218 F.2d 473, 475 (5th Cir. 1955), found no evidence to "justify the inference that the particular flight in question was an experimental one and, thus, that the accident was a natural result of the performance of a discretionary function."

<sup>8</sup>*Toledo v. United States*, 95 F. Supp. 838, 841 (D. Puerto Rico 1950). See also *Coates v. United States*, 181 F.2d 816 (8th Cir. 1950); *Olson v. United States*, 93 F. Supp. 150 (D.N.D. 1950).

<sup>9</sup>See *Fair v. United States*, 234 F.2d 288 (5th Cir. 1956); *Bulloch v. United States*, 133 F. Supp. 885 (D. Utah 1955).

any proper element of discretion."<sup>10</sup> But the limits of this position have not been fully worked out.

A rational basis for determining the existence or nonexistence of governmental immunity might be the distinction between major policy decisions necessary in determining whether to enter into a project, or where to locate it, or what its general outlines and methods were to be, on the one hand, and the subordinate decisions that someone would have to make in carrying out the major objectives, on the other. This distinction would be imprecise, but it would reflect in a general way the need to forestall the intra-governmental conflicts that might be presented if the judiciary were called upon to review the propriety or wisdom of political or regulatory action by the legislature or the executive. At the same time this test would have the merit of curtailing liability only in so far as the need exists.

Some earlier decisions pointed approximately to this test.<sup>11</sup> In *Dalehite v. United States*,<sup>12</sup> the culmination of the famous Texas City disaster litigation, the problem was presented to the Supreme Court. Among other things this case involved decisions (1) to ship ammonium nitrate, long used as a component in explosives, for fertilizer purposes to our allies after the close of hostilities; (2) to refrain from further experimentation designed to discover the extent of its dangerously explosive character; and (3) to bag the product at a certain temperature, using a certain type of container, without any warning thereon of possible dangers. In a four-to-three decision the Court held that all these decisions involved the exercise of a discretionary function:<sup>13</sup>

“[T]he ‘discretionary function or duty’ . . . includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators

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<sup>10</sup>Christenson, J., in *Bulloch v. United States*, 133 F. Supp. 885, 888 (D. Utah 1955).

<sup>11</sup>*Somerset Seafood Co. v. United States*, 193 F.2d 631 (4th Cir. 1951); *Maryland for Use of Pumphrey v. Manor Real Estate & Trust Co.*, 176 F.2d 414 (4th Cir. 1949); *Smith v. United States*, 113 F. Supp. 131 (D. Del. 1953); see Note, 38 MINN. L. REV. 175 (1954).

<sup>12</sup>346 U.S. 15 (1953), affirming *In re Texas City Disaster Litigation*, 197 F.2d 771 (5th Cir. 1952) (consolidated suit representing some 8,485 plaintiffs for damages amounting to \$200,000,000).

<sup>13</sup>*Id.* at 35.

in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion."

The dissenting minority felt that immunity should not attach to decisions (2) and (3), which after all involved exactly the kind of exercise of judgment that private industry must constantly make at the peril of having some later court or jury find it unreasonable.<sup>14</sup> Nor did the dissenters think it significant, as the majority apparently did, that the acts and omissions charged as negligent had all received specific approval at a fairly high policy-making level.<sup>15</sup>

Some water has gone over the dam since the *Dalehite* case. The Court of Appeals for the Fifth Circuit recently said:<sup>16</sup>

"It is further worthy of note that the minority in *Dalehite*, whose dissent was indicative of the desire to give broad extension to the Tort Claims Act, had become the majority in *Indian Towing Co.* A reading of the opinions and the dissents in the two cases leads to the conclusion that *Indian Towing Co.* represents a definite change in attitude on the part of the Supreme Court."

Other decisions in district courts and courts of appeal reflect something of the same point of view. It is not at all clear, however, that *Dalehite* has been altogether overruled. The present area of doubt concerns those operational details that have been specifically approved at higher policy-making levels. Some of the more recent decisions will illustrate this doubt. In *Fair v. United States*<sup>17</sup> an Air Force captain who was released from a base hospital after cursory psychiatric examination shot plaintiff's decedent, whom he had

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<sup>14</sup>See 2 HARPER and JAMES, TORTS §28.3 (1956).

<sup>15</sup>Compare "The decisions . . . were all responsibly made at a planning rather than operational level," 346 U.S. at 42, with "if decisions are being made at Cabinet levels as to the temperature of bagging explosive fertilizers, . . . and how the bags should be labeled, perhaps an increased sense of caution and responsibility even at that height would be wholesome," *id.* at 58. See also *Boyce v. United States*, 93 F. Supp. 866 (S.D. Iowa 1950) (cited with approval by the majority in *Dalehite*, 346 U.S. at 36, n.32), in which the size of charges to be used in blasting was described by detailed plans approved by the Army Chief of Engineers; the Government was held to be immune from liability in that respect.

<sup>16</sup>*Fair v. United States*, 234 F.2d 288, 292 (5th Cir. 1956).

<sup>17</sup>234 F.2d 288 (5th Cir. 1956).

previously threatened. Negligence was charged in releasing him with knowledge of his homicidal tendencies, without adequate psychiatric examination or observation and without notifying decedent of his release after an agreement to do so. The court reversed a judgment dismissing the complaint, saying that the Government's liability "is measured by the same rules as the local law applies to a private employer under like circumstances,"<sup>18</sup> even though its employees are "vested with a measure of discretion." The court did, however, note that the discretion was exercised on the operational and not the planning level. In making the challenged decisions "the doctors were on their own."<sup>19</sup>

In *Dahlstrom v. United States*<sup>20</sup> the Civil Aeronautics Authority had decided to establish an instrument approach pattern for the airport at Alexandria, Minnesota, by means of low level flights with a twin-engine plane. The pilots in carrying out these orders frightened the plaintiff's horses while they were being used in an open field. The pilots had not seen the plaintiff or the horses. The court assumed that the matters specifically covered by the CAA's decisions fell within the exercise of a discretionary function, but that in taking precautions the pilots "were on their own,"<sup>21</sup> so that there would be no immunity for any negligence in that regard.

The question has also come up in two recent decisions concerning the alleged injurious consequences of nuclear blasts. In *Bullöch v. United States*<sup>22</sup> the district court said that, if failure to give notice of impending detonations resulted from "a discretionary decision at any level that such notice would be impractical or would interfere with the carrying out of the project or would involve wasted time without justification," the court might not be permitted to weigh the reasonableness of this decision. On the other hand, negligence could properly be predicated on a negligent failure—presumably through mere oversight—to do what ordinary care would require. Another district court held that a choice, made by experts in the field, of the location of certain testing devices constituted the exercise of a discretionary function, so that the court would not review its reasonableness.<sup>23</sup>

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<sup>18</sup>*Id.* at 294.

<sup>19</sup>*Id.* at 293.

<sup>20</sup>228 F.2d 819 (8th Cir. 1956).

<sup>21</sup>*Id.* at 823.

<sup>22</sup>133 F. Supp. 885, 889 (D. Utah 1955).

<sup>23</sup>*Bartholomae Corp. v. United States*, 135 F. Supp. 651 (S.D. Cal. 1955).

What these decisions mean, in sum, is that the victims of the Government's negligent mistakes must still bear the burden of them as long as the mistakes are those in judgment made or ratified on the planning level.<sup>24</sup> Since specifications as to operations are often approved in more or less detail at a quite high level, this is a serious limitation; and the Government has it in its power to make it more serious by the simple device of requiring higher echelon approval for more details.

This carries immunity a great deal further than is needed to shield political and regulatory decisions from inappropriate judicial review. Most of the discretionary decisions involved in the cases discussed have their near analogies — often their exact analogies — in private enterprise. In that field there is a handful of older cases that shielded the businessman's judgment from the consequence of liability. In *Baltimore & Ohio R.R. v. Groeger*<sup>25</sup> it was held that determination of the type of plugs to be installed in the crown plate of a steam locomotive boiler was a matter entrusted to the judgment or discretion of management and was not for a court or jury to question.<sup>26</sup> But decisions like this have not prevailed. The discretion of private enterprise is now fully reviewable by the judiciary.<sup>27</sup> As government activity becomes more extensive and more dangerous the analogous nonpolitical judgments that it entails should also be reviewable. If the courts will not themselves assume this duty, the discretionary function provision of section 2680 (a) should be redefined or repealed entirely.

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<sup>24</sup>See the most recent expression of the Supreme Court, though perhaps not in the same connection, to the effect that "Congress was aware that when losses caused by [negligence in fire fighting] are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the Government and the resulting burden on each taxpayer is relatively slight. But when the entire burden falls on the injured party it may leave him destitute or grievously harmed. Congress could, and apparently did, decide that this would be unfair when the public as a whole benefits from the services performed by Government employees." *Rayonier, Inc. v. United States*, 77 Sup. Ct. 374, 377 (1957).  
<sup>25</sup>266 U.S. 521 (1925).

<sup>26</sup>The Court said: "If the question . . . were one for the determination of a jury, we think there was evidence which would sustain a verdict in the affirmative or in the negative. But . . . the question was not for the jury. . . . Comparative merits as to safety or utility are most difficult to determine. It is not for the courts to lay down rules which will operate to restrict the carriers in their choice of mechanical means by which their locomotives, boilers, engine tenders and appurtenances are to be kept in condition." 266 U.S. at 530.

<sup>27</sup>See in general 2 HARPER and JAMES, TORTS cc. XVII, XXVIII (1956).



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