THE FEDERAL TORT CLAIMS ACT

The ancient principle of sovereign immunity from suit, long abandoned by the United States in the field of contract, has been further undermined by passage of the Federal Tort Claims Act,\(^1\) which grants to the federal courts jurisdiction over actions against the Government for the negligence of its employees. The doctrine of immunity, inherited by this country from eighteenth century English law, has been frequently attacked as an anachronism unsuited to democratic society because of the unfairness to individuals with just claims against the Government. More pragmatically, the correlative system of private claim bills, primary channel through which relief has been afforded to injured parties, has been denounced for usurpation of Congressional energies which might otherwise be devoted to consideration of important national problems.\(^2\)

The first response of Congress to these pressures was the establishment of the Court of Claims in 1855, with jurisdiction over claims against the United States founded upon any law of Congress or upon any contract, express or implied.\(^3\) In 1887 the Tucker Act\(^4\) granted concurrent jurisdiction to the federal district courts in cases involving not more than $10,000. Although it was argued that the statutes did not require such a construction, the Supreme Court entirely excluded tort claims from the grants of jurisdiction.\(^5\)


5. The Act of 1855 was interpreted as excluding torts on the basis of "the strongest implication." Gibbons v. United States, 8 Wall. 269, 275 (U. S. 1868). The Tucker Act conferred jurisdiction on the Court of Claims to hear "All claims founded upon the Constitution of the United States or any law of Congress . . . or upon any contract . . . or for damages, liquidated or unliquidated, in cases not sounding in tort. . . ." The issue as to how much of the sentence was controlled by the phrase "in cases not sounding in tort" was settled in Schillinger v. United States, 155 U. S. 163, 168 (1894), where the Court held that no action based on a tort would be considered whether founded upon the Constitution or not. Moreover, to give the Court of Claims jurisdiction in a quantum meruit action, the contract must be implied in fact, not merely in law. United States v. Minnesota Mut. Ins. Co., 271 U. S. 212 (1926); United States v. Buffalo Pitts Co., 234 U. S. 228 (1914); Harley v. United States, 198 U. S. 229 (1905). The Supreme Court seems on the verge of modifying these long-standing rules, at least in the field of eminent domain. In United States v. Causby, 66 Sup. Ct. 1062 (U. S. 1966), a case involving land situated near an airport used by the Government, the court found that the noise and lights of low-passing planes con-
Congressional reaction to that interpretation was limited to piecemeal legislation, such as that which permitted suit against the Government for patent infringement and for maritime torts and authorized settlement by Federal agencies of claims for property damage in amounts ranging up to $1,000. Government corporations created in recent years have been authorized to sue and be sued in their own names, an authority which has been interpreted in some cases to include damage suits for limited classes of torts.

With Congress still burdened by thousands of claim bills at every session, several attempts have recently been made by legislators to transfer this burden to the courts by enacting a general tort claims law. After unsuccessful efforts in 1929, 1940, and 1942, Congress may finally have solved the major part of the problem through the instant Act.
The statute is a general waiver of governmental immunity in tort, limited only by enumerated exceptions.\(^{11}\) It grants to the federal district courts, sitting without a jury and subject to the Federal Rules of Civil Procedure,\(^{12}\) exclusive original jurisdiction over all money claims, in whatever amount, for property damage or personal injury caused by the negligent or wrongful act of a Government employee within the scope of his employment.\(^{13}\) Appeal lies either to the Circuit Courts of Appeals or, with the consent of all appellees, to the Court of Claims.\(^{14}\) In addition to this judicial remedy, the head of every Federal agency is empowered to settle any claim not in excess of $1,000.\(^{15}\) Such administrative award shall be conclusive on all officers of the Government, unless fraudulently procured;\(^{16}\) but any dissatisfied claimant may refuse the compensation and commence suit in the appropriate district court.\(^{17}\)

The Act provides that the law of the place of the tort shall govern in all cases. The United States is to be liable "in the same manner, and to the same extent as a private individual under like circumstances."\(^{18}\)

Unsuccessful attempts to revive the measure were made in the 71st and 72nd Congresses. Borchard, *The Federal Tort Claims Bill* (1933) 1 U. OF CHI. L. REV. 1. Twin bills, H. R. 7236 and S. 2690, were introduced before the 76th Congress in 1940. In many respects identical to the present act, H. R. 7236 was reported favorably by the House Committee on the Judiciary, H. R. REP. No. 2428, 76th Cong., 3d Sess. (1940), and passed the House; but after hearings, the Senate Judiciary Committee did not report S. 2690, and the measure died. The bills are reprinted in the reports of the committee hearings. See Note (1940) 50 YALE L. J. 328. In the 77th Congress, the Senate passed S. 2221; see SEN. REP. No. 1196, 77th Cong., 2d Sess. (1941), 88 CONG. REC. 3174 (1942) (measure printed). The House Committee on the Judiciary, after hearings on similar measures of its own, H. R. 5373 and H. R. 6463, (bills printed in report of the hearings) reported the Senate measure favorably, with amendments, H. R. REP. No. 2245, 77th Cong., 2d Sess. (1942); but it was not considered by the House before the end of the session. As thus amended S. 2221 is a virtual duplicate of the Act finally passed. Because of this close similarity, the committee hearings and reports on the 1940 and 1942 measures are invaluable source material in analyzing the present Act, especially since the hearings and reports on the 1946 Act are extremely sketchy. This is probably due to the thorough consideration given the 1940 and 1942 measures, and the concentration of the committee on other phases of the Legislative Reorganization Act of 1946, in which the Federal Tort Claims Act is incorporated. See note 1, supra.

11. The exceptions are discussed in detail *infra* p. 542 et seq. Briefly, jurisdiction is denied over claims based on an act done pursuant to a statute or regulation, whether or not valid; one done in the exercise of discretion; or while exercising such governmental functions as regulation of the monetary system or the quarantine service; or one of a class as to which satisfactory provision has already been made, such as maritime torts; or on certain causes of action, such as malicious prosecution, slander, and assault. See F. T. C. A. § 421.


15. F. T. C. A. § 403(a).

16. F. T. C. A. § 403(b).

17. F. T. C. A. § 420.

18. F. T. C. A. § 410(a).
Scope of the Act

Supreme Court interpretation of statutes waiving governmental immunity from suit has followed two distinct and conflicting trends. The older but still active doctrine is that Congress will not be presumed to have made such waiver, and therefore all statutes purporting to do so will be strictly construed. On the other hand the Court has found that dominant contemporary opinion approves increased relaxations of the immunity and, by imputing that view to Congressional intent, has resolved doubtful points of interpretation against the Government or its agencies. This change in attitude has been reflected in the decisions of the lower federal courts. The final scope of the Tort Claims Act will at many points necessarily depend upon which of these approaches is taken by the courts.

The Jurisdictional Grant. The Act gives authority to the head of every Federal agency to settle claims not exceeding $1,000, and vests exclusive jurisdiction in the Federal district courts to hear:

"... any claim against the United States, for money only... on account of damage to or loss of property or on account of personal injury or death... caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury or death in accordance with the law of the place where the act or omission occurred."

Jurisdiction in a given case will depend upon the construction of the phrases "employee of the Government," "Federal agency," "scope of his office or employment," and "negligent or wrongful act or omission," and upon whether the alleged delict falls within one of the enumerated exceptions.

22. F. T. C. A. §§ 403(a), 410(a). The phraseology conferring authority upon the heads of agencies is identical with that applicable to district courts, save that the former is restricted by a clause reading: "where the total amount of the claim does not exceed $1,000." No upper or lower jurisdictional amount limits the Federal district courts. A lower limit was discarded in the expectation that most of the smaller claims would be settled by the administrative procedure, and on the theory that every claimant should have his day in court. See Hearings before the Senate Committee on the Judiciary on S. 2690, 76th Cong., 3d Sess. (1940) 43. One of the first complaints to be filed under the Act seeks to recover $175,000 for the death of claimant's husband from injuries received on July 28, 1945, when a Mitchell bomber crashed into the Empire State Building. N. Y. Times, Nov. 13, 1946, p. 15, col. 3.
23. Since the jurisdiction granted courts and administrative agencies is identical save for the thousand-dollar clause, the problem of jurisdiction will be considered only from the point of view of the courts.
"Employee of the Government" is defined in the Act as including:

"... officers or employees of any Federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a Federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." 24

Congressional committee hearings on earlier bills indicate that the broad language of this section is intended to be liberally construed. They emphasize that the determining fact will be not the individual's primary employment, but the nature of the enterprise in which he was engaged at the time of the tort. 25

"Federal agency" is defined in the Act as including:

"... the executive departments and independent establishments of the United States, and corporations whose primary function is to act as, and while acting as, instrumentalities or agencies of the United States, whether or not authorized to sue and be sued in their own names: Provided, That this shall not be construed to include any contractor with the United States." 26

When a corporation is acting as an agency or instrumentality of the United States, or when one is a contractor with the United States, is determinable only in the framework of specific situations. The nature and consequent privileges of quasi-governmental corporations have been variously construed for different purposes. The Supreme Court has in this connection weighed the nature of the activity performed, 27 the fact that a corporation was created by Congress, 28 the ownership of corporate stock, 29 and the na-

24. F. T. C. A. § 402(b).
28. Skinner & Eddy Corp. v. Mc Carl, 275 U. S. 1 (1927). Mr. Justice Brandeis here terms the Emergency Fleet Corporation, for purposes of the jurisdiction of the Comptroller General over its accounting, an "instrumentality" of the Government. Id. at 5. In a later case reported in the same volume he identifies the same corporation as a "department" of the Government for purposes of the Post Roads Act, differentiating it from other corporations which are merely "instrumentalities." Emerg. Fleet Corp. v. Western Union, 275 U. S. 415, 426 (1928).
ture of powers conferred as distinct from those actually exercised. Moreover, a corporation's primary function is not alone controlling; it must in fact be acting as an instrumentality or agency of the United States when committing the tort complained of.

It is perhaps inevitable that there should be here renewed the time-honored distinction between governmental and proprietary functions. However, in order to achieve the aims of this Act the definition of Federal agency should be held to include at least any corporation which would have shared the governmental immunity in the absence of Congressional waiver.

These distinctions confront claimants with a ticklish problem. Since joinder of parties is not allowed in suits brought under the Act, it will be necessary in each case to decide whether to sue the agency in its own name or to sue the United States, and if the court holds that claimant elected the wrong remedy, he will not only have wasted much time and effort but may also have lost his cause of action due to the operation of the statute of limitations. Courts and claimants alike must be careful to prevent this distinction from becoming extremely burdensome.

"Scope of his office or employment" is defined in the Act only to the extent that when applied to members of the armed forces it shall be interpreted to mean "in line of duty." Courts have interpreted "in line of duty" variously, depending upon the issue involved; when used in connection with military personnel it has generally been broadly construed so as to cover


31. The draftsmen presumably foresaw the possibility that a corporation whose primary function is that of an instrumentality of the United States might engage in other activities of a private nature, for which the United States should not be liable. This seems to be the most probable explanation for the phrase "and while acting as." See text accompanying note 26 supra.

32. See authorities cited note 27 supra.

33. See discussion infra, pp. 554–5.

34. A similar situation arose in Davis v. Dept. of Labor and Industries of the State of Washington, 317 U. S. 249, 254 (1942). To avoid "the horns of the jurisdictional dilemma" the Court, speaking through Mr. Justice Black, in effect held that, in the "twilight zone," it would permit an overlap of jurisdictions which in theory are mutually exclusive. Id. at 256. Mr. Chief Justice Stone, dissenting, said that such a solution "can hardly be deemed to be within judicial competence." Id. at 260. Cf. Hust v. Moore-McCormack Lines, 66 Sup. Ct. 1218, 1225 (U. S. 1946).

35. F. T. C. A. § 402(c). As to other personnel the phrase will be interpreted in accordance with local state law, and raises no problems peculiar to this statute.

many of the ordinary activities of life not usually included within the meaning of "scope of employment." 37 Army Regulations and the decisions of the Judge Advocate General also adopt a broad meaning for the phrase. 38 Since the Army uses it most frequently in cases involving recovery by the military personnel responsible for the act in question, as in cases involving the settlement of active duty pay accounts or the disposition of claims for death gratuity, there is a strong tendency to make "in line of duty" synonymous with "not due to own misconduct." 39 In cases under this Act, where the issue will be recovery by a third person for acts of the military personnel, the phrase "in line of duty" may well be extended even further than has been done by the Army, with the concept of misconduct relegated to a less important position. Since the existing law for settling domestic claims arising out of the activities of the armed forces 40 uses the "scope of employment" phrase, Congress presumably inserted the "in line of duty" definition in order to achieve a broader coverage for this Act. 41

Determination of what constitutes "negligent or wrongful act or omission" may entangle unwary claimants in intricate legal snarls. While the phrase is susceptible of a very broad construction, 42 its normal meaning when used in similar contexts does not extend to causes of action based purely on contract, and it is clear from a reading of the statute and committee reports that Congress used it in this normal sense. 43 Since the right to sue on claims "not sounding in tort" was granted by the Tucker Act, 44 which prescribes a procedure different from that applicable under this statute, 45 it is possible that the common law forms of action will continue to haunt the Federal courts as they unravel the problems of jurisdiction thus presented.

37. Moore v. United States, 48 Ct. Cl. 110 (1913) (death while returning to duty caused by disease presumably contracted while on leave of absence); Malone v. State Life Ins. Co., 202 Mo. App. 499, 508, 213 S. W. 877, 880 (1919) ("in line of duty" said to mean only "not violating any military law," and death occurring while "in line of duty" means only "while in military service").


39. Ibid.

40. 57 Stat. 372 (1943), 59 Stat. 225 (1945), 31 U. S. C. § 223(b) (Supp. 1946) authorizes the Secretary of War to settle claims arising out of negligent acts of members of the armed forces or employees of the War Department while acting within the scope of their employment. See Notes (1946) 31 CORN. L. Q. 408, (1943) 53 YALE L. J. 188.

41. No discussion of the phrase has been found in any of the committee hearings or reports.

42. The word "wrongful" is subject to various interpretations. Thus moral wrongs must be distinguished from those merely legal, and the latter category further subdivided into wrongs ex contractu and those ex delicto. See 1 COOLEY, TORTS (4th ed. 1932) § 2.

43. See Hearings before the Senate Committee on the Judiciary on S. 2690, 76th Cong., 3d Sess. (1940) 43-4.

44. See notes 4 and 5 supra.

45. Under the Tucker Act claims for over $10,000 must be brought in the Court of Claims, those under $10,000 in either the Court of Claims or the Federal district courts. 24 Stat. 505 (1887), 28 U. S. C. §§ 41 (20), 250 (1940). Judgments of the Court of Claims are
The Supreme Court has been careful to preserve the distinction between tort and contract, so long as immunity of the Government depended upon that distinction.\textsuperscript{46} It has repeatedly denied the privilege, sometimes accorded at common law, of waiving the tort and suing on contract on the grounds that this would extend the liability of the Government beyond the Congressional intent.\textsuperscript{47} But if the distinction is retained after the passage of this statute, the issue will be not whether claimant may maintain his suit but in \textit{which court} he should bring it.\textsuperscript{48} It is to be hoped that in this situation the Court will not make a stumbling block of the distinction and will allow plaintiff his choice of jurisdictions whenever grounds can be found for doing so.

Precedent for disregarding the distinction between tort and contract may be found in cases involving Federal agencies authorized to sue and be sued in their own names. In the case of \textit{Keifer & Keifer v. R.F.C.},\textsuperscript{49} based on the negligence of a Federal agency under a contract of bailment, Mr. Justice Frankfurter, writing for a unanimous Court, labels the distinction a "procedural entanglement."\textsuperscript{50} Without deciding whether the action sounded in tort or contract, the decision upholds the jurisdiction of the lower court pursuant to the statutory authorization of suit against the agency. The opinion emphasizes that where the waiver of immunity is not limited specifically to "tort" or "contract," the distinction in border-line cases is not important.\textsuperscript{51} The word "tort" occurs in the Tort Claims Act only in the title, with actionable delicts defined rather as "negligent or wrongful acts or omissions." This studious avoidance of the term which would most surely earmark the old forms of action, taken in conjunction with the \textit{Keifer & Keifer} case, is an indication that ancient formalism may be minimized in litigation under the new Act.\textsuperscript{52}
A separate problem is raised in the field of implied contracts. When by trespass or conversion the Government has interfered with property rights, the Supreme Court has been generous in finding a "taking" and a consequent implied contract to reimburse. Now that actions in tort may be maintained, the Court may change its policy and restrict its construction of "taking" in cases under the Tucker Act. However, since the vast majority of the trespass and conversion cases will fall within the terms of the exceptions to the Tort Claims Act, curtailment of the Tucker Act's coverage would deprive many claimants of any judicial or administrative remedy.

Another question, open to fine-spun legal argument supporting any desired conclusion, is whether the word "wrongful" should be interpreted to include those activities which in some jurisdictions impose liability without fault. The obvious effort of Congress, by the sweeping terms of the Act, is to place the Government in the position of a private corporation in respect to suits in tort, limited only by the carefully worded exceptions. The Act states forthrightly that the United States shall be liable where "... a private person would be liable ... in accordance with the law of the place where the act or omission occurred." This overall intent militates strongly against an unnecessarily restrictive construction of the words used in establishing the broad basis of the Government's liability, and suggests interpreting "negligent or wrongful act or omission" as including all causes of action which would lie in tort against a private litigant.

The Exceptions. With whatever liberality the courts may interpret the waiver of immunity thus broadly defined in the first parts of the Act, the position of the Government is carefully protected by twelve specific exceptions: clear reversal of policy by the Court. For evidence of a recent change in direction in regard to the Tucker Act see United States v. Causby, 66 Sup. Ct. 1062 (U. S. 1946), discussed supra note 5.


54. The first exception, discussed infra p. 543 et seq., denies jurisdiction over claims based on acts done pursuant to statute or regulation, or those based on the exercise of a discretionary function. Most of the cases arise out of flood-control or navigation-improvement projects, and would probably be held excluded by the first clause of the exception. See note 62 infra.

55. For argument to the effect that a wrong is only the breach of a duty owed, and that the action must itself be such a breach if the actor is to be liable for consequent injuries, see 1 COOLEY, TORTS, §§ 3, 56. From this it may be said to follow that where the law imposes absolute liability for the damaging results of acts not in themselves objectionable, the acts themselves are nevertheless not breaches of duty and therefore not "wrongful." But cf. Green v. General Petroleum Corp., 205 Cal. 328, 270 Pac. 952 (1928); PROSSER, TORTS (1941) 429; Harris, Liability Without Fault (1932) 6 Tulane L. Rev. 337.

56. F. T. C. A. § 410(a).

57. Little attention is given to the scope of the phrase in committee hearings. But see Hearings before the Senate Committee on the Judiciary on S. 2690, 76th Cong., 3d Sess. (1940) 43–4.
Each of these must seek its justification in some practical necessity, for the Act is in itself a denial of the validity of conceptualistic sovereign immunity.59

The first exception, which is at once the most sweeping and the least definite, denies jurisdiction to the courts to consider:

"Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or 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 employee of the Government, whether or not the discretion involved be abused." 60

The first half of this exception limits the scope of the word "wrongful" by excepting torts, not negligent, which have been "legalized" by statute or regulation, thus giving to the Government a free hand in pursuing any authorized activity without threat of liability. The scope of the exception will depend primarily upon the interpretation of the phrase "in the execution of a statute or regulation." How remote need an activity be from the direct and immediate command of a statute before it can no longer be said to be done in execution thereof?61 Reference to the committee hearings and reports on the bill indicates that the legislators intended a construction narrowing the exception.62

That the courts would probably have read such an exception into the Act even were it not expressly set forth was recognized by its proponents.63 To hold the Government liable to damage suits for any of its normal and authorized activities would be intolerably burdensome. The Government

58. F. T. C. A. § 421.
60. F. T. C. A. § 421(a).
62. For the most complete development of the intended function of this all-important exception see H. R. REP. No. 2245, 77th Cong., 2d Sess. (1942) 10. And see Hearings before the House Committee on the Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2d Sess. (1942) 33, 44. The reason for the rule suggests a possible criterion for interpreting it: the act complained of, in order to come under the cloak of the exception, must have been one of the consequences intended by Congress or the regulatory agency. Thus a trespass committed by the occasional flooding of plaintiff's land by a flood-control project (where insufficient to constitute a "taking") would fall within the exception, but not an unnecessary trespass by Government employees engaged in working on the project, even though they were acting, in one sense, "pursuant to the statute."
could not defend all suits arising out of the old NRA, for example, or that might be brought under an OPA regulation, both because of the multiplicity of suits and the impossibility of estimating damages. Moreover, as one of the major functions of the Government is to regulate and modify the rights and duties of its citizens, there must of necessity be an incidental surrender of some private rights to promote an orderly and predictable administration. If an individual feels himself unduly imposed upon by such governmental activity, his remedy lies in whatever appellate authority there may be, and thereafter to the ballot box. In any event, the Act does not leave claimants entirely remediless, for claims not cognizable under its terms may still be presented to Congress, and the liability of individual officers for exceeding or abusing their authority has not been modified.

The second clause of the exception denies jurisdiction to the courts over claims based on the exercise of a discretionary function, whether or not neglig-

64. A suit by a landlord for damages under an OPA regulation imposing a ceiling on rents would, if allowed, introduce for judicial determination the question of how much overall benefit the claimant had received from the statute, and what part the statute played in retarding or preventing inflation. Likewise, under the NRA, the possible stimulus which was given to business generally would have to be weighed against the immediate local damage caused by any given restriction.


66. In many cases, a convenient example being an OPA regulation, the fact that the question is political rather than legal is another reason for denying jurisdiction to the courts in an action for damages. Under the provisions of the Emergency Price Control Act it is improbable that any action for damages caused by an OPA regulation could have been maintained even were this exception omitted from the Tort Claims Act. Judicial consideration of the regulations is expressly limited to a hearing before the Administrator, with appeal to the United States Emergency Court of Appeals and review by the Supreme Court. 56 STAT. 31 (1942), 58 STAT. 638 (1944), 50 U. S. C., App. §§ 923, 924 (Supp. 1946). This procedure is discussed at length and approved in Yakus v. United States, 321 U. S. 414 (1944).

67. Legislative Reorganization Act of 1946, op. cit. supra n. 1, § 131. The bill, S. 2177, as it passed the Senate, provided that no private bill presenting a claim for damages could be considered. The House substitute measure inserted the words "for which suit may be instituted under the Federal Tort Claims Act." In debate on the floor of the House Mr. Monroney, vice-chairman of the committee which presented the bill, said: "... there will be no claims blocked. Either they have a right to come ... before the Congress or they can go into the courts." 92 Cong. Rec., July 25, 1946 at 10091.

Thus a riparian owner whose lands have been incidentally harmed by an authorized flood control project, but who cannot show sufficient damage to justify eminent domain proceedings or to prove a "taking" for purposes of recovery under the Tucker Act, text and authorities note 53 supra, will be relegated to a private claim bill.

68. When an agent of the Government acts beyond his actual authority, or pursuant to an unconstitutional statute, he is often held personally liable, although no recourse is available against the Government. See 2 Cooley, TORTS c. 13-4; MECHM, PUBLIC OFFICERS (1890) Bk. IV; Keefe, Personal Tort Liability of Administrative Officials (1943) 12 FORDHAM L. REV. 130; Block, supra note 59, at 1060. See also Yearsley v. Ross Const. Co., 309 U. S. 18 (1940), 38 Mich. L. REV. 1344; Standard Nut Margarine Co. v. Mellon, 72 F. (2d) 557 (App. D. C. 1934).
gence is shown or the discretion abused. The immunity thus retained is in accord with the generally accepted doctrine of the non-liability of public officers for acts involving the exercise of judgment and discretion. It is justified because of the danger to independent and fearless action by discretionary agents which would result from the threat of actions in tort. The interests of orderly administration and freedom of action by the Government demand that the charge of a negligent or abusive use of discretion in the form of an action for damages be not available to any individual desirous of hampering the functioning of an agency. The citizen’s remedy must lie in other directions.

There is nothing in the Act to indicate that the criteria for distinguishing a discretionary from a ministerial function shall differ from that employed in other contexts, as where the issue is municipal liability in tort, personal liability of a government officer, or availability of injunction against governmental agencies.

Closely related to this general immunity for official acts are four specific exceptions which provide that the jurisdiction of the courts shall not extend to: “any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter;”*74 “any claim arising out of an act or omission of any employee of the Government in administering the provisions of the Trading with the Enemy Act, as amended;”*75 “any claim for damages caused by the imposition or establishment of a quarantine by the United States;”*76 and “any claim for damages caused by the fiscal operation of the Treasury or by the regulation of the monetary system.”*77 These provisions extend beyond the first exception because, having no qualifying phrases,

69. See cases and texts cited note 72 infra.
70. If the action of the Federal agent is unconstitutional or beyond his authority, claimant can often hold the agent individually liable. See note 68 supra. But if not, and claimant merely objects to the exercise of discretion, his only recourse is removal of the offending official, either through political action or, possibly, impeachment. See Dakota Cent. Tel. Co. v. South Dakota ex rel. Payne, 250 U. S. 163, 184 (1919).
74. F. T. C. A. § 421(b).
76. F. T. C. A. § 421(f).
77. F. T. C. A. § 421(i).
they cover even gross negligence in performing a ministerial duty. However, the provisions are carefully worded in the attempt not to include the ordinary common-law torts of negligence of employees of those agencies, disassociated from their primary purposes. In hearings and committee reports this point is frequently stressed.

These four exceptions reveal an abundance of caution on the part of Congress in relaxing the Government's immunity. They exclude liability for damages caused not by the adoption of a policy or the exercise of discretion but rather by negligence within the agencies concerned. As regards the monetary system the draftsmen presumably felt that the liability would be too immense and the damages too widespread to justify any allowance of claims. As regards the Trading with the Enemy Act, a probable contributing factor, though not mentioned in hearings or reports, was the diplomatic and military undesirability of authorizing trials in open court. The postal exception is based on the number of cases which might arise were it not included. No satisfactory explanation for the quarantine provision has been given. It was once described as "dangerous," which presumably means that if it were not included, some large judgments might be recovered. If, however, a private person has been greatly damaged by the unnecessary imposition of a quarantine, not due to a mistaken use of discretion by some

78. Even in the absence of these specific exceptions, the activities concerned would not impose liability on the Government for statutory wrongs or for the negligent performance of a discretionary duty, under the first exception. Note 60 supra.

79. See, e.g., H. R. Rep. No. 2245, 77th Cong., 2d Sess. (1942) 10: "However, the common-law torts of employees of regulatory agencies would be included within the scope of the bill. . . . Thus, [the sections] exempting claims arising from the administration of the Trading With the Enemy Act or the fiscal operations of the Treasury, are not intended to exclude such common-law torts as an automobile collision caused by the negligence of an employee of the Treasury Department or other Federal agency administering those functions." And see Hearings before the House Committee on the Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2d Sess. (1942) 33.

80. The explanations given for these provisions are often ambiguous or inconclusive. Thus the treasury exception was explained on the basis that it seemed "proper and desirable to the framers of the bill." Hearings before the Senate Committee on the Judiciary on S. 2609, 76th Cong., 3d Sess. (1940) 39. And again: "The other exemptions . . . relate to certain governmental activities which should be free from the threat of damage suits. . . ." H. R. Rep. No. 2245, 77th Cong., 2d Sess. (1942) 10.

81. An additional reason advanced for this exception is the ease with which postal matter may be insured. Hearings before the Senate Committee on the Judiciary on S. 2690, 76th Cong., 3d Sess. (1940) 38. For a discussion of the personal liability of postmasters see 2 COOLEY, TORTS § 305.

82. Hearings before the Senate Committee on the Judiciary on S. 2690, 76th Cong., 3d Sess. (1940) 38. Since the exception applies only to the imposition of a quarantine, by which only a limited number of parties would be damaged, the danger does not appear to be multiplicity of suits. If, due to negligence in some ministerial capacity, a quarantine were not imposed and an epidemic thereby started, the exception does not apply. However, in such a case, the duty owed by the Government being only to the public in general, no individual would have standing to sue. Cf. 1 COOLEY, TORTS § 59; 2 id. § 301, and cases cited.
officer but simply to negligence within the department, it seems that the
general public in whose interest the quarantine was imposed should bear the
loss, rather than the blameless individual upon whom it fell.

The same observations apply in large part to another exception, which
denies jurisdiction to the courts over "any claim arising out of assault,
battery, false imprisonment, false arrest, malicious prosecution, abuse of
process, libel, slander, misrepresentation, deceit, or interference with con-
tract rights." \(^{33}\) The reason for including this exception, as explained in
committee hearings of an earlier act, is the difficulty of defending such suits
and the probability of judgments against the Government in amounts out
of proportion to the damages actually suffered by claimants.\(^{34}\) The reason
seems insufficient to warrant complete denial of jurisdiction to the courts.
If it seemed desirable to exclude recovery for mental suffering or other par-
ticular phases of liability, that could be accomplished by specific provision.
But this sweeping exception imposes a hardship upon claimants and leaves
open one fruitful source of private claim bills.\(^{35}\)

Another group of exceptions is included because of satisfactory provisions
already made for handling the claims covered. This group includes the col-
lection of taxes and customs duties\(^{36}\) maritime torts\(^{37}\) injury to vessels or
their cargo, crew or passengers while in the Panama Canal,\(^{38}\) and the ac-
tivities of the TVA.\(^{39}\) The exception relating to taxes and customs should,
like the exceptions covering negligence in certain departments, discussed
above, be interpreted as not including ordinary torts, disassociated from the

\(^{33}\) F.T.C.A. § 421(h).

\(^{34}\) The proponents of an earlier bill seemed to fear the inflammatory nature of some of
the torts here excluded, such as possible third degree beatings by the FBI. See Hearings
before the Senate Committee on the Judiciary on S. 2690, 76th Cong., 3d Sess. (1940) 39. The
fact that all cases will be tried without a jury detracts much from the weight of this argu-
ment.

\(^{35}\) Cf. letter from the Federal Bar Association of New York, New Jersey, and Con-
necticut, id. at 14.

\(^{36}\) F.T.C.A. § 421(c). The Tax Court of the United States has jurisdiction over
et seq. (1940 and Supp. 1946). Claims arising out of the payment of customs duties are
heard by the United States Customs Court, with review by the United States Court of
United States, 69 F. (2d) 480 (C. C. A. 9th, 1934).

\(^{37}\) F.T.C.A. § 421(d). See Canadian Aviator Ltd. v. United States, 324 U. S. 215
(1945) for a review of the legislation permitting suit against the Government in admiralty,
the Acts of 1920 and 1925, loc. cit. supra note 6. See Zeller Marine Corp. v. United States,
66 F. Supp. 447 (S. D. N. Y. 1940), and cases cited, for some of the difficulties of correlating
the statutes with the Tucker Act, loc. cit. supra note 4.

\(^{38}\) F.T.C.A. § 421(g). The handling of claims arising out of the operation of the
Panama Canal are discussed by Burdick in Hearings before the House Committee on the Judi-

\(^{39}\) F.T.C.A. § 421(l).
direct administration of duties involved. The exception relating to the TVA was at no time discussed in hearings or reports. The unqualified terms apply to all activities of TVA employees, so that claimants are relegated to the statute authorizing the Authority to sue and be sued in its own name. That authorization has been interpreted as limiting the right of suit in tort to cases in which the alleged delict was not a duly authorized activity of the Authority, thus imposing much the same restriction as that found in the first exception of this statute.

Of the two remaining exceptions, one covers "any claim arising in a foreign country." This is a desirable corollary to the provision that the law of the place where the act or omission occurred shall govern, to avoid the difficulties inherent in administering foreign law. The other excepts "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." A similarly worded exception is found in the acts authorizing the Secretary of War to settle claims arising out of the activities of our armed forces. Since this Act to some extent replaces and enlarges those measures, and since the meaning of "combatant activity" has apparently not been litigated in the courts, it may be assumed that Congress intended the phrase as construed in administrative interpretations.

90. See note 79 supra. Thus a customs official who through negligence mistakenly thought a bottle to contain contraband and smashed it, would thereby impose no liability upon the Government under this Act. But if in so doing he negligently hurt a bystander, this exception would not deny jurisdiction to the courts in an action by the bystander against the United States.

91. The exception appeared once before, in the version of the 1942 measure reported by the House Committee on the Judiciary. No explanation for it was given. H. R. Rev. 2245, 77th Cong., 2d Sess. (1942) 4, 12. It was introduced into this Act in the House substitute version of the Senate measure. 92 Cong. Rec., July 25, 1946, at 10106, 10143.


94. F. T. C. A. § 421(k).

95. See Hearings before the House Committee on the Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2d Sess. (1942) 35.

96. F. T. C. A. § 421(j).


98. F. T. C. A. § 424(a). Since all foreign claims are excluded from the operation of this act, the Foreign Claims Act, supra note 97, is believed to be unaffected. See discussion infra p. 549 et seq., and note 113.

99. The word "combatant" was inserted into § 421(j) by committee amendment on the floor of the House, without discussion. 92 Cong. Rec., July 25, 1946, at 10143. Hence, no explanation of the intended scope of the term is to be found in committee hearings or reports. The amendment may have been inserted in view of the uncertain meaning of the companion phrase "during time of war." See note 102 infra. Cf. Hearings before the House Committee on the Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2d Sess. (1942) 12.
Both in Army Regulations and in the decisions of the Judge Advocate General of the Army, "combatant activity" has been given a very restricted meaning. Thus no practice or training maneuvers are included, nor are operations not directly connected with engaging the enemy. The meaning of "during time of war" varies with its context. It is generally construed as extending to the signing of the peace treaties, but is sometimes interpreted as terminating with active hostilities. Since only combatant activities are excepted under the instant Act, and since in any event no claim arising in a foreign country will be considered, the meaning of "during time of war" is an academic question, at least for the present.

Absent from this Act is the exception, included in earlier bills, which covered any claim which was within the terms of the Federal Employees' Compensation Act. In the hearings on former bills there was adverse criticism of limiting an employee's rights to the Compensation Act, and its omission now leaves a choice of remedies. However, if an employee elects to proceed with the Compensation Commission and accepts its award, he undoubtedly will not thereafter be permitted to move under this Act also.

Acts Repealed or Modified. A final issue of jurisdiction raised by the statute concerns its effect on previous Acts of Congress. Section 423 directs that in respect of "claims cognizable under part 3 of this title" the provisions of

100. See ARMY REG. 25–25 (9) and (15) (1945) and ARMY REG. 25–90 (9) and (15) (1945).
101. See BULL. JAG, c. 10 (1943–6).
104. All of the bills considered in committee hearings in 1940 and 1942 contained the exception. See note 10 supra. Mr. Holtzoff, representative of the Department of Justice, which played a large part in drafting the measures, opposed the exception as an unfair discrimination against the employees affected. Hearings before Senate Committee on the Judiciary on S. 2690, 76th Cong., 3d Sess. (1940) 49. He testified that the provision was included because it was thought that the idea of giving a choice of remedies would be considered too advanced. Its omission now is evidence that Congress has come abreast of the ideas then held by the Department of Justice.
106. See Dahn v. Davis, 258 U.S. 421 (1922). Plaintiff, a Government railroad employee injured in the course of his employment, had standing to sue on the tort under the Federal Control Act, 40 STAT. 451 (1918). It was held that acceptance of an award under the Federal Employees' Compensation Act estopped him from further action against the Government. And see Brady v. Roosevelt S. S. Co., 317 U.S. 575, 581 (1943). For an interpretation which suggests the possibility of proceeding under the Tort Claims Act if an award is refused by the Compensation Commission, see Humphrey v. Poss, 245 Ala. 11, 15 So. (2d) 732 (1943). For effect of a statute permitting employee to accept compensation payments and also to sue the tort-feasor, see Porello v. United States, 153 F. (2d) 605, 608 (C. C. A. 2d, 1946) [interpreting the Longshoremen's and Harbor Workers' Compensation Act, 44 STAT. 1440 (1927), 52 STAT. 1168 (1938), 33 U.S.C. § 933 (1940)].
107. The Act is divided into four parts: (1) title and definitions; (2) provisions for ad-
the Act shall be the exclusive remedy against any Federal agency whether or not authorized to sue and be sued in its own name. Section 424 repeals certain statutes providing for the administrative settlement of small claims, “in respect of claims cognizable under part 2 of this title.” Since the limiting exceptions are set out in part 4, the question arises whether sections 423 and 424 withdraw from the previously-granted jurisdiction only those cases which are cognizable under this Act as restricted by the exceptions, or withdraw all cases which would otherwise be cognizable under the broad grant of jurisdiction of parts 2 and 3.

If the former interpretation is adopted, the sue-and-be-sued clauses and the old administrative remedies remain available to claimants excluded from recourse to the Tort Claims Act by its exceptions. This result can be sustained as in line with the overall purpose of the Act to increase, rather than decrease, government responsibility in tort, which purpose militates against an interpretation crippling previous specific relaxations of immunity. Moreover, since part 2 of the Act is introduced with the phrase “Subject to the limitations of this title,” and part 3 begins “Subject to the provisions of this title,” it may be argued that those parts are required, by their wording, to be construed as incorporating the exceptions of part 4, and, accordingly, that sections 423 and 424 do not prevent resort to the earlier statutes authorizing suit in cases where the exceptions would bar suit under the Tort Claims Act. However, the Act may be interpreted as abrogating previous relaxations of immunity in cases cognizable under, or excepted from the scope of, the Tort Claims Act. In support of this interpretation, it may be argued that Congress has here laid out a comprehensive, well-reasoned scheme of governmental liability for negligence, which it would be inconsistent to apply as the exclusive remedy against some departments, while avoiding its limitations as to others by relying on the old sue-and-be-sued clauses.

The report of the Joint Committee on the Organization of Congress makes

ministrative settlements; (3) provisions for judicial determinations; (4) provisions common to parts 2 and 3. Both the exceptions and the sections relating to repeal of former statutes are in part 4.

108. F. T. C. A. § 424(a).
110. For citations to the sue-and-be-sued clauses see note 8 supra. It is doubtful that the analysis above has more than a spurious validity, for the sue-and-be-sued clauses have themselves been so interpreted by the courts as to embrace most of the limitations imposed by the exceptions in the Tort Claims Act. Thus, while the courts are not in agreement as to the extent of tort liability incurred under the sue-and-be-sued clauses, no case has gone so far as to permit suit questioning the legality of a statute or the wisdom of an exercise of discretion. Cf. Pennell v. HOLC, 21 F. Supp. 497, 498 (D. C. Me. 1937); Grant v. TVA, 49 F. Supp. 564 (E. D. Tenn. 1942). The leading case of Keifer & Keifer v. RFC, 306 U. S. 381 (1939), does not suggest that the authority of the clause is unlimited. See in general Nagler, Liability of the United States Government in Tort (1940) 14 Tulane L. Rev. 407, 417–20; (1939) 23 Am. Jur., Foreign Corporations § 574; Note (1940) 125 A. L. R. 809, 814 (considers only HOLC).
it abundantly clear that, at least as to section 423 relating to the sue-and-be-sued clauses, the former grant of jurisdiction is intended to be entirely removed in suits for money recovery sounding in tort, and claimants' exclusive judicial remedy is to be against the United States under this Act.111 Section 424, relating to administrative settlements, is almost identical in wording, but can be differentiated on several counts. The committee reports, while clear as to the meaning ascribed to section 423, do not thus clarify section 424,112 and a careful analysis of sub-section 424(a) suggests that part of that sub-section has no meaning unless the exceptions of part 4 of the Act are read into part 2.113 Moreover, the reasons motivating many of the

111. Sen. Rep. No. 1400, 79th Cong., 2d Sess. (1946) 33-4: "This will place torts of 'suable' agencies of the United States upon precisely the same footing as torts of 'nonsuable' agencies . . . and in both cases the exceptions of the bill would apply either by way of preventing recovery at all or by way of leaving recovery to some other act, as, for example, the Suits in Admiralty Act. It is intended that neither corporate status nor 'sue and be sued' clauses shall, alone, be the basis for suits for money recovery sounding in tort." This language was taken verbatim from the Report of the Committee on the Judiciary to accompany S. 2221, H. R. Rep. 2245, 77th Cong., 2d Sess. (1942) 11.

112. Sen. Rep. No. 1400, op. cit. supra note 111, at 34: "This section [424] provides that as to claims cognizable under part 2 of the title existing provisions of law authorizing administrative adjustment of such claims are repealed. Provisions of law authorizing adjustment of claims not cognizable under part 2 would remain unaffected as to such claims." This leaves unanswered the question as to what claims are to be considered "cognizable under part 2." The report of the Senate Committee on the Judiciary on the 1942 measure, S. 2221, perhaps indicates that that bill was intended to repeal the former authority over claims falling within the exceptions. It reads: " . . . claims which occur prior to the effective date of the bill; claims which may, irrespective of negligence, be adjusted under existing law, and claims not cognizable under the bill for any other reason, may be considered and determined by the Federal agencies under existing law as at present. However, claims based upon the negligence of a Federal employee acting within the scope of his authority and cognizable under Title II [Part 2] of the bill are to be presented for administrative adjustment solely under this bill." Sen. Rep. 1196, 77th Cong., 2d Sess. (1942) 8. (S. 2221, as reported, included claims only for "negligent," and not for "wrongful," acts.)

113. F. T. C. A. § 424(a). The first clauses of the subsection repeal former provisions of law authorizing settlements by Federal agencies where the jurisdictional limitations of this act apply, i.e., where the injury or damage was "caused by the negligent or wrongful act or omission of an employee of the Government while acting within the scope of his office or employment . . . ", after which there is added: " . . . in respect of claims cognizable under part 2 of this title. . . ." The last quoted clause has no meaning unless there are some acts caused by the negligent or wrongful act of an employee which are not cognizable under part 2. Such acts can only be those which are included within the exceptions, and as to them the former authority is not repealed.

For example, one of the statutes specifically mentioned in § 424(a) authorizes the Attorney General to determine any claims up to $500 for damages caused by an agent of the FBI acting within the scope of his employment. No negligence or wrongfulness is required by the statute. 49 St. 1184 (1936), 31 U. S. c. § 224(b) (1940). Sec. 424 of the Tort Claims Act repeals this grant of authority only as to cases caused by a negligent or wrongful act, so that the Attorney General presumably may still allow a claim for damages caused by an agent while legitimately pursuing his duties. But since false arrest is excepted from the Act, § 421(h), and therefore not cognizable under part 2, it would appear that the Attorney General may also continue to settle claims up to $500 for a wrongful false arrest.
exceptions are applicable only to part 3, providing for court trials with unlimited recovery and are inapplicable to an administrative settlement with a $1000 limit. For these reasons it is possible that the courts will permit no actions in tort against the sue-and-be-sued agencies, whereas the heads of departments may continue to settle some claims, excluded from this Act by the exceptions, under authority of previous grants of jurisdiction.

The Act nowhere mentions its effect upon certain of the existing statutes authorizing suit against the Government for limited classes of torts, such as that granting to the Court of Claims exclusive jurisdiction of actions for patent infringement or for damage to oyster beds from dredging operations. Cases will probably arise which might give a choice of remedies either under one of the old statutes or under the new Act. By the familiar doctrine that the more recent Act controls, the courts could hold in that event that the sole remedy lay under the Tort Claims Act. Or by following the doctrine that when there are two conflicting statutes upon the same subject, one general and the other specific, the specific statute governs without regard to priority of enactment, the courts could easily avoid the conflict by holding patent infringement and damage to oyster beds unaffected by the Tort Claims Act. Even if this course is not followed, the old Acts cannot be held entirely repealed by implication, for many cases arising thereunder

The construction here contended for is in some cases almost inescapable. For example, the Secretary of War was authorized by an act in 1942, loc. cit. supra note 97, to settle claims arising in a foreign country out of the activities of his department. Section 421(k) of this Act excepts any claim arising in a foreign country. Unless the repealing clause of section 424 is intended to be read in the light of this exception, then, as to claims arising out of the negligence of a soldier abroad, all administrative authority to settle has been repealed. Such an interpretation will necessarily lead to a renewed flood of private claim bills, a result which it is believed Congress did not intend.

Thus the danger of large judgments, the undesirability of court trials, to a large extent the inconvenience of a multiplicity of claims, are here of minor importance. This argument does not suggest any extention of the powers of settlement of the agencies into new and possibly dangerous fields. It is merely directed at not permitting this Act to restrict the authority which the agencies have been exercising under previous statutes. See note 7 supra.

The opinions differ as to whether the infringement of a patent is a tort or a “taking,” Compare Crozier v. Krupp, 224 U. S. 290 (1912), with Keifer & Keifer v. RFC, 306 U. S. 381, 396 (1939); cf. Schillinger v. United States, 155 U. S. 163 (1894). But if the infringement of a patent is held to be a “wrongful act” within the meaning of this statute, and it does appear to be included in that phrase, then in every case it may become necessary to resolve a conflict of jurisdiction between the Court of Claims and the Federal District court in terms of whether or not the case falls within the scope of the first exception, discussed supra p. 543 et seq.

That these statutes were not listed as exceptions, as were those governing maritime torts, supra note 6, weakens this argument.
will not be within the terms of the new statute.\textsuperscript{119} It is to be hoped that the silence of Congress will be interpreted as giving claimant his choice of remedies in a proper case, rather than requiring him to justify the jurisdiction of whichever court he elected in terms of the mutual exclusiveness of the Acts.\textsuperscript{123}

**Practice and Procedure**

The clear purpose of the Act is to prescribe the same substantive rules as are applicable ordinarily between private litigants in the Federal district courts. In all cases the rights of claimants are to be determined "in accordance with the law of the place where the act or omission occurred."\textsuperscript{121} There is no separate interpretation of this provision, so that the place of the tort, if doubtful, must be decided in accordance with applicable common law doctrines.\textsuperscript{122} The United States is to be liable whenever a private person in like circumstances would be, and, in cases in the district courts, "to the same claimants, in the same manner, and to the same extent . . . except . . . for interest prior to judgment and for punitive damages."\textsuperscript{123} Thus the doctrine of *Erie R. R. v. Tompkins*\textsuperscript{124} is written into the act, and no special rules of substantive law are invoked.\textsuperscript{125}

\textsuperscript{119} Any infringement of a patent done pursuant to a statute or as a result of the exercise of a discretionary function would be excluded by the first exception. *F. T. C. A.* § 421(a). No such limitation is written into the acts cited, note 115 *supra.*

\textsuperscript{120} Hammond v. United States, 95 Ct. Cl. 464, 42 F. Supp. 284 (1942); Brothers v. United States, 52 Ct. Cl. 462 (1917), aff'd, 250 U. S. 88 (1919); E. W. Bliss Co. v. United States, 53 Ct. Cl. 47 (1917), aff'd, 253 U. S. 187 (1920); Cramp & Sons v. Internat. Curtis Turbine Co., 246 U. S. 28, 41 (1918) *semble.* These cases suggest that a suit against the Government arising out of a patent infringement may, in a proper case, be brought under either the Act of 1910 or the Tucker Act, as on an implied contract. The jurisdictional conflict has not been acute in this situation, since original jurisdiction under both statutes lies in the Court of Claims, and appellate procedure is the same. United States v. Esnault-Pelterie, 303 U. S. 26 (1938), *aff'd* 84 Ct. Cl. 625 (1937); Hammond v. United States, 95 Ct. Cl. 464, 42 F. Supp. 284 (1942). However, the possible conflict between the Act of 1910 and the Tort Claims Act will be a vital issue in every case. Cf. discussion pp. 550-553 *supra.*


\textsuperscript{121} F. T. C. A. §§ 403(a), 410(a).


\textsuperscript{123} F. T. C. A. § 410(a).


\textsuperscript{125} The single exception is that the United States "shall not be liable for interest prior to judgment or for punitive damages." *F. T. C. A.* § 410(a). Obedience to the local law is a departure from some of the earlier bills. Note 10 *supra.* Thus the measures considered in 1940, S. 2690 and H. R. 7236, incorporated provisions designed to offset the effect of *Erie R. R. v. Tompkins,* 304 U. S. 64 (1938), by establishing a certain uniformity in the law of Government liability; viz., contributory negligence a complete defense; only pro-rata lia-
While procedure will generally be the same as between private litigants, the Government is protected by several specific provisions.\textsuperscript{129}

\textit{Proceedings in the Federal District Courts.} Venue of an action is laid in either the federal district court of plaintiff's residence or of the place of the tort, including the Territories and possessions.\textsuperscript{127} The court is to sit without a jury.\textsuperscript{128}

Several problems arise from the fact that pursuant to the authority of this statute the courts will be acting as an arm of the legislative department of the Government \textsuperscript{129} and not under the constitutional grant of judicial authority.\textsuperscript{128} They will be sitting as courts of claims \textsuperscript{131} and as such will be governed by the Federal Rules of Civil Procedure as applied to proceedings in the district courts under the Tucker Act. Section 411 of the Act affirms the applicability of the Rules without any expressed limitation. However, the reasoning of the Supreme Court in the case of \textit{United States v. Sherwood} \textsuperscript{132} will probably be held controlling. In that case the Court held that the Federal Rules applied only to the manner of exercising jurisdiction and could not be used to increase jurisdiction.\textsuperscript{133} Therefore joinder of parties was not permitted \textsuperscript{134} where it had the effect, by bringing in a third party as co-defendant with the United States, of giving the court jurisdiction of a controversy between private parties which it could not otherwise have considered.

\begin{itemize}
  \item \textsuperscript{126} The Federal Rules of Civil Procedure are prescribed. F. T. C. A. § 411. But see discussion \textit{infra} as to joinder of parties, counterclaims, effect of proceedings on subsequent actions against the Government, etc.
  \item \textsuperscript{127} F. T. C. A. § 410(a).
  \item \textsuperscript{128} Ibid. The constitutionality of this provision is not open to question, for, having the power to retain complete immunity, the Government is free to relax it on terms. McElrath v. United States, 102 U. S. 426 (1880). See \textit{Hearings before the House Committee on the Judiciary on H. R. 5373 and H. R. 6463}, 77th Cong., 2d Sess. (1942) 21.
  \item \textsuperscript{129} U. S. Const., Art. I, § 8. See Williams v. United States, 289 U. S. 553 (1933).
  \item \textsuperscript{130} U. S. Const., Art. III, § 1.
  \item \textsuperscript{132} 312 U. S. 584 (1941), rev'd \textit{Sherwood v. United States}, 112 F. (2d) 587 (C. C. A. 2d, 1940).
  \item \textsuperscript{133} Id. at 589–90.
\end{itemize}
The *Sherwood* case can be distinguished on the grounds that it applies to the Tucker Act, which was adopted long before the Federal Rules, whereas this Act is written with those Rules in mind and expressly invokes their control. Therefore any expansion of jurisdiction involved in giving the Rules full effect can be held to have been granted by Congress and not by the Rules themselves. This argument is answered in part by reference to the committee report on the bill considered in 1942 which, citing the *Sherwood* case, interprets identical words to mean that no joinder is intended. Furthermore, serious procedural difficulties would be raised by permitting joinder of parties. For the constitutional guarantee of a jury is applicable to controversies between individuals and could not be denied to a third party joint tort-feasor or to the employee of the Government who committed the tort, by the device of joining him as a defendant with the United States. Therefore it seems inevitable that the rights of plaintiff and of the Government against others will have to be adjudicated in a separate controversy.

Counterclaims by the United States are to be governed by the applicable provisions of the Tucker Act. That act in effect gives to the courts jurisdiction to hear any demand whatsoever by the Government as a set-off or counterclaim against plaintiff, and has been frequently and liberally interpreted. But jurisdiction to hear the counterclaim fails when the original

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135. The Tucker Act was passed in 1887, the Federal Rules adopted in 1938, and the *Sherwood* case decided in 1941.

136. The committee report on the amended version of S. 2221, which in all relevant respects is copied verbatim in the present Act, reads: "It is intended that the district courts in exercising jurisdiction under this title shall exercise essentially the same type of jurisdiction as district courts exercise concurrently with the Court of Claims of the United States under the Tucker Act. . . . The bill therefore does not permit any person to be joined as a defendant with the United States and does not lift the immunity of the United States from tort actions except as jurisdiction is specifically conferred upon the district courts by this bill. See United States v. Sherwood, 312 U. S. 584 (1941); Lynn v. United States, 110 F. (2d) 586, 589 (C. C. A. 5th, 1940); Waite v. United States, 57 Ct. Cl. 546 (1922); Jackson v. United States, 27 Ct. Cl. 74, 81 (1891). The phrase 'as a court of claims' in section 301 of the Senate bill [section 410(a) of this Act] was deleted as surplusage." H. R. REP. No. 2245, 77th Cong., 2d Sess. (1942) 9. See also *Hearings before the House Committee on the Judiciary on H. R. 5373 and H. R. 6463, 77th Cong. 2d Sess. (1942) 21–3.

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138. If joinder were permitted and the individual defendant refused to waive his right to a jury, a constitutional issue would be presented. Cf. Lynn v. United States, 110 F. (2d) 586, 588–9 (C. C. A. 5th, 1940). The objection could be met only by separating the trials, thus defeating the joinder, or by conducting a single trial with the jury being concerned only with the liability of the individual, the judge acting independently as to the liability of the United States.

139. F. T. C. A. § 411.

claim is dismissed for want of jurisdiction, and the counterclaim must be against only the parties to the original action. However, the counterclaim need not arise out of the same transaction and it may be in an amount greater than plaintiff sues for.

The Act does not enlarge the very limited right of counterclaim against the United States. Two comparatively recent Supreme Court decisions limit that right as follows: (1) No counterclaim which would require an affirmative money judgment against the United States may be heard unless the court in which it is brought could have had jurisdiction of the claim in an original suit. (2) No counterclaim may be heard unless it arises out of the same transaction as that on which the Government bases its cause of action, or unless the court could have had original jurisdiction. Since the Government cannot bring suit in the Federal district court sitting as a court of claims without a jury, as authorized by this Act, torts may be pleaded as counterclaims only in amounts which will not result in judgments against the United States and only when the Government’s suit is on the same transaction.

141. Kelleam v. Md. Casualty Co., 312 U. S. 377 (1941); Baltimore & O. R. Co. v. United States, 34 Ct. Cl. 484, 502 (1899). However, lack of jurisdiction over the original claim will not defeat jurisdiction as to the counterclaim if the court could have exercised original jurisdiction over the counterclaim. Isenberg v. Biddle, 125 F. (2d) 741, 743 (App. D. C. 1941). Since suits under this Act will be brought in the district courts sitting specially as courts of claim without a jury, those courts as such could not have exercised original jurisdiction over a claim by the United States, and therefore cannot adjudicate the Government’s counterclaim if plaintiff’s cause of action is not supported by the Act. See supra p. 554.
144. REV. STAT. § 1061 (1875); 28 U. S. C. § 252 (1940); McElrath v. United States, 102 U. S. 426 (1880).
147. See cases cited note 145 supra. See also In re Monongahela Rye Liquors, 141 F. (2d) 864 (C. C. A. 3d, 1944).
148. See supra p. 554.
149. In the majority of jurisdictions, where contributory negligence is a valid defense against the entire claim, there will be no advantage to a defendant sued by the Government in pleading negligence of the Government employee as a counterclaim. For if both parties were negligent, there will be no recovery; if the Government alone was negligent, defendant will have to bring suit under the Federal Tort Claims Act. He cannot collect on a counterclaim, because the court in which he was being sued by the Government would not be sitting as a court of claims with statutory authority to render judgments against the Government. See cases cited supra note 146.
Claimant's action in the district court is further governed by several special provisions. Suit may be brought upon a claim filed with an agency for consideration and settlement, if the claim is denied or the award refused.\(^\text{150}\) But the complaint cannot be filed until after final action has been taken by the agency or until fifteen days after notice of withdrawal of the claim from such agency.\(^\text{151}\) If a claim once presented to an agency is later taken to court, the amount sued for can be no greater than the sum previously demanded of the agency, unless the increase is based upon newly discovered evidence or intervening facts.\(^\text{152}\) A one year statute of limitations is adopted, but is extended to a date six months after final disposition of a claim by an agency or after notice of withdrawal.\(^\text{153}\) The Attorney General is authorized to "arbitrate, compromise, or settle any claim cognizable under [part 3], after the institution of suit thereon, with the approval of the court in which such suit is pending."\(^\text{154}\) Appeal lies to the Circuit Courts of Appeals or, with the written consent of all appellees, to the Court of Claims which will then have the same duties and powers as the Circuit Courts.\(^\text{155}\) Payment of any judgment rendered by the court shall be made by the General Accounting Office.\(^\text{156}\)

**Administrative Awards.** The provisions governing administrative settlement when the claim is not in excess of $1,000\(^\text{157}\) are explicit and raise no problems of interpretation. The claim must be filed with the agency in

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\(^{150}\) F. T. C. A. § 410(b). The objection that an earlier bill was too generous to claimants in preserving a right to sue if dissatisfied with the administrator's award was answered by analogizing the administrative remedy to an attempt at settlement between private parties. See *Hearings before the House Committee on the Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2d Sess. (1942) 32.*


\(^{152}\) *Ibid.*

\(^{153}\) F. T. C. A. § 420.

\(^{154}\) F. T. C. A. § 413. This provision is taken from the acts permitting suits in admiralty against the Government for maritime torts, where it is thought to have been successful. See *Hearings before the Senate Committee on the Judiciary on S. 2690, 76th Cong., 3d Sess. (1940) 37.*

\(^{155}\) F. T. C. A. § 412. This provision was added to the 1942 bill, partly because of a casual suggestion made by President F. D. Roosevelt. See H. R. REP. No. 2245, 77th Cong., 2d Sess. (1942) 6, 11. However, it also represents a compromise between a desire for uniformity in appellate decisions and a feeling that claimants have a right to the convenience of a local appellate tribunal. No advantage between the procedures other than geographical location is apparent, unless the various courts are more or less generous to claimants. See *Hearings before the House Committee on the Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2d Sess. (1942) 17–9.*

\(^{156}\) F. T. C. A. § 411. The Act provides that the same provisions for payment of judgments shall be applicable as in cases brought under the Tucker Act. See Rev. STAT. §§ 236, 1089 (1875), as amended 43 STAT. 939 (1925), 31 U. S. C. § 225 (1940); 33 STAT. 41 (1904), as amended 42 STAT. 24 (1921), 31 U. S. C. § 228 (1940).

\(^{157}\) F. T. C. A. Part 2.
writing within one year of its accrual.\textsuperscript{158} No provision is made as to the manner in which the claim is to be filed or the information which must be given.\textsuperscript{159} The decision on the claim is to be made by the head of the agency or his designee for the purpose,\textsuperscript{160} and in the absence of fraud that decision will be binding on all officers of the Government.\textsuperscript{161} While the agencies are directed to observe the local law and presumably will take due consideration of judicial interpretations of the statute, no provision is made for appeal from, or supervision of, the agencies' exercise of jurisdiction, or for promoting uniformity of treatment.\textsuperscript{162}

Payment shall be made "by the head of the Federal agency concerned out of appropriations that may be made therefor, which appropriations are hereby authorized."\textsuperscript{163} And finally, the head of each agency is directed to report annually to Congress on all claims paid.\textsuperscript{164}

**Effect of Judgment or Award.** The acceptance of any award made by an agency or of any settlement by the Attorney General

"... shall be final and conclusive on the claimant, and shall constitute a complete release by the claimant of any claim against the United States and against the employee of the Government ... by reason of the same subject matter."\textsuperscript{165}

The Act further provides, in regard to suits brought under section 410(a),

"The judgment in such an action shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the Government ... ."\textsuperscript{166}

\textsuperscript{158} F. T. C. A. § 420.

\textsuperscript{159} There was some discussion in the hearings on earlier bills to require filing, at least of a notice of intention to claim, within a few weeks of the occurrence giving rise to the claim, in order to give the Government an opportunity to prepare a defense while witnesses and evidence could still be located. This plan was not adopted, presumably because a short statute of limitations would inevitably lead to the filing of a large number of private claim bills in Congress, and because most Government departments require their employees to file reports of all accidents immediately after they occur. This will be sufficient notice to protect the department in most cases. See *Hearings before Senate Committee on the Judiciary on S. 2690*, 76th Cong., 3d Sess. (1940) 47.

\textsuperscript{160} F. T. C. A. § 403(a).

\textsuperscript{161} F. T. C. A. § 403(b).

\textsuperscript{162} Some earlier bills provided that the Attorney General should prescribe criteria to be followed by the various agencies. See *Hearings before the Senate Committee on the Judiciary on S. 2690*, 76th Cong., 3d Sess. (1940) 42. That provision was deleted in 1942, together with a companion section which provided for review by the Attorney General of all claims settled by the agencies in amounts between $500 and $1,000. See *Hearings before the House Committee on the Judiciary on H. R. 5373 and H. R. 6463*, 77th Cong., 2d Sess. (1942) 10, 12. While there is now no provision for review, claimant is free to refuse any award and take the matter to court. See note 150 supra.

\textsuperscript{163} F. T. C. A. § 403(c).

\textsuperscript{164} F. T. C. A. § 404. This provision will enable Congress to keep itself informed of the relative generosity to claimants of the heads of agencies.

\textsuperscript{165} F. T. C. A. § 403(d).

\textsuperscript{166} F. T. C. A. § 410(b).
In respect to further action against the Government, the acceptance of an award or settlement would probably have been held an accord and satisfaction even without the statutory command, but the question is here definitely settled. The effect of a judgment on further action against the Government or its agencies is not prescribed by the Act and will depend on rules of res judicata.

As against the employee, the provision relative to acceptance of an award is again little more than a statement of prevailing law. The same will be true in most jurisdictions of the provision as to judgments. That sentence clearly applies only to judgments rendered on the merits and should not be interpreted as referring to any judgment by which the court denies its jurisdiction. This intent is evidenced in the committee hearings on earlier bills.

167. Mason v. United States, 17 Wall. 67 (U. S. 1872); Note (1913) 42 L. R. A. (N.S.) 111, 113.

168. The Act forbids suits against any agency on a claim which may be brought against the United States. F. T. C. A. § 423. See discussion p. 549 et seq., supra. Normally a judgment against claimant would preclude any further action by him against the Government on the same cause of action. For effect of judgment where decision is based on lack of jurisdiction, see infra, note 170. In that event, if some other remedy were available to claimant, as under the act authorizing suit for patent infringement, supra note 115, he presumably could seek satisfaction under the alternative remedy. See discussion supra p. 552. Or if the lack of jurisdiction were based upon a holding that a responsible Government corporation was not a "Federal agency" within the definition of section 402(a), suit could presumably be instituted against the corporation under the sue-and-be-sued clause. See supra p. 538.

169. By the weight of authority, a release of either master or servant operates to release the other, where both are liable to a third party for a tort of the servant. MacDonald v. Henry Hornblower and Weeks, 268 Mich. 626, 256 N. W. 572 (1934). See Note (1940) 126 A. L. R. 1199, and cases there collected.

170. Such a judgment cannot be res judicata of the issues involved in the action. Gould v. Evansville & C. R. R., 91 U. S. 526 (1875); additional cases collected (1924) 34 C. J. § 1193a.

171. See Hearings before the House Committee on the Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2d Sess. (1942) 9. The Assistant Attorney General testified: "If the Government has satisfied a claim which is made on account of a collision between a truck carrying mail and a private car, that should, in our judgment, be the end of it. After the claimant has obtained satisfaction of his claim from the Government, either by judgment or by an administrative award, he should not be able to turn around and sue the driver of the truck."


173. F. T. C. A. § 410(b), quoted supra p. 558. Even in the absence of such a statutory command, it is almost universally held that a judgment by a court of competent jurisdiction in an action against the master will be a bar to the same plaintiff in a subsequent action against the servant, where the issue in dispute is identical. Jenkins v. Atl. C. Line R. R.,
No mention is made in the Act as to the rights of the claimant against a third party joint tort-feasor, and those rights will accordingly depend entirely on local law. That no joinder will be permitted has been argued elsewhere, and plaintiff will have to seek his remedy in a separate action. By the terms of the statute the acceptance of an administrative award from the Federal agency involved will constitute an accord and satisfaction with the Government, and in nearly all jurisdictions this will bar further recovery by plaintiff from any joint tort-feasors.

The Act presents no peculiar problems as to the Government's rights of subrogation against the employee, or of contribution or indemnity from a joint tort-feasor, save that joinder is not allowed and, accordingly, the rules applicable to private litigants will be determinative.

One provision of the Act of no complexity but considerable professional interest is that relating to attorney's fees. It is provided that the court rendering judgment, or the Attorney General in reaching a compromise, or the Federal agency approving a claim, may, as a part of the judgment, award, or settlement, determine and allow reasonable attorney's fees, which, if the recovery is $500 or more, shall not exceed 10 percent of the amount recovered under part 2, or 20 percent of the amount recovered under part 3, to be paid out of but not in addition to the amount of the judgment, award, or settlement. Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be guilty of a misdemeanor, and shall, upon conviction thereof, be subject to a fine of not more than $2,000 or imprisonment for not more than one year, or both.
It will be observed that the authority to fix the fee is permissive, but the penalty for charging more than the statutory maximum applies whether or not the fee be fixed, and that the penalty applies only "if recovery be had."^179

CONCLUSION

The Federal Tort Claims Act is clearly a major step in the process of laying to rest the doctrine of sovereign immunity. While the Act's exceptions are very broad and will in some measure defeat the aims of eliminating private claim bills from Congress, they appear to be for the most part well taken, at least until experience with the Act indicates to what extent Governmental immunity should be further relaxed.

The most difficult problem now facing a suitor against the Government stems from the multiplicity of statutes authorizing suit. As has been indicated in this discussion, considerable overlap exists between some of these measures. Perhaps in time Congress will substitute for them one comprehensive statute. Meanwhile the courts are faced with the problem of coordinating the interpretations of existing laws so as to achieve their objectives with the minimum conflict.

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179. In committee hearings on previous bills this provision was explained as being in conformity with stipulations usually found in private bills passed by Congress. It was further defended on the ground that defendant here is solvent, a fact said to warrant decreasing the average contingent fee. The provision was bitterly attacked in letters from various bar associations, one of which alleged that the provision would have the practical effect of closing the courts to claimants. See Hearings before the Senate Committee on the Judiciary on S. 2690, 76th Cong., 3d Sess. (1940) 14–6, 40–1; Hearings before House Committee on the Judiciary on H. R. 7236, 76th Cong., 3d Sess. (1940) 13, 22. "The limitation upon attorney's fees would of course be exclusive of actual disbursements made or incurred on behalf of the client." H. R. REP. No. 2245, 77th Cong., 2d Sess. (1942) 10.