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Liability for Parole Decisionmaking: the Absence of Discretion in the Parole Process

Robert F. Polglase

Liability for Parole Decisionmaking: the Absence of Discretion in the Parole Process

In *Payton v. United States*,[1] the Fifth Circuit Court of Appeals held that the United States was liable under the Federal Tort Claims Act,[2] for the parole of a federal prisoner who, following release, murdered plaintiff's wife. The court concluded that such parole decisionmaking did not come within the discretionary function exemption of the Federal Tort Claims Act (FTCA).[3]

Thomas Warrent Whisenhant was sentenced in 1966, while a member of the Air Force, to twenty years in federal prison for assault with intent to murder a female member of the Air Force. During incarceration, he was diagnosed as psychotic and suffering from paranoid schizophrenia. In 1968 prison psychiatrists concluded that Whisenhant was in need of continuing psychiatric treatment. In spite of this, his sentence was reduced to ten years in 1970, and parole was granted in 1973.[4]

Following parole, Whisenhant brutally beat and murdered three women including plaintiff's decedent.[5] During his trial for murder, a psychiatrist testified that Whisenhant's behavior should have been recognized as repetitive and his release on parole bordered on gross negligence.[6]

Plaintiffs filed a claim for damages under the administrative claim provision of the FTCA.[7] After six months, the claim was withdrawn[8] and suit

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1. 636 F.2d 132 (5th Cir. 1981).
2. 28 U.S.C. §§ 1346(b), 2671-2680 (1976).
3. 28 U.S.C. § 2680(a) (1976). Under this section claims are excluded that are based on:
   > 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 an employee of the Government, whether or not the discretion involved be abused.
4. 636 F.2d at 134.
5. *Id.* All three women were brutally murdered, including plaintiff's decedent. Furthermore, the pleadings tended to show that the decedent's body was horribly mutilated as well. *Id.* at 134 n.2. Whisenhant's criminal records, available prior to parole, also showed involvement in two crimes of violence against women in 1973. *Id.* at 134 n.1.
6. *Id.*
7. 28 U.S.C. § 2675(a) (1976).
8. The pertinent part of 28 U.S.C. § 2675(a) provides:
   > An action shall not be instituted upon a claim against the United States for money damages . . . unless the claimant shall have first presented the

was filed in the District Court for the Southern District of Alabama. The district court[9] found that the United States Board of Parole, in making parole decisions, had broad discretion to decide individual cases. The court further found that the majority of requirements for parole under the former regulations[10] were subjective rather than objective in nature.[11] Because of the subjective quality of the parole decision, which was essentially made on a case-by-case basis,[12] the district court found the parole decision clearly to be within the discretionary function exemption of the FTCA. Accordingly, the district court dismissed for lack of jurisdiction.[13]

Before the FTCA was adopted, the sovereign immunity doctrine barred suits against the United States.[14] This doctrine was based on the theory of English common law that "the king can do no wrong"[15] and had been adopted early in American law.[16] The federal version of sovereign immunity, namely that the United States could not be sued in tort unless it consented,[17] developed from this common law theory.

At the federal level, however, absolute immunity has now been replaced in some instances by the FTCA.[18] Through the FTCA, Congress has allowed limited waiver of the doctrine of sovereign immunity in certain tort actions.[19] Acts performed by federal agencies or officials that are discre-

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> claim to the appropriate Federal agency . . . . The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant . . . be deemed a final denial of the claim for purposes of this section . . . .

9. 468 F. Supp. 651, 655 (S.D. Ala. 1980).

10. *See* 28 C.F.R. § 2.2 (1973). These were changed in 1975 to a more detailed standard and again in 1978 to a less detailed one. *Compare* 28 C.F.R. §§ 2.18-.20 (1975) with 28 C.F.R. §§ 2.18-.20 (1978). For more detailed descriptions of the guidelines themselves, *see* Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810 (1975); Alschuler, *Sentencing Reform and Parole Release Guidelines*, 51 U. COLO. L. REV. 237 (1980).

11. 468 F. Supp. at 655.

12. *See* Hendry v. United States, 418 F.2d 774, 783 (2d Cir. 1969).

13. 468 F. Supp. at 656.

14. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821). *See* Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 218-25 (1963).

15. 1 BLACKSTONE, COMMENTARIES 246-47 (Jones ed. 1915).

16. Sovereign immunity was recognized in the United States early in the nineteenth century. *See* Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-12 (1821). The doctrine in English law has been traced back to seventeenth century common law, *see* Case of the Marshakea, 10 Co. Rep. 68a, 77 Eng. Rep. 1027 (C.P. 1613). For a historical overview of the doctrine, *see* Gray, *Private Wrongs of Public Servants*, 47 CAL. L. REV. 303, 325-33 (English view), 333-47 (American view) (1959).

17. Feres v. United States, 340 U.S. 13 (1950); United States v. Shaw, 309 U.S. 495 (1940); United States v. Eckford, 73 U.S. (6 Wall.) 484 (1867).

18. 28 U.S.C. §§ 1346(b), 2671-80 (1976).

19. 636 F.2d at 135-36.

tionary are excluded from liability,[20] as opposed to purely ministerial acts.

In deciding whether the discretionary function exemption of the FTCA was applicable to the instant case, the court in *Payton* first reviewed the existing legal tests to determine whether the governmental actions in this case, namely the decision to parole Whisenhant, was discretionary in nature. The discretionary function exemption was first construed in *Dalehite v. United States.*[21] In *Dalehite,* the United States Supreme Court was presented with claims arising from a fertilizer plant explosion in Texas City, Texas in which plaintiff's decedent was killed. The fertilizer, which was highly explosive, was being produced under a federal program and would be shipped to post-war Europe.[22] The plaintiffs claimed negligence under three theories: (1) carelessness in drafting the fertilizer export plan; (2) negligence in the various phases of the manufacturing process and; (3) dereliction of duty in failing to police shipboard loading of the fertilizer.[23]

In reviewing the legislative history of the discretionary function exemption and the FTCA, the Court noted that:

> while Congress desired to waive the Government's immunity from actions for injuries to person and property occasioned by the tortious conduct of its agents acting within the scope of business, it was not contemplated that the Government should be subject to liability arising from acts of a governmental nature of function.[24]

The Court rejected plaintiff's claim, noting that all the decisions that were alleged to be negligent occurred at the planning rather than operational stages of the fertilizer program.[25] Therefore, the decisions that were the basis of the complaint were discretionary and the government was exempt from liability.

The "planning level-operational level" distinction that focuses on the decisionmaking hierarchy in the government, and upon which the decision in *Dalehite* was made, was characterized by the court in *Payton* as conclusionary and of little aid.[26] Rather than apply a single test to assess liability against the government, the court in *Payton* developed a "practical analytical framework for determining the nature and quality of the

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20. 28 U.S.C. § 2680(a) (1976).
21. 346 U.S. 15 (1953).
22. *Id.* at 17-23.
23. *Id.* at 24.
24. *Id.* at 27-28 (footnotes omitted).
25. *Id.* at 42.
26. 636 F.2d at 138. The court quoted from Indian Towing Company v. United States, 350 U.S. 61, 68 (1955) in which the majority discussed the application of the *Dalehite* test.

discretion involved."[27] In designing the analysis, the Fifth Circuit followed the guidelines of the Supreme Court, developed in two cases,[28] that the FTCA should be construed liberally and the discretionary function exemption should not be developed broadly. In *Indian Towing Co. v. United States*,[29] the United States was sued for the alleged negligent operation of a lighthouse. Although the Court found that the Coast Guard need not provide lighthouse service, once it did so, it must not do so negligently.[30] The Court also held that the FTCA must be construed liberally.[31]

In *Rayonier, Inc. v. United States*,[32] the Court was faced with a claim for damages arising from allegedly negligent firefighting by the United States Forest Service during a forest fire that burned the petitioners' lands.[33] The government contended that liability could result only in those situations in which governmental bodies had traditionally been responsible for the misconduct of their employees.[34] In rejecting this contention, the Supreme Court held that "the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability."[35] It was against this background that the Fifth Circuit in *Payton* examined the "nature and quality" of the parole process.

Prior to 1973, the Board of Parole was an arm of the Department of Justice. Then, the usual parole process was to grant a hearing with the inmate and parole officials. The hearing was held when the inmate had served a sufficient length of his sentence to be entitled to parole.[36] Parole decisions were based on the judgment of the Parole Board member in attendance at the hearing.[37] Since the parole decision was based almost entirely on the judgment of the Board member, courts were unwilling to overturn those decisions, and several cases characterized the Board's dis-

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27. 636 F.2d at 138. *See* Smith v. United States, 375 F.2d 243, 246 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967).

28. Rayonier, Inc. v. United States, 352 U.S. 315 (1957); Indian Towing Co. v. United States, 350 U.S. 61 (1955).

29. 350 U.S. 61 (1955).

30. *Id.* at 69.

31. *Id.* at 64-65.

32. 352 U.S. 315 (1957).

33. *Id.* at 316.

34. *Id.* at 318.

35. *Id.* at 319. *See also* United States v. Muniz, 374 U.S. 150 (1963); Feres v. United States, 340 U.S. 135 (1950).

36. This was pursuant to the former parole statute, Act of July 31, 1951, Pub. L. No. 82-98, § 4202, 65 Stat. 150 (1951) (formerly codified at 18 U.S.C. § 4202 (1970)).

37. 636 F.2d at 139. *See also* Act of June 25, 1948, Pub. L. No. 80-645, § 4203(a), 62 Stat. 854 (1948) (formerly codified at 18 U.S.C. § 4203(a) (1970)).

cretion in this area as being absolute.[38]

In 1973, the Board of Parole established guidelines for parole decisionmaking to promote a "more consistent exercise of discretion."[39] In revising the guidelines, the Board developed a matrix system with an "offense severity rating" and "salient factor score" comprising the axes. The offense severity rating evaluates different offenses on a scale of one through six, according to the seriousness of an inmate's criminal actions.[40] The rating is individually determined by Board members and examiners according to the facts of each case. The salient factor score is a numerical predictor of the inmate's prognosis on parole.[41] The two indicators merge to form the Guidelines Table, which is used to set a release date.[42]

The court in *Payton* found that the revised system "structured discretion" and that the process takes on a "mechanical flavor."[43] Thus, under the new guidelines, it would appear to be possible to cast the *Dalehite* "planning-operational" test upon the parole decisionmaking process and find that the parole decision was more a fixed operational process depending on statistical and numerical predictors than a highly individualized, discretionary process. The court was not satisfied with this analysis and instead proposed a more broadly based inquiry. The court approached the inquiry from the separation of powers viewpoint, apparently in order to insure that policy-making functions of government would still remain exempt from liability. The court also sought to develop criteria that would consider the relevant policy considerations each time an activity was claimed to fall under the discretionary function exemption.[44]

The court proposed a three-pronged test: (1) review of the nature of the loss imposed by the governmental injury; (2) the nature and quality of the governmental activity and the competing governmental interests against liability; and (3) the court's capacity for deciding the case.[45] In considering the nature of the injured party's loss, the court in *Payton* found that important factors for consideration would be the seriousness of the injuries sustained and the ability of the injured party to absorb the loss as incident to an acceptible social or political risk of governmental activity. Also to be considered are the public's expectations of govern-

38. *See* Tarlton v. Clark, 441 F.2d 384, 385-86 (5th Cir. 1971). *See also* Buchanan v. Clark, 446 F.2d 1379 (5th Cir. 1971); Hendry v. United States, 418 F.2d 774 (2d Cir. 1969).

39. 28 C.F.R. § 2.20(a) (1979).

40. *Id.*

41. *Id.*

42. *Id.*

43. 636 F.2d at 142.

44. *Id.* at 143-44. The court avoided "proposing a precise litmus paper test" but rather adopted a "pragmatic interest anslysis which seeks a delicate balance between activism and restraint, without the conclusory application of labels." *Id.* (footnote omitted).

45. *Id.* at 144-45.

ment activities and the nature of the reliance by the public on the government to perform these activities without harm.[46]

When evaluating the nature and quality of the governmental activity that caused the injury, several factors may be taken into account. These would include the agency guidelines or procedures in the area and the administrative level at which the activity that caused the injury took place.[47] From the court's analysis it would appear that policymaking or decisionmaking at the higher levels of administration would still be classified as discretionary. Activities that traditionally require a high degree of individual discretion, such as foreign policymaking or judicial and prosecutorial functions, would appear to be still exempt from liability under separation of powers guidelines.[48]

When considering the court's capacity to hear the case, the court in *Payton* noted that instances may arise in which the facts of the case raise complex economic, social or policy issues. These issues very well could be political in nature. In the area of political questions the court adopted the guidelines of *Baker v. Carr*.[49] The court found it important to question whether the vehicle of a tort suit was the proper method to evaluate a governmental decision.[50] The court found complexity alone to be "not dispositive,"[51] but rather that courts should examine the complications of considering the particular case and whether those complications could be resolved judicially.[52] While hopefully removing a political question from judicial determination, these factors would also be relevant in analyzing whether a specific act is discretionary, as the above criteria would serve to identify higher level policydecisions or constitutional acts in which the discretionary function exemption would apply.[53]

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46. The court noted that "the dearth of such alternatives was a primary reason for the enactment of the FTCA." 636 F.2d at 144.

47. 636 F.2d at 144-45. *See also* Smith v. United States, 375 F.2d 243, 246 (5th Cir. 1967).

48. *Id.*

49. 369 U.S. 186 (1962). In *Baker*, the Supreme Court said that several factors arising in a case would subject it to dismissal, including commitment of the issues by constitutional mandate to a single political department; lack of judicial standards for resolving the question; the forcing of the judiciary to make initial policy determinations in specific areas; and governmental embarassment by multiple decisions. *Id.* at 217.

50. 636 F.2d at 145. *See also* Hendry v. United States, 418 F.2d 744, 783 (2d Cir. 1969).

51. *Id.*

52. *Id.*

53. A four-pronged test to identify discretionary acts has been adopted by two state courts, Washington and Florida. *See* Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010, 1019 (Fla. 1979); Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 407 P.2d 440, 445 (1965). The test is:

> (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program or objective? (2) Is the questioned act, omission, or

In applying the three-pronged test to the facts of *Payton*, the appellate court found that the discretionary function exemption did not apply to the existing parole process. The nature of the plaintiffs' loss, the first prong of the test, was severe in this case—the decedent was brutally murdered. Furthermore, the decision to parole this offender would be contrary to the most basic governmental function of preserving the public safety. The court also noted that alternative remedies, such as life insurance on the victim, would be wholly inadequate considering the manner of death in the instant case, nor did a federal crime victim compensation program exist.[54] The analysis of the plaintiffs' loss was then balanced against the competing interests of the government in avoiding liability according to the analytical framework developed earlier by the court.

In reviewing the competing governmental interests the court noted that, due to the mechanical nature of computing Whisenhant's offense severity rating and salient factor score, and the apparent failure of the parole examiners to secure and read Whisenhant's psychiatric evaluations as required of them by Parole Board regulations,[55] the review process that allowed Whisenhant's release was a mechanical one under predetermined internal rules and regulations.

The real issue in *Payton* concerned the lack of compliance with the parole regulation, which occurred apart from any policymaking function or decision. Because plaintiffs' allegations were confined to application of the guidelines, no separation of powers questions would plague the case and the court would not be intruding into the policymaking process. Although the Government contended that the final decision to release Whisenhant was a discretionary one in itself,[56] the appellate court found

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> decision essential to the realization or accomplishment of that policy, program or objective as opposed to the one which would not change the course of direction of the policy, program or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to make the challenged act, omission, or decision? If these preliminary questions can be clearly and unequivocally answered in the affirmative, then the challenged act, omission, or decision can, with a reasonable degree of assurance, be classified as a discretionary governmental process and nontortious, regardless of its unwisdom. If, however, one or more of the questions call for or suggest a negative answer, then further inquiry may well become necessary, depending upon the facts and circumstances involved.

67 Wash. 2d at 246, 407 P.2d at 445.

54. 636 F.2d at 145.

55. 28 C.F.R. § 2.19 (1978).

56. The government took the position that "even if the Board knew Whisenhant would go on such a hideous rampage as occurred it still had the discretion to release him and remain protected from liability." 636 F.2d at 146.

that the discretion lay not in the specific parole decision itself, but rather in adopting the parole regulations and guidelines.[57] The decision to implement the system was discretionary, the application of the system to Whisenhant was ministerial.

The court also found a clear duty on the part of the Government to exercise proper control over dangerous prisoners.[58] At the same time, the court found judicial review to be minimally intrusive in instances of this nature because the policy level of parole decision making would not be inhibited. Indeed, the court found that liability would have a favorable impact in some respects, such as increasing accountability and more efficient parole administration.[59] Thus, the court found no competing governmental interests that would preclude liability in this instance because of the low level, ministerial fashion in which the parole decisions are carried out in the Parole Commission, balanced against the almost non-justifiable loss imposed on the plaintiffs.[60]

Regarding the court's capacity to hear the case, the complexity inherent in such a suit was found to be minimal. In fact, the court's experience in dealing with criminal cases, especially mentally ill offenders and recidivists, would appear to be helpful. Since there would be no initial policymaking decisions by judicial fiat, as cautioned against in *Baker*, the court would appear to be an appropriate forum for such a case.[61]

In deciding that the discretionary function exemption does not apply in *Payton*, the Fifth Circuit has created a forum for aggrieved crime victims of federal parolees. The impact of just how often this forum may be used by the victims cannot as yet be determined. While the facts of *Payton* seem to urge that the plaintiffs receive a trial on the merits, it is possible that cases will arise in which the facts do not seem so obvious. An instance which could surface is one in which the matrices and guidelines fail to predict repeat criminal activity. The trier of fact, who will ulti-

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57. 636 F.2d at 146-47.

58. *Id.* at 147-48. Arizona, in a similar case, has found that a duty exists on the part of Parole Board members not to be negligent in releasing dangerous prisoners. Grimm v. Arizona Board of Pardons and Paroles, 115 Ariz. 260, 564 P.2d 1227 (1977); *see also* Kutcher, *The Legal Responsibility of Probation Officers in Supervision*, 41 FED. PROB. 35 (March 1977); Note, *Parole Board Liability for the Criminal Acts of Parolees*, 8 CAPITAL U.L. REV. 149 (1978); Note, *Parole Board Members Have Only Qualified Immunity for Decision to Release Prisoner*, 46 FORDHAM L. REV. 1301 (1978). The RESTATEMENT (SECOND) OF TORTS § 319 (1965) also provides: One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

59. 636 F.2d at 148.

60. *Id.* at 145-46. *See* Underwood v. United States, 356 F.2d 92 (5th Cir. 1966), in which the Fifth Circuit determined that a mental patient's negligent discharge after the patient's records were reviewed by staff psychiatrists was actionable under the FTCA.

61. *Id.* at 148.

mately bear the burden of decision may have a difficult time in determining liability. However, far more complex cases have been accommodated by courts, usually without severe difficulty.

The victim of a crime in most states today remains sadly undercompensated. The criminal justice system is just beginning to devise aggressive restitution programs for the victims of crime. Until Congress can develop a fair, workable system of victim compensation the courts are, and should be, the proper forum for victims in cases such as this.

ROBERT F. POLGLASE