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THE FEDERAL TORT CLAIMS ACT AFTER FIVE YEARS

By E. L. FISHER*

I. HISTORICAL

The enactment in 1946 of legislation recognizing a general liability on the part of the United States, and providing definite machinery for enforcement thereof, for damage or injury caused by the negligent or wrongful act or omission of employees of the Government while acting within the scope of their employment,[1] brought to an end an era of Federal immunity from responsibility frequently and harshly criticized by the bar and by students of government alike.

It is interesting to note that the barrier of sovereign immunity which precluded a judicial remedy against the Government for its wrongdoing, other than for breach of contract[2] or pursuant to specific authorization by Congress,[3] resulted, in the

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1. The original Federal Tort Claims Act, approved August 2, 1946, 60 STAT. 842, as amneded August 1, 1947, 61 STAT. 722, was repealed concomitantly with codification of its provisions under the title "Judicial Code and Judiciary." 62 STAT. 897 (1948), 28 U.S.C. §§ 1346(b), 1402(b), 1504, 2401(b); 2042, 2411-12, and 2671-80 (Supp. 1949). Also, there have been subsequent amendments, 63 STAT. 62(1949), 28 U.S.C. § 2401(b) (Supp. 1950), and 63 STAT. 444 (1949), 28 U.S.C. § 2680 (Supp. 1950).
2. Recognized beginning with establishment of the Court of Claims, 10 STAT. 612 (1855), as amended, 28 U.S.C. § 1491 (Supp. 1951), to hear claims "founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government," and the extension of concurrent jurisdiction to the United States District Courts by the Tucker Act, 24 STAT. 505 (1887), as amended, 28 U.S.C. § 1346 (Supp. 1951), where not more than $10,000 might be involved, to adjudicate claims "for damages, liquidated or unliquidated, in cases not sounding in tort." These grants of jurisdiction were construed to exclude tort claims. Gibbons v. United States. 8 Wall. 269, 19 L. Ed. 453 (1868); Hill v. United States, 149 U.S. 593, 13 S.Ct. 1011, 39 L. Ed. 862 (1892).
3. Among the instances where Congress had authorized suits or provided administrative machinery for determination of legal responsibility under customary rules of law, mention may be made of acts permitting suit for infringement of patents, 36 STAT. 851 (1910), as amended, 62 STAT. 941 (1948), 28 U.S.C. § 1498 (Supp. 1951); establishing an Employees Compensation Commission, 39 STAT. 742 (1916); conferring power on the head of each executive department and independent establishment to settle claims for damages to or loss of privately owned property, not over $1,000, "caused by the negligence of any officer or employee of the Government, acting within the scope of his employment," 42 STAT. 1066 (1922); authorizing suits for damage caused by public vessels, 43 STAT. 1112 (1925); and numerous acts conferring on the heads of certain departments limited powers to settle tort claims in small amounts, usually not exceeding $500.

words of Professor Borchard, from an "historical error," and was "neither sound, just nor responsive to the demands of modern social engineering."[4] The eighteenth century concept that "The king can do no wrong" apparently originally meant that the king was not privileged to do wrong, not that he was incapable of doing wrong or immune to liability for the consequences of wrongdoing. Only through misinterpretation and a process or rationalization has it been accepted in the United States as precedent for the doctrine of the Government's nonsuability in tort—that there can be no legal right as against the authority that makes the law on which the right depends.[5] The great influence of the doctrine is illustrated by the fact that Government corporations created in recent years with authority "to sue and be sued" in their own names could not, in fact, be sued in tort until the decision of the Supreme Court in *Kiefer & Kiefer v. Reconstruction Finance Corp.*[6]

The incompatibility between sovereign irresponsibility in tort and constitutional government under which the federal state derives its powers from the governed has been recognized and voiced by many. Witness President Lincoln's statement, in a pre-Civil War message to the Congress, "It is as much the duty of Government to render proper justice against itself, in favor of citizens, as it is to administer the same between private individuals."[7] Recently, Chief Justice Vinson, writing for the Court in *Larson v. Domestic & Foreign Corp.*, stated

> It is argued that the principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited wherever possible. There may be substance in such a viewpoint as applied to suits for damages. The Congress has increasingly permitted such suits to be maintained against the sovereign and we should give hospitable scope to that trend.[8]

However, it is not entirely fair to infer that no remedy of any kind was available to the faultless individual who had suffered damage or injury through governmental invasion of his rights. He could and did petition Congress for redress. The first private relief act for a tort claim was enacted in 1792, compensating the

4. Edwin M. Borcard, *Governmental Responsibility in Tort*, 11 A.B.A.J. 495 (1925).
5. Hill v. United States, 9 How. 386, 13 L. Ed. 185 (1850); Gibbons v. United States, 8 Wall. 269, 19 L. Ed. 453 (1868); Kawananakoa v. Polybank, 205 U.S. 349, 27 S.Ct. 526. 51 L. Ed. 834 (1907).
6. 306 U.S. 381, 59 S.Ct. 516, 83 L. Ed. 784 (1939).
7. Mentioned in Irvin M. Gottlieb's discussion, *The Federal Tort Claims Act*, 35 GEO. L.J. 1 (1946).
8. 337 U.S. 682, 703, 69 S.Ct. 1457, 1468, 93 L. Ed. 1628, 1643 (1949).

schools of Wilmington, Delaware, for damages suffered from troops during the Revolutionary War.[9] Since that time, thousands of such measures have been presented and considered. In fact, by 1946 their numbers had increased to an average of between two and three thousand each Congress. This reservation by the Congress to itself of authority to deal with tort claims generally, despite painstaking and conscientious consideration of such claims by its committees, not only left the injured party to the uncertain graces of political eventuality but merited severe reprobation because the burden it imposed infringed upon the time of the legislators to consider matters of pressing national importance. As early as 1832, the farsighted John Quincy Adams wrote, in his memoirs, "There ought to be no private business before Congress."[10]

The agitation for reform of the cumbersome private bill system bore its first fruit in H.R. 14737 of the Sixty-fifth Congress (1919), and thereafter the subject was almost continuously before the Senate or the House of Representatives in one form or another. Mr. Justice Reed summarized the legislative history when, in *United States v. Spelar,* he wrote, "The Federal Tort Claims Act of 1946 was the product of some twenty-eight years of congressional drafting and redrafting, amendment and counter-amendment."[11]

Whether the inadequacies of legislative relief, or the necessity that Congress free itself from the importunities of tort claimants and the time consuming burden of considering their cases, or a combination of both, was responsible, the gradual transfer of claims by Congress from political to legal channels—first in contract cases, then in special classes of small tort claims, and culminating in adoption of the tort claims statute as Title IV of the Legislative Reorganization Act of 1946—has laid to rest most of the academic controversy over the wisdom of the course theretofore followed in this country and, through the concept of *respondeat superior* inherent in the statute, appears to have established a permanent foundation for protection through legal processes of the individual's personal rights in his relations with the Federal Government.

The various provisions of the new statute now have been tested in the courts in many respects by five years of experience in their administration. Contrary to the expectations of those who feared that, due to the influence of the common law doctrine of strict construction of a waiver of sovereign immunity, its pro-

9. 6 STAT. 8 (1792).
10. See note 7, *supra.*
11. 338 U.S. 217, 219, 70 S.Ct. 10, 11, 94 L. Ed. 3, 6 (1949).

visions would be construed as much as possible in line therewith for the protection of the Government and its officers against the consequences of their wrongful acts, the application of that doctrine has been repudiated by the Supreme Court in the recent *Aetna* case.[12] Chief Justice Vinson, speaking for the Court, said "We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement . . . 'The exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor by refinement of construction, where consent has been announced.'[13]"

It thus appears almost certain that full effect will be given to the expressed intent of Congress that the United States shall be liable as a private person on claims within the coverage of the statute.

II. Statutory Provisions

Liability.—At the time the original Federal Tort Claims Act was re-enacted in codified form,[14] the liability provision of section 410(a), constituting the heart of the act, was raised to the proper dignity of an independent section.[15] Therein the United States is declared to be "liable," respecting the provisions relating to tort claims, "in the same manner and to the same extent as a private individual under like circumstances," although not for "interest prior to judgment or for punitive damages."[16]

Exclusions.— Thirteen categories of claims are excepted from the coverage provided.[17] They are claims—

(a) based upon an act or omission of an employee, "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

12. United States v. Aetna Cas. & Surety Co., 338 U.S. 366, 383, 70 S.Ct. 207, 216, 94 L. Ed. 171, 186 (1949).
13. Anderson v. Hayes Const. Co., 243 N.Y. 140, 147, 153 N.E. 28, 29-30 (1926).
14. See note 1, *supra*. The codification involves changes in language, but the revisor's note states that "Minor changes were made in phraseology."
15. 62 STAT. 983 (1948), 28 U.S.C. § 2674 (Supp. 1951).
16. If, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the liability undertaken is for "actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof."
17. 62 STAT. 984 (1948), as amended, 63 STAT. 444 (1949), 28 U.S.C. § 2680 (Supp. 1951).

or an employee of the Government, whether or not the discretion involved be abused."

(b) arising out of the "loss, miscarriage, or negligent transmission of letters or postal matter."

(c) arising "in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer."

(d) for which a remedy is provided in admiralty law by 46 U.S.C. Sections 741-752 and 781-790.

(e) arising out of an act or omission in "administering" the Trading with the Enemy Act, 50 U.S.C. Appendix Sections 1-31.

(f) for damages caused by the "imposition or establishment of a quarantine by the United States."

(g) arising from "injury to vessels, or to the cargo, crew or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters."

(h) arising out of "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

(i) for damages "caused by the fiscal operations of the Treasury or by the regulation of the monetary system."

(j) arising out of the "combatant activities of the military or naval forces, or the Coast Guard, during time of war."

(k) arising "in a foreign country."

(l) arising from the "activities" of the Tennessee Valley Authority.

(m) arising from the "activities" of the Panama Canal Company (formerly Panama Railroad Company).

Suit.—The declaration of liability is amplified, and technical immunity from suit is waived, through grant to the United States District Courts of exclusive jurisdiction "of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or 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 circum-

stances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[18]

The jurisdiction conferred includes jurisdiction over counterclaims and set-off.[19]

Judgment in such an action is made "a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the Government whose act or omission gave rise to the claim."[20]

Where a small claim has been presented for administrative settlement,[21] suit may not be commenced thereon until the agency concerned has made final disposition thereof, unless the claim is withdrawn "upon fifteen days written notice," and in no instance may suit be instituted for a sum in excess of the amount of the claim presented to the agency, "except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim."[22]

Moreover, claims "shall be tried by the court without a jury."[23]

Administrative Adjustment.—The head of each Federal agency or his designee for this purpose is authorized, on the same basis, to adjust and settle, without prejudice to the right to sue of the claimant who does not choose to accept the administrative determination of his claim (but finally insofar as other officers of the Government are concerned), small tort claims not exceeding $1,000 in amount.[24]

Disposition in this manner "shall not be competent evidence of liability or amount of damages."[25]

Acceptance by the claimant of an administrative award constitutes a complete release by the claimant of claims both against the United States and against the employee responsible for the wrong.

Venue.—Note that civil actions on tort claims against the United States "may be prosecuted only in the judicial district

18. 63 STAT. 101 (1949), 28 U.S.C. § 1346(b) (Supp. 1951).
19. 63 STAT. 101 (1949), 28 U.S.C. § 1346(c) (Supp. 1951).
20. 62 STAT. 984 (1948), 28 U.S.C. § 2676 (Supp. 1951).
21. See "Administrative Adjustment," *infra*.
22. 62 STAT. 983 (1948), as amended, 63 STAT. 107 (1949), 28 U.S.C. § 2675 (a) and (b) (Supp. 1951).
23. 62 STAT. 971 (1948), 28 U.S.C. § 2402 (Supp. 1951).
24. 62 STAT. 983 (1948), as amended, 64 STAT. 987 (1949), 28 U.S.C. § 2672 (Supp. 1951).
25. 62 STAT. 983 (1948), as amended, 63 STAT. 107 (1949), 28 U.S.C. § 2675 (Supp. 1951).

where the plaintiff resides or wherein the act or omission complained of occurred."[26] Similarly, jurisdiction over claims of $1,000 or less appears to be vested only in the Federal agencies out of whose activities the liability arises.[27]

Compromise.—The Attorney General may, with the approval of the court, "compromise, or settle any claim" upon which suit has been commenced,[28] and such disposition "shall not be competent evidence of liability or amount of damages."[29]

Appeal.—In providing for review of district court judgments, jurisdiction is given in the first instance to the Circuit Courts of Appeals[30] and, in the alternative, if the notice of appeal filed in the district court "has affixed thereto the written consent on behalf of all the appellees,"[31] and provided appeal "be taken within ninety days after the entry of the final judgment of the district court,"[32] to the Court of Claims. Review by the Supreme Court of cases decided by the Circuit Courts of Appeals and the Court of Claims is covered by the provisions of law relating to those tribunals.[33]

Attorney's Fees.—Of especial importance to attorneys who represent tort claimants are provisions concerning their fees.[34] The district courts, the heads of agencies, and the Attorney General, as a part of the judgments, awards or compromises effected by them, may "determine and allow reasonable attorney fees." A maximum of ten percent is fixed in the case of recoveries of $500 or more through award by the head of an agency or settlement of the Attorney General. In the case of a judgment, the maximum is set at twenty percent of the amount recovered. In either case, the fees are "to be paid out of but not in addition to the amount of judgment, award, or settlement recovered, to the attorneys representing the claimant." If the attorney "charges demands, receives or collects for services rendered" any sum in excess of that provided for, he "shall be fined not more than $2,000 or imprisoned not more than one year, or both."

Costs, Judgments and Interest.—Where suit is brought in a district court, "costs shall be allowed in all courts to the successful claimant, but such costs shall not include attorney's fees."[35]

26. 63 STAT. 937 (1948). 28 U.S.C. § 1402(b) (Supp. 1951).
27. DEC. COMP. GEN. B-103279 (1951).
28. 62 STAT. 984 (1948), 28 U.S.C. § 2677 (Supp. 1951).
29. 28 U.S.C. § 2675(c) (Supp. 1951). See note 25, *supra*.
30. 62 STAT. 929 (1948), 28 U.S.C. § 1291 (Supp. 1951).
31. 62 STAT. 942 (1948), 28 U.S.C. § 1504 (Supp. 1951).
32. 62 STAT. 963 (1948). 28 U.S.C. § 2110 (Supp. 1951).
33. 62 STAT. 928 (1948), 28 U.S. §§ 1254, 1255 (Supp. 1951), and Revisor's Note. 28 U.S.C. § 1504 (Supp. 1951).
34. 62 STAT. 984 (1948), 28 U.S.C. § 2678 (Supp. 1951).
35. 62 STAT. 973 (1948), 28 U.S.C. § 2412(c) (Supp. 1951).

The limitation, it will be observed, complements the provision that attorney's fees are to be paid out of the principal amount recovered.

Payment of final judgments rendered by the district courts against the United States is made on settlements by the General Accounting Office.[36] Interest is payable at the rate of four percent "from the date of the judgment up to, but not exceeding, thirty days after the date of approval of any appropriation Act providing for payment of the judgment."[37]

Statute of Limitation.—A claim is "forever barred" unless action is begun or it is presented in writing to the appropriate Federal agency "within two years after such claim accrues." However, if an appropriate claim has been presented in writing to a Federal agency within that period of time, suit is not barred "until the expiration of a period of six months after either the date of withdrawal of such claim from the agency or the date of mailing notice by the agency of final disposition of the claim."[38]

Federal Rules of Civil Procedure.—In revising the Judicial Code (Title 28 of the United States Code) certain provisions of Section 411 of the original Federal Tort Claims Act were omitted as unnecessary because "the Rules of Civil Procedure promulgated by the Supreme Court shall apply to all civil actions."[39] The omitted portion provided that "the forms of process, writs, pleadings, and motions, and the practice and procedure, shall be in accordance with the rules promulgated by the Supreme Court pursuant to the Act of June 19, 1934 (48 STAT. 1064); and the same provisions for counterclaim and set-off . . . shall be applicable as in cases brought in the United States District Courts under the Act of March 3, 1887 (24 STAT. 505)."

Exclusiveness of Remedies.—The remedies provided are exclusive, and this is true even in instances where the responsible Federal agency may sue or be sued *eo nomine.*[40]

III. SUPREME COURT DECISIONS

Even the many years of study and planning merged into the provisions of the new law could not prevent serious problems arising after its enactment. The tremendous size and diverse activities of the Federal establishment invited an enormous flow

36. 62 STAT. 974 (1948), 28 U.S.C. § 2414 (Supp. 1951).
37. 62 STAT. 973 (1948), as amended, 63 STAT. 106 (1949), 28 U.S.C. § 2411 (b) (Supp. 1951) and Revisor's Note.
38. 63 STAT. 971 (1948), as amended, 63 STAT. 62 (1949), 28 U.S.C. § 2401 (b) (Supp. 1951).
39. SEN. REP. No. 1559, 80th Cong., amend. No. 61 (1948).
40. 62 STAT. 984 (1948), 28 U.S.C. § 2679 (Supp. 1951).

of claims both to the agencies and to the courts. From a practical working viewpoint, confusion concerning the extent to which sovereign immunity had been relaxed, and the complexities introduced as a result of the impact of state law (in connection with the requirement that liability be determined "in accordance with the law of the place where the act or omission occurred"), undoubtedly have multiplied the task of administration and statutory construction.

Parties: Subrogation.—At the outset, there was considerable uncertainty as to whether persons who had acquired rights through subrogation should be recognized as proper claimants. For example, could an insurance company, whose only interest in the claim was derived from having paid to its insured a portion or all of the insured's claim against the United States, enforce its rights under the law? A choice of sides in the controversy obviously depended upon a liberal or a strict interpretation of the legislative intent, as is evidenced in the contrariety of decisions in the lower courts.

The conflict was resolved by the Supreme Court in the *Aetna* case.[41] Therein the Government had contended that the Anti-Assignment Act[42] made any transfer or assignment of a claim, except for assignments made after payment of the claim, void, and that inconvenience, administrative and accounting difficulties, and procedural problems would ensue if subrogees were permitted to bring suits in their own names.

In the opinion of the Court, the Congress had been fully cognizant of the established rule that subrogation claims were not within the bar of the Anti-Assignment Act at the time the tort claims act was passed, and "The broad sweep of its language assuming the liability of a private person, the purpose of Congress to relieve itself of consideration of private claims, and the fact that subrogation claims made up a substantial part of the burden are also persuasive that Congress did not intend that such claims should be barred."

In holding that the Government must defend suits by subrogees as if it were a private person, the Court pointed out that where a subrogee has paid the full amount of the claim it becomes the only real party in interest, and must sue in its own name, under Rule 17(a), Federal Rules of Civil Procedure. In instances of partial subrogation, the court stated that both insured and insurer "own" portions of the substantive right and should appear in the litigation in their own names. Both are "necessary" parties and the United States may compel joinder

41. Note 12, *supra*.
42. 61 STAT. 501 (1947), 31 U.S.C. § 203 (Supp. 1951).

under Rule 19(b). (Also, in the event separate actions are commenced joinder may be required under Rule 42(a)). The Court held that the pleadings should be made to reveal and assert the actual interest of the plaintiff, and to indicate the interests of any others in the claim. Problems concerning counterclaim or set-off against the original injured person in subrogation cases were recognized but specifically not passed upon.

Parties: Persons in the Armed Forces.— The status of servicemen has presented troublesome questions, due both to exclusion from liability of claims arising out of combat activities of the military and naval forces or the Coast Guard, in time of war, and to the fact that other statutes provide for disability payments to servicemen.

In the *Brooks* case,[43] the Supreme Court considered claims arising from the negligence of a civilian employee of the Army operating an Army truck which resulted in death and injury to persons in the armed forces on leave from their posts of duty. The Court was quick to reject the Government's contention that dire consequences would result from recognizing liability in such circumstances—a battle commander's poor judgment, an army surgeon's slip of hand, a defective jeep which caused injury—saying that the accident was not service connected and had nothing to do with the servicemen's army careers. It stated, "We are not persuaded that 'any claim' means 'any claim but that of servicemen' . . . It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed. The overseas and combatant activities exceptions make this plain."

Mr. Justice Murphy pointed out in the opinion that provisions in other statutes for disability payments to servicemen, and gratuity payments to their survivors, indicate no purpose to forbid tort actions under the Tort Claims Act. The Court refused to call either remedy in the present case exclusive, or to pronounce a doctrine of election of remedies, when Congress had not done so. However, in remanding the case to the Court of Appeals, it was recognized that such a view "does not mean that the amount payable under servicemen's benefit laws should not be deducted, or taken into consideration, when the serviceman obtains judgment under the Tort Claims Act . . . We now see no indication that Congress meant the United States to pay twice for the same injury." The problem of reducing damages *pro tanto,* if decided to be proper, was left entirely to the lower court.

43. Brooks v. United States, 337 U.S. 49, 69 S.Ct. 918, 93 L. Ed. 1200 (1949).

Three additional cases which were heard and decided together, the *Feres, Griggs* and *Jefferson* cases,[44] involving claims arising from injuries sustained by servicemen while on active duty and not on furlough, also have been considered by the Supreme Court. Mr. Justice Jackson concluded, on behalf of the Court, that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." The distinction drawn by the words "activities incident to service" is between situations where, as in the *Brooks* case, the serviceman was on furlough under compulsion of no orders or duty and on no military mission, and those where, as in the *Jefferson* case, the serviceman was required to undergo an abdominal operation while in the Army and the Army surgeon negligently left a towel in his stomach; where, as in the *Feres* case, it was alleged that the serviceman on active duty had perished in quarters negligently assigned because unsafe due to a defective heating plant and failure to maintain an adequate fire watch; or where, as in the *Griggs* case, the complaint was that the serviceman while on active duty met death because of negligent and unskillful medical treatment by army surgeons.

Exclusions — Foreign Countries.—The only case so far decided by the Supreme Court dealing with exclusions is the *Spelar* case.[45] The claim alleged that Flight Engineer Spelar lost his life in a take-off crash at Harmon Field, Newfoundland, an air base leased by Great Britain to the United States, in consequence of the Government's negligent operation thereof. The Court stated that "in brief, though Congress was ready to lay aside a great portion of the sovereign's ancient and unquestioned immunity from suit, it was unwilling to subject the United States to liabilities depending upon the laws of a foreign power. The legislative will must be respected. The present suit, premised entirely upon Newfoundland's law, may not be asserted against the United States in contravention of that will."

Compromise.—In connection with the provision that "the Attorney General, with the approval of the Court may arbitrate, compromise, or settle any claim cognizable under Section 1346-(b) of this title, after the commencement of an action thereon,"[46] even though a compromise is submitted after the case has reached the Supreme Court, "the authority and responsibility" for passing thereon is that of the district court.[47]

44. Feres v. United States, 340 U.S. 135, 71 S.Ct. 153, 95 L. Ed. 152 (1950).
45. United States v. Spelar, 338 U.S. 217, 70 S.Ct. 10, 94 L. Ed. 3 (1949).
46. 62 STAT. 984 (1948). 28 U.S.C. § 2677 (Supp. 1951).
47. Hubsch v. United States, 338 U.S. 440, 70 S.Ct. 225, 94 L. Ed. 244 (1949).

Parties — Joinder and Impleader.—It was held in the *Yellow Cab Company* case[48] that the United States District Courts are empowered to require the United States to be impleaded as a third party defendant and to answer the claim of a joint tort feasor for contribution as if the United States were a private individual. Mr. Justice Burton, in the opinion, considered the Government's contentions that, even though liability for contribution be found, procedural difficulties would be encountered in impleading the United States because, among other things, the original individual defendant would be entitled to a jury trial as guaranteed by the Seventh Amendment to the Constitution, but did not find them difficult of solution, in view of the applicability of Rules 14(a) and 42(b), Federal Rules of Civil Procedure. It was concluded that the Government had consented to be sued for contribution not only in a separate proceeding but also as a third-party defendant.

IV. GENERAL COMMENT

Apart from the decisions of the Supreme Court, which display through their own excellence of analysis and interpretation the merits of the tort claims provisions in their own right, many other decisions have been rendered by the Courts of Appeals and the district courts. Some of the earlier opinions are contradictory, indicating embarrassing uncertainty in the application of rules of statutory construction. Investigation of still unsettled and troublesome problems, which range from judicial establishment of the more obvious statutory directions to complex and novel problems encountered in applying them, is of challenging legal interest, as are other matters involving policy. In passing over this field, the major areas of which have been treated with great ability and discernment by Professor Blanton in his articles,[49] it is apparent that the expanded needs of the public should encourage the practicing lawyer to familiarize himself (or herself) with the general subject. In this connection, Professor Blanton notes that the statutory restrictions on attorney's fees reduce them below those prevailing in tort cases in most jurisdictions, which may hinder the acceptance of worthy cases, but that "From the volume of business under the Act any fear on this score is apparently not well-founded."

The availability of redress through administrative adjustment where interests (including those of subrogees) in a single claim

48. United States v. Yellow Cab Co., 340 U.S. 543, 71 S.Ct. 399, 95 L. Ed. 523 (1951).
49. Fred Blanton, *The Federal Tort Claims Act in Action*, 53 DICK. L. REV. 163 (1948), and *Two More Years of the Federal Tort Claims Act*, 55 DICK. L. REV. 301 (1951).

do not exceed $1,000 in the aggregate[50] should not be discounted. Such claims are in a majority. While settlement is largely on an *ex parte* basis, which might lead to a fear that the agencies would be acutely defense conscious, as they perhaps have been at first, that fear would appear to be justified only to the extent that a claimant's position should be fully presented for evaluation with the official record. In any event, the fact that a case may be withdrawn and taken to the courts insures that agency action will follow as closely as is practicable the pattern set by judicial decisions. Also, in fairness to the conscientious body of administrative personnel who handle such cases, it is felt they are mindful that justice is done to the United States when the claims of its individual citizens are settled justly under the law.

As of July, 1951, there were 2,500,889 civilian employees of the Government.[51] In addition, there were several million servicement in our expanding armed forces. The potential of negligent conduct on the part of this personnel continually threatens to mature into vast Federal responsibilities under the statute—a prospect not minimized by the frequency of accidents.

The Government's only defense to improper claims, as well as its evaluation of proper claims, depends upon thorough means of ascertaining for record purposes accurate facts concerning all acts and omissions out of which tort liability may arise, regardless of whether promising trivial or major consequences. The responsibility of reporting, investigating, and maintaining adequate records, irrespective of whether settlement is to be accomplished through administrative or court action, devolves upon the Federal agencies concerned. Protection of the Government's interests in these matters has made uniform practices advisable, and the steps taken toward that end include the establishment of an Interdepartmental Committee on the Federal Tort Claims Act—an advisory group composed of representatives of the various cooperating Federal agencies—under the sponsorship of the Department of Justice. No small portion of the total expense to the Government of administering the law is attributable to work of such general nature, the cost of which is not susceptible to measurement by existing means.[52]

Statistics.—Completely accurate statistics as to numbers and amounts of claims attributable to the tort claims statute are not available. However, it has been possible to collect information

50. 41 OPS. ATTY. GEN. 13.
51. REPORT, JOINT COMMITTEE ON REDUCTION OF NONESSENTIAL FEDERAL EXPENDITURES, 97 CONG. REC. 11344-7 (1951).
52. Expenses in connection with possible claims under the statute may be charged to appropriations available for general agency administration, 29 COMP. GEN. 111.

and to project figures that show roughly the true situation, separately, with respect to claims upon which suit has been instituted and claims presented for administrative adjustment.

Data obtained from the Federal Tort Claims Section of the Claims Division, Department of Justice, as adjusted,[53] appears to furnish reliable information as to suits entered and settled during the five Federal fiscal years ended June 30, 1951, as follows:

	1947	1948	1949	1950	1951 (Incomplete)
Suits	654	1,475	1,212	1,013	1,122
Judgments	$207,500	$706,107	$1,342,250	$1,218,123	$891,040
Compromises	$ 66,063	$506,069	$1,397,567	$1,321,383	$802,984

On July 1, 1951, there were left pending 2,926 cases for a total amount of $434,918,175.44. Not included were 322 cases for a total amount of $12,654,333.46, which had been entered against employees or agencies individually, presumably involving ultimate Federal liability.

The respective agencies are required to "report annually to Congress all claims paid . . . stating . . . the amount claimed, the amount awarded . . . "[54] A preliminary analysis of such reports disclosed that the nature of the information required, the fact that different annual reporting periods were employed in a number of instances, and a general incompleteness and lack of uniformity in presentation for statistical purposes, made them unsuitable for use here.

However, most of the tort claims subject to administrative adjustment originate from activities of the Post Office Department, the Department of Defense (Army, Navy and Air Force), the Department of the Treasury, and the Veterans' Administration. Data obtained from these agencies has been employed as a basis upon which to project[55] what is believed to be a reasonable approximation of actual figures, as follows:

53. The official figures were increased by five per cent to compensate for (a) claims not recorded because classified as admiralty or different matters and processed by other bureaus of the Department, and (b) claims not included because brought against agencies or employees individually (although apparently involving ultimate Federal liability).

54. 62 STAT. 983 (1948), 28 U.S.C. § 2673 (Supp. 1951).

55. Available data from the Department of Defense, the Department of the Treasury, the Post Office Department, and the Veterans' Administration showed only the number of claims allowed, necessitating an increase by one-third—a percentage corresponding to the ratio found to exist in instances where complete figures were available—to adjust for claims entertained but disallowed or abandoned. Compromise settlements by the Attorney General, which are paid out of agency funds, were eliminated from the amounts of awards. Both numbers of claims and amounts of awards were increased by an estimated five per cent to project figures for the Government as a whole.

	1947	1948	1949	1950	1951
Claims	12,149	19,324	16,925	15,950	15,875
Awards	$825,400	$1,513,400	$1,825,700	$1,120,500	$1,038,000

It might seem from the 1950 and 1951 figures that claims and amounts are decreasing. However, such a view would not be justified. Among other things, at the beginning of the 1950 fiscal year the period within which claims could be presented was enlarged from one to two years. Also, backlogs of unprocessed claims have increased generally since that time. Recent filings appear to be in greater numbers and for larger amounts than in 1950 or 1951.