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seek the most favorable forum, but it contains no significant guarantees of expeditious settlements or protection of the contractor from ruinous appellate litigation. Since both of these alternatives are beyond the powers of the executive branch, Congress should respond to the stimulus provided by the instant decision and adopt a new disputes procedure that will be truly impartial, expeditious, and inexpensive.

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ABSOLUTE LIABILITY AND THE FEDERAL TORT CLAIMS ACT: A CONTRADICTION IN TERMS BY JUDICIAL INTERPRETATION

Laird v. Nelms, 406 U.S. 797 (1972)

Respondent's home in North Carolina was extensively damaged by sonic booms caused by United States Air Force planes. He sought recovery under the Federal Tort Claims Act (the Act).[1] The federal district court granted summary judgment for the Government[2] on the ground that the training flight was within the Act's discretionary function exception.[3] The United States Court of Appeals for the Fourth Circuit vacated this judgment and held although the flight was discretionary, there is no room for discretion in the amount of protection afforded civilians from the effects of sonic booms, since that is dictated by Air Force regulations.[4] Additionally, the court reaffirmed its position that the Government could be held absolutely liable, since state law imposed strict liability on private individuals under similar

1. 28 U.S.C. §§1346, 2671-80 (1970). Under the doctrine of sovereign immunity the Government may not be sued unless by its own consent. This statute is the government's consent to be sued on certain specified tort claims.

2. 406 U.S. 797, 798 (1972).

3. 28 U.S.C. §2680. "The provisions of this chapter and section 1346(b) of this title shall not apply to - (a) Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

4. Nelms v. Laird, 442 F.2d 1163, 1165 (4th Cir. 1971); U.S. Air Force Reg., No. 55-34 (28 July 1954) provides in part: "3. Check List of Protective Measures. Commanders should use the checklist below in planning the maximum protection for civilian communities. The measures outlined should be used whenever feasible."

circumstances.[5] On appeal the United States Supreme Court reversed and HELD, since the Act protects only against a negligent or wrongful act or omission there can be no recovery on a theory of absolute liability.[6]

The Federal Tort Claims Act is an attempt by Congress to limit the United States Government's sovereign immunity[7] by permitting suit for damages caused by the "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his employment."[8] This presents the intricate legal problem of determining what constitutes a negligent or wrongful act or omission.[9] Some early cases indicated that activities for which the common law had imposed strict liability were included within the meaning of the Act.[10] The Supreme Court, however, rejected this view in *Dalehite v. United States*.[11] The Court stated that because the Act applies only to negligent or wrongful acts or omissions, and whereas absolute liability arises irrespective of the conduct of the tortfeasor, the imposition of absolute liability on the United States is necessarily excluded.[12] However, this restrictive interpretation of the Act has been severely criticized.[13]

Within a year after *Dalehite* the Fourth Circuit rejected this limited interpretation in *United States v. Praylou*.[14] The court reasoned that, since South Carolina imposed strict liability for the infliction of injury or damage by the operation of a plane,[15] the effect was to declare that such infliction of injury or damage was itself a wrongful act.[16] Therefore, the words "negligent or wrongful act," as used in the Federal Tort Claims Act, were held

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5. Nelms v. Laird, 442 F.2d 1163, 1168 (4th Cir. 1971); *see* United States v. Praylou, 208 F.2d 291 (4th Cir. 1953), *cert. denied*, 347 U.S. 934 (1954). Reliance on state law was supported by §1346(b) of the Act, which provides that the United States shall be liable where it "if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. §1346(b) (1970).

6. 406 U.S. at 799. Justices Stewart and Brennan dissented; Justice Douglas took no part in consideration of the case.

7. *See* text of note 1 *supra*.

8. 28 U.S.C. §1346(b) (1970).

9. Note, *The Federal Tort Claims Act*, 56 YALE L.J. 534, 540 (1947). *See also* Street, *Tort Liability of the State: The Federal Tort Claims Act and the Crown Proceedings Act*, 47 MICH. L. REV. 341, 350 (1949).

10. *E.g.*, Parcell v. United States, 104 F. Supp. 110 (S.D.W. Va. 1951).

11. 346 U.S. 15, 44-45 (1953). *Dalehite* was an action for damages incurred in 1947 when two cargo vessels exploded in the harbor at Texas City, Texas.

12. *Id.* at 45.

13. *See, e.g.*, Jacoby, *Absolute Liability Under the Federal Tort Claims Act*, 24 FED B.J. 139 (1964). Until the instant decision the Supreme Court had not again relied on this restrictive interpretation.

14. 208 F.2d 291 (4th Cir. 1953). *Praylou* was cited by the Supreme Court in Rayonier, Inc. v. United States, 352 U.S. 315, 319 n.2 (1957).

15. S.C. CODE ANN. §2-6 (1962). This is an enactment of the Uniform Aeronautics Act.

16. United States v. Praylou, 208 F.2d 291, 293 (4th Cir. 1953). The court distinguished *Dalehite* on the basis that the imposition of strict liability on the government did not arise out of the mere possession of property, but rather out of an invasion of personal and property rights through the government's ultra-hazardous activity. *Id.* at 295.

to include any actions for which absolute liability had been imposed by the legislature of the state.[17] At least one commentator[18] suggested that the Supreme Court's denial of certiorari,[19] considered in light of later decisions discussed below,[20] reflected a shift in the Court's position from a strict to a liberal interpretation of the Act.

Just two years after *Dalehite* created a presumption in favor of sovereign immunity, the Supreme Court recognized in *Indian Towing Co. v. United States*[21] that the Federal Tort Claims Act had "cut the ground out from under the doctrine of sovereign immunity."[22] Moreover, the Court stated that it should not read immunity into a statute designed to remove it.[23] This decision emphasized that, with few exceptions,[24] wherever a private individual may be held accountable under the law of the jurisdiction of the tort, so should the government.[25] In *Hess v. United States*[26] the Supreme Court affirmed this position by setting aside the circuit court's decision[27] as to the law applicable when an injury occurred on navigable waters. The Court held that the United States was liable, if at all, under the Oregon Employers Liability Law.[28] Although it did not find that Oregon law imposed absolute liability, the Court indicated it would not hesitate to apply the same law to the United States as would be applied to any private individual.[29]

The reason for applying state law was explained in *Rayonier, Inc. v. United States*.[30] The Court concluded that the primary purpose of the Act was to insure that no person would be forced to assume the entire burden of damages suffered as a result of governmental action carried on for the benefit of the public at large.[31] Rather, such losses should be apportioned among all who contribute to the financial support of the government.[32]

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17. *Id. See* 28 U.S.C. §1346 (b) (1970).
18. Jacoby, *supra* note 13.
19. United States v. Praylou, 347 U.S. 934 (1954).
20. Hess v. United States, 361 U.S. 314 (1960); Rayonier, Inc. v. United States, 352 U.S. 315 (1957); Indian Towing Co. v. United States, 350 U.S. 61 (1955).
21. 350 U.S. 61 (1955). This was an action in negligence to recover damages to a ship resulting from the Coast Guard's failure to properly maintain a lighthouse. The Court held that although the decision to maintain the lighthouse was discretionary, once made there was no room for discretion as to the degree of care to use. This reasoning is similar to that used by the Fourth Circuit in the instant case and reflects a liberal interpretation of the Act.
22. *Id.* at 65.
23. *Id.* at 69.
24. *See* U.S.C. §2680 (1970).
25. *Id.* §2674.
26. 361 U.S. 314 (1960).
27. Hess v. United States, 259 F.2d 285 (9th Cir. 1958). The circuit court using Oregon rules of conflict of laws, held that general maritime law, and not the Oregon Employer's Liability Law, should apply.
28. Hess v. United States, 361 U.S. 314, 321 (1960); ORE. REV. STAT. §654.305 (1972).
29. Hess v. United States, 361 U.S. 314, 318 (1960).
30. 352 U.S. 315 (1957).
31. *Id.* at 320.
32. *Id.*

Under this theory there is no logical reason why damaging governmental acts that have been sanctioned in the state by imposition of absolute liability, should be treated differently from similar acts for which proof of negligence is still required. It would be patently unfair to deny citizens the right to sue the United States merely because the state, in trying to afford greater protection, adopted absolute liability for the commission of an act that previously had been subject to proof of negligence.[33]

One of the aims in passing the Federal Tort Claims Act was to reduce the number of private claims that were regularly introduced before Congress and that could more effectively and efficiently be handled by the courts.[34] It is arguable that in order to accomplish this goal the Act must be liberally construed.[35] Moreover, the Court's statement in *Indian Towing*[36] that it should not override the intent of Congress supports this view. The Act specifies that the law of the state where the injury occurred shall be controlling,[37] and the area of absolute liability was not expressly excluded from the application of the Act.[38] However, the reasoning in *Dalehite,* reinforced by the instant decision, is not consistent with that philosophy.

The effect of the present decision is to exclude the law of absolute liability from the provisions of the Act and thereby recreate an area of governmental immunity. Furthermore, the laws of most jurisdictions impose strict liability for certain activities that, as a matter of public policy, should not be forbidden even though they involve a high degree of risk that cannot be eliminated regardless of the precautions taken.[39] If the intent of Congress was to allow suit to be brought on any tort claim, with the exception of certain areas expressly excluded from the operation of the Act, it is doubtful that the well-established area of absolute tort liability would have been overlooked. Yet this is the implication of the decision in the instant case.

The present decision is a retreat from earlier cases and reflects a fundamentally different interpretation of the words of the Act. It marks a return

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33. United States v. Praylou, 208 F.2d 291, 294-95 (4th Cir. 1953). *Praylou* cited the example of the Uniform Aeronautics Act (UAA). Under the UAA strict liability is the only basis for an action for damages caused by an airplane. The Government would therefore be immune in those states that had adopted the UAA, regardless of the degree of care exercised, but it would be liable, if negligent, in states that had not adopted the UAA.

34. H.R. REP. No. 2245, 77th Cong., 2d Sess. 6 (1942). *See also* H.R. REP. No. 1287, 79th Cong., 1st Sess. 2 (1945); Gelhorn & Lauer, *Federal Liability for Personal and Property Damages,* 29 N.Y.U.L. REV. 1325, 1328-29 (1954).

35. The restrictive interpretation of the Act in *Dalehite* resulted in the necessity of Congress enacting a bill to grant compensation to the victims of the Texas City disaster. *See* Act of Aug. 12, 1955, ch. 864, 69 Stat. 707; H.R. REP. No. 2024, 83d Cong., 2d Sess. (1954); H.R. REP. No. 1305, 84th Cong., 1st Sess. (1955); H.R. REP. No. 1623, 84th Cong., 1st Sess. (1955); S. REP. No. 684, 84th Cong., 1st Sess. (1955).

36. 350 U.S. at 69.

37. 28 U.S.C. §1346(b) (1970).

38. *Id.* §2680.

39. 406 U.S. at 804 (dissenting opinion). The most obvious example is the use of explosives in building roads.