NOTES

FEDERAL GOVERNMENT LIABILITY "AS A PRIVATE PERSON" UNDER THE TORT CLAIMS ACT

The recent case of *Rayonier v. United States*[1] has focused attention on a twilight area of United States liability under the Federal Tort Claims Act.[2] The primary question is whether the "governmental-proprietary" distinction, important in the tort law of municipal corporations,[3] is to be employed in interpreting the Tort Claims Act, thereby precluding liability for torts committed by federal employees in the course of carrying out activities peculiarly "governmental" in character.

In municipal corporation law, application of the "governmental-proprietary" distinction affords immunity to the municipality for torts committed while it is performing activities designated as "governmental," such as the operation of schools, fire departments, police departments and the prevention and cure of disease.[4] On the other hand, liability is imposed when the tort arises from a "proprietary" activity, such as operation of water and light plants, management of property used for income producing purposes, and maintenance of streets, highways, bridges, sewers and drains.[5] Considerable conflict exists in the judicial classification of particular activities as either "governmental" or "proprietary."[6]

The Tort Claims Act provides that the district courts shall have jurisdiction ". . . under circumstances where the United States, *if a private person, would be liable* to the claimant in accordance with the law of

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1. 352 U.S. 315 (1957).
2. Act of Aug. 2, 1946, c. 753, 60 STAT. 842 (codified in scattered sections of 28 U.S.C.). Hereinafter called the Tort Claims Act.
3. "Municipal corporations are regarded as having a rather curious dual character, which has given the courts a great deal of difficulty, and has left the law in a tangle of disagreement and confusion. On the one hand they are subdivisions of the state, endowed with governmental powers. . . . On the other they are corporate bodies, capable of much the same acts as private corporations. . . . The law has attempted to distinguish between the two functions, and to hold that in so far as they represent the state, in their 'governmental,' 'political,' or 'public' capacity, they share its immunity from tort liability, while in their 'corporate,' 'private,' or 'proprietary' character they may be liable." PROSSER, THE LAW OF TORTS § 109, at 774 (2d ed. 1955).
4. 18 MCQUILLIN, MUNICIPAL CORPORATIONS § 53.24 (3d ed. 1950).
5. 18 *id.* § 53.23.
6. See, *e.g.*, Warp, *The Law and Administration of Municipal Tort Liability*, 28 VA. L. REV. 360 (1942). For an extensive, scholarly study of the problems involved see Borchard, *Governmental Liability in Tort*, 34 YALE L. J. 1, 129, 229 (1924-25), 36 YALE L. J. 1, 757, 1039 (1926-27); Borchard, *Governmental Responsibility in Tort*, 28 COL. L. REV. 577, 734 (1928).

the place where the act or omission occurred,"[7] (emphasis added), and that, "The United States shall be liable, respecting the provisions of this title relating to tort claims, *in the same manner and to the same extent as a private individual under like circumstances*"[8] (emphasis added). The phrases *"private person"* and *"in the same manner and to the same extent as a private individual under like circumstances"* give rise to the instant problem.

Nothing in the legislative history of the Tort Claims Act provides a guide to ascertain the intended meaning of these phrases.[9] However, two alternative interpretations are suggested. A literal interpretation of the phrases suggests that the United States should be liable only when the substantive tort law of the jurisdiction where the damage occurred provides a remedy against either a natural person or a private corporation. On the other hand since nothing in the Act expressly precludes adjudication of the government's liability according to the tort liabilities and immunities of a municipal corporation, the Act could be construed as adopting such an interpretation. Pursuance of the latter course would necessarily require utilization of the "governmental-proprietary" distinction.

If the measure of United States liability under the Act is literally coextensive with the liabilities of natural persons or private corporations, adequate remedies would seemingly be provided to damaged litigants. Thus, Government undertaking of activities generally performed by private persons would impose upon federal employees the standard of care required of private persons and subject the Government to the same liabilities as are borne by private employers. For example, a federal employee, acting in the course of his duties, negligently causes an injury

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7. 28 U.S.C. § 1346 (b) (1952).

8. 28 U.S.C. § 2674 (1952).

9. The congressional committee reports are of no value in this respect. The Tort Claims Act was but a small portion of the Legislative Reorganization Act which was intended "to provide for increased efficiency in the legislative branch of the Government." Legislative Reorganization Act of 1946, c. 753, 60 STAT. 812. The interest of Congress was centered upon the provisions dealing with the structural organization and operation of the House and Senate with the result that the Tort Claims Act received little attention. What mention there is of the specific provisions in the Tort Claims Act goes only to the meaning of the "discretionary" exception. See note 80, *infra*. Other than this, the most that can be gleaned from committee reports and House and Senate debates is that Congress *intended* to rid itself of the overwhelming burden of private bills and to provide litigants, in the courts, a more rapid and equitable means of prosecuting their claims against the Government. There is, therefore, no reason to suggest that Congress intended to either include or exclude the "governmental-proprietary" distinction as an interpretative aid to assess liability of the Government under the Tort Claims Act. See H.R. REP. No. 2428, 76th Cong., 3d Sess. 2 (1940); H.R. REP. No. 2245, 77th Cong., 2d Sess. (1942); S. REP. No. 1196, 77th Cong., 2d Sess. 7 (1942); H.R. REP. No. 1287, 79th Cong., 1st Sess. 2 (1945). See also State of Maryland v. United States, 165 F. 2d 869 (4th Cir. 1947); Samson v. United States, 79 F. Supp. 406 (S.D. N.Y. 1947).

while driving a truck. Under this interpretation of the Tort Claims Act the United States would be liable because substantive tort law provides a remedy against a private person who employs a negligent truck driver. But even if the Act was interpreted literally to the effect that government liability is judged by the tort law applicable to private persons as such, there would still remain a rather large area in which United States immunity would persist. Private persons ordinarily do not perform certain functions, for example, maintain armies, control floods over vast areas, impose quarantines, provide police protection, fight fires with an organization of men and equipment established for such a purpose, construct and maintain lighthouses, maintain bodies for an express purpose of rescuing persons endangered by the seas, and provide landing directions for airplanes from control towers at airports. Such functions are peculiarily suited to be carried on by public bodies, and in fact are almost exclusively performed by them.[10] There is no body of private substantive tort law which has arisen from such sovereign functions that the courts can utilize to assess United States liability under the Tort Claims Act. Thus, if liability is imposed upon the United States under the Tort Claims Act *only* under circumstances where a private person as such would be liable, the absence of private activity in the foregoing instances, with the necessarily corresponding lack of private tort law, would result in United States immunity for negligent injuries arising out of such activities.

It is in the foregoing types of activity, characterized as "governmental," that the "governmental-proprietary" distinction would attain its importance if the Tort Claims Act were to be interpreted to incorporate the distinction. Application of the "governmental-proprietary" distinction would afford immunity for activities termed "governmental" and liability for those termed "proprietary."[11] Since "governmental" activities are the types of functions where there is no private liability because private persons do not usually engage in such functions, and "proprietary" activities are those where private liability obtains because private persons do engage in such functions, the ultimate result of application

10. The reason for the exclusively "governmental" character of many such functions and the absence of private activity is undoubtedly due to the small profit which would be realized from private investment in such undertakings. This was recognized in Eastern Air Lines v. Union Trust Company, 221 F.2d 62 (D.C. Cir. 1955), *aff'd per curiam*, 350 U.S. 907 (1955), where the court said, "Airports are usually constructed, maintained and operated by municipalities, probably because the cost of construction is great and the prospect of financial reward does not attract private capital. But, as far as we know . . . there was no reason why a private individual or a private corporation could not construct an airport and operate a control tower manned by its own operators. . . ." *Id.* at 74.

11. See note 3 *supra*.

of the "governmental-proprietary" distinction to the Tort Claims Act would impose liability upon the Government in about the same manner and to about the same extent as would result should the standard applicable to natural persons be applied to the Act. However, utilization of the "governmental-proprietary" distinction would add a complicating factor to the process of adjudication of cases under the Tort Claims Act. Instead of imposing a blanket immunity for negligence arising out of "governmental" activities, the courts would focus their attention upon determining whether a particular activity should be categorized as "governmental" or as "proprietary" according to the law of the jurisdiction where the tort occurred. The states which utilize the distinction[12] have had little success in developing logical rules and attaining consistent results.[13] Thus, application of the "governmental-proprietary" distinction to the Tort Claims Act would impose upon the federal courts the burden of administering an extremely complicated and inconsistent body of law.

Analysis of the cases occurring under the Tort Claims Act suggests that the courts have adopted neither the standard of tort liability applicable to private persons as such nor the standard of the "governmental-proprietary" distinction. Rather, the courts appear to have pursued a "middle ground" in interpreting the Act and assessed liability against the United States for negligent performance of "governmental" activities notwithstanding the absence of comparable private tort liability and without recourse to the "governmental-proprietary" distinction. This "middle ground" seems to result from judicial speculation as to what activities private persons *could* reasonably perform and a hypothesization of their liabilities *should* they engage in such activities. The validity of this proposition will be examined in light of a series of four Supreme Court decisions which have given rise to much of the controversy: *Dalehite v. United States*,[14] *Feres v. United States*,[15] *Indian Towing v. United*

12. The "governmental-proprietary" distinction is applied in every state except Florida and South Carolina. PROSSER, THE LAW OF TORTS § 109, at 775 (2d ed. 1955).

13. "Thus the governmental-proprietary rule often produces legalistic distinctions that have only remote relationship to the fundamental considerations of municipal tort responsibility. It does not seem good policy to permit the chance that a school building may or may not be producing a rental income at the time determine whether a victim may recover for his fall into a dark and unguarded basement stairway or elevator shaft. Instances like those found in Chicago could be multiplied. There the city is liable for negligently driven vehicles of the library, water, and garbage disposal departments, but not for those concerned with health or police. Jurisdiction over streets by the city of Chicago opens the way to recovery for injuries from street defects, but the immunity rule applies when the Chicago Park District happens to have jurisdiction." Fuller & Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437, 443 (1941). See also Seasongood, *Municipal Corporations: Objections to the Governmental or Proprietary Test*, 22 VA. L. REV. 910-17 (1936).

14. 346 U.S. 15 (1953).

15. 340 U.S. 135 (1950).

States,[16] and *Rayonier v. United States.*

The *Dalehite* case was the first to articulate United States immunity under the Tort Claims Act from liability for negligence in the performance of "governmental" activities. The salient facts of the case were: At the close of World War II, cabinet-level decisions were made to ship fertilizer to war-ravaged Europe. The fertilizer was manufactured from ammonium nitrate, an ingredient of high explosives. Negligent decisions of the method of its production and storage resulted in the fertilizer being highly explosive. Spontaneous combustion took place and subsequent explosions and fires practically destroyed the town of Texas City, Texas.[17]

The plaintiff, in conjunction with pleadings of negligence in the planning and execution of the crash-program to manufacture and ship fertilizer,[18] alleged that the Coast Guard had been negligent in fighting the fires from the explosions, and that such negligent fire-fighting was an additional proximate cause of his injuries.

The Court rejected liability[19] arising out of the Coast Guard's negligent fire fighting, holding that,

> ". . . [The Act] did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. . . . [I]n fact, if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire."[20]

It would appear from these words that the Court assumed the "governmental-proprietary" distinction to be of importance in construing the Tort Claims Act, at least in so far as the distinction bears upon the activities of public firemen.[21]

However, it is reasonably arguable that these few words in the *Dalehite* opinion represent merely a superficially considered, incidental

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16. 350 U.S. 61 (1955).

17. *Dalehite* was a test case which represented over 300 separate personal and property claims on the behalf of 8485 persons. The amount in issue from these claims totaled two hundred million dollars. At least one writer is of the opinion that the Court's decision could have been influenced by the magnitude of the potential liability. James, *Inroads on Old Tort Concepts (Part 2)*, 15 NACCA L. J. 281, 294 (1955).

18. The Court denied United States liability for negligence in planning and executing the fertilizer program on the basis of the "discretionary" exception to the Tort Claims Act. See note 80 *infra* for the "discretionary" exception.

19. The Court affirmed the decision of the court of appeals, *In re* Texas City Disaster Litigation, 197 F.2d 771 (5th Cir. 1952), which had reversed a judgment for plaintiff in the district court.

20. 346 U.S. at 43-44.

21. See Mr. Justice Jackson's dissent, 346 U.S. 15, 47.

holding of the Court. The Court had already disposed of the case on the basis of the "discretionary" exception to the Tort Claims Act[22] and the dominant theme throughout the entire majority opinion stressed this aspect of the case.[23] Moreover, the Court relied upon *Feres v. United States* as its only authority under the Tort Claims Act to support its conclusion that the United States was immune from suit for damages caused by "governmental" activities.[24] The *Feres* case must be regarded as something less than justifiably sound precedent to the effect that the "governmental-proprietary" distinction controls interpretation of the Tort Claims Act.

The *Feres* decision reviewed three cases involving servicemen who were injured owing to the negligence of other members of the armed forces.[25] The issue involved was United States liability to servicemen injured while on duty because of the negligence of other servicemen who were carrying out official duties. The Court's conclusion was that there was no governmental liability under the Tort Claims Act for injuries to servicemen "when the injuries arise out of or are in the course of activity incident to service."[26]

Throughout the *Feres* opinion, the Court reasoned that the *status* of the plaintiffs in relation to the army was the primary factor in denying relief.[27] The "governmental-proprietary" distinction was not mentioned as such, although the Court did note that there was no analogous private

22. See note 80 *infra.*

23. Mr. Justice Reed, delivering the opinion of the Court, devoted twenty seven pages to a detailed analysis of the factors pertaining to the "discretionary" exception, a historical survey of the policy behind the adoption of the "discretionary" exception and a careful espousal of the Court's interpretation and application of the "discretionary" exception. The plaintiff's allegations of the Coast Guard's negligent fire fighting were dismissed in one page, almost as an afterthought: ". . . as to the alleged failure in fighting the fire, we think this too without the Act." 346 U.S. at 43. See note 17 *supra* as to the possible influence of the large amount of damages sought.

24. "Our analysis of the question is determined by what was said in the *Feres* case." 346 U.S. at 43.

25. Two incidents arose out of negligent medical treatment by army surgeons and the third from an army barracks which burned because of a defective heating plant. See note 15, *supra.*

26. 340 U.S. at 146. "Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law. We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence." *Ibid.*

27. "We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officer or the Government he is serving . . . This Court . . . cannot escape . . . enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in armed services. . . . The compensation system . . . is not negligible or niggardly. . . ." *Id. passim.*

tort liability.[28] Thus, if one accepts the *status* of the injured soldiers as the controlling factor in the *Feres* decision,[29] it becomes difficult to defend or justify the case as valid precedent for the *Dalehite* statement about public firemen and the corresponding implication in the latter case that immunity under the Tort Claims Act extends to "governmental" activities as defined by the "governmental-proprietary" distinction.

Two years after the *Dalehite* decision the "governmental-proprietary" distinction was again before the Court in *Indian Towing Co. v. United States*. The Coast Guard maintained a lighthouse near a dangerous coastline. Negligence in examining and repairing the electrical system resulted in a failure of the light. No warning was issued to persons navigating in the area and plaintiff's tug went aground and was damaged.[30] Rejection of the "governmental-proprietary" distinction was strongly phrased and the Court emphasized the "chaos" that would develop should it be applied to the Tort Claims Act:

". . . [T]he Government in effect reads the statute as imposing liability in the same manner as if it were a municipal corporation . . . it would thus push the courts into the 'non-govermental'-'governmental' quagmire that has long plagued the law of municipal corporations . . . The Federal Tort Claims Act cuts the ground from under that doctrine; it is not self-defeating by covertly embedding the casuistries of municipal liability for torts."[31] The Court recognized that the maintenance of navigational aids such as lighthouses is a "governmental" function and that

28. "One obvious shortcoming in these claims is that plaintiffs can point to no liability of a 'private individual' even remotely analogous to that which they are asserting against the United States." *Id.* at 141.

29. The Court noted that *Feres* was a "'wholly different case'" from Brooks v. United States, 337 U.S. 49 (1949), which allowed recovery against the Government for injuries sustained by a soldier in an off-duty status due to the negligence of a truck driver in a military convoy. Similarly, there has been government liability where dependents of servicemen, veterans and civilians employed by the armed services have been negligently injured in military hospitals. Fair v. United States, 234 F.2d 288 (5th Cir. 1956); Panella v. United States, 216 F.2d 622 (2d Cir. 1954); United States v. Trubow, 214 F.2d 192 (9th Cir. 1954); United States v. Gray, 199 F.2d 239 (10th Cir. 1952); Costley v. United States, 181 F.2d 723 (5th Cir. 1950); Canon v. United States, 111 F. Supp. 162 (N.D. Cal. 1953); Grigalauskas v. United States, 103 F. Supp. 543 (D. Mass. 1951); Herring v. United States, 98 F. Supp. 69 (D. Colo. 1951); Dishman v. United States, 93 F. Supp. 567 (D. Md. 1950). *Contra*, O'Neil v. United States, 202 F.2d 366 (D.C. Cir. 1953); *see* Smart v. United States, 207 F.2d 841 (10th Cir. 1953) (recovery denied on grounds of "discretionary" exception); Dugan v. United States, 147 F. Supp. 674 (D.D.C. 1956) (recovery denied on grounds of "discretionary" exception). In light of these cases, allowing recovery against the Government for injuries to civilians arising from the negligence of service personnel, it is difficult to explain the *Feres* decision on any ground other than the military *status* of the plaintiffs.

30. Government counsel conceded that the "discretionary" exception was not involved, 350 U.S. at 64, but insisted that there was "no liability for negligent performance of 'uniquely governmental functions.'" *Ibid.*

31. *Id.* at 65.

there is no analogous private activity; however, it hypothesized that *should* Congress permit private persons to operate lighthouses they would be liable for doing so negligently and denied that there need be *identical* private activity in order to hold the United States liable under the Tort Claims Act.[32] Although that portion of the *Dalehite* opinion which suggests immunity for the negligent performance of "governmental" activities was not expressly overruled,[33] *Indian Towing* would seem to go far toward eliminating the "governmental-proprietary" distinction from the Tort Claims Act.[34]

The most recent and most significant Supreme Court decision concerning the "governmental-proprietary" distinction was *Rayonier v. United States*. The case involved negligence of the United States acting in the capacity of a public fireman—the same function given immunity in the *Dalehite* case. The Government owned forest land and had granted a right of way to a railroad. Sparks from an engine ignited highly inflammable debris which the Government had negligently allowed to accumulate along the right of way. The United States Forest Service assumed control over the fire fighting and had soon contained the conflagration to a 1600 acre area; however the Forest Service negligently failed to completely extinguish the fire, leaving it to smolder for a period

32. "Moreover, if the United States were to permit the operation of private lighthouses—not at all inconceivable—the Government's basis of differentiation would be gone and the negligence charged in this case would be actionable. Yet there would be no change in the character of the Government's activity in the places where it operated a lighthouse, and we would be attributing bizarre motives to Congress were we to hold that it was predicating liability on such a completely fortuitous circumstance—the presence of identical private activity." *Id.* at 66-67.

33. The Court noted that, "The differences between this case and Dalehite need not be labored. The governing factors in Dalehite sufficiently emerge from the opinion in that case." *Id.* at 69. This statement was amplified by a footnote: "The Court in Dalehite disposed of a claim of liability for negligence in connection with fire fighting by finding that 'there is no analogous liability * * *' in the law of torts. 346 U.S. at page 44, 73 S. Ct. at page 972. *But see* Workman v. New York City, 179 U.S. 552, 21 S. Ct. 212, 45 L.Ed. 314." *Ibid.* n. 4. (Emphasis added.) Referral to the *Workman* case in this context is significant because in that case recovery was allowed against the City of New York under federal admiralty law for the negligent operation of a fireboat. This would indicate that had the matter of negligent government fire fighting been before the Court, it would have imposed liability under the Tort Claims Act, notwithstanding the Dalehite holding. Mr. Justice Reed, dissenting, recognized this possible ramification of the majority opinion. "Logically it may cover negligence in fire fighting, although the Dalehite holding on that point is not overruled." *Id.* at 76.

34. The dissenting opinion noted this as an implication of the holding. ". . . Liability of governments for the failure of lighthouse warning lights is as unknown to tort law as, for example, liability for negligence in fire fighting excluded by the Dalehite ruling. Lighthouse keeping is as uniquely a governmental function as fire fighting. . . . The over-all impression from the majority opinion is that it makes the Government liable under the Act for negligence in the conduct of 'any governmental activity on the operational level.' It seems broad enough to cover all so-called 'uniquely governmental activities.'" *Id.* at 75-76.

of five weeks. The fire broke out again, spread over an area of twenty miles and damaged plaintiff's property.

Basically, two grounds of government negligence were alleged: allowing inflammable debris to remain on its property in a place that constituted a fire hazard under the laws of Washington, and failing to extinguish the fire when it was confined to the smaller area knowing that conditions were such that it might break out again.[35]

The district court dismissed the suit on the basis of the *Dalehite* case[36] and was affirmed by the court of appeals.[37] The Supreme Court reversed, and, as in the *Indian Towing* case, rejected applicability of the "governmental-proprietary" distinction to suits arising under the Tort Claims Act, saying,

> "We expressly decided in *Indian Towing* that the United States liability is not restricted to the liability of a municipal corporation or other public body and that an injured party cannot be deprived of his rights under the Act by resort to an alleged distinction, imported from the law of municipal corporations. . . . and for obvious reasons the United States cannot be equated with a municipality, which conceivably might be rendered bankrupt if it were subject to liability for the negligence of its firemen."[38]

The case was remanded to determine whether the evidence "would be sufficient to impose liability on a private person under the laws of the State of Washington,"[39] and the Court stressed that the measure of liability was that applied to "private persons or corporations under similar circumstances."[40]

Since few activities are more "governmental" in character than safeguarding navigation with lighthouses or protecting forested areas by

35. 352 U.S. at 317.

36. "My general impressions at this time about it are that in the absence of the Dalehite case I would overrule the motion [to dismiss]. . . . If in all of the matters referred to in the complaint he [the head forest ranger] was acting as a public fireman, according to Dalehite there is no action. . . . I am obliged. . . . to sustain the motion to dismiss, basing it entirely on the Dalehite case." Transcript of Record, pp. 37-41, Rayonier v. United States, 352 U.S. 315 (1957).

37. "We see no distinction between non-liability of the United States for negligence of the Coast Guard in fighting fires and analogous negligent conduct by the Forest Service." Rayonier Incorporated v. United States, 225 F.2d 642, 646 (9th Cir. 1955).

38. 352 U.S. at 319-20.

39. *Id.* at 321.

40. "These provisions, [in the Tort Claims Act] given their plain natural meaning, make the United States liable to petitioners for the Forest Service's negligence in fighting the forest fire if, as alleged in the complaints, Washington law would impose liability on private persons or corporations under similar circumstances." *Id.* at 318.

means of firefighting, it is reasonably arguable that the facts of the *Indian Towing* and *Rayonier* cases support the conclusion that the "governmental-proprietary" distinction is of no importance in assessing United States liability under the Tort Claims Act and that the *Dalehite* case, in so far as it accepted the distinction, has been overruled by the Supreme Court.[41]

This conclusion would appear to be supported by numerous court of appeals and district court decisions. These cases have arisen from the negligence of federal employees while performing activities classified as immune "governmental" functions under the "governmental-proprietary" distinction as applied in most states. Thus, the Government has been held accountable when employees in the capacity of policemen have negligently performed their duties. For example, liability has been imposed where a military policeman negligently injured the plaintiff while shooting at a man who was resisting arrest;[42] and where an F.B.I. agent in pursuit of a criminal negligently drove into the plaintiff.[43] Likewise, the Government has been held liable for its employees' negligent torts while performing activities such as maintenance of public parks,[44] maintenance of public buildings such as post offices,[45] marking the position of a sunken vessel which posed a hazard to shipping,[46] maintenance of buoys

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41. The Court in *Rayonier* noted that it would not apply the distinction ". . . between the Government's negligence when it acts in a 'proprietary' capacity and its negligence when it acts in a 'uniquely governmental' capacity. . . ." and that "to the extent that there was anything to the contrary in the Dalehite case it was necessarily rejected by Indian Towing." *Id.* at 319.

42. Cerri v. United States, 80 F. Supp. 831 (N.D. Cal. 1948). ". . . To reason that the United States cannot be here held liable because a municipality in California is protected by the sovereignty of the state, is to ignore the plain meaning of the Federal Tort Claims Act and to deny the object sought by Congress. . . . Certainly, the statute itself makes no distinction between governmental activities of a sovereign nature and those of a proprietary nature, nor does it include within the claims exempted . . . those of this type." *Id.* at 833.

43. Sullivan v. United States, 129 F. Supp. 713 (N.D. Ill. 1955).

44. In Claypool v. United States, 98 F. Supp. 702 (S.D. Cal. 1951), a park ranger who knew that bears had recently attacked visitors to the park told the plaintiff that they would not attack without provocation and that it would be safe to sleep out of doors. The plaintiff followed the ranger's advice and was mauled by a bear. The court rejected the "governmental-proprietary" distinction and assessed the United States with liability for the ranger's negligence.

45. Jackson v. United States, 196 F.2d 725 (3d Cir. 1952); United States v. Hull, 195 F.2d 64 (1st Cir. 1952); Blaine v. United States, 102 F.Supp. 161 (E.D. Tenn. 1951).

46. Somerset Seafood Co. v. United States, 193 F.2d 631 (4th Cir. 1951). "It is suggested that it [the Tort Claims Act] was not intended to impose liability on the United States for damages arising out of the exercise of what are essentially 'governmental' functions as distinguished from those which might be carried on by private individuals, but we think there is no basis for such distinction." *Id.* at 635.

delineating a navigation channel,[47] operation of airport control towers,[48] and performance of military activities.[49]

But even though the *Indian Towing* and *Rayonier* cases strongly suggest that assessment of United States liability under the Tort Claims Act has been considered apart from the "governmental-proprietary" distinction, a different conclusion may be drawn. It is possible to deny that neither is a square holding on the question of application of the distinction to the Act. The decisions can be rationalized on the basis of substantive tort theories sufficient in themselves to have imposed private liability even though the general activity involved was not one in which private persons ordinarily engage. Thus, in *Indian Towing* the Court likened the Government, in its capacity as a lighthouse operator, to a volunteer. A volunteer is one who has no original tort duty of care toward a particular person; however, once he initiates an act in behalf of another person so as to induce reliance upon his performance, he must then proceed with due care.[50] If this decision can be said to rest upon the ground of a breach of this substantive tort duty of a volunteer,[51] the

47. *Cf.* Russell, Poling & Co. v. United States, 140 F. Supp. 890 (S.D. N.Y. 1956).

48. Air Transport Associates v. United States, 221 F.2d 467 (9th Cir. 1955); United States v. Union Trust Company, 221 F.2d 62 (D.C. Cir. 1955), *aff'd per curiam*, 350 U.S. 907 (1955). Both cases specifically considered and rejected application of the "governmental-proprietary" distinction to the Tort Claims Act.

49. The cases involving negligence of members of the armed forces have disregarded the fact that private persons do not operate armies and have looked to the nature of the specific activity in question. When the activity from which the negligence arose is clearly similar to private activity, *e.g.*, operation of vehicles, airplanes, swimming pools, or activities on one's land giving rise to stream pollution, liability is imposed notwithstanding the operation of the "governmental-proprietary" distinction in the various states where the torts occurred. See United States v. Gaidys, 194 F.2d 762 (10th Cir. 1952); Johnson v. United States, 170 F.2d 767 (9th Cir. 1948); Smith v. United States, 113 F. Supp. 131 (D. Del. 1953); Brewer v. United States, 108 F. Supp. 889 (M.D. Ga. 1952); Parcell v. United States, 104 F. Supp. 110 (S.D. W. Va. 1951); Brown v. United States, 99 F. Supp. 685 (S.D. W. Va. 1951); Skeels v. United States, 72 F. Supp. 372 (W.D. La. 1947). *Contra*, Williams v. United States, 115 F. Supp. 386 (N.D. Fla. 1953), *aff'd per curiam*, 218 F.2d 473 (5th Cir. 1955) (recovery denied on basis of "discretionary" exception).

50. ". . . [I]t is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner.

". . . .

"The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning." 350 U.S. at 64-65, 69.

51 Under this same tort theory of the standard of care required of a volunteer the Government was held liable for negligence of the Coast Guard in the rescue of a person in peril at sea. United States v. Lawter, 219 F.2d 559 (5th Cir. 1955). *Contra*, Dougherty Co. v. United States, 207 F.2d 626 (3d Cir. 1953), *cert. denied*, 347 U.S. 912 (1954);

statements of the Court relating to rejection of the "governmental-proprietary" distinction have less authoritative effect.

Likewise, in the *Rayonier* case the Government can be likened to a landowner fighting a fire rather than a "public" fire fighter. The property upon which the fire started was owned by the Government and plaintiff alleged that it had been negligently maintained. Washington statutes make such conditions in forest lands a nuisance and require a landowner on whose property a fire has started to take reasonable measures to extinguish it.[52] The district court was of the opinion that these facts were sufficient to show negligence on the part of a private land owner.[53] Even though the court of appeals had found as a matter of law that the United States operations as a firefighter, rather than its operations as a landowner were the proximate cause of the plaintiff's damages,[54] Justice Black, in remanding the case, mentioned that the statê law on the latter point might have been incorrectly applied by the court of appeals.[55] Such facts provide a basis for rationalizing United States liability on a substantive tort theory applicable to private persons and thereby lessen the necessity of explaining the decision on the grounds of liability for the "governmental" activity of firefighting.

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cf. Lacey v. United States, 98 F. Supp. 219 (D. Mass. 1951) (recovery denied because rescue attempt did not deter others from participating).

52. WASH. REV. CODE § 76.04.380 (1952); WASH. REV. CODE § 76.04.450 (1952).

53. ". . . [I]f the Government does not have immunity by virtue of its capacity as a public fireman, my opinion is there is a duty, there would be a duty to exercise reasonable care in confining, controlling and extinguishing fire and consequently I would be of the opinion that the action might be maintained, but for the public capacity of the Forest Service in the matter of fighting fire." Transcript of Record, p. 41, Rayonier v. United States, 352 U.S. 315 (1957).

54. ". . . While much is alleged as to the origin of the fire, negligence of the United States in failing to keep the railroad right of way clear of inflammable matter as well as negligence in failing to control the early spread of the fire, we read the amended complaint in its entirety as picturing a situation wherein the operation occurring after the fire had spread to the 1600-acre plot is determinative of the liability of the Government, if any. . . . [I]t was this recurrence of fire on the 1600-acre tract which was the sole proximate cause of the injury to appellant's property and that risks, if any, created by the acts or omissions of agencies of the Government prior to the containment of the fire in the 1600-acre area had terminated." Rayonier Incorporated v. United States, 225 F.2d 642, 644 (9th Cir. 1955).

55. ". . . While the Court of Appeals relied on state law to uphold the dismissal of those allegations in the complaints which charged negligence for reasons other than the Forest Service's carelessness in controlling the fire, we cannot say that court's interpretation of Washington law was wholly free from its erroneous acceptance of the statements in Dalehite about public firemen. Furthermore it has been strongly contended here that the Court of Appeals improperly interpreted certain allegations in the complaints and as a result of such misinterpretation incorrectly applied Washington law. . . . In view of the circumstances, we think it proper to vacate both judgments in their entirety so that the District Court may consider the complaints anew . . . wholly free to determine their sufficiency on the basis of whether . . . [they] would be sufficient to impose liability on a private person under the laws of the State of Washington." 352 U.S. at 320-21.

The majority of lower federal court decisions likewise can be explained.[56] Thus, for example, liability for negligent maintenance of parks and public buildings is readily rationalized by the duties of private landowners to invitees or licensees and the duties owed by a volunteer can be used as the basis of liability for negligently placing warning signals near sunken vessels and negligently marking navigation channels.[57]

But even though *Indian Towing, Rayonier* and the lower federal court cases are capable of being rationalized on the ground of substantive tort doctrines sufficient in themselves to impose private liability, and the value of such opinions as direct renunciations of the "governmental-proprietary" distinction may therefore be questioned, nevertheless, it would seem more reasonable to argue that the Supreme Court has renounced the distinction. These cases are not reconcilable with the subtle intricacies of the "governmental-proprietary" distinction as it is utilized in state courts.[58] To assert that these cases avoid a holding on the "governmental-proprietary" distinction because one aspect of the "governmental" activity involved is analogous to a specific, actionable private activity, overlooks the fact that in municipal corporation tort law the distinction frequently provides immunity notwithstanding the presence of *identical* private activity.[59]

Moreover, even if the cases are capable of being distinguished, an examination of the considerations which originally prompted the courts

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56. However, it is difficult to explain the cases involving torts of police officers on the grounds of private tort liability in that private persons, under circumstances other than extraordinary, are not authorized to perform such activities. See notes 42 and 43 *supra*. Although an individual would be liable for negligently firing a gun into a crowd of people or negligently driving an automobile, it is unrealistic to distill these specific acts from the dominant element that they were performed in the course of the apprehension of criminals. Perhaps these cases provide the strongest argument that the "governmental-proprietary" distniction is not material to the interpretation of the Tort Claims Act.

57. The cases involving negligent operation of airport control towers have arisen from large, complex and expensive operations. Because of the substantial capital investment involved plus the small profit return, such undertakings are operated by government bodies as publically owned, public utilities. However, private persons do operate airports, though they are smaller in extent, and private liabilities in this field may be used as the basis for government liability under the Tort Claims Act. See note 49 *supra* for the basis of liability for negligence arising out of military activities.

58. Tort Claims Act cases arising out of negligence in the operation of government hospitals have imposed liability even though the state law in the states where the hospitals are located directs a contrary result through the "governmental-proprietary" distinction. *E.g., compare* Fair v. United States, 234 F.2d 288 (5th Cir. 1956), *with* Gartman v. City of McAllen, 130 Tex. 237, 107 S.W.2d 897 (1937).

59. See, *e.g.,* Bouchard v. Auburn, 133 Me. 439, 179 Atl. 718 (1935) (negligent removal of rotten tree limb which overhung sidewalk and street in heavily populated part of city); Board of Education of the School District of the City of Cincinnati v. McHenry, 106 Ohio St. 357, 140 N.E. 169 (1922) (dentist employed by school board negligently broke jaw of pupil in the public school).

to develop the "governmental-proprietary" distinction, the rationalizations which have been employed to justify its continuance, and the results obtained under the application of the distinction lead to the conclusion that there are no valid policy considerations supporting utilization of the distinction in interpreting the Tort Claims Act.

Originally the distinction was based upon three policy considerations: Recognition of actions arising from "governmental" acts would produce an infinity of suits; there was no precedent for such a suit; and there was no corporate fund out of which to pay the damages.[60] These objections to allowing a suit against a unit of government, while possibly valid one hundred and fifty years ago, would seem to lack logical appeal in modern tort law.[61]

The arguments employed to justify continued utilization of the "governmental-proprietary" distinction after its inception have been many and varied. The most widely adopted rationalizations for urging continuance of the distinction amount to no more than variations of the "King Can Do No Wrong" concept under which the state is immune from suit.[62] The dominant theme underlying these reasons is that since the municipality is created under the egis of the immune state, it is but an auxiliary of the state and is thus immune from suit for those activities which it performs for the benefit of the state, *i.e.*, "governmental" activities.[63] Therefore, the source of the immunity provided to the municipality by the "governmental-proprietary" distinction is the sovereign immunity of the state. Under such a theory, if the state should abandon its immunity, there would be no logical basis upon which the courts could continue to protect the municipality from liability. There is no valid reason for United States waiver of sovereign immunity under the Tort Claims Act to be mitigated by the sovereign immunities of the states

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60. The "governmental-proprietary" distinction was first utilized in Great Britain in 1798. Russell v. Men of Devon, 2 T.R. 667, 100 Eng. Rep. 359 (1798). It was adopted in the United States in New York in 1842. Bailey v. City of New York, 3 Hill 531 (N.Y. 1842).

61. The states that have waived their sovereign immunity and abolished the "governmental-proprietary" distinction have not experienced over-crowded court dockets from the recognition of such actions. The modern law of negligence is noted for its flexibility and adaptability to unique situations; it has not been immobilized by a lack of precedent when called upon to determine the rights of parties involved in a novel dispute. Congress has regularly appropriated funds in order to pay damages assessed against the United States under the Tort Claims Act.

62. PROSSER, THE LAW OF TORTS § 109, p. 770 (2d ed. 1955). The "King Can Do No Wrong" concept provided immunity to the United States Government from tort claims prior to adoption of the Tort Claims Act in 1946. See, *e.g.*, United States v. Sherwood, 312 U.S. 584 (1941).

63. Warp, *The Law and Administration of Municipal Tort Liability*, 28 VA. L. REV. 360, 362 (1942).

through their "governmental-proprietary" distinction. Should the distinction be adopted, the federal government would be in the peculiar position of both waiving its immunity from suit and at the same time retaining part of such immunity as a derivative from state immunities.

Another argument in support of the "governmental-proprietary" distinction is that municipalities cannot afford to properly perform their functions if they are made liable for the torts of their employees.[64] The states that have waived their sovereign immunity have not experienced this difficulty.[65] Moreover, imposition of liability in the performance of "proprietary" functions such as water and light plants which often pose greater risks and involve greater potential liabilities than many "governmental" activities apparently has not hampered these functions. But even assuming that this argument is valid in applying the distinction to municipalities, it can hardly be said to be valid in relation to the federal government. It is doubtful if any federal activity would be terminated on the basis of fear that an occasional tort by an employee would result in a damage suit against the United States.[66]

In most states the minute distinctions utilized in the classification of activities as either "governmental" or "proprietary" lack logical appeal.[67] The results of similar cases from one jurisdiction to another are anything but uniform.[68]

Under the Tort Claims Act, the Government is to be liable, ". . . in accordance with the law of the place where the act or omission oc-

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64. Borchard, *Governmental Liability in Tort,* 34 YALE L. J. 129, 132-33 (1924).

65. MacDonald, *The Administration of a Tort Liability Law in New York,* 9 LAW & CONTEMP. PROB. 262 (1942); David & French, *Public Tort Liability Administration: Organization, Methods, and Expense,* 9 *id.* at 348; Warp, *Tort Liability Problems of Small Municipalities,* 9 *id.* at 363.

66. "There is one suggestion made upon argument which must be rejected with scorn. It is said that, if the Government is held to responsibility for breaks in the canals and dams which it has constructed, it will effectually dampen the ardor of the bureaus for constructing other works. This suggestion is amoral at least." Ure v. United States, 93 F. Supp. 779, 792 (D. Ore. 1950), *aff'd,* 193 F.2d 505 (9th Cir. 1951).

67. "It is when we come to the municipal corporation as an agency of the public power that we find the greatest confusion to prevail, not only as to the substantive liability or immuniy of the corporation in tort, but as to the grounds upon which the liability or immunity, as the case may be, properly rests. In few, if any, branches of the law have the courts labored more abjectly under the supposed inexorable domination of formulas, phrases and terminology, with the result that facts have often been tortured into the framework of a formula, lacking in many cases any sound basis of reason or policy." Borchard, *supra* note 64 at 129. See note 13 *supra.*

68. "Not all courts, however, are equally submissive to the commands of a ritual; so that we find the utmost confusion among the courts in the attempt to classify particular acts of state agents as governmental or corporate. Disagreement among the courts as to many customary municipal acts and functions may almost be said to be more common than agreement and the elaboration of the varying justifications for their classification is even less satisfying to any demand for principle in the law." Borchard, *supra* note 64 at 129.

curred. . . ."[69] Thus the effect of adoption of the "governmental-proprietary" distinction, in addition to immunity for most sovereign activities, would be a widespread variance in the application of the Tort Claims Act to similar cases arising in different states and would impose upon the Federal Courts a burden of administering an extremely complicated and inconsistent body of law.[70] Although it is impossible to ascertain any specific congressional intent as to the interpretation of the Tort Claims Act,[71] it is highly doubtful that Congress intended to inject the distinction into the Act in view of the confusion and uncertainty that its utilization would promote.[72]

If the "governmental-proprietary" distinction were to be resolutely applied to cases arising under the Tort Claims Act, United States immunity would prevail in many areas of activity where, under the present interpretation of the Act, there is now liability.[73] Regardless of the uncertainty of congressional intent as to the interpretation of specific provisions in the Tort Claims Act, it is clear that Congress meant to alleviate as much as possible the overwhelming burden of considering private bills for the relief of individual tort claims.[74] Such a result would not be obtained through adoption of the "governmental-proprietary" distinction since it would increase to a large extent the number of activities without the purview of the Tort Claims Act.

As stated previously, the case law indicates that the distinction has not been utilized. Neither have the courts evaluated United States liability under the Act *strictly* on the basis of the tort law applicable to natural persons or private corporations.[75] Although liability of the

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69. 28 U.S.C. § 1346(b) (1952).

70. In the *Indian Towing* case, Mr. Justice Frankfurter characterized the law of municipal corporations as a "quagmire" and noted that "chaos" would develop in the courts if the distinction should be applied to the Tort Claims Act. 350 U.S. at 65.

71. See note 9 *supra*.

72. An inference can be drawn from the silence of Congress on the question coupled with the twelve express exceptions to the waiver of United States immunity that were delineated in the Act (28 U.S.C. § 2680 (1952)). Application of the rule of construction, *expressio unius est exclusio alterius,* plus Supreme Court rulings that the Act is to be liberally construed lend credence to the conclusion that the "governmental-proprietary" distinction should not be applied to cases arising under the Tort Claims Act.

73. For example, the Government would be immune from suits arising out of the negligence of policemen, firemen, post office employees, street cleaners, and the negligent operation of parks and federal courthouses. Such results are not consistent with the modern trend of minimizing individual losses by expanding tort remedies available to injured parties through both the courts and the legislature.

74. Jackson, *The Tort Claims Act—The Federal Government Assumes Liability in Tort,* 27 NEB. L. REV. 30, 31 (1947). See note 9 *supra*.

75. The operation of hospitals is not a uniquely "governmental" activity. Many private individuals and corporations are engaged in this pursuit. However, in most states liability of a private hospital is contingent upon whether the service rendered is charitable or for profit. As indicative of the proposition that the courts have not entirely

Government under the Tort Claims Act is to be adjudged "in the same manner and to the same extent as a private individual,"[76] the absence of actual private activity corresponding to the activity pursued by the Government with the consequential absence of private tort law in such areas has provided no immunity to the United States.[77] There is no private tort law in the areas of uniquely "governmental" activity only because private persons have not engaged in such activities. Therefore, there are no private duties or standards of care that have developed against which the conduct of the United States can be measured to determine its liability. However, this lack of corresponding private liability has not been an insurmountable obstacle. When confronted with such situations the courts have indicated a judicial willingness to hypothesize in regard to the duties and liabilities of private persons *should* they undertake such activities, and have assessed United States liability under the Act accordingly. Factually, the extent of this hypothesization seems to be limited by whether it is reasonably conceivable that a private person *might* undertake a particular activity. Liability is imposed if private activity, corresponding to that in which the Government was engaged, is not reasonably inconceivable.[78] But if the probability of private activity is remote, United States immunity under the Tort Claims Act

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accepted the tort law applicable to "private persons" in construing the Tort Claims Act, it should be noted that although the "Charitable Institution" theory determines the liability of negligently operated private hospitals, this theory has not affected determination of cases under the Act arising from negligently operated government hospitals. Dishman v. United States, 93 F.Supp. 567 (D. Md. 1950). See Grigalauskas v. United States, 103 F.Supp. 543 (D. Mass. 1951) where the court went to great lengths to find that a serviceman's dependent receiving care in an army hospital is not a recipient of charity because the purpose of the hospital is ". . . the building and preservation of health and morale in the armed forces." *Id.* at 551.

76. 28 U.S.C. § 2674 (1952).

77. Under the Tort Claims Act the Government is to be liable ". . . in accordance with the law of the place where the act or omission occurred. . . ." 28 U.S.C. § 1346(b) (1952). Because of the lack of common law liability of private persons in areas of uniquely "governmental" activity there is no "law of the place" which the courts can utilize to determine the liability of the Government under the Tort Claims Act. Consequently, the federal courts have been developing what appears to be a "common law" doctrine for the law of torts unique to the United States Judiciary which is not derivative from the torts common law of the several states. Compare the frequently repeated proposition that "there is no federal general common law" as expressed in Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). Growth of a "federal common law" has not been confined to the law of torts. See, *e.g.*, Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

78. ". . . it is hard to think of any governmental activity on the 'operational level,' our present concern, which is 'uniquely governmental,' in the sense that its kind has not at one time or another been, or could not conceivably be, privately performed." Indian Towing v. United States, 350 U.S. at 68. See, *e.g.*, United States v. Union Trust Company, 221 F.2d 62 (D.C. Cir. 1955). *aff'd per curiam*, 350 U.S. 907 (1955).

prevails.[79] Thus, the courts appear to have adopted a "middle ground" between the extremes of either the literal standard of tort law of private persons or the standard of the "governmental-proprietary" distinction in applying the Tort Claims Act provisions to United States negligence in fields of uniquely "governmental" activities.

However, liability under the Tort Claims Act does not extend to the full breadth of "governmental" activities performed by the federal government. It is easily recognizable that immunity is required in certain fields so that the United States will not be hampered from effectively administering important programs for the furtherance of the public welfare. The "discretionary" exception in the Tort Claims Act,[80] as an alternative to the "governmental-proprietary" distinction, provides a sufficient safety valve so as to immunize the United States from liabilities to which it should not be held. The cases which have afforded immunity to the Government for negligent performance of uniquely "governmental" activities have utilized the "discretionary" exception to the Tort Claims Act.[81] Most of the activities protected by the "discretionary" exception involve programs instituted by high-level policy decisions which have far-reaching economic, military or political consequences.[82] Thus, there has been immunity in situations such as terminating price control regulations causing plaintiff to lose money on a contract,[83] failing to operate a coal mine after it had been seized during a national emergency,[84] acting in pursuance of plans to control floods[85] and improve

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79. Thus, there is immunity when persons confined in penal institutions are negligently injured: Morton v. United States, 228 F.2d 431 (D.C. Cir. 1955), *cert. denied,* 350 U.S. 975 (1956); Van Zuch v. United States, 118 F.Supp. 468 (E.D. N.Y. 1954); Shew v. United States, 116 F. Supp. 1 (M.D. N.C. 1953); Sigmon v. United States, 110 F. Supp. 906 (W.D. Va. 1953). See also National Mfg. Co. v. United States, 210 F.2d 263 (8th Cir. 1954), *cert. denied,* 347 U.S. 967 (1954) (*semble*) (negligent weather forecasts made by the United States Weather Bureau).

80. "The provisions 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." 28 U.S.C. § 2680(a) (1952). For a perceptive study of the "discretionary" exception, see Peck, *The Federal Tort Claims Act—A Proposed Construction of the Discretionary Function Exception,* 31 WASH. L. REV. 207 (1956).

81. The *Dalehite* case is the leading authority for the application of the "discretionary" exception. See notes 17 and 18 *supra.*

82. Congressional reports indicate that the "discretionary" exception was intended to prevent actions arising out of such activities. The reports mentioned suits against regulatory agencies like the Federal Trade Commission and the Securities and Exchange Commission and claims against the Government arising from projects designed to improve flood control and navigation. H.R. REP. No. 1287, 79th Cong., 1st Sess. (1945); S. REP. No. 1400, 79th Cong., 2nd Sess. (1946).

83. Jones v. United States, 89 F. Supp. 980 (S.D. Iowa 1949).

84. Old King Coal Co. v. United States, 88 F. Supp. 124 (S.D. Iowa 1949).

85. *E.g.,* Olson v. United States, 93 F.Supp. 150 (D. N.D. 1950).

navigability of streams,[86] determining that migratory birds could not be hunted—the birds had eaten plaintiff's grain from a field adjoining the game preserve,[87] and making decisions to test secret military weapons.[88]

These functions are of such a nature that their efficient and economical management can only be undertaken by the Government. Carrying out such functions affects many persons, and massive and widespread damage claims could arise from a single government act.[89] Immunity is required for these types of activity if they are to be administered effectively, for without it a government employee or official might be hesitant to exercise his authorized discretion out of fear of reprisal. Judicial review of the wisdom of this class of activities would involve political considerations that are within the province of the legislative and executive branches of government.[90]

The term "discretionary" as it is used in the Tort Claims Act is no innovation in the field of public law. For many years the federal courts had worked with the interpretation of "discretionary" in determining when official conduct involves discretion which may be exercised without giving rise to liability of government officers. Historically, the phrase, "discretionary function or duty" had acquired a definitive meaning in areas closely related to that covered by the Tort Claims Act, such as whether mandamus or injunction will issue to compel action by a government officer,[91] and the determination of personal liability of government officers in damage suits.[92] It appears that Congress deliberately used the phrase in the Act with the intention that it should have the same meaning afforded by the courts in suits against government officials.[93] There is even reason to suggest that had the "discretionary" exception

86. *E.g.*, Coates v. United States, 181 F.2d 816 (8th Cir. 1950).

87. Sickman v. United States, 184 F.2d 616 (7th Cir. 1950).

88. Williams v. United States, 115 F. Supp. 386 (N.D. Fla. 1953), *aff'd per curiam*, 218 F.2d 473 (5th Cir. 1955); Bartholomae Corporation v. United States, 135 F.Supp. 651 (S.D. Cal. 1955) (atomic weapons testing). But if the damage is caused by ministerial negligence during the course of executing the program as distinguished from the discretionary decision to initiate the program, liability is imposed. Bulloch v. United States, 133 F. Supp. 885 (D. Utah 1955) (atomic weapons testing).

89. This was the situation in the Texas City disaster which gave rise to the *Dalehite* case. See note 17 *supra*.

90. For an excellent analysis of the policy considerations see, Coates v. United States, 181 F.2d 816 (8th Cir. 1950). "Manifestly the project [Missouri River flood and navigation control] embodies decisions and the exercise of discretion and discretionary functions of the highest order by both the legislative and executive branches of the government and the formulation, expression and application of governmental policy entirely beyond any power of interference by the judicial branch." *Id.* at 817.

91. *E.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). See Sherwood, *Mandamus to Review State Administrative Action*, 45 MICH. L. REV. 123, 139 (1946).

92. *E.g.*, Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U. S. 949 (1950). See, PROSSER, THE LAW OF TORTS § 109, at 780-84 (2d ed. 1955).

93. Coates v. United States, 181 F.2d 816, 818 (8th Cir. 1950).

been excluded from the Act, it nevertheless would have been utilized by the courts to provide government immunity in certain instances.[94]

Of the cases that have arisen involving "discretionary" activities, the results have often been phrased in terms of the activity being "governmental" or "sovereign."[95] It appears that the word "governmental" retains its importance under the Tort Claims Act only in so far as it may be useful to describe the consequence of United States immunity for "discretionary" activities as contrasted with its use as one of the categories in the "governmental-proprietary" distinction. The "discretionary" exception in the Tort Claims Act provides the immunity from tort liability necessary to ensure adequate performance of functions essential to the public welfare free from the possibility of damage claims which if present might result in timid, hesitant administration of public programs. At the same time utilization of the "discretionary" exception does not result in unnecessary immunities at the operational level of government activity such as would necessarily occur should the "governmental-proprietary" distinction be used.

FOREIGN CORPORATIONS: THE INTERRELATION OF JURISDICTION AND QUALIFICATION

There are two bases of personal jurisdiction over foreign corporations: a corporation may give actual consent to judicial jurisdiction manifested normally by compliance with a state foreign corporation qualification act;[1] and secondly, a corporation, even though it has not qualified, by engaging in sufficient activity within the state to establish a basis for jurisdiction other than actual consent is subject to judicial jurisdiction.[2] Under the doctrine of *International Shoe Co. v. State of Washington*[3] the latter basis has undergone substantial change in recent years. The instant inquiry involves an examination of the interrelation of these two bases and the impact of *International Shoe* thereon with particular emphasis on

94. This has occurred under the statutory waiver of immunity from damages arising out of activities of the T.V.A. Although the waiver does not mention any exceptions it has been interpreted by the courts so as to exclude liability for discretionary functions. See Grant v. T.V.A., 49 F. Supp. 564 (E.D. Tenn. 1942); Pacific National Fire Ins. v. T.V.A., 89 F. Supp. 978 (W.D. Va. 1949).

95. *E.g.*, Coates v. United States, 181 F.2d 816, 819 (8th Cir. 1950); Williams v. United States, 115 F. Supp. 386, 388 (N.D. Fla. 1953), *aff'd per curiam*, 218 F.2d 473 (5th Cir. 1955); North v. United States, 94 F. Supp. 824, 828 (D. Utah 1950).

1. RESTATEMENT, CONFLICT OF LAWS §§ 90, 91 (Tent. Draft No. 3, 1956).

2. *Id.* at §§ 91a, 92.

3. 326 U.S. 310 (1945).