Washington Law Review

Volume 48 | Number 2

2-1-1973

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Recommended Citation
Cornelius J. Peck, *Laird v. Nelms: A Call for Review and Revision of the Federal Tort Claims Act*, 48 Wash. L. Rev. 391 (1973).
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LAIRD v. NELMS: A CALL FOR REVIEW AND REVISION OF THE FEDERAL TORT CLAIMS ACT

by Cornelius J. Peck*

Courts upon occasion perform a catalytic function with respect to the legislative process. They may perform that function by expressly directing attention to matters requiring the enactment of legislation,[1] or by making observations which prick the conscience of legislators who have been indifferent to the demands of a changing society.[2] Courts inadvertently may perform a catalytic function by rendering a decision so unacceptable that legislative response becomes a necessity. In this latter way, the unfortunate decision of the Supreme Court of the United States in *Laird v. Nelms*[3] may provoke congressional consideration of the Federal Tort Claims Act and produce needed revision of that act.

The Court's decision unnecessarily imposes upon the Act an interpretation which fails to distribute equitably the inevitable cost of government. If the implications of the language of the majority opinion are pursued, the Government will be immune from many traditional and well established tort liabilities. Predicated upon an assumption that the judiciary is incapable of correcting its own errors, the decision is sadly out of keeping with the creative role appellate courts have played in recent years in reforming tort law for our changing society.[4]

This article will evaluate *Laird v. Nelms* in its historical context, criticizing the Court's rationale and outlining the problems it creates. *Laird v. Nelms* provides the stimulus for both the subsequent discussion of the justification for strict liability under the FTCA and the

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1. *See, e.g.*, Spanel v. Mounds View School Dist., 264 Minn. 279, 118 N.W.2d 795 (1962).

2. Lewis, *The Supreme Court and Its Critics*, 45 MINN. L. REV. 305, 315, 317 (1961).

3. 406 U.S. 797 (1972).

4. R. KEETON, VENTURING TO DO JUSTICE: REFORMING PRIVATE LAW (1969). Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 365 (1963). *Cf.* United States v. Muniz, 374 U.S. 150, 165-166 (1963).

essential revisions to the FTCA proposed to alleviate the problems created by the Court's decision.

I. THE DECISION IN *LAIRD v. NELMS*

Laird v. Nelms was decided by a vote of six to two,[5] with the majority opinion written by Justice Rehnquist. Justice Stewart, with whom Justice Brennan joined, dissented. Rejecting the plaintiff's assertion of a right to recover under a principle of North Carolina law imposing absolute liability upon one who engages in an ultrahazardous activity, the majority held that the United States could not be held liable under the FTCA for damage done to the plaintiff's house by the sonic boom of an Air Force plane absent proof of negligence. The Court of Appeals for the Fourth Circuit, relying upon its earlier decision in *United States v. Praylou,*[6] had reached the contrary conclusion, finding nothing in the FTCA which would bar recovery upon that basis.[7]

The plaintiffs thought it proper to base their theory of recovery on North Carolina law because the FTCA provides that the United States shall be liable for injuries to persons or property:[8]

> caused by the negligent or wrongful act or omission of any employees of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance *with the law of the place* where the act or omission occurred.

The commitment of governmental liability to principles of local state tort law is repeated in another section:[9]

> The United States shall be liable, respecting the provisions of the title relating to tort claims, in the same manner and to the same extent as a *private individual under like circumstances,* but shall not be liable for interest prior to judgment or for punitive damages.

5. Justice Douglas heard argument but withdrew from participation in consideration or decision of the case.
6. 208 F.2d 291 (4th Cir. 1953), *cert. denied,* 352 U.S. 315 (1954). For a discussion of *Praylou, see* note 18 *infra.*
7. Nelms v. Laird, 442 F.2d 1163 (4th Cir. 1971).
8. 28 U.S.C. § 1346(b) (1970) (emphasis added).
9. 28 U.S.C. § 2674 (1970) (emphasis added).

Although this statutory language clearly indicates that the predominant purpose of the FTCA is to make state law determinative of what constitutes a "wrongful" act, the Court substituted a highly technical reading of the statute and assumed that its brand of federal common law controlled.[10]

II. PRIOR CASE LAW: THE COURT'S OPTIONS

The question of whether the United States might be held liable under the FTCA on a theory of strict or absolute liability had received attention from the Supreme Court of the United States in 1953 when the Court decided the case of *Dalehite v. United States*.[11] *Dalehite* was the test case for determining the liability of the United States for the damage done at Texas City by the explosion of fertilizer grade ammonium nitrate which had been manufactured for the United States according to its specifications and under its control. A majority of four justices held that, even assuming the correctness of the trial court's findings of causal negligence on the part of the Government, recovery was barred by the discretionary function exception of the Act.[12] In a much quoted passage, Justice Reed said for the majority:[13]

> It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activ-

10. This strained construction only can be derived by interpreting the FTCA to mean that only if an act is "wrongful" according to federal common law does one examine state law to determine whether the government would also be liable under that body of law. According to this theory, state law is only relevant after an initial determination of governmental liability under federal common law. This unspoken premise of the Court's rationale seems incongruous with the FTCA's rather clear preference for state law. *See* text accompanying notes 49-54 *infra*. Other fallacies in the majority opinion besides this overly technical reading of the FTCA are considered in the section entitled "*Laird v. Nelms:* The Court's Rationale," *infra*.

11. 346 U.S. 15 (1953).

12. 28 U.S.C. § 2680 (1970) provides: "The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

13. 346 U.S. at 35-36.

> ities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of § 2680(a) would fail at the time it would be needed, that is when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion.

Having disposed of the argument to impose liability on the basis of specific and general findings of negligence, the majority turned its attention to what it termed "some slight residue of theory of absolute liability without fault," which it found reflected in the trial court's finding that the fertilizer constituted a nuisance and in the contention of the petitioners before the Court.[14] Said the majority:[15]

> We agree with the six judges of the Court of Appeals . . . that the Act does not extend to such situations, though of course well known in tort law generally. It [the Act] is to be invoked only on a "negligent or wrongful act or omission" of an employee. Absolute liability, of course, arises irrespective of how the tortfeasor conducts himself; it is imposed automatically when any damages are sustained as a result of the decision to engage in the dangerous activity. The degree of care used is irrelevant to the application of that doctrine. But the statute requires a negligent act. It is our judgment that liability does not arise by virtue either of United States ownership of an "inherently dangerous commodity" or of engaging in an "extra-hazardous" activity.

The *Dalehite* majority's rejection of strict liability under the FTCA obtained apparent agreement from the three dissenters, who had disagreed vigorously with the majority on other questions but took no exception to the above-quoted statement.[16]

With the exception of the Fourth Circuit, every court of appeals to which the question has been brought has concluded that it was obligated to follow the *Dalehite* construction of the Act and rule that the FTCA does not permit recovery based on the doctrine of strict or ab-

14. 346 U.S. at 44.
15. 346 U.S. at 44-45.
16. The fallacies of this cavalier rejection of strict liability under the FTCA will be considered in a separate section entitled "The Case for Strict Liability," *infra*.

solute liability.[17] Nevertheless, the question of whether such recovery was possible remained alive because of the Fourth Circuit's decision in *United States v. Praylou,*[18] from which certiorari was denied soon after the *Dalehite* decision, wherein the Government was held liable on the basis of a South Carolina statute imposing absolute liability.

Constrained by his position on a court of appeals, Judge Parker, author of the *Praylou* decision, was not free to reconsider or reject the position taken by the *Dalehite* majority on strict or absolute liability. Instead, he undertook to distinguish the cases, stating that liability arising from the possession of dangerous property is very different from liability for damage inflicted by Government employees imposed upon the basis of absolute liability rather than negligence.[19] The attempted distinction, which involves a shift of inquiry from the propriety of defendant's conduct to the harmful invasion of interests suffered by the plaintiff, is not a persuasive one, and its lack of persuasiveness stimulated speculation that the Supreme Court's denial of certiorari reflected uncertainty as to the validity of the *Dalehite* pronouncement on the subject.

The speculation was intensified and further legitimatized three years later by the Supreme Court's decision in *Rayonier, Inc. v. United States.*[20] As I pointed out soon after the decision in that case,[21] the

17. Emelwon, Inc. v. United States, 391 F.2d 9 (5th Cir. 1968); Wright v. United States, 404 F.2d 244 (7th Cir. 1968); United States v. Page, 350 F.2d 28 (10th Cir. 1965); Bartholmae Corp. v. United States, 253 F.2d 716 (9th Cir. 1957); United States v. Taylor, 236 F.2d 649 (6th Cir. 1956), *petition for cert. dismissed,* 355 U.S. 801 (1957); Heale v. United States, 207 F.2d 414 (3d Cir. 1953). *See* Abraham v. United States, 465 F.2d 881 (5th Cir. 1972). *See also* United States v. Hull, 195 F. 2d 64 (1st Cir. 1952), decided prior to *Dalehite.*

18. 208 F.2d 291 (4th Cir. 1953), *cert. denied,* 352 U.S. 315 (1954). In *Praylou,* plaintiffs who suffered physical injury and property damage caused by a government plane which crashed on their land were allowed to recover damages from the federal government under the FTCA even though their recovery was predicated on a South Carolina statute which imposed absolute liability upon owners of aircraft operated over the state. The court stated that Congress did not intend to prohibit recovery based on absolute liability under the FTCA, concluding that the effect of the state's strict liability statute was to make the government's act "wrongful" within the meaning of the FTCA.

19. 208 F.2d at 295.

20. 352 U.S. 315 (1957). In *Rayonier,* the plaintiffs alleged federal negligence in accumulating flammable materials on federal property and allowing the fires which damaged plaintiffs' land to ignite and spread. The United States Supreme Court held that plaintiffs were not precluded from recovering damages for negligence under the FTCA by the government's allegations that the conduct involved occurred while government employees were acting as public firemen, a uniquely governmental function for which neither *municipalities* nor other *local governments* were vicariously liable under the common law or Washington state statutes. The Court remanded the case to the dis-

Court of Appeals for the Ninth Circuit had decided that governmental liability could not be predicated on certain statutes of the State of Washington which imposed liability without fault. The conflict between the decisions of the courts of appeals in *Praylou* and *Rayonier* was mentioned several times in the briefs of both the petitioner and the Government, with the Government's brief characterizing the *Praylou* decision as "wrong" and in "irreconcilable conflict with *Dalehite*."[22] With this background, it was significant to find *Praylou* cited in the *Rayonier* decision with favor in support of a sentence stating:[23]

> To the extent that there was anything to the contrary [*i.e.*, anything which would allow the government to limit its liability by characterizing itself as a public body in order to invoke the law of municipal corporations] in the *Dalehite* case it was necessarily rejected by *Indian Towing*.

The earlier decision of the Supreme Court in *Indian Towing Company v. United States*[24] had not involved the question of strict or absolute liability, but had made it apparent that new appointments and a realignment of the Court had supplanted the majority of four in *Dalehite*.[25] More important, its rejection of the argument that there was no liability under the FTCA for acts performed in a "uniquely governmental" capacity manifested a determination to adapt principles of private tort law to liability assumed by the United States under the Act. With this background it seemed significant that the Supreme

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trict court to determine whether the law of Washington would hold a private person liable for conduct similar to that alleged to constitute negligence under the FTCA. If private persons would be liable for negligence under Washington law, the *Rayonier* Court held that the federal government would be responsible under the FTCA even though the alleged negligence was caused by federal employees acting as public firefighters. *See also* Hess v. United States, 361 U.S. 314 (1960), in which the Court remanded for consideration of whether a claim under the FTCA was covered by an Oregon employers' liability statute. The Court noted that the statute provided a road to recovery "considerably easier" than the proof of negligence in a wrongful death action. *Id.* at 316.

21. Peck, *Absolute Liability and the Federal Tort Claims Act*, 9 STAN. L. REV. 433, 434 (1957) [hereinafter cited as Peck, *Absolute Liability*.]

22. *Id.*

23. 352 U.S. at 319 n.2.

24. 350 U.S. 61 (1955). Plaintiffs in *Indian Towing* were allowed recovery under the FTCA for damages caused by the Coast Guard's negligent operation of a lighthouse light. The Court held that the FTCA did not insulate the federal government from liability for functions alleged to be "uniquely governmental," concluding that the government is responsible for negligence under the FTCA even if no private persons are engaged in similar activities.

25. Peck, *Absolute Liability*, at 436 n.18.

Court's remand in *Rayonier* to the district court for determination of whether the allegations of the complaint would be sufficient to impose liability on a private person was not limited to a liability for negligence. The remand strongly suggested that the Government might be liable even if the Washington statutes did impose liability without fault.

III. *LAIRD V. NELMS:* THE COURT'S RATIONALE

Thus, in *Laird v. Nelms* the Supreme Court was free to approve the Fourth Circuit's imposition of a strict or absolute liability for sonic boom damage as consistent with its prior decisions under the FTCA. Instead, Justice Rehnquist delivered an opinion one might expect from a precedent-minded judge of a lower court who could not consider the wisdom or continued vitality of language of an opinion of a higher court. Indeed, Justice Rehnquist went further and overstated the extent to which prior case law controlled the decision in *Laird v. Nelms*. Speaking of the majority opinion in *Dalehite,* he said:[26]

> The Court's opinion rejected various specifications of negligence on the part of Government employees that had been found by the District Court in that case, and then went on to treat petitioner's claim that the Government was absolutely or strictly liable because of its having engaged in a dangerous activity.

Of course, the majority in *Dalehite* had not rejected the district court's findings of negligence. On the contrary, Justice Reed noted that the findings of the district court had been explicitly rejected by only three of the six judges of the court of appeals and stated that he would consider the case as one in which the findings came to the Supreme Court unimpaired.[27] Justice Reed continued, "Even assuming their correctness *arguendo,* though, it is our judgment that they do not establish a case within the Act."[28]

It is true that in one section of his opinion Justice Reed indicated that experience prior to the Texas City explosion had indicated that fertilizer grade ammonium nitrate was a material which could be

26. 406 U.S. at 798.
27. 346 U.S. at 24.
28. *Id.*

safely handled as it had been handled there,[29] but immediately following that passage, in dealing with the challenged findings of negligence of the Coast Guard in supervising the storage of the fertilizer and fighting the fire after it started, he said, "We do not enter into an examination of these factual findings. We prefer, again, to rest our decision on the Act."[30] The *Dalehite* Court concluded that the Government's failure to prevent the fire by regulating the storage of fertilizer could not be the basis of liability because, like the specific findings of negligence previously discussed, it was a matter classically within the discretionary function exception.[31] According to *Dalehite,* governmental liability for inadequately fighting the fire was further precluded by the absence of a comparable private liability, since the Act did not create new causes of action.[32]

The effect of Justice Rehnquist's incorrect assertion that the *Dalehite* majority had rejected the specifications of governmental negligence is to create the impression that the right to recovery in *Dalehite* turned upon the question of strict or absolute liability, implying that the *Dalehite* majority's tangential comments on strict liability in that case constituted what he called "the Court's holding in *Dalehite.*"[33] The *Dalehite* majority's discussion of the subject began, however, with the above-quoted deprecatory phrase, "there is yet to be disposed of some slight residue of theory of absolute liability without fault,"[34] which certainly does not signal that what follows is the crucial portion of the opinion. Commentators have suggested that this portion of the *Dalehite* majority opinion was dictum,[35] but whether it was or not the Court's favorable citation of *Praylou* in the *Rayonier* case at least gave it a challenged status nowhere reflected in Justice Rehnquist's opinion.

Having concluded that the FTCA as interpreted in *Dalehite* precluded recovery on a theory of strict or absolute liability, Justice

29. 346 U.S. at 42.
30. 346 U.S. at 42-43.
31. 346 U.S. at 43.
32. *Id.* It was this latter proposition of *Dalehite* which was jettisoned in *Indian Towing, supra* note 24.
33. 406 U.S. at 799.
34. 346 U.S. at 44.
35. *See* F. HARPER & F. JAMES, THE LAW OF TORTS 856 (1956); Jacoby, *Absolute Liability Under the Federal Tort Claims* Act, 24 FED. BAR J. 139, 140 (1964); Reynolds, *The Discretionary Function of the Federal Tort Claims Act,* 57 GEO. L.J. 81, 94 n.71 (1968); Steffen, *A Federal Tort Claims Act Tort,* 34 TENN. L. REV. 367, 374 (1967).

Rehnquist turned his attention to the question of whether the act which caused the sonic boom might be considered a trespass and thus constitute a "wrongful act" for which liability might be imposed. That the Government might be held liable for trespass under the Act was established in 1956 in *Hatahley v. United States*.[36] The legislative history to which reference was made in *Laird v. Nelms* also makes it clear that Congress intended to make the Government liable under the FTCA for trespass, and that it did so by adding the word "wrongful" to the provision which ultimately became the grant of jurisdiction under the Act.[37] Although Justice Rehnquist stated that the type of trespass subsumed under the word "wrongful" was exemplified by the conduct of the Government agents in *Hatahley*,[38] unfortunately he did not explain what distinguishes the confiscation of horses whose Indian owners are unknown from the infliction of a damaging sonic boom on unknown persons below.[39]

Turning to the eminent domain cases to evaluate the prerequisites of trespass under federal law, once again Justice Rehnquist dealt in an argumentative manner with language of a former decision of the Court to support his conclusion that there should be no liability. He commented:[40]

> The notion that a military plane on a high altitude training flight itself intrudes upon any property interest of an owner of the land over which it flies was rejected in *United States v. Causby*, 328 U.S. 256 (1946).

36. 351 U.S. 173 (1956). In *Hatahley*, the federal government was held liable under the FTCA for Department of Interior employees' confiscation and destruction of certain Navajo Indians' horses found grazing on public lands. Although the federal employees' action was authorized by a Utah abandoned horse statute, the government was found liable because the federal agents had failed to give plaintiffs notice as required by a federal law, the Taylor Grazing Act, before impounding livestock unlawfully grazing on a federal range. Consequently, their wrongful acts constituted trespasses.

37. *See* Peck, *Absolute Liability*, at 449. For the text of 28 U.S.C. § 1346(b) (1970), *see* note 8 and accompanying text *supra*.

38. 406 U.S. at 802.

39. One conceivable but unpersuasive difference is that the confiscation and destruction of each horse was a consequence specifically intended by the government agents, whereas the government's lack of knowledge as to which houses or property would be injured by the sonic boom arguably prevents characterizing the infliction of harm as an intended consequence and hence as a trespass. This distinction, of course, hinges on whether intent comprehends only the actor's specific purpose or also includes the natural and probable consequences of his acts. The government here clearly intended to create the sonic booms and knew that property damage probably would result, although it did not specifically intend to damage Mr. Nelms' house.

40. 406 U.S. at 799.

He then quoted a portion of the *Causby* opinion declaring that the ancient common law doctrine of ownership of land extending to the periphery of the universe has no place in the modern world.[41] From this he concluded that a version of trespass to ground below by the passage of a plane causing damage "was ruled out by established federal law."[42] That he attributed this effect to the *Causby* decision is verified by his subsequent consideration of whether "the precise holding of *United States v. Causby*"[43] could be skirted by treating the air wave of a sonic boom as a direct invasion of the land.

The precise holding of *United States v. Causby* was that the Government was liable to pay compensation because it had imposed a servitude constituting a taking of property by frequent, low flights of Government aircraft which diminished the value of the land directly below.[44] As the opinion explicitly noted that the general rejection of the ancient rule did not control the case,[45] the above-quoted language cannot be construed to constitute *Causby's* holding. Further, the Court in *Causby* did not attempt to determine the precise limits of the air space in the public domain.[46] Contrary to Justice Rehnquist's statement, it did not decide whether injurious uses of the air space in the public domain constituted a wrong to the owner of the land below.[47] If anything, the holding of the case is more consistent with governmental tort liability predicated on infrequent aircraft flights which damage the property below than it is with the conclusion drawn by Justice Rehnquist.[48] Nevertheless, based on his analysis of *Causby*,

41. The portion of the opinion which he quoted, 406 U.S. at 799-800, reads as follows:

> It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe—*cujus est solum ejus est usque ad coelum*. But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the air space would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim. 328 U.S. at 260-261.

42. 406 U.S. at 800.

43. *Id.*

44. 328 U.S. 256, 261-62. Thus a physical touching of the land was not regarded as a prerequisite of a constitutional taking of property.

45. 328 U.S. at 261. *See* note 41 *supra*.

46. 328 U.S. at 266.

47. Griggs v. Allegheny County, 369 U.S. 84 (1962), however, did allow recovery for use of public, navigable airspace which damaged the owner below. *See* note 54 *infra*.

48. In actions based on a constitutional taking rather than a governmental tort theory, several state court decisions have fully adopted the rationale foreshadowed by

Justice Rehnquist concluded that a sonic boom cannot constitute an invasion of private property sufficient to justify recovery based on a trespass theory.

Justice Rehnquist's comments on *Causby* merit further criticism. First, the wording of the FTCA strongly indicates that *state* law controls what constitutes a wrongful act under the statute.[49] Moreover, state law and not federal law has been used to give meaning to other crucial words in the FTCA. Thus, it is state law which determines the very important question of whether an employee was acting within the course of his employment so as to fasten liability upon the United States.[50] The statutory phrase accepting liability "in accordance with the law of the place where the act or omission occurred" has been interpreted to incorporate the whole law, including the conflict of law rules, of that place to ensure that the United States is treated as a private individual under like circumstances.[51] In so holding, the Supreme Court cautioned that in interpreting the FTCA it should not[52]

> be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy. We should not assume that Congress intended to set the courts completely adrift from state law with regard to questions for which it has not provided a specific and definite answer in an act such as the one before us which, as we have indicated, is so intimately related to state law.

And on questions of substantive law controlling liability, state law, not federal law, governs on such matters as negligence per se, proximate cause, contributory negligence, assumption of risk, burden of proof, res ipsa loquitur, damages, contribution and indemnity, and the effect of a release from liability.[53]

Further, accepting *arguendo* the Court's undivided interest in fed-

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Causby, holding that governmental interference with private property can constitute constitutional taking in the absence of trespass (overflight) by the government. *See, e.g.*, Martin v. Port of Seattle, 64 Wn. 2d 309, 391 P.2d 540 (1964); Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962); Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 DICK. L. REV. 207 (1967). *Cf.* Batten v. United States, 306 F.2d 580 (10th Cir. 1962).

49. *See* note 10 and accompanying text, *supra*.
50. Williams v. United States, 350 U.S. 857 (1955).
51. Richards v. United States, 369 U.S. 1 (1962).
52. 369 U.S. at 11.
53. Note, *Extent to which State Law is Applicable in Actions under Federal Tort Claims Act—Federal Cases*, 7 L. ED. 994.

eral common law, the Court cited the wrong case; it totally ignored *Griggs v. Allegheny County*,[54] which at least arguably established the right to recover damages for a governmental taking even where technical trespass to the landowner's airspace cannot be proved. It is also significant that *Causby* involved a governmental taking of private property under the fifth amendment; *Causby's* discussion of trespass did not apply to a claim under the FTCA. In addition, the Court misrepresented the *Causby* decision by failing to consider its ubiquitous concern with interference with the utility of the land as an underlying basis for recovery.[55]

Finally, the majority opinion in *Laird v. Nelms* noted that following the Court's decision in *Dalehite* Congress enacted a bill granting compensation to some of the victims of the Texas City disaster, and that at no time during the hearings was an attempt made to modify the Court's construction of the FTCA.[56] The relevance of the suggested inference of congressional approval depends, of course, upon the reading given the *Dalehite* decision. If, as suggested above, the decision is interpreted as resting upon the Court's construction of the discretionary function exception of the Act, the failure of Congress to act would constitute but a weak indication of congressional opinion concerning the question of strict or absolute liability. Moreover, the sound view that legislative failure to enact a bill is not one of

54. 369 U.S. 84 (1962). In *Griggs*, the defendant county, which owned and operated a public airport in compliance with CAA regulations, was held liable for the taking of an air easement based on damage caused by aircraft flights which passed over plaintiffs' property on takeoff and landing. These flights were in the public or navigable airspace as defined by statute [49 U.S.C. § 1301(24) (1964)], because navigable airspace had been legislatively redefined to include takeoff and landing patterns. While stressing that the flights were directly over plaintiffs' land, technical trespass to the landowners' airspace did not and could not exist since the flights originated in public, navigable airspace. *Griggs* thus implied that overflight (trespass) was not a prerequisite of recovery.

55. Although flights directly over plaintiff's lands were involved in *Causby*, the Court repeatedly designated nonphysical elements such as use and enjoyment of the surface as essential property rights. Stating that compensation should be made for destruction of the "owner's right to possess and exploit the land . . . his beneficial ownership," the Court concluded that the compensation should follow even if the "enjoyment and use of the land are not completely destroyed." 328 U.S. at 262. The Court further commented:

> the use of the airspace immediately above the land would *limit the utility of the land* and cause a diminution in its value . . . . Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate *interference with the enjoyment and use of the land.*

328 U.S. at 266 (emphasis added).

56. 406 U.S. at 802.

the designated ways of enacting a law cautions against attributing significance to uninitiated or uncompleted legislative activities.[57]

IV. PROBLEMS CREATED BY *LAIRD V. NELMS*

The decision in *Laird v. Nelms* will almost certainly lead to a narrowing of governmental liability under the FTCA. The majority's suggestion that the Act accepts only liabilities based upon the principle of *respondeat superior*[58] will enable the federal government to avoid many tort liabilities not based on that principle. Thus it may be expected that the Government will resist with increased vigor any attempt to impose liabilities such as those previously recognized on the basis of the Oregon Employer's Liability Law,[59] the Illinois Scaffolding Act,[60] or the Wisconsin Safe Place Statute[61] in situations in which no Government employee would have been liable for a tort. The Government will enjoy even greater success in resisting attempts to impose liability under principles of state law imposing nondelegable duties upon the employers of independent contractors.[62] It will undoubtedly continue to insist, as it has successfully done in the past, that liability cannot be imposed under permissive use statutes or comparable rules of state law simply because of ownership of property such as automobiles or aircraft.[63] Dram shop statutes will no

57. See Hart, *Comment on Courts and Law Making,* in LEGAL INSTITUTIONS TODAY AND TOMORROW 40, 46 (1959). *See, e.g.,* Wong Yang Sung v. McGrath, 339 U.S. 33, 47 (1950).

58. 406 U.S. at 801.

59. Hess v. United States, 282 F.2d 633 (9th Cir. 1960), *noted in* 36 WASH. L. REV. 229 (1961).

60. Schmid v. United States, 273 F.2d 172 (7th Cir. 1959).

61. American Exchange Bank of Madison v. United States, 257 F.2d 938 (7th Cir. 1958).

62. Such a liability has been denied in a number of cases. *See, e.g.,* Hodge v. United States, 310 F. Supp. 1090 (M.D. Ga. 1969), *aff'd,* 424 F.2d 545 (5th Cir. 1970); Wright v. United States, 404 F.2d 244 (7th Cir. 1968); Emelwon, Inc. v. United States, 391 F.2d 9 (5th Cir. 1968); United States v. Page, 350 F.2d 28 (10th Cir. 1965), *cert. denied,* 382 U.S. 979 (1966). Some courts have found the Government liable on the theory that it was guilty of negligence in failing to perform its non-delegable duty; *see, e.g.,* Emelwon, Inc. v. United States, *supra;* Pierce v. United States, 142 F. Supp. 721 (E.D. Tenn. 1955), *aff'd,* 235 F.2d 466 (6th Cir. 1956). *See* L. JAYSON, HANDLING FEDERAL TORT CLAIMS § 214.02(5) (1970) for a discussion of the cases.

63. *See* Hubsch v. United States, 174 F.2d 7 (5th Cir. 1949), *referred to dist. ct. for approval of compromise,* 338 U.S. 440 (1949); United States v. Taylor, 236 F.2d 649 (6th Cir. 1956), *petition for cert. dismissed,* 355 U.S. 801 (1957).

longer provide a basis for recovery for harm done by persons who have become intoxicated at military clubs.[64]

Further, the *Laird* Court's treatment of whether the air wave of a sonic boom can be regarded as an invasion of land indicates that the Government will not be liable in blasting cases under the FTCA on the theory of absolute liability. It raises problems of governmental liability even in states in which trespass has been the theory for imposing liability for damage done by flying debris in blasting cases.[65] Said Justice Rehnquist:[66]

> It is quite clear, however, that the presently prevailing view as to the theory of liability for blasting damage is frankly conceded to be strict liability for undertaking an ultrahazardous activity, rather than any attenuated notion of common-law trespass. See Restatement of Torts, §§ 519, 520(e); W. Prosser, Law of Torts § 75 (4th ed. 1971). While a leading North Carolina case on the subject of strict liability discusses the distinction between actions on the case and actions sounding in trespass that the earlier decisions made, it, too, actually grounds liability on the basis that he who engages in ultrahazardous activity must pay his way regardless of what precautions he may have taken. *Guilford Realty and Ins. Co. v. Blythe Bros. Co.,* 260 N.C. 69, 131 S.E.2d 900 (1963).
>
> More importantly, however, Congress in considering the Federal Tort Claims Act cannot realistically be said to have dealt in terms of either the jurisprudential distinctions peculiar to the forms of action at common law or the metaphysical subtleties that crop up in even contemporary discussions of tort theory. See Prosser, *supra,* at 492-496. The legislative history discussed in *Dalehite* indicates that Congress intended to permit liability essentially based on the intentionally wrongful or careless conduct of Government employees, for which the Government was to be made liable according to state law under the doctrine of *respondeat superior,* but to exclude liability based solely on the ultrahazardous nature of an activity undertaken by the Government.

64. Deeds v. United States, 306 F. Supp. 348 (D. Mont. 1969); *but cf.* Konsler v. United States, 288 F. Supp. 895 (N.D. Ill. 1968); Megge v. United States, 344 F.2d 31 (6th Cir. 1965).

65. Prosser, *The Principle of Rylands v. Fletcher,* in SELECTED TOPICS IN THE LAW OF TORTS 159, 161 (1953), states that there are seven or eight jurisdictions which distinguish between trespass and case in blasting cases.

66. 406 U.S. at 800-01.

Conceivably diligent counsel may be able to persuade courts that the theory of liability in a particular state still remains that of trespass and thus obtain a recovery denied in other jurisdictions in which the courts have recognized that blasting cases present appropriate situations for the use of a strict liability test. But the strong implication of the Court's language is that in the future the United States will be held liable in blasting cases only upon proof of negligence.

Laird v. Nelms illustrates another problem met with sufficient frequency to justify changes in the jurisdiction of the federal district courts. In the district court Nelms had claimed a right to compensation on the alternative ground that his property had been taken without just compensation. Section 1346(a)(2) of the Judicial Code grants jurisdiction to federal district courts to hear claims against the United States:[67]

> founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

However, since the jurisdiction granted is for claims not exceeding $10,000,[68] the provision has a limited attraction for persons like Nelms, who had claimed damages of $16,000 in his FTCA suit. If the conduct complained of is a compensable taking rather than a tort, the federal district court has no jurisdiction if the claim exceeds $10,000, and the availability of relief will depend upon whether the suit is transferred to the court of claims pursuant to 28 U.S.C. § 1406(c).[69] On the other hand, the court of claims does not have original jurisdiction of suits under the FTCA, so filing suit there would preclude consideration of the tort claim.

The difficulties of determing whether a claim is properly viewed as a tort claim, a contract claim, or a claim for a compensable taking would be reduced greatly if the $10,000 limitation on the jurisdiction of the federal district courts under the Tucker Act were removed or at least raised substantially.[70] The time certainly has passed when a liti-

67. 28 U.S.C. 1346(a)(2) (1970).
68. *Id.*
69. *See* Myers v. United States, 323 F.2d 580 (9th Cir. 1963); *cf.* Vigel v. United States, 293 F. Supp. 1176 (D. Colo. 1958).
70. Jurisdiction of claims not exceeding that amount was conferred on the district courts in 1911, and the decline in the value of the dollar since then would itself justify a

gant should be forced to decide, on the basis of a pretrial appraisal of his theories of recovery, in which of two courts with different and varying jurisdictions he will file his action.[71]

In addition, the majority's suggested limitation of liability to "intentionally wrongful or careless conduct"[72] reduces the remedies available to those who have been injured by tortious Government activities. There are many torts for which liability cannot be characterized as involving "intentionally wrongful or careless conduct." For example, there is a well-established strict liability for subsidence of land caused by removal of lateral or subjacent support, for damage done by trespassing cattle, for conversion of property purchased *bona fides*, for misdelivery of a bailed chattel, for sale of a defective product in the course of business, and for renting defective equipment.[73] Almost equally absolute is the liability imposed upon common carriers for damage to goods transported or the liability imposed upon hotel or innkeepers for loss of a guest's goods.[74] Even intentional and harmful invasions of land, for which a private person would be liable, may not be wrongful because justification may arise from an emergency. Thus, the Air Force pilot who intentionally selects a field of wheat in which to set down his falling aircraft may have a privilege to do so arising from his private emergency.[75] Even when he selects a less populated portion of a city in which to crash land, his conduct might be considered justifiable in light of both public and private emergencies.

Predictably, each of these traditional tort liabilities will in time be subjected to judicial scrutiny to determine whether it is sufficiently "wrongful" to provide a basis for recovery under the FTCA. Thus it will be necessary to deal with the "jurisprudential distinctions"

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doubling of the limit. Act of March 3, 1911, ch. 231, § 24, ¶ 20, 36 Stat. 1093. Circuit courts were given jurisdiction of claims up to $10,000 in the original Tucker Act. Act of March 3, 1887, ch. 359, § 2, 24 Stat. 505. Moreover, an increase in the jurisdiction of the district courts would be consistent with the Congressional decision in 1962 to facilitate litigation with the government by permitting suits against government officers in courts more conveniently located for the plaintiffs. Act of Oct. 5, 1962, Pub. L. No. 87-748, 76 Stat. 744.

71. For a comparable view, *see* Steffen, *A Federal Tort Claims Act Tort*, 34 TENN. L. REV. 367, 395-408 (1967).

72. 406 U.S. at 801.

73. *See* Peck, *Negligence and Liability Without Fault in Tort Law*, 46 WASH. L. REV. 225, 232-239 (1971). *See also* U.S. DEP'T TRANSP., THE ORIGIN AND DEVELOPMENT OF THE NEGLIGENCE ACTION: AUTOMOBILE INSURANCE AND COMPENSATION STUDY (1970).

74. Peck, *supra* note 73, at 234.

75. *Cf.* Vincent v. Lake Erie Transp. Co., 109 Minn. 456, 124 N.W. 221 (1910); Ploof v. Putnam, 81 Vt. 471, 71 A. 188 (1908).

and "metaphysical subtleties" of the law of torts which Justice Rehnquist thought deserved no consideration. Limitation of liability to conduct which is wrongful in a moral or ethical sense will, of course, depart further from the FTCA's general objective of making Government as responsible for harms tortiously inflicted as are private persons. It also will expose Congress to the burden of considering private bills for the benefit of those denied relief under the FTCA.

V. THE CASE FOR RECOGNIZING STRICT LIABILITY

The failure of the Court in *Laird v. Nelms* to repudiate the language of *Dalehite* relating to strict or absolute liability is to be lamented when one considers the strength of the case for recognizing such liability. That argument was forcefully presented in Justice Stewart's dissent. It also has been fully developed elsewhere,[76] and will only be summarized here.

The argument first must overcome the contention that such liability is precluded by the language of the jurisdictional grant of 28 U.S.C. § 1346(b), which permits suits for injuries "caused by the negligent or wrongful act or omission" of a Government employee. Since strict or absolute liability is imposed without regard to negligence or fault, it is a liability based on conduct which is not wrongful in the sense of being prohibited or condemned. But the proposition that recovery is therefore precluded under the FTCA rests upon an assumption that when Congress used the word "wrongful" in 28 U.S.C. § 1346(b) it used it in a sense involving some moral or ethical judgment. That is possible, but Congress also might have used the word in a legalistic sense, in which case the word is synonymous with the word "tortious."[77] It certainly seems likely that in legislating on the subject of tort suits against the Government, Congress would use words in their legal rather than their colloquial meaning. If the word "tortious" were sub-

76. *See* Jacoby, *Absolute Liability Under the Federal Tort Claims Act*, 24 FED. BAR. J. 433 (1964); Steffen, *A Federal Tort Claims Act Tort*, 34 TENN. L. REV. 367, 370-382, 410 (1967); Peck, *Absolute Liability;* 2 F. HARPER & F. JAMES, THE LAW OF TORTS 860 (1956); Note, *Absolute Liability and the Tort Claims Act*, 5 STAN. L. REV. 274 (1953).

77. BLACK'S LAW DICTIONARY 1739 (3rd Ed. 1933) defines the word "Tortious" as "Wrongful; of the nature of a tort," and at 1738, the word "Tort" is defined as "Wrong; injury; the opposite of right." It is there further said, "In modern practice, *tort* is constantly used as an English word to denote a wrong or wrongful act, for which an action will lie, as distinguished from a *contract*."

stituted for the word "wrongful" there could be no doubt that the jurisdictional grant encompasses liability for harm which is not intended and which could not be prevented by reasonable precautions or care.[78] Even if the word "wrongful" embodied a more common sense meaning, a strong case has been made that one who has injured another by engaging in an extrahazardous activity is guilty of a conditional fault which is removed only through payment of compensation.[79]

The argument that the statute should be construed to permit recovery against the Government on any principle of state private tort law (other than those expressly excluded) finds strength in the name of the Act itself. It also finds support in the previously quoted provision of 28 U.S.C. § 2674, rendering the United States liable "in the same manner and to the same extent as a private individual under like circumstances." The fact that that section contains two general exceptions (for interests prior to judgment and punitive damages) invokes the familiar rule of statutory construction that courts should give effect only to express exceptions. The inference that Congress did not intend to preclude imposition of strict or absolute liability is further strengthened by the specific exceptions found in 28 U.S.C. § 2680.[80] In

78. RESTATEMENT (SECOND) OF TORTS § 6, comment *a* (1965).

79. Keeton, *Conditional Fault in the Law of Torts,* 72 HARV. L. REV. 401 (1959). Keeton defines "conditional fault" as the moral sense of the community, roughly equivalent to a shared concept of blameworthiness. The author considers this moral standard to be the real basis for emerging principles of tort law. *Id.* at 418-19.

80. 28 U.S.C. § 2680 (1970) reads as follows:

Exceptions.

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

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

(c) Any claim 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) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

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

(g) Repealed. Sept. 26, 1950, ch. 1049, § 13(5), 64 Stat. 1043.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest,

particular, the inference is supported by the specific exceptions of 28 U.S.C. § 2680(h) for "any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." If there had been a congressional intent to exclude the well-known strict liability of those engaging in ultrahazardous activities, the legislators' pervasive desire for comprehensive and unambiguous draftsmanship certainly would have dictated inclusion of that type of tort liability in the list of exceptions.[81]

The argument for recognizing strict or absolute liability under the FTCA also needs to overcome the contention that liability under the Act is limited to that encompassed by the principle of *respondeat superior* because 28 U.S.C. § 1346(b) accepts liability only for harm caused by acts or omissions "of any employee of the Government while acting within the scope of his office or employment . . . ." Since there was no doubt that the harm was caused by the governmentally authorized act of the Air Force pilot in *Laird,* the majority opinion did not rely on the FTCA's scope of employment limitation as a reason for denying liability. But that argument has succeeded in other contexts in which attempts have been made to impose liability on the basis of government ownership of property or state laws establishing vicarious liability for performance of non-delegable duties. The government thus has escaped liability by alleging that the harm complained of was caused either by an independent contractor or by a condition of government property not created by a federal employee, harms conventionally outside the scope of *respondeat superior* liability and hence beyond the FTCA's allegedly narrow waiver of sover-

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malicious prosectution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

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

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

(k) Any claim arising in a foreign country.

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

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives. . . .

81. Of course if the drafters subjectively intended the term "wrongful" to exclude strict liability, they would not have listed it as an exception. But this contention contradicts the rule of statutory construction which recognizes legislators' natural desire for clarity in draftsmanship, and it begs the question by assuming knowledge of the definition of "wrongful."

eign immunity.[82] The statutory argument is technical, converting a recognition that government acts only through its employees into a principle limiting liability. Thus, even in acquiring property or arranging for the performance of nondelegable duties, the United States must act through its employees.

Respondeat superior evolved with the changing needs of society as but one of the rules imposing vicarious liability, a rule which has nothing to commend itself as particularly suitable to problems of governmental liability. Given a general commitment to principles of state tort law, there is no reason to exclude from the act any liability for tortious conduct recognized by state law.[83]

Another obstacle to recognizing strict or absolute liability under the FTCA lies in the discretionary function exception of 28 U.S.C. § 2680.[84] That exception has been the source of considerable difficulty in administration of the Act and has received critical attention from the commentators.[85] The Court of Appeals for the Fourth Circuit had found the exception inapplicable in its decision in *Laird v. Nelms* because it concluded that the discretion of the officer who authorized the training flight was limited by an Air Force regulation directing that precautions be taken in "planning the maximum protection for civilian communities."[86] Other courts have reached a contrary conclusion, holding that the discretionary function exception bars recovery for harm caused by sonic booms produced in the course of authorized flights.[87] Because of his conclusion that the FTCA did not permit the imposition of strict or absolute liability upon which the right to recovery depended, Justice Rehnquist found it unnecessary to examine this exception. Justice Stewart, however, considered the matter and concluded that the exception was inapplicable.

82. *See* Peck, *Absolute Liability*, at 446-47.
83. *Id.* at 447-48.
84. *See* note 80 *supra*.
85. James, *The Federal Tort Claims Act and the Discretionary Function Exception: The Sluggish Retreat of an Ancient Immunity*, 10 U. FLA. L. REV. 184 (1957); Peck, *The Federal Tort Claims Act—A Proposed Construction of the Discretionary Function Exception*, 31 WASH. L. REV. 207 (1956); Reynolds, *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L.J. 81 (1968); K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.08 (Supp. 1970); 2 F. HARPER & F. JAMES, THE LAW OF TORTS 296-97 (Supp. 1968).
86. 442 F.2d 1163, 1165-66.
87. *See* Abraham v. United States, 465 F.2d 881 (5th Cir. 1972); Maynard v. United States, 430 F.2d 1264 (9th Cir. 1970); McMurray v. United States, 286 F. Supp. 701 (W.D. Mo. 1968); Schwartz v. United States, 38 F.R.D. 164 (D.N.D. 1965); Huslander v. United States, 234 F. Supp. 1004 (W.D.N.Y. 1964).

Justice Stewart's review of the legislative history of the FTCA led him to conclude, as have the commentators,[88] that the primary purpose of the discretionary function exception was to avoid subjecting policy decisions of Congress, the executive branch, or administrative agencies to second-guessing by courts under the guise of tort actions. As long as the state statutes and judicial decisions establishing strict liability are general principles of state law, imposing absolute liability under the FTCA creates no possibility of second-guessing because such liability does not depend upon a judicial determination that the Government officials acted negligently, irresponsibly, illegally, unwisely, or in any other improper manner.[89] As illustrated by *Laird,* the only issues before the court would be causation and damages. Since the purpose of the discretionary function exception would not be served in such a case, it should not be applied.[90]

As Justice Stewart argued, the rule announced by the majority seems to be contrary to the whole policy of the FTCA.[91] That Act was adopted to ensure that the inevitable costs of government would be shared by the public which enjoys the benefits of the government's activities. To permit the infliction of harm such as that caused by the sonic boom of a military aircraft to go uncompensated constitutes an almost barbarous method of allocating the inevitable costs of military operations. One would be horrified at the suggestion that an employee of the Internal Revenue Service might raise funds to support a military training program by selecting at random both the individual taxpayer and the amount to be contributed. Yet that is very nearly the result reached by the majority in denying Nelms any recovery for the harm inflicted upon his house because of his inability to prove negligence in the operation of the aircraft involved.[92] Such a cavalier rejec-

88. *See* note 85 *supra.*

89. However, courts would have to remain alert for the possibility of state absolute liability law which would be general in form but specific in reality. For example, a state law imposing strict liability on all who engage in a specific activity which in reality is conducted by the federal government should be subject to special scrutiny to avoid allowing state courts or legislatures to arbitrate federal policy decisions.

90. *Cf.* Peck, *Absolute Liability,* at 450-53.

91. 406 U.S. at 809.

92. We do, of course, use a lottery for determining which of our young men will be called to military service, which usually results in a loss of income or delay of career development, and may even result in serious injury or death. The traditional obligation of all men to serve in the military service has provided a rationalization which converts the selection process into something less than the imposition of a new burden. However, recognition that Government should pay a fair wage for the services it receives from

tion of liability[93] may be expected to result in a number of private congressional bills requesting compensation for persons similarly injured, and thus to defeat a principal objective of the FTCA—the relief of Congress from the burden of considering private bills.[94] Further, since risk-bearing capacity and the ability to spread costs constitute a major part of the rationale for strict or absolute liability, such a rule is especially appropriate for abnormally dangerous activities of the United States Government. Nevertheless, the Government apparently will go free absent proof of negligence when it conducts abnormally dangerous activities, while others less able to bear the burden remain strictly liable. Thus if commercial airlines ever engage in supersonic flights over the United States the predictable result is that they will be held to a strict liability which the Government has been allowed to escape.[95]

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members of the military has affected even this traditional concept of a citizen's duty and obligation so that fully professional and volunteer armed forces, not dependent on the draft, soon may be established.

93. As amended in 1970, the Military Claims Act permits the Secretary of the Army, Navy or Air Force to settle claims for personal injury or property damage in amounts not more than $15,000. However, the policy of the Air Force appears to resist payment of sums for structural damage to buildings on the theory that such damage is not caused by sonic booms. *See* United States v. Gravelle, 407 F.2d 964, at 966-968 (10th Cir. 1969); Note, 32 J. AIR L. & COM. 596, 598 (1966). Even when compensation is paid under the Act, the decision to do so is made administratively as a matter of grace rather than as a matter of right of the injured party.

94. *See* Dalehite v. United States, 346 U.S. 15, 24-25 (1952). In support of the legislation that became the Federal Tort Claims Act, the Report of the House of Representatives stated:

> For many years the present system has been subjected to criticism, both as being unduly burdensome to the Congress and as being unjust to the claimants, in that it does not accord to injured parties a recovery as a matter of right but bases any award that may be made on considerations of grace. Moreover, it does not afford a well-defined continually operating machinery for the consideration of such claims.
>
> The magnitude of the task of considering and disposing of private claims can be gathered from the following statistics:
>
> In the Sixty-eighth Congress about 2,200 private claim bills were introduced, of which 250 became law, then the largest number in the history of the Claims Committee.
>
> In the Seventieth Congress 2,268 private claim bills were introduced, asking more than $100,000,000. Of these, 336 were enacted, appropriating about $2,830,000, of which 144, in the amount of $562,000, were for tort.
>
> In each of the Seventy-fourth and Seventy-fifth Congresses over 2,300 private claim bills were introduced, seeking more than $100,000,000. In the Seventy-sixth Congress approximately 2,000 bills were introduced, of which 315 were approved for a total of $826,000.
>
> In the Seventy-seventh Congress, of the 1,829 private claims bills introduced and referred to the Claims Committee, 593 were approved for a total of $1,000,253.30. . . . So far during the present Congress about 1,279 private claim bills have been introduced. Of these, 225 have been enacted, appropriating about $965,353.06.

H.R. REP. No. 1287, 79th Cong., 1st Sess. 2 (1945).

95. Baxter, *The SST: From Watts to Harlem in Two Hours,* 21 STAN. L. REV. 1

VI. PROPOSED AMENDMENTS

A complete review of the experience under the FTCA and formulation of a definitive proposal for its revision is a project beyond the scope of this law review article. Such a project should be undertaken by the staffs of appropriate congressional committees; it should include not only review of court decisions and problems encountered in the administrative settlement of claims, but also consideration of the possibility of recognizing claims which so clearly are not covered by the present Act that they have not become the subject of suits or administrative consideration. An account should be obtained from each government agency of its experience with the Act and its recommendations for change or expansion of coverage. Views of practitioners, judges, and other experts should of course be obtained. The 568-page report of the California Law Revision Commission on the problems of sovereign immunity in that state suggests the magnitude of the task.[96] Nevertheless, *Laird v. Nelms* makes it imperative to suggest revisions to the jurisdictional grant and discretionary function provisions of the FTCA.

VII. CLARIFYING THE JURISDICTIONAL GRANT

The problems created by *Laird v. Nelms* could be avoided by changing the language of 28 U.S.C. § 1346(b)[97] to incorporate expressly in that jurisdictional grant the test of the liability of a private individual under like circumstances now stated in 28 U.S.C. § 2674.[98] Thus, the language could be changed to confer upon the district

(1968), is an excellent article describing in detail the nature of sonic booms and the dangerous and unpredictable possibilities of magnification or reinforcement of the pressure waves through atmospheric conditions and topography. The author concludes that the only basis of liability that seems a fruitful avenue to recovery for sonic boom damage is strict liability, and he adopts that test for federal legislation which he proposes. *Id.* at 50, 56. Others who have given consideration to the subject have likewise concluded that there should be a strict liability for harm caused by sonic booms. *See* RESTATEMENT (SECOND) OF TORTS § 520A (Tent. Draft No. 12, 1966); W. PROSSER, LAW OF TORTS 516 (4th ed. 1971); Note, 20 KANSAS L. REV. 545 (1972); Note, 47 N.Y.U.L. REV. 136 (1972); Note, 32 J. AIR L. & COM. 596, 606 (1966); Comment, 31 S. CAL. L. REV. 259, 284 (1958).

96. *See* CALIF. LAW REVISION COMM'N, A STUDY RELATING TO SOVEREIGN IMMUNITY (1963).

97. *See* text accompanying note 8 *supra.*

98. *See* text accompanying note 9 *supra.*

courts jurisdiction of civil actions against the United States for damages for:

> injury or loss of property, or personal injury or death caused by the *tortious* conduct, acts or omissions of any federal agency of the United States, including the *tortious* conduct, acts or omissions of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the conduct, act or omission occurred.

This acceptance of a general liability for tortious conduct does require adaptation of the private law of torts to peculiar problems of governmental responsibility. Governmental activity differs in some crucial respects from private activity, and some exceptions from rules of private liability must be expected. The alternative is to enact a statute designating the specific types of liability recognized, but this approach would require an unworkable cataloging of types of compensable harm unless some principles of general applicability were stated. If general principles are stated, the result is not significantly different from a generalized acceptance of private tort law.

The experience of several states which have extensively relinquished sovereign immunity corroborates the workability of the proposed rule. A broad waiver of immunity has been the rule in New York for many years.[99] While the judiciary has found it necessary to engraft exceptions from the principles of private tort law, the New York experience has proved that those principles have a general adaptability to operations of government.[100] The State of Washington has had a similar broad waiver of immunity since 1961,[101] and nothing which has occurred since its enactment indicates that principles of private tort law are unsuitable when applied to determine governmental liability. Although the statute adopted by the California legislature in 1963 begins with a general disclaimer of tort liability, subsequent sections comprehensively adopt principles of private tort law.[102] Thus its end product reflects the judgment of the California

99. *See* N.Y. CT. CL. ACT. § 8 (McKinney 1963).
100. *See* 2 F. HARPER & F. JAMES, THE LAW OF TORTS 292 (Supp. 1968). *See also* Peck, *The Federal Tort Claims Act—A Proposed Construction of the Discretionary Function Exception,* 31 WASH. L. REV. 207, 209-10 n.9, n.10 (1956).
101. WASH. REV. CODE § 4.92.090 (Supp. 1971).
102. *See* CAL. GOV'T CODE ANN. §§ 815-840.6 (West 1966). The broad disclaimer of

legislature that general tort principles are adaptable to problems of governmental liability.

One exception from a comprehensive acceptance of private tort principles does seem essential to accommodate the problems of government. It is what is usually referred to as a discretionary function exception.

VIII. THE DISCRETIONARY FUNCTION EXCEPTION

The discretionary function exception of the FTCA has been the source of considerable litigation and the subject of a considerable amount of critical commentary.[103] Twenty-six years of experience with the Act should make it possible now for Congress to state with greater clarity the solutions to what were only suspected to be problems of applying tort law to operations of government. In addition, the experience in several states with state tort claims acts provides guidance in revising the language.

The FTCA exception now provides that the Act shall not apply to:[104]

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

The first portion of the exception—that relating to acts of employees exercising due care in the execution of a statute or regulation—has not been a source of difficulty, and it probably should be retained in its present form. The FTCA was not intended to serve as a

liability is found in § 815(a). However, subsequent sections provide, for example, that a public entity is liable to the same extent as a private person for injuries proximately caused by public employees acting within the scope of their employment (§ 815.2), and for injuries proximately caused by the tortious acts of independent contractors (§ 815.4). Other provisions enact familiar tort law formulations weighing foreseeability of risk, gravity of potential harm, reasonableness of conduct creating the dangerous conditions, and practicability of alternative courses of action as determinants of a public entity's liability (§§ 835, 835.2, 835.4).

103. *See* note 85 *supra*.

104. 28 U.S.C. § 2680(a) (1970).

means for testing the wisdom or validity of statutes or regulations in a tort action. Nor should the failure of a legislature to adopt a better or wiser policy constitute a tort. Perhaps legislation should be enacted to provide remedies for persons who have suffered special losses or harm through enforcement of laws later found to be invalid, such as imprisonment under a statute later declared unconstitutional, or the financial losses of defense against prosecution under such a statute. But if the government employees involved have exercised "due care" in the execution of a statute or regulation, the case is not one for a tort recovery. The problem is one peculiar to government, finding no analogue in private activity, and it should not be treated under general tort law even if some principle of tort law might be thought applicable to such a claim.

It is the latter portion of the exception—the discretionary function portion—which should be revised. It should be deleted from 28 U.S.C. § 2680(a) and replaced by a new section reading:

> The United States shall not be liable in any action based upon consequences which were intended, or which were the result of alleged negligent acts or failures to act, if the United States proves that those specific consequences were intentionally caused, or in a negligence action that the risks of those consequences were knowingly, deliberately, or necessarily encountered, by an employee or officer who was authorized to do so and who did so pursuant to discretionary authority given him by the Constitution, a statute, or a regulation.

This is a rephrasing of the defense which I earlier suggested that the Government be required to establish in order to invoke the present discretionary function exception.[105] The effect of the rephrased exception would be to allow the government to establish a discretionary function defense to tort claims based on intentional or negligent misconduct but not to claims based on strict liability. The defense would be affirmative, requiring the government to prove the officer's or employee's authority to make the decision which caused the harm or created the risk of harm. Requiring proof of such authority precludes the application of the defense to conduct of employees who have no authority to establish norms but who are expected to be guided by existing norms. It also precludes the application of the de-

105. Peck, *supra* note 73, at 225.

fense to conduct of employees or officers who may have had but in fact did not utilize discretionary authority. I make this suggestion with the confidence derived from the approval the test has found in the decisions of the Supreme Courts of California and Washington dealing with discretionary function problems under tort claims acts of those states.

In *Johnson v. State*[106] the Supreme Court of California encountered the contention that a parole officer's decision not to warn foster parents of the homicidal tendencies of a sixteen-year-old boy was the exercise of a discretionary function within the meaning of the California code provisions applicable to tort claims. The court rejected the contention while adopting a construction of those code provisions which would ensure judicial abstention in areas in which responsibility for the basic policy decisions has been committed to other branches of government. Consistent with the suggestion that the defense be an affirmative defense, the court said:[107]

> Immunity for "discretionary" activities serves no purpose except to assure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government. Accordingly, to be entitled to immunity the state must make a showing that such a policy decision, consciously balancing risks and advantages, took place. The fact that an employee normally engages in "discretionary activity" is irrelevant if, in a given case, the employee did not render a considered decision.

The Washington Supreme Court faced the question of whether a discretionary function exception should be engrafted judicially upon the broad statutory acceptance of tort liability in a case involving the claims for damage done by a juvenile who had escaped from a close security correction facility and set fire to a church and a house.[108] The plaintiff charged the state with negligence in maintaining an "open program" at the institution, in assigning the boy to that program, and in assigning the boy to work on the boiler room detail.[109] The court decided that the claim was barred by an implied discretionary func-

106. 69 Cal. 2d 782, 73 Cal. Rptr. 240, 447 P.2d 352 (1968).
107. 73 Cal. Rptr at 249 n.8, 447 P.2d at 361 n.8.
108. Evangelical United Brethren Church v. State, 67 Wn. 2d 246, 407 P.2d 440 (1965), *noted in* 41 WASH. L. REV. 552 (1966).
109. 67 Wn. 2d at 252, 407 P.2d at 443.

tion exception, and in the course of so doing approved my suggestion that:[110]

> "Liability cannot be imposed when condemnation of the acts or omission relied upon *necessarily* brings into question the propriety of governmental objectives or programs or the decision of one who, with the authority to do so, determined that the acts or omission involved should occur or that the risk which eventuated should be encountered for the advancement of governmental objectives."

Additional and very persuasive support for the suggestion comes from Professor Davis, who proposes that the decision of the Supreme Court of California in *Johnson v. State, supra,* become the foundation for further development of the law under the discretionary function exception of the FTCA.[111] Professor Jaffe, while critical of certain aspects of the construction of the discretionary function exception which I propose, has characterized as "basically sound" the suggestion that the Government should prove that taking the risk was in fact a considered element of the discretionary decision.[112]

IX. OTHER ESSENTIAL REVISIONS

Most of the FTCA's other specifically enumerated exceptions to governmental liability should be eliminated. These express exceptions are designed for purposes which can be served adequately by a properly limited discretionary function provision coupled with the defenses and privileges incorporated in traditional rules of tort law.[113] The FTCA now explicitly excludes federal liability for interest prior to judgment[114] and for punitive damages,[115] as well as liability for traditional tort claims[116] based on assault, battery,[117] false imprison-

110. 67 Wn. 2d at 254, 407 P.2d at 444, *citing* Peck, *The Federal Tort Claims Act,* 31 WASH. L. REV. 207-40 (1956). While it seems that the court erred in applying the test to the decisions to assign the boy to the "open program" and put him on the boiler detail, its analysis of the discretionary function problem generally is supportive of the suggested language for the FTCA discretionary function execption.

111. K. DAVIS, ADMINISTRATIVE LAW TREATISE 846-49 (Supp. 1970).

112. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 259 (1965).

113. RESTATEMENT (SECOND) OF TORTS §§ 49-156 (1965).

114. 28 U.S.C. § 2674 (1970). If an award of interest prior to judgment is necessary to make an injured party whole for all of the loss suffered, retention of the exception would constitute a departure from the general principles of private tort law.

115. 28 U.S.C. § 2674 (1970). *See* note 122 *infra.*

116. 28 U.S.C. § 2680(h) (1970).

117. The assault and battery exception causes injustice because many courts have

ment, false arrest, malicious prosecution, abuse of process,[118] libel, slander, misrepresentation,[119] deceit, and interference with contract rights.[120] Some time ago, Professor Davis concluded that the continued exclusion of most deliberate torts had been a source of injustice, and that the exceptions should be eliminated from the Act.[121] Indeed, the only one of these exceptions that deserves to be retained is that shielding the federal government from liability for punitive damages.[122] If more protection is needed for specific activities, those activities should be narrowly stated in particularized exceptions instead of the present broad language which permits unjustifiable denials of governmental liability.

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refused to look behind the acts of the assaulting employee to determine whether negligence of other government employees created the occasion for the assault. *See* Moos v. United States, 118 F. Supp. 275 (D. Minn. 1954); United States v. Shively, 345 F.2d 294, 297 (5th Cir. 1965), *cert. denied,* 382 U.S. 883 (1965); United States v. Faneca, 332 F.2d 872, 875 (5th Cir. 1964), *cert. denied,* 380 U.S. 971 (1964); Collins v. United States, 259 F. Supp. 363 (E.D. Pa. 1966). *Cf.* Pendarvis v. United States, 241 F. Supp. 8 (E.D.S.C. 1965). *But see* Rogers v. United States, 397 F.2d 12, 15 (4th Cir. 1968). Without this exception, the government would be protected adequately from excessive liability by common law privileges and by exclusion of governmental liability for employees' acts committed beyond the scope of employment.

118. False imprisonment, false arrest, malicious prosecution, and abuse of process do not represent an important area of government exposure. Justice would better be served by an evaluation of the cases on their merits. *See, e.g.,* Blitz v. Boog, 328 F.2d 596 (2nd Cir. 1964), *cert. denied,* 379 U.S. 855 (1964); Pendarvis v. United States, 241 F. Supp. 8 (E.D.S.C. 1965).

119. Although the Supreme Court has indicated that the exception for misrepresentation should only be allowed to shield the government from liability for economic harm suffered in business transactions, United States v. Neustadt, 366 U.S. 696, 711 n.26 (1961), lower courts have applied it to bar recovery for property damage, deaths, and personal injuries. *See, e.g.,* National Mfg. Co. v. United States, 210 F.2d 263 (8th Cir. 1954), *cert. denied,* 347 U.S. 967 (1954); Clark v. United States, 218 F.2d 446 (9th Cir. 1954); Bartie v. United States, 216 F. Supp. 10 (W.D. La. 1963), *aff'd on other grounds,* 326 F.2d 754 (5th Cir. 1964); Vaughn v. United States, 259 F. Supp. 286 (N.D. Miss. 1966). If the exception for misrepresentation were eliminated, the principles of private tort law would be very favorable to the government. *See* L. JAYSON, HANDLING FEDERAL TORT CLAIMS § 217.01 (1970).

120. The ambiguity of the tort of interference with contract rights almost ensures uneven and unjust treatment of claimants. *Compare* Dupree v. United States, 264 F.2d 140 (3rd Cir. 1959), *cert. denied,* 361 U.S. 823 (1959) *with* Hendry v. United States, 418 F.2d 774 (2nd Cir. 1969).

121. K DAVIS, ADMINISTRATIVE LAW TREATISE § 25.08 (Supp. 1970). *See also* F. HARPER & F. JAMES, THE LAW OF TORTS § 29.13 (1956).

122. Punitive damages paid by the government rather than by its malicious or negligent employees would not perform their usual admonitory or deterrent function unless the United States was given a right of indemnity. *See* United States v. Gilman, 347 U.S. 507 (1954) (goverment has no right of indemnity against employee for his misconduct). Nor would punitive damages serve the basic purpose of redistributing the actual costs of governmental activity. For a general consideration of the function of punitive damages, *see* Morris, *Punitive Damages in Tort Cases,* 44 HARV. L. REV. 1173 (1931).

Moreover, if the FTCA is revised, its coverage should be extended to claims arising out of National Guard activities.[123] At present, persons suffering losses as a consequence of National Guard training activities obtain relief on claims which do not exceed $15,000 only as a matter of administrative grace; larger claims may be reported to Congress for further consideration and possible passage of a private bill.[124]

In revising the FTCA, consideration must also be given to the Drivers Act,[125] a 1961 amendment to the FTCA. Although intended to provide the equivalent of insurance for government employees for liabilities incurred while operating private motor vehicles within the scope of their employment, the Drivers Act in fact adversely affects both of its intended beneficiaries: injured plaintiffs[126] and government employees.[127]

CONCLUSION

The construction given the FTCA in *Laird v. Nelms* is much to be regretted and certainly should not be allowed to stand. The rationale and justification for the imposition of strict or absolute liability upon

123. Although detailed federal standards control National Guard activities [32 U.S.C. §§ 301-714 (1970)], National Guardsmen remain employees of the state and are not considered federal employees unless they have been ordered into the service of the United States. Thus the United States has not been held liable under the FTCA for National Guardsmen's tortious conduct in training and other activites. *See* Maryland v. United States, 381 U.S. 41 (1965). For a history of the statutes governing the National Guard and its predecessors, *see* Colby and Glass, *The Legal Status of the National Guard and Its Predecessors,* 29 VA. L. REV. 839 (1943); Weiner, *The Militia Clause of the Constitution,* 54 HARV. L. REV. 181 (1940).

124. In 1960 Congress enacted the National Guard Tort Claims Act which now provides for administrative settlement of claims which do not exceed $15,000 and permits Congress to authorize payment of larger amounts. *See* 32 U.S.C. § 714 (1970).

125. 28 U.S.C. § 2679(b) (1970). Pub. L. No. 87-258, Sept. 21, 1961, 75 Stat. 539.

126. Complications result from the fact that the two year Statute of Limitations established by 28 U.S.C. § 2401(d) (1970) is shorter than the limitation period applicable to negligence actions in many states. *See* Carr v. United States, 422 F.2d 1007 (4th Cir. 1970). There are enormous difficulties in determining whether a member of the military forces is acting in the course of his employment while traveling by private vehicle and on leave pursuant to orders for a change of duty stations. A remedy against the United States thus may not be available until after the FTCA limitation period has expired. *See* L. JAYSON, HANDLING FEDERAL TORT CLAIMS § 216.03(2) (1970); Faix, *Altheo Williams Revisted: "Line of Duty" Cases—Need for Reconsideration,* 26 FED. BAR J. 12, 16-29 (1966); Note, 26 JAG J. 107 (1971).

127. *See, e.g.,* Gilliam v. United States, 407 F.2d 818 (6th Cir. 1969), in which a government employee injured in an automobile accident due to negligence of a fellow employee acting within the scope of his employment was not allowed to recover under the FTCA, but was instead allowed only the less comprehensive relief available under the Federal Employees' Compensation Act.

one engaging in abnormally dangerous activities find a near perfect application against the United States. Imposition of such liability would transfer the inevitable costs of highly dangerous government activities from the victims upon whom they accidentally fall to the United States Treasury and ultimately to the general public, for whose benefit the activities are undertaken. There need be no interference with the activities of the Government other than to require it to pay the allocable costs pursuant to standards generally accepted as just and supportive of the interests of society.

Unless the FTCA is amended to reject the *Laird v. Nelms* holding, its coverage will be greatly reduced. Liabilities will be limited to those based upon proof of wrongdoing by employees for which the Government is liable on a *respondeat superior* basis. The Government will not be held liable for many familiar and well established torts, leaving injured parties with no remedy other than appeal to Congress in a private bill. Unless Congress undertakes the burden of considering private bills, the business of Government will be carried on without doing justice to those harmed by its operations. Furthermore, the necessity of revising the FTCA to reject the *Laird v. Nelms* rationale provides the occasion for correction of other errors of the original draft which time and experience have now disclosed.