

Notes

An Evaluation of The Federal Employees Liability Reform And Tort Compensation Act: Congress' Response to *Westfall v. Erwin*

INTRODUCTION

Recently, Congress enacted legislation immunizing federal employees from liability for common law torts committed within the scope of their employment. This legislation, known as the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Act),¹ was prompted by the Supreme Court's decision issued in *Westfall v. Erwin* on January 13, 1988.² In *Westfall*, the Court severely restricted the scope of protection afforded to federal employees from common law tort liability, especially lower level employees, the "rank and file" workers.³

Prior to the *Westfall* decision, a federal employee's actions were absolutely protected from common law tort liability when the acts complained of were within the perimeter of the employee's official duties.⁴ In *Westfall* the Court departed from this general rule by

1. 134 CONG. REC. S7668 (daily ed. June 13, 1988).

2. 108 S. Ct. 580 (1988).

3. 134 CONG. REC. S7668 (daily ed. June 13, 1988) (statement of Sen. Grassley). See *infra* notes 8-20 and accompanying text for a discussion of *Westfall*.

4. 134 CONG. REC. H4719 (daily ed. June 27, 1988) (statement of Rep. Moorhead). For a thorough discussion on the absolute immunity of federal officials and employees see Comment, *Tort Immunity of Federal Executive Officials: The Mutable Scope of Absolute Immunity*, 37 OKLA. L. REV. 285 (1984).

adding an additional requirement for immunity when a federal employee is sued in her personal capacity; to be immunized from liability an employee must have acted within the scope of her employment and must have exercised governmental discretion.⁵ The increased possible exposure of lower level federal employees to ruinous personal liability after *Westfall* prompted the introduction of reform legislation, House of Representatives Bill 4612, which was ultimately passed as the Act.

As passed, the Act removes *Westfall* liability, and instead provides that the exclusive remedy for such torts is through an action against the United States under the Federal Tort Claims Act (FTCA).⁶ The FTCA was amended, as a result of the Act, to substitute the United States as the sole defendant in any action against a federal employee acting within the scope of employment, and to permit the United States to assert any defenses based on judicial or legislative immunity which could have been raised by the employee.⁷

Although the Act is a knight in shining armor to the federal work force, the federal government may now continue to escape liability from its own negligence through the discretionary function loophole in the FTCA. This Note presents a discussion of the background and history of the doctrine of official absolute immunity culminating in the *Westfall* decision and Congress' response to that decision. This Note concludes that the Act is generally beneficial to both the federal government and to plaintiffs injured by the government. The benefits to the government, however, are weightier and as a result this factor should be taken into account by the federal courts when acting as the ultimate arbiter of the Act's scope and effect.

I. BACKGROUND AND DEVELOPMENT OF THE ACT

A. *Westfall v. Erwin*

On February 8, 1984, William T. Erwin, Sr., a civilian warehouse employee at the Anniston Army Depot in Anniston, Alabama, was injured when he was exposed to toxic soda ash at the depot.⁸ In his complaint, Erwin alleged that while working at the depot, he inhaled ash which had spilled from improperly stored bags.⁹ As a result, Erwin allegedly suffered chemical burns to his eyes and throat, permanent injury to his vocal cords, and emotional and mental distress.¹⁰

Erwin brought suit in the Circuit Court of Jefferson County, Ala-

5. 108 S. Ct. at 583.

6. 28 U.S.C. §§ 2671-80 (1965).

7. H.R. 4612, § 4-8.

8. *Westfall* was the Chief of the Receiving Section at the Depot.

9. 108 S. Ct. at 582.

10. *Erwin v. Westfall*, 785 F.2d 1551, 1552 (11th Cir. 1986).

bama on February 7, 1985 against Westfall and two other supervisors who worked at the depot. The supervisors removed the action to the United States District Court for the Northern District of Alabama. That court granted summary judgment in favor of the defendants on June 5, 1985, on the ground that the defendant supervisors were immune from common law torts.¹¹ This finding was made, according to the district court, in view of the fact that the alleged tort was committed while the defendants were acting within the scope of their employment.¹²

The district court relied on *Johns v. Pettibone Corp.*¹³ in which the Eleventh Circuit Court of Appeals held that "absent an allegation of a tort of constitutional magnitude, federal officials are entitled to absolute immunity for ordinary torts committed within the scope of their jobs."¹⁴

Erwin then appealed to the Eleventh Circuit which reversed and remanded.¹⁵ In a per curiam decision, the Eleventh Circuit noted that at the time the defendants' motion for summary judgment was before the district court, *Pettibone* was good law. Subsequent to the district court's ruling, however, the opinion in *Pettibone* was withdrawn and modified twice.¹⁶ Ultimately, the holding in *Pettibone* stated that "a government employee enjoys immunity only if the challenged conduct is a discretionary act and is within the outer perimeter of the actor's line of duty."¹⁷ The Eleventh Circuit concluded that the district court erred in granting summary judgment for Westfall because the additional element of the immunity test was absent — whether the conduct complained of was discretionary or not.¹⁸

It was the dispute among circuit courts as to the necessity of the discretionary prong which prompted the United States Supreme Court to grant certiorari in *Westfall*.¹⁹ The Supreme Court subsequently affirmed the judgment of the Eleventh Circuit and held that federal employees would be liable for injuries associated with their

11. *Id.* at 1552.

12. *Id.*

13. 755 F.2d 1484 (11th Cir. 1985) (per curiam).

14. *Id.* at 1486 (quoting *Clause v. Gyorkey*, 674 F.2d 427, 431 (5th Cir. 1982)).

15. *Westfall*, 785 F.2d at 1553.

16. *Johns v. Pettibone Corp.*, 755 F.2d 1484 (11th Cir.), *op. withdrawn, rev'd and remanded*, 769 F.2d 724 (11th Cir. 1985), *aff'd on reh'g*, 843 F.2d 464 (11th Cir. 1988).

17. 769 F.2d at 728.

18. *Westfall*, 785 F.2d at 1552.

19. *Westfall v. Erwin*, 107 S. Ct. 1346 (1987).

official conduct unless the actions were within the scope of their employment *and* involved the exercise of governmental discretion.²⁰

B. Congress Responds

In issuing its decision in *Westfall*, the Supreme Court explicitly stated that "Congress is in the best position to provide guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context. Legislated standards governing the immunity of federal employees involved in state-law tort action would be useful."²¹ Recognizing that the *Westfall* decision would result in substantial personal liability exposure for the entire federal workforce, the Honorable Barney Frank,²² a representative from Massachusetts, introduced H.R. 4358 before the House.²³

On April 12, 1988, Mssrs. Frank, Shaw, Fish,²⁴ and Wolf introduced H.R. 4358,²⁵ the precursor bill to H.R. 4612, with the stated purpose of "[a]mend[ing] title 28, United States Code, to provide for an exclusive remedy against the United States for suits based upon certain negligent or wrongful acts or omissions of United States employees committed within the scope of their employment, and for other purposes."²⁶ Soon thereafter, the bill was referred to the House Committee on the Judiciary.²⁷

Two days later, on April 14, a hearing was conducted before the House Subcommittee on Administrative Law and Governmental Relations to consider H.R. 4358.²⁸ During the hearing, testimony from a variety of witnesses was received, the majority of which favored adoption of the legislation. On June 14, 1988, Representative Frank submitted the Judiciary Committee's report on the amended and re-numbered bill, H.R. 4612.²⁹ The committee amended the legislation, and unanimously recommended to the Full House that the bill be passed.³⁰

20. *Westfall*, 108 S. Ct. at 585.

21. *Id.*

22. Chairman, Subcommittee on Administrative Law and Governmental Relations.

23. H.R. 4358, 100th Cong., 2d Sess. (1988).

24. Members of the House Committee on the Judiciary.

25. H.R. 4358, 100th Cong., 2d Sess. (1988).

26. *Id.*

27. For a detailed discussion on the mechanics of the federal legislative process, see generally E. WILLET, *HOW OUR LAWS ARE MADE*, H.R. DOC. NO. 158, 99th Cong., 2d Sess. (1985).

28. *Legislation to Amend the Federal Tort Claims Act: Hearing on H.R. 358 Before the Subcomm. on Admin. Law and Govtl. Relations of the Comm. on the Judiciary*, 100th Cong., 2d Sess. (1988).

29. H.R. REP. NO. 700, 100th Cong., 2d Sess. (1988).

30. *Id.* at 10.

The contents of the Committee Report contain a summary of the key testimony received during the Subcommittee hearing. This report substantially follows the Department of Justice's (D.O.J.) sixty-six page statement submitted by Deputy Assistant Attorney General Robert L. Willmore.³¹ The need for a legislative response to *Westfall* was summarized by the D.O.J. as follows:

In short, we are now faced with an immediate crisis of personal liability exposure for the entire federal workforce. Virtually all federal employees, and particularly rank and file employees, face the possibility of being required to defend a lawsuit in which his or her personal fortune is at stake, even though the actions complained of clearly were official duties. There thus is a new climate of uncertainty wherein federal employees have no way of knowing whether they are protected when they act, or whether even the most routine of their official duties will expose them to a lawsuit jeopardizing their personal assets.³²

On June 27, 1988, the unanimous passage of H.R. 4612 by both the Subcommittee and the Full committee was reported to the Full House.³³ In addressing the House, Representative Frank pointed out that the bill does not apply to cases that allege violations of constitutional rights,³⁴ and that the Act was merely restoring the status quo under the Federal Tort Claims Act.³⁵

Rising in support of H.R. 4612, Representative Wolf stated: "[I]t is unconscionable to ask Government employees, who have no reasonable way of knowing whether they are protected when they act, to make decisions or take actions capable of spawning tort lawsuits."³⁶

A quorum not being present in the House, a vote was suspended until June 28, 1988, on which date two-thirds of the House voted to pass H.R. 4612.³⁷ The bill was then received by the Senate on July 6, 1988, and referred to the Committee on the Judiciary.³⁸

While the House of Representatives considered H.R. 4612, the Senate introduced its own version of the Act on June 13, 1988.³⁹ Senate Bill 2500, introduced by Senator Grassley and co-authored

31. *Id.* at 57.

32. *Id.* at 64.

33. 134 CONG. REC. H4718 (daily ed. June 27, 1988) (statement of Rep. Frank).

34. Persons alleging constitutional torts will, under the Act, remain free to pursue a remedy against an individual employee if they so choose. *See generally* *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

35. 134 CONG. REC. H4718 (daily ed. June 27, 1988) (statement of Rep. Frank).

36. *Id.*

37. 134 CONG. REC. H4804 (daily ed. June 28, 1988).

38. 134 CONG. REC. S8900 (daily ed. July 6, 1988).

39. 134 CONG. REC. S7668 (daily ed. June 13, 1988).

by Mssrs. Humphrey, Tribble, and Stevens, closely tracked the language of H.R. 4612. Senate Bill 2500 was reported by the Senate Judiciary Committee with an amendment, offered by Senator Heflin, on October 5, 1988.⁴⁰ The unpublished Committee report produced a bill which would include employees of the Tennessee Valley Authority (TVA) within the scope of protection offered by H.R. 4612.⁴¹ In general, the Senate amendment gives immunity from liability for common law torts to employees of the TVA who act in the scope of their employment, by providing the Federal Tort Claims Act as the exclusive remedy.⁴²

On October 12, 1988, the Full Senate considered H.R. 4612 and whether to amend it to include the TVA language.⁴³ The Full Senate agreed to the amendment and passed H.R. 4612 with the TVA language included.⁴⁴ The House of Representatives, on October 20, 1988, considered the Senate amendment and found it to be favorable, two-thirds having voted in favor.⁴⁵ H.R. 4612, with the Senate amendment, was enrolled and submitted to President Reagan who signed the bill into law on November 18, 1988.⁴⁶

II. THE HISTORY OF ABSOLUTE IMMUNITY

Federal officials and employees have generally been immune from tort liability by virtue of a doctrine known as absolute official immunity.⁴⁷ The doctrine finds its roots not in statutory form but as a matter of federal law "to be formulated by the courts in the absence of legislative action by Congress."⁴⁸ The rationale behind such a broad sweep of absolute immunity is to "insulate the decision making process [of federal officials] from the harassment of prospective litigation,"⁴⁹ and to abrogate the threat of liability which could impede the effective administration of government.⁵⁰ The scope of protection afforded to federal officials, however, has not existed without disagreement among federal courts of appeal.

The history of federal official immunity can be traced to the early

40. 134 CONG. REC. S14,603 (daily ed. Oct. 5, 1988).

41. S2500, 100th Cong., 2d Sess., § 9 (1988).

42. *Id.*

43. 134 CONG. REC. S15,597 (daily ed. Oct. 12, 1988).

44. 134 CONG. REC. S15,600 (daily ed. Oct. 12, 1988).

45. 134 CONG. REC. H10,678 (daily ed. Oct. 20, 1988).

46. Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (1988).

47. *Westfall v. Erwin*, 108 S. Ct. 580, 583 (1988). The doctrine encompasses damages suits against government employees or officials acting in their personal capacity. (The terms "employees" and "officials" are used interchangeably throughout the case law and thus throughout this Note.)

48. *Howard v. Lyons*, 360 U.S. 593, 597 (1959).

49. *Westfall*, 108 S. Ct. at 583.

50. *See Barr v. Matteo*, 360 U.S. 564 (1969).

nineteenth century. In *Little v. Barreme*,⁵¹ a United States naval officer seized a ship thought to be violating a federal act which prohibited trade with the French. Chief Justice Marshall held that since Captain Little did not have authority to seize Barreme's ship under the Act, he should be held personally liable for Barreme's damages.⁵²

Throughout the nineteenth century, federal courts offered little or no protection to federal officials and employees against tort actions.⁵³ A trend emerged in 1875, however, as illustrated by *Lamar v. Browne*,⁵⁴ whereby the Supreme Court indicated its willingness to extend tort immunity to federal officials when their actions fell within prescribed boundaries. In *Lamar*, United States Treasury agents were granted immunity from allegedly converting cotton bales, a violation of the Abandoned and Captured Property Act of 1863.⁵⁵ The Supreme Court held that the agents were protected by the doctrine of official immunity as they had acted for the government and within the scope of their powers.⁵⁶ This case and others like it set the stage for increased extension of the immunity doctrine during the late 1800s.

The latter half of the nineteenth century ushered in one of the most influential decisions to shape the immunity doctrine. In *Spalding v. Vilas*,⁵⁷ an attorney brought suit against the Postmaster General alleging that the latter had published a letter intending to injure the attorney's reputation and to interfere with his business relations. Upholding the Postmaster's demurrer, the Supreme Court introduced a test to define the circumstances under which immunity would attach. Justice Harlan's majority opinion stated: "[A]ction[s] having more or less connection with the general matters committed by law to [the federal officials'] control or supervision" would be immunized from tort liability.⁵⁸

51. 6 U.S. (2 Cranch) 170 (1804).

52. *Id.* at 175. Captain Little was held liable for \$8,504.00 in damages.

53. See *Mitchell v. Harmony*, 54 U.S. (13 How) 115 (1851) (Army officers held liable for conversion of merchant's property); *Bates v. Clark*, 95 U.S. 204 (1877) (Army officers sued for seizing whiskey from merchants in the Dakota Territory); *Hendricks v. Gonzalez*, 67 F. 351 (2d Cir. 1895) (U.S. Customs agent held liable for mistakenly believing a cargo ship was loaded with arms and thus in violation of international neutrality laws).

54. 92 U.S. 187 (1875).

55. Abandoned and Captured Property Act of 1863, ch. 120, 12 Stat. 820 (1863).

56. *Lamar*, 92 U.S. at 196.

57. 161 U.S. 483 (1896).

58. *Id.* at 498.

Thus, the outer limits of a federal employee's duty were defined to be acts carried out pursuant to the functions of the particular department or agency within the government. The often quoted rationale for federal official immunity was set out in *Spalding* as follows:

[A federal official] should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint But if he acts, having authority, his conduct cannot be made the foundation of a suit against him personally for damages⁵⁹

Spalding, while making great strides in the area of official immunity, was generally followed for its limited holding that agency or department heads could publish information or speak concerning the operation of their agencies, without fear of retaliatory suit.⁶⁰ *Spalding*'s progeny also limited immunity to executive officials, rarely extending it to lower level employees. As suits against government officials continued to be filed, lower courts found that they were required to balance two conflicting interests. The first was the right of private citizens to be free from oppressive or malicious action on the part of federal officials, and the second was the need to protect the government from vexatious lawsuits thought to inhibit the fearless execution of federal policy.⁶¹ It was not until sixty-three years after *Spalding* that the Supreme Court addressed this balancing test in the case of *Barr v. Matteo*.⁶²

Barr involved a libel suit filed by subordinate officials against their superior, the Acting Director of the Office of Rent Stabilization. The defendant had suspended his subordinates and published his reasons for doing so in a press release.⁶³ The District of Columbia Court of Appeals declined to extend absolute immunity because the statements were made outside the line of duty, and because the defendant was not of Cabinet ranking.⁶⁴ The Supreme Court reversed on both grounds. In addressing the issue of rank, Justice Harlan wrote:

The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower

59. *Id.* at 498-99.

60. *See, e.g.,* *Mellon v. Brewer*, 18 F.2d 168 (D.C. Cir.), *cert. denied*, 275 U.S. 530 (1927) (Secretary of the Treasury granted immunity); *Smith v. O'Brien*, 88 F.2d 769 (D.C. Cir. 1937) (Chairman of the Federal Tariff Commission granted immunity).

61. *See* Comment, *supra* note 4, at 294.

62. 360 U.S. 564 (1959).

63. *Id.* at 565-67.

64. *Barr v. Matteo*, 244 F.2d 767, 768 (D.C. Cir.), *vacated*, 355 U.S. 171 (1957).

rank in the executive heirarchy.⁶⁵

Thus, the doctrine of immunity was, for the first time, explicitly extended to all federal government officials, regardless of rank, so long as the acts were in the "outer perimeter"⁶⁶ of the officials' line of duty. The *Barr* Court stated:

We think that under these circumstances a publicly expressed statement of the position of the agency head, announcing personnel action which he planned to take in reference to the charges so widely disseminated to the public, was an appropriate exercise of the discretion which an officer of that rank must possess if the public service is to function effectively. . . . The fact that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable⁶⁷

Although it seemed a straightforward solution to the immunity issue, Justice Harlan's opinion in *Barr* led to the very dispute among the circuits which the *Westfall* Court set out to resolve. Most of Harlan's analysis focused on delineating the boundaries of the discretionary function. However, the *Barr* Court rendered the privilege of immunity applicable simply because the acts of the director were within the outer perimeter of his line of duty.⁶⁸

Barr, while remaining good law, was followed for different propositions by different federal courts. Some circuits required the discretionary function prong of *Barr*,⁶⁹ while others required only the outer perimeter prong.⁷⁰ Thus, not only was *Barr* applied inconsistently, lower courts were left without precise definitions for "acts of discretion" and "outer perimeter of duty."

The *Westfall* Court settled the dispute among the circuits and required that both prongs be met, sending shock waves throughout the ranks of federal employees and officials. The *Westfall* decision was seen as pulling the rug out from under federal workers and creating a workplace filled with fear.⁷¹ Until *Westfall*, the majority of actions against federal employees acting in their personal capacities were

65. 360 U.S. at 572-73.

66. *Id.* at 575.

67. *Id.* at 574-75.

68. *Id.*

69. See, e.g., *Dretar v. Smith*, 752 F.2d 1015, 1017 n.2 (5th Cir. 1985); *Araujo v. Welch*, 742 F.2d 802, 804 (3d Cir. 1984); *George v. Kay*, 632 F.2d 1103, 1105 (4th Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981) (implying the requirement); *Green v. James*, 473 F.2d 660, 661 (9th Cir. 1973).

70. See, e.g., *General Electric Co. v. United States*, 813 F.2d 1273, 1276-77 (4th Cir. 1987); *Poolman v. Nelson*, 802 F.2d 304 (8th Cir. 1986); *Lojuk v. Johnson*, 770 F.2d 619, 626 n.4 (7th Cir. 1985), *cert. denied*, 474 U.S. 1067 (1986); *Ricci v. Key Bancshares of Me., Inc.*, 768 F.2d 456, 463-64 (1st Cir. 1985).

71. 134 CONG. REC. S15,599 (daily ed. Oct. 12, 1988) (statement of Sen. Heflin).

unsuccessful. Cases were resolved early through summary judgment or dismissal. These motions succeeded because it was possible to at least argue that the employee was acting within the scope of employment. Federal employees, especially lower ranking functionaries performing ministerial duties, were left after *Westfall* not knowing whether the most routine of their official duties would expose them to state tort lawsuits jeopardizing their personal assets.⁷²

After *Westfall*, these fears were also well founded when one looked closely at the impact of the discretionary function requirement. The earliest judicial attempts to define the limits of a discretionary act distinguished between acts involving policy making or discretionary functions and those which are purely ministerial.⁷³ The majority rule among the circuits has been that an official will generally be held immune as long as the duty performed was purely non-ministerial.⁷⁴

The Second Circuit set out a definition for discretionary acts which can be summarized as follows: "[I]s the act complained of the result of a judgment or decision which it is necessary that the government official be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability?"⁷⁵ It was argued that this broad definition of discretion was appropriate as a great number of decisions are made by federal officials who do not hold policy-making positions. This rule, however, leaves lower echelon federal employees liable for their actions while those of their policy-making superiors are protected. Indeed, lawmakers in both the House and the Senate focused on *Westfall's* effect on lower ranking employees in their reports and floor debates.⁷⁶ Examples of hypothetical post-*Westfall* claims included suits for tortious breach of contract against government contracting officers; suits against park rangers for injuries suffered at sites supervised or operated by the National Park Service; and suits against maintenance personnel for misplaced electrical cords or improperly mopped floors that may have caused injuries.⁷⁷ Actions of this nature would have potentially

72. 134 CONG. REC. S15,599 (daily ed. Oct. 12, 1988) (statement of Sen. Grassley). It could be argued that all lower ranking employees, post-*Westfall*, were indeed certain that their tortious acts committed within the scope of their duties would trigger personal liability.

73. Ministerial acts are those required by a higher authority. See *Heine v. Raus*, 399 F.2d 785, 790 (4th Cir. 1968).

74. See generally *Garner v. Rathburn*, 346 F.2d 55 (10th Cir. 1965); *In re Estate of Burks v. Ross*, 438 F.2d 230 (6th Cir. 1971); *David v. Cohen*, 407 F.2d 1268 (D.C. Cir. 1969).

75. *Ore Gustavsson Contracting Co. v. Floete*, 299 F.2d 655, 659 (2d Cir. 1962), cert. denied, 374 U.S. 827 (1963).

76. See generally H.R. REP. NO. 700, 100th Cong., 2d Sess. (1988); and 134 CONG. REC. S15,599 (daily ed. Oct. 12, 1988) (statement of Sen. Grassley).

77. H.R. REP. NO. 700, 100th Cong., 2d Sess. 3 (1988).

threatened the personal assets of these officers. Ironically, even though *Westfall* created an entire class of potential defendants, lower ranking employees are not necessarily capable of satisfying large tort judgments.⁷⁸

Even though *Westfall* was yet to be tested, the specter of defending protracted personal liability suits on all three levels of the federal government prompted the quick response from Congress in the form of House of Representative Bill 4612.

III. HOW THE FEDERAL TORT CLAIMS ACT HAS BEEN AMENDED

Congress enacted the Federal Tort Claims Act (FTCA) in 1964 to redress the many wrongs for which victims of governmental torts could find no remedy.⁷⁹ The FTCA enables plaintiffs to bring tort actions in federal court against the federal government, its agents and employees, under circumstances where the United States, if a private person, would be liable to the claimant.⁸⁰ The FTCA, in one stroke, did away with the antiquated notion that the "king can do no wrong" by providing that the federal government shall be liable in tort "in the same manner and to the same extent as a private individual under like circumstances."⁸¹

House of Representative Bill 4612, as enacted, provides that the exclusive remedy for common law torts committed by federal employees⁸² within the scope of their employment is through an action against the United States under the Federal Tort Claims Act.⁸³ Substantial precedent for such an exclusive remedy provision exists, including provisions protecting federal employees in the negligent operation of an automobile,⁸⁴ a provision protecting Defense Department attorneys,⁸⁵ and provisions protecting federally employed medical personnel.⁸⁶

78. 134 CONG. REC. S15,599 (daily ed. Oct. 12, 1988) (statement of Sen. Grassley).

79. For a thorough discussion of the history of the Federal Tort Claims Act, see *Dalehite v. United States*, 346 U.S. 15, 24-30 (1953).

80. 28 U.S.C. § 2674.

81. *Id.*

82. The Act is intended to protect officers and employees of all three branches of government from *Westfall*-type suits. See H.R. REP. NO. 700, 100th Cong., 2d Sess. 5, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 5945.

83. Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, § 5, 102 Stat. 4564 (to be codified at 28 U.S.C. § 2679(b)(1)).

84. 28 U.S.C. §§ 1346(b), 2671-80.

85. 10 U.S.C. § 1054.

86. See, e.g., 10 U.S.C. § 1089 (Defense Department medical personnel); 22

Section 2671 of title 28 has now been amended to extend coverage of the FTCA to officers and employees of the legislature and judicial branches.⁸⁷

Section 2674 of title 28 has now been amended to provide that the United States may assert any defense based on the judicial or legislative immunity of judicial and congressional employees along with any other defenses a private person would be able to assert, such as contributory negligence and assumption of risk.⁸⁸ This provision has already come under attack by one legislator as possibly violating the long accepted doctrine of respondeat superior.⁸⁹

Section 2679(d) of title 28 has now been amended to provide for the substitution of the United States as the defendant in cases where the federal employee acted in the course and scope of his employment.⁹⁰ This remedy is exclusive, precluding any other civil action or civil suit for money damages from being lodged against the employee or his estate.⁹¹ This amendment also makes clear that the exclusive remedy provision does not extend to constitutional torts or to causes of action brought against an individual under another statute.⁹²

Section 2679(d) of title 28 has also been amended to require that the United States be substituted as the sole defendant whenever the Attorney General determines that the act or omission alleged to have caused the claimant's injuries was within the scope of office or employment.⁹³ Upon such a determination, any action in state court shall be removed to a federal district court.⁹⁴ If the Attorney General refuses to certify the employee as having acted within course and scope, the employee may petition the district court for a ruling

U.S.C. § 2458(a) (NASA medical personnel); 38 U.S.C. § 4116 (VA medical personnel); 22 U.S.C. § 2702 (State Department physicians); 42 U.S.C. § 233 (Public Health Service physicians).

87. Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, § 3, 102 Stat. 4564 (to be codified at 28 U.S.C. § 2671).

88. Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, § 4, 102 Stat. 4564 (to be codified at 28 U.S.C. § 2674).

89. The majority rule at common law in the private employment context is that an employer, sued for the tortious acts of its employee, may not invoke the employee's remedies under the doctrine of respondeat superior. See *Hearing on H.R. 4358, Federal Employees Liability Reform and Tort Compensation Act of 1988*, 100th Cong., 2d Sess. 41 (1988) (letter to Rep. Barney Frank from Rep. Don Edwards).

90. Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, § 6, 102 Stat. 4564 (to be codified at 28 U.S.C. § 2679(d)(1)).

91. Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, § 5, 102 Stat. 4564 (to be codified at 28 U.S.C. 2679(b)(1)). See also H.R. REP. NO. 700, 100th Cong., 2d Sess. 5, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 5945.

92. Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, § 5, 102 Stat. 4564 (to be codified at 28 U.S.C. § 2679(b)(2)).

93. Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, § 6, 102 Stat. 4564 (to be codified at 28 U.S.C. § 2679(d)).

94. *Id.*

on this determination.⁹⁵ Civil actions against the United States which are dismissed for failure to first file an administrative claim pursuant to the requirements of the FTCA will be treated as timely if: (1) the claim would have been timely filed on the date that the underlying civil action was commenced; and (2) if a proper claim is filed with the appropriate federal agency within sixty days after dismissal of the civil action.⁹⁶

IV. THE PRACTICAL EFFECTS OF THE ACT

The Federal Employees Liability Reform and Tort Compensation Act of 1988 was intended to be an evenhanded response to *Westfall*.⁹⁷ The legislators believe that the Act will fairly compensate tort victims while adequately protecting federal employees from personal liability for actions taken in the course and scope of federal employment.⁹⁸ Plaintiffs seeking redress against federal employees will be limited to the exclusive remedy of suing the United States, as the sole defendant, under the FTCA.

The Act provides a test to determine whether the complained-of act was committed within an employee's scope of employment: "whether the employee's acts are an incident of, a part of, or in furtherance of, the employee's employment."⁹⁹ Before the Act, federal courts consistently looked to descriptions of job responsibilities¹⁰⁰ or statutory authorizations¹⁰¹ in deciding whether federal employees were acting within their official scope. The United States will not be substituted as the sole defendant if an employee is accused of egregious misconduct and the Attorney General so certifies.

The FTCA provides that the determination of whether an employee was acting within the scope of his employment is to be governed by the law of the state in which the alleged wrongful conduct

95. *Id.*

96. *Id.*

97. 134 CONG. REC. S15,599 (daily ed. Oct. 12, 1988) (statement of Sen. Grassley).

98. *Id.* at S15,600.

99. *Kemerer v. United States*, 330 F. Supp. 731, 733 (W.D. Pa. 1971), *aff'd*, 474 F.2d 1338 (3d Cir. 1973). In the case of a member of the military, Naval Forces, or National Guard, "acting within the scope of office or employment . . . means acting in the line of duty." 28 U.S.C. § 2671.

100. *See General Electric Co. v. United States*, 813 F.2d 1273, 1279 (4th Cir. 1987), *vacated and remanded on other grounds*, 108 S. Ct. 743 (1988); *Poolman v. Nelson*, 802 F.2d 304, 309 (8th Cir. 1986).

101. *See Doe v. McMillan*, 412 U.S. 306, 322 (1973).

occurred.¹⁰² One commentator has set out ten separate factors to be considered in making this determination. Among them are: the time, place, and purpose of the act; was the act one commonly done by the employee; was the act outside the enterprise of the employer; was the act entrusted to the employee; was the act one the employer expected to be done; was the instrumentality by which the harm was done furnished by the employer to the employee; was the act a departure from the normal method of accomplishing an authorized result; and whether the act was seriously criminal.¹⁰³

The Act explicitly governs all claims which accrue after the date of enactment: November 18, 1988. The provisions of the Act will also apply to claims which have not been reduced to final judgment on the date of enactment, regardless of when the claims accrued.¹⁰⁴ Plaintiffs who have a claim, but have not initiated a lawsuit, will be permitted to submit their administrative claim against the United States for up to two years after the date of enactment, or within the time remaining under the applicable state statute of limitations, whichever is longer.¹⁰⁵ Last, plaintiffs who have initiated a lawsuit but have not filed their administrative claims will have at least sixty days after dismissal of the civil action to file, if the filing of the suit was timely under state law.¹⁰⁶

The Act will probably result in a cost savings to the federal government.¹⁰⁷ Prior to this legislation, defendants in *Westfall* actions were represented by the United States Attorney when the defendant's actions were within the scope of their employment. After the Act, even though the United States Attorney will represent the United States as the sole defendant, the action will progress under the FTCA resulting in a cost savings to the government as FTCA defenses are less costly.¹⁰⁸ The unavailability of punitive damages will also result in lower costs to the government.¹⁰⁹

A. *How the Act Favors Claimants*

From the perspective of an injured plaintiff, the ability to sue the United States under the FTCA presents certain advantages over a suit against an individual federal employee. With regards to uncomplicated claims, the FTCA contains an administrative claims proce-

102. *Davies v. United States*, 542 F.2d 1361 (9th Cir. 1976).

103. 2 L. JAYSON, *HANDLING FEDERAL TORT CLAIMS*, § 216.01 n.9 (1988).

104. Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, § 8, 102 Stat. 4565 (to be codified at 28 U.S.C. § 2679(b)).

105. *Id.*

106. *Id.*

107. H.R. REP. NO. 700, 100th Cong., 2d Sess., at 11 (1988) (Report from Congressional Budget Office).

108. *Id.*

109. 28 U.S.C. § 2674.

dure whereby certain claims may be expeditiously settled, for an amount not greater than \$25,000.00.¹¹⁰ If the claim is disapproved or if the agency offers an amount in settlement which the claimant regards as insufficient, the claimant may proceed to litigation. This can be viewed as having "two bites at the apple instead of one."¹¹¹

The most important advantage lies in the fact that while a major percentage of federal employees may be unable to satisfy a judgment, the United States would be able to pay any judgment that is awarded.

B. Disadvantages of the Exclusive Remedy

The current provisions of the FTCA require that an administrative claim must be filed as an initial step in the claimant's pursuit of money damages.¹¹² Furthermore, no suit may be brought until after the claim has been denied by the agency.¹¹³ This less time consuming and less expensive remedy must be considered in light of the fact that the administrative claim will be reviewed and adjudicated by the agency which allegedly committed the wrongful act. Secondly, submission of an administrative claim with the required supporting documents without equal disclosure of the government's position may result in a tactical disadvantage if the claim is subsequently denied.

Attorney's fees are limited under the FTCA. For claims accruing on or after January 18, 1967, fees connected to administrative settlement are limited to twenty percent of the recovery and twenty-five percent after suit has been brought.¹¹⁴ Recovery under the FTCA is also limited to compensatory damages.¹¹⁵ Pre-judgment interest and punitive damages are not recoverable.¹¹⁶ If state law provides only punitive damages for wrongful death, the government's liability is still measured by compensatory damages.¹¹⁷

The limitation on attorney's fees may ultimately result in decreasing willingness among plaintiff's attorneys to accept cases like *Westfall*. Furthermore, no allowance for fees is made for the attorney who takes the case up to the Court of Appeals or the Supreme

110. 28 U.S.C. § 2672 (Supp. 1988).

111. 1 L. JAYSON, *supra* note 103, § 2 (1977).

112. 28 U.S.C. § 2675(a).

113. *Id.*

114. 28 U.S.C. § 2678.

115. 28 U.S.C. § 2674.

116. *Id.*

117. *Id.*

Court. If the attorney does decide to take the claimant's cause to the courtroom, actions under the FTCA are conducted without a jury,¹¹⁸ a fact not entirely beneficial to a tort plaintiff.

As an exclusive remedy, the FTCA may prove to be a drier well than proposed by the Act's supporters. As the sole party defendant, the United States government may take advantage of the numerous exceptions and exclusions within the FTCA to avoid liability.¹¹⁹ The express exclusions to the FTCA are listed in 28 U.S.C. § 2680 and fall into three general categories: exclusions based on the performance of discretionary functions or duties;¹²⁰ exclusions related to particular types of governmental activities;¹²¹ and exclusions related to specific torts.¹²² For the purposes of this Note, the first two are important as there is a good chance that, in claims arising out of the specific torts category, a finding will be rendered that the employee acted outside the scope of his office, thus providing the claimant with an alternate remedy against the employee.

The most litigated exclusion surrounds claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal . . . employee of the government, whether or not the discretion involved be abused."¹²³ Application of the discretionary exclusion is not conditional on the exercise of due care and may apply whether or not negligence was present.¹²⁴ The reason for such immunity parallels the doctrine of sovereign immunity discussed above. In passing the FTCA, Congress intended to protect a certain class of governmental actions and decisions based on considerations of public policy. "In sum, the discretionary function exception insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment."¹²⁵ This exception to liability in the FTCA is important with respect to the Act as the government may easily argue that a particular defendant's acts were discretionary in nature and as such escape FTCA liability.

After passage of the Act, a claimant will be unable to seek redress from the government if the district court determines that the defendant's actions were of a sufficient discretionary nature to render the exclusion applicable.¹²⁶ Exact definitions of the exclusion are varied,

118. 28 U.S.C. § 2402.

119. 28 U.S.C. § 2680 (Supp. 1988).

120. 28 U.S.C. § 2680(a).

121. 28 U.S.C. § 2680(b)-(g), (i)-(n).

122. 28 U.S.C. § 2680(h).

123. 28 U.S.C. § 2680(a).

124. See *Dalehite v. United States*, 346 U.S. 15, 33-34 (1953).

125. *Berkovitz By Berkovitz v. United States*, 108 S. Ct. 1954 (1988).

126. For a general discussion of the discretionary function exception as a bar to federal jurisdiction, see Comment, *The Discretionary Function Exception: Is It A Bar*

however, there are guidelines which can prove useful in estimating its boundaries. The exclusion will apply to "a [government] function or duty which necessarily requires the exercise of reason in the adoption of means to an end, discretion as to how, when, or where an action shall be done"¹²⁷ However, it is not the status or level of the actor which governs the application of the exclusion but the discretionary nature of the challenged conduct.¹²⁸

In 1984, the Supreme Court broadly construed the discretionary function exception in the case of *United States v. Varig Airlines*.¹²⁹ The Supreme Court in *Varig* held that an allegedly negligent inspection by the Federal Aviation Administration (FAA) of the airliner's lavatory could not give rise to tort liability under the FTCA.¹³⁰ The Court held:

[T]he basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a government employee - whatever his or her rank - are of the nature and quality that Congress intended to shield from tort liability.

Second, whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the government acting in its role as a regulator of the conduct of private individuals Congress wished to prevent judicial "second guessing" in social, economic, and political policy through the medium of an action in tort.¹³¹

Unfortunately, for attorneys representing FTCA claimants, *Varig* did not provide a workable definition of discretionary acts. An earlier Supreme Court case, *Dalehite v. United States*,¹³² set out a planning versus operational test to assist in defining discretionary limitations.¹³³ The *Dalehite* Court held that decisions made at the planning level would be immune under the discretionary exclusion while those at the implementation level would not.¹³⁴

After *Varig*, it is unclear whether the operational-planning distinction survives. Some writers have argued that the discretionary conduct focus of *Varig* has abrogated the distinction¹³⁵ while others assert that *Dalehite* remains the test for the applicability of section

To Federal Jurisdiction?, 1983 UTAH L. REV. 117 (1983).

127. Mims v. United States, 349 F. Supp. 839, 843 (W.D. Va. 1972).

128. United States v. Varig Airlines, 467 U.S. 797, *reh'g denied*, 468 U.S. 1226 (1984).

129. *Id.*

130. *Id.* at 821.

131. *Id.* at 813-14 (footnotes omitted).

132. 346 U.S. 15 (1953).

133. *Id.* at 42.

134. *Id.*

135. See Bacon v. United States, 810 F.2d 827, 829 (8th Cir. 1987); Johnston v. United States, 597 F. Supp. 374, 434 (D. Kan. 1984).

More recently, the Supreme Court has attempted to restate and clarify the scope of the discretionary function in *Berkovitz By Berkovitz v. United States*.¹³⁷ In *Berkovitz*, the United States was sued under the FTCA for approval of production and distribution of a defectively manufactured polio vaccine.¹³⁸ The Court held that "the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow."¹³⁹ Justice Marshall, writing for a unanimous Court stated: "In examining the nature of the challenged conduct, a court must first consider whether the action is a matter of choice for the acting employee . . . conduct cannot be discretionary unless it involves an element of judgment or choice."¹⁴⁰ Thus, where a federal employee has no rightful option but to adhere to federal guidelines and as such, the employee's conduct cannot appropriately be the product of free choice of judgment, the discretionary function is inapplicable for there has not been an exercise of discretion.¹⁴¹

Berkovitz stands for the proposition that the government may not hide from liability under the discretionary function when the alleged conduct was the result of a statutory guideline. This is a benefit to claimants under the FTCA and the new Act as a diligent plaintiff's attorney may, depending on the facts of the case, argue that the government employee's decisional conduct was pursuant to one of the numerous government statutes and/or regulatory programs of federal agencies.¹⁴² Whichever test a district court chooses, one thing is clear: the Government by enacting House of Representatives Bill 4612 has provided an exclusive remedy in which lies a broad and largely undefined exclusion that can be fatal to an otherwise bona fide claim.

CONCLUSION

The Federal Employees Liability and Tort Compensation Act of 1988 is an attempt to clear the muddled waters of the doctrine of federal official immunity. For decades, federal courts had applied inconsistent and varied tests to determine when a grant of immunity

136. See *Alabama Electric Cooperative, Inc. v. United States*, 769 F.2d 1523, 1527 (11th Cir. 1985); *Drake Towing Co., Inc. v. Meisner Marine Constr. Co.*, 765 F.2d 1060, 1064 (11th Cir. 1985); 2 L. JAYSON, *supra* note 103, § 248.01.

137. 108 S. Ct. 1954 (1988).

138. *Id.* at 1957.

139. *Id.* at 1958.

140. *Id.*

141. 108 S. Ct. at 1958-59.

142. But note, however, that the discretionary function exception was not designed to cover all acts of regulatory agencies and their employees, but only such acts as are discretionary in nature. See, H.R. REP. NO. 1287, 79th Cong., 1st Sess. 6 (1945).

should be extended to federal officials or employees acting within the scope of their employment. The *Westfall v. Erwin* decision was perceived by Congress as creating a crisis in the federal workplace by virtue of its holding which would immunize upper level employees while leaving lower ranking employees liable. Congress responded to Justice Marshall's express invitation to consider the issue and to fashion a more appropriate legislative solution.

The Act appears to be both sword and shield at the same time. By providing claimants with the FTCA as an exclusive remedy, injured plaintiffs have potential access to an efficient administrative claims procedure and the nation's most solvent defendant. On the other hand, the FTCA contains numerous restrictions and exclusions which could leave claimants who are clearly injured at the behest of a negligent sovereign without an alternate source of redress. All in all, the newly enacted legislation appears to be an even-handed approach to the complex and delicate task of balancing the need to protect a nation's citizens with the need to protect its civil servants. Only time and the manner in which the district courts apply the Act will be the ultimate arbiters of the Act's effectiveness and fairness.

WILLIAM T. CORNELL

