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Federal Tort Claims Act and French Law of Governmental Liability: A Comparative Study

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FEDERAL TORT CLAIMS ACT AND FRENCH LAW OF GOVERNMENTAL LIABILITY: A COMPARATIVE STUDY

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Governmental liability for tort seems to be a field in which a comparative study is particularly appropriate. The subject is a segment of legislative reforms in which the influence of foreign systems has been marked. Highly developed foreign systems, especially the French, played their rôle in the demands among scholars for legislative reforms. The late Professor Edwin Borchard of Yale Law School, for many years one of the chief sponsors of federal legislation, made detailed studies of the foreign laws of governmental responsibility for tort.[1]

The Federal Tort Claims Act of 1946[2] stands as the accomplishment of the movement for legislative reform. As the "product of some twenty-eight years of congressional drafting and redrafting, amendment and counter-amendment,"[3] the Federal Tort Claims Act was passed by the 79th Congress as Title IV of the Legislative Reorganization Act of 1946.

BASIC THEORY OF THE GOVERNMENT'S LIABILITY UNDER THE FEDERAL TORT CLAIMS ACT AND IN THE FRENCH PRACTICE

Governmental liability under the Federal Tort Claims Act generally follows the private law rules of tort. Section 2674 of the Judicial Code[4] provides that the United States shall be liable "in the same manner and to the same extent as a private individual under like

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1. See his series of articles entitled *Government Liability in Tort*, 34 YALE L.J. 1, 129, 229 (1924-25), and *Governmental Responsibility in Tort*, 36 YALE L.J. 1, 757, 1039 (1926-27), 28 COL. L. REV. 577, 734 (1928). Professor Borchard dealt with foreign law extensively in his articles in 36 YALE L.J. and especially in 28 COL. L. REV. In his monumental treatise of international law, DIPLOMATIC PROTECTION OF CITIZENS ABROAD 116-76 (1915), Professor Borchard had devoted a substantial chapter to a comparative study of the municipal law of various countries concerning governmental liability for tort.

As a research assistant to Professor Borchard in 1934-1935, the author first had occasion to study, on a comparative basis, the laws of governmental responsibility for tort.

2. 60 STAT. 842 (1946), as amended, 28 U.S.C.A. §§ 1346(b), 1402(b), 1504, 2110, 2401(b), 2402, 2411(b), 2412, 2671 ff. (1950).

3. United States v. Spelar, 338 U.S. 217, 219-20, 70 Sup. Ct. 10, 94 L. Ed. 3 (1949).

4. 28 U.S.C.A. § 2674 (1950).

circumstances." And in Section 1346(b),[5] the claims are described as claims for damages caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, "under 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."

Within the limits specified in the Act, Congress thus adopted the rules of tort law applicable to relations between private individuals. As Circuit Judge Hutcheson described it in the case of *United States v. Campbell*:[6]

> "The whole structure and content of the Federal Tort Claims Act makes it crystal clear that in enacting it and thus subjecting the Government to suit in tort, the Congress was undertaking with the greatest precision to measure and limit the liability of the Government, under the doctrine of respondeat superior, in the same manner and to the same extent as the liability of private persons under that doctrine were measured and limited in the various states."

This statement may be compared with the language used by the French *Tribunal des Conflits* in the celebrated *Blanco* case.[7] That case, decided in 1873, has become the fountainhead of the French law of governmental responsibility for tort. It involved liability of the Government for an injury sustained when a wagon was pushed by employees of a government tobacco warehouse from the warehouse onto the street. Ruling on a question of jurisdiction, namely, that cases of governmental liability for tort are not subject to the jurisdiction of the ordinary civil courts but are within that of the administrative courts, the *Tribunal des Conflits* made the following pronouncement:

> "The responsibility which may be incumbent upon the Government for damage caused to individuals by acts of persons employed by the Government in public service, cannot be governed by the rules which have been established in the Civil Code for the relations between individuals. Governmental responsibility is neither general nor absolute; it has its special rules which vary according to the needs of the service and the necessity of reconciling the rights of the Government with private rights."[8]

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5. 28 U.S.C.A. § 1346(b) (1950).

6. 172 F.2d 500, 503 (5th Cir. 1949), *cert. denied*, 337 U.S. 957 (1949). In that case, the Government was held not liable when a person was knocked down by a sailor who, without orders, had gotten off a troop train and was running to get back on the train.

See also the thoughtful comments on the philosophy of the Act by Judge Johnson in the recent case of National Mfg. Co. v. United States, 22 U.S.L. WEEK 2373 (8th Cir. Feb. 16, 1954).

7. Feb. 8, 1873, [1873] Dalloz Jurisprudence Générale [hereinafter Dalloz] III.20, 22.

8. ". . . la responsibilité qui peut incomber à l'Etat pour les dommages causés aux particuliers par le fait des personnes qu'il emploie dans le service public, ne peut être régie par les principes qui son établis dans le code civil pour les rapports de particulier à particulier . . . cette responsabilité n'est ni

As usual, the statement of the "Commissaire du Gouvernement"[9] elaborated upon the rationale of the decision. Concluding that the rules of tort in the Civil Code are inapplicable to the Government when it exercises a public function,[10] he reasoned:

> "It appears to me impossible — in reason and justice — to assimilate completely the state to a private person with respect to its relations with its agents and with respect to the resulting consequences regarding liability toward third persons. First, the rôle of the state, in performing public services, is not voluntary but is mandatory; it has been imposed upon the state not for private purpose but in the interest of all. — Secondly, we must also consider the importance and extent of these services and (leaving aside the Army and Navy so as to mention only administrative services) the enormous number of agents of all kinds, of public officers, auxiliary agents, employees, and attendants whom the services require; the conditions of their appointment and advancement which, frequently regulated by statute or general regulations, do not always leave freedom of choice to the administration; the infinite variety of functions and, consequently, of relationships existing between the state and its agents in connection therewith."[11]

OUTLINE OF THE FRENCH LAW OF GOVERNMENTAL RESPONSIBILITY

The historical development of the French law of government responsibility was set forth by Léon Blum, then Commissaire du Gouverne-

générale ni absolue; elle a ses reglès spéciales qui varient suivant les besoins du service et la nécessité de concilier les droits de l'Etat avec les droits privés." The language was repeated verbatim by the Tribunal des Conflits in 1945 in Du Verne v. Department de la Nièvre (Jan. 20, 1945, Rec. [Recueil des arrêts du Conseil d'Etat, statuant au contentieux, etc.; hereinafter Rec.] 274) where the Tribunal ruled that the administrative law courts have jurisdiction over actions against the Government for torts committed by a person to whose guardianship public assistance authorities had committed their ward.

The principle of the nonapplicability of the *respondeat superior* rule of the Civil Code (Art. 1384) was discussed in 1 LAFERRIÈRE, TRAITÉ DÉ LA JURIDICTION ADMINISTRATIVE 677-80 (2d ed. 1896), in what has become a classic of French administrative law, from the viewpoint of statutory construction, legislative history, and basic principles.

9. For a brief description of the position of such "Commissaires du Gouvernement," see *infra*, note 16.

10. The commissaire emphasized that the traditional French rule prohibiting interference by the judiciary with the administration should cover claims against the Government whenever a public service was involved, even though the relief sought was only for money damages.

11. [1873] Dalloz, III.20, 21, col. 3: "Il nous semble impossible, en bonne raison et en bonne justice, d'assimiler complètement l'Etat à un simple particulier pour ses rapports avec ses agents et pour les conséquences qui en peurent dériver au point de vue de sa responsabilité vis-à-vis des tiers. — Et d'abord, le rôle de l'Etat, dans l'accomplissement des services publics, est non pas volontaire, mais obligatoire; il lui est imposé non dans un intérêt privé, mais dans l'intérêt de tous. — En deuxième lieu, il faut considérer l'importance et l'étendue de ces services, et (en laissant à part l'armée de terre et de mer pour ne parler que des services administratifs) le nombre énorme d'agents de toutes sortes, fonctionnaires publics, agents auxiliares, employés, gens de service qu'ils nécessitent; les conditions de leur nomination et de leur avancement qui, réglés souvent par la loi ou par des règlements généraux, ne laissent pas toujours à l'administration la liberté de son choix; la variété infinie des emplois, et, par suite, des rapports qui s'établissent entre l'Etat et ses agents à leur occasion."

ment, in his statement in the case of *Lemonnier*.[12] Originally, a provision of the French Constitution of the Year VIII of the Revolutionary Period (*i.e.*, December, 1799) prevented suit against the officer personally, except with permission of the Council of State, and a legal reasoning along the lines of "force majeure" precluded suit against the Government. In 1870, that provision of the Constitution of the Year VIII was repealed. Blum expressed the view that the purpose of the repeal actually was to confer broad jurisdiction upon the ordinary courts:

> "It was the intention to subject to a personal remedy — like in England, for example — the individual officer who had given the order, or executed it, in cases of arbitrary arrest, illegal seizure, or wilful irregularity of any kind."[13]

But in construing that repeal, the *Tribunal des Conflits* was strongly influenced by the general principle of separation of powers (believed in France to prohibit interference by the regular courts with the executive) and recognized the jurisdiction of the ordinary courts only for acts involving a "faute personelle," *i.e.*, faults detached from the public service.[14]

The *Blanco* case established the jurisdiction of the Conseil d'Etat (Council of State), the highest French administrative tribunal, for suits against the Government. Government responsibility for tort has come to occupy a most prominent rôle in the practice of that tribunal. Each volume of decisions of the Conseil d'Etat covers one whole year,[15] and, for example, of the total of reported decisions of 1950 (well over 1,000), approximately one-sixth was concerned with governmental liability for tort. Almost 20% of those cases involved accidents caused by government automobiles and trucks.

Jurisdictional and procedural issues, especially the peculiar system of the "commissaire du gouvernement"[16] and the institution of the

12. July 26, 1918, Rec. 761; see especially 765-67. See also STREET, GOVERNMENTAL LIABILITY: A COMPARATIVE STUDY 15-19 (1953); PRATT, *Tort Liability of the State*, Part II of ROKHAM AND PRATT, STUDIES IN FRENCH ADMINISTRATIVE LAW (1947); for a summary description of the French law and its history see Blachly and Oatman, *Approaches to Governmental Liability in Tort: A Comparative Survey* 9 LAW AND CONTEMP. PROB. 181, 205 (1942).

13. "On voulait que — comme en Angleterre par exemple — en cas d'arrestation arbitraire, de saisie illégale, d'irrégularité maligne d'une espèce quelconque, le fonctionnaire qui aurait donné ou executé l'ordre fut passible d'une sanction personelle." July 26, 1918, Rec. 761, 766.

14. See Pelletier, Tribunal des Conflicts, July 26, 1873; Recueil des Arrêts du Conseil d'Etat, PART II, 1st supp. 117.

15. This is possible because the Conseil d'Etat, like other French courts, writes its opinions in the briefest, most skeleton form; usually, only conclusions are stated, and many cases consist merely of a fairly small number of sentences. A large number of cases is not reported verbatim but merely appears, with one sentence, in the table of contents of the annual volume.

16. For a recent discussion, in English, of the commissaires du gouvernement, see Hamson, *Le Conseil d'Etat Statuant au Contentieux*, 68 L.Q. REV. 60, 77 ff. (1952). They are attached to the Conseil d'Etat but not advocates of the Gov-

French administrative law courts[17] are outside the scope of this article. It is generally recognized now that the French administrative courts do not suffer in their rôle as protectors of the individual from the fact that they have been organized apart and entirely separate from the regular judicial system. Dicey's[18] general deprecation of the French system, characterizing it as "this scheme of so-called administrative law" has long since been corrected.[19] Experts in the field, such as Professors Léon Duguit[20] and Roger Bonnard[21] have shown that the special administrative courts in France are inclined to grant wider protection to the rights of the individual than are the ordinary French courts.

There are additional basic distinctions between the French system and our law. The French law is almost completely judge-made.[22] There is no statute in France similar to the Federal Tort Claims Act or to our general state statutes.[23] Principles of royal non-liability for tort disappeared earlier in France, and no special statute for governmental liability was required.

Contrary to the situation in most of our states, the law of torts is codified in France (Code Civil, Articles 1382-1386), though extremely briefly and in general terms. But no codification exists with respect

ernment. If the Government desires to argue a special point, it is represented by special counsel. Though not a voting member of the tribunal, the commissaire publicly announces his opinion and his reasons therefor, at much greater length than the court. See the publication LE CONSEIL D'ETAT, LIVRE JUBILAIRE (1952) commemorating its 150th anniversary, especially the series of articles on pages 143-373; and the review of the volume by Professor Yntema in 2 AM. J. COMP. LAW 409 (1953).

17. That institution was considered extensively in this country in connection with various proposals, within the last two decades, to improve the procedure of administrative justice, proposals which in June, 1946, led to the enactment of the Administrative Procedure Act, 5 U.S.C.A. §§ 1001-1011 (1950). *E.g.*, UHLER, REVIEW OF ADMINISTRATIVE ACTS (1942), and a series of articles by Professor Riesenfeld, entitled *The French System of Administrative Justice: A Model for American Law?* 18 B.U.L. REV. 48, 400, 715 (1938).

18. LAW OF THE CONSTITUTION 308 (5th ed. 1897); LECTURES INTRODUCTORY TO THE STUDY OF THE LAW OF THE CONSTITUTION 169 ff., 207-08 (2d ed. 1886) (stating that it is hardly fanciful to compare the Star Chamber with the Conseil d'Etat).

19. Parker, *State and Official Liability* 19 HARV. L. REV. 335 (1906); Borchard, *Governmental Responsibility in Tort* 36 YALE L.J. 1039, 1083 (1927). See Garner, *French Administrative Law* 33 YALE L.J. 597 (1924); PRATT, *op. cit. supra* note 12, at 62; Frankfurter, *Foreword* 47 YALE L.J. 515, 517 (1938). See also Garner, *Anglo-American and Continental European Administrative Law* 7 N.Y.U.L.Q. REV. 387, 401 (1929); Schwartz, *French and Anglo-American Conceptions of Administrative Law* 6 MIAMI L.Q. 433, 439 (1952).

20. LES TRANSFORMATIONS DU DROIT PUBLIC 169.

21. PRÉCIS ELÉMENTAIRE DE DROIT ADMINISTRATIF, 79 (1926); see also Borchard, *French Administrative Law*, 18 IOWA L. REV. 133 (1933); Hamson, *Le Conseil d'Etat Statuant au Contentieux*, 68 L.Q. REV. 60, 72 (1952); generally, 2 GOODNOW, COMPARATIVE ADMINISTRATIVE LAW 231 (1893).

22. This is true of most French administrative law. WALINE, TRAITÉ ÉLÉMENTAIRE DE DROIT ADMINISTRATIF 21 (6th ed. 1951).

23. Statutory regulations giving jurisdiction to the civil courts exist for special subject matters, such as liability for war damages, riots, customs, railways, indemnity to persons innocently convicted, etc.

to the Government's liability. On the other hand, our federal law of governmental liability for tort is common law only to the extent that it is the common law of the various states which determines the rules of tortious liability. But the extent to which these rules are made applicable to the Government, is a matter regulated by statute.

Broadly speaking, the Government's liability has constantly been expanded in France. The original purpose of the *Blanco* decision apparently was to free the Government of a rigorous application of the rules of private law, especially the strict rules of *respondeat superior*.[24] But in many ways the development of the practice has been in the opposite direction. Liability has been affirmed without the necessity of showing the fault of an individual employee[25] and, more frequently than in private law, the rule of liability without fault has been adopted.

In the early practice of the Conseil d'Etat, until the end of the 19th century, the Government was held liable only if the function involved was an "acte de gestion," *i.e.*, when the Government was acting in a managerial capacity, such as the administration of public property or public utilities. That limitation was abandoned, and the Government's liability was extended to other matters. That rule was established in the *Feutry* case.[26] A dangerous inmate of an insane asylum had escaped and had caused damage by committing arson. Improper supervision of the insane was alleged. Discussing the theoretical distinction, —frequently made in this country for municipal corporations[27]— between proprietary and sovereign functions, the commissaire stated that the distinction

> "has no basis in law, is not predicated upon anything real and in no way corresponds with the reality of facts . . . . Examination of each of the administrative actions which writers or courts arbitrarily classify in one of the two categories, shows that one could also have included it in the other category."[28]

24. See WALINE, *op. cit. supra* note 22, at 576 ff.
25. See infra, p. 259.
26. Feutry v. Departement de l'Oise, Tribunal des Conflits, Feb. 29, 1908, Rec. 208, 217 (containing the significant statements of the commissaire). See also the statement by the commissaire in the Thérond case, Mar. 4, 1910, Rec. 193.
27. The distinction has met with opposition. Doddridge, *Distinction between Governmental and Proprietary Functions of Municipal Corporations*, 23 MICH. L. REV. 325 (1925); Lloyd, *Municipal Tort Liability in New York*, 23 N.Y.U.L.Q. REV. 278 (1948). There is no such express, general distinction under the Federal Tort Claims Act. See *In re* Texas City Disaster Litigation, 197 F.2d 771, 778 (5th Cir. 1952), *aff'd sub nom.* Dalehite v. United States, 346 U.S. 15 (1953); Somerset Seafood Co. v. United States, 193 F.2d 631 (4th Cir. 1951); Cerri v. United States, 80 F. Supp. 831, 833 (N.D. Cal. 1948). Of course, the exception from the Act of claims based upon the exercise, or failure to exercise, a "discretionary function" (see *infra*, p. 258) and the provision of the Act creating liability "in the same manner and to the same extent as a private individual under like circumstances" [28 U.S.C.A. § 2674 (1950)] to a large extent may serve to accomplish a similar result.
28. ". . . cette distinction qui . . . n'a aucune base légale, qui ne repose sur rien de réel et qui ne correspond nullement à la realité des faits. . . . Quand

The Government's liability was extended to many fields of "sovereign functions." "Actes de gouvernement" remain exempt from liability, but those exemptions have substantially been limited to legislative and diplomatic functions.[29]

EXCEPTIONS

The Federal Tort Claims Act specifies a catalogue of exceptions. A comparison of some of them with the French laws shows the following:

(a) *Willful torts.*—Claims arising out of "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights" are specifically excepted from the Act.[30] Excessive physical force used by a military police officer was deemed to fall within the assault and battery exception,[31] and, in accordance with the law of the particular state (Washington), a case of excessive interrogation of a civilian by an army sergeant, resulting in temporary insanity, was excepted from the Act as an assault.[32] A situation where a school allegedly suffered in its reputation and business due to action of the Veterans Administration advising veterans against enrolling, was believed to fall within the exception.[33]

No similar exceptions were developed in the French practice. Thus, recovery has been granted in France in cases of assault,[34] arbitrary arrest or detention which are not part of criminal investigations,[35] and attacks upon an individual's reputation.[36]

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on examine les uns après les autres, les actes administratifs que les auteurs ou les tribunaux classent arbitrairement dans l'une de ces deux catégories, on se rend compte qu'on le pourrait tout assui bien comprendre dans l'autre." Feb. 29, 1908, Rec. 208, 216.

29. Diplomatic functions in the protection of French nationals remain exempt. *E.g.*, Huter, July 22, 1921, Rec. 727 (claim for share in fund paid by Germany under treaty for indemnification of Alsatians who had suffered for political reasons). Failure to grant, or negligence in granting, diplomatic protection, is not actionable. Poujade, Dec. 23, 1904, Rec. 873; Moninot, Feb. 11, 1916, Rec. 79; Bastide, May 31, 1918, Rec. 525.

The exception of actes de gouvernement also covers matters such as state of siege and acts of war. See, generally, DUEZ, LES ACTES DE GOUVERNEMENT (1935).

30. 28 U.S.C.A. § 2680(h) (1950).

31. Lewis v. United States, 194 F.2d 689 (3d Cir. 1952).

32. United States v. Hambleton, 185 F.2d 564 (9th Cir. 1950).

33. Fletcher v. Veterans Administration, 103 F. Supp. 654 (E.D. Mich. 1952); *cf.* Gubbins v. United States, 192 F.2d 411, 413 (D.C. Cir. 1951) (putting person on the "Proclaimed List" as a foreign national under the Trading with the Enemy Act).

34. *E.g.*, Sinapi, Mar. 30, 1938, Rec. 331 (brutality of a police officer).

35. Brécard, Nov. 25, 1949, Rec. 515; Durand-Dastes and Biziere, Mar. 24, 1950, Rec. 191 (extended, unlawful detention in the course of the liberation of France in 1944). The ordinary courts have some jurisdiction over certain damage suits for unlawful arrest; see *infra*, note 88.

36. Demoiselle Ducasse, Feb. 21, 1936, Rec. 232 (young girl questioned by police office on a public street, without justification, whether she was listed in a register of prostitutes maintained by the town); see also Sieur Sudre, Apr. 3,

(b) *Torts in foreign countries.*—Claims "arising in a foreign country" are specifically excepted.[37] The provision excludes torts committed abroad, although the territory is under a long-term lease to the United States,[38] or is under military occupation by the United States.[39] This exception is in line with the principle of the Act that the government's liability shall be "in accordance with the law of the place where the act or omission occurred."[40] The French law of governmental liability being *sui generis* and independent of the private law rules of torts, the Conseil d'Etat has not made such an exception.[41]

(c) *Combatant activities.*—Claims "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war" are excepted.[42] The Conseil d'Etat has made a similar exception by excluding so-called war damages. Special statutes, the Act of April 17, 1919, and the Act of October 28, 1946, dealt with that subject and are held to be the exclusive remedies.[43]

(d) *Mail delivery.*—The Federal Tort Claims Act specifically excepts "any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matters."[44] French law contains a similar principle of nonresponsibility. Special legislation first enacted at the end of the 18th century (Year V of the period of the French Revolution) so provides specifically. The principle of nonresponsibility covers

1936, Rec. 452 (injury to a sculptor's reputation ("droit moral") because of damage to a fountain due to inadequate upkeep); Sieur Gillard, Nov. 3, 1933, Rec. 995; Epoux Brusteau, Dec. 8, 1948, Rec. 465 (defamatory statements in an administrative order).

37. 28 U.S.C.A. § 2680(k) (1950).

38. United States v. Spelar, 338 U.S. 217, 70 Sup. Ct. 10, 94 L. Ed. 3 (1949) (Newfoundland air base).

39. Cobb v. United States, 191 F.2d 604 (9th Cir. 1951), *cert. denied*, 342 U.S. 913 (1952).

40. 28 U.S.C.A. § 1346(b) (1950). United States v. Spelar, 338 U.S. 217, 221, 70 Sup. Ct. 10, 94 L. Ed. 3 (1949): "Congress . . . was unwilling to subject the United States to liabilities depending upon the laws of a foreign power." See statement by Assistant Attorney General Francis M. Shea, *Hearings before Committee on the Judiciary on H.R. 5373 and H.R. 6463*, 77th Cong., 2d Sess. 35 (1942).

41. See Corsin v. Ministre des affaires étrangères, Oct. 24, 1930, Rec. 864 (valuables entrusted at the time of the Russian Revolution by a French citizen to the Danish legation in St. Petersburg, which were lost at the French legation in Stockholm). Vecchini, Nov. 12, 1949, Rec. 480 (action of the French minister at Caracas, Venezuela).

42. 28 U.S.C.A. § 2680(j) (1950). But activities having merely an incidental relation to some activities directly connected with previously ended fighting on war fronts are not "combatant activities" within the meaning of the clause. Johnson v. United States, 170 F.2d 767 (9th Cir. 1948).

43. See Dame Chpolansky, Nov. 30, 1945, Rec. 244 (arrest and deportation of civilian in 1942); Sieur Braggins, Feb. 28, 1947, Rec. 87. The case of Sieur Salgues, July 11, 1947, Rec. 315 (person arrested and maltreated by military police in June, 1940) has been cited as possibly suggesting a modification of the practice, on the ground that a special statute of May 20, 1946, though not mentioned in the decision, may have been applicable. DUEZ AND DEBEYRE, TRAITÉ DE DROIT ADMINISTRATIF 470 (1952).

44. 28 U.S.C.A. § 2680(b) (1950).

regular mail, as well as telegram and telephone services, both government operated by the so-called P.T.T.[45]

(e) *Judicial officers.* — Judges are not within the contemplation of the Federal Tort Claims Act.[46] A judge "is a member of the independent judiciary and is not under the control of the United States any more than a member of the legislative department is in legislating."[47] There is, however, a special statute granting relief to persons unjustly convicted and imprisoned.[48] The statute does not cover false arrest and imprisonment.[49] It limits recovery to $5,000 and specifies in detail how the unjust conviction must be shown by a court or pardon certificate.[50]

In France, a similar principle has been developed excepting judicial acts. The principle is given a broad application. It includes matters which are preparatory to judicial determinations and acts rendered in execution of judicial decisions. It was held that the Conseil d'Etat had no jurisdiction, when in the course of a criminal investigation a police officer allegedly made an arbitrary arrest.[51] Jurisdiction was, likewise, denied when a third person was killed by the "police judiciare" apprehending criminals.[52] The principle of nonresponsibility for judicial acts was relied on in a case involving an alleged error of the conseil de revision in declaring fit for military service a man suffering from hernia.[53]

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45. See DUEZ AND DEBEYRE, *op. cit. supra* note 43, at 466. A statute of Nov. 17, 1941, extended the principle of nonresponsibility to delays in the service of postal accounts (a method used for transmitting money).

46. See the definition of the term "employee of the government" in the Act [28 U.S.C.A. § 2671 (1950)] which includes only the executive branch.

47. Cromelin v. United States, 177 F.2d 275, 277 (5th Cir. 1949), *cert. denied*, 339 U.S. 944 (1950) (court-appointed trustee in bankruptcy likewise outside the scope of the Act).

48. 52 STAT. 438 (1938), 28 U.S.C.A. §§ 1495, 2513 (1950). Here, too, Professor Borchard was a protagonist of legislative reform. He called attention to the lack of a remedy in such situations. On a comparative basis, Professor Borchard described the pertinent laws of most European countries, including France, tracing the history, theory, and contents of the statutes. BORCHARD, CONVICTING THE INNOCENT 380-406 (Yale University Press, 1932).

49. Ekberg v. United States, 76 F. Supp. 99 (Ct. Cl. 1948). False imprisonment and false arrest are specifically excepted also from the Federal Tort Claims Act, see *supra*, p. 252. Ekberg v. United States, *supra*, at 101; Denahey v. Isbrandtsen Co., 80 F. Supp. 180 (S.D.N.Y. 1948).

50. Verdict of not guilty at second trial does not make issuance of certificate of innocence by trial judge mandatory. Rigsbee v. United States, 204 F.2d 70 (D.C. Cir. 1953). See also Simclair v. United States, 109 F. Supp. 529 (Ct. Cl. 1953), *cert. denied*, 345 U.S. 974 (1953); Weiss v. United States, 91 F. Supp. 742 (Ct. Cl. 1950), 95 F. Supp. 176 (S.D.N.Y. 1951); Hadley v. United States, 66 F. Supp. 140 (Ct. Cl. 1946), *cert. denied* 329 U.S. 815 (1947).

51. Sieur Trillat v. Etat Francais, dame Lanfrey et sieur Carlin, Tribunal des Conflits, Dec. 14, 1946, Rec. 334. The rule is different in cases of unlawful arrest not forming part of criminal investigation, see *supra*, p. 252. But there is some jurisdiction of the ordinary courts over damage suits against the officer for unlawful arrest; see *infra*, note 88.

52. Bugnon, Feb. 14, 1945, Rec. 33.

53. Hoffmann, Apr. 27, 1917, Rec. 334. The Conseil d'Etat noted that the draftee had failed to attack the decision of the conseil de revision, but concluded that in any event there was no basis for liability. The assertion was

The principle of non-liability for judicial acts is sometimes[54] explained as a consequence of the safeguards, procedural and evidentiary, protecting judicial action, sometimes[55] as the result of the hesitancy of the administrative tribunals to impinge upon the civil courts.

Like this country, France has a special statute providing for indemnity in cases of miscarriage of criminal justice. A statute of June 8, 1895,[56] amending the Code of Criminal Procedure (Code d'instruction criminelle, art. 446), created the right of indemnity of a convicted person whose innocence has been established by a "révision" of the judgment. Damages are awarded by such judgment of "revision," *i.e.*, not the administrative court.[57] A more recent statute, Article 7 of the Act of February 7, 1933,[58] makes the Government liable in cases where a civil judge has acted fraudulently or has committed a serious professional fault in the conduct of a trial. Suit must be brought in the ordinary courts, against the judge personally, but the Government is required to pay the judgment, retaining a right of reimbursement.

(f) *Tax collection.* — The Federal Tort Claims Act specifically excludes from its operation "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."[59] In France, it has been recognized that in the interest of efficient tax collection the activities of treasury officials should not be fettered by undue fear of governmental liability. In its process of judicial legislation, the Conseil d'Etat has established the requirement that, in order to hold the Government liable in tort in connection with tax collection, grave fault, "faute lourde" must be shown.[60]

(g) *Groups of persons excepted as claimants because covered by special laws.* — In *Feres v. United States*[61] the Supreme Court established that the Act does not apply to injuries sustained by members

also made, unsuccessfully, that in operating on him, the medical and hospital personnel of the Army had acted negligently; see *infra*, p. 256, for the exclusion of such situations.

54. *E.g.*, WALINE, TRAITÉ ÉLÉMENTAIRE DE DROIT ADMINISTRATIF 606 (6th ed. 1951).

55. DUEZ AND DEBEYRE, TRAITÉ DE DROIT ADMINISTRATIF 463-64 (1952).

56. [1895] Dalloz, IV.80.

57. See also Pollet, May 31, 1935, Rec. 642 (miscarriage of justice by military courts).

58. [1933] Dalloz, IV.65.

59. 28 U.S.C.A. § 2680(c) (1950). See Chambers v. United States, 107 F. Supp. 601 (D. Kans. 1952); Broadway Open Air Theatre, Inc. v. United States, 208 F.2d 257 (4th Cir. 1953).

60. See *e.g.*, Demoreuil, July 1, 1927, Rec. 739 ("faute d'une gravité exceptionelle"); Société Jules Chanfray, May 21, 1948, Rec. 223.

61. 340 U.S. 135, 71 Sup. Ct. 153, 95 L. Ed. 152 (1950).

of the armed forces on active duty,[62] resulting from the negligence of others in the armed forces. The rationale of the exception, which is not specifically spelled out in the Act, seems to lie in the fact that a comprehensive system of administrative benefits for such injuries is on the statute books.[63] Speaking for a unanimous Court, Mr. Justice Jackson emphasized that there cannot be an analogous liability of a "private individual" growing out of "like circumstances," that the Act's reference to the "law of the place where the act or omission occurred" strongly suggests its inapplicability to the case, and that the Act's silence concerning the special compensation statutes of members of the armed forces demonstrates that the Act was not intended to grant recovery for injuries incident to military service.

The *Feres* opinion has become an important precedent leading to the exclusion of other groups of persons from the benefits of the Federal Tort Claims Act. Thus, the Court of Appeals for the District of Columbia has held that because of the existence of a special compensation statute, veterans, too, may not recover under the Federal Tort Claims Act for injuries due to malpractice in a veterans' hospital;[64] the Federal Tort Claims Act is not available to a member of the U. S. Park Police while on duty;[65] nor may an inmate of a federal reformatory recover under the Act.[66] An amendment to the Federal Employees' Compensation Act, October 14, 1949, codified the principle of exclusiveness by providing that the liability of the United States under that Act is exclusive and in place of all other liability under "any Federal tort liability statute."[67]

In France, the Conseil d'Etat developed an identical principle. It

62. The Act was applied, however, in a case where a member of the armed forces was killed by an army truck while not on active duty, the accident having no connection with his army career. Brooks v. United States, 337 U.S. 49, 69 Sup. Ct. 918, 93 L. Ed. 1200 (1949) (the amounts payable under servicemen's benefit laws to be deducted from the recovery under the Federal Tort Claims Act).

63. That principle was adopted also in the interpretation of another tort liability statute, the Public Vessels Act [46 U.S.C.A. § 781 (1944)]. Federal employees covered by the Federal Employees' Compensation Act may not proceed under the Public Vessels Act. Johansen v. United States, 343 U.S. 427, 72 Sup. Ct. 849, 96 L. Ed. 1051 (1952) (citing the *Feres* decision).

64. O'Neil v. United States, 202 F.2d 366 (D.C. Cir. 1953); Pettis v. United States, 108 F. Supp. 500 (N.D. Cal. 1952). Conversely, the Federal Tort Claims Act was held applicable where a civilian employee was treated in a veterans' hospital for a disease which, antedating the employment, was not covered by the special compensation system. Canon v. United States, 111 F. Supp. 162 (N.D. Cal. 1953).

The recent case of Brown v. United States, 209 F.2d 463 (2d Cir. 1954), reached a conclusion opposite to the *O'Neil* case.

65. Lewis v. United States, 190 F.2d 22 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 869 (1951).

66. Sigmon v. United States, 110 F. Supp. 906 (W.D. Va. 1953) (compensation statute for Federal prisoners (18 U.S.C.A. § 4126 (1951) held exclusive).

67. 63 STAT. 861 (1949), 5 U.S.C.A. § 757(b) (1950); Sasse v. United States, 201 F.2d 871 (7th Cir. 1953); Johansen v. United States, 343 U.S. 427, 436-38, 72 Sup. Ct. 849, 96 L. Ed. 1051 (1952).

predicated such result upon the broad idea that the special laws providing for pensions and disability benefits of government employees and soldiers have precedence over the general, judge-made rules of governmental tort liability, even though the special laws may not grant complete indemnification for an injury sustained due to a "faute de service public."[68] Applications of the principle are numerous. Thus, there were excluded from the general tort law injuries suffered, *e.g.*, by police officers,[69] soldiers,[70] teachers,[71] and other civil servants.[72] Recently, however, there has been a certain liberalizing trend in cases where the injury was sustained by an official while not on duty. Like in *Brooks v. United States*,[73] the difference between the benefits under the special laws and the larger amount of damages under the general tort law has been allowed. Thus, funeral expenses and special damages —to the extent not covered by the pensions— were awarded to a widow of a civil servant killed while not on duty,[74] and special damages were granted to a widow of a retired army officer.[75] Besides, there is some authority for the proposition that the general tort rules remain applicable to the extent that no pension rights are granted by the special legislation to the particular type of claimant (*e.g.*, mother of the deceased.)[76]

(h) *Execution of Statute or Regulation — Discretionary Function.* — Claims based upon acts or omissions of employees exercising due care "in the execution of a statute or regulation, whether or not such statute or regulation be valid," are excepted from the Federal Tort Claims Act; also, there are excepted claims based upon the exercise, or failure to exercise, a discretionary function, "whether or not the discretion involved be abused."[77]

The exception of acts carrying out statutes or regulations, whether valid or not, "bars tests by tort action of the legality of statutes or

68. See Veuve Alaize, Oct. 28, 1938, Rec. 801.
69. Sieur Reynier, Oct. 21, 1942, Rec. 278.
70. Dame veuve Renucci, May 21, 1948, Rec. 227; Dame Guyot, Dec. 19, 1947, Rec. 475; Epoux Torrès, Feb. 11, 1944, Rec. 54 (involving death due to alleged malpractice in an army hospital; the suit for damages was dismissed, the Conseil d'Etat leaving it undecided whether the claimants would meet the specific requirements for pensions granted to survivors); see Dame Maida Aicha, Feb. 4, 1948, Rec. 58.
71. Dame veuve Munet, June 7, 1946, Rec. 163 (damages claimed for medical expenses and for premature retirement due to accident caused by alleged faute de service).
72. Dame veuve Comtet, May 21, 1947, Rec. 213.
73. 337 U.S. 49, 53, 69 Sup. Ct. 918, 93 L. Ed. 1200 (1949).
74. Dame veuve Lafourcade, Feb. 10, 1950, Rec. 104.
75. Dame veuve Bizon, Jan. 21, 1949, Rec. 31; see Dame veuve Cusson, Feb. 18, 1949, Rec. 86 (injury caused by vehicle of U.S. military forces; pursuant to agreement between the two countries, France had assumed the liability).
76. See Veuve Clement, Nov. 12, 1949, Rec. 481 (dependent parent of a civil servant).
77. 28 U.S.C.A. § 2680(a) (1950).

regulations."[78] In France there is no judicial review of the constitutionality of statutes, so that the concept of an invalid statute does not arise in that form. But, aside therefrom, French law traditionally has reached the same result, in that it has held that tort liability of the government cannot be predicated upon a statute or regulation. In 1838, the Conseil d'Etat rejected a claim by a tobacco manufacturer who was damaged by a law of 1835 establishing a governmental tobacco monopoly.[79] More recently, damages were granted in some extreme cases, on the principle of equality, where the enactment was silent on the question of indemnity.[80] But in most cases recovery is denied.[81] When recovery is given, it is not on the basis of a "fault" but on the theory of absolute liability.[82]

The exception from the Federal Tort Claims Act of discretionary functions, even though there be an abuse of discretion, is most significant. The important decision of the Supreme Court in *Dalehite v. United States*[83] (the Texas City disaster litigation) was predicated upon it. The Court held that "discretionary function or duty" includes more than the initiation of government programs and activities.[84] No discussion of the scope and implications of the *Dalehite* opinion will here be attempted. It may be mentioned only that the court in the *Dalehite* opinion described the Act as being "unique in Anglo-American jurisprudence in its explicit exception for discretion."[85]

French law has no such exception.[86] This will become apparent from the description on the next pages of the situations in which a "faute de service public" was found to exist. It is clear that "détourne-

78. Dalehite v. United States, 346 U.S. 15, 33, 73 Sup. Ct. 956, 97 L. Ed. 1427 (1953).

79. DUEZ AND DEBEYRE, TRAITÉ DE DROIT ADMINISTRATIF 458 ff. (1952); 2 LAFERRIÈRE, TRAITÉ DE LA JURIDICTION ADMINISTRATIVE 13 (2d ed. 1896) (stressing the principle of sovereignty).

80. Société anonyme des produits laitiers "La Fleurette," Jan. 14, 1938, Rec. 25. [1938] Dalloz, III.41 (prohibition of cream substitute, which was not harmful; the Conseil d'Etat found that the individual producer should not bear the burden). Caucheteux et Desmont, Jan. 21, 1944, Rec. 22 (statute, not a health measure but enacted for the benefit of the market in cereals, reduced the permissible percentage of ingredients other than malt and hop in beer production; shutdown required of plant producing glucose for breweries, the only item the plant could produce without very substantial alterations).

81. *E.g.*, Syndicat du commerce des blés, seigles, avoines et orges, June 7, 1940, Rec. 193. Société des Etablissements Lacaussade, Oct. 22, 1943, Rec. 231; Compagnie générale de grande pêche et société d'importation et d'exploitation, Jan. 14, 1938, Rec. 23.

82. See *infra*, p. 266 for a discussion of the scope given to that doctrine in the French practice.

83. 346 U.S. 15, 73 Sup. Ct. 956, 97 L. Ed. 1427 (1953).

84. *Id.* at 35. Note the broad statement concerning the Congressional intent to protect the Government from claims affecting governmental functions. *Id.* at 32; see also *id.* at 28.

85. *Id.* at 32, n. 27.

86. The German law of governmental tort liability, likewise, does not exempt abuses of discretion. See Preuss. Staat v. P., German Supreme Court, Mar. 26, 1935, 147 Entscheidungen des Reichsgerichts in Zivilsachen 179.

ment de pouvoir" (abuse of power) may lead to government liability, though the function involved is discretionary in nature.[87]

FAUTE DE SERVICE PUBLIC

One of the most significant characteristics of the French system is the concept of "faute de service public," developed through the process of judicial legislation of the Conseil d'Etat.[88] The Government is liable, whether or not fault on the part of an individual government employee is shown. Rationalizations of that concept, sometimes, are to the effect that liability, even when there is negligence on the part of an individual, essentially is not the result of that negligence but rather of the Government's own fault shown by the "mauvais fonctionnement du service."[89] Only proof that the damage was due to an Act of God or to accident, will relieve the Government.

The concept of faute de service public is radically different from the approach of the Federal Tort Claims Act. In the Court of Appeals

87. In addition to the cases cited *infra,* pages 262-65, see also Epoux Larmanjat, Nov. 2, 1949, Rec. 454 (arrest at time of French liberation allegedly as collaborators, but in reality in order to injure the persons in their careers); Société l'Eveil de Contres, Dec. 23, 1932, Rec. 1129 (abuse of licensing power, discriminating against particular claimant); Compagnie anonyme des Sablières de la Seine, June 30, 1944, Rec. 189 (refusal, on improper grounds, to grant permission for sale of land).

88. Aside from the instances where jurisdiction over tort liability was by statute conferred upon the civil courts (see *supra,* note 23 and p. 250) and where it is in the civil courts because the Government engages in private business (UHLER, REVIEW OF ADMINISTRATIVE ACTS 60 (1942)), there is also the field of "voie de fait." See *id.* at 133-76 ("administrative trespass"). That doctrine is applied in cases where the act of the employee is illegal to such an extent that conceptually it is no longer considered administrative action, with the result that the ordinary, not the administrative, courts have jurisdiction. DE LAUBADÈRE, MANUEL DE DROIT ADMINISTRATIF 66 (3d ed. 1951) DUEZ AND DEBEYRE, *op. cit. supra* note 79, at 250 ff., 468, 882; WALINE, *op. cit. supra* note 54, at 430 ff. Cases of "voie de fait" are rare. It must be shown that the illegal act interfered with some private right. *E.g.,* see Carlier, Conseil d'Etat, Nov. 18, 1949, [1950] Sirey, Recueil Général [hereinafter cited as Sirey] III.49 (damages for illegal seizure by police of pictures taken of cathedral); see also Pettex-Sabarot v. Comité départemental de l'Office du blé pour la Haute-Loire, Cour de Cassation, June 29, 1942, [1942] Sirey, I.106 (statement on scope of voie de fait); Curé de Réalmont v. Maire de Réalmont, Tribunal des Conflits, July 4, 1934, [1935] Sirey, III.97 (damages for interference by mayor, in violation of resolution of city council, with property devoted to religious purposes); Labadié v. Gaillardon, Cour de Cassation, Feb. 8, 1876; [1876] Dalloz, I. 289 (damages for illegal arrest followed by unlawfully prolonged detention); Favre v. Mas, Cour d'appel de Lyon, Jan. 28, 1904, [1904] Dalloz, II.321 (damage action against officer; unlawful arrest, considered a judicial rather than an administrative act); compare L'Action francaise v. Bonnefoy-Sibour, Tribunal des Conflits, Apr. 8, 1935, Dalloz, Recueil Périodique et Critique III.25 (1935) (damage action against police prefect for general seizure of newspaper, such seizure not having been indispensable for maintenance of public order). *But cf.* Perrin, Tribunal des Conflits, Feb. 17, 1947, Rec. 501 (no *voie de fait* seen in case of defective requisitioning).

89. See, *e.g.,* DUEZ AND DEBEYRE, *op. cit. supra* note 79, at 420 ff.; for a discussion of the writings of several French authors see STREET, GOVERNMENTAL LIABILITY: A COMPARATIVE STUDY 58-62 (1953).

decision in the *Texas City Disaster Litigation* Judge Rives stated for the court:

> "The necessity of *some definite act* of commission or omission on the part of *some particular employee or employees of the Government* as a predicate for its liability is emphasized by the requirement of Section 1346(b) that liability be determined 'in accordance with the law of the place where the act or omission occurred.'" [Emphasis supplied.][90]

The French concept has an "anonymous character." It is not necessarily connected with the fault of a designated, identified individual. Rather, proof is sufficient that the public service, either in its organization or operation, was defective. "It is the service which is being judged, not its agent."[91]

For example, in the case of *Anguet*,[92] the public doors of a post office station were locked before a customer completed his business. He was asked to leave through a room reserved for the letter carriers. There he got into an argument with two letter carriers who expelled him forcibly. Striking against a projection on the door-sill of the room, he injured his leg. The Government disclaimed responsibility, for the reason that a "faute personelle" of a Government employee, rather than a "faute de service," had been the cause. However, the Conseil d'Etat held that, whatever the personal responsibility of the individuals, the accident was attributable to the "mauvais fonctionnement du service public," namely, the fact that (1) somebody had advanced the hands of the clock — and in a well-operated service that should not occur —, and (2) there was a projection at the door of the room — and there should not be such a defect in a well-managed operation. It was not considered necessary to inquire who had advanced the clock or who had ordered or tolerated the projection of the door-sill.[93]

The degree of "défectuosité" required for governmental liability varies according to the kind of service involved, the place where the damage occurred, and the particular circumstances of each case. Poor operation of a public service has been found in different fields of ad-

90. 197 F.2d 771, 776 (5th Cir. 1952), *aff'd sub nom.* Dalehite v. United States, 346 U.S. 15 (1953). This requirement does not preclude application of the doctrine of *res ipsa loquitur*, amounting to a generalized inference of negligence, in a proper case. United States v. Hull, 195 F.2d 64 (1st Cir. 1952).

91. DUEZ AND DEBEYRE, *op. cit. supra* note 79, at 421. The anonymous character of faute de service public, and other aspects of the French law, were discussed in the interesting book, MUCH, DIE AMTSHAFTUNG IM RECHT DER EUROPAEISCHEN GEMEINSCHAFT FUER KOHLE UND STAHL (1952), which is a study comparing French with German law as a basis for the law of the European Steel and Coal Community. *Id.* at 26 ff.

92. Feb. 3, 1911; [1913] Dalloz, III.26.

93. See the analysis of the case by DUEZ AND DEBEYRE, *op. cit. supra* note 79, at 421, n.3.

A *respondeat superior* doctrine, similar to ours, is applied by the French civil courts in tort cases between private individuals under art. 1384 of the Code Civil. In private law suits against a principal, the civil courts first establish the fault of the individual agent.

ministration and may lead to recovery for personal injury and property damage. For instance, the Government is liable for damages due to operation of government automobiles and trucks,[94] and of airplanes,[95] to the operation of public works,[96] to the defective condition of premises allotted to public use,[97] and, though only in the more recent practice, for damages due to police action.[98] An especially important case involving the Government's liability for automobile accidents is the case of *Soc. d'assurances mutuelles "Les travailleurs francais."*[99] In that case, the Conseil d'Etat stated that the particular dangers of automobile traffic create a presumption of fault on the part of the driver, rebuttable by proof that the accident was "imputable soit à une cause étrangère à son auteur, soit à un cas fortuit ou de force majeure."[100]

Faute de service may consist of a failure to take precautionary steps. Early, the Government was held liable for its failure to install some protection in the frame of an embankment.[101] Many cases involve public roads,[102] often involving lack of proper warning signals.[103] In the *Thévenet*[104] case, a municipality was held liable for failure of the police

94. *E.g.*, Verbanck, Tribunal des Conflits, Nov. 27, 1933; Mabille Conseil d'Etat, Feb. 9, 1934, [1934] Dalloz, Recueil Periodique et Critique III.13 (trucks of public road and street cleaning departments; considered part of public service). Cases of government liability for such accidents are most numerous; see *supra*, p. 249.

95. Rapin, Nov. 9, 1928, Rec. 1153; (the pilot had been grossly negligent, subjecting him to personal liability; but that liability was held not to deprive the victim of his right of action against the Government; rather, the victim's rights against the pilot devolve upon the Government by means of subrogation).

96. Demoiselle de Butler, Apr. 8, 1933, Rec. 474 (bad condition of a road not constructed in accordance with regulations).

97. Dame Chiffoleau, Oct. 30, 1934, Rec. 988 (poisoning due to the bad condition of premises allotted to a postmaster; as the result, the wife (the postmaster) suffered injuries and her husband died; no recovery *qua* faute de service public for the wife's injuries because, like under the Federal Tort Claims Act, no recovery in excess of statutory provisions on pensions (see *supra*, p. 257); on the other hand, damages awarded for the death of the husband, but not to the full amount, because of contributory negligence. In French law, contributory negligence merely reduces the amount of recovery proportionately).

98. Casini, Nov. 17, 1948, Rec. 432 (passer-by injured by traffic policeman); see *infra*, p. 264.

99. Dec. 22, 1924, [1926] Sirey, III.1 (comment of Professor Hauriou). The insurance company was the plaintiff. Under the Federal Tort Claims Act, too, insurance companies may sue as subrogees, despite the Anti-Assignment Statute. United States v. Aetna Casualty & Surety Co., 338 U.S. 366, 70 Sup. Ct. 207, 94 L. Ed. 171 (1949).

100. The same kind of presumption exists in cases between private individuals, Bessières, Cour de Cassation, July 29, 1924, [1924] Sirey, I.321, but in that field, different from governmental liability, the presumption could be based on a statutory provision.

101. Dép. de la Dordogne, May 10, 1907, Rec. 438.

102. *E.g.*, Dép. du Loiret, Nov. 7, 1934, Rec. 1028 (truck overturned due to poor condition of a road).

103. Ministre des Travaux publics v. Sieur Devaux et consorts Baclet, Mar. 24, 1944, Rec. 101 (hidden, exceptional danger on road). See also Commune d'Avenay, Nov. 18, 1942, Rec. 325; Vve. Barré, Feb. 24, 1939, [1939] Sirey, III.63.

104. June 23, 1916, Rec. 244; see also Le Guillon, Jan. 29, 1936, Rec. 138;

to make certain that a shooting gallery installed at a public festival was at a sufficient distance from a residential dwelling. Similar facts were involved in the *Lemonnier*[105] case, a leading case on the relationship between the Government's liability and the personal liability of the individual officer.[106]

Failure to take adequate precautionary steps has led to governmental liability in connection with the operation of schools.[107] Improper supervision was the basis of liability when, in a colony, the Government failed to supervise the localities where a band of escaped convicts lived openly, and a murder was committed by them.[108] On the ground of improper supervision, damages were awarded when a minor interned in an insane asylum became pregnant by an employee of the asylum.[109]

A faute de service public need not be a defect of a physical nature. The City of Paris was held liable to a bank which had extended credit to a contractor in reliance on a city certificate erroneously creating the impression that a certain amount was owed to the contractor, while in reality the necessary audit had not yet been made.[110] Damages were awarded for the illegal act of the police in prohibiting access to a cathedral to a person who had criticized the restoration work of the Government.[111] Repeatedly, the Government was held liable for improper exercise of the power of requisitioning.[112] And, when a

Lorain, Apr. 20, 1934, [1935] Sirey, III.31 (failure to have first aid station close by).

105. July 26, 1918, Rec. 761. See, especially, the extensive statement of the commissaire, Léon Blum, at 762-771.

106. Under the Federal Tort Claims Act, a judgment under the Act constitutes a bar to any action by the claimant "against the employee of the government whose act or omission gave rise to the claim" [28 U.S.C.A. § 2676 (1950)]. The rule established in the *Lemonnier* case is that even though the employee may be personally liable for his "faute personelle," and even though a civil court may have rendered judgment against him, the Conseil d'Etat will nevertheless hold the Government liable if in its view there existed a faute de service. The Conseil d'Etat will, however, so fashion its judgment that the victim's recovery does not exceed his actual damage.

"Faute personelle" has been variously described. Generally, it means a fault detachable from the functions of the officer.

107. Viala, July 22, 1921, Rec. 750; see also Rouly, Feb. 3, 1937, Rec. 148; Ville de Montpellier, Dec. 23, 1941, Rec. 244.

108. Zulémaro, Jan. 4, 1918, Rec. 9; cf. Duchesne, Jan. 4, 1918, Rec. 10.

109. Dame Rivoal, June 14, 1933, Rec. 630 (the Government was subrogated to the judgment awarded by the civil courts against the father); see also Chatry, Jan. 29, 1936, Rec. 139 (death due to inadequate supervision).

110. Société Pommier, Feb. 25, 1944, Rec. 69.

111. Carlier, Nov. 18, 1949, [1950] Sirey, III.49, with a comment by Drago (the seizure by the police of pictures taken was held to be a "voie de fait"; see *supra*, note 88).

112. Sieurs Patureau-Miraud, Neveu et autres, July 30, 1949, Rec. 409 (no attempt made, as required, first to obtain the produce by means of a voluntary sale); see also Gillard, Nov. 3, 1933, Rec. 995 (seizure for nonpayment of taxes, in violation of a regulation prohibiting execution against persons mobilized into the army). An early case involving a typically governmental function was the case of Sieur et Dame Zimmerman, Feb. 27, 1903, Rec. 178 (damages when the Government prematurely executed an administrative order of condemnation).

government officer illegally ordered the shutdown of a factory and prohibited its continued operation, the Conseil d'Etat reversed that order and awarded damages for the time the factory had been closed.[113]

The Government may be liable on the ground that it unduly delayed action, sometimes even though no time limit was set by the statute. Cases in which the delay was beyond a definite time limit established by statute or regulation involved, for example, an application for a building permit[114] or the suspension of a civil servant.[115]

In other cases, no definite time limit had been established. Thus, a minor had enlisted, without the consent of his father, in the French foreign legion, under a false name and claiming to be eighteen years old; the father demanded the immediate release of his son, submitting certificates establishing the son's age, but the Secretary ordered the release only three months later, although the verification was simple in view of the proof submitted; during the month preceding the order the son was transferred to a combat division, despite the fact that his true age was then known to his superiors, and he was killed in battle after the issuance of the Secretary's order of release but before it reached the division.[116]

An individual had begun construction of a building without the required permit; the city served upon him a survey of the plat; applying for correction of the survey, he discontinued construction. The city corrected the survey only more than a year later. The Conseil d'Etat held that both claimant and the city were at fault, the former for having begun construction without the permit, the latter for its delay.[117]

In the case of *Commune de Sarlat et Société "La Mutuelle générale francaise,"*[118] the roof of an old church, which was the property of a city but had been declared a historic monument, collapsed. The law provided that repair work on a historic monument could not be done without the approval of the "Administration des Beaux-Arts," an agency of the national government. It took ten months for that agency to give such approval. During that period the city, for reasons of safety, prohibited access to a little building, attached to the rear of the church, which served as a store. The owner of the store had obtained a judgment in damages, before the ordinary courts, against the city. The latter and its insurance company, in turn, sued the national

113. Société Bat'a, Feb. 24, 1950, Rec. 120; see also Cie navale des Petroles, June 13, 1947, Rec. 265, where a company's application to engage in brokerage activities had illegally been denied.
114. Ville de Perpignan, July 5, 1935, Rec. 777.
115. Liénard, July 29, 1932, Rec. 821.
116. Brunet, July 18, 1919, [1920] Dalloz, III.7. However, because no actual, material damage could be shown, no recovery other than costs was permitted.
117. Buffard, Mar. 23, 1923, Rec. 283; see also Poirey, June 25, 1924, Rec. 594; *cf.* Société Van Outryve, July 6, 1934, Rec. 786, 788.
118. Feb. 13, 1942, Rec. 49.

government, and the Conseil d'Etat granted recovery, on the ground that the Administration des Beaux-Arts had not made any showing jusifying such long delay; a maximum period of four months would have been reasonable in the circumstances.

Damages were awarded for excessive delay of the police (over two years) in assisting the sheriff in executing a judgment of eviction.[119]

Degree of Fault

The last case and several previously mentioned held the Government liable on the basis of "faute lourde." By its method of judge-made law the Conseil d'Etat has developed rules as to the degree of fault required to hold the Government liable. Thus, during periods of emergency (such as the time of the retreat of the French army in June, (1940)[120] only a "faute exceptionelle et d'une particulière gravité"[121] will lead to government responsibility. If the governmental action occurs in the colonies, the Conseil d'Etat will award damages only if it finds a "faute manifeste et particulièrement grave." Grave fault must be proved in connection with certain branches of administrative functions. In that way, the Conseil d'Etat has implemented the pronouncement of the Tribunal des Conflits in the *Blanco* decision[122] that governmental responsibility is "neither general nor absolute; it has its special rules which vary according to the needs of the service."

The functions of the police are the most noteworthy example requiring qualified fault. Government liability for police activities was slow to be recognized. In 1905, in the *Tomaso Greco* case,[123] the Conseil d'Etat, by way of a dictum, first announced the principle of liability for actions of the police if grave fault is shown. In a village in Tunisia, a bull had become wild and was chased by an armed crowd, including two policemen and an officer. Some shots were fired, and plaintiff was injured. He claimed that the Government was liable either because the shot injuring him had been fired by a policeman, despite orders not to fire, or because, if fired by a third person, that could have been prevented by a better organization of the police. The Government defended on the ground that it could never be liable for actions of the police.[124] While denying recovery on the facts, the Conseil d'Etat

119. Sieur Braut, Jan. 22, 1943, Rec. 19 ("faute lourde"; no showing that it was necessary to delay action in order to maintain public order and safety; the Government was subrogated to the judgment for unpaid rent which the civil courts would ultimately award to the landlord for the period in question).
120. See Finidori, Sept. 20, 1944, Rec. 254 (loss of personal belongings of employee of an army store).
121. See Zulémaro, Jan. 4, 1918, Rec. 9, *supra*, note 108.
122. See *supra*, p. 247.
123. Feb. 10, 1905, Rec. 139.
124. For the details see the statements of the commissaire. *Id.* at 139-42.

stated that the alleged facts, if proved, would have made the Government liable.[125]

Later cases involving the police include supervision of public festivals and, generally, maintenance of public safety and order.[126] Damages because of a "faute lourde" were awarded in a case where, in order to prevent disturbances between strikers and workers willing to work, the police took steps, harmful to the company, which the Conseil d'Etat considered excessive.[127] In another case,[128] damages were awarded because, contrary to regulations, police inspectors questioning a person failed to take him to the police station, thus making possible the disappearance of a stolen diamond. Or, failure to enforce fire regulations for movie theatres was considered a "faute lourde" where, in sufficient time to take action, the police had been advised that the performances were dangerous.[129]

Other cases where a "faute d'une particulière gravité" was required, involved, *e.g.*, insufficient supervision of inmates of a public insane asylum,[130] or improper performance of medical services in a government hospital.[131]

Liability because of the illegality of an administrative order also requires proof of qualified fault. Such qualified fault was found when the Government failed to respect a final judgment of a civil court ordering it to return seized bills of money.[132] Similarly, damages were awarded in a case where the permit of an association to hold religious services in a public park was canceled illegally.[133]

125. In his note to the case ([1905] Sirey, III.113), Professor Hauriou traced the development of the practice prior to the *Tomaso Greco* decision: Originally, no actions of the police could result in liability, but gradually certain types of special police activities (such as harbor police, police regulating flood waters, etc.) were excepted; the *Tomaso Greco* case was the first case generally recognizing the Government's liability for what Professor Hauriou has called a "mesure de police proprement dite."

126. See DUEZ AND DEBEYRE, *op. cit. supra* note 79, at 429, and *e.g.*, the cases cited, *supra*, pp. 261-62.

127. Compagnie nouvelle des sucreries réunies, Jan. 26, 1944, Rec. 32. See also Société des chaux et ciments Valette-Vialard, Jan. 8, 1943, Rec. 4 (during sitdown strike police occupied factory and prohibited access; since the maintenance of public order did not justify such action, the Conseil d'Etat awarded damages on the basis of "faute lourde").

128. Société à responsabilité limitée "Comptoir des precieux," Jan. 19, 1945, Rec. 21.

129. Ville de Perpignan v. Dame Dalbiez, July 29, 1943, Rec. 218.

130. *Cf.* Dame Guillaumie, Oct. 27, 1933, Rec. 974.

131. *E.g.*, Commission administrative des hospices civils de Marseille, May 18, 1938, Rec. 435. Apparently, no such qualified fault is required when the damages are due to a fault in the organization of the hospital. Teyssier, Mar. 12, 1937, Rec. 307. See also Commission administrative des hospices civils de Marseille, Dec. 21, 1938, Rec. 968.

132. Bouladou, Dec. 22, 1948, Rec. 491 (damages included interest for the five years' delay).

133. Jeunesse indépendante chrétienne féminine, Dec. 1, 1948, Rec. 449; see also Beauzet, Feb. 28, 1947, Rec. 84 (liability for suspending operation of a business); Sieurs Puybonnieux, May 22, 1939, Rec. 349 (damage caused to neighbors by the illegal enlargement of a municipal cemetery).

A less serious illegality of an order,[134] or a mere non-observance of formal requirements, is not a sufficient basis for liability. When the Government's refusal to grant a permit was reversed as violating certain procedural requirements, a claim for damages was denied, on the ground that issuance of the permit was a discretionary matter and there had been no showing that the permit would have been granted if the formal requirements had been observed.[135]

ABSOLUTE LIABILITY WITHOUT FAULT

The question whether the Government may be liable under the doctrine of absolute liability without fault was recently decided by the Supreme Court in the *Dalehite* case. The Court held that it is not:

> "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 in performing the activity is irrelevant to the application of that doctrine. But the statute requires a negligent act. So it is our judgment that liability does not arise by virtue either of United States ownership of an 'inherently dangerous commodity' or property, or of engaging in an 'extra hazardous' activity. *United States v. Hull*, 195 F.2d 64, 67."[136]

Prior to the *Dalehite* case, the Court of Appeals for the First Circuit had stated that the Government is not subject to suit under the doctrine of liability without fault,[137] while the Court of Appeals for the Tenth Circuit, in a case involving an alleged nuisance (storing of explosives), had suggested, by way of dictum, that it might hold the Government liable under that theory.[138] The holding of *Dalehite* has since been applied by some appellate courts unqualifiedly,[139] but in the very recent case of *United States v. Praylou*[140] the Fourth Circuit sought to limit the above-quoted statement of the Supreme Court and applied against the Government the rule of absolute liability of the Uniform Aeronautics Act.

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134. See Bour, Sept. 1, 1944, Rec. 241 (improper denial of unemployment compensation, set aside on appeal, not a sufficient basis for a damage suit).

135. Sieur Leca, May 22, 1942, Rec. 160.

136. Dalehite v. United States, 346 U.S. 15, 44-45, 73 Sup. Ct. 956, 97 L. Ed. 1427 (1953). The doctrine of the celebrated British case of Fletcher v. Rylands, L.R. 1, Ex. 265 (1866), *aff'd* L.R. 3, H.L. 330 (1868), thus is not applicable under the Federal Tort Claims Act.

137. United States v. Hull, 195 F.2d 64, 67 (1st Cir. 1952) (liability of the Government was affirmed, however, in the case on the basis of a generalized inference of negligence, *res ipsa loquitur*).

138. Denney v. United States, 185 F.2d 108, 110-111 (10th Cir. 1950) (the Court citing the case of Exner v. Sherman Power Construction Co., 54 F.2d 510 (2d Cir. 1931), which discussed the extent of adoption of the *Fletcher v. Rylands* doctrine in this country).

139. Heale v. United States, 207 F.2d 414 (3d Cir. 1953); United States v. Inmon, 205 F.2d 681 (5th Cir. 1953); Harris v. United States, 205 F.2d 765 (10th Cir. 1953).

140. 208 F. 2d 291 (4th Cir. 1953).

In France, the Conseil d'Etat, again by its process of judge-made law, developed an expanding theory of government liability without fault. However, it would be misleading to compare the French law only with our tort law of absolute liability. Some of the French cases falling within that category, the so-called doctrine of "risque administratif," reach into fields which under our legal system are considered under other headings, such as eminent domain, implied contract, or, generally, just compensation. Cases holding the Government liable on such grounds, like *United States v. Causby*,[141] *Portsmouth Harbor Land & Hotel Co. v. United States*,[142] *United States v. Lynah*,[143] and *United States v. Kansas City Life Ins. Co.*,[144] must be considered in that connection. Under the theory of those cases, compensation may be due, without regard to negligence, for certain interferences by the Government with the use of real property.

The French law of liability without fault[145] does not include acts due to "force majeure."[146] Nevertheless, liability has been affirmed in varied situations where equity and the principle of equality demand the grant of an indemnity, even though no "faute du service public" can be shown. It is required under the doctrine of "risque administratif" that the damage be special and abnormal. No recovery is granted for injuries which affect, or are capable of affecting, everybody.[147]

The doctrine of "risque administratif" originated in cases where the construction of public works resulted in reducing the value of ad-

141. 328 U.S. 256, 66 Sup. Ct. 1062, 90 L. Ed. 1206 (1946) (frequent flights of Government aircraft over land at low altitudes, destroying the use of the property as a chicken farm).

142. 260 U.S. 327, 43 Sup. Ct. 135, 67 L. Ed. 287 (1922) (erection of a fort and firing guns over nearby land).

143. 188 U.S. 445, 23 Sup. Ct. 349, 47 L. Ed. 539 (1903) (destruction of all use of land by flooding due to construction, in the bed of a river, of works obstructing the natural flow of its water). Pumpelly v. Green Bay Co., 13 Wall. 166 (U.S. 1871); United States v. Welch, 217 U.S. 333, 30 Sup. Ct. 527, 54 L. Ed. 787 (1910).

144. 339 U.S. 799, 70 Sup. Ct. 885, 94 L. Ed. 1277 (1950) (destruction of agricultural value of land, not in any sense within bed of river, by underflowing, due to construction in the interest of navigation of dam on river maintaining river continuously at ordinary high-water level).

145. Gellhorn and Schenck, *Tort Actions Against the Federal Government*, 47 COL. L. REV. 722, 738-40 (1947), making a brief reference to the French law, have suggested that an extension of our law might be desirable to include some aspects of liability without fault. See also STREET, GOVERNMENTAL LIABILITY: A COMPARATIVE STUDY 78 (1953).

146. *I.e.*, a phenomenon foreign to the Government's activity, such as, *e.g.*, earthquakes, floods, tornadoes, civil war, or an invasion. DUEZ AND DEBEYRE, TRAITÉ DE DROIT ADMINISTRATIF 432-34 (1952); Professor Hauriou, in a comment on the *Ambrosini* case, *Conseil d'Etat*, May 10, 1912, [1912] Sirey, III.161.

147. In attempts to rationalize the doctrine of "risque administratif," the great economic power of the state and principles of economic quality have been stressed; see, *e.g.*, WALINE, TRAITÉ ÉLÉMENTAIRE DE DROIT ADMINISTRATIF 577-78 (6th ed. 1951). Mention has been made of the preamble of the French Constitution of 1946: "La nation proclaime la solidarité et l'égalité de tous les Francais devant les charges qui découlent des calamités nationales."

jacent property.[148] Early,[149] damages were granted to a worker injured in a government arsenal, though no fault of the Government was shown and the work was not, inherently, especially dangerous — a case which lost much of its significance through the subsequent enactment of workmen's compensation legislation.[150] In the absence of a fault, the Government is liable for the accidents of persons specifically asked to assist in the fighting of a fire[151] or who answer a general alarm call.[152] Upon the theory of "risque administratif," the Conseil d'Etat awarded damages to a corporation which the Government, in mediating a serious labor dispute and to avoid disturbances, had pressured into transferring its operations to a workers' cooperative. Upon bankruptcy of the cooperative, the company had to make payments on a loan incurred by the cooperative. Though the Government acted lawfully, it was, nonetheless, held liable for 75% of the company's loss.[153]

In 1916, grenades stored in a fort at the outskirts of Paris exploded and the owners of realty in the vicinity suffered damage. In the case of *Regnault-Desroziers,* the Government was held liable, without fault, on the ground that the storing of large quantities of explosives near a populated area, done during the war in order quickly to supply the army, entailed extraordinary risks for which the Government must be liable.[154] Another instance applying the doctrine of "risque administratif" was a case where the Government was held responsible for damage to land when, by order of a mayor, fire was set to adjoining property in order to check the development of an epidemic.[155]

148. Chamboredon, May 11, 1883, Rec. 479 (interference with irrigation due to construction of tunnel). DUEZ AND DEBEYRE, *op. cit. supra* note 146, at 435. The concept of expropriation proper is limited in France to cases where title is taken.

149. Cames, June 21, 1895, Rec. 509 (not being a regular worker, the injured person was not entitled to a pension). [1897] Sirey, III.33, with a note by Hauriou; [1896] Dalloz, III.65.

150. However, the same principle was mentioned, for instance, in the case of Dame Laboirie, June 24, 1938, Rec. 578, where the person injured was a member of the city's auxiliary police and was not covered by the municipal compensation law. See Beteau, Mar. 2, 1932, Rec. 249 (interne of a government hospital injured by a patient, held entitled to damages).

151. Chavat, Mar. 5, 1943, Rec. 62.

152. Faure, Nov. 30, 1945, Rec. 245; Ville de Senlis, Feb. 15, 1946, Rec. 50 (injury of person complying with police officer's request to frustrate attempt of suicide).

153. Soc. Boulenger, Nov. 21, 1947, Rec. 435.

154. Mar. 28, 1919, [1920] Dalloz, III.1, 6 (with a comprehensive comment by Appleton); [1919] Sirey, III.25 (with a critical note by Hauriou). The case was followed in Cie. P.-L.-M., Mar. 26, 1920, Rec. 354, involving similar facts. See also Société nationale des chemins de fer francais, Mar. 16, 1945, Rec. 54 (transportation on the railroad of an exceptionally large quantity of explosives).

155. Walther, Dec. 24, 1926, Rec. 1140; [1927] Sirey, III.34. In this country, it is an established tradition, based upon common law, that the Government is not liable for the destruction of property to prevent the spreading of a fire. Bowditch v. Boston, 101 U.S. 16, 18, 25 L. Ed. 980 (1879); see Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415, 43 Sup. Ct. 158, 67 L. Ed. 322 (1922); and

The doctrine of "risque administratif" has found application in situations where for reasons of public order persons were deprived of their ordinary rights to legal recourse. In the *Couitéas* decision,[156] a Tunisian settler had obtained a final judgment of eviction against a large number of Arabs who for many years had been squatting on his lands. For reasons of public order, the Government persistently refused to grant forcible execution of the judgment. Though finding the Government's action to be without fault, the Conseil d'Etat awarded damages, on the ground that such loss should not be borne by the individual.[157] During the period of labor strife in the 1930's, owners of struck factories obtained eviction orders from the civil courts against sitdown strikers. But because of the threat of serious disturbances if the police were to take action, the Government refused to lend force for the execution of the judgments. The Government was held not to have been at fault, but damages were awarded on the principle of "égalité devant les charges publiques."[158] However, recovery was denied in such cases when the refusal was only for a time considered normal and permissible in the circumstances.[159]

French theorists have sought to rationalize and justify the theory. Writers have speculated whether or not the doctrine will continue to expand. The view has been expressed[160] that recent extensions of the doctrine are a product of a "politique jurisprudentielle," *i.e.*, that the theory has sometimes been resorted to when the Conseil d'Etat was hesitant to criticize acts bordering upon governmental policy by finding a "faute du service public."

CONCLUSION

Several conclusions are suggested. Our study, it is hoped, will serve to dispel the misconception, frequently encountered, that growth of

United States v. Caltex, Inc., 344 U.S. 149, 154, 73 Sup. Ct. 200, 97 L. Ed. 140 (1952).

156. Nov. 30, 1923, Rec. 789; [1923] Sirey, III.57 (statements of the commissaire and a long comment by Professor Hauriou).

157. To the same effect, on similar facts, Epoux de Richemont, Mar. 23, 1945, Rec. 60. In the case of Sieur Wallaert, Dec. 21, 1949, Rec. 560, the same principle was applied when, for reasons of public safety and order, the City Administration of Lille refused, for a period of two months, to execute a judgment of eviction against ten families.

158. Société la Cartonnerie et Imprimerie de Saint-Charles, June 3, 1938, Rec. 529; [1939] Sirey, III.9 (conclusions of the commissaire); followed in numerous cases, see, *e.g.*, Société anonyme des établissements Goulet-Turpin, and other cases, Rec. 1942, 430. Fonderies Franco-belges, and other cases, Rec. 1943, 409.

159. Société des Etablissements Le Calvez, Sept. 30, 1942, Rec. 269 (16 days); see also La mutuelle du commerce et de l'industrie, May 28, 1947, Rec. 223 (9 days; recovery denied also for the Government's failure to comply with the factory's request for intervention, made before a civil judgment had been secured).

160. DUEZ AND DEBEYRE, TRAITÉ DE DROIT ADMINISTRATIF 445 (1952); see STREET, GOVERNMENTAL LIABILITY: A COMPARATIVE STUDY 66 *et seq.* (1953).

law by means of judge-made law is unknown in the so-called civil law countries. We have shown that French law on this subject is "common law" to a larger extent than our federal law. Specifically with respect to the answers given in the two countries to particular issues of governmental liability, our comparison has shown some similarities and many dissimilarities.

The principle that the tort rules are generally inapplicable to injuries covered by comprehensive systems of administrative benefits, is similar in both countries. That similarity seems to re-emphasize the inherent reasonableness of the exclusion. Many of the dissimilarities are in fields of far-reaching importance. The most significant are the wide scope of the French concept of "faute de service public" and its anonymous character, and the broad extent of absolute liability. Any evaluation of those dissimilarities must appreciate the basic nature of the French law of governmental responsibility. Essentially, the wide ramifications of "faute de service public" and of absolute liability are predicated upon the elementary principle expressed in the *Blanco* opinion that the Government's liability was *not* to be like that of a private individual but was to be *sui generis*. Unlimited by the rules of private law, French governmental liability for tort developed its broad scope. The basic principle of our Federal Tort Claims Act is exactly opposite, in that, with specified exceptions and limitations, the Government is to be liable in the same manner as a private individual under like circumstances.

It is useful to know that certain solutions were adopted in the French practice, but the fundamental difference between the two systems must always be fully recognized. Many broad aspects of liability, flowing from the rationale dominating the French law, clearly are not in harmony with the principles of our Federal Tort Claims Act, which is governed by an opposite rationale.