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THE KING DOES NO WRONG—LIABILITY FOR MISADMINISTRATION

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I. INTRODUCTION

The age-old rule of the common law that a citizen may not seek redress from the government for wrongs committed by the latter is often restated in the form of two maxims. One is that "the king can do no wrong." It refers to "wrongs" in the narrower sense of the word, meaning torts and related delicts. It has its counterpart if not origin in the Roman-Byzantine holding, *princeps legibus solutus est.*[1] Many modern countries and some states have abrogated the rule.[2] The other maxim, "the sovereign cannot be sued without his consent,"[3] precludes any law suit, not merely in tort, against the government unless it "consents." This latter rule has no counterpart in the civil law, which has not objected to contractual suits against the "fisc" since time immemorial. As a matter of fact, the fisc of the civil law countries is usually conceived as a juristic person existing for the very purpose of enabling the state to be a plaintiff or defendant in a civil litigation.[4]

Like many other maxims, both rules lose much of their dogmatic, would-be fundamental character when they are stripped of their rolling phraseology and reduced to simple statements of law. To hold that the king "can do no wrong" means that anything he does simply *is* no legal wrong, hence no violation of the law (short of breaches of contracts not covered by the maxim). It fitted into the constitutional system of an unrestricted absolute monarchy, or of Hitler's government, whose legal theories proclaimed that everything the chief of state does is law—*l'état c'est moi.* It has little room in a constitutional monarchy whose ruler is subject to the law.[5] It is utterly out of place in a democracy.[6] The statement that whatever "the king" does may not be

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1. DIGEST 1.3.31. For the English counterpart see 1 Bl., COMM. *245.

2. *E.g.*, GERMAN CIVIL CODE §§ 839, 841, 1 MANUAL OF GERMAN LAW 110 (Foreign Office ed. 1950); FRENCH CIVIL CODE Art. 1382, as interpreted by Trib. Confl. Feb. 2, 1917, 3 Dalloz, Recueil periodique de jurisprudence 102 (1907), and other decisions; ILL. REV. STAT., c. 37, § 439.8 (1945); N.Y. Laws 1929, c. 467, § 12a, N.Y. Laws 1949, c. 860, § 8. And see DAVIS, ADMINISTRATIVE LAW 797-98 (1951); PARKER, ADMINISTRATIVE LAW 288 (1951).

3. *Cf.* Justice Holmes in Kawananakoa v. Polyblank, 205 U.S. 349, 353, 27 Sup. Ct. 526, 51 L. Ed. 834 (1907).

4. VON BOLLA, DIE ENTWICKLUNG DES FISCUS ZUM PRIVATRECHTSSUBJEKT, MIT BEITRAGEN ZUR LEHRE VOM AERARIUM (1938); VASSALLI, CONCETTO E NATURA DEL FISCO (1908).

5. More properly expressed, whose ruler is subject to pre-existing, ascertainable law.

6. Carter, J., dissenting, in Madison v. City and County of San Francisco, 236 P.2d 141 (Calif. 1951).

regarded as a legal wrong furthermore means that where he, as usual, acts through subordinates, their wrongful acts cannot be imputed to him. The tort doctrine of respondeat superior means to hold a master liable as if he had committed the tort himself. Since the king would not be liable had he done the act himself (which, *pro tanto,* is no "wrong") it follows that he is not responsible for acts of inferior organs. In short, according to the rule, a governmental act is never a tort, at least as far as the government is concerned.[7]

The second rule, concerning the "sovereign" who cannot be sued without his "consent," is truly more in the nature of a circle—a vicious circle at that —rather than a rule of law. The term "sovereign" obviously must be taken as meaning "lawmaker," for only his "consent" can have any legal relevance. And of course, we do not mean the physical lawmaker, such as the individual members of Congress, but rather the lawmaker in the abstract sense of the word—meaning, in our country, both Houses of Congress plus the President (whose lack of approval may under certain conditions he healed). Since the term lawmaker in this sense is a misleading superfluity, we may simply say "the law."[8] The law must consent before the state can be sued. The law, however, does not properly "consent"—a term more appropriate for contractual negotiations—but rather acts by making law.[9] Our so-called maxim, then, translated into twentieth-century legal language, simply means that there cannot be a lawsuit against the government unless the law so permits. The law does permit it in certain *generally* prescribed instances, such as under the Court of Claims Act or the Federal Tort Claims Act, as well as in *specifically* prescribed instances, *viz.,* private acts of Congress, which are of course also "law."[10]

These clarifications seem necessary to demonstrate that these maxims are no more than rules of law that can (and should) be altered. They do not involve any "inherent" principles of government. If the ever misleading word "inherent" must be used at all in this connection, then it should be done only to say that it is certainly within the inherent powers of government to promulgate the law in such a fashion that a governmental act can be both a tort and suable like the act of any other juristic person. Proper semantics reduces an old inadequacy of the law to its proper proportions. To say that a sovereign "cannot" do wrong and "cannot" be sued without his "consent" creates the impression of a nearly immutable, fundamental law whose alteration must be regarded as an exceptional "grant" —whatever that means. To say merely that our law, at the present time,

7. For a discussion of the problem of the individual officer's liability see section III, below.

8. KELSEN, GENERAL THEORY OF LAW AND STATE 123-62 (1946).

9. *Ibid.*

10. See also below, at notes 36-37.

regards liability and suability of the government as the exception rather than the rule has no overawing influence. Rather, it creates the desire to change the law.

The Federal Tort Claims Act[11] cannot be regarded as a satisfactory change. Unquestionably, that Act has brought us a step forward in that it holds the Federal Government liable for some torts of its agents. Indeed, the sweeping language of Section 1346(b) tends to create the impression that the United States is liable whenever a private person would be liable under the same circumstances.[12] This, however, is unfortunately wrong, in view of the formidable list of exceptions in Section 2680, especially subsections (a) and (h). The latter exempts the Government from liability for all intentional torts.[13] The former—most pertinent to our discussion—retains the gist of the old nonliability doctrine for injuries involving discretionary conduct.[14] In other words, when the king really acts as a king, he still commits no wrong.

II. Claims Against the Government

The Federal Government may be sued for negligent torts committed by its employees in the course of what may be vaguely described as nonsovereign or not administrative-legal business. If the wrong consists of one of the old, established wilful torts,[15] no action lies, regardless of whether or not the act committed may be called an administrative act. Likewise is the question whether the official acted within the scope of his employment immaterial as far as these torts are concerned. Even if he did, the Government is not liable. Nor is it of relevance whether the act is exempted from liability under the first or second part of Section 2680(a) as either an act consisting in the execution of a—valid or invalid—law or regulation or an act consisting in the performance of a discretionary function.

11. Originally Title IV of the Legislative Reorganization Act of 1946, 60 Stat. 812, 842 (1946), *amended,* 61 Stat. 722 (1947); repealed by the new Federal Judicial Code, and incorporated into 28 U.S.C. §§ 1346, 1402, 2401, 2402, 2671-80 (1950).

12. ". . . for money damages . . . for injury or loss of property, or personal injury or death 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." 28 U.S.C. § 1346 (b) (1950).

13. "(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

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

15. Above, note 14.

It was therefore of a mere ornamental value that Mr. Justice Burton emphasized in the *Joint Anti-Fascist Refugee Committee* case[16] that the matter did not involve a damage suit for defamation. If it had, the suit would have been dismissed, for slander and libel are acts to which the FTCA does not apply.[17]

In a recent case[18] the gist of the tort action was that the plaintiff had been "grilled excessively" and for an unreasonable length of time by an army investigator in the course of an interrogation. As a result, the plaintiff was in a psychotic condition characterized by loss of memory and persecutory delusions, which the trial court found to be the direct and proximate result of the investigator's unlawful conduct.[19] The court of appeals reversed,[20] because (1) if the act should be classified as a negligent one, no recovery would lie under the applicable law of the State of Washington,[21] (2) if the act should be considered as wilful and hence an actionable tort under the state law, then recovery is barred against the Government by the exclusion of wilful torts in Section 2680(h) of the Federal Tort Claims Act. Had the army man negligently scratched the woman with his pen, she would have recovered fully. *A fortiori,* one would think, she ought to have no difficulty in being made whole for a wilful invasion of her rights. This, however, seems to be incompatible with our notions of sovereignty, however antiquated they may be.

In view of this attitude of our federal law there are not many lawsuits for wilful torts against the Government itself. But the decisions discussed below in section III, involving suits against the officials themselves, especially the *Gregoire* case,[22] make it clear that recovery is being denied against the officer for the very reason of his official capacity, that is, because he is in fact an arm of the king whose wrongs are not torts.

Negligent acts, on the other hand, are at times suable against the United States. The deed complained of must have been committeed by a Government employee "while acting within the scope of his office or employment."[23] Where the employee was engaged, for instance, in a "frolic and detour," he was not an agent of his principal, the Government, according to well-known principles of the law of agency not further to be discussed here[24]

16. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 139, 71 Sup. Ct. 624, 95 L. Ed. 556 (1951).
17. Above, note 14. See also below, notes 51, 52.
18. United States v. Hambleton, 185 F.2d 564 (9th Cir. 1950), 7 NACCA L.J. 192 (1951).
19. Hambleton v. United States, 87 F. Supp. 994 (W.D. Wash. 1949).
20. United States v. Hambleton, 185 F.2d 564 (9th Cir. 1950).
21. For want of "impact," still required as a basis for a negligence action in Washington and other states. Hambleton case, 185 F.2d at 565; PROSSER, TORTS 214 (1941).
22. Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), *cert. denied,* 339 U.S. 949 (1950); see below, note 40.
23. 28 U.S.C. § 1346(b) (1950).
24. *E.g.,* United States v. Wibye, 191 F.2d 181 (9th Cir. 1951); United States v.

While the agency-law side of the problem of governmental liability creates no particular difficulty, the state of the law is somewhat less lucid in regard to what we may call "misadministration." For, as we have seen, not all wrongful, negligent acts of Government officials entail liability. If the claim is based on an act or omission of an employee, "exercising due care," in the execution of a —valid or invalid—law or regulation it will be rejected;[25] and the same is true if the claim is based on a "discretionary" function or duty, "whether or not the discretion involved be abused."[26]

The first part of subsection (a) is unnecessarily verbose. A Government employee either does or does not act within the scope of his authority. If he does not, the Government is not liable, as we have noted, under both the law of agency and Section 1346(b). But if he does act within the scope of his employment he is necessarily engaged in the execution of the law, be it a statute or regulation.[27] And if in so executing the law he is "exercising due care," the Government cannot be liable in tort, for a tort—apart from intentional torts, which are specifically excluded—is essentially an act of not exercising due care. The importance of the first clause of Section 2680(a), then, lies merely in the phrase, "whether or not such statute or regulation be valid." An official who executes an invalid statute or regulation does really not carry out a lawful duty. Rather, he violates it. The official who, otherwise exercising due care, writes or executes a regulation which later is held to be void for want of legal authority does actually commit a legal wrong in the broadest sense of the word. It is the meaning of the clause that a tort claim cannot be based merely on the invalidity of a general norm.

The second clause, however, treats with a very important group of wrongs. The Federal Government exempts itself from liability whenever the act complained of consists of the exercise of a "discretionary" function, even though the discretion may have been abused. From a point of view of legal theory, however, a sharp distinction between discretionary and nondiscretionary cannot be drawn; more precisely, there is no function that does not involve the exercise of some discretion, however narrow. The duties of every government official consist in applying some law—statute, regulation, directive, court decision, individual instruction—which inevitably lends itself to various constructions at times.[28] Even when a mere messenger

Campbell, 172 F.2d 500 (5th Cir. 1949), *cert. denied* 337 U.S. 957 (1949); Rutherford v. United States, 73 F. Supp. 867 (E.D. Tenn. 1947), *aff'd*, 168 F.2d 70 (6th Cir. 1948); Note, *Judicial Reception of the Federal Tort Claims Act*, 44 ILL. L. REV. 212, 221 (1949).

25. 28 U.S.C. § 2680(a), first part (1950).

26. *Id.*, second part.

27. BENTHAM, THE LIMITS OF JURISPRUDENCE DEFINED 57, 91 (Everett ed. 1945); KELSEN, GENERAL THEORY OF LAW AND STATE (1945).

28. For a treatise, destined to become a classic, see KELSEN, *Preface "On Interpretation,"* in THE LAW OF THE UNITED NATIONS xiii-xvii (1950).

is instructed to go to a certain place by the "shortest route," it is still open to question—and hence to his discretion—whether "short" means short in time or in miles.[29] At least since Locke the criteria of functions that involve the "power to act according to discretion for the public good, without the prescription of the law"[30] have plagued the legal world. Of course, there is a factual difference between a very wide, a not so wide and a very limited discretion. The discretion involved in deciding whether the granting of a license is in the "public interest" is certainly wider than that of a government truck driver who must make up his mind which route to choose. But this difference is not a categorical one but rather amounts to a mere gradual transition. In other words, it is impossible to delineate "discretionary" functions from others in an *a priori* fashion. The decision, therefore, as to what a discretionary function (meaning, one that allows a relatively wide discretion) can never be reached with any degree of precision. The inevitably ensuing result will be uncertainty and arbitrariness of the law.[31] Of course, it is not always possible to draw proper categorical definitions and thus a degree of uncertainty is at times inevitable. Who would deny that the transition from "solvent" to "insolvent" is but a gradual one? Yet in order to subject the latter, but not the former, to insolvency laws, the law must rely on just that criterion. In our case, however, the situation is somewhat different. There are definitely people who are insolvent and others who are not. The border cases lie in the middle. But there is no governmental function that cannot at all be said to be discretionary; and even if we construe the term to mean "wide" discretion, the transition will necessarily be fluctuating and uncertain. In addition, there is the problem of legal policy—ought there to be such a differentiation? Should not rather the Government be liable whenever one of its agents has abused his discretion or, which is the same, his power? Foreign countries as well as New York have answered the question in the affirmative.[32] If, however, we do choose the narrow-liability approach for the Federal Government then we have at least no reason to hail the FTCA as a milestone of progress.

There are already some cases on the books that show the difficulty of eliminating "discretionary" functions from the scope of liability. We are of course not amazed that a plaintiff could not recover for damages resulting from the execution of certain Migratory Bird Treaty regulations, in con-

29. See United States v. Wilbye, 191 F.2d 181 (9th Cir. 1951).

30. 2 LOCKE, TWO TREATISES OF GOVERNMENT *160; Parker, *Separation of Powers Revisited: Its Meaning to Administrative Law,* 49 MICH. L. REV. 1009, 1014 (1951).

31. See the cases below, at notes 34-37.

32. See note 2, above. In Austria some twenty years ago a probate judge approved a business investment of an infant's estate without first inquiring into the soundness of the investment. When the money was lost as a result of this "abuse of discretion," the Austrian Government in an unreported decision was held liable for its judge's negligence.

sequence of which the plaintiff's crops were destroyed by waterfowl.[33] The preservation of wildlife cannot be subordinated to the property claims of individuals and quite obviously no tort action would lie even if there were no exempting clauses in Section 2680(a). Less obvious, however, is the treatment of assumption of governmental discretion in various cases involving flood and river control. To be sure, the flood control, with the necessarily ensuing damage to some landowner, is warranted by the pertinent statute; but it does not follow that to cause an explosion that was unnecessarily detrimental to property must be regarded, as the courts did, as an exercise of a discretionary governmental duty for which no tort action lies. The discretion of the officer in charge may consider it necessary to construct a dam, to open flood gates, to deepen a river channel, to plan dikes or even to change the course of a river; but the manner in which these operations are being carried out does not necessarily involve so wide a discretion as to make Section 2680 (a) applicable, yet so the courts have held.[34] On the other hand, and particularly in the light of the foregoing opinions, one might think that administering the right medicine is a function involving very much discretion, so that no tort action could lie against the Government as the doctor's or nurse's superior, even where the discretion was abused. The courts have held otherwise.[35] One of the few duties I could think of as not, or hardly, involving any "discretion" is the one whereby an official is to point out government regulations to an inquiring party. Yet this was apparently not the opinion of competent lawyers as well as the Congress in a case where an army wife was wrongly advised as to her rights concerning the moving of furniture across the country.[36] A special bill was necessary[37] allowing the Court of Claims to entertain the action, which was obviously thought to be otherwise excluded as based on a "discretionary" function.

The gist of all these and the many more cases that are going to fill the books seems to be that minor infractions committed by Government employees may be indicated but not major ones. If the tax collector negligently

33. Sickman v. United States, 184 F.2d 616 (7th Cir. 1950), *cert. denied,* 341 U.S. 939 (1951). And see Oro Fina Consolidated Mines v. United States, 92 F. Supp. 1016 (Ct. Cl. 1950), *cert. denied,* 341 U.S. 948 (1951) (no damage claim for closing of gold mine by defendant pursuant to wartime regulations).

34. Coates v. United States, 181 F.2d 816 (8th Cir. 1950); North v. United States, 94 F. Supp. 824 (D. Utah 1950); Boyce v. United States, 93 F. Supp. 866 (S.D. Iowa 1950); Olson v. United States, 93 F. Supp. 150 (D.N.D. 1950); Pacific Nat. Fire Ins. Co. v. TVA, 89 F. Supp. 978 (W.D. Va. 1950); Thomas v. United States, 81 F. Supp. 881 (W.D. Mo. 1949).

35. Costley v. United States, 181 F.2d 723 (5th Cir. 1950); Griggs v. United States, 178 F.2d 1 (10th Cir. 1949), *rev'd on other grounds sub nom.* Feres v. United States, 340 U.S. 135, 71 Sup. Ct. 153, 95 L. Ed. 152 (1950); Bandy v. United States, 92 F. Supp. 360 (D. Nev. 1950). And see United States v. Scrinopskie, 179 F.2d 959 (5th Cir. 1950) (damage to machines by negligent packing recoverable). But see Denny v. United States, 171 F.2d 365 (5th Cir. 1948), *cert. denied,* 337 U.S. 919 (1949).

36. Benolken v. United States, 99 F. Supp. 723 (D. Neb. 1951).

37. Priv. L. No. 115, 81st Cong., 1st Sess., c. 222, § 189 (1949).

drops a citizen's watch, the Government is liable, but if he by mistake impresses a lien on the man's property and thereby ruins his business, the Government is not liable.[38]

III. CLAIMS AGAINST THE WRONGDOING OFFICIAL

If a private person commits a legal wrong against another person, so as to constitute a tort, he is primarily liable; and if he is an employee or agent of another person and acts within the scope of his apparent authority, his employer or principal is liable, too. These principles, however, are not applicable where the wrongdoer acts as an officer of the Government. Not only is the liability of his superior, the Government, strictly limited on the ground of sovereign immunity, but also his own liability will regularly be disclaimed because of actual or imagined reasons of public policy.[39]

Thus in a recent case a Frenchman who had been wrongfully kept in custody as an enemy alien for four years (!) sued the responsible officers for damages for false arrest, alleging that the defendants acted through personal ill-will, maliciously, without any authority of law, and without reasonable or colorable cause. The action was dismissed for failure to state a cause of action.[40]

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, *should* not escape liability for the injuries he may so cause; and *if it were possible in practice to confine such complaints to the guilty,* it would be monstrous to deny recovery. . . . In this instance it has been thought in the end *better to leave unredressed the wrongs* done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."[41]

Here and there one can note attempts to draw a line between officials acting within and officials acting without the scope of their duties. Where the latter situation exists, the official is no longer an official, and since a governmental official's duty consists only in applying the law and not in violating it, so the argument runs, he would be liable as a private person whenever he acts wrongfully.[42] Unfortunately, it is fruitless to pursue this line

38. See Powell v. Rothensies, 86 F. Supp. 701 (M.D. Pa. 1949), *aff'd* 183 F.2d 774 (3rd Cir. 1950) (action was against individual collector of revenue but opinion shows that no claim would lie against the Government either).

39. See the reasoning in the *Gregoire* case, below, at notes 40, 41, 43; and see Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 69 Sup. Ct. 1457, 93 L. Ed. 1628 (1949). See also Walkup, *Immunity of the State from Suits by Its Citizens—Toward a More Enlightened Concept,* 36 GEO. L.J. 310, 334-35 (1948); Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine,* 59 HARV. L. REV. 1060 (1946).

40. Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), *cert. denied,* 339 U.C. 949 (1950).

41. *Id.* at 581 (italics supplied).

42. If "publick officers will infringe men's rights, they ought to pay greater damages than other men, to deter and hinder other officers from like offences." Ashby v. White,

of thought further as far as federal law goes and to investigate the extent to which it would be applicable to any wrong, "discretionary" and "administrative" or otherwise, committed by officials, for it has remained pure theory so far.

> "The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, *never cover occasions where the public good is not their aim,* and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that *that cannot be the meaning of the limitation without defeating the whole doctrine.* What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him."[43]

In other words, "official acts in performance of the duties of an office *do not mean simply the lawful acts* of the officer holding that office, but include all acts done under color by virtue of that office,"[44] because (according to the Supreme Court) it "is not in the public interest that such a suit should be maintained" even where the official acted "corruptly or maliciously."[45] The absence of probable cause and the presence of malice or other bad motive do not suffice to impose liability upon an officer who acted as officer.[46]

In consequence of the courts' refusal to allow suits for what we call misadministration, recovery against the allegedly wrongdoing officials has been denied for want of a cause of action for assault,[47] malicious prosecution,[48] false imprisonment,[49] wrongful search and seizure,[50] libel,[51] defamation

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2 Ld. Raym. 938, 956, 92 Eng. Rep. 126, 137 (K.B. 1703) (dictum). And see Bell v. Hood, 327 U.S. 678, 66 Sup. Ct. 773, 90 L. Ed. 939 (1946) (where officer exceeds his authority, he might have acted in private capacity and lost immunity protection); Gibson v. Reynolds, 172 F.2d 95, 98-99 (8th Cir. 1949) (dictum holds officer liable if he acted from personal motives, revenge, etc., yet suit dismissed for want of cause though malicious and wanton misclassification of plaintiff as a draftee was alleged); Zimmerman v. Poindexter, 78 F. Supp. 421 (D. Hawaii 1947) (motion to dismiss suit for want of cause of action denied where defendant officers were alleged to have wronged plaintiff under cloak of office). DICEY, THE LAW OF THE CONSTITUTION 189, 198 (8th ed. 1915) argues that the "rule of law" excludes the immunity of officials.

43. Gregoire v. Biddle, 177 F.2d 579, 581 (italics supplied).

44. Tinkoff v. Campbell, 86 F. Supp. 331, 332 (N.D. Ill. 1949).

45. Bradley v. Fisher, 13 Wall. 335, 351, 20 L. Ed. 646 (1872); Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926) (good survey of the authorities concerning judicial as well as executive, including quasi-judicial, officers).

46. Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949) *cert. denied,* 339 U.S. 949 (1950); Powell v. Rothensies, 86 F. Supp. 701 (M.D. Pa. 1949), *aff'd,* 183 F.2d 774 (3d Cir. 1950).

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

48. Laughlin v. Rosenman, 163 F.2d 838 (D.C. Cir. 1947); Cooper v. O'Connor, 99 F.2d 135 (D.C. Cir. 1938), *cert. denied,* 305 U. S. 643 (1938); and see White v. Brinkman, 23 Cal. App.2d 307, 73 P.2d 254 (1937).

49. Bell v. Hood, 327 U.S. 678, 66 Sup. Ct. 773, 90 L.Ed. 939 (1946); Papagianakis v. The Samos, 186 F.2d 257 (4th Cir. 1950), *cert. denied,* 341 U.S. 921 (1951); Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949); Brown v. Rudolph, 25 F.2d 540 (D.C. Cir.

of business and reputation,[52] damages caused by explosion[53] or simply for wrong application of the law.[54] Dicta to the contrary here and there[55] have not altered this legal situation.

Nor has the FTCA. As a matter of fact, the Act has limited the recoverability of tort claims against the official in that either a court judgment in a tort action against the United States or the acceptance of an out-of-court settlement constitute a complete bar to any action by the claimant against the government employee whose conduct gave rise to the claim.[56] The first-named limitation, according to the language of section 2672, applies to both favorable and unfavorable judgments.[57]

In short, where the Act does apply—to negligent torts not involving so-called discretionary functions—it is superfluous to sue the official inasmuch as the United States is liable. And where the Act does not apply—to intentional torts as well as to abuse of "discretion"—the law bows to the idea that both the king and his henchmen do no wrong.

1928), *cert. denied*, 277 U.S. 605 (1928); Keppleman v. Upston, 84 F. Supp. 478 (N.D. Cal. 1949); Zimmerman v. Poindexter, 78 F. Supp. 421 (D. Hawaii 1947); White v. Brinkman, 23 Cal. App.2d 307, 73 P.2d 254 (1937).

50. Bell v. Hood, 327 U.S. 678, 66 Sup. Ct. 773, 90 L. Ed. 939 (1946); Powell v. Rothensies, 86 F. Supp. 701 (M.D. Pa. 1949), *aff'd*, 183 F.2d 774 (3d Cir. 1950).

51. Smith v. O'Brien, 88 F.2d 769 (D.C. Cir. 1937); United States, to Use of Parravicino v. Brunswick, 69 F.2d 383 (D.C. Cir. 1934); Mellon v. Brewer, 18 F.2d 168 (D.C. Cir. 1927), *cert. denied*, 275 U.S. 530 (1927); Farr v. Valentine, 38 App. D.C. 413, Ann. Cas. 1913C 821 (1912); DeArnaud v. Ainsworth, 24 App. D.C. 167, 5 L.R.A. (N.S.) 163 (1904).

52. Spalding v. Vilas, 161 U.S. 483, 16 Sup. Ct. 631, 40 L. Ed. 780 (1896) (a leading case on the whole subject matter of officials' torts); Glass v. Ickes, 117 F.2d 273 (D.C. Cir. 1940); Tinkoff v. Campbell, 86 F. Supp. 331 (N.D. Ill. 1949).

53. Pacific National Fire Ins. Co. v. TVA, 89 F. Supp. 978 (W.D. Va. 1950).

54. Bradley v. Fisher, 13 Wall. 335, 20 L. Ed. 646 (1872); Dodez v. Weygandt, 173 F.2d 956 (6th Cir. 1949); Gibson v. Reynolds, 172 F.2d 95 (8th Cir. 1949); Laughlin v. Rosenman, 163 F.2d 838 (D.C. Cir. 1947); Lang v. Wood, 92 F.2d 211 (D.C. Cir. 1937); Standard Nut Margarine Co. of Florida v. Mellon, 72 F.2d 57 (D.C. Cir. 1934), *cert. denied*, 293 U.S. 605 (1934); Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926); Zimmerman v. Poindexter, 78 F. Supp. 421 (D. Hawaii 1947); Block v. Sassaman, 26 F. Supp. 105 (D. Minn. 1939); and see Benolken v. United States, 99 F. Supp. 723 (D. Neb. 1951).

55. Such as the ones above, note 42.

56. 28 U.S.C. §§ 2672, 2676, (1950). For a case—before the FTCA—of holding a "ministerial" government employee liable, see Brady v. Roosevelt Steamship Co., 317 U.S. 575, 63 Sup. Ct. 425, 87 L. Ed. 471 (1943).

57. Obviously, however, and despite the language of section 2676, the limitation does not apply where the action against the United States is dismissed because the employee did not act within the scope of his employment.