Strict Liability under the Federal Tort Claims Act: Does Wrongful Cover a Few Sins, No Sins, or Non-Sins

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STRICT LIABILITY UNDER THE FEDERAL TORT CLAIMS ACT:
DOES "WRONGFUL" COVER A FEW SINS, NO SINS, OR NON-SINS?

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INTRODUCTION

The Federal Tort Claims Act,1 with various exceptions,2 subjects the United States Government to tort liability for certain specified acts of its employees.3 One of the controversies in regard to the scope

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3. Section 1346(b) gives exclusive jurisdiction to the United States District Courts over:
of this tort liability is whether the Act makes the United States *strictly* liable in those situations where, by statute or under common law principles, a private citizen engaging in the same conduct could be held so liable. A private citizen, under common law principles, can be held strictly liable if he is found to have voluntarily engaged in or permitted activity which is found to be abnormally dangerous or ultrahazardous. It may seem that the recent Supreme Court decision in *Laird v. Nelms*, which determined that the government's tort liability under the Act does not include strict liability for ultrahazardous activity, has finally and absolutely settled the controversy. The Court's opinion, however, has not quelled the debate on the scope of the government's tort liability.

The federal government engages in an expanding range of activities [e.g., flood-control projects, supersonic airplane flights] which affect an increasingly large proportion of the country's population. Since many of those activities may be defined as ultrahazardous, the number of tort claims that are neither negligent nor wrongful, and hence are not within the coverage of the Act, will correspondingly increase. Those persons claiming strict liability, like all tort claimants prior to the passage of the Act in 1946, will have to seek special congressional legislation to recover their losses. Such a re-

... civil actions on claims against the United States for money damages, accruing on and after January 1, 1945, 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.


Section 2674 states that:
The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances... .


4. See id.


7. Id. at 802—03.


requirement, however, would seem to vitiate the purpose of the Act, which was to shift the burden of deciding meritorious claims from the Congress to the courts.\footnote{See note 42 infra.}

It is of considerable importance, therefore, that the arguments as to whether strict liability for ultrahazardous activity should be covered in the Act be examined to determine if the judicial exclusion of strict liability is consistent with the aims of the Act. This article will analyze those arguments from three different perspectives: the language of the Act itself, the judicial constructions of the Act, and the public policies which are and should be the basis for the Act.

I. THE LANGUAGE OF THE STATUTE

When construing the language of the Act to ascertain whether the scope of federal tort liability includes strict liability for ultrahazardous activities, much attention is focused on the phrase “negligent or wrongful act or omission.”\footnote{28 U.S.C. § 1346(b) (1970). For text of this section see note 3 supra. This quoted language appears in the section defining jurisdiction of the federal courts over tort claims against the United States. The section titled “Liability of the United States” does not mention the “negligent or wrongful” requirement, but states:

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

Within this phrase, the word “wrongful” has become the lever grasped by judges to either expand or reduce federal tort liability.\footnote{See, e.g., Hatahley v. United States, 351 U.S. 173, 181 (1957); Dalehite v. United States, 346 U.S. 15, 45 (1953); United States v. Causby, 328 U.S. 256 (1946).}

The term “wrongful” was added after the term “negligent” in the evolution of the phrase “negligent or wrongful act or omission.”\footnote{Indian Towing Co. v. United States, 350 U.S. 61 (1955). See also 6 AKRON L. REV. 105, 108 (1973):

A tort claims bill passed the Senate in 1942 which only provided for liability for “negligence.” This bill was amended by the House Judiciary Committee and the phrase “negligent or wrongful act or omission” was used. The committee indicated that “the committee prefers its language as it would afford relief for certain acts or omissions which may be wrongful but not necessarily negligent.” Although this bill did not become law, the same phrase was used in the bill enacted in 1946.
\textit{Id.} (emphasis added) (footnotes omitted).}
described as "inconclusive," but it does seem clear that "wrongful" was added with some intention of expanding liability. The problem is to determine how far beyond the restricted concept of negligence the legislators intended to expand liability.

The Fourth Circuit in United States v. Praylou equated "wrongful" with the Restatement of Torts' definition of "tortious":

[T]he word "tortious," which means wrongful, "is appropriate to describe not only an act which is intended to cause an invasion of an interest legally protected against intentional invasion, or conduct which is negligent as creating an unreasonable risk of invasion of such an interest, but also conduct which is carried on at the risk that the actor shall be subject to liability for harm caused thereby, although no such harm is intended and the harm cannot be prevented by any precautions or care which it is practicable to require."

The Supreme Court, however, in Dalehite v. United States ruled that the word "wrongful" did not add the absolute liability theory to the coverage of the Act. Finding that the overall intent of Congress was to require some kind of misfeasance or nonfeasance to make the government liable under the Act, the Court stated that "wrongful" was added merely to cover non-negligent trespasses.

Commentators have not been able to agree on whether the Court's statement was a holding or dictum, but the very least that can be said is that the Court's analysis was weak. Before reaching the strict liability question, it held that the discretionary function exception

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16. See note 13 supra.
18. Id. at 293, citing RESTATEMENT (SECOND) OF TORTS § 6, comment a, at 12 (1965).
19. Dalehite v. United States, 346 U.S. 15 (1953) (action against the United States seeking damages for a death caused by the disastrous explosion of fertilizer made with an ammonium nitrate base at Texas City, Texas, on April 16 and 17, 1947).
20. Id. at 45.
22. Compare Dostal, Aviation Law under the Federal Tort Claims Act, 24 FED. B.J. 165, 177 (1964) (Dalehite held no strict liability), with Comment, Federal Liability for Sonic Boom Damage, 31 S. CAL. L. REV. 259, 266 (1958) (restricted liability holding of Dalehite is mere dictum). See generally Peck, Absolute Liability, supra note 15. The author cautiously notes that Dalehite "said" there is no strict liability. Id. at 433.
of the Act barred recovery, at least for negligence, against the government and the Coast Guard. If the Court was saying that the discretionary function exception did indeed only apply to possible liability for negligence, then the Court’s exclusion of strict liability from the Act’s coverage was a holding. It was dictum, however, if the Court was saying that the exception barred all liability of the government.

The Dalehite interpretation of the word “wrongful” as excluding the federal government from strict liability in tort was most recently followed in Laird v. Nelms. After noting the Dalehite precedent, the Court in Laird reasoned that: 1) assuming a sonic boom could be equated to blasting, strict liability under modern law should be based on the ultrahazardous nature of the activity, not on trespass theory; 2) Congress did not intend the Act to cover strict liability founded on the high degree of danger present in certain activities; and 3) Congress, by making no attempt to amend the Act after Dalehite, though granting relief to victims in that case, had impliedly accepted the Court’s earlier view in Dalehite. The dissent in Laird, on the other hand, suggested that “wrongful” is synonymous with tortious. Tortious activity carries with it strict liability, not because the conduct is blameworthy, but because of the very high risk of harm to others.


24. Dalehite v. United States, 346 U.S. 15, 43 (1953). The Court also denied recovery against the Coast Guard for its alleged failure to supervise the storage of fertilizer that exploded and its failure in fighting the fire prior to the explosion because there was no analogous private liability—a prerequisite for recovery under the Act. See note 3 supra. Public firemen are immune from private suits for their alleged failures or carelessness. 346 U.S. at 43.

25. The Court apparently resolved this debate, however, in Laird v. Nelms [406 U.S. 797 (1972)], by treating its earlier pronouncement in Dalehite as holding and precedent. Id. at 798—99.


27. Id. at 800.

28. Id. at 801.

29. Id. at 802.

30. Id. at 804—06 (Stewart, J., dissenting).

31. See Cobey, The New California Governmental Tort Liability Statutes, 1 Harv. J. Legis. 16, 27 (1964), where it is noted that there is no provision for strict
What kinds of conduct, then, should the term “wrongful” include? The Supreme Court in Laird ruled that “wrongful” only includes trespass. Yet, under modern law, trespass liability in tort normally requires a showing of intent, negligence, or ultrahazardous activity. If the last mentioned category is ruled out, “wrongful” then adds only intentional trespasses. Under this interpretation, a few other torts might also be covered: nuisance, trespass to chattels and conversion, invasion of privacy, intentional infliction of mental anguish, and the torts involving interference with family relations. But most of this possible coverage is doubtful. It is seldom likely to be applied to anything other than trespass (and perhaps liability under the California statute since there had not been adequate time to consider whether damages should be awarded in such a case. See generally Van Alstyne, Governmental Tort Liability: Judicial Lawmaking in a Statutory Milieu, 15 STAN. L. REV. 163 (1963).

34. See Denny v. United States, 185 F.2d 108 (10th Cir. 1950) (does not rule out possibility that the United States could be liable for a nuisance per se or nuisance in fact). Cf. Street, Tort Liability of the State: The Federal Tort Claims Act and the Crown Proceedings Act, 47 MICH. L. REV. 341, 364 (1949). The author indicates that the United States could be liable in nuisance, but notes there can be no declaratory or injunctive relief. Immunity of local governmental bodies has often been held limited or inapplicable as to nuisance liability. See Wilbourne, Municipal Nuisance Liability: A Problem in Characterization, 38 CONN. B.J. 51 (1964).
36. But see Hambleton v. United States, 185 F.2d 564, 567 (9th Cir. 1950) (intentional infliction of mental anguish constitutes assault and recovery is thus precluded under the Act). Cf. Morton v. United States, 228 F.2d 431 (D.C. Cir. 1955), cert. denied, 350 U.S. 975 (1956) (discretionary function exception bars claim for holding prisoner wrongfully as mental defective, subjecting him to physical and mental cruelty, and invading his privacy). See also Radford v. United States, 264 F.2d 709 (5th Cir. 1959) (discretionary function exception bars recovery for conspiracy to bring about discharge of employee).
nuisance) based on intent. It might occasionally also be used in borderline cases where it is apparent that either a negligent or intentional tort has occurred, but it is not clear which. Thus, the exclusion of strict liability from within its scope makes "wrongful" very limited in meaning.

Since there is nothing in the Act which indicates that a "wrongful" act requires blameworthy or socially-disapproved behavior to any degree greater than that which tort law normally requires for liability, strict liability should be included within the definition of "wrongful."

II. THE JUDICIAL POLICY OF INTERPRETATION

Given the ambiguity of the Act's language regarding the extent of the government's liability, a court may base its decision on its interpretation of proper statutory construction: Should the Act be strictly construed as a limited waiver of immunity, or liberally interpreted as a sweeping statement that the government is, in general, to be liable to the same extent as a private individual? The Supreme Court, in the Laird decision, relied heavily on both the legislative history that indicated the original drafters of the Act did not have coverage of strict liability torts in mind and on the Court's refusal in Dalehite to apply such liability. This essentially strict construction, confined by legislative history and precedent, may be considered appropriate since the result is not to deny relief for all claims, but rather to require proof of fault in order to establish liability. And, it may be argued, this result is also bolstered by the Act's use of "wrongful" rather than "tortious," as the latter word


40. See Bulloch v. United States, 133 F. Supp. 885 (D. Utah 1955) (absolute liability imposed by state law on individuals while United States could be liable only for negligence); Barroll v. United States, 135 F. Supp. 441 (D. Md. 1955) (state law probably would enforce strict liability for similar private activity and United States could have been liable had evidence of negligence been sufficient). In cases involving such governmental activities as supersonic flights or atomic detonations, negligence may be so difficult to prove that a denial of strict liability is tantamount to a denial of any liability. See Peck, Laird, supra note 8.
can more readily be taken to cover harmful conduct, whether or not involving fault.\textsuperscript{41}

However, such a narrow construction of the language, denying recovery where clearly none of the statutory exceptions applies, is at odds with a basic purpose for passage of this legislation: elimination of congressional consideration of tort claims.\textsuperscript{42} Indeed, it has been forecast that even some of the present exceptions may eventually be eliminated to aid the shift of claim consideration from the legislative to the judicial branch.\textsuperscript{43} Furthermore, while congressional action would be required to amend the express exceptions to governmental liability, it does not necessarily follow that congressional inaction should be construed as approval of judicially framed exceptions not delineated in the Act.\textsuperscript{44} Finally, in line with the widespread movement toward abolition of governmental and most other tort immunities, the current prevailing trend, notwithstanding the Court's decision in \textit{Laird}, is toward liberal interpretation of statutes eliminating immunity.\textsuperscript{45} This seems especially appropriate where

41. See text accompanying notes 16—19 supra.

[T]he connotation of tortious conduct is not wrongful conduct, but harmful conduct, whether or not wrongful. In any event, if it were to be admitted that the operation of an airplane is "tortious conduct," the Federal Tort Claims Act does not waive immunity for tortious conduct but for negligent and wrongful conduct, an entirely different matter.


Cf. Dalehite v. United States, 346 U.S. 15, 45 (1953) (more appropriate ways of providing strict liability could have been found had Congress so intended). But see Peck, Laird, supra note 8. The author suggests that Congress could have intended "wrongful" to mean "tortious," a common legalistic definition. Id. at 407—08. See also 22 J. Pub. L. 219, 225—27 (1973).

42. "The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities . . . and not to leave just treatment to the caprice and legislative burden of individual private laws." Indian Towing Co. v. United States, 350 U.S. 61, 68—69 (1955). See Peck, Laird, supra note 8, at 412 (discussing the volumes of private claims presented to Congress).


44. "[T]he sound view that legislative failure to enact a bill is not one of the designated ways of enacting a law cautions against attributing significance to uninitiated or uncompleted legislative activities." Peck, Laird, supra note 8, at 402-03. But see text accompanying note 26 supra.

legislation of a government terminates its own immunity; points of doubt should be resolved against the drafter, in whose hands lies the power to amend the law if necessary.

In one of its first cases interpreting the Federal Tort Claims Act, the Supreme Court squarely rejected a strict interpretation of the statute.\textsuperscript{46} Shortly thereafter, however, the Court denied recovery for non-combat injuries incident to military service on the basis that Congress did not intend such claims to be within the scope of governmental liability under the Act.\textsuperscript{47} The Court stated in that case that the Act "should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole."\textsuperscript{48} The next major decision interpreting the scope of liability under the Act was the \textit{Dalehite} case, in which the Court said that "... no action lies against the United States unless the legislature has authorized it."\textsuperscript{49} The decision tended toward a strict construction of the waiver of immunity and a broad interpretation of the "discretionary function" exception. The Court also addressed itself to the possibility of absolute liability of the government for injury due to ultrahazardous activities, stating that "... the Act does not extend to such situations, though of course well known in tort law generally."\textsuperscript{50}

In subsequent decisions, the Court retreated somewhat from the restrictive language in \textit{Dalehite}, evidencing a trend toward a more liberal interpretation of the Act. In \textit{Indian Towing Co. v. United States},\textsuperscript{51} recovery was allowed for damages resulting from the negligent failure of the Coast Guard to repair a beacon in a lighthouse. The Court held that liability was dependent neither on the distinction between "governmental" and "proprietary" functions, nor on the existence of comparable private activity, stating that "... we would be attributing bizarre motives to Congress were we to hold that it was predicating liability on such a completely fortuitous circumstance—the presence or absence of identical private activ-


\textsuperscript{47} Feres v. United States, 340 U.S. 135 (1950).

\textsuperscript{48} \textit{Id.} at 139.

\textsuperscript{49} 346 U.S. at 30, \textit{citing}, \textit{e.g.}, Feres v. United States, 340 U.S. 135, 139 (1950).

\textsuperscript{50} 346 U.S. at 44. There has been considerable debate as to whether or not this language was the holding or dictum. See text accompanying notes 20—22 \textsuperscript{supra}. The Court, however, apparently ruled that this language was the holding in \textit{Laird v. Nelms} [406 U.S. at 798—99]. See text accompanying note 23 \textsuperscript{supra}.

Two years later, in Rayonier, Inc. v. United States, the Court held that the tort liability of the federal government was more closely analogous to that of private persons than to that of municipal corporations. The Court emphasized that the test of the United States' liability under the Act is whether a private person would be responsible for similar negligence under the laws of the state where the acts occurred. Thus, the United States was held liable for the negligence of its employees acting as public firemen, whereas municipal corporations are traditionally immune from such liability. The Court reiterated that no exception existed for "uniquely governmental" functions, stating, "To the extent that there was anything to the contrary in the Dalehite case it was necessarily rejected by Indian Towing." The Federal Tort Claims Act, it was said, established "... novel and unprecedented governmental liability."

Intervening between Dalehite and Rayonier was the Fourth Circuit's decision in United States v. Praylou. In Praylou, the United States was held liable for damage resulting from the crash of a government airplane, even though the applicable state law imposed strict liability on airplane owners for such damage. The court reasoned that the Dalehite decision did not bar recovery, but was limited to denying strict liability of the government for the possession of dangerous property. The Dalehite limitation was not applicable to a situation "merely because the law of a state imposes absolute liability for such damage and not mere liability for negligence." To hold otherwise, the Praylou court ruled, "would be contrary to the requirement of 28 U.S.C. § 2674 that the United States shall be liable 'in the same manner and to the same extent as a private individual in like circumstances'." Although the Supreme Court denied certiorari on the appeal of Praylou, an ambiguous reference to the case in Rayonier and the fact that the remaining members of the majority in Dalehite were in the minority in Indian Towing and Rayonier led to speculation that the Court was ready to endorse

52. Id. at 67 (footnote omitted).
54. Id. at 319.
55. Id.
56. Id.
58. Id. at 295.
59. Id.
60. Id.
absolute liability of the government under the Federal Tort Claims Act.\(^2\)

Strict liability was firmly established in the tort law of almost all the states of the Union when the Federal Tort Claims Act was passed, and the Act provides for application of the law of the state where an alleged tort by the government has occurred.\(^3\) To “read into” the statute an exception for strict liability causes an unnecessary departure from this general use of local tort standards\(^4\) and defeats the policy of uniform treatment regardless of whether a defendant is an individual or the government. In either case, the applicable state law should apply.\(^5\) Of course, the rule in Laird achieves a uniformity of its own—no strict liability of the federal government regardless of where the action arises.\(^6\) But this is not the kind of uniformity envisioned either by the Act\(^7\) or by general conflict of laws rules, which increasingly look to equitable considerations rather than rigid formulae.\(^8\)

In fact, with the exception of absolute liability, where state law imposes a higher than usual degree of care, both the lower courts and the Supreme Court seem to agree that this higher standard applies to the United States Government under the Tort Claims Act. Thus, the United States was held to the standard of care pro-

62. See Peck, Absolute Liability and the Federal Tort Claims Act, 9 STAN. L. REV. 433 (1957). The personnel change in the Supreme Court is discussed in a footnote. Id. at 436 n.18.


64. See Peck, Absolute Liability, supra note 15, at 454. There was once doubt whether local law applied to the doctrine of respondeat superior, but it is now clear that it does. Id. at 447—48.

65. But see Bartholomae Corp. v. United States, 253 F.2d 716 (9th Cir. 1957) (damage to property allegedly caused by nuclear detonations). The court indicated that strict liability could not apply, but said that in general the law of Nevada, where the blasts occurred, must be determinative. Id. at 719.

66. See also Huslander v. United States, 234 F. Supp. 1004 (W.D.N.Y. 1964). The court denied government liability for personal injuries due to sonic boom under the theory that the activity causing the injury was within the discretionary function exception set forth in 28 U.S.C. § 2680(a). The court suggested that such an approach is preferable. It avoids a quagmire of varying results due to differences in the local law on which government liability is dependent under the Federal Tort Claims Act. Id. at 1007—08.

67. See Note, Torts—The Discretionary Function Exception and Absolute Liability in an Action for Recovery for “Sonic Boom” Damage Brought Under the Federal Tort Claims Act, 20 KAN. L. REV. 545, 554 (1972). The author contends that it would be “absurd, or at the least contradictory” not to hold the government absolutely liable where a private individual would be.

vided in a local statute regulating storage of explosives in determining the government's liability for injuries sustained by two youths from the explosion of a hand grenade. The government contended that it had exercised due care in the storage of the grenades, despite making no effort to comply with the provisions of the state law. The court held, however, that the statute was applicable to the defendant and that "failure to observe the requirements of the State statute or ordinance as to care is evidence of negligence." That the standard of care owed by the government in determining its liability under the Federal Tort Claims Act is dependent on state law is well settled under the "private person counterpart" doctrine. And the Supreme Court implicitly endorsed this principle in a decision holding that the right of action under the provisions of a state employers' liability act, which require the use of every feasible precaution "for the protection and safety of life and limb," may be used to recover for a maritime death in that state.

Nevertheless, the Court in Dalehite and Laird refused to apply local standards in situations where the applicable law would impose strict liability on the government. The logical inconsistency of imposing on the federal government the same high degree of care as provided by local law, but not imposing strict liability when the law of the jurisdiction provides for it, is readily apparent. Such evasion and hair-splitting could be avoided by simply extending the "private person counterpart" doctrine to all determinations of liability, including absolute liability.

70. Id. at 631 (citations omitted).
71. See, e.g., United States v. Ridolfi, 318 F.2d 467 (2d Cir. 1963) (state law determines extent of applicability of res ipsa loquitur doctrine); Schmid v. United States, 273 F.2d 172 (7th Cir. 1959) (government liable for failure to comply with state statutory safety requirements; contributory negligence and assumption of risk not allowed as defenses since precluded by state law); Ford v. United States, 200 F.2d 272 (10th Cir. 1952) (United States not liable for injury to trespasser where local law provides no duty of care for safety of trespassers on part of landowners); Molohon v. United States, 206 F. Supp. 388 (D. Mont. 1962) (standard of care owed by federal government determined by state law); Meza v. United States, 119 F. Supp. 662 (W.D. Ky. 1954) (United States negligent under state standards in failing to clear explosives from living area on military reservation).
   Under [the] statute a defendant is liable for failure to "use every device, care and precaution which it is practicable to use for the protection and safety of life and limb . . . ."
   Id. at 316, citing Ore. Rev. Stat. § 654.305 (1953).
One writer has noted that courts have resorted to various "escape devices" in order to impose absolute liability without referring to it as such, including "... res ipsa loquitur, negligence per se, implied contract, eminent domain, and the questionably circuitous practice of holding independent contractors strictly liable with an inference that they may in turn obtain relief from the Government through contractual remedies." With regard to the last device, the government generally is not answerable for the negligence of its independent contractors, and where immunity from liability is recognized to be in the government, it is often extended to private parties contracting with the government. Some cases, however, have held the United States liable where highly dangerous activities were involved. Furthermore, the vicarious immunity of government contractors is in the process of erosion: the contractors' immunity has been rejected where the government had no part in controlling the details of the activity, and where the ultrahazardous activity was not essential to the performance of the contract with the government. Additionally, mere state authorization to engage in a dan-


74. See Strangi v. United States, 211 F.2d 305 (5th Cir. 1954) (government not liable for negligence of independent contractor employing dangerous instrumentality). The rationale is that the government is only liable for the negligent or wrongful acts or omissions of its employees [28 U.S.C. § 1346(b)(1970)], and an independent contractor is not an employee of the government. Strangi v. United States, 211 F.2d 305, 308 (5th Cir. 1954).

75. See generally 19 Minn. L. Rev. 129 (1934).

76. See, e.g., Stancil v. United States, 196 F. Supp. 478 (E.D. Va. 1961) (government at least has duty to warn of dangerous work being performed by independent contractor); Pierce v. United States, 142 F. Supp. 721 (E.D. Tenn. 1955) (government has non-delegable duty as to electric power transmitted over its lines). But cf. Emelwon, Inc. v. United States, 391 F.2d 9 (5th Cir. 1968) (any liability of the United States should be based on its own negligence as employer); Strangi v. United States, 211 F.2d 305 (5th Cir. 1954).


gerous activity carries with it none of the governmental immunity which might accrue if the activity were carried out by the state or municipality. If this erosion should lead to elimination of the immunity for government contractors, it would seem to follow, under the "private person counterpart" doctrine, that the government's immunity also should be revoked.

Apart from tort liability, a different type of strict liability may be enforced in suits against the government for blasting, airplane trespasses, and similar damage to real property. If the activity amounts to a "taking" of the property, due process requires full compensation. But if the damage, though considerable, falls short of a taking—as is likely to be true where a single sonic boom has occurred—this basis cannot be utilized. If there is no taking, then the due process means of enforcing strict liability vanishes, though the damage may be as great and the activity is such that it would impose strict liability on any other defendant.

The trespass action remains an alternate basis of recovery as it is the one tort, apart from negligence, which the Supreme Court has held affirmatively to be subsumed under the "wrongful" acts for which the government is liable under 28 U.S.C. § 1346(b)(2). Lower courts have thus evaded the prohibition of strict liability by finding a trespass or nuisance, and by leaving largely unclarified whether the basis underlying the tort is intent, negligence, or ultra-


83. See, e.g., Hatahley v. United States, 351 U.S. 173 (1956) ("wrongful" held to include trespass which is not strictly negligent); Wildwood Mink Ranch v. United States, 218 F. Supp. 67 (D. Minn. 1963) (government held liable due to "either negligence or trespass, or both").

hazardous activity. The use of these actions, however, to avoid the prohibition of strict liability is limited. Blasting damage may no longer be treated as a trespass, but is conceded to be an ultrahazardous activity. Furthermore, Laird held that the theory of trespass could not be used to clothe the damage from a sonic boom caused by a military aircraft so as to bring it "within the Act's waiver of immunity." If "wrongful" is not expanded beyond the tort of trespass, whose usefulness is clouded by modern technology, then the Federal Tort Claims Act is surely not equating the government's liability with that of a private person. The alternative would be to stretch the meaning of "trespass" out of its traditional shape—not necessarily a bad result, but one the courts have been justifiably reluctant to employ merely to bring some situations of harm within the scope of the government's liability under the Act.

The Supreme Court, in its decision in Laird, relied on its earlier pronouncement in Dalehite to answer the fundamental question of the scope of government liability. Yet Dalehite need not have been a roadblock to the imposition of strict liability on the government. The Court in Dalehite brushed aside the argument—affirmatively applied in later cases such as Indian Towing and Rayonier—that the government should be liable where a private person would be, finding that other public bodies enjoyed immunity and thus were not liable for damage incident to fire fighting. But the doctrine of sovereign immunity, in fire fighting and other activities, has been greatly undermined since that time. In light of these develop-

87. See, e.g., id., citing United States v. Causby, 328 U.S. 256, 260—61 (1946). The Causby Court found a glidepath easement for an airport over respondent's property.

On the rules existing prior to the recent trend toward abolition see Davis, Tort Liability of Governmental Units, 40 MINN. L. REV. 751 (1956); Annot., 60 A.L.R.2d 1193 (1958). Under those rules, fire fighting and fire prevention were, as Dalehite
ments, the *Laird* decision is an apparent anomaly—and a retreat from the progressive direction in which the Court had appeared to be moving. As one critic has commented:

At a time when more and more courts and commentators are realizing the injustice of sovereign immunity, the Court has restrictively interpreted a congressional effort to abrogate such immunity. Moreover, the Court has done so in a decision based on questionable statutory interpretation, a narrow reading of the legislative history and dubious public policy.50

### III. PUBLIC POLICY ARGUMENTS

Assuming that a liberal construction of the Federal Tort Claims Act has been judicially endorsed, and assuming that such a construction would allow "wrongful" to cover strict liability, what public policy considerations should convince the Supreme Court to rule that the Act waives the government's sovereign immunity for suits based on the theory of strict liability?

One writer has cited three factors which he felt would make it unlikely that the courts would hold for recovery for sonic boom damage under the Act: "[T]he difficulties in amassing evidence against the United States, the public policy considerations inherent in the flight of supersonic governmental aircraft, and the existence of other remedies available to the aggrieved party."91 These three factors are common to many ultrahazardous activities and therefore

said, usually classified as "governmental" activities to which no liability could attach. See Fuller & Casner, *Municipal Tort Liability In Operation*, 54 Harv. L. Rev. 437, 442-43 (1941). These rules remain in effect in some jurisdictions. Even where immunity has been terminated, cases based on alleged negligence in fire prevention activities are often unsuccessful on the basis of general negligence principles. See Duran v. City of Tucson, 509 P.2d 1059 (Ariz. Ct. App. 1973) (duty owed public in general, not individual plaintiff); Motyka v. City of Amsterdam, 15 N.Y.2d 136, 256 N.Y.S.2d 595 (1965) (lack of duty).


91. 39 Tul. L. Rev. 145, 149 (1964)(footnotes omitted). The article supports amendment of the Federal Tort Claims Act to allow strict liability, but views it as unlikely that the courts will find such liability under the present statute. For a discussion of the public policy issue see Coasey v. Hallaby [231 F. Supp. 978, 979 (W.D. Okla. 1964)], which states that supersonic flight is essential to the development of a commercial supersonic transport (SST), and that such flights also provide useful information to the armed forces for defense purposes. See also Kirk v. United States, 451 F.2d 690 (10th Cir. 1971) (relief sought under the Tucker Act, 28 U.S.C. § 1346(a)(2) (1970), for property damage from high altitude supersonic
should be scrutinized to determine whether they are in fact legitimate reasons for denying strict liability for ultrahazardous activities under the Act. First, the difficulty of proof certainly exists in many potential suits against the government, but this by itself does not prevent recovery. Similarly, the difficulty in proof should not be allowed to stand by itself to prevent recovery with respect to ultrahazardous activities. Second, although it is true that alternative statutes may be used in a number of situations of possible federal liability, those other statutes usually have limited coverage and low monetary limits.  

The public policy argument, however, has some undeniable strength and should be carefully examined. It may seem both harsh and detrimental to the public to impose liability without fault on a governing entity and its contractors undertaking projects which are necessary to promote general welfare and security.  

Certainly the solvency of the government, which could be conceivably threatened by the potential multiplicity of suits growing from the malfunction of a large federal project, is of great importance to all citizens. But as the Supreme Court has noted, the solvency of the federal government is not so easily threatened by tort liability as that of a municipality would be, and the government is protected by numerous safe-flights after the statute of limitations applicable to the Federal Tort Claims Act had run was denied because it was not a taking in violation of the fifth amendment to the Constitution of the United States and because of a finding of quasi-contract; Grant v. United States, 326 F. Supp. 843 (W.D. Okla. 1970) (discusses policy for denying Federal Tort Claims Act relief but finds for plaintiff on condemnation theory).  


93. See Pumphrey v. J.A. Jones Constr. Co., 250 Iowa 559, 94 N.W.2d 737 (1959), criticized in Comment, Authorized Government Contractors Exempted from Strict Liability, 12 STAN. L. REV. 691 (1960). Cf. Katz v. Slade, 460 S.W.2d 608 (Mo. 1970) (no strict liability of municipally-owned golf course). Thus, some courts have refused to impose on government-owned zoos the strict liability usually applied to the acts of wild animals. See City & County of Denver v. Kennedy, 476 P.2d 762 (Colo. 1970). Accord as to no federal strict liability, Ashley v. United States, 215 F. Supp. 39 (D. Neb. 1963), aff'd per curiam, 326 F.2d 499 (8th Cir. 1964). Some cases, particularly in the United Kingdom and Canada, have refused to apply strict or nuisance liability to activities specifically authorized by legislation. Linden, Strict Liability, Nuisance and Legislative Authorization, 4 OSGOODE HALL L. REV. 196 (1966). Such immunity in the United States, however, has been greatly limited, and in earlier case law often abandoned. Id. at 207.
guards not requiring blanket immunity from strict liability.\textsuperscript{94}

The first safeguard is that the strict liability doctrine contains limitations of its own which the government can utilize just as readily as any other defendant. Strict liability for ultrahazardous activity is confined "to those harms the risks of which made the activity extra-hazardous . . . ."\textsuperscript{95} The injury then, in a given case, must be one contemplated by the original policy decision to voluntarily engage in the ultrahazardous activity in spite of the known risks.\textsuperscript{96} Tort concepts analogous to contributory negligence, assumption of risk, foreseeability, and proximate cause have been applied in determining strict liability questions. Thus, in an early decision it was held that a defendant who kept a vicious animal was not liable for injuries caused by a horse which became frightened when it saw the animal, because the risk involved in keeping the animal did not include such an event.\textsuperscript{97} More recently, a court found for defendants engaged in blasting activity which agitated minks being raised by the plaintiff to the point where they slaughtered their own offspring.\textsuperscript{98} The opinion reasoned that the mother minks' intervention had broken the chain of causation and thus called for an allegation of negligence on the part of the defendant.\textsuperscript{99}

The Restatement of Torts also supports the position that strict liability is confined to the foreseeable risks of an ultrahazardous activity. It gives as an example a situation where a defendant storing dynamite would be held strictly liable for the consequences of any explosions. If, however, a part of the wall of the magazine were to collapse and injure a pedestrian, the law of negligence would apply.\textsuperscript{100} In summary, strict liability does not mean absolute, unlimited liability. Recovery is, whenever possible, limited to a specific class of persons injured in a certain way by a particular class of harms.\textsuperscript{101}

Another safeguard is the enumeration of exceptions in the Act

\textsuperscript{94} Rayonier, Inc. v. United States, 352 U.S. 315, 320 (1957).
\textsuperscript{96} \textit{See note 5 & accompanying text supra.}
\textsuperscript{97} Scribner v. Kelley, 38 Barb. (N.Y.) 14 (1862).
\textsuperscript{98} Madsen v. East Jordan Irrigation Co., 101 Utah 552, 125 P.2d 794 (1942).
\textsuperscript{100} \textit{Restatement of Torts} § 519, comment b (1934).
itself. Some protect rather narrow areas of government activity, such as the conduct of the Tennessee Valley Authority and the Panama Canal Company. Other, more pervasive government conduct, such as the handling of mail by the postal department, the activity of the armed forces during wartime, and the fiscal operations of the Treasury Department, are also exempted. And finally, broad categories of tort claims in areas such as libel, slander, and interference with contract rights are completely excluded without reference to any government branch or department. Such far-ranging exceptions significantly narrow the areas of possible recovery under the Act and help to refute any contention that the imposition of strict liability standards might threaten governmental solvency through a proliferation of tort claims.

An additional exception, the aforementioned discretionary function clause, is so broad that it is capable of supplying immunity wherever judgment and discretion have been exercised by federal employees. Because of the need for both government independence of action and freedom of the executive and legislative branches from constant judicial evaluation by the judiciary, "... almost no one contends that there should be compensation for all the ills that result from governmental operations." The commentators are nearly unanimous in recognizing that the primary goal of this concept is the protection of the activities of other branches from constant judicial evaluation within the context of tort actions. Clearly the courts should not be allowed to impose liability for the conse-

103. Id. at § 2680(l).
104. Id. at § 2680(m).
105. Id. at § 2680(i).
106. Id. at § 2680(h), as amended, Pub. L. No. 93—253, § 2, 88 Stat. 50 (March 16, 1974). This section was only recently amended to make “assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution” on the part of federal law enforcement officials actionable. Id.
quences of a genuine policy decision, the formulation of a regulation, or a quasi-judicial ruling. But, these are the types of decisions which the discretionary function exception was designed, and can be used, to immunize. The scope of the immunity of these "planning and policy-making decisions" has a definite correlation with the need for departmental independence.

There is, however, no such correlation between the need for departmental independence and the areas that tort law has sought to protect by the imposition of strict liability. The formulation of plans, the exercise of judgment involved in prosecutorial activities—these are areas where freedom of action might be considered essential, and where the discretionary function exception should be applied. But these are not necessarily covered by the strict liability principle, which relates largely to the danger involved in a given activity, and not to the degree of high level policy-making involved. If strict liability were applied under the Tort Claims Act—to blasting, for instance—some decisions could continue to be immune (such as the decision to undertake a highway-building program), but many need not (such as an employee's decision of how much explosive to use in a charge).

If we return to the basic policy justification for the discretionary

110. Such a position was maintained by Assistant Attorney General Shea in congressional testimony. He reasoned that the adoption of the discretionary function section would exempt no more activities from liability than the courts, under the separation of powers doctrine, would exempt anyway in the absence of such an exception. Hearings Before the House Committee on the Judiciary, 77th Cong., 2d Sess., ser. 13, at 29 (1942).

111. See text accompanying notes 108—09 supra.

112. See United States v. Faneca, 332 F.2d 872 (5th Cir. 1964) (formulating and carrying out plans for admission of first Negro to University of Mississippi comes within discretionary exception). See generally 52 Mich. L. Rev. 733 (1954).


114. This assumes, of course, that the discretionary function exception in the Act applies to "wrongful" as well as negligent conduct. This assumption is supported by the broad language of the exception and by the dissenting opinion in the sonic-boom case. Laird v. Nelms, 406 U.S. 797, 803 (1972) (Stewart, J., dissenting). The majority in the Dalehite case may not have so reasoned since they discussed the possibility of strict liability after they had already held that the exception applied. Dalehite v. United States, 346 U.S. 15, 45 (1953).
function exception, its inapplicability to most situations involving ultrahazardous activity can be better appreciated. With ultrahazardous activity the policy maker has evaluated the risks involved and recognized that they are unavoidable. The fear is that a court will substitute its own perspective for that of the policy maker and determine, in view of the risks involved, that a particular action should not have been undertaken. By imposing liability, however, a court is not telling another branch of government to act differently; it is only requiring that it pay for the inevitable consequences of its acts. This distinction was appreciated by the Fourth Circuit in *Laird*. The court pointed to an Air Force Regulation which recognized the risks inherent in supersonic flight and stipulated that this carried with it a duty to accept the responsibility for any damage which might arise.115

Finally, it must be recognized that the loss-spreading abilities of the United States far exceed those of private persons and businesses (or their insurers) upon whom tort law currently casts the full burden of absolute liability for certain catastrophes. In recent years loss-spreading concepts have been the subject of a large amount of commentary, particularly in the areas of products liability and auto-accident compensation.116 In these areas no one is necessarily engaging in ultrahazardous activity, but the imposition of strict liability achieves a desirable result of loss-spreading. Theoretically, those who participate in a given activity are required, through price mechanisms, to carry the burden of any damages which might arise.

The Federal Tort Claims Act was passed partly for the purpose

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115. *Laird v. Nelms*, 442 F.2d 1163, 1165–66 (4th Cir. 1971). The court cited Air Force Regulation No. 55–34, which required that precautions designed to provide "the maximum protection for civilian communities" be taken in planning supersonic flights. The court gave the word "maximum" its literal meaning, and concluded that the Regulation

\[\ldots\] recognizes that despite all precautions, damage may result from sonic booms, and in that event, requires the Air Force to accept responsibility for restitution without qualification and pay all just claims.

442 F.2d at 1166.

of insuring that the individual or entity injured by government action would not be forced to shoulder the entire loss but could take advantage of the government's unique ability to spread the cost of the injuries.\footnote{117} It also served to recognize the inherent fairness in placing the loss on the party who set in motion the force which caused it, rather than upon the innocent, often previously uninvolved victim of the force's operation.\footnote{118} The tort doctrine of strict liability is based on similar policy considerations: (1) liability can usually be better prepared for and spread by the enterprise engaging in such activities as blasting than by the property-owner or bystander harmed thereby; and (2) it is more equitable to put the loss on the one responsible for the blasting or other operation, who can control the timing, placing, and other details of its occurrence, than on the individual unconnected with the event.\footnote{119} Thus, the policy considerations underlying the Tort Claims Act and the doctrine of strict liability are not mutually exclusive, but have developed out of the same basic concerns of the law.

In view of the similarity of these underlying policy considerations, the Act should be construed to include strict liability for ultrahazardous activities. The present policy of the government is a paradox.  

\footnote{117. See Rayonier, Inc. v. United States, 352 U.S. 315, 319—20 (1957); United States v. Aetna Cas. & Sur. Co., 338 U.S. 366, 383 (1949). Congress was aware that when losses caused by such negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the Government and the resulting burden on each taxpayer is relatively slight. But when the entire burden falls on the injured party it may leave him destitute or grievously harmed. Rayonier, Inc. v. United States, 352 U.S. 315, 320 (1957).}

\footnote{118. This principle of liability, however, conflicts with another leading tort doctrine: that loss will be left where it falls unless there is some reason, i.e., fault, to shift it. The friction thus generated by these two principles may be considered one of the basic underlying conflicts in tort law. See Roberts, Negligence: Blackstone to Shaw to ? An Intellectual Escapade in a Tory Vein, 50 CORNELL L.Q. 191 (1965). The classic case in this area is Brown v. Kendall [60 Mass. (6 Cush.) 292 (1850)], which rejected the older common law of trespass and stated the general rule of no liability without fault.}

\footnote{119. See, e.g., Enos Coal Mining Co. v. Schuchart, 243 Ind. 692, 188 N.E.2d 406 (1963). A business should bear its own costs, burdens, and expenses of operation, and these should be distributed by means of the price of the resulting product and not shifted, particularly, to small neighboring property owners for them to bear alone. We can understand no sensible or reasonable principle of law for shifting such expense or loss to persons who are not involved in such business ventures for profit.}

\textit{Id.} at 408.
If it is argued that an activity such as supersonic flight is of such value to the public at large that it should be engaged in regardless of risk, it strengthens the argument that the recipients of this benefit should be required to share its cost. If, on the other hand, it is argued that such a public benefit would be too costly, one can seriously question whether such a high-risk activity should be carried out in the first place.

Mere public need for a particular type of work or facility has never been considered to provide immunity from strict liability where it would otherwise exist.120 To hold this to be true with respect to federal ultrahazardous activities will jeopardize the entire basis of such liability and reverse the current trend of tort law, since a great many activities are of immense possible benefit to the public—and many of these are also the activities that pose the greatest danger of harming some individuals. Governmental strict liability seems peculiarly well suited to many areas, such as nuclear energy, in which our national government is especially active.121

CONCLUSION

A noted commentator once observed the evolution in the courts' interpretation of the Federal Tort Claims Act from an approach bound by history and precedent to an approach which is guided by reason.122 It is submitted that this progress would be furthered by recognition that the language of the Act lends itself to coverage of

But cf. Bartholomae Corp. v. United States, 253 F.2d 716, 719 (9th Cir. 1957). The court indicated that it would not impose strict liability under the Act for nuclear blasts. However, it did not hold that the federal government could never be held strictly liable for nuclear blast damage. The court merely held that, in the absence of a state determination of whether private parties could be held strictly liable for the results of an atomic blast (under 28 U.S.C. § 1346(b)(2) (1970) the law of the place of the situs of the act determines liability under the Federal Tort Claims Act), and, in the absence of arguments by claimants about what such state law should be, “no liability [could] be predicated upon the fact of the explosions themselves, whatever the consequences.” Id.
strict liability, that an interpretation allowing such coverage is consis-
tent with the liberal construction of the statute which the courts have otherwise adopted, and that the result thus achieved would remove an unnecessary vestige of the outmoded and dying doctrine of sovereign immunity. We no longer maintain that the King can do no wrong or that he is to be treated differently from anyone else when he does. When the King does no wrong but harm nonetheless occurs, this same equality should prevail.