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10 SUING THE GOVERNMENT

Case in Point: *Dalehite v. United States* 346 U.S. 15 (1953)

At the end of World War II, a good deal of Europe lay in ruins. To help preserve the peace and the stability of European governments, the United States embarked on a policy of helping Europe to feed itself. It was not possible for America to send enough food, so part of the policy adopted was to send fertilizer to help Europe grow plentiful crops as soon as possible. The fertilizer chosen was fertilizer grade ammonium nitrate (FGAN). At the time, ammonium nitrate was a component found in explosives. The government reopened munitions plants that had been closed after the war and produced the ammonium nitrate. The nitrate was sent to private companies (DuPont and Hercules Powder Company), who contracted with the government to produce FGAN. An army ordinance officer was assigned to each plant that produced FGAN to oversee its production.

The government of France purchased 2,800 tons of FGAN and stored it in a warehouse for three weeks in Texas City, Texas, while waiting for ships to transport the fertilizer to France. On June 15, 1947, 1,850 tons of FGAN were loaded into a hold on a French ship, the *Grandcamp,* which also held substantial amounts of other explosives. Another 1,000 tons were loaded into the *High Flyer,* which also held 2,000 tons of sulfur. On June 16, at 8:15 a.m., smoke led to the discovery of a fire in the *Grandcamp* hold where the FGAN was stored. All hatches were closed, and steam was introduced into the hold, but it did not retard the fire. The captain ordered the ship to be vacated, and less than an hour after the smoke was first detected, the FGAN in the hold exploded, causing the FGAN in the other holds to explode, which then caused the other explosives aboard the *Grandcamp* to explode. The force of the explosion threw fire to the dock area of the city and to the *High Flyer,* which was at the next pier. Efforts to contain the blaze aboard the *High Flyer* were unsuccessful, as was an attempt to tow it out to sea. At 1 a.m. on June 17, the sulfur and FGAN aboard the *High Flyer* exploded with a vengeance that leveled what was left of the burning dock area of the city. The explosions and fire claimed the lives of 560 people, injured 3,000,[1] and caused property damage in the neighborhood of $200 million.[2]

The survivors of Henry G. Dalehite were among 300 parties who sued the government for negligence. The plaintiffs claimed in this case[3]—and the trial judge found as a matter of fact—that the controlling negligence law was that of the place where the negligent act (or omission) occurred. The FGAN involved in the Texas City incident was manufactured in Iowa and Nebraska, so their negligence laws were controlling. The Erie Doctrine[4] requires that in a federal court action where there is no federal law to apply (Congress does not pass tort or negligence laws because they are the sole province of the states), the federal courts must apply appropriate state law. The negligence laws of both Nebraska and Iowa hold that a manufacturer is liable for defects in its product that could have been avoided by the exercise of reasonable care (sometimes called due care). The plaintiffs also claimed, and the trial judge found, that the government failed to exercise reasonable care by (a) discontinuing the testing of FGAN when tests at that point indicated "suspected but unverified dangers," (b) packaging the FGAN in paper bags at temperatures that were too high, (c) ignoring a history of unexplained fires and explosions involving ammonium nitrate, and (d) failing to warn (by labeling the sacks of FGAN as "fertilizer" instead of warning of the explosive nature of the product).

This last finding, failure to warn, is important because the cause of the fire was either spontaneous combustion or a smoldering cigarette left by a longshoreman. If it was the latter, then the failure to warn becomes almost dispositive of the case. The *Dalehite* plaintiffs were awarded $75,000 by the trial judge.[5]

The plaintiffs in this case sued the federal government under an act of Congress called the Federal Tort Claims Act (FTCA),[6] which was passed in 1946 and waived sovereign immunity for the federal government. Sovereign immunity is the notion that a sovereign (the people in the United States) cannot be sued without the sovereign's consent. The FTCA is the vehicle through which the federal government consented to allow itself to be held liable for its torts (negligence).

Prior to the passage of the FTCA, when citizens were injured as a result of government's (or a government employee's) negligence, they simply could not sue the government to recover damages. The only process available was to have their representative submit a private bill in Congress. In the 70th Congress (1927–29), 2,268 private bills claiming damages from government wrongs were introduced.[7] These bills sought more than $100 million collectively, and Congress passed 336 of them, for a total expenditure of $2,830,000. Over the next eight Congresses (up to 1945), 2,118 such private bills were introduced per session. Only 408 (19 percent) passed, calling for $1.5 million per Congress (the figures are averages).

Because the government has the power to decide whether it can be sued, it can also decide under what conditions it will allow itself to be sued. Hence, the FTCA has certain exceptions or situations under which the government will not be liable. The exception involved in this case, the *discretionary function exception,* is found in Section 2680 of the Act and reads as follows:

> The provisions of this chapter . . . shall not apply to . . . (a) any claim based upon an act or omission of an employee of the government, exercising due care, in the execution of a statute or regulation, whether or not the statute or regulation be valid [this part of the exception is meant to bar citizens from using tort suits to challenge the legality of acts of Congress or regulations] or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused.

The second part is the *discretionary function exception,* and its purpose is to make acts of discretion immune from negligence suits so that those in government will not hesitate to make a decision out of fear of a lawsuit.

When the government lost in the *Dalehite* case at the trial court, it appealed to the circuit court, which overturned the trial judge. On review by the Supreme Court, the question narrowed to an interpretation of the discretionary exception clause. (That is, whether the decisions to stop testing FGAN, to bag it at high temperatures, to put it in paper bags rather than something more stable, and to label it as fertilizer were acts of discretion within the meaning of the exception.) In a 4 to 3 decision (two justices did not participate), the Court said the exception was meant to make immune acts of discretion in the exercise of government functions. Whether there is negligence or not, the Act meant to protect, for example, flood control, irrigation, and activities of the Federal Trade Commission, the Securities and Exchange Commission, and other regulatory agencies. Indeed, the Court said the only government negligence that was not exempted under the Act was the "common law torts of employees of agencies," such as negligence in driving an automobile. Therefore, all of the above-mentioned decisions claimed by the plaintiff to constitute negligence, whether they were negligent or not, are exempted under Section 2680 of the Act. The Dalehite plaintiffs (and all the rest of them as well) lost their suit, and Justice Jackson wrote a strong dissent:

> Many acts of government officials deal only with the housekeeping side of federal activities. The Government, as landowner, as manufacturer, as shipper, as warehouseman, as shipowner and operator, is carrying on activities indistinguishable from those performed by private persons. In this area, there is no good reason to stretch the legislative text to immunize the Government or its officers from responsibility for their acts, if done without appropriate care for the safety of others. Many official decisions even in this area may involve a nice balancing of various considerations, but this is the same kind of balancing which citizens do at their peril and we think it is not within the exception of the statute.
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> The Government's negligence here was not in policy decisions of a regulatory or governmental nature, but involved actions akin to those of a private manufacturer, contractor, or shipper. Reading the discretionary exception as we do, in a way both workable and faithful to legislative intent, we would hold that the Government was liable under these circumstances. Surely a statute so long debated was meant to embrace more than traffic accidents. If not, the ancient and discredited doctrine that "The King can do no wrong" has not been uprooted; it has merely been amended to read, "The King can do only little wrongs." (346 U.S. 15, 60)

Questions

1. What was the legal situation of the affected citizens of Texas City after the Court's ruling? Did they have a remedy at all, or were they simply out of luck (and money)?[8]
2. Does this decision seem to you to be democratically acceptable? Why or why not?

Sovereign Immunity

As a good deal of American law does, the concept of sovereign immunity dates from medieval England. It means, as Justice Jackson said in dissent in the *Dalehite* case, that the king (or sovereign) can do no wrong and therefore cannot be sued. Lest you believe that sovereign immunity is a concept with no practical consequences in the 21st century, the case of *Lane v. Pena,* 518 U.S. 187 (1996), should be instructive.

Mr. Lane entered the United States Merchant Marine Academy in 1991 after passing a Defense Department physical examination. During his freshman year, however, he was diagnosed with diabetes by a private physician. Lane informed the academy's medical staff, and a hearing was held to determine whether his condition would prevent service in the Merchant Marine or in the Navy. The hearing found that insulin-dependent diabetes was a disqualifying condition, and Lane was involuntarily separated from the academy. He challenged his involuntary separation at a § 554 hearing within the Department of Transportation [DOT], which runs the Merchant Marine Academy. His challenge was on the basis of the Rehabilitation Act of 1973. The Act forbids any activity receiving federal funds or any program run by a federal executive branch agency (DOT) from discriminating against any individual solely on the basis of a disability. After Lane lost at the agency hearing, he sued in federal district court alleging a violation of the Rehabilitation Act. As remedies for discriminating against him on the basis of his disability, Lane sought reinstatement into the Academy plus money damages. Regarding sovereign immunity and money damages, § 505 of the Rehabilitation Act says, "The remedies, . . . set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act . . . [of] any recipient of federal assistance or federal provider of such assistance." As money damages are available as a remedy under the 1964 Civil Rights Act, Lane must have assumed they were available to him under the Rehabilitation Act.

However, the Supreme Court has said that it is not enough for Congress to simply waive sovereign immunity. If Congress intends to waive sovereign immunity, that intention must be clear and "unequivocally expressed in statutory text"; there can be no such thing as an implied waiver. The Court was willing to accept that Congress had unequivocally waived sovereign immunity for programs receiving federal assistance. But the language of § 505, quoted above, fails to mention executive branch programs; hence, Congress had not clearly and unequivocally waived sovereign immunity for suits like Lane's. Lane was reinstated, but no money damages were allowed due to a lack of a waiver of sovereign immunity.

Hence, sovereign immunity is alive and well. Indeed, a few state legislatures still have not waived their respective sovereign immunities. The point that you should understand is that citizens cannot sue government unless government consents to be sued. Indeed, it is not enough for a governmental unit to consent to be sued. As you just read in *Lane v. Pena,* sovereign immunity is not waived until five justices of the Supreme Court have decided that the government has "clearly and unequivocally" consented to be sued. In *West v. Gibson,* 527 U.S. 212 (1999) at the end of this chapter, the issue is whether a 1991 amendment to the 1964 Civil Rights Act authorizing compensatory damages "clearly and unequivocally" provides the Equal Employment Opportunity Commission (EEOC) with the power to award compensatory damages against another federal agency.

The Supreme Court refused to recognize a waiver of federal sovereign immunity in *The Department of the Army v. Blue Fox, Inc.,* 525 U.S 225 (1999). Section 702 of the Administrative Procedure Act (in Appendix A) appears to waive the sovereign immunity

of federal agencies in legal actions for remedies "other than for money damages." The Miller Act requires prime federal contractors to post a bond to protect the interests of subcontractors. In this case, the Department of the Army required no Miller bond on a project, and the prime contractor failed to pay a subcontractor (Blue Fox). Blue Fox obtained a court judgment against the prime contractor but still feared it would never see the money, as the contractor had already been paid. Blue Fox sued the Army in district court seeking an equitable lien against funds still held by the Army for the project and an order directing payment. Despite the fact that this is an action by an aggrieved party against a federal agency for a remedy other than money damages, the Supreme Court said the action was outside Section 702's waiver of immunity. Blue Fox could not sue the Army because of sovereign immunity.

The sovereign immunity of the states relative to the Eleventh Amendment is a hot legal topic recently. The Eleventh Amendment was adopted in 1795 as a reaction against a Supreme Court decision in the 1793 case of *Chisholm v. Georgia*.[9] Chisholm was a citizen of South Carolina who sued the state of Georgia in federal court. As Article III of the Constitution clearly specified that federal court jurisdiction extended to suits between "a state and citizens of another state," the *Chisholm* suit was allowed to proceed. Two years later, the Eleventh Amendment was adopted, withdrawing federal court jurisdiction from suits where a state is sued by a citizen of another state (or of a foreign state). The notion that a sovereign cannot be sued unless it consents is the Eleventh Amendment's underpinning.

The commerce clause of the Constitution (Article I, section 8, clause 3), grants to Congress the power to regulate commerce between the states, between states and foreign countries, and with the Indian tribes. Pursuant to that authority, Congress passed the Indian Gaming Regulatory Act in an attempt to bring order to the process of gambling on Indian reservations (which are federal enclaves located within states). The law requires the states to negotiate with Indian tribes that wish to establish gambling on their reservations, and it admonishes the states to conduct those negotiations "in good faith." Indeed, the law authorized the tribes to sue the states in federal court, should a tribe suspect that a state is not negotiating in good faith. The Seminole tribe sued the state of Florida in federal court for failure to negotiate in good faith, but the Supreme Court said the part of the Gaming Act that authorized unconsenting states to be sued was unconstitutional.[10] Indeed, in making that decision, the Court overruled a 1989 case that established the power of Congress to abrogate a state's Eleventh Amendment sovereign immunity pursuant to an exercise of power under the commerce clause.[11]

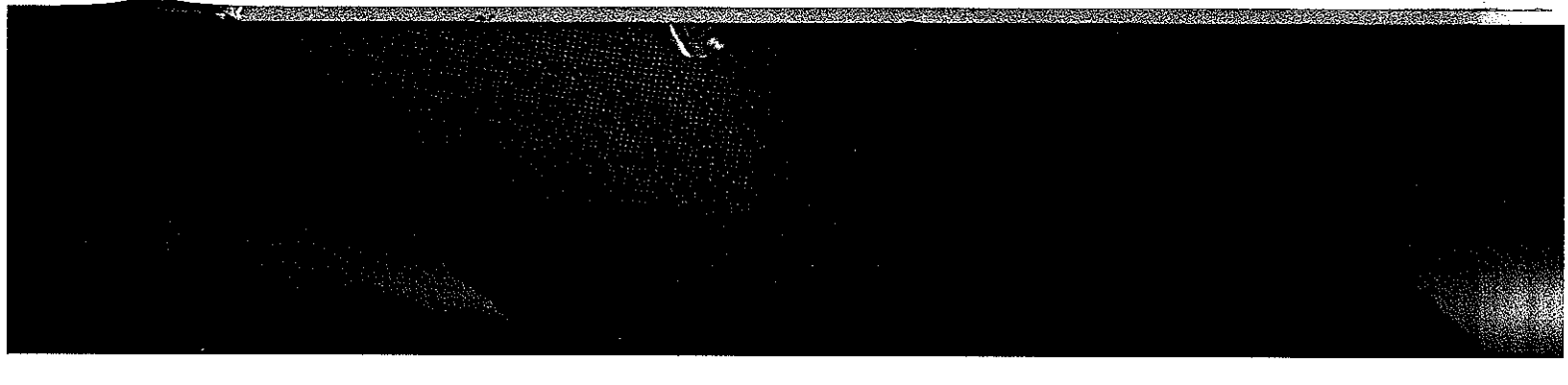
The Fair Labor Standards Act, a piece of New Deal legislation, is our nation's current minimum wage law. When Congress debates whether to raise the minimum wage, what it is really doing is debating an amendment to the Act. The Act imposes not only a federal minimum wage but also a 40-hour work week and a requirement that any employee who works more than the 40-hour limit will be paid time and a half. The Act applies to all governments and private employers (who *have* 15 or more employees . . .), and it creates a private right of action (so a citizen can sue the offending employer). When probation officers sued their employer (the State of Maine) in the state courts of Maine for violations of the overtime provision, the Supreme Court said no.[12] The Court said that the sovereign immunity created by the Eleventh Amendment means that Congress is without the power to authorize citizen suits against a state government in either state or federal court. The upshot of this and similar recent cases is that the states are free to ignore the Fair Labor Standards Act, and affected employees have no remedy available unless the secretary of labor wants to sue the state on behalf of the workers.

The Court has not been consistent in its Eleventh Amendment jurisprudence. The Americans With Disabilities Act (ADA) was passed by Congress, not under the commerce clause, but under the enforcement provisions of the Fourteenth Amendment (which forbids the states from denying to their citizens due process of law or the equal protection of the laws). The enforcement provision grants to Congress the authority to see that the dictates of the Fourteenth Amendment are enforced. The ADA forbids any entity (including the states) from discriminating against people on account of their disabilities. It further authorizes any citizen who has been discriminated against because of a disability to sue in the federal courts. In a 2001 case, two disabled employees of the state of Alabama sued the state in federal court for damages caused by an alleged violation of the ADA.[13]

Two criteria must be met before Congress can constitutionally abrogate the states' Eleventh Amendment sovereign immunity: (a) Congress must "unequivocally" indicate its intent to do so in the statutory language, and (b) it can only be done pursuant to a proper constitutional grant of authority. Congress met the first criterion in passing the ADA. The question in the *Alabama* case was whether Congress met the second criterion. We already know from the *Seminole* and the *Maine* cases that Congress lacks the power to authorize suits against the states under its commerce clause power. The Court had previously held, however, that Congress does possess the power to abrogate Eleventh Amendment immunity under the enforcement provisions of the Fourteenth Amendment. The problem for the Alabama employee-plaintiffs was that the Court has severely limited congressional Fourteenth Amendment enforcement powers relative to the Eleventh Amendment. Before Congress can authorize Fourteenth Amendment enforcement citizen-suits against the states, there must be a record of a pattern of discrimination by the states (for example, racial discrimination), and the remedy authorized by Congress must be proportional to the documented discrimination. The Alabama plaintiffs lost this case because the Court found that Congress had failed to document a history of state discrimination against the disabled. This was a 5 to 4 decision, with Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas in the majority.

Compare, however, the 2004 case of *Tennessee v. Lane*.[14] Whereas the *Alabama* case involved one plaintiff who suffered from cancer and another who was afflicted with asthma and sleep apnea, the *Tennessee* case involved paraplegics. The facts of the *Lane* litigation are compelling and worth repeating. Lane, who was confined to a wheelchair, was apparently charged with some criminal violations. When he showed up for his first court appearance, he must have been chagrined to discover that the hearing was scheduled for a second-floor courtroom, and the courthouse had no elevator. Lane crawled up the two flights of stairs for his hearing and presumably had to slide back down. On his return for a second appearance, once again in a second-floor courtroom, Lane refused to crawl up the stairs a second time, and he refused to allow deputies to carry him. As a consequence of his refusal, Lane was arrested and jailed for failure to appear.

The *Tennessee* case involved a paraplegic court reporter who lost jobs because she was unable to access courtrooms. In the 2004 case, Justice O'Connor switched sides to create another 5 to 4 decision, this time with a majority composed of Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer. Applying the same two-pronged test it applied in the *Alabama* case, this Court found that there was sufficient congressional documentation of state discrimination against the disabled and that the remedy was appropriate. Whereas the *Alabama* case involved Title One of the ADA (which generally forbids discrimination against the disabled and requires employers to make reasonable accommodations for their



disabled employees), the Tennessee case involved Title Two (which forbids excluding the disabled from "programs and activities of a public entity").

In 1996, Congress passed the Telecommunications Act to make the telephone and Internet industries more competitive. It requires that incumbent local exchange carriers (in this case, Verizon) provide interconnection with existing networks to new competitors who wish to enter the incumbent's local market (in this case, MCI Worldcom). The Act requires that agreements between incumbent carriers and new competitors must be approved by the respective state's public utilities commission (PUC) and that the PUC's actions can be reviewed in the federal courts. Verizon and Worldcom entered into the required agreement, which was approved by the Maryland PUC. Several months later, a dispute erupted between the two companies, and Verizon refused to abide by part of the contract. Worldcom petitioned the Maryland PUC for relief, and the PUC sided with Worldcom and ordered Verizon to pay Worldcom. Instead, Verizon sued the Maryland PUC and its individual commissioners in federal court. This suit was not barred by the Eleventh Amendment because of a 1908 doctrine called the *ex parte Young* doctrine that provides federal court jurisdiction in a suit against a state seeking to enjoin state action that allegedly violates federal law, even where the state itself is immune under the Eleventh Amendment. The case is *Verizon v. Public Service Commission of Maryland,* and it is a 2002 case.[15]

The Constitution grants to Congress the power to regulate bankruptcies, and using that power, Congress has stipulated that student loans typically cannot be discharged in a bankruptcy proceeding, except where the failure to discharge them would constitute an "undue hardship" on the debtor. To discharge a student loan in bankruptcy, the debtor is required to go through a separate lawsuit to prove the undue hardship. In a 2004 case, a debtor initiated the separate lawsuit to discharge her student loans, but she had to sue a state agency that had acquired her student loan indebtedness.[16] The state agency claimed Eleventh Amendment immunity from the suit. Certiorari was granted in this case to determine whether Congress possessed the power under its Article I, Section 8 bankruptcy authority to abrogate a state's Eleventh Amendment immunity, but according to the dissent, the Court ducked the issue and decided on narrower grounds. The Court found that in admiralty law, when a state possesses property, the federal courts have jurisdiction over the property (called *in rem* jurisdiction) in a lawsuit over the property. Such suits are not barred by the Eleventh Amendment. The Court reasoned that holding a student loan in a bankruptcy proceeding was like holding property in an admiralty case, so the bankruptcy suit against the state was not barred by sovereign immunity.

Finally, regarding the state of sovereign immunity, the Eleventh Amendment, and administrative law, there was a 2002 case involving the Federal Maritime Commission, which appears at the end of this chapter. A cruise ship company requested a docking berth in the Charleston, South Carolina, harbor from the South Carolina State Ports Authority, which denied the request because the ship would be used exclusively for gambling, which is contrary to South Carolina's public policy. The cruise ship company filed a complaint with the Federal Maritime Commission complaining that the ports authority's decision violated the Shipping Act of 1984. The company wanted the commission to order the ports authority to pay reparations, stop violating the Shipping Act, and provide a berth in the Charleston harbor. While this might sound like the *Verizon* case above, you will need to read the case to see how the Court resolved it.

Sovereign immunity is alive and well both at the federal and at the state level. However, as local units of government are not sovereigns, they are not clothed with immunity from

suit. As we move through the chapter, you will find that sometimes, some government employees cannot be sued either. That is called a *qualified immunity.*

Waiving Sovereign Immunity: The Federal Tort Claims Act

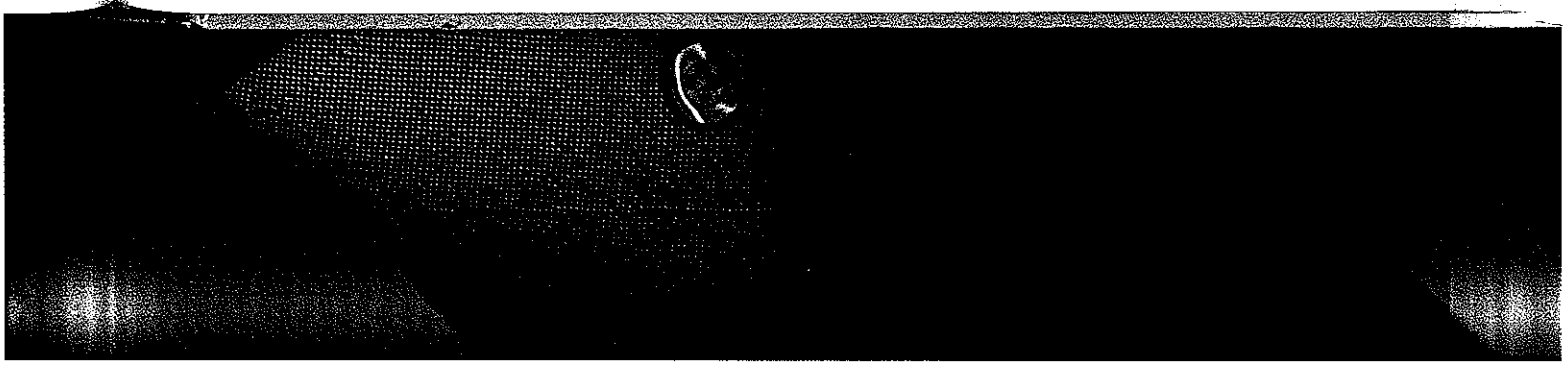
Whether state or federal, a tort claims act is necessary if citizens are going to be able to sue government for its acts of negligence. Any time a lawsuit is filed, it contains identifiable components. A suit is started by the filing of a complaint, which states the name and address of the plaintiff (to help establish jurisdiction), alleges that the defendant (also identified by name and address) did certain acts that resulted in injury to the plaintiff, and asks the court for certain relief—known in American jurisprudence as a *remedy.* American remedies fall into two categories: common-law remedies and equitable remedies. Common-law remedies involve money damages, and equitable remedies are allowed only where a common-law remedy is not adequate to take care of the plaintiff's situation. There are several equitable remedies, but perhaps the most common are injunctions and declaratory judgments. An injunction is a court order stopping certain action, and a declaratory judgment is one by which a court declares a law or agency activity to be unconstitutional or otherwise unlawful. Of the cases that began each chapter, only two have involved common-law remedies: the *Dalehite* case and *Hale v. Walsh* in Chapter 8, in which Professor Hale asked the Court for both types of remedies (compensatory damages for lost wages and retraining expenses incurred, and reinstatement to his position as professor of history—an equity remedy).

So long as a government refuses to waive its sovereign immunity, theoretically, neither type of action—common-law or equity—can be maintained against the government. The federal legislation permitting suits in equity against the government is found in Section 702 of the Administrative Procedure Act, although the language permitting equity actions was not added until 1976. There is some inconsistent case law involving declaratory judgments and injunctions instituted against the government prior to that amendment.

At least one type of suit at common law was permitted with the passage of the FTCA in 1946: torts. A tort is a "legal wrong done to another person."[17] To prevail in a tort suit, the plaintiff needs to establish the existence of a legal duty and the breach of that duty, which is the proximate cause of harm to the plaintiff's person or property. There are two categories of torts: intentional and unintentional. You are probably familiar with at least the names of intentional torts: invasion of privacy, defamation of character (libel and slander), assault, battery, false imprisonment, malicious prosecution, and so on. Negligence is the unintentional tort. Because most intentional torts are exempt under the FTCA, our discussion will focus on negligence.

Just as criminal law presumes that all adults know and understand the law and are possessed of free will to choose right from wrong, so negligence law imposes a legal duty on all adults to take reasonable care (due care) that their actions (or failures to act) do not cause harm to others. Because the latter is a legal duty, negligence suits often narrow to whether the defendant took reasonable care. Such was the essence of the *Dalehite* case at the trial court, and the trial judge found as a matter of fact that the government had breached its duty to exercise reasonable care.

How would one know whether another had failed to take reasonable care? Domino's Pizza advertised nationally that customers would get their pizza free if it was not delivered within a half hour. The survivors of a Domino's delivery boy sued the company when the



boy was killed in an auto accident caused by his speeding to meet the deadline. Has the company breached its duty to take reasonable care through its scheme to capture a larger share of the pizza delivery market? Yes, because the average reasonable person would have foreseen that the scheme, and the way it was implemented (the free pizza came out of the delivery person's pocket, not company profits), could lead to injury. Hence, the test for whether the duty to exercise reasonable care has been breached is whether the average reasonable person would have foreseen that the actions taken by the defendant could cause harm. Foreseeability does not have to be specific. (That is, the average reasonable person would not have had to foresee a delivery boy's speeding and getting killed or two ships blowing up and leveling a city along with its citizens.) One only needs to foresee that some general harm might result from the defendant's actions, and that is a question of fact often submitted to a jury (except that juries are forbidden under the FTCA).

Aside from the question of how much money in damages should be awarded, a successful negligence action requires that the plaintiff prove that the failure to exercise reasonable care was the proximate cause of the injuries to the plaintiff. Although first-year law students spend considerable time trying to master proximate cause, it is introduced here only so you can appreciate a tort claims lawsuit. Kimble's survivors sued a company when its roof fell in and killed Kimble. The negligence alleged was that the roof was in disrepair, and the defendant had failed to repair it; hence the failure to exercise reasonable care was the proximate cause of Kimble's death. In defense, the company admitted that the roof was in need of repair but claimed it fell in because of a violent storm; hence, the proximate cause of Kimble's death was an act of God and not the company's negligence.[18] These questions are often resolved by applying the "but-for" test. But for the negligence of the defendant, would the plaintiff have been injured? This, too, is a question of fact to be determined by the trier of fact (judge or jury). In the *Kimble* case, if the plaintiff's attorney could establish that no other roofs fell in during the storm, that would probably satisfy the but-for test.

The Discretionary Function Exception

In a typical negligence action, then, the plaintiff must prove (a) there was a failure to exercise reasonable care, (b) the failure was the proximate cause of the injury, and (c) the failure to exercise reasonable care resulted in a specific dollar amount of injury. In an FTCA case, the plaintiff has another hurdle to clear, for the government can say: "Yes, we were negligent and our negligence was the proximate cause of injury, but the negligence arose out of an act of discretion; therefore, we are not liable." Indeed, in the *Dalehite* case, nearly all of these elements were in dispute. The government attorneys claimed that the acts complained of (stopping the test, bagging at high temperatures and in paper, and labeling) did not amount to a failure to exercise reasonable care because there was a rational scientific explanation for each. The cause of the fire was in dispute, and the amount of damages was also disputed, as was whether the alleged acts of negligence were covered by the discretionary exception.

Over the years, the Court's interpretation of the discretionary function has not changed much from the Court's view of it in 1953. Theoretically, it is not simply "the common law torts of employees" that fall within the exception. Today, the courts distinguish between acts of discretion with policy implications and acts of discretion simply implementing policy (or planning versus operational acts of discretion). The former are covered by the discretionary exception, but the latter, presumably are not. Actually, the planning/operational

dichotomy was recognized in *Dalehite,* with the trial judge finding the acts complained of to be operational but the Supreme Court finding them to be planning in nature.[19]

The discretionary function exception is controversial because the whole reason for a tort claims act is to soften the blow of sovereign immunity and to make government accountable to its citizens when government action causes injury or death. The exception, however, takes a potentially huge chunk of governmental activity and reimmunizes it. William Weaver and Thomas Longoria[20] recite a bone-chilling list of government actions that left innocent citizens dead or maimed, including turning southern Utah citizens into nuclear fallout guinea pigs[21] and releasing a biological agent on an unsuspecting San Francisco citizenry.[22]

The Supreme Court has considered the discretionary function exception in only four cases. You are already familiar with one of them, the *Dalehite* case in 1953. In 1984, the Court heard *United States v. Varig Airlines,*[23] which case involved a Boeing 707 aircraft that was sold to a Brazilian air carrier. On a 1973 flight from Rio de Janeiro to Paris, a fire that broke out in one of the lavatories and filled the cabin with toxic smoke. All but 11 of the 135 passengers and crew died. The lawsuits were filed on behalf of the Brazilian company, which wanted to be reimbursed for the lost aircraft, and the survivors of the dead. The plaintiffs allege that whatever caused the fire was exacerbated by the fact that fire-resistant material was not used in the lavatory as required by federal regulations. The essence of the complaint was that a government agency (predecessor to the Federal Aviation Administration [FAA], but we will use FAA here) negligently certified an aircraft to be airworthy when in fact, it was not. The FAA has an elaborate procedure for certifying the airworthiness of aircraft. The procedure involves agency review of manufacturing documents and physical inspections of the planes. The problem was that the FAA employed fewer than 400 engineers and consequently lacked the manpower to review all the documents and conduct all the inspections. Hence, the FAA hired the manufacturer's engineers to act as its agents in the certification process and adopted a system of spot checks; in fact, each plane is not really inspected by the FAA. That is how an aircraft that was not in compliance with regulations got into the air. The Supreme Court said the decisions to use the manufacturer's employees and to adopt a system of spot checks were acts of discretion with policy implications, which were meant to be protected from lawsuit by the discretionary function exception.

Four years after the *Varig Airlines* case, the Court said that a suit against the National Institutes of Health (NIH) and the Food and Drug Administration (FDA) was not necessarily barred by the discretionary exception. Kevan Berkovitz, a two-year-old infant, contracted polio by ingesting an oral polio vaccine. The lawsuit alleged that the Division of Biological Standards, a bureau under the NIH, wrongfully licensed a manufacturer to make the vaccine and the FDA wrongfully approved release to the public of the lot containing Kevan's dose. The government argued that the lawsuit should be blocked by the discretionary function exception. The plaintiffs allege that the Division of Biological Standards licensed the production of the vaccine without first receiving required data from the manufacturer. While Kevan's claim against the FDA was more complex, his claim against the Biological Standards Division was not barred by the discretionary function exception. The doctrine from the case is that agencies are not free to utilize discretion to ignore statutory commands or regulatory standards. Both the congressional act that commands them and the subsequent agency regulations require that before a license for a vaccine can be issued, the Biological Standards Division must receive test data from the

manufacturer relating to the product's compliance with regulatory standards. As Kevan has alleged that the Division issued the license without receiving the required data, the agency cannot have the lawsuit barred by claiming that it exercised its discretion to license the product without receiving and reviewing the data.

The Court's most recent statement on the discretionary function exception came in a 1991 case in which a federal banking agency took over a healthy financial institution and mismanaged it so badly that it became insolvent. The case is reproduced below.

United States v. Gaubert
499 U.S. 315 (1991)

Justice White delivered the opinion for a unanimous Court. Justice Scalia filed a concurring opinion.

When the events in this case occurred, the Home Owners' Loan Act of 1933, provided for the chartering and regulation of federal savings and loan associations (FSLA's). Section 1464(a) authorized the Federal Home Loan Bank Board (FHLBB) "under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation" of FSLA's, and to issue charters, "giving primary consideration to the best practices of thrift institutions in the United States." In this case the FHLBB and the Federal Home Loan Bank—Dallas (FHLB-D) undertook to advise about and oversee certain aspects of the operation of a thrift institution. Their conduct in this respect was challenged by a suit against the United States under the Federal Tort Claims Act (FTCA), asserting that the FHLBB and FHLB-D had been negligent in carrying out their supervisory activities. The question before us is whether certain actions taken by the FHLBB and FHLB-D are within the "discretionary function" exception to the liability of the United States under the FTCA. The Court of Appeals for the Fifth Circuit answered this question in the negative. We have the contrary view and reverse.

I

This FTCA suit arises from the supervision by federal regulators of the activities of Independent American Savings Association (IASA), a Texas-chartered and federally insured savings and loan. Respondent Thomas M. Gaubert was IASA's chairman of the board and largest shareholder. In 1984, officials at the FHLBB sought to have IASA merge with Investex Savings, a failing Texas thrift. Because the FHLBB and FHLB-D were concerned about Gaubert's other financial dealings, they requested that he sign a "neutralization agreement" which effectively removed him from IASA's management. They also asked him to post a $25 million interest in real property as security for his personal guarantee that IASA's net worth would exceed regulatory minimums. Gaubert agreed to both conditions. Federal officials then provided regulatory and financial advice to enable IASA to consummate the merger with Investex. Throughout this period, the regulators instituted no formal action against IASA. Instead, they relied on the likelihood that IASA and Gaubert would follow their suggestions and advice.

In the spring of 1986, the regulators threatened to close IASA unless its management and board of directors were replaced; all of the directors agreed to resign. The new officers and directors, including the chief executive officer who was a former FHLB-D employee, were recommended by FHLB-D. After the new management took over, FHLB-D officials became more involved in IASA's day-to-day business. They recommended the hiring of a certain consultant to advise IASA on operational and financial matters; they advised IASA concerning whether, when, and how its subsidiaries should be placed into bankruptcy; they mediated salary

disputes; they reviewed the draft of a complaint to be used in litigation; they urged IASA to convert from state to federal charter; and they actively intervened when the Texas Savings and Loan Department attempted to install a supervisory agent at IASA. In each instance, FHLB-D's advice was followed.

Although IASA was thought to be financially sound while Gaubert managed the thrift, the new directors soon announced that IASA had a substantial negative net worth. On May 20, 1987, Gaubert filed an administrative tort claim with the FHLBB, FHLB-D, and FSLIC, seeking $75 million in damages for the lost value of his shares and $25 million for the property he had forfeited under his personal guarantee. That same day, the FSLIC assumed the receivership of IASA. After Gaubert's administrative claim was denied six months later, he filed the instant FTCA suit in the United States District Court for the Northern District of Texas. His amended complaint sought $100 million in damages for the alleged negligence of federal officials in selecting the new officers and directors and in participating in the day-to-day management of IASA. The District Court granted the motion to dismiss filed by the United States, finding that all of the challenged actions of the regulators fell within the discretionary function exception to the FTCA.

The Court of Appeals for the Fifth Circuit affirmed in part and reversed in part. 885 F. 2d 1284 (1989). Relying on this Court's decision in *Indian Towing Co. v. United States,* 350 U.S. 61 (1955), the court distinguished between "policy decisions," which fall within the exception, and "operational actions," which do not. . . . [T]he Court of Appeals affirmed the District Court's dismissal of the claims which concerned the merger, neutralization agreement, personal guarantee, and replacement of IASA management, but reversed the dismissal of the claims which concerned the regulators' activities after they assumed a supervisory role in IASA's day-to-day affairs. We granted certiorari and now reverse.

II

The liability of the United States under the FTCA is subject to the various exceptions contained in § 2680, including the "discretionary function" exception at issue here. That exception provides that the Government is not liable for "any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

The exception covers only acts that are discretionary in nature, acts that "involve an element of judgment or choice," and "it is the nature of the conduct, rather than the status of the actor" that governs whether the exception applies. The requirement of judgment or choice is not satisfied if a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," because "the employee has no rightful option but to adhere to the directive."

Furthermore, even "assuming the challenged conduct involves an element of judgment," it remains to be decided "whether that judgment is of the kind that the discretionary function exception was designed to shield." Because the purpose of the exception is to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort," when properly construed, the exception "protects only governmental actions and decisions based on considerations of public policy."

Where Congress has delegated the authority to an independent agency or to the Executive Branch to implement the general provisions of a regulatory statute and to issue regulations to that end, there is no doubt that planning-level decisions establishing programs are protected by the discretionary function exception, as is the promulgation of regulations by which the agencies are to carry out the programs. In addition, the actions of Government agents involving the necessary element of choice and grounded in the social, economic, or political goals of the statute and regulations are protected.

Thus, in *Dalehite,* the exception barred recovery for claims arising from a massive fertilizer explosion. The fertilizer had been manufactured, packaged, and prepared for export pursuant to detailed regulations as part of a comprehensive federal program aimed at increasing the food supply in occupied areas after World War II. Not only was the cabinet-level decision to institute the fertilizer program discretionary, but so were the decisions concerning the specific requirements for manufacturing the fertilizer.

Nearly 30 years later, in *Varig Airlines,* the Federal Aviation Administration's actions in formulating and implementing a "spot-check" plan for airplane inspection were protected by the discretionary function exception because of the agency's authority to establish safety standards for airplanes. Actions taken in furtherance of the program were likewise protected, even if those particular actions were negligent. Most recently, in *Berkovitz,* we examined a comprehensive regulatory scheme governing the licensing of laboratories to produce polio vaccine and the release to the public of particular drugs. We found that some of the claims fell outside the exception, because the agency employees had failed to follow the specific directions contained in the applicable regulations, i.e., in those instances, there was no room for choice or judgment. We then remanded the case for an analysis of the remaining claims in light of the applicable regulations.

Under the applicable precedents, therefore, if a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation. If the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy. On the other hand, if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations.

Not all agencies issue comprehensive regulations, however. Some establish policy on a case-by-case basis, whether through adjudicatory proceedings or through administration of agency programs. Others promulgate regulations on some topics, but not on others. In addition, an agency may rely on internal guidelines rather than on published regulations. In any event, it will most often be true that the general aims and policies of the controlling statute will be evident from its text.

When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion. For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime. The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.

III

In light of our cases and their interpretation of § 2680(a), it is clear that the Court of Appeals erred in holding that the exception does not reach decisions made at the operational or management level of the bank involved in this case. A discretionary act is one that involves choice or judgment; there is nothing in that description that refers exclusively to policymaking or planning functions. Day-to-day management of banking affairs, like the management of other businesses, regularly requires judgment as to which of a range of permissible courses is the wisest. Discretionary conduct is not confined to the policy or planning level. "It is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." . . .

The Court's first use of the term "operational" in connection with the discretionary function

exception occurred in *Dalehite,* where the Court noted that "the decisions held culpable were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the Government's fertilizer program." Gaubert relies upon this statement as support for his argument that the Court of Appeals applied the appropriate analysis to the allegations of the amended complaint, but the distinction in *Dalehite* was merely description of the level at which the challenged conduct occurred. There was no suggestion that decisions made at an operational level could not also be based on policy.

Neither is the decision below supported by *Indian Towing.* There the Coast Guard had negligently failed to maintain a lighthouse by allowing the light to go out.

The United States was held liable, not because the negligence occurred at the operational level but because making sure the light was operational "did not involve any permissible exercise of policy judgment." Indeed, the Government did not even claim the benefit of the exception but unsuccessfully urged that maintaining the light was a governmental function for which it could not be liable. The Court of Appeals misinterpreted *Berkovitz's* reference to *Indian Towing* as perpetuating a nonexistent dichotomy between discretionary functions and operational activities.

Consequently, once the court determined that some of the actions challenged by Gaubert occurred at an operational level, it concluded, incorrectly, that those actions must necessarily have been outside the scope of the discretionary function exception.

IV

We now inquire whether the Court of Appeals was correct in holding that some of the acts alleged in Gaubert's amended complaint were not discretionary acts within the meaning of § 2680(a). The decision we review was entered on a motion to dismiss. We therefore "accept all of the factual allegations in [Gaubert's] complaint as true" and ask whether the allegations state a claim sufficient to survive a motion to dismiss.

These claims asserted that the regulators had achieved "a constant federal presence" at IASA. In describing this presence, the amended complaint alleged that the regulators "consulted as to day-to-day affairs and operations of IASA," "participated in management decisions" at IASA board meetings, "became involved in giving advice, making recommendations, urging, or directing action or procedures at IASA"; and "advised their hand-picked directors and officers on a variety of subjects." Specifically, the complaint enumerated seven instances or kinds of objectionable official involvement.

First, the regulators "arranged for the hiring for IASA of . . . consultants on operational and financial matters and asset management." Second, the officials "urged or directed that IASA convert from a state-chartered savings and loan to federally-chartered savings and loan in part so that it could become the exclusive government entity with power to control IASA." Third, the regulators "gave advice and made recommendations concerning whether, when, and how to place IASA subsidiaries into bankruptcy." Fourth, the officials "mediated salary disputes between IASA and its senior officers." Fifth, the regulators "reviewed a draft complaint in litigation" that IASA's board contemplated filing and were "so actively involved in giving advice, making recommendations, and directing matters related to IASA's litigation policy that they were able successfully to stall the Board of Directors' ultimate decision to file the complaint until the Bank Board in Washington had reviewed, advised on, and commented on the draft." Sixth, the regulators "actively intervened with the Texas Savings and Loan Department (IASA's principal regulator) when the State attempted to install a supervisory agent at IASA." Finally, the FHLB-D president wrote the IASA board of directors "affirming that his agency had placed that Board of Directors into office, and describing their mutual goal to protect the FSLIC insurance fund." According to Gaubert, the losses he suffered were caused by the regulators' "assumption of the duty to participate in, and to make, the day-to-day decisions at IASA and [the] negligent discharge of that assumed duty."

Moreover, he alleged that "the involvement of the FHLB-Dallas in the affairs of IASA went beyond its normal regulatory activity, and the agency actually substituted its decisions for those of the directors and officers of the association."

We first inquire whether the challenged actions were discretionary, or whether they were instead controlled by mandatory statutes or regulations. Although the FHLBB, which oversaw the other agencies at issue, had promulgated extensive regulations which were then in effect, neither party has identified formal regulations governing the conduct in question. As already noted, 12 U.S.C. § 1464(a) authorizes the FHLBB to examine and regulate FSLA's, "giving primary consideration to the best practices of thrift institutions in the United States." Both the District Court and the Court of Appeals recognized that the agencies possessed broad statutory authority to supervise financial institutions. The relevant statutory provisions were not mandatory, but left to the judgment of the agency the decision of when to institute proceedings against a financial institution and which mechanism to use. For example, the FSLIC had authority to terminate an institution's insured status, issue cease-and-desist orders, and suspend or remove an institution's officers, if "in the opinion of the corporation" such action was warranted because the institution or its officers were engaging in an "unsafe or unsound practice" in connection with the business of the institution. The FHLBB had parallel authority to issue cease-and-desist orders and suspend or remove an institution's officers. Although the statute enumerated specific grounds warranting an appointment by the FHLBB of a conservator or receiver, the determination of whether any of these grounds existed depended upon "the opinion of the Board." The agencies here were not bound to act in a particular way; the exercise of their authority involved a great "element of judgment or choice."

We are unconvinced by Gaubert's assertion that because the agencies did not institute formal proceedings against IASA, they had no discretion to take informal actions as they did. Although the statutes provided only for formal proceedings, there is nothing in the language or structure of the statutes that prevented the regulators from invoking less formal means of supervision of financial institutions. Not only was there no statutory or regulatory mandate which compelled the regulators to act in a particular way, but there was no prohibition against the use of supervisory mechanisms not specifically set forth in statute or regulation.

Gaubert also argues that the challenged actions fall outside the discretionary function exception because they involved the mere application of technical skills and business expertise. But this is just another way of saying that the considerations involving the day-to-day management of a business concern such as IASA are so precisely formulated that decisions at the operational level never involve the exercise of discretion within the meaning of § 2680(a), a notion that we have already rejected in disapproving the rationale of the Court of Appeals' decision. It may be that certain decisions resting on mathematical calculations, for example, involve no choice or judgment in carrying out the calculations, but the regulatory acts alleged here are not of that genre. Rather, it is plain to us that each of the challenged actions involved the exercise of choice and judgment.

We are also convinced that each of the regulatory actions in question involved the kind of policy judgment that the discretionary function exception was designed to shield. The FHLBB Resolution quoted above, coupled with the relevant statutory provisions, established governmental policy which is presumed to have been furthered when the regulators exercised their discretion to choose from various courses of action in supervising IASA. Although Gaubert contends that day-to-day decisions concerning IASA's affairs did not implicate social, economic, or political policies, even the Court of Appeals recognized that these day-to-day "operational" decisions were undertaken for policy reasons of primary concern to the regulatory agencies: . . .

In the end, Gaubert's Amended Complaint alleges nothing more than negligence on the part of the regulators. Indeed, the two substantive counts seek relief for "negligent selection of directors and officers" and "negligent involvement in day-to-day operations." Gaubert asserts

that the discretionary function exception protects only those acts of negligence which occur in the course of establishing broad policies, rather than individual acts of negligence which occur in the course of day-to-day activities. But we have already disposed of that submission. If the routine or frequent nature of a decision were sufficient to remove an otherwise discretionary act from the scope of the exception, then countless policy based decisions by regulators exercising day-to day supervisory authority would be actionable. This is not the rule of our cases.

V

Because from the face of the amended complaint, it is apparent that all of the challenged actions of the federal regulators involved the exercise of discretion in furtherance of public policy goals, the Court of Appeals erred in failing to find the claims barred by the discretionary function exception of the FTCA. We therefore reverse the decision of the Court of Appeals for the Fifth Circuit and remand for proceedings consistent with this opinion.

It is so ordered.

Questions

1. Do you think the policy/operational distinction still exists?
2. Can you summarize the main variables that lead to government immunity under the discretionary function exception?

Intentional Torts

The other exclusion in the FTCA is intentional torts. Assault (putting one in fear or apprehension) and battery (an unauthorized touching) are two intentional torts with which you are probably familiar. Defamation of character (slander and libel) is another. As originally passed, the FTCA maintained sovereign immunity for the government in the event that one of its employees committed an intentional tort. As this chapter moves to the notion of official immunity, you will be introduced to the case of *Barr v. Matteo,* in which federal employees who had been libeled by their boss sued him individually for the tort of libel. In a case similar to *Dalehite*, the jury found that the employer had libeled the employees, but the Supreme Court said the boss was clothed with (a different kind of) immunity.

In the early 1970s, many events caused policymakers to question the wisdom of continuing the intentional tort exception.[24] There were, for example, the wholesale arrests of thousands who demonstrated in Washington, D.C., on May Day in 1971. (They were held in a football stadium.) There was a Supreme Court decision in a case called *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* (which you will read shortly), which was handed down in June 1971. There were the shootings at Kent State University and Jackson State University in May 1970. But it was the accumulation of several events in and around St. Louis in 1973 that caused Congress to amend the intentional tort exception to the FTCA in March 1974.

A former federal program called Drug Abuse Law Enforcement (DALE) was a special effort by state and local law enforcement agents and Bureau of Narcotics and Dangerous Drugs officers to get at drug trafficking in the United States. One of the regional DALE offices was in St. Louis. DALE officers frequently worked undercover and were described by several citizens who had contact with them as "shabbily dressed and with long hair."[25]

Herbert and Evelyn Giglotto, who lived in Collinsville, Illinois, were awakened at 9:30 p.m. on April 23, 1973, by the sound of someone breaking down their front door. According to Boger, Gitenstein, and Verkuil, who studied the case, Mr. Giglotto was met in the hallway outside the bedroom by five shabbily dressed men who grabbed him and dragged him back to the bedroom, threw him on the bed, tied his hands behind his back, put a gun to his head, and told him that if he moved they would kill him. The men shouted abuse at Mr. Giglotto, then grabbed his wife (who was wearing only a negligee), threw her on the bed, and gave her the same treatment her husband had received. The men identified themselves as federal agents, and, eventually, 15 or so of them had entered and left the bedroom. After about 15 minutes, one of the agents came into the bedroom with Giglotto's checkbook and other documents and announced, "Well, we have the wrong people." The couple were untied and allowed to sit on the bed but not allowed to get dressed. The agents left without explanation, "leaving behind a smashed television, a broken camera, scattered books, scratched furniture and a shattered antique vase,"[26] not to mention the lack of a front door. DALE agents would later arrest a man who lived next door to the Giglottos.

A half hour later, across town, shabbily dressed men broke into the home of the Askews, who were accosted at the dinner table. Mr. Askew would eventually testify that from the appearance of the men and the weapons they brandished (sawed-off shotguns), he first thought that his son had been in a fight with a motorcycle gang member, and now the gang had come to his house to kill the boy.[27] After Mrs. Askew, who had fainted, was revived, the DALE agents were able to convince the Askews that they were federal agents. The Askews were not treated with the abuse, verbal or physical, that the Giglottos had received, but the house was searched while they were held at gunpoint. Eventually, one of the agents said it must have been a "bad tip," and they left. Different and more pleasant agents appeared at both houses the next day with assurances that the property damage would be paid for, but no apology was forthcoming, and there was no offer to pay for the trauma that DALE agents had caused the two families.

The actions of the DALE agents constitute the torts of assault, battery, and false imprisonment, but because of the intentional tort exclusion in the FTCA, the Giglottos and Askews were without a legal remedy.

It turned out that several of the agents involved in the April 23 raids had been involved in two similar incidents over the preceding year. A special assistant attorney general said that he had suspended the four agents. One of the suspended agents, however, was caught by the press at another raid shortly after the suspension. It turned out the four agents had simply been reassigned to planning and coordinating the raids.

The incidents received nationwide coverage in the press. The administrative reaction was to create a new agency, the Drug Enforcement Agency (DEA); severely restrict the use of "no-knock" entries; stress the importance of obtaining a warrant (it appears there was no warrant in either case); and, finally, to see to it that federal agents wear identifying clothing in raids and searches. The Giglottos and the Askews went to Washington, D.C., to testify, and as a result of the publicity surrounding this incident, Congress amended the FTCA to remove sovereign immunity for intentional torts such as assault, battery, and false imprisonment, when committed by a federal law enforcement officer.

Official or Qualified Immunity

One of the things the FTCA does is to absolve the individual federal employee of liability and spread the financial burden to the taxpayers. In the case you are about to read next,

Federal Bureau of Narcotics Agents entered (they broke in) a man's apartment, searched him and the apartment, and arrested him for alleged narcotics violations—all without a warrant. Except to the extent that it may involve a battery or false imprisonment (which at the time—1971—were intentional torts exempted under the FTCA), this is not an action for a tort. The man, Mr. Bivens, was suing the narcotics agents individually (not the agency or the federal government) for violating his Fourth Amendment rights. If Congress has never authorized such suits, can they be maintained?

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics
403 U.S. 388 (1971)

Justice Brennan delivered the opinion of the Court, joined by Justices Douglas, Stewart, White, and Marshall. Justice Harlan concurred, and Chief Justice Burger and Justices Black and Blackmun filed dissents.

The Fourth Amendment provides that: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." In *Bell v. Hood,* 327 U.S. 678 (1946), we reserved the question whether violation of that command by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct. Today we hold that it does.

This case has its origin in an arrest and search carried out on the morning of November 26, 1965. Petitioner's complaint alleged that on that day respondents, agents of the Federal Bureau of Narcotics acting under claim of federal authority, entered his apartment and arrested him for alleged narcotics violations. The agents manacled petitioner in front of his wife and children, and threatened to arrest the entire family. They searched the apartment from stem to stern. Thereafter, petitioner was taken to the federal courthouse in Brooklyn, where he was interrogated, booked, and subjected to a visual strip search.

On July 7, 1967, petitioner brought suit in Federal District Court. In addition to the allegations above, his complaint asserted that the arrest and search were effected without a warrant, and that unreasonable force was employed in making the arrest; fairly read, it alleges as well that the arrest was made without probable cause. Petitioner claimed to have suffered great humiliation, embarrassment, and mental suffering as a result of the agents' unlawful conduct, and sought $15,000 damages from each of them. The District Court, on respondents' motion, dismissed the complaint on the ground, inter alia, that it failed to state a cause of action. 276 F.Supp. 12 1967. The Court of Appeals, one judge concurring specially, affirmed on that basis. 409 F.2d 718 (CA2 1969). We granted certiorari. We reverse. . . .

I

Respondents do not argue that petitioner should be entirely without remedy for an unconstitutional invasion of his rights by federal agents. In respondents' view, however, the rights that petitioner asserts—primarily rights of privacy—are creations of state and not of federal law. Accordingly, they argue, petitioner may obtain money damages to redress invasion of these rights only by an action in tort, under state law, in the state courts. In this scheme the Fourth Amendment would serve merely to limit the extent to which the agents could defend the state law tort suit by asserting that their actions were a valid exercise of federal power: if the agents were shown to have violated the Fourth Amendment, such a defense would be lost to them and they would stand before the state law merely as private individuals. Candidly

admitting that it is the policy of the Department of Justice to remove all such suits from the state to the federal courts for decision, respondents nevertheless urge that we uphold dismissal of petitioner's complaint in federal court, and remit him to filing an action in the state courts in order that the case may properly be removed to the federal court for decision on the basis of state law. We think that respondents' thesis rests upon an unduly restrictive view of the Fourth Amendment's protection against unreasonable searches and seizures by federal agents, a view that has consistently been rejected by this Court. Respondents seek to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.

Accordingly, as our cases make clear, the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen. It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. And "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." . . .

Second. The interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile. Thus, we may bar the door against an unwelcome private intruder, or call the police if he persists in seeking entrance. The availability of such alternative means for the protection of privacy may lead the State to restrict imposition of liability for any consequent trespass. A private citizen, asserting no authority other than his own, will not normally be liable in trespass if he demands, and is granted, admission to another's house. But one who demands admission under a claim of federal authority stands in a far different position. The mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist an unlawful entry or arrest by resort to the local police; and a claim of authority to enter is likely to unlock the door as well. . . .

Third. That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty. . . .

Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But "it is well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison,* 1 Cranch 137, 163, 2 L.Ed. 60 (1803). Having concluded that petitioner's complaint states a cause of action under the Fourth Amendment, we hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment.

II

In addition to holding that petitioner's complaint had failed to state facts making out a cause of action, the District Court ruled that in

any event respondents were immune from liability by virtue of their official position. 276 F.Supp., at 15. This question was not passed upon by the Court of Appeals, and accordingly we do not consider it here. The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

So ordered.

Judgment reversed and case remanded.

Questions

1. What is the holding in *Bivens?*
2. Do you think this is a good or a bad decision? Why?

Some have attributed to *Bivens* the notion of qualified immunity, but as you can tell from reading the case, the Court passed on the question of immunity. Some government officials have absolute immunity. That means they cannot be sued at all in their official capacity. Judges, prosecutors, and presidents are examples.[28] Most government officials possess what is called a qualified immunity for *Bivens*-type suits. This means that sometimes they can be sued, and sometimes they are immune from suit.

In the 1950s, the acting director of the Office of Rent Stabilization (Barr) issued a press release that a jury later found to have slandered former employees (Matteo and Madigan). This was not a *Bivens*-type action but, rather, a tort suit. It was not an FTCA suit, however, because the plaintiffs were not suing the government but, instead, were suing Barr personally for an intentional tort. One of the defenses Barr raised was that even if his actions did amount to slander, because he was acting in an official capacity, he should enjoy immunity. The Supreme Court agreed, saying, "The fact that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable."[29]

The "privilege" the Court spoke of is official immunity (as opposed to governmental immunity), and in saying that official immunity extended all the way to the "outer perimeters of official duty," the Court effectively created an absolute immunity for governmental officials.

The *Bivens* case signaled the end of absolute official immunity. Indeed, on remand to the circuit court, the *Bivens* defendants were found to have acted beyond the outer perimeters of their line of duty. The case you are about to read, although it is not the most recent case on federal official immunity, is famous for its official immunity jurisprudence.

Butz v. Economou
438 U.S. 478 (1978)

Justice White delivered the opinion of the Court, joined by Justices Brennan, Marshall, Blackmun, and Powell. Justice Rehnquist filed an opinion concurring in part and dissenting in part, joined by Chief Justice Burger and Justices Stewart and Stevens.

This case concerns the personal immunity of federal officials in the Executive Branch from claims for damages arising from their violations of citizens' constitutional rights. Respondent filed suit against a number of officials in the Department of Agriculture claiming that they

had instituted an investigation and an administrative proceeding against him in retaliation for his criticism of that agency. The District Court dismissed the action on the ground that the individual defendants, as federal officials, were entitled to absolute immunity for all discretionary acts within the scope of their authority. The Court of Appeals reversed, holding that the defendants were entitled only to the qualified immunity available to their counterparts in state government. *Economou v. U.S. Dept. of Agriculture,* 535 F.2d 688 (1976). Because of the importance of immunity doctrine to both the vindication of constitutional guarantees and the effective functioning of government, we granted certiorari. . . .

I

Respondent controls Arthur N. Economou and Co., Inc., which was at one time registered with the Department of Agriculture as a commodity futures commission merchant. Most of respondent's factual allegations in this lawsuit focus on an earlier administrative proceeding in which the Department of Agriculture sought to revoke or suspend the company's registration. On February 19, 1970, following an audit, the Department of Agriculture issued an administrative complaint alleging that respondent, while a registered merchant, had willfully failed to maintain the minimum financial requirements prescribed by the Department. After another audit, an amended complaint was issued on June 22, 1970. A hearing was held before the Chief Hearing Examiner of the Department, who filed a recommendation sustaining the administrative complaint. The Judicial Officer of the Department, to whom the Secretary had delegated his decisional authority in enforcement proceedings, affirmed the Chief Hearing Examiner's decision. On respondent's petition for review, the Court of Appeals for the Second Circuit vacated the order of the Judicial Officer. It reasoned that "the essential finding of willfulness . . . was made in a proceeding instituted without the customary warning letter, which the Judicial Officer conceded might well have resulted in prompt correction of the claimed insufficiencies." *Economou v. U.S. Department of Agriculture,* 494 F.2d 519 (1974).

While the administrative complaint was pending before the Judicial Officer, respondent filed this lawsuit in Federal District Court. Respondent sought initially to enjoin the progress of the administrative proceeding, but he was unsuccessful in that regard. On March 31, 1975, respondent filed a second amended complaint seeking damages. Named as defendants were the individuals who had served as Secretary and Assistant Secretary of Agriculture during the relevant events; the Judicial Officer and Chief Hearing Examiner; several officials in the Commodity Exchange Authority; the Agriculture Department attorney who had prosecuted the enforcement proceeding; and several of the auditors who had investigated respondent or were witnesses against respondent. . . .

The complaint stated that prior to the issuance of the administrative complaints respondent had been "sharply critical of the staff and operations of Defendants and carried on a vociferous campaign for the reform of Defendant Commodity Exchange Authority to obtain more effective regulation of commodity trading." The complaint also stated that, some time prior to the issuance of the February 19 complaint, respondent and his company had ceased to engage in activities regulated by the defendants. The complaint charged that each of the administrative complaints had been issued without the notice or warning required by law; that the defendants had furnished the complaints "to interested persons and others without furnishing respondent's answers as well"; and that following the issuance of the amended complaint, the defendants had issued a "deceptive" press release that "falsely indicated to the public that [respondent's] financial resources had deteriorated, when Defendants knew that their statement was untrue and so acknowledge[d] previously that said assertion was untrue." . . .

The complaint then presented 10 "causes of action," some of which purported to state claims for damages under the United States Constitution. For example, the first "cause of action" alleged that respondent had been denied due process of law because the defendants had instituted unauthorized proceedings against him without proper notice and with the knowledge that respondent was no longer

subject to their regulatory jurisdiction. The third "cause of action" stated that by means of such actions "the Defendants discouraged and chilled the campaign of criticism [plaintiff] directed against them, and thereby deprived the [plaintiff] of [his] rights to free expression guaranteed by the First Amendment of the United States Constitution." . . .

The defendants moved to dismiss the complaint on the ground that "as to the individual defendants it is barred by the doctrine of official immunity." . . .

II

The single submission by the United States on behalf of petitioners is that all of the federal officials sued in this case are absolutely immune from any liability for damages even if in the course of enforcing the relevant statutes they infringed respondent's constitutional rights and even if the violation was knowing and deliberate. Although the position is earnestly and ably presented by the United States, we are quite sure that it is unsound and consequently reject it.

Bivens established that compensable injury to a constitutionally protected interest could be vindicated by a suit for damages invoking the general federal-question jurisdiction of the federal courts, but we reserved the question whether the agents involved were "immune from liability by virtue of their official position," and remanded the case for that determination. On remand the Court of Appeals for the Second Circuit, as has every other Court of Appeals that has faced the question, held that the agents were not absolutely immune and that the public interest would be sufficiently protected by according the agents and their superiors a qualified immunity. . . .

"[I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." . . .

We agree with the perception of these courts that, in the absence of congressional direction to the contrary, there is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by *Bivens* than is accorded state officials when sued for the identical violation under § 1983. The constitutional injuries made actionable by § 1983 are of no greater magnitude than those for which federal officials may be responsible. The pressures and uncertainties facing decisionmakers in state government are little if at all different from those affecting federal officials. We see no sense in holding a state governor liable but immunizing the head of a federal department; in holding the administrator of a federal hospital immune where the superintendent of a state hospital would be liable; in protecting the warden of a federal prison where the warden of a state prison would be vulnerable; or in distinguishing between state and federal police participating in the same investigation. Surely, federal officials should enjoy no greater zone of protection when they violate federal constitutional rules than do state officers. . . .

This is not to say that considerations of public policy fail to support a limited immunity for federal executive officials. We consider here, as we did in *Scheuer,* the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority. Yet *Scheuer* and other cases have recognized that it is not unfair to hold liable the official who knows or should know he is acting outside the law, and that insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment. We therefore hold that, in a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to the qualified immunity specified in *Scheuer,* subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business.

We think that the Court of Appeals placed undue emphasis on the fact that the officials sued here are—from an administrative perspective—employees of the Executive Branch. Judges have absolute immunity not because of their particular location within the Government but because of the special nature of their responsibilities. . . . We think that adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages. . . .

We therefore hold that persons subject to these restraints and performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts. Those who complain of error in such proceedings must seek agency or judicial review.

We also believe that agency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts. The decision to initiate administrative proceedings against an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution. An agency official, like a prosecutor, may have broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought.

We turn finally to the role of an agency attorney in conducting a trial and presenting evidence on the record to the trier of fact. We can see no substantial difference between the function of the agency attorney in presenting evidence in an agency hearing and the function of the prosecutor who brings evidence before a court. . . .

We therefore hold that an agency attorney who arranges for the presentation of evidence on the record in the course of an adjudication is absolutely immune from suits based on the introduction of such evidence. . . .

VI

There remains the task of applying the foregoing principles to the claims against the particular petitioner-defendants involved in this case. Rather than attempt this here in the first instance, we vacate the judgment of the Court of Appeals and remand the case to that court with instructions to remand the case to the District Court for further proceedings consistent with this opinion.

So ordered.

Question

1. The Court here clearly establishes a qualified official immunity for federal officials. Can you describe when such officials will be liable and when they enjoy immunity?

In 1994, The Supreme Court ruled that a *Bivens* action would not be available when suing a federal agency; it only applies to individual employees.[30] A similar issue was decided by the Court in 2001 where the issue was whether an injured plaintiff can use a *Bivens* action to sue a private corporation that was running a federal halfway house under federal contract. The case is *Correctional Services Corporation v. Malesko,* and it appears at the end of this chapter.

Immunity in the States

Because sovereign immunity was the jurisprudential status quo in the United States and both the state and the federal governments are sovereign entities, it follows that state

governments are clothed with sovereign immunity. They cannot be sued without their consent. Today, there are still 10 states that have refused to relinquish sovereign immunity.[31] The rest have passed tort claims acts, most of which are similar to the FTCA in that there are numerous exceptions.

What about county and city government? Because they are creatures of the state legislature, they are not sovereign and hence do not enjoy sovereign immunity. Local governments did, however, have an immunity created by the courts. Local governments could not be sued so long as they were engaged in a governmental function or activity but could be sued if engaged in a proprietary function, one that could be performed by a private business. The state of North Dakota, for example, runs a bank and a mill and elevator and, at one time, brewed beer. These are proprietary functions. The distinction between proprietary and governmental functions no longer exists, as you will discover as you read the *Owen* case below.

Part of the Civil Rights Act of 1871 is 42 U.S.C.1983 imposes civil liability on "any person" who, acting under color of law, deprives another of their federally protected rights. Lawsuits filed under 42 U.S.C. 1983 are referred to as 1983 suits or § 1983 suits. For a long time, the term *person* in the Act was not read to include cities, counties, or local units of government. Cities had an absolute immunity from suit under § 1983. All of that changed in *Monell v. New York City Department of Social Services,* 436 U.S. 658 (1978). Female employees of the agency sued under § 1983 when they were forced to take leave from work due to pregnancy before there was any medical justification to do so. The Court decided that cities and their agencies are *persons* within the Act. There would no longer be absolute immunity for local government under § 1983. The question of whether local government should enjoy a qualified immunity was left for the case below.

Owen v. City of Independence
445 U.S. 622 (1980)

Justice Brennan delivered the opinion of the Court, joined by Justices White, Marshall, Blackmun, and Stevens. Justice Powell filed a dissent joined by Justices Stewart and Rehnquist and Chief Justice Burger.

Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978), overruled *Monroe v. Pape,* 365 U.S. 167 (1961), insofar as *Monroe* held that local governments were not among the "persons" to whom 42 U.S.C. § 1983 applies and were therefore wholly immune from suit under the statute. *Monell* reserved decision, however, on the question whether local governments, although not entitled to an absolute immunity, should be afforded some form of official immunity in § 1983 suits. In this action brought by petitioner in the District Court for the Western District of Missouri, the Court of Appeals for the Eighth Circuit held that respondent city of Independence, Mo., "is entitled to qualified immunity from liability" based on the good faith of its officials: "We extend the limited immunity the district court applied to the individual defendants to cover the City as well, because its officials acted in good faith and without malice." 589 F.2d 335 (1978). We granted certiorari. We reverse. . . .

I

The events giving rise to this suit are detailed in the District Court's findings of fact, 421 F.Supp. 1110 (1976). On February 20, 1967, Robert L.

Broucek, then City Manager of respondent city of Independence, Mo., appointed petitioner George D. Owen to an indefinite term as Chief of Police. In 1972, Owen and a new City Manager, Lyle W. Alberg, engaged in a dispute over petitioner's administration of the Police Department's property room. In March of that year, a handgun, which the records of the Department's property room stated had been destroyed, turned up in Kansas City in the possession of a felon. This discovery prompted Alberg to initiate an investigation of the management of the property room. Although the probe was initially directed by petitioner, Alberg soon transferred responsibility for the investigation to the city's Department of Law, instructing the City Counselor to supervise its conduct and to inform him directly of its findings. . . . While Alberg was away on the weekend of April 15 and 16, two developments occurred. Petitioner, having consulted with counsel, sent Alberg a letter demanding written notice of the charges against him and a public hearing with a reasonable opportunity to respond to those charges. At approximately the same time, City Councilman Paul L. Roberts asked for a copy of the investigative report on the Police Department property room. Although petitioner's appeal received no immediate response, the Acting City Manager complied with Roberts' request and supplied him with the audit report and witness statements. . . . On the evening of April 17, 1972, the City Council held its regularly scheduled meeting. After completion of the planned agenda, Councilman Roberts read a statement he had prepared on the investigation. Among other allegations, Roberts charged that petitioner had misappropriated Police Department property for his own use, that narcotics and money had "mysteriously disappeared" from his office, that traffic tickets had been manipulated, that high ranking police officials had made "inappropriate" requests affecting the police court, and that "things have occurred causing the unusual release of felons." At the close of his statement, Roberts moved that the investigative reports be released to the news media and turned over to the prosecutor for presentation to the grand jury, and that the City Manager "take all direct and appropriate action" against those persons "involved in illegal, wrongful, or gross inefficient activities brought out in the investigative reports." After some discussion, the City Council passed Roberts' motion with no dissents and one abstention. . . .

City Manager Alberg discharged petitioner the very next day. Petitioner was not given any reason for his dismissal; he received only a written notice stating that his employment as Chief of Police was "[t]erminated under the provisions of Section 3.3(1) of the City Charter." Petitioner's earlier demand for a specification of charges and a public hearing was ignored, and a subsequent request by his attorney for an appeal of the discharge decision was denied by the city on the grounds that "there is no appellate procedure or forum provided by the Charter or ordinances of the City of Independence, Missouri, relating to the dismissal of Mr. Owen." . . . The local press gave prominent coverage both to the City Council's action and petitioner's dismissal, linking the discharge to the investigation. As instructed by the City Council, Alberg referred the investigative reports and witness statements to the Prosecuting Attorney of Jackson County, Mo., for consideration by a grand jury. The results of the audit and investigation were never released to the public, however. The grand jury subsequently returned a "no true bill," and no further action was taken by either the City Council or City Manager Alberg.

II

Petitioner named the city of Independence, City Manager Alberg, and the present members of the City Council in their official capacities as defendants in this suit. Alleging that he was discharged without notice of reasons and without a hearing in violation of his constitutional rights to procedural and substantive due process, petitioner sought declaratory and injunctive relief, including a hearing on his discharge, backpay from the date of discharge, and attorney's fees. The District Court, after a bench trial, entered judgment for respondents. 421 F.Supp. 1110 (1976).

The Court of Appeals initially reversed the District Court. . . . Respondents petitioned for review of the Court of Appeals' decision. Certiorari was granted, and the case was remanded for further consideration in light of our supervening decision in *Monell v. New York City Dept. of Social Services,* 436 U.S. 658 (1978). The Court of Appeals on the remand reaffirmed its original determination that the city had violated petitioner's rights under the Fourteenth Amendment, but held that all respondents, including the city, were entitled to qualified immunity from liability. 589 F.2d 335 (1978).

Monell held that "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." The Court of Appeals held in the instant case that the municipality's official policy was responsible for the deprivation of petitioner's constitutional rights: "[T]he stigma attached to [petitioner] in connection with his discharge was caused by the official conduct of the City's lawmakers, or by those whose acts may fairly be said to represent official policy. Such conduct amounted to official policy causing the infringement of [petitioner's] constitutional rights, in violation of section 1983." . . . We turn now to the reasons for our disagreement with this holding. . . .

III

Because the question of the scope of a municipality's immunity from liability under § 1983 is essentially one of statutory construction, see *Wood v. Strickland,* 420 U.S. 308 (1975); the starting point in our analysis must be the language of the statute itself. By its terms, § 1983 "creates a species of tort liability that on its face admits of no immunities." Its language is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted. Rather, the Act imposes liability upon "every person" who, under color of state law or custom, "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." And *Monell* held that these words were intended to encompass municipal corporations as well as natural "persons." . . . But there is no tradition of immunity for municipal corporations, and neither history nor policy supports a construction of § 1983 that would justify the qualified immunity accorded the city of Independence by the Court of Appeals. We hold, therefore, that the municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983. . . .

To be sure, there were two doctrines that afforded municipal corporations some measure of protection from tort liability. The first sought to distinguish between a municipality's "governmental" and "proprietary" functions; as to the former, the city was held immune, whereas in its exercise of the latter, the city was held to the same standards of liability as any private corporation. The second doctrine immunized a municipality for its "discretionary" or "legislative" activities, but not for those which were "ministerial" in nature. A brief examination of the application and the rationale underlying each of these doctrines demonstrates that Congress could not have intended them to limit a municipality's liability under § 1983.

In sum, we can discern no "tradition so well grounded in history and reason" that would warrant the conclusion that in enacting § 1 of the Civil Rights Act, the 42d Congress *sub silentio* extended to municipalities a qualified immunity based on the good faith of their officers. Absent any clearer indication that Congress intended so to limit the reach of a statute expressly designed to provide a "broad remedy for violations of federally protected civil rights," *Monell v. New York City Dept. of Social Services,* 436 U.S., at 685, we are unwilling to suppose that injuries occasioned by a municipality's unconstitutional conduct were not also meant to be fully redressable through its sweep.

. . . Moreover, § 1983 was intended not only to provide compensation to the victims of past

abuses, but to serve as a deterrent against future constitutional deprivations, as well. See *Robertson v. Wegmann,* 436 U.S. 584 (1978); *Carey v. Piphus,* 435 U.S. 247 (1978). The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. Such procedures are particularly beneficial in preventing those "systemic" injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith. . . .

In *Scheuer v. Rhodes,* supra, 416 U.S., at 240, the Chief Justice identified the two "mutually dependent rationales" on which the doctrine of official immunity rested: "(1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." . . .

The first consideration is simply not implicated when the damages award comes not from the official's pocket, but from the public treasury. . . .

It has been argued, however, that revenue raised by taxation for public use should not be diverted to the benefit of a single or discrete group of taxpayers, particularly where the municipality has at all times acted in good faith. On the contrary, the accepted view is that stated in *Thayer v. Boston*—"that the city, in its corporate capacity, should be liable to make good the damage sustained by an [unlucky] individual, in consequence of the acts thus done." 36 Mass., at 515. After all, it is the public at large which enjoys the benefits of the government's activities, and it is the public at large which is ultimately responsible for its administration. Thus, even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated. . . .

The second rationale mentioned in *Scheuer* also loses its force when it is the municipality, in contrast to the official, whose liability is at issue. At the heart of this justification for a qualified immunity for the individual official is the concern that the threat of personal monetary liability will introduce an unwarranted and unconscionable consideration into the decisionmaking process, thus paralyzing the governing official's decisiveness and distorting his judgment on matters of public policy. The inhibiting effect is significantly reduced, if not eliminated, however, when the threat of personal liability is removed.

IV

In sum, our decision holding that municipalities have no immunity from damages liability flowing from their constitutional violations harmonizes well with developments in the common law and our own pronouncements on official immunities under § 1983. Doctrines of tort law have changed significantly over the past century, and our notions of governmental responsibility should properly reflect that evolution. No longer is individual "blameworthiness" the acid test of liability; the principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct.

We believe that today's decision, together with prior precedents in this area, properly allocates these costs among the three principals in the scenario of the § 1983 cause of action: the victim of the constitutional deprivation; the officer whose conduct caused the injury; and the public, as represented by the municipal entity. The innocent individual who is harmed by an

abuse of governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole. And the public will be forced to bear only the costs of injury inflicted by the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy."

Reversed.

Question

1. Do local units of government have qualified immunity?

Owen, the plaintiff in the preceding case, was suing the city under 42 U.S.C., § 1983. The law creates a constitutional suit against state officials, just as the decision in *Bivens* created one for federal officials and the *Monell* case creates the same kind of suit against a local government. Such suits are referred to as "1983 suits," and they constitute a mushrooming proportion of cases filed in federal courts.[32] Court interpretation of § 1983 created a qualified official immunity for state officials, just as the immunity articulated in *Butz* created a qualified immunity for federal officials. However, the decision in *Owen* does not allow for a qualified immunity for local governments. It is important that you understand the state of 1983 jurisprudence after *Owen.* Local governments can be sued. They have no immunity. However to successfully sue a local government, a plaintiff must show that the action that caused the injury was the official policy of the city. The case of *Pembaur v. Cincinnati* at the end of this chapter addresses that issue.

Another lawsuit involving issues of immunity was filed by Walter McMillian, who sat on Alabama's death row for six years. His case is somewhat famous because *60 Minutes* did a piece on him that eventually led to his release, and a best-selling book has been written about his experience.[33] On a Saturday morning in November 1986, while Ronda Morrison was being brutally murdered in the back of a dry cleaning store, Walter McMillian was attending an outdoor barbecue with about 100 other black friends and neighbors in Monroeville, Alabama. Several months later, Walter was arrested, convicted after a trial that lasted less than three days, and sentenced to be executed in Alabama's electric chair. The State has since admitted that coerced false testimony was used against him at trial and exculpatory evidence was withheld from Walter's attorney and the jury. Walter eventually sued the sheriff who coerced the false testimony and the county under § 1983. In the courts, this suit boiled down to a question of policy. The Supreme Court, in a 5 to 4 decision, held that the county had no policy-making role in county law enforcement. Hence, whatever may or may not have happened in McMillian's criminal trial was not the result of policy by Monroe County. It could not be sued under § 1983. Just as the city manager's actions incurred § 1983 liability for the city in the *Owen* case, the issue now turned to whether the sheriff by his policy actions incurred liability for Monroe County. The answer was no because the court determined that while the sheriff was a policymaker, he worked for the state, not the county. Walter lost this round of suits. He could still sue the sheriff as an individual under § 1983, but he would face the hurdle of *judgment proof,*

a concept familiar to law students. Try to answer the question, "Why cannot Walter sue Alabama"? See *McMillian v. Monroe County, Alabama,* 520 U.S. 781 (1997).

In another case, B. J. Moore, who was the sheriff of Bryan County, Oklahoma, hired Burns, a relative, as a reserve officer for the department. Burns and a deputy sheriff stopped the Browns' truck and ordered the occupants to exit. When they did not comply fast enough to suit Burns, he grabbed the passenger and threw her out of the truck. Mrs. Brown's knees hit the pavement, damaging them so severely that they needed to be replaced surgically. The Browns sued Bryan County for the cost of the knee replacement surgery under § 1983. The suit alleged that the sheriff's hiring policy should incur 1983 liability for the county. Had the sheriff done a normal law enforcement background check on Burns, he would have discovered a violent history, including a string of misdemeanor convictions for assault. The Supreme Court said that the county would be liable if a policymaker acted on behalf of the county with deliberate indifference toward a citizen. Plus, the deliberate indifference must cause the injury. The Court concluded that one bad hiring decision did not constitute deliberate indifference sufficient to incur § 1983 liability for Bryan County. See *Board of Commissioners of Bryan County v. Brown,* 520 U.S. 397 (1997).

The two cases that follow show the evolution of doctrine in state official immunity cases. The *Wood* case articulates the present constitutional test to determine when a state official has crossed the line from immunity to liability.

Scheuer v. Rhodes
416 U.S. 232 (1974)

Chief Justice Burger delivered the opinion for a unanimous court. Justice Douglas did not participate.

We granted certiorari in these cases to resolve whether the District Court correctly dismissed civil damage actions, brought under 42 U.S.C. § 1983, on the ground that these actions were, as a matter of law, against the State of Ohio, and hence barred by the Eleventh Amendment to the Constitution and, alternatively, that the actions were against state officials who were immune from liability for the acts alleged in the complaints. These cases arise out of the same period of alleged civil disorder on the campus of Kent State University in Ohio during May 1970 which was before us, in another context, in *Gilligan v. Morgan,* 413 U.S. 1 (1973). . . . In these cases the personal representatives of the estates of three students who died in that episode seek damages against the Governor, the Adjutant General, and his assistant, various named and unnamed officers and enlisted members of the Ohio National Guard, and the president of Kent State University. The complaints in both cases allege a cause of action under the Civil Rights Act of 1871, now 42 U.S.C. § 1983. Petitioner Scheuer also alleges a cause of action under Ohio law on the theory of pendent jurisdiction. Petitioners Krause and Miller make a similar claim, asserting jurisdiction on the basis of diversity of citizenship. . . .

The District Court dismissed the complaints for lack of jurisdiction over the subject matter on the theory that these actions, although in form against the named individuals, were, in substance and effect, against the State of Ohio and thus barred by the Eleventh Amendment. The Court of Appeals affirmed the action of the District Court, agreeing that the suit was in legal effect one against the State of Ohio and, alternatively, that the common-law doctrine of

executive immunity barred action against the state officials who are respondents here. 471 F.2d 430 (1972). We are confronted with the narrow threshold question whether the District Court properly dismissed the complaints. We hold that dismissal was inappropriate at this stage of the litigation and accordingly reverse the judgments and remand for further proceedings. We intimate no view on the merits of the allegations since there is no evidence before us at this stage.

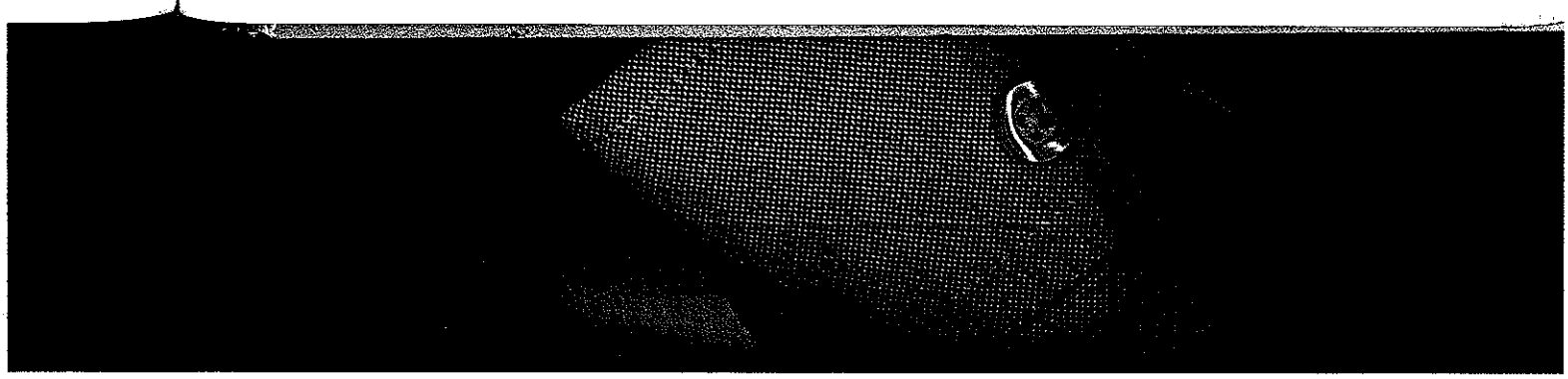
I

The complaints in these cases are not identical but their thrust is essentially the same. In essence, the defendants are alleged to have "intentionally, recklessly, willfully and wantonly" caused an unnecessary deployment of the Ohio National Guard on the Kent State campus and, in the same manner, ordered the Guard members to perform allegedly illegal actions which resulted in the death of plaintiffs' decedents. Both complaints allege that the action was taken "under color of state law" and that it deprived the decedents of their lives and rights without due process of law. Fairly read, the complaints allege that each of the named defendants, in undertaking such actions, acted either outside the scope of his respective office or, if within the scope, acted in an arbitrary manner, grossly abusing the lawful powers of office. The complaints were dismissed by the District Court for lack of jurisdiction without the filing of an answer to any of the complaints. The only pertinent documentation before the court in addition to the complaints [was] two proclamations issued by the respondent Governor. The first proclamation ordered the Guard to duty to protect against violence arising from wildcat strikes in the trucking industry; the other recited an account of the conditions prevailing at Kent State University at that time. In dismissing these complaints for want of subject matter jurisdiction at that early stage, the District Court held, as we noted earlier, that the defendants were being sued in their official and representative capacities and that the actions were therefore in effect against the State of Ohio. The primary question presented is whether the District Court acted prematurely and hence erroneously in dismissing the complaints on the stated ground, thus precluding any opportunity for the plaintiffs by subsequent proof to establish a claim. . . .

Whatever the plaintiffs may or may not be able to establish as to the merits of their allegations, their claims, as stated in the complaints, given the favorable reading required by the Federal Rules of Civil Procedure, are not barred by the Eleventh Amendment. Consequently, the District Court erred in dismissing the complaints for lack of jurisdiction. . . .

III

The Court of Appeals relied upon the existence of an absolute "executive immunity" as an alternative ground for sustaining the dismissal of the complaints by the District Court. If the immunity of a member of the executive branch is absolute and comprehensive as to all acts allegedly performed within the scope of official duty, the Court of Appeals was correct; if, on the other hand, the immunity is not absolute but rather one that is qualified or limited, an executive officer may or may not be subject to liability depending on all the circumstances that may be revealed by evidence. The concept of the immunity of government officers from personal liability springs from the same root considerations that generated the doctrine of sovereign immunity. While the latter doctrine—that the "King can do no wrong"—did not protect all government officers from personal liability, the common law soon recognized the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability. This official immunity apparently rested, in its genesis, on two mutually dependent rationales: (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good. . . .



Under the criteria developed by precedents of this Court, § 1983 would be drained of meaning were we to hold that the acts of a governor or other high executive officer have "the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the federal government." *Sterling v. Constantin*, 287 U.S., at 397. In *Sterling*, Mr. Chief Justice Hughes put it in these terms: "If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the State may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount authority of the Federal Constitution. When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression." . . .

V

The documents properly before the District Court at this early pleading stage specifically placed in issue whether the Governor and his subordinate officers were acting within the scope of their duties under the Constitution and laws of Ohio; whether they acted within the range of discretion permitted the holders of such office under Ohio law and whether they acted in good faith both in proclaiming an emergency and as to the actions taken to cope with the emergency so declared. Similarly, the complaints place directly in issue whether the lesser officers and enlisted personnel of the Guard acted in good-faith obedience to the orders of their superiors. Further proceedings, either by way of summary judgment or by trial on the merits, are required. The complaining parties are entitled to be heard more fully than is possible on a motion to dismiss a complaint.

We intimate no evaluation whatever as to the merits of the petitioners' claims or as to whether it will be possible to support them by proof. We hold only that, on the allegations of their respective complaints, they were entitled to have them judicially resolved.

The judgments of the Court of Appeals are reversed and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Wood v. Strickland
420 U.S. 308 (1975)

Justice White delivered the opinion of the Court, joined by Justices Brennan, Stewart, Marshall, and Stevens. Justice Powell filed an opinion concurring in part and dissenting in part, which was joined by Chief Justice Burger and Justices Blackmun and Rehnquist.

Respondents Peggy Strickland and Virginia Crain brought this lawsuit against petitioners, who were members of the school board at the time in question, two school administrators, and the Special School District of Mena, Ark., purporting to assert a cause of action under 42 U.S.C. § 1983, and claiming that their federal constitutional rights to due process were infringed under color of state law by their expulsion from the Mena Public High School on the grounds of their violation of a school regulation prohibiting the use or possession of intoxicating beverages at school or school activities. The complaint as amended prayed for