

compensatory and punitive damages against all petitioners, injunctive relief allowing respondents to resume attendance, preventing petitioners from imposing any sanctions as a result of the expulsion, and restraining enforcement of the challenged regulations, declaratory relief as to the constitutional invalidity of the regulation, and expunction of any record of their expulsion. After the declaration of a mistrial arising from the jury's failure to reach a verdict, the District Court directed verdicts in favor of petitioners on the ground that petitioners were immune from damages suits absent proof of malice in the sense of ill will toward respondents. 348 F.Supp. 244 (WD Ark. 1972). The Court of Appeals, finding that the facts showed a violation of respondents' rights to "substantive due process," reversed and remanded for appropriate injunctive relief and a new trial on the question of damages. 485 F.2d 186 (CA8 1973). A petition for rehearing en banc was denied, with three judges dissenting. Certiorari was granted to consider whether this application of due process by the Court of Appeals was warranted and whether that court's expression of a standard governing immunity for school board members from liability for compensatory damages under 42 U.S.C. § 1983 was the correct one. . . .

The violation of the school regulation prohibiting the use or possession of intoxicating beverages at school or school activities with which respondents were charged concerned their "spiking" of the punch served at a meeting of an extracurricular school organization attended by parents and students. At the time in question, respondents were 16 years old and were in the 10th grade. The relevant facts begin with their discovery that the punch had not been prepared for the meeting as previously planned. The girls then agreed to "spike" it. Since the county in which the school is located is "dry," respondents and a third girl drove across the state border into Oklahoma and purchased two 12-ounce bottles of "Right Time," a malt liquor. They then bought six 10-ounce bottles of a soft drink, and, after having mixed the contents of

the eight bottles in an empty milk carton, returned to school. Prior to the meeting, the girls experienced second thoughts about the wisdom of their prank, but by then they were caught up in the force of events and the intervention of other girls prevented them from disposing of the illicit punch. The punch was served at the meeting, without apparent effect. . . .

Ten days later, the teacher in charge of the extracurricular group and meeting, Mrs. Curtis Powell, having heard something about the "spiking," questioned the girls about it. Although first denying any knowledge, the girls admitted their involvement after the teacher said that she would handle the punishment herself. The next day, however, she told the girls that the incident was becoming increasingly the subject of talk in the school and that the principal, P. T. Waller, would probably hear about it. She told them that her job was in jeopardy but that she would not force them to admit to Waller what they had done. If they did not go to him then, however, she would not be able to help them if the incident became "distorted." The three girls then went to Waller and admitted their role in the affair. He suspended them from school for a maximum two-week period, subject to the decision of the school board. Waller also told them that the board would meet that night, that the girls could tell their parents about the meeting, but that the parents should not contact any members of the board.

Neither the girls nor their parents attended the school board meeting that night. Both Mrs. Powell and Waller, after making their reports concerning the incident, recommended leniency. At this point, a telephone call was received by S. L. Inlow, then the superintendent of schools, from Mrs. Powell's husband, also a teacher at the high school, who reported that he had heard that the third girl involved had been in a fight that evening at a basketball game. Inlow informed the meeting of the news, although he did not mention the name of the girl involved. Mrs. Powell and Waller then withdrew their recommendations of leniency, and the board voted to expel the girls from school for the remainder of the semester, a period of approximately three months.

The board subsequently agreed to hold another meeting on the matter, and one was held approximately two weeks after the first meeting. The girls, their parents, and their counsel attended this session. The board began with a reading of a written statement of facts as it had found them. The girls admitted mixing the malt liquor into the punch with the intent of "spiking" it, but asked the board to forgo its rule punishing such violations by such substantial suspensions. Neither Mrs. Powell nor Waller was present at this meeting. The board voted not to change its policy and, as before, to expel the girls for the remainder of the semester. . . .

Petitioners as members of the school board assert here, as they did below, an absolute immunity from liability under § 1983 and at the very least seek to reinstate the judgment of the District Court. If they are correct and the District Court's dismissal should be sustained, we need go no further in this case. Moreover, the immunity question involves the construction of a federal statute, and our practice is to deal with possibly dispositive statutory issues before reaching questions turning on the construction of the Constitution. We essentially sustain the position of the Court of Appeals with respect to the immunity issue. . . .

The nature of the immunity from awards of damages under § 1983 available to school administrators and school board members is not a question which the lower federal courts have answered with a single voice. There is general agreement on the existence of a "good faith" immunity, but the courts have either emphasized different factors as elements of good faith or have not given specific content to the good-faith standard. . . .

Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have

known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. That is not to say that school board members are "charged with predicting the future course of constitutional law." A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith. . . .

#### IV

Respondents' complaint alleged that their procedural due process rights were violated by the action taken by petitioners. The District Court did not discuss this claim in its final opinion, but the Court of Appeals viewed it as presenting a substantial question. It concluded that the girls were denied procedural due process at the first school board meeting, but also intimated that the second meeting may have cured the initial procedural deficiencies. Having found a substantive due process violation, however, the court did not reach a conclusion on this procedural issue.

Respondents have argued here that there was a procedural due process violation which also supports the result reached by the Court of Appeals. But because the District Court did not discuss it, and the Court of Appeals did not decide it, it would be preferable to have the Court of Appeals consider the issue in the first instance.

The judgment of the Court of Appeals is vacated and the case remanded for further proceedings consistent with this opinion.

So ordered.

Although they do not relate so much to administrative law, the student should be aware that there are many other forms of immunity from suit. Members of Congress and state legislators are immune from both suit and criminal prosecution under constitutional speech and debate clauses. City Council members and County Commissioners have an absolute immunity for their legislative decisions. Where a city administrator filed a 1983 suit

against the mayor and the vice president of the city council for vindictively eliminating her agency (and hence her job), the Court said they were immune because it was legislative activity.<sup>34</sup> Prosecutors normally enjoy an absolute immunity from suit. However, a prosecutor swore as to the veracity of facts in an affidavit supporting an arrest warrant, but the facts turned out to be wrong. After the charges were dropped and he was released from jail, the individual who was arrested sued the prosecutor under § 1983. The Court said that the prosecutor was acting in the capacity of a witness rather than as an advocate for the jurisdiction so she was not immune from suit in this instance.<sup>35</sup> States can make charities immune from their torts, and the Supreme Court recently created a different kind of immunity for HMOs in certain kinds of suits.<sup>36</sup>

## KINDS OF LAWSUITS PROMINENT IN LITIGATION WITH GOVERNMENT

We have covered many different kinds of lawsuits, and you need to keep them straight. They can be confusing. Remember from Chapter 4 that under the Administrative Procedure Act, it is theoretically possible to force an agency to act when it refuses to do so. However, the Supreme Court has never allowed that to happen. It is also possible under the Act to challenge actions taken by agencies, but to do so: (a) the challenged activity must be reviewable, (b) the court must have jurisdiction, (c) the case must be ripe and cannot be moot, (d) the plaintiff must have standing, (e) the plaintiff must have exhausted all avenues of appeal within the agency, and (f) there must not be a primary jurisdiction problem. If all of those conditions are met, one may sue a federal agency.

### Federal Tort Claims Act

Under an FTCA suit, a plaintiff needs to show that there was a breach of a legal duty to exercise reasonable care (foreseeability), that the injury was caused by the breach of the duty to exercise reasonable care (proximate cause), and that the suit is not barred by the discretionary exception. The policy-making/policy implementation dichotomy appears not to exist since the 1991 *Gaubert* decision. Apparently, if government action involves an act of discretion in the furtherance of government policy, that agency action will be immune from lawsuit.<sup>37</sup> The individual employee is absolved of liability in an FTCA suit. You will want to check your own state's tort claims act for different exceptions. If your state does not have a tort claims act, it is one of those few states that have not waived sovereign immunity, and the state cannot be sued.

### Constitutional Torts

This is a *Bivens* suit. The plaintiff sues an individual federal employee, alleging that the employee violated the plaintiff's constitutionally protected rights. Federal employees enjoy a qualified immunity. The qualified immunity is established where the defendant/employee acted in good faith. To establish a lack of good faith, a plaintiff can show that the employee either knew or should have known that his or her actions would violate the plaintiff's constitutionally protected rights. A plaintiff might also try to prove that the employee acted maliciously to deprive the plaintiff of a protected right. If this suit is successful, the individual employee must pay the damages, not the government or an agency.

### Section 1983

Success in Section 1983 lawsuits depends on who or what is being sued. To sue an individual state or local government employee, a plaintiff must show that the employee showed the same lack of good faith discussed above under *Bivens*. It is the employee who will pay, not the government.

To sue a county, city, or other lower unit of government (the states are protected by sovereign immunity), the plaintiff either can sue the unit of government directly or can sue an individual employee on the theory of vicarious liability. There is no qualified immunity. Whether the employee acted in good faith does not matter. The plaintiff must show that the employee was a policymaker for the governmental unit and made the final policy that deprived the plaintiff of federally protected rights. For example, there is no question that the sheriff of Monroe County took actions that violated several of Walter McMillian's constitutionally protected rights. Nor is there a question that the sheriff is a law enforcement policymaker. The problem for McMillian's suit was that the sheriff was not a final policymaker. Only the attorney general of Alabama has the power to make final law enforcement policy. If a plaintiff is suing the governmental unit directly rather than an individual acting on its behalf, the plaintiff needs to show that the injury resulted from the final, official policy of the unit of government.

It is possible to sue a private individual acting on behalf of the state. We have previously discussed the popular trend toward privatization. Where a state privatized several of its prisons and guards violated a prisoner's rights, the prisoner filed a § 1983 suit. There is no question about state action; the "private" guards are state actors for § 1983 purposes. The question in *Richardson v. McKnight*, 521 U.S. 399 (1997), was whether the private guards should have the same qualified immunity that a state prison guard would have (whether they knew or should have known). The answer is no. Private employees when acting as state actors do not possess a qualified immunity. But compare the *Malesko* case at the end of this chapter, where the Court said that a *Bivens* suit was not available in a suit against a private corporation operating under a federal contract. That is, even though it is a "state actor," because it is an entity and not an individual, it cannot be sued under *Bivens*.

There is a criminal counterpart to § 1983. Whereas 42 U.S.C. 1983 provides for civil damages for a violation of an individual's federally protected rights, 42 U.S.C. 242 provides for criminal penalties for the same thing. A state judge was sentenced to 25 years in prison for sexually assaulting a woman in his chambers, when the woman had legal matters pending before his court. See *United States v. Lanier*, 520 U.S. 259 (1997).

Both *Bivens* and § 1983 lawsuits are unique because the individual is legally liable and financially responsible for a court judgment, not the related government. Almost more important than the salary an employee will receive are considerations about what benefits the employer offers. If you interview for employment with a government, you should inquire into employer-provided liability insurance to protect you against § 1983 judgments.

### Additional Related Kinds of Lawsuits

*Americans with Disabilities Act.* The ADA applies to both private and government employers. However, the Eleventh Amendment may prevent suits against the states, but not lower units of government. It forbids discrimination against individuals with disabilities and requires employers to make "reasonable accommodations" for their disabled

employees. In an interesting recent case, an employee suffered a stroke. After rehabilitation, she returned to work but got fired after three months. The company said she was slow, and her work was unsatisfactory. She applied for and obtained federal disability. To receive disability benefits, applicants must prove that they are unable to perform their previous work and that there is no job in the national economy they can do. Under the ADA, employers are required to make reasonable accommodations to allow the disabled employees to "perform the essential functions of their job." The plaintiff sued the employer for failing to make reasonable accommodations for her. The company's position was that if she has already demonstrated that she cannot perform her job (by qualifying for disability), *a fortiori* the company need not try to reasonably accommodate her.

The precise legal issue was whether a plaintiff on disability is estopped from pursuing an ADA suit. The Court said that disability plaintiffs are not automatically estopped from suing under the ADA. The presumptions of the statutes are contradictory, however, and the plaintiff would need to explain how she could be qualified for disability, on the one hand (she cannot work), and demand that an employer reasonably accommodate her so she can perform the essential functions of the job, on the other hand. See *Cleveland v. Policy Management Systems, Inc.*, 526 U.S. 795 (1999).

*The 1964 Civil Rights Act.* The Civil Rights Act does a host of things, but of most relevance here, it forbids discrimination in interstate commerce on the basis of race, color, religion, national origin, and in the case of employment, gender. It applies to all levels of government as well as private industry (provided a business has 15 or more employees. . .). Plaintiffs need to show specific discrimination toward them or prove that the discrimination has a disproportionate impact on a clearly identifiable protected group (race, color, religion, etc.). The Act allows benign discrimination and does not require a showing of purposeful discrimination (as the equal protection clause does for racial discrimination). The EEOC has been delegated enforcement authority. A plaintiff files a complaint with the EEOC, which investigates the complaint and holds a hearing. The EEOC can find the complaint is not legitimate, it can find discrimination under the Act and award remedies, or it can give permission to sue in federal court. There is no immunity from Civil Rights Act suits, qualified or otherwise. By a 1991 amendment, either the EEOC or the courts can award compensatory damages for intentional violations of the law (see *West v. Gibson* at the end of this chapter). The 1991 amendment also allows for the award of punitive damages where a plaintiff can show that the intentional discrimination was done with malice or "reckless indifference."<sup>38</sup>

*Equal protection suits.* These apply only to government or private parties when they are acting for the government (state action). The equal protection clause of the Fourteenth Amendment is not meant to prohibit government from treating groups or people differently. That is the essence of what governments do when adopting public policy: Some will benefit, and some will not. What the equal protection clause does is prohibit government from treating people differently without a reason for doing so. A three-tier level of analysis is applied to equal protection doctrine, with each tier requiring a more substantial reason for the challenged disparate treatment. The first tier is called simple rationality. It applies to government regulation of business and only requires that government have a believable reason for disparate treatment. The second tier is called heightened scrutiny and applies to any form of social or economic discrimination that is not a first or third tier.

Typically, in public administration, the middle tier cases will involve either gender or age discrimination. At this level, to be allowed to continue disparate treatment, government must (a) proffer an important governmental interest and (b) demonstrate that the disparate treatment will accomplish the important interest. The third tier is called the compelling interest test, and it applies where government has discriminated on the basis of race (called suspect classes) or on the basis of a fundamental right (to vote, to travel, or to retain family privacy). Here, for the government's disparate treatment to survive, the government must proffer a compelling reason to treat people differently, and they must implement the disparate treatment in a manner that is the least restrictive on the liberties of individuals. Governments almost never survive court application of the compelling interest test.

*Race discrimination.* Official governmental action that treats people differently based on racial considerations is almost nonexistent today. Only the University of Michigan's Law School was able to survive the compelling interest test, and then by a close 5 to 4 decision of the Supreme Court (see Chapter 8). More subtle forms of racial discrimination are gaining attention. The issue of resegregation of America's schools has gained a lot of attention with the 50th anniversary of the *Brown v. Bd. of Education* case.

*Gender discrimination.* A claim of gender discrimination could be litigated under the 1964 Civil Rights Act, primarily but not exclusively against a private employer or against the government under the equal protection clause. Official government policy that discriminates on the basis of sex is not as prevalent as it was a few decades ago. However, Congress has passed an immigration law that covers the citizenship of children born out of wedlock in a foreign country when one parent is a citizen and the other is not. The law provides that if the mother is a citizen, the child is a citizen at birth, but if the father is the citizen, then the father needs to go through certain steps before the child can be a citizen. Tuan Ahn Nguyen was born in Vietnam to an American father and a Vietnamese mother in 1969. Tuan moved to America at the age of six and lived with his father. He became a permanent resident of the United States, but the father never went through the hoops required by law to make Tuan a citizen (some of those hoops need to be accomplished before the child turns 18). In 1992, Tuan pleaded guilty to some criminal charges in Texas, and three years later, the Immigration and Naturalization Services instituted proceedings to deport him back to Vietnam. The question before the Supreme Court narrowed to whether Congress's disparate treatment of the sexes was constitutional (while the equal protection clause only applies to state governments, the courts apply middle-tier analysis under the Fifth Amendment's due process clause to federal gender discrimination). The Court decided, 5 to 4, that the government had important interests that justified the discrimination (assurances that both a biological and family relationship existed between the child and the father) and that the law would accomplish those objectives. Tuan was deported back to Vietnam.<sup>39</sup>

*Age discrimination.* People who believe they have been discriminated against because of their age have two legal options. If it is government that has discriminated, they can sue under the equal protection clause of the Fourteenth Amendment. Such a suit gets middle-tier analysis, and the court will ask whether there is an important governmental objective and whether the discrimination is rationally related to the achievement of that objective. If the answer to both questions is yes, then it is not unconstitutional for the government to discriminate on the basis of age.

Also, Congress passed the Age Discrimination in Employment Act (ADEA), not under its commerce power, but under its power to enforce the Fourteenth Amendment. The Act forbids discrimination in employment against anyone older than 40, and it provides for a private right of action. Several governmental employees sued their states, alleging that particular policies relating to evaluation for merit pay and salary scales created a disparate impact on older employees. The states moved to dismiss based on the Eleventh Amendment's sovereign immunity (see the discussion early in this chapter on the Eleventh Amendment). The Supreme Court unanimously found that congressional enforcement powers under the Fourteenth Amendment were powerful enough to abrogate the Eleventh Amendment's sovereign immunity (where the commerce clause was not). Next, splitting 5 to 4, the Court said that Congress lacked the power to stipulate that discrimination against individuals older than 40 was illegal. That is because the Supreme Court has established that the Constitution allows age discrimination so long as it is rational (see the two-pronged test described in the previous paragraph). If Congress wants to ban discrimination against people older than 40, it will have to pass a constitutional amendment to do so (or alternatively wait until sufficient personnel changes on the Court do away with the two-pronged test). See *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000).

## SUMMARY

1. *Sovereign immunity*. Both state and federal governments in America are clothed with sovereign immunity. They can be sued only with their consent and only under the conditions they set:
  - a. Section 702 of the Administrative Procedure Act sanctions suits in equity against the federal government.
  - b. A tort claims act is the vehicle through which most state and federal governments agree to be held liable in money damages for their torts (mostly for the unintentional tort of negligence).

To pursue a successful negligence suit against the federal government, plaintiffs must show that (a) there was a failure to exercise reasonable care (foreseeability measured by the average reasonable person), (b) the failure to exercise reasonable care was the proximate cause of injuries, (c) a dollar amount can be attached to the injuries, and (d) the negligent action was not the result of the exercise of discretion in furtherance of public policy.

The tort claims act absolves the individual employee of legal liability (so long as the negligence occurred in the scope of employment) and spreads the cost to the taxpayers.

2. *Federal official or qualified immunity* is a term used to connote that individual employees of the federal government can be sued for their acts that violate the constitutional rights of another but that they have a qualified immunity in that sometimes they are immune from such suits: (a) when there is a lack of malice (i.e., they acted in good faith) and (b) when they did not know and could not have known that their actions would violate the constitutional rights of another (e.g., *Butz v. Economou*). This qualified immunity comes from the *Butz* case. This kind of lawsuit makes the individual employee liable for money damages; it is not the government or the agency that gets sued. Such lawsuits were not created by statute; they

were created by the Supreme Court in the *Bivens* case and are referred to as *Bivens* suits. In two situations, a plaintiff who otherwise could sue under *Bivens* cannot maintain a successful *Bivens* action:

- a. Where the defendant demonstrates special factors counseling hesitation in the absence of affirmative action by Congress (see *Bush v. Lucas*<sup>40</sup>).
  - b. Where the defendant shows that Congress has provided an equally effective remedy at law (see *Carlson v. Green*<sup>41</sup>).
3. *Qualified immunity at the state and local level.* State employees are exposed to liability for violating another person's rights by § 1983 of the Civil Rights Act of 1871. Like federal employees, they have a qualified immunity: (a) when there is absence of malice and (b) when they did not know and could not have known that their actions would violate the constitutional rights of another.
  4. *Immunity for city and county governments.* City and county governments can also be sued under § 1983 (*Owen v. City of Independence*). However, such suits can be successful only if the violation of citizens' rights was the result of a local policy. To hold a local unit of government liable under § 1983, plaintiffs need to show that their constitutional rights were violated and the violation resulted from a local government official policy or the actions of a local official who can be said to represent official policy (for example, the city administrator for the city of Independence, Missouri, but not the sheriff of Monroe County, Alabama). There is no qualified immunity for local governments under § 1983.

## END-OF-CHAPTER CASES

### *Federal Maritime Commission v. South Carolina State Ports Authority* 535 U.S. 743 (2002)

*Justice Thomas delivered the opinion of the Court, joined by Justices Rehnquist, O'Connor, Scalia, and Kennedy. Justice Stevens filed a dissenting opinion. Justice Breyer filed a dissenting opinion, in which Justices Stevens, Souter, and Ginsburg joined.*

This case presents the question whether state sovereign immunity precludes petitioner Federal Maritime Commission (FMC or Commission) from adjudicating a private party's complaint that a state-run port has violated the Shipping Act of 1984, 46 U.S.C. § 1701. We hold that state sovereign immunity bars such an adjudicative proceeding.

1

On five occasions, South Carolina Maritime Services, Inc. (Maritime Services), asked respondent South Carolina State Ports Authority (SCSPA) for permission to berth a cruise ship, the *M/V Tropic Sea*, at the SCSPA's port facilities in Charleston, South Carolina. Maritime Services intended to offer cruises on the *M/V Tropic Sea* originating from the Port of Charleston. Some of these cruises would stop in the Bahamas while others would merely travel in international waters before returning to Charleston with no intervening ports of call. On all of these trips, passengers would be permitted to participate in gambling activities while on board.

The provision authorizes an award of compensatory damages in an "action" brought under § 717; the word "action" is often used to distinguish judicial cases from administrative "proceedings." See *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 60-62 (1980). . . .

While falling short of embracing the argument as its own, the majority flirts with the contention that allowing agencies rather than juries to award compensatory damages lowers the costs of resolving employment disputes and protects the public fisc. It is not clear to me that juries would be less protective of the fisc than would one group of Government employees who deem themselves empowered by agency interpretation to award Government funds to fellow employees. When a Government employee seeks damages from the Government itself, there may be advantages in insisting upon the expertise of a trial court with experience in awarding damages in all types of cases, with the additional safeguards of trial in a forum of high visibility, trial by jury if either party chooses to ask for it, and appellate review. These factors are disregarded by the majority, which seems instead to suggest that the nature

and convenience of administrative proceedings will by necessity provide a financial advantage to the Government.

In all events, speculation does not suffice to overcome the rule that waivers of sovereign immunity must be clear and express. An unequivocal waiver of the United States' sovereign immunity to administrative awards of compensatory damages cannot be found in the relevant statutory provisions. To the extent the majority relies on textual analysis, it establishes at most (if at all) that the statutes might be read to authorize such awards, not that the statutes must be so read. To the extent the majority relies on legislative history and other extratextual sources, it contradicts our precedents and sets us on a new course, for before today it was well settled that "[a] statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text." *Lane*, 518 U.S. at 192; *Nordic Village*, 503 U.S. at 37 ("The 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report"). With respect, I dissent.

## NOTES

1. *Dalehite v. United States*, 346 U.S. 15, 47-48 (1953).

2. *Ibid.*, 16.

3. There was an agreement among all the plaintiffs and defendants that the trial judge's findings of fact and interpretation of law as to the federal government's liability in the *Dalehite* litigation would be accepted in all the remaining suits, 346 U.S. 15, 16.

4. *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938).

5. 346 U.S. 15, 55.

6. 28 U.S.C. 1346 and 2671-80.

7. The material on private bills comes from footnote 9 in *Dalehite v. United States*, 346 U.S. 15, 25.

8. The only available remedy for the Texas City plaintiffs was to return to the activity the FTCA was intended to stop—the private bill. By 1957, when

Congress passed the last private bill from this incident, it passed 1,394 awards for a total of almost \$17 million. See Donald Barry and Howard Whitcomb, *The Legal Foundations of Public Administration*, 2d ed. (St. Paul, Minn.: West, 1987), p. 268.

9. *Chisholm v. Georgia*, 2 Dall. 419 (1793).

10. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

11. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

12. *Alden v. Maine*, 527 U.S. 706 (1999).

13. *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 536 (2001).

14. *Tennessee v. Lane*, 124 S.Ct. 1978 (2004).

15. 535 U.S. 635 (2002).

16. *Tennessee Student Assistance Corporation v. Hood*, 541 U.S. 440 (2004).

17. Daniel Oran, *Oran's Dictionary of the Law* (St. Paul, Minn.: West, 1983), p. 424.

18. *Kimble v. Machintosh Hemphill Company*, 59 A. 2d 68 (1948).
19. 346 U.S. 15, 35-36.
20. William G. Weaver and Thomas Longoria, "Bureaucracy that Kills: Federal Sovereign Immunity and the Discretionary Function Exemption," 96(2) *American Political Science Review* 335 (June 2002).
21. *Allen v. United States*, 588 F.Supp. 247, 336 (D. Ut. 1984).
22. *Nevin v. United States*, 696 F.2d. 1229 (9th Cir. 1983).
23. 346 U.S. 15 (1983).
24. The material on the Giglotto and Askew raids comes from Jack Boger, Mark Gitenstein, and Paul Verkuil, "The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis," 54 *North Carolina Law Review* 498 (1976).
25. *Ibid.*, pp. 501, 502.
26. *Ibid.*, p. 501.
27. *Ibid.*
28. But see *Forrester v. White*, 108 S.Ct. 538 (1988), where a judge was held not to be immune in the execution of administrative duties as opposed to judicial duties.
29. *Barr v. Matteo*, 360 U.S. 564, 575 (1959).
30. *Federal Deposit Insurance Corporation v. Meyer*, 510 U.S. 471 (1994).
31. Arthur Bonfield and Michael Asimow, *State and Federal Administrative Law* (St. Paul, Minn.: West, 1989), p. 640.
32. Sande Buhai, "Symposium: Social Justice in the 21st Century: In the meantime: State Protection of Disability and Civil Rights," 37 *Loyola of Los Angeles Law Review* 1065, 1072 (Spring 2004).
33. Pete Earley, *Circumstantial Evidence: Death, Life, and Justice in a Southern Town* (New York: Bantam Books, 1995).
34. *Bogan v. Scott-Harris*, 523 U.S. 44 (1998).
35. *Kalina v. Fletcher*, 522 U.S. 118 (1997).
36. *Pegram v. Herdrich*, 530 U.S. 211 (2000).
37. See *United States v. Gaubert*, 499 U.S. 315 (1991), at p. 326, where the Court says, "the Court of Appeals misinterpreted *Berkovitz's* reference to *Indian Towing* as perpetuating a *nonexistent dichotomy* [emphasis mine] between discretionary functions and operational activities."
38. *Kolstad v. American Dental Association*, 527 U.S. 526 (1999).
39. See *Nguyen and Boulais v. Immigration and Naturalization Service*, 533 U.S. 53 (2001).
40. 426 U.S. 367 (1983).
41. 446 U.S. 14 (1980).