Recent Decisions

Harlan P. Weir
Charles J. O'Malley

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RECENT DECISIONS

PRISONERS — FEDERAL TORT CLAIMS ACT — PRISONER MAY MAINTAIN SUIT FOR INJURIES SUFFERED WHILE CONFINED IN UNITED STATES PENITENTIARY. — Appellant, Henry Winston, a prisoner since 1956 in the United States Penitentiary at Terre Haute, Indiana, brought an action under the Federal Tort Claims Act, alleging that he had contracted a brain tumor in April of 1959, and that due to negligent diagnosis and treatment by prison medical officers he has become permanently blind. The district court dismissed his complaint on the ground that the Federal Tort Claims Act did not permit such suits. On appeal to the Court of Appeals, Second Circuit, it was held: reversed. The Federal Tort Claims Act does permit suits against the United States by prisoners in federal penitentiaries for negligence of prison officials and personnel. Winston v. United States, 305 F.2d 253 (2d Cir. 1962).

Prisoners traditionally have been able to sue their jailers for negligent acts resulting in injury to them, but the sovereign immunity doctrine has long shielded federal and state governments from suit for the torts of their employees or agents, except where the government has given its assent to be sued.1

The Federal Tort Claims Act2 goes far in waiving sovereign immunity. It provides that the United States is liable for the negligence of its employees or agents “under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”3 The United States is to be held liable “in the same manner and to the same extent as a private individual under like circumstances.”4

The question of whether a federal prisoner can recover under the act has not yet been before the United States Supreme Court. The Courts of Appeal for the seventh5 and eighth6 circuits and various district courts have had this question before them. The circuit courts and all but one of the district courts7 have denied relief on the ground that the act was not intended to cover prisoners. These courts have all considered Feres v. United States8 as controlling.

The basic argument concerns statutory construction. The Federal Tort Claims Act does not except prisoners by its terms from the waiver of immunity, although there are thirteen express exceptions written into the act.9 Whether Congress “intended” to exclude them is the issue. In the Feres case, the Supreme Court held that members of the Armed Services were denied tort recovery for injuries sustained while on active duty.10 Among the grounds for denying recovery was the fact that the United States could only be held liable “in the same manner and to the same extent as a private individual under like circumstances”11 and no private individual could ever be held liable “in like circumstances”12 because no individual has the power to recruit and maintain an army with such authority over individuals as the Government vests in its command.

1 Prosser, Torts §109 (2d ed. 1955).
2 The Federal Tort Claims Act was enacted as Title IV of the Legislative Reorganization Act of 1946, 60 Stat. 842, and the relevant provisions are now found in 28 U.S.C. § 1346(b), 2671-80 (1958).
5 Jones v. United States, 249 F.2d 864 (7th. Cir. 1957).
10 But see Brooks v. United States, 337 U.S. 49 (1949). Because a person was a member of the armed services at the time of the accident does not prevent recovery of a judgment against the United States under the Federal Tort Claims Act for his death or injury (not incident to his service) from the negligence of an employee of the Government.
The Court reasoned that Congress couldn't have intended that liability be dependent on where the serviceman was stationed at the time of the injury, since the serviceman didn't have any control over where he was sent, and, as a result, would not have any choice over what law was to govern him. The relationship between the serviceman and the Government is “distinctively federal in character”\(^{13}\) and federal law must govern this relationship.

Finally, the Court maintained that Congress had already provided a system of compensation for injuries or death to servicemen.\(^{14}\) Sigmon v. United States,\(^{15}\) reasoning by analogy to Feres, denied recovery to a federal prisoner, for the alleged negligence of Government employees. Thus, the courts have implied two exceptions to the waiver of immunity granted by the Federal Tort Claims Act in addition to the thirteen express exceptions contained in the act.\(^{16}\) In Sigmon, the most important factor in denying recovery seemed to be the relationship between the United States and the prisoner. Since the United States is liable only in the same manner as a “private individual under like circumstances” and since no private person can keep another in penal servitude, there could be no analogous liability.\(^{17}\) The court felt that the uniformity of federal law relating to the prison system would be disrupted by allowing prisoners to sue under the act, because the law of the place where the act or omission occurred would govern the case. This argument was used to exclude prisoners from the purview of the act. The fact that the prisoners has been given a system of compensation for injuries sustained in prison industries\(^{18}\) was interpreted as evidence that Congress intended that remedy to be exclusive. Finally, the court felt that prison discipline would be adversely affected by allowing such suits.

The reasoning of the Sigmon case was followed in Shew v. United States\(^{19}\) and Van Zuch v. United States.\(^{20}\) Both courts felt that Feres was controlling although the court in the Shew case held that as a matter of law, the plaintiff’s injury was not caused by defendant's negligence. In the Van Zuch case, the plaintiff was a patient in the prison hospital where he was injured. The court rejected the plaintiff’s contention that the “like circumstances” test was satisfied because the negligence alleged was failure to provide adequate medical care and private doctors could be held liable under similar circumstances, holding that no person has the right to imprison another.\(^{21}\) Thus, Van Zuch distinguishes the relationship between a patient and doctor inside and outside of prison, holding that all the circumstances must be taken into account, especially the fact of the distinctly federal relationship between the federal government and federal prisoners. There is no analogy between the negligence of a private doctor and the negligence in operating a prison hospital.

In Berman v. United States\(^{22}\) the plaintiff sued for injuries caused by the alleged negligence of employees of a federal hospital. The court denied recovery on the grounds that the law of the place could not govern where the relationship between the parties was distinctively federal; and that a prisoner while in a federal hospital for treatment is still a prisoner, even though the situation in which he was injured was remote from his status as prisoner.

Two significant Supreme Court decisions seem to limit the “like circumstances” requirement as applied by the Feres case. In Indian Towing Co. v. United States\(^{23}\) the Court allowed a person chartering a barge to recover under the act where injury

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13 Id. at 143-144.
14 Id. at 144.
21 Id. at 472.
to the barge was caused by the negligence of the Coast Guard in operating a light house. The Government strongly argued that the act must be read so as to exclude any injuries resulting from the performance of activities which private persons do not perform. Lighthouse operations were uniquely governmental and no analogy could be drawn to activities of private individuals. The Court said the test was not "under the same circumstances"24 as the Government implied, but under "like circumstances." The Government is under the same duty of care where its agents induce reliance as would a private party, and if a private individual breached his duty of care in this situation he would undoubtedly be held liable.

In Rayonier Inc. v. United States25 the Court repeated the test laid down in the Indian Towing Co. case. The test of liability is "whether a private person would be responsible for similar negligence under the laws of the state where the acts occurred."26 The Rayonier Co. case allowed a person to recover where his land had been damaged due to the negligence of the Forest Service in handling a fire.

Two Circuit Court cases27 decided after the Indian Towing Co. and Rayonier decisions both followed the rationale of Feres in denying relief to federal prisoners. But in Lawrence v. United States28 the Court allowed a prisoner to recover where he was injured under circumstances not closely related to his status as a prisoner. The plaintiff was injured in a collision of two vehicles, both driven by employees of the United States. The Court accepted the basic soundness of the Sigmon case but declared that "... it is running a good principle into the ground to declare in terms of a categorical imperative that a federal prisoner, by virtue of his status alone, may not sue the United States under the provisions of the Federal Tort Claims Act where his claim is based upon the alleged negligence of a federal employee completely disassociated from his status."29

It appears that the decision in the Feres case has been misinterpreted by the courts. The Supreme Court in Feres, when it denied relief to servicemen injured on active duty, based a major part of its argument on the fact that there was in existence a system of compensation for service-incurred injuries.30 Where injuries have been sustained by servicemen not on active duty, they have been allowed to recover under the Federal Tort Claims Act.31

The Sigmon court followed the reasoning of Feres. The prisoner in Sigmon was eligible for compensation from the federal prison industries fund,32 and the court felt that the existence of this system of compensation precluded prisoners from suing under the Federal Tort Claims Act. The decisions following Sigmon expanded upon this line of reasoning. In the Van Zuch case the prisoner was injured while he was a patient in a hospital and therefore wasn't eligible for compensation benefits. He was left without a remedy. The Berman case is another significant extension of Sigmon. In that case the plaintiff was convicted for narcotics possession but was hospitalized on the recommendation of the judge. While in the federal hospital for narcotics addiction he was injured as a result of the alleged negligence of the government's agents. The court denied him recovery, even though a private individual operating a hospital could be held liable in "like circumstances," on the grounds that his residing in the hospital did not change his status as a prisoner. Thus in Van Zuch the "discipline" problem is ignored, and in Berman the "like cir-

24 Id. at 61.
26 Id. at 319.
27 Lack v. United States, 262 F. 2d 167 (8th. Cir. 1958); Jones v. United States, 249 F. 2d 864 (7th. Cir. 1957).
29 Id. at 245.
30 340 U.S. 144.
cumstances" requirement is glossed over. The rationale of these two cases goes far beyond the grounds on which Feres was decided.

Countering this trend to interpret the act strictly are the Indian Towing Co. and Rayonier decisions. The Supreme Court, in deciding these two cases showed a tendency to interpret the act liberally. The Lawrence case is the most significant lower court decision in line with this liberal interpretation of the act.

Winston is significant in that it is the first decision to reject the interpretation of the act by the Sigmon court. The present case points out that the Feres decision is not applicable to the federal prisoner situation. Congress could have provided for a uniform federal law in enacting the Federal Tort Claims Act, but it chose to enact that the law of the place where the injury occurred should govern. The argument that the policy of Congress has been to treat all federal prisoners alike is not controlling. The Tort Claims Act, which causes state law to be the applicable law, makes many federal activities dependent on state law. Congress, when it was considering the act, would most likely have provided an express exception for federal prisoners if it had envisioned a very great disruption in its policy of uniform treatment. And, finally, it can hardly be said that Congress has provided a uniform system of rights for federal prisoners when so few of them are covered by any system of compensation for injuries or death to them while they are in prison.

The Winston decision seems just. Federal prisoners should not be deprived of the waiver of immunity provided by the Torts Claims Act.

Harlan P. Weir

ALIENS — IMMIGRATION AND NATIONALITY ACT — JUDICIAL REVIEW OF FINAL ORDERS OF DEPORTATION — In 1961 Congress passed an amendment to the Immigration and Nationality Act in order to expedite the final determination of alien deportation orders. Included among the provisions of the amendment was a change in the existing procedure for judicial review of final orders of deportation made by the Immigration and Naturalization Service. The court of initial jurisdiction is no longer the federal district court, but the court of appeals of the proper venue. The scope of this part of the amendment was tested recently in four cases. In Foti v. Immigration and Naturalization Service the alien petitioner had been ordered deported and had requested the Attorney General to grant a temporary stay of the order because of the possibility of physical persecution if he was returned to the country of his origin. The Attorney General refused and the alien brought suit in the Second Circuit Court of Appeals claiming abuse of discretion. In a five to four decision the court refused to hear the case on the grounds that it lacked original jurisdiction to review anything but final orders of deportation made by the Immigration and Naturalization Service. Since the issue of this case was not such an order but a denial of discretionary relief by the Attorney General, it was held that the courts of appeals did not have original jurisdiction and could not take the case.

In declining jurisdiction the Court of Appeals affirmed an earlier case, Zupich v. Esperdy, where the district court took jurisdiction of precisely the same issue, the Attorney General's denial of a stay of deportation to the alien petitioner.

Prior to this, two cases had come up in the Seventh Circuit, one of which, Blagiac v. Flagg, involved denial of a stay of deportation and the other, Roumeliotis v. Immigration and Naturalization Service, refusal to grant the alien a preferential immigrant visa. The Roumeliotis case is similar to the other three for the reason

5 304 F.2d 623 (7th Cir. 1962).
6 304 F.2d 453 (7th Cir. 1962).
RECENT DECISIONS

that it too involves not a final order of deportation but a denial of discretionary relief. In Blagiac and Roumeliotis, Judge Swygert of the Seventh Circuit held that Congress had vested original jurisdiction in courts of appeals to review these determinations in addition to final orders of deportation. These were a part of the deportation order in the sense that deportation will follow unless the relief is granted and for that reason were within the amendment. The literal wording of the amendment controlled in the Second Circuit, whereas the Seventh Circuit saw its words a broader meaning. Foti v. Immigration and Naturalization Service, 31 U.S.L. WEEK 2153 (2d Cir. Oct. 2, 1962); Zuﬁpich v. Esperdy, 31 U.S.L. WEEK 2057 (S.D.N.Y. July 31, 1962); Blagiac v. Flagg, 304 F.2d 623 (7th Cir. 1962); Roumeliotis v. Immigration and Naturalization Service, 304 F.2d 453 (7th Cir. 1962), appeal docketed, 31 U.S.L. WEEK 3103.

In order to prevent abuses and delays in the expulsion of undesirable aliens from the country, Congress passed an amendment to the Immigration and Nationality Act.7 The amendment established a number of changes in the existing procedure for the judicial review of administrative orders of deportation made by a special inquiry officer of the Department of Immigration and Naturalization. Under the Immigration and Nationality Act of 1952 a special inquiry officer, acting in a quasi-judicial capacity, held a hearing, took evidence and made a recommendation for the final order of deportation.8 When the alien was taken into custody to await deportation, his sole opportunity for judicial review of the administrative proceedings was by writ of habeas corpus. However, since the 1955 Supreme Court decision in Shaughnessy v. Pedrejo,9 these orders of deportation under the 1952 Immigration and Nationality Act could be reviewed not only by habeas corpus as before but also in actions for declaratory judgments and injunctive relief. Moreover, the alien who had lost a declaratory judgment action could sue out a writ of habeas corpus when taken into custody. And the alien could seek relief by habeas corpus repeatedly. So the end result was that a determination of the administrative official who had held the original hearing could be dragged through the courts over a period of years if the alien so desired and was able to obtain astute and willing counsel. As might be expected, relatively few of the aliens against whom deportation orders had been issued had the necessary finances to do this; but those who did were thought by Congress to be the least desirable aliens, criminals and subversives.10

The changes in the Act brought about by the 1961 amendment were designed to prevent these abuses of the right to judicial review. Paramount among these changes was a provision making prior determinations of the validity of the deportation order res judicata,11 which was the most important measure in the amendment

9 S. REP. No. 1515, 81st Cong., 2d Sess. 28 (1950).

The House added a judicial review provision to the bill which we thought was very beneﬁcial. That was the only ﬁeld of the law in which the doctrine of res judicata would not apply. Criminals and subversives, with all the money and power of the Communist Party behind them, have brought suit after suit and made a mockery of the judicial process in the United States in an effort to remain here after they have been ordered to be deported.


Every petitioner for review or for habeas corpus proceedings shall state whether the validity of the order has been upheld in any prior judicial proceeding, and, if so, the nature and date thereof, and the court in which the proceeding took place. No petition for review or for habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceeding, unless the petition presents grounds which the court finds could not have been presented in such prior proceeding, or the court ﬁnds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order.
to prevent abuse of the judicial process by continued relitigation of the validity of the order of deportation.\textsuperscript{13} Other changes were made to prevent certain other abuses. Venue is restricted to the judicial circuit where the deportation hearing was conducted or where the alien resided.\textsuperscript{14} This was designed to prevent filing of petitions in courts with crowded dockets where the case might be years before it came up. No review is allowed unless the alien had exhausted administrative remedies.\textsuperscript{15} A definite time limit is set in which the alien can file a petition for judicial review. Previously, an action could not begin until the government had started the actual physical process of deportation. Now the alien must request review within six months of the final order of deportation.\textsuperscript{16}

Finally, the forum for judicial review of the administrative order was changed from the district court to the court of appeals of the proper venue.\textsuperscript{17} Section 1105a(a) of Title 8 reads:

The procedure prescribed by, and all the provisions of sections 1031-1042 of Title 5, shall apply to, and be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title.\ldots

Sections 1031-1042 of Title 5 vest exclusive jurisdiction to enjoin, set aside, suspend or determine the validity of all final orders of the Federal Communications Commission, the Secretary of Agriculture, the United States Maritime Commission and the Atomic Energy Commission. With the amendment to the Immigration Act, this procedure now applies to the Immigration and Nationality Service. The purpose of this part of the amendment was twofold. First of all, by abrogation of the district court's power to review an order of deportation, one of the primary causes of delay in the final determination of its validity is eliminated.\textsuperscript{18} Secondly, the framers of the amendment desired to afford some protection to the alien himself. The forum is the United States court of appeals, where judicial review has been provided for many years respecting orders of the other administrative agencies. Since deportation proceedings deal with the liberty of persons rather than mere property, the committee (the House Committee on the Judiciary) has concluded that granting an initial review in an appellate court gives the alien greater rights, greater security, and more assurance of a close study of his case by experienced judges.\textsuperscript{19}

The scope of this provision for exclusive appellate review has been tested in the four recent cases mentioned above. The result was a conflict between the Seventh Circuit and the Second Circuit on the interpretation to be given that part of the amendment which has become section 1105a(a) of the Act. In the case of Blagiac v. Flagg,\textsuperscript{20} the petitioner had been ordered deported and had applied for discretionary relief in the form of a stay of the deportation order, a prerogative of the Attorney General in cases where the alien will suffer physical persecution if returned to the country of his citizenship.\textsuperscript{21} At issue was not the validity of the deportation order itself but whether or not the Attorney General's refusal of the stay was an abuse of discretion. Roumeliotis v. Immigration and Naturalization Service\textsuperscript{22} was decided by the same court on the same day. There the alien was

\begin{itemize}
  \item 19 2 U.S. CODE Cong. & AD. NEWS 2972 (1961).
  \item 20 304 F.2d 623 (7th Cir. 1962).
  \item 21 8 U.S.C. § 1253(h) (1958):
  \begin{quote}
  The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.
  \end{quote}
  \item 22 304 F.2d 453 (7th Cir. 1962).
\end{itemize}
protesting the denial of a preferential immigrant visa sometimes given to aliens who had overstayed their nonimmigrant visas. In both of these cases the government contested the jurisdiction of the court of appeals to decide the cases. Neither of these cases, it was argued, involved a final order of deportation made pursuant to administrative proceedings in connection with the hearing held by the special inquiry officer. Rather, what was at issue was the discretionary relief allowed by other sections of the Act. Therefore, the government contended, courts of appeals do not have exclusive primary jurisdiction and the case should be heard in the district court which remains as the court of primary jurisdiction for review of administrative determinations not covered by the amendment. The Seventh Circuit Court of Appeals thought otherwise. While the issues of the cases did not come within the literal wording of the amendment, still they were ancillary to the deportation order and, therefore, properly belonged to the exclusive jurisdiction of courts of appeals. "If the withholding of the deportation order is not granted, the alien will be deported; thus in a realistic sense the denial of a stay is a part of the deportation order."23

The Second Circuit Court of Appeals did not agree. Sitting en banc in the case of Foti v. Immigration and Naturalization Service,24 the court accepted, by a five to four decision, the ruling of an earlier district court decision25 that the amendment to the Act was to be interpreted narrowly and that, consequently, courts of appeals could take primary jurisdiction only of cases involving an appeal from the ruling of the special inquiry officer. In both the Foti case and the earlier district court case of Zupicich v. Esperdy,26 as in the Blagiac case, the alien contended that the Attorney General's refusal to grant the stay was an abuse of discretion. To be sure, the wording of the amendment vests courts of appeals with exclusive jurisdiction for review of only the order entered after the hearing held by the special inquiry officer. Whether or not Congress intended to include in the amendment these other determinations that are part of the entire deportation process is debatable. The Seventh Circuit was of the opinion that Congress did so intend; the Second Circuit was of another mind.

There is no doubt that a literal reading of this judicial review amendment would preclude exclusive appellate court review in situations involving denial of discretionary suspension of deportation and denial of a preferential visa. These are not final orders of deportation made by a special inquiry officer after a hearing in which the officer occupies a quasi-judicial position. Rather, they are discretionary forms of relief from the order itself and given, not after an administrative proceeding, but solely on the strength of collateral factors. The courts in the Foti and Zupicich cases held that exclusive jurisdiction to review such proceedings has not been given courts of appeals by the 1961 amendment. In the Zupicich case, the court gave additional arguments for its determination that Congress did not intend to allow courts of appeals to review more than final orders:

Moreover, the venue provisions of the new statute . . . lend additional support to the conclusion that the new review provisions were not intended to cover (denial of suspension of the order of deportation) determinations. Venue is in the judicial circuit where "the administrative proceedings before a special inquiry officer were conducted." The determination of deportation is a different kind of proceeding than is the withholding of deportation.27

In Foti the majority felt that policy reasons also dictated refusal to allow primary jurisdiction. "[T]he triviality of the grounds urged on the merits in the two cases in the Seventh Circuit, as in the two here, adds point to our belief that Congress could not have meant to require three judges to pass upon such petitions."28

23 304 F.2d 623, 625 (7th Cir. 1962).
26 Ibid.
27 Ibid.
The issue here turns upon determination of Congressional intent as expressed in the words "final orders of deportation... made... pursuant to administrative proceedings (of the special inquiry officer)." Congress included for review only section 1252(b) of the Act, that is the hearing conducted by the special inquiry officer. Did it mean to include other determinations of the Service and the Attorney General such as denial of the discretionary power to suspend the effect of the deportation order? The obvious meaning of the language used in the amendment is difficult to overcome. But there are good arguments in favor of the broad interpretation of the amendment. The purpose of the amendment was to prevent disreputable aliens from delaying their deportation over many years through abuse of the judicial process. If district courts are allowed to review these determinations that are not final orders of deportation, appeal can be made from the district court decision to the court of appeals. This could be used to delay deportation. Moreover, the language used in the discussion of the bill lends support to the conclusion that Congress meant to remove from district court jurisdiction everything except a habeas corpus proceeding brought by an alien in custody under a deportation order. Nowhere in the records of the introduction of the bill into either House or Senate or in the records of the floor debates over its passage was there any conscious differentiation made, or awareness that such a problem as presented in these cases might arise. Rather, the proponents of the bill talk in general terms. Two quotes from Representative Walter made during the floor debate on the amendment illustrate what seems to be the Congressional intent to remove review of all facets of deportation orders from the district courts to courts of appeals. "Most important, by eliminating review in the district courts, the bill would obviate one of the primary causes of delay in the final determination of all questions which may arise in a deportation proceeding." Or again:

A deportable alien, under the bill, will have an automatic stay of deportation unless the court otherwise directs. It is hoped, indeed, that the courts of appeals will be very circumspect in granting such stays, as distinguished from district courts which are overwhelmed with work of various types, which prevents the judge from having enough time to look into the facts of the case closely when he is requested to issue a restraining order.

This could lead to the conclusion that it was mere legislative oversight that caused these other proceedings to be excluded from the exact words of the bill. The Seventh Circuit came to that conclusion. The minority opinion in the Foti case did also:

In our view our majority brethren have chosen to adopt an interpretation of statutory language which is both artificially literal and highly inappropriate to the actual situation; in so doing they have frustrated the legislative purpose and have saddled the litigants and the courts with a complicating, overlapping, and delaying additional form of deportation review. It is not without irony that a carefully formulated program fashioned over the years by Congress to provide a simple and complete form of review in this important area, comparable to that provided for the other administrative agencies, should result under judicial surgery in only adding delay and confusion to existing methods of review.

Charles J. O'Malley

33 Id. at 11333.