DEPARTMENT OF JUSTICE

CIVIL RIGHTS DIVISION

Enforcement of Court Desegregation Orders

UNIVERSITY OF MISSISSIPPI

Miscellaneous Cases Arising From the Desegregation of the University of Mississippi -- Files of Civil Rights Division Materials.

[illegible] Reg. [illegible] 58

DEPARTMENT OF JUSTICE

CIVIL RIGHTS DIVISION

Enforcement of Court Desegregation Orders

UNIVERSITY OF MISSISSIPPI

Cyril T. Faneca v. McShane, et al.

Pleadings

Pleadings - Fonseca v. United States, et al

144-41-489

11,851

IN THE UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF MISSISSIPPI

SOUTHERN DIVISION

CYRIL T. FANECA, JR. — PLAINTIFF

VS. — CIVIL ACTION NO. 2604

UNITED STATES OF AMERICA, ET AL — DEFENDANTS

INTERROGATORIES TO THE UNITED STATES

COMES NOW, the Plaintiff, CYRIL T. FANECA, JR., and files this his Interrogatories to be answered by the Defendant, THE UNITED STATES OF AMERICA, by and through its duly appointed official, Mr. Carl Eardley, Civil Division, Justice Department, Washington 25, D. C., pursuant to the provisions of Rule 33 FRCP, and propounds herewith the following interrogatories to the said Mr. Carl Eadley, on behalf of the Defendant, THE UNITED STATES OF AMERICA:

INTERROGATORY NO. 1

State the names, addresses, and official positions of all Federal employees and personnel, with the exception of members of the United States Army and Mississippi National Guard, who were on or about the campus of the University of Mississippi, at Oxford, Mississippi, from September 30, 1962 through and including October 5, 1962.

INTERROGATORY NO. 2

State the names, addresses, and official positions of all

federal employees and personnel, with the exception of the members of the United States Army and the Mississippi National Guard, who were on the North and West side of the Lyceum Building, campus of the University of Mississippi, Oxford, Mississippi, from three o'clock p.m. September 30, 1962 through and including one o'clock a.m. October 1, 1962.

INTERROGATORY NO. 3

State whether or not the Defendant, THE UNITED STATES OF AMERICA, has, in its possession, pictures, photographs, pictorial information, or other information, whether written or in pictorial form, setting forth and giving the physical picture, description, height, weight, age, of all of the Federal employees and personnel, with the exception of the members of the United States Army and the Mississippi National Guard, who were on or about the campus of the University of Mississippi, at Oxford, Mississippi, from September 30, 1962 through and including October 5, 1962.

Respectfully submitted,

CARTER AND MITCHELL

BY _____
Edward L. Cates

ATTORNEY'S CERTIFICATE

I, EDWARD L. CATES, one of the attorneys of record for the Plaintiff, CYRIL T. FANECA, JR., do hereby certify that I have this day caused to be served upon the Defendant, THE UNITED STATES OF AMERICA, two true copies of the foregoing Interrogatories to the Defendant, THE UNITED STATES OF AMERICA, by causing same to be

served by United States mail, postage prepaid, by mailing same to the Honorable Robert Haubarg, United States Attorney, Jackson, Mississippi.

Done this the 24th day of April, 1963.

EDWARD L. CATES
One of the Attorneys of Record
for the Plaintiff, Cyril T.
Fanoca, Jr.

Edward L. Cates
Carter and Mitchell
Attorneys at Law
Mezzanine Suite
Plaza Building
Post Office Box 1582
Jackson, Mississippi

IN THE [redacted]
FOR THE [redacted]

CYRIL T. FISCHER, JR.
Plaintiff

vs.

[redacted]
P. McSHANE, [redacted]
Defendants

CIVIL ACTION NO. [redacted]

[redacted] DISTRICT OF MISSISSIPPI
FILED
NOV 21 1962
Loryce E. Wharton, Clerk
By [redacted]

ORDER

This cause coming on for hearing on motion of witnesses, Katzenbach and McShane, to vacate and in the alternative for other relief and the Court having heard the arguments of counsel for plaintiff and counsel for Katzenbach and McShane on said motion and being of the opinion that its order of November 17, 1962 as to the taking of depositions of Katzenbach and McShane on the 23rd day of November, 1962 at Oxford, Mississippi, should be suspended effectively with the right reserved by the Court to fix a subsequent date for the taking of such oral depositions if, after the propounding of interrogatories by plaintiff, it appears to the Court at such time that it is reasonably necessary to take depositions orally;

It is therefore ordered and adjudged that:

(1) The effectiveness of this Court's order requiring the appearance of witnesses, Katzenbach and McShane, on November 23, 1962 at Oxford, Mississippi for the purpose of giving their depositions on oral examination as requested by plaintiff be and the same is hereby suspended.

(2) The Court reserves the right to fix a subsequent date for the taking of such depositions on oral examination at Oxford, Mississippi, if at a later time and after the propounding of interrogatories by plaintiff, it appears reasonably necessary to require the taking of oral depositions.

(3) If oral depositions are later required, the Court will

issue a protective writ if requested; and said parties as witnesses shall give full and complete answers to plaintiff's interrogatories within ten days after receipt thereof in Washington.

ORDERED AND ADJUDGED this 21st day of November, 1962.

Harold Cox

UNITED STATES DISTRICT JUDGE

A TRUE COPY, I HEREBY CERTIFY.

BY: E. Mathison

Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

CYRIL T. FANECA, JR.

vs. Civil Action No. 2604

UNITED STATES OF AMERICA, NICHOLAS KATZENBACH, JAMES P. MCSHANE, JOHN DOE, RICHARD ROE

Library, 5th Floor
U. S. Post Office and
Federal Building
Jackson, Mississippi
Wednesday, November 21, 1962
Beginning at 8:30 a.m.

RULING ON MOTION

BEFORE:

HONORABLE WILLIAM HAROLD COX
United States District Court Judge

APPEARANCES:

HONORABLE EDWIN L. HOLMES, JR., Assistant United States District Attorney, Jackson, Mississippi, and HONORABLE CARL EARDLEY, Director of Litigation, Civil Division, United States Department of Justice, Washington, D. C., both appearing for defendants.

HONORABLE RICHARD L. CATES, Attorney at Law, Jackson, Mississippi, appearing for the plaintiff.

PROCEEDINGS

BY THE COURT:

I frankly don't see the occasion for all of the haste, and I don't at this moment know of any peculiar advantage that there would be to the plaintiff in taking an oral deposition that would be lost in taking a deposition by written interrogatories of these gentlemen right at the moment.

It looks to me like what you are trying to find out is information, and the answers are probably going to have to be studied answers. You will probably get more information by addressing interrogatories to them to be answered in Washington than if you called them to come to Oxford without the assistance of a subpoena duces tecum and give testimony, and since the process hasn't been even yet completed on these individual defendants I hesitate to press any kind of unusual order against them which was entered sort of as an emergency under a misconception on everybody's part of what the factual situation was at the time at a time when process hadn't even been attempted on them. It hadn't been attempted until even after the

oral argument as late as yesterday afternoon.

I certainly think you are entitled to all of the information you want, and I think the proper order would be to not vacate that order but I will suspend the effectiveness of the order and will reserve the right to fix a subsequent date for the taking of the depositions on oral examination in Oxford, Mississippi at a later time, if and when it is made later to appear that there is some necessity for it after you have propounded interrogatories to these defendants and anybody else in the Department of Justice trying to discover who these parties are, and they will be expected to give you full and complete answers, and if you are not satisfied with the answers and can show me that you are reasonable in your dissatisfaction I will not hesitate to require them to appear at Oxford, Mississippi and to give you oral depositions on that or any other subject that you may wish, and give them protection against criminal and civil process at the time.

BY MR. EARDLEY:

Does Your Honor want us to prepare the order?

BY THE COURT:

Well, you might prepare it in conjunction with each other.

I am simply suspending the effectiveness of this order. I decline to vacate the order, I am simply suspending it.

BY MR. HOLMES:

If Your Honor please, Mr. Eardley is figuring on catching a plane out of here at ten-thirty and if it's all right with the Court I will prepare the order.

BY THE COURT:

All right, that's all right, if you and Mr. Cates agree on it that's all right.

BY MR. EARDLEY:

Thank you very much, Your Honor.

***

REPORTER'S CERTIFICATE

STATE OF MISSISSIPPI

COUNTY OF HINDS

I, Elizabeth S. Evans, official court reporter, certify that the foregoing four pages, including this page, contain an accurate, complete and true transcript of the proceedings set forth on the title page hereof, as taken down and later transcribed by me to the best of my skill and ability.

(Treas. U.S.

From MR. JOHN G. LAUGHLIN

To John Doar
Rm 1143

For your info & files if you wish.

J.M.

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

CYRIL T. [illegible], JR.,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,
[illegible],
[illegible] P. [illegible],

Defendants.

CIVIL NO. 2604

SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF
MEMORANDUM TO DISMISS

Memoranda in support of the Motions to Dismiss have previously been filed with the Court. This memorandum is intended as a supplement to the previous memoranda and treats with questions which were discussed at or which arose in the course of the hearing on the Motions on January 18.

A. The United States has not consented to be sued for the claims asserted in Counts 1 and 4.

1. As pointed out to the Court on January 18, claims against the United States are asserted in only Counts 1 and 4 of the complaint and in each Count, the jurisdiction of the Court is assertedly based upon 28 U.S.C. 1346(b) -- the Federal Tort Claims Act. By virtue of 28 U.S.C. 1346(b) the United States has consented to be sued for, and the district courts have jurisdiction over, claims for money damages "for injury or loss of property, or personal injury or death"

caused by the negligent or wrongful act of employees of the United States acting within the scope of their employment. 28 U.S.C. 1346(b). In neither Count 1 or Count 4 of the complaint does plaintiff complain either of property loss or damage or of personal injury. Rather, in both Counts plaintiff seeks money damages for the alleged deprivation of plaintiff's constitutional rights (Complaint, Paragraphs IX, X (Count 1); Paragraph XXI (Count 2)). A claim of this sort is plainly not encompassed by the jurisdictional grant found in 28 U.S.C. 1346(b). Accordingly, the complaint, as to the United States, wholly fails to state a claim upon which relief can be granted or over which this Court has jurisdiction. For this very basic reason the complaint should be dismissed as to the United States.

2. Even if the complaint could be read as stating a claim for which the United States has consented to be sued, the suit is barred by reason of the assault and battery exception to the Tort Claims Act found in 28 U.S.C. 2680(h). By its terms 28 U.S.C. 2680 precludes suit since the jurisdictional provisions in 28 U.S.C. 1346(b) "shall not apply" to (2680(h)). "Any claim arising out of assault, battery ###." Plaintiff's claim based upon the alleged deprivation of constitutional rights clearly arises out of the assault and battery allegedly committed on the evening of September 30, 1962. Thus, the complaint adverts to the alleged

"charge [by Government officials] toward the plaintiff, and after having been pleaded with and begged by the Plaintiff not to do so, did wrongfully and negligently fire at or upon the Plaintiff certain tear gas or other type of gas projectile." Complaint, Paragraph VIII (Count 1); see also Paragraph XXI (Count 4). Those alleged acts, of course, describe an assault and battery. And in both Counts 1 and 4 of the Complaint it is alleged that "the direct and proximate cause of the Defendants' acts [described in paragraph VIII] were to injure and damage Plaintiff, by denying the Plaintiff's constitutional right [s]". Complaint, Paragraph IX (Count 1); see also, paragraph XXI (Count 4). On its face, then, the Complaint discloses beyond the point of contradiction that the claims against the United States arise out of an alleged assault and battery and are, therefore, outside the jurisdiction of this Court as conferred by 28 U.S.C. 1346(b). For this additional reason the Complaint, as to the United States, should be dismissed.

B. The Mississippi Non-Resident Service Statute (Mississippi Code, 1942, §1437) has no application to this case and is an ineffective basis for asserting personal jurisdiction over the individual defendants.

To the memorandum previously submitted in support of the Motion to Dismiss the action as to the individual defendants, we wish to add a reference to the Fifth Circuit's decision and opinion in Mississippi Wood Processing Co. v. Rothschild, 201 F. 2d 933.

This decision makes it plain that §1437 of the Mississippi Code, 1942, cannot be read or applied literally and that single acts performed by a non-resident in the State of Mississippi are an insufficient basis for a federal court to acquire and assert personal jurisdiction over a non-resident defendant. This decision by the Fifth Circuit, we point out, was based upon the Court's construction of Mississippi law as set out by the Mississippi Supreme Court in the case of Davis-Wood Lumber Co. v. Lofton, 210 Miss. 863, 50 So. 2d 615. Consistent with the rationale of the Davis-Wood case and the Mississippi Wood case, supra, we submit that §1437 of the Mississippi Code has no proper application to the defendants Katzenbach and McShane. Particularly should this be so when regard is had for the purpose for which they were present in the State on September 30 and the capacity in which they acted on that date. A single venture into the State as federal officers carrying out official responsibilities of the federal government cannot be said to constitute doing business, or performing work or services, within the meaning of §1437. The service of process effected under §1437 should, accordingly, be quashed and the complaint dismissed as to the individual defendants.

C. Defendants on September 30 were at all times acting within the scope of their official responsibilities and are immune from personal liability for acts performed in discharge of their official duties.

We previously filed with the Court the affidavit of the defendant Katzenbach in which he states:

> That all actions on the part of federal officials, agents and employees complained of [in this action] were performed in discharge of official governmental responsibilities ***.

Notwithstanding this sworn statement, the Court, on January 18, indicated a reluctance to accept this statement and expressed the belief that a determination of the scope of the responsibility of the government officials named in the complaint presented a fact issue upon which evidence might be necessary.

We cannot agree that there is a genuine issue as to whether the defendants were acting within the scope of their official responsibilities or that evidence beyond the sworn statement now before the Court is needed to resolve the issue. In this connection, we note that in Count 1 of the Complaint (Paragraph VI) plaintiff himself states that all defendants (known and unknown) were "acting in the scope of their employment." In neither Count 2 or Count 3 is there an allegation that either Katzenbach or McShane acted outside the scope of their employment on September 30. Count 4 of the Complaint does not involve Katzenbach or McShane at all but purports to state a claim only against the United States and the unknown defendants, Doe and Roe.

In Count 2, there is an allegation that defendants Katzenbach and McShane "unlawfully and without authority" came into the City of Oxford and upon the campus of the University of Mississippi * * *" (Paragraph XIII). This is a conclusory allegation, of course; in any event, the mere presence of Katzenbach and McShane in the city and upon the campus caused no harm to the plaintiff and there is not, for obvious reasons, any allegation to that effect.

In Count 3, there is an express allegation that government officials "did exceed the scope of their employment" (Paragraph XVII). This allegation pointedly pertains only to the unknown defendants -- Doe and Roe -- and not to defendants Katzenbach and McShane.

In sum, we do not believe that, viewing the complaint by its separate counts or in its entirety, it can reasonably be said to raise an issue, fact or otherwise, as to whether Katzenbach and Rauh exceeded the scope of their official responsibilities on September 30. The complaint does, of course, question the competency of the individual defendants to carry out their responsibilities; it also may be said to question the judgment and discretion they exercised as well as the necessity for the action they took or commanded. The applicability of the doctrine of absolute privilege (as most recently defined and applied by the Supreme Court in Barr v. Matteo, 360 U.S. 564), does not, however, turn upon the competency of the federal official or upon a qualitative appraisal of the judgment the official has exercised; rather, the determinative issue is whether, considering the office of the individual, the act or acts complained of fall within the bounds of the individual's official responsibilities or the discretion with which the individual is clothed by reason of his office. See, Barr v. Matteo, 360 U.S. at 573 - 574. Judged by these standards, there can, we submit, be no doubt that the acts of which plaintiff complains all were performed by the individual defendants in discharge of their assigned duty to see that the lawful injunctive orders of this Court and of the Court of Appeals were carried out. The effective discharge of their responsibilities necessarily called for the exercise of judgment and discretion; while plaintiff may question their judgment and the discretion which they exercised, the privilege which the defendants invoke, as the Supreme Court has said, applies "with equal force to discretionary acts *** where the concept of duty encompasses the sound exercise of discretionary authority." 360 U.S. at 575.

Properly viewed, this case clearly calls for the application of the doctrine of absolute privilege which is bottomed on the concept that it is "important that officials of the government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of these duties -- suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous and effective administration of policies of government." 360 U.S. at 571; see also, [redacted] v. Biddle, 177 F. 2d 579, 581.

Finally, we suggest that there is no valid factual issue involved which might stand in the way of resolving this lawsuit on the motions now before the Court. As noted above, the sworn statement of Mr. Katzenbach is before the Court attesting to the fact that all actions complained of were performed in discharge of official governmental responsibilities. Plaintiff, we venture to say, is neither competent nor qualified to contradict this statement; and any further statement or testimony by government officials would simply be cumulative to the statement now before the Court.

[redacted]

For the foregoing reasons, as well as for the reasons heretofore advanced, the Motions to Dismiss should be granted.

[redacted]
United States Attorney

[redacted]

[redacted]
Attorneys, Civil Division
Department of Justice

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF MISSISSIPPI

SOUTHERN DIVISION

CYRIL T. PANISCA, JR.

Plaintiff

v.

UNITED STATES OF AMERICA,
NICHOLAS KATZENBACH,
JAMES P. McSHANE
JOHN DOE,
RICHARD ROE

Defendants

CIVIL ACTION NO. 2804

MOTION TO DISMISS

The defendants, Nicholas Katzenbach and James P. McShane, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, respectfully move the Court as follows:

(1) To quash the service of summons and complaints herein and the return of service of summons and complaints and to dismiss the action as to said defendants, Nicholas Katzenbach and James P. McShane for lack of jurisdiction of the persons of said defendants on the grounds that:

(a) The defendants, Nicholas Katzenbach and James P. McShane have not been personally served with a copy of the summons and complaint within the territorial limits of the State of Mississippi.

(1) Service of a copy of the summons and complaint on Heber Ladner, Secretary of State, State of Mississippi, as recited in the return of service herein is not effective service on said defendants for the reason that Heber Ladner, Secretary of State, is not an agent of the said defendants authorized by appointment or by law to receive service of process.

(2) To dismiss this action as to said Nicholas Katzenbach and James P. McShane on the ground that the complaint fails to state a claim against said defendants upon which relief can be granted.

Defendants, Nicholas Katzenbach and James P. McShane, attach hereto, and make a part hereof a memorandum in support of the within Motion.

ROBERT E. HAUBERG
United States Attorney

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF MISSISSIPPI

SOUTHERN DIVISION

CYRIL T. FANICA, JR., Plaintiff	)	
v.	)	CIVIL ACTION NO. 2904
UNITED STATES OF AMERICA, NICHOLAS KATZENBACH, JAMES P. McSHANE, JOHN DOE, RICHARD ROE, Defendants	)	

MEMORANDUM IN SUPPORT OF

MOTION TO DISMISS FILED BY DEFENDANTS

NICHOLAS KATZENBACH AND JAMES P. McSHANE

I. The District Court did not Acquire Personal Jurisdiction over Defendants Katzenbach and McShane Through Service of Process upon the Secretary of State

It is, of course, elementary that in order to maintain an in personam suit against an individual, jurisdiction over the person must be acquired by the Court. As non-residents of the State of Mississippi, personal service could not be and has not been made upon the individual defendants. As the sole basis for subjecting defendants Katzenbach and McShane to the jurisdiction of the court, plaintiff relies upon Section 1437 of the Mississippi Code, 1942, which, in material part provides, that

> Any non-resident, person, firm, partnership, general or limited, or any corporation not qualified under the

> constitution and laws of this state as to doing business herein, who shall do any business or perform any character of work or service in this state, shall, by the doing of such business or the performing of such work or service, be deemed to have appointed the secretary of state ... to be true and lawful attorney or agent of such non-resident, upon whom process may be served in any action ... accruing from the doing of such business or the performing of such work or service. ... 1/

On behalf of defendants Katzenbach and McShane we respectfully submit that this non-resident service provision of the Mississippi Code has no proper application in this case and the attempted service through the Secretary of State is utterly unavailing as a jurisdictional basis for the maintenance of this action. We think it clear that, in providing for substituted service upon non-residents, the Mississippi legislature was particularly concerned with non-resident individuals and business entities engaged in commercial activities within the State of Mississippi. 2/ Patently, the activities of the defendants complained of by the plaintiff cannot be placed in the category of commercial activity, neither can it be said that either Mr. Katzenbach or Mr. McShane were on September 20, 1962 performing "work or services" in the State of Mississippi. The sole basis for their presence in the state was in connection with the enforcement of lawful orders of the United States District Court for the Southern District of Mississippi and of the United States Court of Appeals for the Fifth Circuit.

Plaintiff's attempt to acquire personal jurisdiction through the use of Section 1438 must be judged in the light of the Supreme Court's language in the recent decision of Hanson v. Denckla, 357 U.S. 235. In this case the Court said (357 U.S. at 251):

1/ Section 1438, Mississippi Code, 1942, provides the manner of service upon non-residents as authorized by Section 1437.

2/ Cf., Jaquard Motors, Inc. v. Jackson Auto & Supply Co., _____ Miss. _____, 135 So. 2d 269.

> • • • The requirements for personal jurisdiction over non-residents have evolved from the rigid rule of Pennoyer v. Neff, 95 U.S. 714, to the flexible standard of International Shoe Co. v. Washington, 326 U.S. 310. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. See Vanderbilt v. Vanderbilt, 354 U.S. 416, 418. Those restrictions were more than a guarantee of immunity from inconvenient or distant litigation. They are consequences of territorial limitations on the power of the respective states. However minimal the burden of defending in a forum tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him. See International Shoe Co. v. Washington, 326 U.S. 310, 319.

Although the substituted service statutes are as broad as constitutional authority will permit, the effectiveness of such statutes in a particular situation poses a problem of statutory construction within the constitutional framework and its application to the factual background of each individual case. 3/ And it is now the established law that "it is essential in each case that there be some act by which the defendant purposefully avails [himself] of the privilege of conducting activities within the forum State, thus invoking the protections of its laws," 4/ and that the defendant must have such contact with the forum State that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316, and cases cited.

In the light of these authorities and the factual background of the claims plaintiff would assert, it is clear that this suit cannot be maintained. Defendants Katzenbach and McShane have not purposefully availed themselves of the privilege of conducting

3/ Kops-Weeks v. Lewis, 267 F. 2d 374, 377 (C.A. 7), certiorari denied, 361 U.S. 882.

4/ Hanson v. Denckla, 357 U.S. 235, 253.

activities within the State of Mississippi they have not invoked the protection of Mississippi laws; to the contrary, the single purpose of the individual defendants' very limited contact with the State of Mississippi was in connection with and for the purpose of enforcing the lawful orders of this Court. To subject them to the defense of plaintiff's suit in a foreign tribunal far removed from their personal residences, would, in the words of the Supreme Court, offend "traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316.

II. The Complaint fails to state a Claim upon which Relief can be Granted for the Reasons that the Officials, Agents and Employees of the Government Whose Acts are Complained of are Absolutely Immune

By reason of their status as high-ranking executive officers of the Government acting in their official capacity and in discharge of their law enforcement responsibilities, Deputy United States Attorney General Katzenbach and Chief United States Marshal McShane are absolutely immune from liability.

Barr v. Matteo, 360 U.S. 564 (1959)

Howard v. Lyons, 360 U.S. 593 (1959)

Ove Gustavsen Contracting Co. v. Floete, 299 F. 2d 655 (C.A. 2 1962)

Gregoire v. Biddle, 177 F. 2d 579 (C.A. 2 1949) cert. den. 339 U.S. 949

Jones v. Kennedy, 121 F. 2d 40 (C.A.D.C. 1941) cert. den. 314 U.S. 624

Cooper v. Gomez, 99 F. 2d 133 (C.A.D.C. 1938) cert. den. 305 U.S. 649

This immunity has been expressly recognized with respect to conduct of Government officials in the enforcement of lawful court orders.

Yeagley v. Cobb, 12 F. 2d 295 (C.A. 2 1926), aff'd 273 U.S. 503. (Special Assistant to the Attorney General)

Sw[illegible] v. W[illegible], 114 F. Supp. 634 (D. Alaska 1953), aff'd [illegible] F. 2d [illegible] (C.A.9 1954) (U.S. Attorney)

L[illegible] v. G[illegible], 138 F. 2d 923 (C.A.D.C. 1943) cert. den. 322 U.S. 728 (U.S. Attorney)

The principal reason for the recognition of the privilege is, as stated by the Court in Barr, to leave Government officials free to exercise their duties without fear of damage suits in respect of acts done in the course of those duties. In the Court's view, the reasons were admirably expressed in greater detail by Judge Learned Hand in Gregoire v. Biddle, 177 F. 2d 579, 581: 5/

> It does indeed go without saying that an official, who is in fact guilty of using his power to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be cases of persistent public officers who have been immune to their duties, but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. • • •
>
> The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public

5/ Quoted by the Supreme Court in Barr at pp. 571-572.

good is not their aim, and hence fail to consider a power dishonestly in accordance with its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the conclusion must be such as would have justified the act, if he had been using his power for any of the purposes of which control it was vested in him. . . .

This immunity is not abrogated by the Civil Rights Act, 42 U.S.C. 1983.

Ryan v. Jacquin, 243 F.2d 94 (C.A.10 1957)

Tate v. Arnold, 223 F.2d 782 (C.A.8 1955)

By its very terms, this Act creates a remedy only against a "person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory," deprives any citizen of the United States of any of his rights, privileges, or immunities secured by the Federal Constitution and laws. (Emphasis added.) Defendants Katzenbach and McShane, as Federal officials, acting to enforce orders of the United States Court of Appeals, certainly did not act under color of any state statute, ordinance, regulation, custom, or usage. It is therefore clear that the Civil Rights Act is inapplicable to this case. Gregoire v. Biddle, 177 F.2d 579 (C.A.2, 1949), cert. den., 339 U.S. 949; Swanson v. Wills, 114 F.Supp. 434 (D. Alaska, 1953), aff'd, 220 F.2d 460 (C.A. 9, 1955).

ROBERT E. HAUSERG
United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

CYRIL T. FAHEGA, JR. — PLAINTIFF

VS. — NO. 2304

UNITED STATES OF AMERICA, ET AL — DEFENDANTS

NOTICE TO PARTIES

TO: Mr. Carl Bradley
Justice Department
Washington 25, D. C.

Mr. Robert Hamberg
U. S. Attorney
Jackson, Mississippi

Please take notice that the undersigned will cause the foregoing motion to reconsider the Court's ruling on November 21, 1962, to come on for hearing as soon as practicable.

Respectfully submitted,

CYRIL T. FAHEGA, JR.

By _____
EDWARD L. CAINE
ATTORNEY FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
EILOXI DIVISION

CYRIL T. FANECA, JR. — PLAINTIFF

VS. — No. 2004

UNITED STATES OF AMERICA, ET AL — DEFENDANTS

MOTION TO GRANT REARGUMENT UPON THE
COURT'S RULING OF NOVEMBER 21, 1962

Comes now, the Plaintiff, Cyril T. Faneca, Jr., and respectfully moves the Court to grant reargument upon the Court's ruling of November 21, 1962, upon the Defendants, Katzenbach and McShane's motion to reconsider this Court's previous order on November 17, 1962 and for cause respectfully says:

(1) That there are factual changes which were not present when the Court made its ruling on November 21, 1962, in that the Defendants, Katzenbach and McShane contended that to require their being present in Oxford, Mississippi, would present hardship and inconvenience, when in fact, the Defendant McShane was in Oxford at his own pleasure, at the moment that his motion was being argued by counsel in Jackson. That, therefore, there is no merit to Defendants Katzenbach and McShane's contention that there would be any inconvenience by requiring their being present in Oxford for the purpose of taking their deposition.

(2) That this Court need enter no protection order, as prayed for by the Defendants, Katzenbach and McShane, as

entered on behalf of the Defendant McShane, an order granting a writ of habeas corpus extricating him from confinement and arrest in Oxford, Mississippi, fully demonstrating that all of the normal processes of the judiciary in the State of Mississippi will afford the Defendants, Katzenbach and McShane, at the taking of their depositions in Oxford, full, complete, and adequate relief.

(3) That there has been proper and complete non-resident service of process upon the Defendants, Katzenbach and McShane, as provided by Sections 1437 and 1438 of the Mississippi Code, 1942, as Recompiled and Annotated, but that full and complete jurisdiction and venue by this Court is not necessary in order to permit the taking of their deposition, (4 Moore's Federal Practice and Procedure, Par. 26.19, Page 1075), and to deny the taking of the depositions "on any issue until the jurisdiction of the Court was determined, is * * * unsound", (4 Moore's Federal Practice and Procedure, Cf., Urquhart v. American-LaFrance Fomaite Corporation, 144 F.2d 542, and Silk v. Sieling, 7 FRD 576.)

(4) That to cause the Plaintiff, Cyril T. Fanoca, Jr., to elicit the necessary information and evidence by way of interrogatories instead of the taking of oral depositions at Oxford, Mississippi, in order to determine the jurisdiction of this Court and to properly frame the Plaintiff's issues, would be completely inadequate and burdensome, in that the Plaintiff could not ascertain by interrogatories the breadth and nature of the Defendants, Katzenbach and McShane's rendered service, control, and coordination of the unknown marshals, and/or border patrolmen who injured your Plaintiff, for the

purpose of establishing jurisdiction, and for the purpose of determining the negligence of these Defendants, and the unknown Defendants, and for the purpose of clarifying and properly establishing the issues of this cause.

WHEREOF, PREMISES CONSIDERED, your Plaintiff, Cyril T. Fanaca, Jr., does respectfully pray that this Court will set this cause down for reargument as to the ruling made by this Court on November 21, 1962, and does further respectfully pray that this Court will enter an order requiring the appearance of the Defendants, Katzenbach and McShane at Oxford, Mississippi, on November 29 and 30, 1962, for the purpose of Plaintiff taking their depositions by oral examinations.

Respectfully submitted.

CYRIL T. FANECA, JR.

By _____
EDWARD L. CATES
ATTORNEY FOR PLAINTIFF

ATTORNEY'S CERTIFICATE

I, Edward L. Cates, one of the attorneys of record for the Plaintiff, do hereby certify that I have caused to be served upon the Defendant, United States of America, two (2) true copies of the foregoing motion by personally serving upon _____ E. H. HUBERT, _____, United States Attorney for the Southern District of Mississippi, at Jackson, Mississippi, said copies, and upon the Defendants, Katzenbach and McShane, a true copy by like service.

DONE this the 23rd day of November, 1962.

_____
EDWARD L. CATES
ATTORNEY FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF MISSISSIPPI

CYRIL T. FANECA, JR., Plaintiff,	)	
v.	)	NO. 2604
UNITED STATES OF AMERICA, ET AL., Defendants.	)	

O R D E R

On November 10, 1962 this cause came on for a hearing on defendant's motions to quash subpoenas duces tecum and to rescind this Court's order authorizing the plaintiff to take the depositions of Nicholas Katzenbach and James McShane or in the alternative to change the place for taking the deposition to Washington, D. C.;

IT IS ORDERED that the defendant's motion to quash the subpoenas duces tecum be and is hereby continued for further hearing, pending which no response to such subpoenas duces tecum need be made.

IT IS FURTHER ORDERED that defendant's motion to rescind this Court's order authorizing the taking of the depositions of Nicholas Katzenbach and James McShane or in the alternative set the place of taking such depositions at Washington D. C. be and the same is hereby overruled.

IT IS ORDERED that the notice of taking the depositions of Nicholas Katzenbach and James McShane is hereby modified to provide that the place of the taking of such depositions shall be Oxford, Mississippi and that the time shall be agreed upon mutually by the plaintiff and defendant.

IT IS ORDERED that the costs of the taking of such depositions shall be borne by the plaintiff.

Done this day of , A.D. 1962.

UNITED STATES DISTRICT JUDGE

United States District Court

FOR THE

Southern Dist. Miss.

CIVIL ACTION FILE NO. ——

CYRIL T. FAUCA, JR.

vs.

UNITED STATES, et al

No. 2804

To

Nicholas Katzenbach
Justice Department
Washington, D. C.

YOU ARE HEREBY COMMANDED to appear in the United States District Court for the Southern District of Mississippi at the Federal Building in the city of Jackson, Mississippi on the 9th day of November 1962 at 2:00 o'clock P. M. to testify on behalf of the Plaintiff as an adverse witness

in the above entitled action and bring with you

1. Any and all documents and lists showing names and addresses of any and all U. S. Marshals, any and all Deputy U. S. Marshals, any and all U. S. Border Patrolmen, and any and all other United States employees, sent, employed and/or agents upon the Campus of the University of Mississippi, Oxford, Mississippi; which you have in your possession, caused to be made; from 30 September 1962 to date

(over)

November 2, 1962

Edward L. Cates
Attorney for Plaintiff
P.O.Box 2005, Jackson, Miss.
Address

[illegible] Clerk

By [illegible] Deputy Clerk.

RETURN ON SERVICE

Received this subpoena at on
and on at
served it on the within named
by delivering a copy to h and tendering to h the fee for one day's attendance and the mileage allowed by law.

Dated
....., 19....

By .....

Service Fee
Travel ....$
Services .....

Total .....$

Subscribed and sworn to before me, a this
day of , 19 .

2. Any and all statements made by you concerning any of the activities of the United States and/or any activities of your on the Campus of the University of Mississippi, Oxford, Mississippi, on the dates of 30 September 1962 to date.

3. Any and all orders, instructions, or other instructive documents by your superiors and/or others directing you and others to go upon the Campus of the University of Mississippi, Oxford, Mississippi.

4. Any and all documents, declarations, proclamations, orders, decrees, or other instruments declaring [redacted] of Emergency, or other state of emergency in Oxford, Mississippi, and/or upon the Campus of the University of Mississippi, Oxford, Mississippi.

5. Any and all documents, statements or other written evidence by any U. S. Marshal, Deputy U. S. Marshal, U. S. Border Patrolman, and/or other agent, employee of the United States which you have or caused to be made concerning the damage to the Plaintiff, Cyril T. Paneca, Jr. on 30 September 1962.

FOR THE

Southern Dist. Miss.

CIVIL ACTION FILE NO. .....

CYRIL T. FANECA, JR.

vs.

UNITED STATES, et al

No. 2334

To

Nicholas Katzenbach
Justice Department
Washington, D. C.

YOU ARE HEREBY COMMANDED to appear in the United States District Court for the Southern District of Mississippi at the Federal Building in the city of Jackson, Mississippi on the 9th day of November 1962 at 2:00 o'clock P. M. to testify on behalf of the Plaintiff as an adverse witness

in the above entitled action and bring with you

1. Any and all documents and lists showing names and addresses of any and all U. S. Marshals, any and all Deputy U. S. Marshals, any and all U. S. Border Patrolmen, and any and all other United States employees used, employed and/or agents upon the Campus of the University of Mississippi, Oxford, Mississippi; which you have in your possession, caused to be made; from 30 September 1962 to date

(over)

November 2, , 19 62

Edward L. Cates
Attorney for Plaintiff
P.O.Box 2005, Jackson, Miss.
Address

LO[illegible] S[illegible] N
Clerk

By [illegible]
Deputy Clerk.

RETURN ON SERVICE

Received this subpoena at on
and on at
served it on the within named
by delivering a copy to h and tendering to h the fee for one day's attendance and the mileage allowed by law.

Dated , 19

By

Service Fees
Travel $
Services
Total $

Subscribed and sworn to before me, a this
day of , 19

2. Any and all statements made by you concerning any of the activities of the United States and/or any activities of your on the Campus of the University of Mississippi, Oxford, Mississippi, on the dates of 30 September 1962 to date.

3. Any and all orders, instructions, or other instructive documents by your superiors and/or others directing you and others to go upon the Campus of the University of Mississippi, Oxford, Mississippi.

4. Any and all documents, declarations, proclamations, orders, decrees, or other instruments declaring [redacted] of Emergency, or other state of emergency in Oxford, Mississippi, and/or upon the Campus of the University of Mississippi, Oxford, Mississippi.

5. Any and all documents, statements or other written evidence by any U. S. Marshal, Deputy U. S. Marshal, U. S. Border Patrolman, and/or other agent, employee of the United States which you have or caused to be made concerning the damage to the Plaintiff, Cyril T. Fanaca, Jr. on 30 September 1962.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] T. [redacted], Jr.

Plaintiff

v.

[redacted] of America,
[redacted],
[redacted] B. [redacted]
[redacted],
[redacted]

Defendant

CIVIL ACTION NO. [redacted]

[redacted] TO DISMISS

The defendant, United States of America, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, respectfully moves the Court to dismiss this action as to the United States and, in support thereof, assigns the following grounds:

1. The Court lacks jurisdiction because the defendant, United States of America, has not waived immunity from suit or consented to be sued upon the claim or claims set forth in the complaint.

2. The complaint fails to state a claim against the defendant, United States of America, upon which relief can be granted.

Defendant, the United States of America, attaches hereto, and makes a part hereof an Affidavit of Nicholas Cal. Katzenbach, Deputy Attorney General of the United States, and a memorandum in support of the Government's Motion.

[redacted] L. [redacted]
[redacted] States Attorney

[redacted]
[redacted]
[redacted] of Justice

AFFIDAVIT:

I, NICHOLAS deB. KATZENBACH, Deputy Attorney General of the United States, being duly sworn according to law, deposes and says:

That on September 30, 1962 and for sometime prior thereto, the Governor of the State of Mississippi and certain law enforcement officers and other officials of that State, and other persons, individually and in unlawful assemblies, combinations and conspiracies, had been and were willfully opposing and obstructing the enforcement of orders entered by the United States District Court for the Southern District of Mississippi and the United States Court of Appeals for the Fifth Circuit.

That on September 30, 1962, I was in the city of Oxford, Mississippi and upon the campus of the University of Mississippi, at the direction of the Attorney General of the United States, to supervise and direct all United States Marshals and their deputies in the performance of their public duties, including the execution and enforcement of all lawful writs, processes and orders entered by the United States District Court for the Southern District of Mississippi and the United States Court of Appeals for the Fifth Circuit.

That all actions on the part of federal officials, agents and employees complained of in the case of Cyril T. Ramsey, Jr. v. United States of America, Nicholas Katzenbach, James P. McShane, John Doe, Richard Doe, Civil No. 2604, were performed in discharge of official governmental responsibilities, under my direction and supervision, acting in conformity with directions and instructions of the Attorney General of the United States.

Brief

November 14, 1962

Memo to the Files

From: John Doar

Re: Faneca v. U.S., et al

In Dalehite v. U.S. 346 U.S. 15:

> Since no individual acts of negligence could be shown the suits for damages that resulted necessarily predicated the Government's liability on participation of the United States in the manufacture and transportation of FGAN.
>
> 1. United States careless in drafting and adopting fertilizer plan.
>
> 2. United States specifically negligent in various phases of the manufacturing process.
>
> a. bagging at a high temperature
> b. use of paper bagging material
> c. absence of labeling and warning.
>
> 3. Official dereliction of duty in failing to police the ship

From the dissenting opinion:

> ... When an official asserts governmental authority in a manner which legally binds one or many he is acting in a way which no private person could. Such activities do and are designed to affect often, dilatoriously, the affairs of individuals, but courts have recognized the public policy that such officials shall not be controlled solely by statutory or administrative mandate and not by additional threat of a private damage suit. Thus, the Attorney General was not liable for a false arrest. See Gregoire v. Biddle 177 F. 2nd 579.

Apparently the majority felt that all of the acts complained involved a consequence, weighing of expediency v. caution and were therefore within the immunity granted for discretionary acts.

Gustovsson Contracting Company v. Floete 299 F. 2nd 655

A government official who has the duty of inspecting the performance of a government contract was personally liable for damages caused by the alleged result and malicious filing of false reports concerning the performance of government contracts resulting in the contract being cancelled.

> "The doctrine of immunity for officers performing official duties involving the exercise of judgment and discretion was a doctrine evoked to protect high-ranking policy-making administrative officers."

The question is whether it should be extended to cloak with immunity all governmental employees.

In this case it was so extended because the government employee whose duty it is to inspect the performance of government contracts would find it difficult honestly and independently to pass upon such work if he knew that an unfavorable report coupled with an allegation of falseness notice would subject him to the risk, inconvenience and the embarrassment of a public trial with the result of which he might lose his home and savings.

Sauber v. Glideman 283 F. 2nd 941 (1960)

This was an action for malicious prosecution of a Special Assistant to the Attorney General who was appointed to prosecute Sauber who was a former Internal Revenue Collector in Chicago. The District Court held that the duties as prosecuting attorney did not require the application of the doctrine of absolute privilege with respect to the Attorney's communications to the press.

Assistant Attorney General Olney had certified that the Special Assistant was authorized and expected to conduct relations with the press and make such public statements as were called for in connection with his assignment. The Court relying on the Barr case, reversed. The Barr case involved a press release by the Acting Director of an executive agency. The press release related to internal agency affairs which had received congressional notice which in turn had been the subject of press comment. The Court held that the test of the privilege in relation to conduct complained of with respect to matters

committed to the officer's control and supervision depended upon the scope of the power and discretion incident to the duty instructed to the officer by delegation and re-delegation of authority from the highest to the lowest levels of Government.

Dalehite v. United States, 346 U.S. 15 (1953)

Facts: Texas City Disaster - ship being loaded with ammonium nitrate caught fire and blew up, igniting and exploding two other ships nearby and devastating town. Ammonium nitrate was being shipped to France as fertilizer as part of a U.S. program to assist Germany, Japan and Korea in recovering from world war II - caused food shortages. Although the fertilizer was in the hands of a private shipper at the time of the accident, the district court found the U.S. liable under the Tort Claims Act because (1) the U.S. knew, or should have known, of the dangerous propensities of the fertilizer as an ingredient in explosives; (2) the U.S. should have given more warning of the potential dangers to those concerned; and (3) the U.S. should have better policed the handling in order to minimize the danger. The Court of Appeals reversed en banc.

Issue: Whether this case comes within the exception to the waiver of sovereign immunity in the Tort Claims Act proscribing application of the Act to any claim 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.

Decision: Yes, it does. J/affd. Douglas and Clark took no part. Jackson, Black, Frankfurter dissent.

Reasons: (Reed wrote the opinion) Legislative history of Tort Claims Act indicates that while Congress desired to waive immunity from actions for injuries to person and property occasioned by the tortious conduct of its agents acting within their scope of business, it was not contemplated that the Government should be subject to liability arising from acts of a governmental nature or function (27-28). The Act requires clear relinquishment

of sovereign immunity to give jurisdiction for tort actions (31). It is clear that with respect to the exception at issue herein, 28 U.S.C. 2680(a), the clause "whether or not the discretion involved be abused" connotes both negligence and wrongful acts in the exercise of the discretion (33). The "discretion" protected is the discretion of the executive or the administrator to act according to one's judgment of the best course (34). Acts of subordinates in carrying out the operations of government cannot be actionable (36). The alleged negligence does not subject the government to liability. 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 (42). The U.S. is not liable, either, for the failure of the Coast Guard to properly police the loading and fight the fire - see the Feres case (43). Nor is there any support for the doctrine of absolute liability without fault (44).

Jackson, in dissent, would interpret the Act as making the tort liability of the Government analogous to that of a private person, especially where, as here, the Government is carrying on activities indistinquishable from those performed by private persons.

Feres v. United States, 340 U.S. 135 (1950)

Facts: Three cases, the fact common to all being that the acts sued upon happened to persons on active duty in the armed services. Feres perished in a barracks fire caused by a defective heating plant. Jefferson had a towel left in his stomach in a previous abdominal operation performed by Army doctors Griggs died because of negligent and unskillful medical treatment by army surgeons. In Feres, Dist.Ct. dism. and Ct. Ap. aff'd. In Jefferson, Dist. Ct. held U.S. not liable (after a trial) in this type of case & Ct. Ap. aff'd. In Griggs, Dist. Ct. dism. and C.A. rev.

Issue: Does Tort Claims Act remedy extend to one sustaining "incident to the service" what under other circumstances would be an actionable wrong.

Decision: No. Feres and Jefferson aff'd. Griggs reversed. Douglas concurs in result.

Reasons: Jackson Primary purpose of Act was to extend a remedy to those who had been without - if it been incidentally benefitted those already well provided for, this was unintentional. Military personnel had comprehensive statutory system of relief authorized previously. Tort Claims Act does not create new causes of action but brings acceptance of liability under circumstances that would bring private liability into existence. No private liability analogous to that asserted here - only if status of both parties ignored. But liability of U.S. is that created by "all the circumstances," thus no parallel.
It is also relevant here that claim under Act depends on local law because they cannot control where they are sent. Finally, federal character of relationship between U.S. and its military rules out applicability of local law.

Act does not contemplate co-existing with compensation system, giving serviceman his choice. Serviceman is at a disadvantage in litigation and is better off with compensation system only.

Brooks v. United States, 337 U.S. 49 is distinguishable because there Brooks was on furlough when injured in auto accident with Gov't. vehicle and private individual could have, and did, collect (father riding in car with him).

Indian Towing Co. v. United States, 350 U.S. 61 (1955)

Facts: Barge went aground because beacon in lighthouse operated by Coast Guard was not functioning properly. Dist. Ct. dismissed on ground U.S. not liable under Tort Claims Act. Ct. Ap. aff'd.

Issue: Whether the government is liable for negligent performance of activities which private persons do not perform.

Decision: Yes, it is. J/ Rev & Rem. Reed, Burton, Clark and Minton dissent.

Reasons: Statutory liability is not, as Gov't says, imposed to the same extent as would be imposed on a private individual "under the same circumstances," but same as "under like circumstances." Thus, having undertaken lighthouse task and inducing reliance, Gov't liable for misfeasance. Doctrine of liability of municipal corp. not applicable to Tort Claims situation. Nor can the Court follow the "uniquely governmental" activity theory, for then liability would be predicated on a completely fortuitous circumstance - the presence or absence of identical private activity. Feres and Dalehite, relied on by the Ct Ap., are distinguishable.

Dissent relies on Feres and Dalehite, says silence of Congress indicates approval of those decisions. Lighthouse keeping is a uniquely governmental function. Municapality would not be liable in place of trial and thus U.S. should also be exempt.

Rayonier, Inc. v. United States, 352 U.S. 315 (1957)

Facts: Sparks from locomotive travelling over government land ignited fires in dry brush negligently allowed along right-of-way. Forest Service took control as they had agreed to do and as a result of their improper firefighting fire spread. It was finally controlled but remained smoldering. It did so over a month, although it could have been completely extinguished during this time. Then fire flared up again, damaging R's land and buildings. District Court dismissed and Court of Appeals affirmed.

Issue: Whether the U.S. is exempt from liability under the Tort Claims Act because the Forest Service agents were acting in the "uniquely governmental" capacity of public fireman.

Decision: No, it is not. J/vacated and remanded. Reed and Clark dissent.

Reasons: Lower courts relied on Supreme Court's statement in Dalehite that Tort Claims Act does not change rule that alleged failure or carelessness of public firemen does not create private actionable rights. Lower courts in error. Test is whether local law would impose liability on private persons under similar circumstances, not whether local law imposes liability on municipal or other local governments for such acts. See Indian Towing Co. v. U.S. Not significant that this liability is "novel and unprecedented" or might involve a heavy burden on the public treasury. U.S. cannot be equated with a municipality.

In dissent, Justices Reed and Clark said immunity of public bodies for injuries fighting fire well settled, citing Dalehite.

Mahler v. United States, 306 F.2d 713 (C.A. 3, 1962)

Facts: Plaintiff - appellant was injured when his automobile collided with a fallen boulder on the Penn-Lincoln Highway near Pittsburgh, a road built with one-half federal funds.

Issues: Whether the decision of the Secretary in approving the state's highway plan and thus approving the standard of safety which allowed this accident to happen falls within the discretionary function exception to the Tort Claims Act.

Decision: Yes it does. J/aff'd.

Reasons: Dalehite case held where there is room for policy judgment and decision there is discretion and found U.S. not liable for decisions made at a planning rather than operational level and involving considerations more or less important to the practicability of a program. The determination here was a policy judgment of the type most important to the success of the highway program. As such, it falls on the planning side of the planning-operational distinction of Dalehite and immunity is not waived.

N.B. In n. 13, p.723 the court states that it does not read the opinions in Rayonier and Indian Head Towing Co. as having retracted the language from Dalehite herein relied upon. It thus rejects Jemison v. The Duplex, 163 F. Supp. 947 (S.D. Ala 1958), holding against the U.S. on analogous facts, because it cannot be reconciled with the aforementioned language from Dalehite.

United States v. Campbell, 172 F. 2d 500 (C.A. 5, 1949), cert. denied, 337 U.S. 957

Facts: C run into and knocked down by sailor running to catch troop train. Dist Ct held sailor was acting in line of duty and held for C under the Tort Claims Act.

Issue: Whether U.S. liable under the Tort Claims Act because accident occurred "in line of duty."

Decision: No. J/rev.

Reasons: Despite long line of cases construing "line of duty" liberally with respect to claims by servicemen, this involves Tort Claims Act, which limits U.S. liability, under the doctrine of respondent superior, in the same manner and to the same extent as the liability of private persons under that doctrine was limited by the various states. "Line of duty" not the same as "within the scope of his employment", which is the standard under the T.C.A.

United States v. Bleazer, 177 F. 2d 914 (C.A. 8, 1949), cert. denied, 339 U.S. 903

Facts: P injured in collision with auto driven by Marine Lt. travelling to another post, under orders, with delay en route specified. Trial ct. held U.S. liable under Tort Claims Act.

Issue: Whether accident occurred within scope of his employment

Decision: No. J/rev.

Reasons: Doctrine of respondent superior applies -- Lt. not engaged in Gov't business at time of accident -- U.S. had no right to direct his driving. Not significant that U.S. pays him mileage -- he could have gone by rail or air. North Carolina (situs of accident) law is the same.

Barr v. Matteo, 360 U.S. 564 (1959)

Facts: M was the author of a plan to pay employees of an expiring agency for accrued annual leave in lieu of terminal-leave pay, then rehire the employees for the new agency. A few employees were so paid, including M. When B, as present acting chief of the new agency, was criticized by Congress for the action, B announced to the press that he was suspending M for his part in the scheme. M sued B for libel and B defended on grounds of privilege. Dist. Ct. & Ct. Ap. held for M.

Issue: Whether a libellous statement by a lesser government official is to be accorded immunity from suit where the making of such a statement to the press is not one of the stated duties of the official.

Decision: Yes J/ rev. Black concurs. Warren and Douglas dissent. Brennan dissents. Stewart dissents.

Reasons: (Harlan) Law of privilege largely one of judicial making. Constitution protects only Senators and Congressmen, but absolute privilege was extended to judges, then officers of government related to judicial process, then executive officers. Reason for privilege is to permit officials to exercise their duties unembarrassed by fear of damage suits in respect of acts done in the course of those duties. Privilege protects only acts done within scope of powers, but test is occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. Applies to lesser officials, too, though protection less broad because duties less sweeping. Here plea must be sustained, even though B was not required by law or the direction of his superiors to speak out. Privilege applies with equal force to discretionary acts at those levels where the concept of duty encompasses the sound exercise of discretionary authority.

Black concurs on the ground that the press release was neither authorized nor plainly beyond the scope of B's official business. Warren and Douglas would protect internal reports but not public statements of lesser officials.
Brennan would give a qualified privilege, not protecting defamatory, untrue and malicious statements.
Steward does not agree that the statement was in "line of duty", although he agrees with the principles in Harlan's opinion.

Howard v. Lyons, 360 U.S. 593

Facts: H was Capt. in U.S. Navy & Lyons was Nat'l. Cmdr of the Federal Employees Veterans Assn. when H submitted memo defaming L to his Chief & then allegedly to press. Dist. Ct. held for H on defense of privilege. On appeal, L abandoned "release to press" charge. Ct Ap allowed only qualified privilege on release to congressional delegations & rev. & rem.

Issue: Whether Barr v. Matteo governs this case.

Decision: Yes. J/rev. Black concurs. Brennan dissents. Warran & Douglas dissent.

Reason: (Harlan) Release to congressional delegation was in line of duty. On another issue not resolved by Ct. Ap., held Fed. Cts. not bound to follow state law on extend of privilege in respect of civil liability for statements allegedly defamatory under state law.

Warren: No duty to send report to Congress and thus entitled to qualified privilege only.

Gregoire v. Biddle, 177 F. 2d 579 (C.A. 2, 1949), cert. denied, 339 U.S. 949

Facts: B & others accused of arresting G on the pretence that he was a German and therefore an enemy alied. A judge found he was a Frenchman and released him. G sues B for false arrest. Dist. Ct. dismissed.

Issue: Whether B, the Attorney General, has absolute privilege for these actions.

Decision: Yes. J/aff'd.

Reasons: Officials of the Department of Justice, when engaged in prosecuting private persons, enjoy the same absolute privilege as judges. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him.

Sauber v. Gliedman, 283 F. 2d 941 (C.A. 7, 1960)

Facts: G was special asst. to A.G. to try tax fraud case against S and others. After he was sworn in G called press conference at which he made allegedly malicious defamatory statements about S. Dist. Ct. granted G's motion for summary judgment.

Issue: Whether G was entitled to the defense of absolute privilege.

Decision: Yes. J/aff'd.

Reasons: Under the rule of the Barr case a public statement may be privileged where the nature of the officials's duties requires that he be immune from private tort liability in respect to it in furtherance of the effective functioning of government. Measured by this, G's statement was privileged. He represented the A.G. in this action and his superior officer said he was authorized to make such public statements as were called for in connection with this assignment. This statement was.