FEDERAL TORT CLAIMS LIABILITY - WHO ARE UNITED STATES EMPLOYEES?

A Thesis

Presented To

The Judge Advocate General's School, U.S. Army

The opinions and conclusions expressed herein are those of the individual student author and do not necessarily represent the views of either The Judge Advocate General's School, U.S. Army, or any other governmental agency. References to this study should include the foregoing statement.

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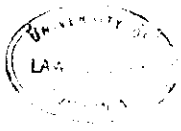

SCOPE

An identification of persons who are "United States employees" for purposes of casting liability upon the United States under the respondeat superior principles of the Federal Tort Claims Act, by analyzing federal decisional law concerning: choice of federal or state law; characteristics of "federal agencies", of the "employment relationship," and the "contractor relationship"; application of the "loaned servant" doctrine and the dual employment status concept; the significance of source of compensation and supervision; and the consideration given to the degree of specificity of identification required.

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I. INTRODUCTION

The Federal Tort Claims Act[1] is a qualified congressional waiver of the sovereign immunity of the United States from tort liability for negligent and wrongful acts of government employees.

Subject to certain provisions listed at 28 U.S.C. § 2680,[2] the federal district courts were granted exclusive jurisdiction of civil actions on claims against the United States,

> for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[3]

Since the passage of the FTCA, numerous federal cases have arisen in which the courts have decided the issue of

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[1]Title IV, Legislative Reorganization Act of 1946, Ch. 753, 60 Stat. 842, as amended, 28 U.S.C. §§ 1291, 1346(b),(c), 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-80 (1964), as amended, 28 U.S.C.A. §§ 2401, 2671, 2672, 2675, 2677-79 (1966) [hereafter cited as FTCA].

[2]Thirteen activities are specifically excepted from the sovereign immunity waiver of the FTCA.

[3]28 U.S.C. § 1346(b) (1964), as amended by 80 Stat. 307 (1966).

status as an employee of the United States Government within the meaning of the FTCA. In every case resulting in liability under the FTCA some person must have acted wrongfully or negligently as an employee of the government.

The purpose of this thesis is to identify the status of persons who are "United States employees" for purposes of casting liability upon the United States under the respondeat superior principles of the FTCA. The scope of this thesis excludes questions relating to whether government employees were acting within the scope of their employment at the time of an alleged negligent act covered by the FTCA. Also, there will be no direct concern with cases in which the issue involves a plaintiff's possible status as an employee of the government, thereby possibly preventing his taking advantage of the remedies available under the FTCA. Since the status of an agency or organization frequently bears on the federal employment question, the characteristics of federal agencies will be discussed throughout this thesis.

The FTCA provides the basic statutory standards for the judicial determination of the issue of government employment. The context of the phrase "employee of the

government" expressly includes

> officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.[4]

The term "federal agency" is defined in the same title and section of the FTCA to include "the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States,"[5] but not to include any contractor with the United States.[6] Judicial interpretation of these statutory definitions has resulted in much clarification of the meaning of employee of the government. The courts faced with the problem of identifying government employees have had to consider numerous factors in addition to the above-mentioned statutory definitions, which in practice amount to broad generalities requiring refinement by application of FTCA decisional law.

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[4] 28 U.S.C. § 2671, as amended by 80 Stat. 307 (1966).

[5] 28 U.S.C. § 2671, as amended by 80 Stat. 307)1966).

[6] 28 U.S.C. § 2671, as amended by 80 Stat. 307 (1966).

Since the FTCA definitions of government employee and federal agency are not restatements of common-law concepts, nor sufficiently definitive statutory substitutes for the traditional meaning of employee or agency, the courts have been confronted with the task of determining whether the FTCA definitions preempt or implement the common-law definitions.[7] Furthermore, it has been necessary to resolve the related issue of choice of federal or state law where there is a conflict. In most cases, however, there is little significant distinction between state and federal law on these issues.[8]

Where an alleged employee fails to qualify as a government employee under any of the three distinct categories set forth in the definitions section (i.e., officers and employees of any federal agency, members of the military and naval forces, and persons acting on behalf of a federal agency in an official capacity, with or without compensation, temporarily or permanently), the courts have had to go beyond the wording of the Act to determine

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[7]Thomas v. United States, 204 F. Supp. 896 (D. Vt. 1962), is an example of a court ruling that due to insufficient statutory definition of employee the general principles of agency should be applied.

[8]Jayson, Handling Federal Tort Claims: Administrative and Judicial Remedies, § 201 (1964).

if such a person was intended to be within the comprehension of the Act. During the course of this thesis considerable emphasis will be placed on case analysis showing judicial application of non-statutory, as well as statutory, criteria to the resolution of the issue of government employee status.

II. FACTORS BEARING ON THE DETERMINATION OF STATUS AS AN FTCA GOVERNMENT EMPLOYEE

A. PREFATORY STATEMENT OF CONSIDERATIONS TO BE COVERED

In the process of construing the FTCA provisions relating to government employee status, the federal courts have with varying frequency analyzed a number of recurring issues that influence the judicial process in arriving at a conclusion of FTCA employee status. These considerations may be summarized as: Whether state or federal law is controlling in determining FTCA employee status; whether an activity may be characterized as a federal agency (of which its employees qualify as FTCA employees) or whether it possesses the distinguishing characteristics of an independent contractor (of which its employees do not qualify as FTCA employees); whether the "loaned servant" doctrine may be applied to avoid or to establish FTCA employee status; whether the alleged tortfeasor relates to the federal government in a dual capacity, as an independent contractor for some purposes, and as an employee for other purposes; whether sufficient nexus exists to establish FTCA employee status based on compensation or supervision coming from a federal source; whether an inability to identify a particular individual

as an FTCA employee should preclude recovery under the FTCA. Frequently, these factors combine or interact to result in a determination of employee status. Each of these topics will be discussed below.

B. WHETHER STATE OR FEDERAL LAW IS CONTROLLING IN DETERMINING THE FTCA EMPLOYEE QUESTION

An unresolved conflict of opinion exists among the federal courts as to whether state or federal law is to be applied in the judicial determination of status as an employee within the meaning of the FTCA.

Several arguments have been advanced in decisions holding that state law is controlling on the issue of employee status. One plausible argument analogizes the issue of employment status with the issue of whether the tortfeasor was within the scope of employment at the time of a negligent or wrongful occurrence. Since there is no question regarding state law applicability to the issue of scope of employment, it is urged that state law should likewise control the determination of

employee status.[9] Another argument advanced in favor of state law controlling this issue refers to the wording of the FTCA which provides that FTCA liability shall be determined by "the law of the place where the act or omission occurred."[10] It is thought that this statutory direction to apply state law to determine liability incorporated the determination of employee status. It appears that the underlying logic is that there can be no

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[9]Hopson v. United States, 136 F. Supp. 804 (D.C. Ark. 1956); Williams v. United States, 350 U.S. 857 (1955), established the rule that state law is to be applied to determine the scope of employment issue. This is apparently the only clear Supreme Court holding on the choice of law problem pertaining to the three statutory definitions in the FTCA.(scope of employment, government employee, and federal agency). In Maryland ex rel., Levin v. United States, 381 U.S. 41 (1965), the issue could have been clarified by expressing federal law applicability to a federal employment question; however the court preferred to discuss the issue in terms of the administrative practices of the Defense Department and the Congressional purpose in authorizing, and Congressional recognition of, the status of National Guard Caretakers. In Feres v. United States, 340 U.S. 135 (1950), United States v. Standard Oil Co., 332 U.S. 301 (1947), and United States v. Gilman, 347 U.S. 507 (1954), it was stated as dicta, apparently, that federal law should determine the federal employment question, but many lower federal courts have not considered this pronouncement as binding.

[10]28 U.S.C. § 1346(b) (1964).

liability under the FTCA without a determination of employee status and since the Act directs state law to be applied in the determination of liability, state law should be also applied in the preliminary determination of employee status.[11] FTCA decisional law in the Fourth, Sixth and Eighth Circuits supports the position that state law controls this issue.[12]

A number of courts have held to the contrary on the issue of whether state or federal law must be applied to determine employee status. The major argument advanced in favor of federal law controlling this issue is that the meaning of the phrase "employee of the government" contained in the FTCA is a matter of statutory construction and since the FTCA is a federal statute, federal law should be controlling unless state law is expressly designated as controlling the issue. FTCA interpretations in the Second, Fifth, Ninth, and Tenth Circuits support

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[11] Fries v. United States, 170 F.2d 726, (6th Cir. 1948), cert. denied, 336 U.S. 954 (1948); Smick v. United States, 181 F. Supp. 149 (D. Nev. 1960).

[12] Maloof v. United States, 242 F. Supp. 175 (D. Md. 1965); Buchanan v. United States, 305 F.2d 738 (8th Cir. 1962); Hopson v. United States, 136 F. Supp. 804 (D. Ark. 1956).

this view.[13] Although the Supreme Court has discussed this issue and stated in Feres v. United States[14] that the question of government employment is clearly federal in character and that it is governed exclusively by federal law, the federal courts of the Fourth, Sixth, and Eighth Circuits apparently considered this position as mere dicta and not binding law in light of the subsequent holding in Williams v. United States,[15] that state law governs the scope of employment issue. It would appear that the view holding federal law applicable to the determination of government employment is the more logical and legally defensible. The government creating the act should not be controlled by unrelated laws in deciding who is or is not its employee. The likening of the issue of employment status with the scope issue is not a logical categorization since the issue of employment has significance apart from the imposition of liability under the FTCA. For instance, employee status may be

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[13] Courtney v. United States, 230 F.2d 112, (2d Cir. 1956); Maryland v. United States, 381 U.S. 41 (1965); Blackwell v. United States, 321 F.2d 96 (5th Cir. 1963); Brucker v. United States, 338 F.2d 427 (9th Cir. 1964), cert. denied, 381 U.S. 937; Pattno v. United States, 311 F.2d 604, (10th Cir. 1962); United States v. Hainline, 315 F.2d 153 (10th Cir. 1963). See generally, 14 L. Ed. 2d. 897.

[14] 340 U.S. 135 (1950).

[15] 350 U.S. 857 (1955).

determinative of certain rights to wages, medical or retirement benefits, or it may create a legal status subjecting the employee to criminal process such as military courts-martial. As mentioned above, the United States Supreme Court has not ruled precisely on the issue of state or federal law controlling the determination of employee status. However, it has held that federal practice should be considered in the determination of the issue of employee status. The court stated in Maryland ex rel. Levin v. United States[16] that it viewed congressional purpose, administrative practice of the Defense Department, consistent congressional recognition, and state supervisory practices relative to civilian personnel of the National Guard in combination to arrive at a conclusion of state rather than federal employee status. The effect seems to be that federal law was determinative of the issue, but state law (to the extent that state supervisory practices may be considered state law) is not totally ignored.

Regarding the issue of whether an organization may be characterized as a federal agency for FTCA purposes, it may also be said that there are few precise holdings

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[16]381 U.S. 41 (1965).

indicating which law should be applied. Since most federal agencies are established pursuant to federal legislative or executive action, and since there is usually federal regulation of the organization's functions, practices, and purposes in the form of federal statutes or directives, it seems most appropriate that federal law should control the judicial determination of the status of federal agency. In the few cases discussing this precise issue federal law was held to control.[17]

If, however, the issue arises regarding possible characterization of a wrongdoer as an independent contractor or his employee, rather than a government employee (the significance of this distinction is to be discussed below) the courts generally refer to local law describing the status as an independent contractor.[18] One authority indicates that perhaps this is due to the fact that there is an absence of federal law in this area.[19]

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[17]United States v. Holcombe, 277 F.2d 143 (4th Cir. 1960); Standard Oil Company v. Johnson, 316 U.S. 481 (1942).

[18]Buchanan v. United States, 190 F. Supp. 523 (D. Minn. 1961); Anderson v. United States, 259 F. Supp. 148 (E.D. Pa. 1966).

[19]Jayson, Handling Federal Tort Claims: Administrative and Judicial Remedies, § 202.01 (1964).

C. WHETHER AN ACTIVITY OR ORGANIZATION MAY BE CHARACTERIZED AS A FEDERAL AGENCY OR WHETHER IT POSSESSES THE DISTINGUISHING CHARACTERISTICS OF AN INDEPENDENT CONTRACTOR.

If an individual distinctly has status as an officer or employee of a federal agency, or is an active member of the Armed Forces of the United States, or holds any other status within the express provisions of 28 U.S.C. § 2671, there can be no doubt that he is an FTCA government employee. On the other hand, subject to certain exceptions to be mentioned below, it may be stated as a general proposition that the United States government may not be held liable under the FTCA for the negligence of an independent contractor or his employees. As mentioned in the introduction the Act expressly states that the term "federal agency" does not include "any contractor" with the United States.[20] The immediate significance of the statutory delineation between "federal agencies" and "any contractor" with the United States appears in the further interpretation of the definitions section of the FTCA in which an employee of the government is defined to include the officers or employees of any federal agency and persons acting on behalf of a federal agency in an official capacity.[21] Since any contractor with the United

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[20] 28 U.S.C. § 2671 (1964), as amended by 80 Stat. 307 (1966).

[21] 28 U.S.C. § 2671 (1964), as amended by 80 Stat. 307 (1966).

States may not be construed as a federal agency, neither an independent contractor nor his employee may, according to the language of the statute, be considered an employee of the United States for the purpose of establishing FTCA liability.

The question next arises as to the meaning of the term "any contractor" and whether traditional standards of definition apply. Often the term "independent contractor" is used interchangeably with the term "contractor" in matters concerning the FTCA. As a matter of legal semantics there appears to be no significant distinction between the term "contractor" and "independent contractor". Black defines contractor as "one who in pursuit of independent business undertakes to perform a job or piece of work, retaining in himself control of means, method and manner of accomplishing the desired result."[22] The same authority defines independent contractor as "one who, exercising an independent employment, contracts to do a piece of work according to his methods and without being subject to the control of his employer except as to the result of the work."[23] The essence of these definitions

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[22]Black, Law Dictionary (4th ed. 1951) p. 397.

[23]Id. at 911.

is that the contractor is freed from superior authority regarding the performance of the particular undertaking, thus the emphasis on independence of the contractor. This characterization of independence establishes that a master-servant relationship does not exist.[24] The legal implication of this independence is that the contractor is responsible for his and his employee's negligence, but that the government engaging his services is not. This is an intended result as the liability assumed by the federal government under the FTCA is a respondeat superior type of liability and if there is no master-servant relationship existing between the government and the wrongdoer, there can be no FTCA liability.[25]

As examples of judicial action distinguishing independent contractors from government employees, the following cases are mentioned. In Strangi v. United States,[26] after emphasizing that the main distinction between the

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[24]See Restatement, Agency 2d § 220(2) for a statement of the legal characteristics of servants and independent contractors.

[25]Jayson, Handling Federal Tort Claims: Administrative and Judicial Remedies, §§ 203,276 (1964); 28 U.S.C. § 1346(b) (1964).

[26]211 F.2d 305 (5th Cir. 1954).

independent contractor and the master-servant relationship is in the degree of control or right of control retained by the employer over the details of the work as it is being performed, but stating that no absolute distinguishing criteria exists, the court held that a person under contract with the government to clear land for a reservoir was not an employee of the government but rather an independent contractor and therefore there was no FTCA liability for his negligent use of fire since control of such activity did not lie with the United States.

In Buchanan v. United States,[27] it was held, after emphasizing the lack of authoritative control over the firm's manner and means by which the details of its work were performed, that a firm that operated a government arsenal and manufactured ammunition was an independent contractor rather than an employee of the government. It was mentioned by the court that although the government maintained some measure of general control over the arsenal property, such control was similar to the interest and general control ordinarily exercised by

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[27] 305 F.2d 738 (8th Cir. 1962).

an owner over his property which through lease or other arrangement is in the immediate possession of another, and that the government control was exercised in the necessary area of inspection to insure that the firm's obligations to the government were fulfilled, rather than being exercised to take over the firm's obligations.

The total situation approach was similarly employed in Hopson v. United States,[28] where the firm operating an Army depot was held to be an independent contractor, and its employees not government employees for FTCA purposes, since the only right to control retained or exercised by the government over the depot's operation was limited to control of the results of the work being performed. It was felt that the plant and facilities inspection rights reserved by the standard government contract for this type operation did not destroy the firm's independence of operation.

In a thoroughly reasoned opinion, it was held in Thomas v. United States,[29] that a star route mail carrier was an independent contractor rather than a government

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[28] 136 F. Supp. 804 (D. Ark. 1956).

[29] 204 F. Supp. 896 (D. Vt. 1962).

employee. The main factor considered in drawing this distinction was that of control over the details of the actual performance of the carrier's duties. Although the government's contract with the carrier contained several provisions indicating the government's right to insure the mail delivery was properly performed, it was ruled that these provisions did not amount to control of the manner and method of actual delivery of the mail, nor was it control of the conduct of the carrier along the route. Other factors pointed out as bearing on the "control" question were that the control of the means of complying with the contract was entirely with the carrier, the government's only remedy for failure to perform under the contract's terms was by forfeiture or fine, the method of contract formation was that of competitive bidding (the Postmaster General was required to contract with the lowest responsible bidder), and under these circumstances the government had no choice in selecting the carrier, the only means of discharging the carrier was under the cancellation provisions of the contract, and the risk of profit was entirely on the carrier, who must furnish his own equipment to perform his obligations under the contract and hire his own substitutes when he was unable to personally perform. The carrier was paid according to his own cal-

culations, his mail handling duties differed from those of regular postal department employees, and none of the customary government employee deductions were taken from the carrier's wages.

On the other hand, it was held in Schetter v. Housing Authority of the City of Erie[30] that a public housing authority was actually an instrumentality of the United States, rather than an independent contractor, even though provisions in the lease between the United States and the authority identified Erie as a lessee and an independent contractor and that all persons employed by the lessee were to be his employees, servants, and agents and not those of the lessor. It was pointed out that when a lease shrouds the relationship between the government and an agency, courts should pierce the veil in order to avoid an evasion of governmental responsibility. The court, considering the actualities of the relationship and noting the extent of control retained by the government, felt Erie was in reality a managing agent for the United States rather than a lessee, and therefore the government was held responsible for the negligent repair of a kitchen gas heater which caused the asphyxiation and death of two

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[30] 132 F. Supp. 149 (W.D. Pa. 1955).

young children of tenants in the housing project.

Mention should be made of the considerable potential governmental tort liability in the area of community housing programs since the federal government's involvement in housing projects is vast and expanding. Case law has effectively applied the ordinary tort liability of a private land owner to the United States following the FTCA's waiver of the government's traditional immunity. For example, in an FTCA action against the government for wrongful death allegedly resulting from the negligence of the manager of buildings leased to the federal Public Housing Authority, liability was established in Maryland ex rel. Pumphrey v. Manor Real Estate & Trust Company.[31] The particular facts in Pumphrey are interesting. It was a widow's action to recover for the death of her husband by endemic typhus, a disease transmitted by the means of the bite of a flea from an infected rat. The manager's alleged negligence consisted of failing to take adequate measures to exterminate the rats. The government's argument that the manager, a real estate dealer, was an independent contractor was rejected on the basis that an employee is defined as a person acting on behalf of a

[31] 176 F.2d 414 (4th Cir. Md. 1949).

federal agency in an official capacity and in this case the manager was subject to the detailed supervision of the Public Housing Authority, and the management contract bound the manager to regulations contained in an official manager's manual. Subsequently it was held in United States v. Dooley[32] that, for purposes of the FTCA, caretakers for a housing project owned by the United States were government employees.

It appears that where housing projects are leased or transferred to state or local management and control that federal tort responsibility may result from residual federal inspection or supervision. One authority states that, regarding the Demonstration Cities and Metropolitan Development Act (1966), where federal agents or instrumentalities exercise sufficient control over the local project as to constitute a cumulative factual predicate for "de facto" control despite the language of contracts and other arrangements stating the independent contractor status of the local agency, a major area of potential FTCA liability exists.[33]

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[32]231 F.2d 423 (9th Cir. Wash. 1957).

[33]Gottlieb & Gantt, "Uncle Sam" as a Landlord Under the Federal Tort Claims Act, 84 (1967).

Subject to certain logical exceptions, the courts have consistently ruled that the torts of independent contractors with the government do not result in FTCA liability. The theme central to the exceptions to this rule is that the United States is subject to liability for tort claims in the same manner and to the same extent as a private person under like circumstances, as expressed in 28 U.S.C. § 2674. Several primary exceptions to the independent contractor exemption from FTCA liability were discussed at length in Benson v. United States.[34] It was recognized that even though the wrongdoer involved was an independent contractor rather than a government employee, the government may be liable for its own negligence in selection of the contractor or in its discharge of functions reserved to government control; or the government may be vicariously liable for the contractor's negligence where the law imposes a non-delegable duty to protect a class or individual from a particular harm; or the government may be liable for its negligence in failing to take reasonable precautionary measures with respect to an inherently dangerous activity, even though the independent contractor may also have been negligent

[34] 150 F. Supp. 610 (N.D. Cal. 1957).

in respect to such activity.[35]

Another exception to the independent contractor basis of non-liability under the FTCA was discussed in Anderson v. United States.[36] It was held that when the government contract directs the independent contractor to perform work which of itself necessarily operates to cause damage to a claimant's property, the government may not avoid FTCA liability. In this case a dredging contractor was directed by the contract to use the claimant's land for a mud and silt dump and the government had failed to acquire the right to use claimant's land. Liability for trespass was based not on the manner in which the work was performed but rather on the fact that the thing contracted to be done caused the damage.

Somewhat similarly in the case of Emelwon, Inc. v. United States,[37] Florida law was interpreted to justify FTCA liability for the negligent spraying of water hyacinth and other noxious vegetation performed by the Florida Game and Fresh Water Fish Commission, an indepen-

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[35]Benson v. United States, 150 F. Supp. 610 (N.D. Cal. 1957), citing Prosser on Torts § 64 (2d ed. 1955).

[36]259 F. Supp. 148 (E.D. Pa. 1966).

[37]391 F.2d 9 (5th Cir. 1968).

dent contractor of the federal government. It was felt by the court that Florida law recognized two theories establishing a duty in the employer (the United States) of the independent contractor. One was that where an employer gains knowledge of a dangerous situation created by an independent contractor, it may incur liability through its failure to halt the operation or otherwise remove the danger. The other theory was based on the non-delegable duty concept. In this regard it was stated that the employer's liability is not absolute, nor is he held vicariously liable for the negligence of the independent contractor, but that liability is imposed on the employer for his own failure to exercise reasonable care in a situation sufficiently dangerous that the employer himself has a duty to third persons.

It should be emphasized that although FTCA liability may be based on these exceptions, it is not dependent on a finding that the contractor involved was an agency of the United States, but rather it is an implementation of the basic policy declaration of 28 U.S.C. § 2674 that the United States shall be liable in the same manner as a private individual under like circumstances.[38]

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[38]Pierce v. United States, 142 F. Supp. 721 (E.D. Tenn.) aff'd per curiam 235 F.2d 366 (6th Cir. 1956); Newman v. United States, 248 F. Supp. 669 (D.D.C. 1965); Hamman v. United States, 267 F. Supp. 411 (D. Mont. 1967); Jayson, Handling Federal Tort Claims: Administrative and Judicial Remedies § 202.01 (1964).

Frequently, in order to establish FTCA liability, it is necessary to prove that a wrongdoing employee's employer is an agency or instrumentality of the government. Judicial treatment of the question of the particular nature of the immediate employer depends on the facts of each case. The definitions section of the FTCA provides limited assistance by expressly designating as federal agencies the executive departments, the military departments, the independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States. This section has been criticized as being insufficient since it caused doubt as to whether the legislative and judicial branches of government were intended to be covered by the FTCA since these branches were not mentioned.[39] Legislative history of the act fails to indicate an express intent that the executive and judicial branches were intended to be included in FTCA coverage. However, indicative of Congressional intent is a Senate Committee Report stating that the definitions section "makes it clear that its provisions cover all Federal agencies. . ., and all Federal

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[39]Jayson, Handling Federal Tort Claims: Administrative and Judicial Remedies § 202.01 (1964).

officers and employees...."[40] Perhaps due to this lack of clarity, an early FTCA case, Cromelin v. United States, held that a federal district judge and a trustee in bankruptcy were not employees of the United States for FTCA purposes.[41] The court so held after weighing the facts that the trustee was an officer of the court, appointed, directed, and paid by the court and that the judge was appointed by the President, confirmed by the Senate, and paid from the federal treasury. The judge's status as a member of the independent judiciary was viewed as removing him from control of the United States, much in the same manner that a member of Congress is not an employee subject to federal control.[42]

Considering the particular wording of the definitions clause which expressly "includes" the executive branch as a federal agency but fails to mention the judicial branch, the Cromelin result is understandable. Perhaps if the plaintiff's attorney in that case had presented the feelings of the Senate as expressed in the above-cited Senate

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[40] S. Rep. No. 1400, 79th Cong., 2d Sess. 31 (1946).

[41] Cromelin v. United States, 177 F.2d 275, (5th Cir. 1949) cert. denied, 339 U.S. 944 (1949).

[42] Id.

Report, a contrary holding would have followed. At least a ruling of non-liability based on the discretionary function exclusion of the FTCA would seem more logical.[43]

A subsequent case, McNamara v. United States,[44] involving an injury due to a fall in the Capitol Building, resulted in a ruling that the legislative branch of government is to be considered as a federal agency even though the FTCA's definitions section was silent on this issue. The fact that the judge sitting on the McNamara case had assisted as a member of the Justice Department in the preparation of the final version of the FTCA of 1946 lends special significance to the McNamara decision. It appears that Judge Holtzoff could not resist the opportunity to clarify the confusion surrounding the federal agency definition. As there was no legislative history indicating an intent to exclude the legislative and judicial branches, and to so limit the act would defeat part of the beneficent purposes of the FTCA, he ruled that the act applies to all three branches of the government.[45]

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[43] 28 U.S.C. § 2680(a) (1964); Jayson, Handling Federal Tort Claims: Administrative and Judicial Remedies § 202.07 (1964).

[44] 199 F. Supp. 879 (D.D.C. 1961).

[45] Id.; Jayson, Handling Federal Tort Claims: Administrative and Judicial Remedies § 202.01 (1964).

An organization with special character deserving consideration is the Peace Corps. The Peace Corps resembles the military organizations in that its members are subject to direction and control flowing from a superior authority having a national purpose as its objective. Members of the Peace Corps also are obligated, although under more flexible terms, to serve definite periods of duty, somewhat similar to the tour of duty agreed upon in a military enlistment. However, the act establishing the Peace Corps declares that volunteers joining the Corps "shall not be deemed officers or employees or otherwise in the service or employment" of the federal government for any purpose unless the act provides a stated exception.[46] One of the stated exceptions in the Peace Corps Act makes Peace Corps volunteers employees of the government for FTCA purposes. 22 U.S.C. 2504 (h) (1964) states that "volunteers shall be deemed employees of the United States Government for the purposes of the Federal Tort Claims Act and any other Federal Tort liability statutes".... It should be noted that the express designation of Peace Corps volunteers as FTCA government employees in the organizational statute is a simple and conclusive method of avoiding judicial incon-

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[46] 22 U.S.C. § 2504(a) (1964); Jayson, Handling Federal Tort Claims: Administrative and Judicial Remedies § 203.02(1)(b) (1964).

sistency on the question of employment status. The Act is also significant in that it indicates Congressional concern about the tortious activities of its newly created organizations. It would be commendable that Congress continue to express its intent regarding employment status in organizations it creates. It could thereby assist the courts in their treatment of FTCA litigation (notwithstanding the difference of opinion among the federal courts as to whether state or federal law controls this question).

In contrast to the Peace Corps is the Civil Air Patrol, a volunteer civilian aviation organization loosely connected with the Air Force. Although the members of the Civil Air Patrol qualify as civilian employees of the federal government for purposes of the Federal Employee's Compensation Act,[47] as do Peace Corps volunteers,[48] the Civil Air Patrol is not characterized as a federal agency within the meaning of the FTCA, and its members do not have FTCA employee status.[49]

However, where the Civil Air Patrol is engaged in a mission for the Air Force it would seem that the FTCA

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[47] 5 U.S.C. § 803 (1964).

[48] 22 U.S.C. § 2504(d) (1964).

[49] Pearl v. United States, 230 F.2d 243 (10th Cir. 1956).

would probably cover the activities of its members either on the basis of the FTCA definitions of employee as one officially acting on behalf of a federal agency, or on the basis of supervision exercised by the government. One authority has indicated that CAP pilots might conceivably be regarded as FTCA employees if they respond to a request from the Air Force to assist in a search for a lost aircraft.[50] Apparently this precise question has not yet been before the courts. Needless to say, should the question arise the solution of it should be hindered by the lack of Congressional direction regarding CAP members federal employee status.

An example of the significance of characterization as a federal agency within the military organization is the legal distinction drawn between non-appropriated fund activities and private associations. Non-appropriated fund instrumentalities, such as equestrian or flying clubs (which may be either non-appropriated fund activities or private associations depending on the method of organization used), military exchange activities, officers' and noncommissioned officer's clubs (messes), and various welfare instrumentalities, have generally been held to

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[50] Jayson, Handling Federal Tort Claims: Administrative and Judicial Remedies § 202.08(2) (1964).

be an integral part of the military organization, and thereby take on the federal agency character of their parent organization. Although there continues to be some judicial uncertainty regarding the non-appropriated fund concept,[51] the United States Supreme Court has ruled that non-appropriated fund instrumentalities are "arms of the government deemed by it essential for the performance of governmental functions."[52] Numerous cases have resulted in decisions applying FTCA employee status to employees (but not members) of non-appropriated fund instrumentalities.[53]

Private association activities have been held not to be an integral part of the military organization, due to the non-essential nature of the functions they perform, and due to the particular characteristics of these organizations which provide for slight governmental supervision (as opposed to the extensive supervision exerted

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[51] See the concurring opinion of Judge Whitaker in Pulaski Cab Company v. United States, 141 Ct. Cl. 160, 167, 157 F. Supp. 955, 959 (1950) and Scott v. United States, 236 F. Supp. 864 (M.D. Ga. 1963).

[52] Standard Oil Company of California v. Johnson, 316 U.S. 481, 485 (1942).

[53] See Roger v. Elrod, 125 F. Supp. 62 (M.D. Ga. 1954); United States v. Holcombe, 277 F.2d 143 (4th Cir. 1960); United States v. Hainline, 315 F.2d 153 (10th Cir. 1963).

over non-appropriated fund activities.[54]

D. APPLICATION OF THE LOANED SERVANT DOCTRINE TO FTCA CASES

An employer who hires a person may loan that person's services to another employer so as to make the person the latter employer's employee. This is the essence of the "loaned servant" doctrine.[55] In their consideration of FTCA suits courts have occasionally been confronted with the loaned servant doctrine in attempts by the government to establish that at the time of negligent conduct by a person hired by the government, such person had actually become another employer's employee so as to avoid governmental liability. On the other hand, claimants sometimes argue that a person hired by some other employer had, at the time of his negligent conduct, become an employee of the government so as to make the government liable rather than the original employer. An appropriate parallel argument in this latter situation where a federal agency is involved would be based on that portion of the definitions section which defines government employees

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[54]Compare para. 2b of Army Reg. No. 230-5 (18 July 1956) with para. 6 of that regulation. Scott v. United States, 226 F. Supp. 864 (M.D. Ga. 1963), aff'd, 337 F.2d 471 (5th Cir. 1964), cert. denied, 380 U.S. 933 (1965).

[55]35 Am. Jur., Master and Servant § 541 (Supp. 1968).

to include "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently, whether with or without compensation."[56] Although this provision was intended to cover public-minded but negligibly compensated government volunteer servants during periods of national emergency,[57] it is not clear how far it should be extended to include other persons who in some way act for the government.[58] It would seem that when the actualities of an employment situation are such as to justify application of the loaned servant doctrine to establish government employment it should not be difficult to find that the employee had acted on behalf of a federal agency.

While the determination of government employment status for the purpose of imposing FTCA liability may often depend on a favorable ruling establishing a loaned servant situation, under other circumstances the doctrine's application would be immaterial in relation to FTCA liability. For instance, it may be that the wrongdoing employee

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[56] 28 U.S.C. § 2671 (1964).

[57] Gottlieb, "The Federal Tort Claims Act - A Statutory Interpretation," 35 Geo. L. J. 1 (1946); Jayson, Handling Federal Tort Claims: Administrative and Judicial Remedies § 203.04 (1964).

[58] Id.

was loaned from one federal agency to another, or it may be that the loaned servant fails to qualify as a government employee either before or after the "loan" is effected.[59]

The loaned servant doctrine was applied in Fries v. United States,[60] to the effect that a chauffeur became a non-federal employee. He had been hired locally by the United States Public Health Service, and was driving a government vehicle in the course of his duties for a venereal disease survey conducted by a city and county, but assisted by the Public Health Service to the extent of loaning equipment and contributing funds, when he negligently caused injury. In this instance the government's assertion of the loaned status of its employee was viewed favorably by the court.

Another instance of a judicial determination of a federal employee becoming a loaned servant, is the early FTCA case of Cobb v. United States.[61] In this action for

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[59]Annotation, 14 L. Ed. 2d 902.

[60]170 F.2d 726 (6th Cir. 1948), cert. denied, 336 U.S. 954.

[61]81 F. Supp. 9 (D. La. 1948).

burns suffered by a member of a junior (high school) ROTC unit it was held that the Regular Army sergeant who had allegedly negligently caused the burns had become a loaned servant and no recovery under the FTCA was allowed since the sergeant was no longer an agent of the United States.[62] In forming its conclusion of a loaned servant status, the court took into consideration the facts that the ROTC military personnel were serving under the control and at the insistence of the state and the public school board, that the military personnel received additional compensation from the school, that the school board was responsible for the military property loaned to it, and that the school board had agreed to appoint one of its custodial employees to care for the loaned equipment. This court's composite approach to the factual situation presented by Cobb is another example of a judicial balancing of legally significant factors, resulting in decisional law defining the ambit of the FTCA. In neither the Fries nor the Cobb cases was there a written or orally expressed agreement stating that

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[62] Two subsequent decisions held that military personnel attached to the Reserve Officer Training Corps at the college level continue to be federal employees for purposes of the FTCA. E.g., La Bombard v. United States, 122 F. Supp. 294 (D. Vt. 1954); Bellview v. United States, 122 F. Supp. 97 (D. Vt. 1954).

the legal responsibility of the federal employee was to be transfered from the federal agency or military service involved. A working arrangement pragmatically evolved whereby the federal employees were to be used in assisting non-federal authorities in matters of mutual interest, and at a certain point during the rendering of this assistance the federal employee's act became the legal responsibility of the assisted non-federal authorities.

The general rule is consistent with these results in that it is not necessary that the person to whom an employee is loaned be given express or written authority to control the employee; the essential thing being the right to control the employee as his proprietor.[63]

The fact that the tortfeasors in the above cited cases received their primary pay from federal sources did not prevent their being loaned. This result is also consistent with traditional legal concepts.[64] A major consideration seems to have been given to the right of control over their employment functions and activities.

The importance of authority or right to control also seems pivotal in cases in which the government's arguments claiming its employee had been "loaned" were

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[63] 35 Am. Jur., Master and Servant § 541 (Supp. 1968).

[64] Id.

not accepted. The general rule is that, in order to escape liability, the original employer must have relinquished full control of the servant for the time being; it is not sufficient that the employee was partially under the control of another. If the employer does not surrender full control over the employee, he remains liable for his negligence during the time he acts for the person to whom he is loaned.[65] There are inherent difficulties in applying this rule to military members since they are at all times subject to the control of a superior federal authority. Any working arrangement with non-military authorities would necessarily have to recognize the military's ultimate right to control its member since one's status as member of the Armed Forces prevents a surrender of full control over that individual.

Subsequent cases involving a loaned servant issue similar to that in Cobb were more concerned with the obligatory nature of the tortfeasor's military status. In Bellview v. United States,[66] the court concluded as a matter of law that an Air Force Lieutenant Colonel, as the Professor of Air Science and Tactics at a Vermont college, was an employee of the government when he negli-

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[65] Id.

[66] 122 F. Supp. 97 (D. Vt. 1954).

gently caused an accident with a car owned by the United States. As factors bearing on the court's decision, the court stated that the tortfeasor was an Air Force officer on active duty, that he was ordered to duty at the college, that he was subject at any moment to be reassigned by the Air Force, and that his main source of livelihood came from his salary as an Air Force officer. This court felt that the inherent control exercised by the Air Force over its member was sufficient to prevent his being loaned to the college. The court was probably in error, however, when it concluded that payment from the Air Force prevents a loaned servant status, since the general rule regarding compensation is contrary. In a subsequent case, a court denied the government's motion to dismiss a negligence complaint on the ground that Army officers assigned to a ROTC unit were not employees of the United States.[67]

It would appear that, while military status does prevent a full surrender of control over him, what is tantamount to full control is relinquished so long as a

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[67]La Bombard v. United States, 122 F. Supp. 294 (D. Vt. 1954). The Army has taken the position that military personnel assigned ROTC duty are to be considered employees of the United States as concerns administrative claims matters, and that the "loaned servant" doctrine is not to be arbitrarily depended upon as a defense to governmental liability. See DA Pam 27-162 "Claims" 1968, P. 50, citing JAGL 1958/8648, 15 July 1958, 8 Dig. Ops. Claims § 35.5 (1959).

military member is actually functioning in a loaned status, and so long as the member's superior authorities forebear exercising their power of control. In other words, a military member should be able to be loaned to a non-federal activity if as much control as is possible under the Armed Forces unique "employment" arrangement is relinquished. This would appear to amount to a forebearance to exercise its right and authority to transfer the loaned member from his present position, and an avoidance of interfering with the borrowing activities' control over the loaned employee.

A leading case involving a situation in which a non-federal employee became a loaned servant to the United States is Martarano v. United States.[68] There it was held that although a state-hired agricultural agent received all his pay and fringe benefits of employment from state agencies, he was, so far as concerned an FTCA suit, an employee of the federal government because it directly supervised and controlled that employer under a "loan" arrangement with the state. The court based its opinion on the law of vicarious liability,and resorted to state and federal statutes permitting the federal use of state

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[68] 231 F. Supp. 805 (D. Nev. 1964).

employees. The employee was officially loaned to the federal Fish and Wildlife Service, and he was working under the direct control and supervision of that agency. A necessary responsibility incident to this right of supervision was the federal government's vicarious liability for the tortious conduct of its state-hired and state-paid employee. Greatly influencing the court's decision were the facts that the Federal Bureau of Sport Fisheries and Wildlife supplied the job description to the state agency, it provided the state employee's efficiency ratings, and it approved his pay increases coming from the state.

It is interesting that this court referred to the language of the FTCA which includes as government employees those persons acting in behalf of a federal agency in an official capacity, even though temporarily and without compensation, in addition to its reference to the loaned servant doctrine. There seemed to be a reluctance to find employee status solely on the loaned servant doctrine, although there was no statement to that effect. Perhaps the court was attempting to incorporate the loaned servant doctrine into this portion of the statutory employee definition. This would seem appropriate since a loaned servant in relation to the FTCA is acting in behalf of the

United States, and frequently he is doing so without federal compensation and on a temporary basis.

The better approach, however, would seem to be to consider the loaned servant doctrine separate from the statutory definitions since the government, in its attempt to establish that one of its employees has been loaned, does not base its argument on the FTCA definitions section. In fact, there is tacit admission of employee status by the use of the loaned servant doctrine as a defense. The employee must have been the lending employer's before he could be loaned to a borrowing employer.

It should be mentioned that when a loaned servant situation exists, an important factor pertaining to the responsibility of the loaning employer for the acts of a borrowed employee is whether the borrowed employee was acting within the scope of the borrowing employer's business at the time of his negligent conduct.[69] In other words, it is conceivable that an FTCA claimant could still resort to the principles of vicarious liability to find the federal government, as a loaning employer, liable for its loaned servant's tortious conduct outside the scope

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[69] 35 Am. Jur., Master and Servant § 541 (Supp. 1968).

of the borrowing employer's activity. This, of course, assumes the employee was still acting within the scope of his federal employment.

E. THE EFFECT OF DUAL EMPLOYMENT STATUS OF AN EMPLOYEE

In contrast to the loaned servant doctrine, it is sometimes argued that an employee may be an employee of both the federal government and another employer at one and the same time. Dual employment status arguments were raised with some initial success in cases involving state National Guardsmen. For instance, in the case of Layne v. United States,[70] an Air National Guardsman was held to be in the dual service of his state and of the United States at the time he was fatally injured in a plane crash resulting from the negligence of federal air field control operators. As a result of this dual capacity holding the decedent's widow was prevented from recovering under the FTCA. Again, in the case of United States v. Holly,[71] a state National Guard unit's caretaker was held to be a federal employee when he negligently caused an automobile accident. An important factor in the court's determination of dual status of

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[70] 295 F.2d 433 (7th Cir. 1961) cert. denied., 368 U.S. 990 (1962).

[71] 192 F.2d 221 (10th Cir. 1951).

the state-employed caretaker was the federal statutory provision (32 U.S.C. § 709) outlining his duties and providing for payment for specified services to come from federal funds. Certain regulations defined the duties and responsibilities in detail and the caretaker was engaged in the performance of such defined duties when the accident occurred. The fact that the caretaker was required by regulations to be a member of the National Guard, take an oath of allegiance to the state, receive compensation from the state, and perform duties for the state was immaterial since the injuries were caused while the caretaker was in the performance of his described statutory duties for the federal rather than the state government. Here, as in loaned servant cases wherein an employee essentially transfers his employer for the purposes of tort liability, the federal government maintained a certain measure of direction and control over the method and means of this employee's service. The major distinction between these cases was the fact that the measure of this control was more limited in the instant case. There was, as the court indicated, a dual employment relationship, rather than a substitution of one employer for another. This situation was essentially viewed as one of dual employment with the caretaker serving two employ-

ers, the federal and the state governments. Where dual status exists, determination of liability turns on the question of the particular employment in which the employee is engaged at the time of his negligent act.

If the caretaker had committed tortious conduct while performing duties flowing from his state rather than federal employment, he would have been held to be a state employee and the United States would not have been liable for such conduct. An example of a dual status case resulting in no FTCA liability was Pattno v. United States.[72] There the United States was not liable for a mid-air collision caused by an Air National Guard caretaker since the purpose of the flight was to evaluate the flying skill of another guardsman, a training function for which the state was responsible.

The use of the Holly case to illustrate a factual situation in which dual employee status existed was to demonstrate a theoretical approach to the problem. The Supreme Court in Maryland ex rel. Levin v. United States[73] effectively overruled Holly when it concluded that civilian

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[72]311 F.2d 604 (10th Cir. 1962), cert. denied, 373 U.S. 911 (1963).

[73]381 U.S. 41 (1965).

caretakers of National Guard units were employees of the state rather than the federal government. This ruling would seem to preempt further application of the dual employment concept to National Guard caretakers, but it should not prevent the future use of the concept in other areas in which the government shares an employee on a relatively equal basis with another employer. It should be mentioned that state National Guard organizations are not federal agencies within the FTCA's definition except when they are called into federal service. It follows that members of such units are not considered employees of the government unless they have been called into federal service.[74]

The issue of dual employment status also arises in certain instances in which the sole employer involved is the United States, where an individual is employed for two separate undertakings. For instance, in the case of Marcum v. United States[75] it was held that a person temporarily employed as a carpenter and foreman by the Geological Survey Division of the Department of Interior to

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[74]Blackwell v. United States, 321 F.2d 96 (5th Cir. 1963). The District of Columbia National Guard is an exception to this rule. O'toole v. United States, 206 F.2d 912 (3rd Cir. 1953).

[75]208 F. Supp. 929 (W.D. Ky. 1962) aff'd, 324 F.2d 787 (6th Cir. 1963).

construct several stream water level gauges was acting as an independent contractor when he was driving his truck home to pick up tools and equipment for use on the job the next day so that FTCA liability could not be established for his negligence while so engaged. It was pointed out that it was clear that a master-servant relationship existed between the employee and the government while he was engaged in the carpenter work for which he was employed, since the government controlled and supervised the manner in which the details of his duties were performed. However, it was stated that a person may serve in a dual capacity and be a servant as to one undertaking for an employer and an independent contractor as to another undertaking for the same employer.

It would seem that the use of the dual status concept in relation to the FTCA is closely related to the question of whether a government's agent was acting within the scope of his employment at the time of his tortious conduct. In Marcum the court framed the issue of scope of employment and then reasoned that there was no master-servant situation justifying application of the respondeat superior theory of liability. The effect was to find that the employee had departed the scope of his employment as a servant and entered the area of his

activities as an independent contractor.

F. SOURCE OF COMPENSATION AND SUPERVISION OF EMPLOYEE AS INDICIA OF FEDERAL EMPLOYEE STATUS

The question sometimes arises as to whether the fact that a person's employment wages are paid from federal government funds establishes federal employer status within the meaning of the FTCA. In the case of Blackwell v. United States[76] the court, after recognizing that a negligent sergeant in the Louisiana National Guard was paid with funds supplied by the United States, held that the sergeant was not an employee of the United States for purposes of the FTCA. The court refused to depart from the well established rule that a member of the National Guard who has not been called into federal service is not an employee of the United States within the meaning of the FTCA. The mere fact of payment from federal funds is not a sufficient connection with the federal government to justify the creation of an employee status. The cases discussed in relation to the loaned servant doctrine (Supra) in which employees hired and paid by the United States were lent to non-federal agencies are further substantiation that a federal source of compensation is non-conclusive as to employee status.

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[76] 321 F.2d 96 (5th Cir. 1963).

The cases discussing instances of non-federal employees becoming employees of the United States for FTCA purposes additionally demonstrate that the source of salary is not a major indicator of FTCA employee status.

The importance of this rule may be seen in relation to the federal government's extensive co-operative efforts with other governments within the federal system. The question often arises as to whether a certain employee is a federal or local government employee. An illustrative case is Harris v. Boreham.[77] There it was held that although the superintendent of public works of a municipality in the Virgin Islands was appointed by the United States Secretary of the Interior, and his salary was paid from federal funds appropriated by Congress for the government of the Virgin Islands, he was nevertheless an official of the municipality's government whose duties were performed under the control and supervision of the governor of the territory. The court emphasized that the fact of federal payment of the superintendent's salary did not indicate that officials of the local government were employees of the United States but merely demon-

[77] 233 F.2d 110 (3rd Cir. 1956).

strated that Congress was willing to subsidize the local government.

The Harris case is a good example of the common situation where both the source of compensation and the right of supervision are raised as conflicting indicators of federal employee status. Its result is consistent with the general rule that control and supervision are major indicators of employee status, while the source of compensation is not. The cases analyzed in the discussion of factors distinquishing independent contractors illustrate this rule's application. One court, in Maloof v. United States,[78] even went so far as to state that where the government possesses the right to exercise substantial control, the contractor must be considered a government employee without regard to other indicia.

Perhaps this is an extreme position, but it raises the further question of what is substantial control. There have been efforts to establish that the government's control over a contractor was substantial when it published and enforced safety regulations pertaining to the contractor's work. The United States has apparently been able to avoid FTCA liability from this approach, as it did in United

[78] 242 F. Supp. 175 (D. Md. 1965).

States v. Page.[79] In that case the negligent manufacture of solid fuel propellant resulted in an explosion causing the death of claimant's decedent. The government had reserved the right to inspect for the adherence to contract safety provisions and an Air Force officer was assigned to the plant with the responsibility of monitoring the contractor's safety performance. The court ruled, however, that the federal contract right of inspection (and the right to stop the work) did not in itself override the general rule of non-liability for torts of the contractor because no duty was created to employees or third parties.

The effect of this decision is two-fold. It indicates that there will be no FTCA liability for the failure of the government to enforce its safety regulation of this type, and secondly, it demonstrates that the right to enforce the safety measures does not amount to control rendering the contractor a government employee.[80]

G. SPECIFICITY IN THE IDENTIFICATION OF FTCA TORTFEASORS

In Smart v. United States[81] it was stated that no

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[79] 350 F.2d 28 (10th Cir. 1965).

[80] DA Pam 27-162 "Claims" 1968, P. 56.

[81] 111 F. Supp. 907 (W.D. Okla. 1953).

action based on the FTCA will lie against the government unless the government employee causing the injury is himself personally liable. In that case a particular government employee (or group of employees) was identified as causing the tortious injury and the court was applying to the factual situation the simple FTCA formula that the United States is liable as would be a private person under the circumstances.[82]

This section of the act has developed considerable controversy over what Congress intended when it established as the test of governmental liability the requirement that private person liability would exist under like circumstances. Did Congress intend that there would be liability only if the government was negligent in a way in which a private person could be negligent? Did it intend that only proprietorial acts were to be covered? Was it intended that the government employee causing the injury be judicially treated as a private person and if he was liable then the government would also be liable?

Early in the history of the FTCA there was concern that this reference to a private person liability could be construed as a limitation on the government's liability by its being interpreted as meaning the United States would

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[82]28 U.S.C. § 1346(b) (1964).

be liable under the FTCA only for the tortious acts that a private person could commit. In Cerri v. United States[83] it was concluded that the government's sovereign functions were so numerous that Congress could not have intended to limit all FTCA liability to governmental acts capable of performance by a private person. In Feres v. United States[84] the Supreme Court held contrary to the Cerri decision by ruling that there was no FTCA liability for injuries or death suffered by members of the Armed Forces incident to their service since they felt that as no private person is lawfully authorized to raise an Army there could be no comparison of governmental and private pursuits. Subsequent Supreme Court decisions[85] have greatly discredited the Feres reasoning and the present rule is that the private person analogy is not to be used as a limitation to FTCA liability. In United States v. Hunsucker,[86] it was believed that at that time the Supreme Court had rejected any distinction between the government's negligence when it acted in its proprietory capacity and its negli-

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[83] 80 F. Supp. 831 (N.D. Cal. 1948).

[84] 340 U.S. 135 (1950).

[85] E.g., Indian Towing Co. v. United States, 350 U.S. 61 (1955).

[86] 314 F.2d 98 (9th Cir. 1962).

gence when it acted in its strictly governmental or sovereign capacity. Currently, the "private person" phrasology is generally recognized as being simply the operative words effecting the FTCA waiver of sovereign immunity rather than words of limitation.[87]

Starting then, with the basic proposition that FTCA liability may be founded on tortious conduct of the employees of the government either in its proprietory or its strictly governmental capacities, the question next arises as to whether a claimant must prove the identity of the wrongdoing government employee in order to satisfy the "private person" test of liability. The Act does not state that a claimant must identify the wrongdoing government employee before FTCA liability arises, and decisional law seems to require only that there must be an uncontradicted inference of employee status in order to establish FTCA liability. In Lund v. United States[88] the claimant was unable to identify a particular government pilot who had allegedly damaged the claimant's automobile by propblasting it with rocks and stones while the car was parked in a designated parking area. The claimant did not

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[87]DA Pam 27-162 "Claims" 1968, P. 35, 36.

[88]104 F. Supp. 756 (D. Mass. 1952).

see the damage occur but argued that negligent starting operation of an aircraft was the only reasonable explanation for the type of damage resulting to his ear. The court held that since there was no evidence to identify the person whose negligent operation caused the damage, and the air station was under the control and direction of the Navy, and there was no counter-evidence offered to neutralize the inference raised that the guilty person was an employee of the United States, that recovery was proper under the FTCA. In this case, neither the employee nor the government property inferentially causing the damage were identified. An earlier case also involving the sufficiency of proof as to whether or not unidentified persons were government employees was Watson v. United States.[89] It presented the probably more common situation in which the claimant saw the government employee and the government property he negligently operated to cause tortious injury, but was unable to precisely identify either. However, evidence was presented showing that the claimant, a civilian employee of the government, was struck by a bus which in size, shape, color, and every detail of appearance corresponded to an army bus which

[89] 90 F. Supp. 900 (D. Alaska 1950).

was at that time being used to shuttle civilians on the post. Evidence was also introduced showing that the bus was being driven by a man wearing an army uniform. The court held these facts sufficient to raise a strong inference that the bus was being driven by an employee of the government. Since the government failed to present evidence to the contrary, this inference was legally sufficient to establish that the bus was being driven by such an employee. The illustrative purpose of this decision is to show that it is sufficient for a claimant to plead and prove facts substantiating that some employee, rather than a particular person, tortiously caused injury to the claimant. This is particularly important in cases involving the negligent maintenance of government property resulting in an unreasonably dangerous condition. Generally, it has been recognized that it is sufficient for the claimant to establish fault on the part of anonymous and unidentified government employees responsible for maintaining the property in a safe condition.[90]

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[90]United States v. Trubow, 214 F.2d 192 (9th Cir. 1954); Jackson v. United States, 196 F.2d 725 (3rd Cir. 1952); United States v. Hull, 195 F.2d 64 (1st Cir. 1952); DA Pam 27-162 "Claims" 1968, P. 50.

III. CONCLUSION

While no attempt has been made to identify all persons qualifying as employees of the government for purposes of the FTCA, representative cases have been discussed for the purpose of illustrating the problems arising in, and the principles applying to, cases dealing with the employment question. From the foregoing discussion it should be concluded that courts faced with the issue of FTCA employee status frequently must depend upon non-statutory criteria, as well as the broad definition of "employee of the government" contained in the Act. It also appears that the major non-statutory indicator of employee status is the factor of control or right to control possessed by the government. Where this factor conflicts with other factors of employee status, it generally determines the issue. Differences in factual circumstances have lead to differences in judicial treatment of the issue of status, regardless of the general recognition of the non-statutory legal principles pertaining to this issue. Depending on the facts of particular cases, judicial conclusions have varied as to whether an activity or organization should be characterized as a federal agency

of which its employees qualify for FTCA purposes, or whether it should be legally distinguished as an independent contractor, the acts of which generally do not support FTCA liability. Results have differed also in the application of the loaned servant doctrine in situations in which persons either enter or depart FTCA employment status, irrespective of formal employer-employee relationships. There has also been an inconsistency, depending on varying factual circumstances, in judicial consideration given to the dual employment concept, with some cases holding that one employee is the legal responsibility of two employers; such liability existing in separate and distinct spheres of activity.

FTCA decisional law has established that the fact that a person receives his wages or compensation for work performed does not necessarily qualify such a person as a government employee. It has also established that the source of an employee's supervision and the right of control over the details of performance are primary indicators of employee status. These are logical developments, considering the purpose of the FTCA was to permit a respondeat superior type liability for the negligent acts of persons occupying a servant relationship with the United States.

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BIBLIOGRAPHY

BOOKS

	PAGES
Am. Jur. Master and Servant § 541 (Supp. 1968)	41,36,32
Black, Law Dictionary (4th ed. 1951) pp. 397, 911	14
Gottlieb & Gantt, "Uncle Sam" as a Landlord Under the Federal Tort Claims Act, 84 (1967)	21
Jayson, Handling Federal Tort Claims: Administrative and Judicial Remedies, §§ 201, 202.01, 202.07, 202.08(2), 203, 203.02(1)(b), 203.04, 276 (1964)	27,28,30 25,24,15 12,4
Prosser, Torts (2d ed. 1955) § 64	23
Restatement, Agency 2d § 220 (2) (1958)	15

Articles

Gottlieb, "The Federal Tort Claims Act - A Statutory Interpretation," 35 Geo. L. J. 1 (1946)	33
Shapiro, Annotation, 14 L. Ed. 2d 892 (1966)	34