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SOVEREIGN IMMUNITY

What Is the Scope of the Federal Tort Claims Act's Waiver of Sovereign Immunity?

by Ralph Anzivino

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ISSUE

Does the Federal Tort Claims Act's waiver of sovereign immunity under circumstances in which the United States, if a private person, would be liable, cover the conduct of a federal mine inspector?

The Federal Tort Claims Act (FTCA) waives the sovereign immunity of the United States for torts of federal employees acting within the scope of their 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." 28 U.S.C. § 1346(b)(1). In addition, Congress has vested the federal district courts with exclusive jurisdiction to hear such tort claims by providing that the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674.

The Federal Mine Safety and Health Act of 1977 (Mine Act) establishes a comprehensive scheme designed to promote the health and safety of the nation's miners and improve working conditions in the nation's mines. Pursuant to the Mine Act, the Secretary of Labor, through the Mine Safety and Health Administration (MSHA), promulgates health and safety standards for coal and other mines. The Mine Act places responsibility for compliance with the health and safety regulations upon the mine operator.

The Mine Act requires MSHA to perform frequent mine inspections and investigations each year to determine whether an imminent danger exists and whether the mine operator is complying with the Act. MSHA is required to inspect each underground mine in its entirety at least four times a year. The Act also provides for an immediate inspection by MSHA when a miner or a representative of miners provides a written and signed notice that there are reasonable grounds to believe that a violation of the Mine Act or of a mandatory health or safety standard exists, or that an imminent danger exists.

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**FACTS**

Respondent miners Joseph Olson and Javier Vargas were seriously injured on January 31, 2000, in a mining accident at the Mission Underground Mine, a copper mine in Arizona that is owned and operated by Asarco Mining Company. The miners were injured when a rock slab weighing nine tons fell from the ceiling of the mine. Respondents allege that, about a year before the accident, in January 1999, MSHA Supervisor James Kirk, who was stationed in the Mesa, Arizona Field Office, received an anonymous written complaint alleging that Asarco used inadequate ground support and roof bolting in its Mission Mine. That complaint asserted that the company had barricaded areas to prevent federal inspectors from observing unsafe conditions. Between May and September 1999, Kirk also received five anonymous telephone calls complaining about safety conditions at the Mission Mine. The callers asked that the mine be inspected for several conditions, including lack of roof bolting to prevent rock falls. Respondents allege that despite those complaints, Kirk did not order or conduct an immediate and thorough inspection of the mine. Finally, Respondents allege that during a regularly scheduled inspection of the Mission Mine in September 1999, MSHA inspector Alan Varland was approached by a miner who complained about unsafe conditions. Respondents allege that, although the miner asserted that Asarco did not use sufficient measures to prevent rock falls, the inspector did not conduct a thorough inspection for those conditions.

In June 2002, Respondents sued the United States under the Federal Tort Claims Act, alleging that MSHA had been negligent in its inspection of the mine and that the United States therefore is liable for the injuries the miners suffered in the January 2000 accident. Respondents' claims of negligence are based on the allegations that (1) Kirk failed to evaluate and act sufficiently upon the six anonymous complaints he received between May and September 1999 regarding safety hazards at the mine; and (2) Varland failed to inspect the mine thoroughly in September 1999. The United States moved to dismiss Respondents' complaint for lack of subject matter jurisdiction and failure to state a claim.

The district court granted the government's motion to dismiss. It held that Respondents' allegations failed to state a claim for tort liability under the law of the place where the alleged tortuous acts or omissions occurred. The court ruled that the liability of the United States under the FTCA is defined as the liability imposed by the state upon a private person in like circumstances. It construed Arizona law, state and municipal decisions occurred. The court ruled that the liability of the United States under the FTCA is defined as the liability imposed by the state upon a private person in like circumstances. The court reasoned that Respondents alleged "no facts" that could support a finding that MSHA's decisions increased the risk of harm to them or that MSHA undertook a duty that Asarco owed to them.

Upon appeal, the Ninth Circuit reversed and remanded. The Ninth Circuit declined to apply the principles of Arizona tort law, under the Good Samaritan doctrine. It reasoned that there is no private-sector analogue for mine inspections because private parties do not wield regulatory power to conduct such unique governmental functions. Instead, the Ninth Circuit decided that Arizona tort law applicable to governmental entities should be applied. The court identified the relevant question as whether, under Arizona law, state and municipal entities would be liable under like circumstances. It construed Arizona law to provide that the state would be subject to liability for a failure by its mine inspectors to perform mandatory safety inspections. Therefore, the court concluded that Respondents had stated a claim for liability under the FTCA.

**CASE ANALYSIS**

The United States maintains that the FTCA waives its sovereign immunity only under circumstances in which 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. The plain text of the FTCA clearly limits the United States' tort liability to that of a private person under state law, and it
The Ninth Circuit disregarded the FTCA's plain text when it looked not to the liability of private persons under Arizona law, but to whether, under Arizona law, state and municipal entities would be liable under like circumstances. That approach, the United States argues, cannot be supported. It is automatic that when a statute's language is plain, the sole function of the courts is to enforce it according to its terms. The text of the FTCA simply leaves no room to expand the United States's liability without regard to whether a private person would be liable in like circumstances to encompass the additional liability that a state has chosen to impose upon its own governmental entities.

The United States further asserts that the Supreme Court's decisions construing the "private individual" language in the FTCA likewise foreclose the conclusion reached by the Ninth Circuit. The Supreme Court has long made clear that the liability of the United States under the FTCA must be judged by reference to the liability imposed on private individuals and not by reference to the liability of a state or municipality. The Court so held in its seminal decision in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955). In that case, the Court considered a FTCA claim that the United States was liable for the Coast Guard's alleged negligence in the operation of a lighthouse. The United States contended that it was not liable under the FTCA for the performance of such "uniquely governmental functions." In effect, the Court observed, the United States had sought to read the FTCA as imposing liability in the same manner as if the United States were a municipal corporation rather than as if it were a private person. The Court expressly rejected that approach, reasoning that it would saddle the FTCA with the casuistry of municipal liability for torts. Instead, the Court held that even when the United States performs uniquely governmental functions, the question is not whether a municipality would be liable, but whether a private party would be liable. That is so, the Court explained, because the text of the FTCA requires reference to the liability principles applicable to a private individual in "like," not "the same," circumstances. In addition, the Supreme Court indicated that the liability of the United States for the Coast Guard's alleged negligence in the operation of the lighthouse should be resolved under the Good Samaritan doctrine.

The United States contends that resort to the FTCA's legislative history is unnecessary given its plain language. But, it says, if the Court were to turn to the legislative history, that history demonstrates a congressional purpose to expose the United States to liability for the conduct of its employees only to the extent that a private individual would be liable under like circumstances. They say the FTCA was the product of "nearly thirty years of congressional consideration." Congress's purpose in enacting the FTCA was to relieve Congress and the President from the burden of disposing of the great number of private claims filed each year seeking redress for alleged tortious conduct by government employees. As the federal government expanded its activities, its agents caused a multiplying number of remediless "wrongs" that would have been actionable if inflicted by an individual or a corporation. UPPERMOST in the collective mind of Congress were the ordinary common-law torts such as negligence in the operation of vehicles, an example frequently mentioned throughout the legislative history. The FTCA was passed with precisely those kinds of garden-variety torts in mind. Because Congress was concerned about the problems created by the commission by government employees of ordinary common-law torts of the sort that private persons commonly commit, it was natural that Congress would choose to waive the United States's sovereign immunity for tort liability only under circumstances in which the United States, if a private person, would be liable to the claimant under state law. The legislative history reveals no intent to extend the United States's liability beyond that of a private person under state law so as to encompass any additional liability that a state may choose to impose upon its own governmental entities. To the contrary, the legislative history confirms that Congress's purpose was to make the tort liability of the United States the same as that of a private person under like circumstances, in accordance with the local law.

The Ninth Circuit looked to whether, under Arizona law, state and municipal entities would be liable under like circumstances. It undertook this analysis based on its conclusion that there is no private-sector analogue for mine inspections because private parties do not wield regulatory power to conduct such "unique governmental functions." The Ninth Circuit believed that the liability of the United States should instead be determined by reference to an Arizona statute that declares it to be the public policy of the state that public entities are liable for the acts and omissions of their employees in accordance with the statutes and common law of the state. Determining that Arizona could be liable under circumstances similar to those in this case if the actions had been taken by a state

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mine inspector, the Ninth Circuit concluded that the federal government should also be held liable. The effect of the Ninth Circuit's approach is to adopt a rule that serves to maximize the liability of the United States by subjecting it to liability in tort under either the principles governing liability of private individuals or, if those principles do not result in liability, to the principles applicable to governmental entities. It is, the United States contends, wholly inconsistent with well-established canons of construction to expand a waiver of sovereign immunity beyond the explicit limit in the statutory text to effectuate such a rule of maximum liability.

The United States believes the FTCA waived the sovereign immunity of the United States only in situations in which a private party would be liable. Under this approach, in circumstances in which a private person would not be liable or that involve a uniquely governmental function with no private party analogue, the FTCA does not impose liability.

The Respondents, on the other hand, maintain that when private persons do not regularly perform the type of conduct complained of, courts may look to an analogous state actor under like circumstances. The United States attempts to limit the FTCA's waiver of sovereign immunity by arguing that if there is no private individual in like circumstances, the United States is simply not liable under the FTCA. Yet according to the Respondents, that position finds no support in the FTCA's text or purpose and has been repeatedly rejected by the Supreme Court. They contend that even when no private analogue exists, the United States is liable for the wrongful conduct of its agents who commit torts that no private individual would possess the authority and opportunity to commit. The FTCA's text does not limit liability to the activities that private persons perform. The Act refers to a "private person" in relation to the "liability" of a private person, not to the "activities" of a private person. In fact, the FTCA speaks of a government employee acting within the scope of his or her office or employment, which presumably would more often than not involve governmental actors performing governmental duties.

The United States attempts to support its assertion that no liability exists for activities private persons do not perform by looking to the legislative history of the Act. The United States argues that Congress had "only garden-variety torts" in mind when passing the FTCA. From that assertion, the United States concludes that it was natural that Congress would choose to waive the United States's sovereign immunity for tort liability only under circumstances in which 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.

But, say the Respondents, that argument is a non sequitur. It does not follow even from the United States's interpretation of the FTCA's legislative history that Congress intended to immunize the United States from those activities for which there is no direct private person analogue. Congress created the FTCA because it thought the government should assume the obligation to pay damages for the misfeasance of its employees in carrying out its work. Had Congress intended that the government be liable only for "garden-variety torts" such as negligent driving, it could have easily excluded all regulatory activity from the FTCA's reach. It did not do so. Rather, the legislative history demonstrates that Congress intended to provide a remedy to those injured by the negligence of governmental employees who were carrying out the United States's work. The FTCA provides that the United States is liable for the negligence of its employees so long as they are acting within the scope of their office or employment. The broad and just purpose of the statute was to compensate the victims of governmental negligence in circumstances like those in which a private person would be liable for his or her personal negligence. The Respondents contend that the United States's argument is also contradicted by the Supreme Court's prior interpretations of the FTCA. In Indian Towing, the Court held that excluding liability for activities that private persons do not perform would be attributing bizarre motives to Congress. The Supreme Court refused to predicate liability on such a completely fortuitous circumstance as the presence or absence of identical private activity. No "private person" analogy was available in Indian Towing because private persons were not allowed to operate lighthouses.

While the United States contends that the FTCA language is "plain," the FTCA does not fully explain what to do when the conduct complained of is conduct that private persons do not regularly perform. Courts have typically filled this gap in one of two ways. One, by imagining a private person and applying the Good Samaritan doctrine, or two, by looking to what the liability of a state actor would be under state law. Respondents contend that the solution that best effectuates Congress's intent is to look to a state actor under state law so long as doing so does not import state governmental immunities or make the United States liable to a greater extent than a private person. This
solution is preferable, they say, because a state actor in a factually analogous situation is in the most "like circumstances." In this case, the state mine inspector provides the most "like circumstances" available for judging whether the United States, if a private person, would be liable under the law of Arizona for the negligent conduct of an MSHA inspector. By looking to Arizona state entity law, the Ninth Circuit carried out in the most precise way possible Congress's intent to impose liability on the United States in accordance with the law of the place where the federal employee's act or omission occurred. Any other result would violate the "like circumstances" requirement because private persons simply do not perform regulatory inspections. If a state government entity would be liable, so, too, would the United States, as long as that liability is not based on a principle unique to governmental entities. In other words, if the principle of law that makes the governmental entity liable under like circumstances is equally applicable to a private person, the United States is exposed to liability under the FTCA.

Respondents further assert that although regulatory inspections are generally not performed by private persons, looking to a state actor for the most "like circumstances" will not subject the United States to any greater liability than that of a private person under Arizona law. Regulatory inspections are inherently governmental functions. The cases in Arizona that discuss persons who negligently conduct inspections that they were required to conduct involve governmental entities. Examining those cases to determine whether the United States would be liable for like conduct in Arizona does not expose the United States to any greater liability than that of a private person because in Arizona the parameters of duty owed by the state will ordinarily be coextensive with those owed by a private person. Liability does not turn on the status of the actor. In Arizona, the law applied to a state actor is the same law that is applied to a private individual, and a state actor is treated like a private litigant for tort purposes. It has long been the law in Arizona that employers or principals—individual, corporate, or governmental—are responsible for the tortuous wrongdoing committed by their agents and employees acting within the scope of their employment. To the extent a state government entity and a private person are equally liable under state law in like circumstances, imposing liability on the United States necessarily comports with the FTCA's requirement that immunity be waived only when a private person would be liable under like circumstances. The Ninth Circuit's decision in this case is thus both permitted by and consistent with the FTCA's "private person" language.

Respondents further argue that the text of the FTCA demonstrates that Congress intended the United States to be liable for negligence in the course of carrying out statutory and regulatory duties. The FTCA excludes from liability any claim based upon an act or omission of an employee of the government exercising due care in the execution of a statute or regulation, whether or not such statute or regulation is valid. By excluding liability for governmental employees who exercise due care in the course of executing statutes or regulations, the Act necessarily includes liability for government employees who do not exercise due care. Congress could have easily excluded liability for all violations of federal statutes or regulations, but it did not. Interpreting the FTCA to immunize the United States from all liability while per-forming acts required by statutes or regulations would impose a result clearly unintended by Congress.

Respondents further believe that the weakness of the United States's position becomes crystal clear when one considers the "discretionary function" exception to the FTCA waiver of sovereign immunity. The United States enjoys immunity to FTCA liability when it exercises a discretionary function. It is well settled that no discretion is involved when a federal statute or regulation prescribes a course of action because in that circumstance the employee has no option but to follow the directive. In other words, it has long been the law that the United States is immune from liability when it performs discretionary functions, but that it is exposed to liability when it performs a function pursuant to a federal statute or regulation that mandates that course of action. Now, the United States is arguing that it also cannot be liable for its violations of even these mandatory statutes and regulations. Congress, the Respondents say, did not intend such a result.

Finally, Respondents maintain that the hypothetical "private person" must be an individual with a "duty" to inspect and not one who "chose" to inspect. The confusion stemming from the "private person under like circumstances" analysis is compounded when courts look to a "private person" but ignore the "under like circumstances" requirement. To satisfy the "like circumstances" requirement, the hypothetical private person who is used to determine liability under state law must be a private person with a duty to inspect, whether contractual or otherwise. The FTCA provides that the United States will be liable in the same manner and to the same extent as a private individual "under

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like circumstances.” In the context of mine inspections, this means that for the government to be liable, its inspector must have been required to inspect with due care. Any analogy to a private person without a duty to inspect with due care falls short, and courts that rely on such an analogy are comparing apples to oranges. The United States correctly points out that inspections often are performed by private entities—insurance companies, labor unions, consultants, employers, and landowners. But whether the private person in those examples is subject to liability is generally not dependent on the Good Samaritan doctrine. In those examples, the inspector had a duty to inspect, whether imposed by statute, contract, or common law. There is thus no need to find an additional duty in the Good Samaritan doctrine. Similarly, in this case, the United States had a duty to inspect the mine. The “like circumstances” analysis should properly be applied to an individual who has a duty to inspect with reasonable care. The Good Samaritan doctrine is clearly not applicable in such a case. While it is true that in Arizona, as in many other states, the Good Samaritan doctrine can provide a source of duty and liability for FTCA purposes, in many cases there is a better analogy. Respondents say that in the case now before the Court, the most analogous person is a state mine inspector.

SIGNIFICANCE
The federal government has more than four million employees. The Federal Tort Claims Act was passed to waive the federal government’s sovereign immunity to permit those injured by a federal employee to recover their loss. The FTCA, however, describes its waiver as “under circumstances where the United States, if a private person, would be liable.” The United States’s interpretation of the waiver language requires an analogue in the private sector to impose liability. For example, a federal employee driving a vehicle that injures someone has an analogue in the private sector, but a federal mine inspector does not. Therefore, it contends there is no liability in this case. The Respondents interpret that same language to require courts to look for a “like circumstance” analogue, such as a state inspector, when determining whether there is liability. The Supreme Court will decide which analogue is to be used for future claims under the FTCA.

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