

In the

Supreme Court of the United States

MELVIN LAIRD, Secretary of Defense)
et al.,)

Petitioners,)

vs.)

JIM WICK NELMS, et al..)

Respondents.)

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No. 71-573

Washington D. C.
April 17. 1972

Pages 1 thru 40

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No. 71-573

JIM NICK NELMS, et al.,

Respondents.
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Washington, D. C.,

Monday, April 17, 1972.

The above-entitled matter came on for argument at
1:00 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

RICHARD B. STONE, ESQ., Office of the Solicitor
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20530; for the Petitioners.

GEORGE E. ALLEN, SR., ESQ., Allen, Allen, Allen &
Allen, 1809 Staples Mill Road, Richmond, Virginia
23230; for the Respondents.

C O N T E N T SORAL ARGUMENT OF:PAGE

Richard B. Stone, Esq.,
for the Petitioners

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George E. Allen, Sr., Esq.,
for the Respondents

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 71-573, Laird against Nelms and others.

Mr. Stone, you may proceed whenever you're ready.

ORAL ARGUMENT OF RICHARD B. STONE, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. STONE: Thank you, Mr. Chief Justice. And may it please the Court:

This case, which comes on a writ of certiorari to the United States Court of Appeals for the Fourth Circuit, raises two important questions of statutory interpretation concerning the scope of the government's liability under the Federal Tort Claims Act.

The issues in this case are closely related to and, in our opinion, virtually controlled by the issues decided by this Court in the landmark case of Dalehite vs. United States, decided at 346 U.S. In that case, of course, the government was held not liable under the Tort Claims Act for damage caused in the disastrous explosion of certain chemical fertilizers which had been packed and transported by the government for export abroad. And which explosion virtually devastated the city of Texas City, Texas.

Fortunately, the factual context of this case is somewhat ghastly than that which the Court confronted in Dalehite.

Q I'm not so sure that it's important at all, but in the Dalehite case, actually it was not government but private contractors who were --

MR. STONE: That's right. But it had been carried out pursuant to a government decision.

Q But that was the basic issue, that a private contractor was implementing a governmental policy to try to keep Europe from starving.

MR. STONE: I think, for the most part, Mr. Chief Justice, it was assumed in the decision that the government had played a sufficiently close role in the entire process, including the planning of the export and the transporting and packing of the materials, that that issue was -- at least that level of responsibility was assumed in the opinion.

Respondents are residents of Nashville, North Carolina, which is a rural community of about 1500 inhabitants. And respondents allege that on several occasions, and especially on November 14, 1968, their house was damaged by so-called sonic booms which, put simply, are noisy vibrations that may occur when aircraft fly overhead at speeds greater than the speed of sound.

Respondents sought first to recover from the Air Force under the administrative procedures authorized by the Military Pay Claims Act, and the Air Force regulations promulgated thereunder. But the Air Force engineer who

investigated their house concluded, in a detailed report, which is reproduced at pages 16 and 17 of the record, concluded that the damages to respondent's home had indeed not been caused by sonic booms.

Respondents then sued the government in the District Court under the Federal Tort Claims Act.

In answer to their complaint and supporting affidavits corroborating the event of the sonic boom and the relation of the November 14 sonic boom to certain damages sustained by respondents' homes, the government filed a motion for summary judgment and supporting affidavits.

The government's affidavits acknowledged, indeed, the Air Force had conducted a supersonic flight over the Nashville, North Carolina, area on the alleged date, and that the aircraft in the flight were attached to the 9th Strategic Reconnaissance Wing of the Strategic Air Command. That is a branch of the Air Force which is charged with the execution of periodic high-level supersonic training flights.

These flights, I understand, are used for training pilots for combat missions and are regulated by comprehensive predetermined flight plans.

The Commander in Chief of the Strategic Air Command, General Holloway, who ranks, for purposes of this type of operation, directly below the Joint Chiefs of Staff, stated in his affidavit that he directed the operational training of

air crews by supersonic flights, and that the November 14th flight was, in his words, "authorized by and conducted pursuant to my direction."

Other affidavits filed by high Air Force personnel also stated that the flight was at all times on course with respect to location and altitude, as described by the mission flight plan, directed by the Commander in Chief; and this statement is, I gather, not controverted in any of the record of this case or in the Court of Appeals opinion, nor is it alleged at all that the flight plan itself was in any manner faulty.

The District Court granted the government's motion for summary judgment on the authority of the Dalehite case, on the ground primarily that the planning and execution of the flights in question was a, quote, "discretionary function for which the government is specifically exempted from liability under Section 2680(a) of the Tort Claims Act"; and I shall address myself to that discretionary function provision shortly.

The Court of Appeals reversed the District Court's grant of summary judgment, and the Court of Appeals held that the discretionary function exemption was inapplicable in this case for reasons which, as I say, I shall refer to later.

On the merits of the case, after getting over the discretionary function exemption, the Court held, in direct

contradiction, I believe, to this Court's holding in Dalehite, that even though no negligence in the planning or operation of the flight had been alleged, and no wrongful conduct at all had been alleged, the government could still be liable under the Tort Claims Act under a theory of strict liability for engaging in ultrahazardous activity.

The government believes that the Court of Appeals erred in both aspects of its holding, both with respect to its refusal to apply the discretionary function exemption and on the merits in its imposition of the theory of absolute liability for the conduct of ultrahazardous activity under the Tort Claims Act.

And I shall, with the Court's permission, deal first with the merits of the case, that is, the question whether the Tort Claims Act gives rise to government liability for ultrahazardous activities without a finding of fault or negligence.

As I imagine the members of this Court are well aware, the Tort Claims Act was enacted by Congress in 1946, and authorized, for the first time in this country's history, a very limited and well-defined range of tort actions which could be brought against the Federal Government.

The issue whether the government ought to waive its sovereign immunity from tort action had been vigorously debated in virtually every Congress since 1919, and over 30 bills had been introduced and extensively discussed in both Houses

of the Congress.

We attempt to show throughout our brief in this case, as we did very extensively in our brief in the Dalehite case, and we have put in our brief here a summary of the extremely complex legislative history of this Act.

As this Court noted in Dalehite, the overwhelming concern of the Congress throughout its discussions about whether to subject the United States to tort liability was the need to provide compensation, without resort to the laborious process of private bills, for those who had been injured by the ordinary common law tortious acts of individual government employees and agents. And the chief example of such a tortious act used literally hundreds of times in the discussions is the negligent operation of a motor vehicle driven by a government employee in the scope of his employment.

Indeed, the House Report in the 79th Congress, which ultimately passed the final version of the Tort Claims Act, noted the need to insure that the Act would "preclude any possibility that the bill might be construed to authorize suit for damages growing out of an authorized activity where no negligence on the part of any governmental agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious."

Q I thought that the government had a department

to which a person who had suffered damages of this nature would submit a claim and they would be paid, administratively.

MR. STONE: That is right, Mr. Justice Douglas. There is provision in the Military Pay Claims Act, which is set out at 10 U.S.C. 2732 and so on, by which --

Q The reason that I asked is that out West, where I come from, this sonic thing has been a terrible nuisance and has injured a lot of property. People have filed their claims and been paid.

MR. STONE: Yes, and so in this case, similarly in this case a claim was filed to the Air Force. What the Military Pay Claims Act does is authorize the Air Force to establish -- and the other branches of the government for whom the military approve, and damage that might occur to civilians -- to institute procedures under which recovery might be sought regardless of fault. And that administrative procedure was indeed followed in this case by respondents; and the Air Force, as I stated earlier, the Air Force engineer determined that there was no causal connection in this case between the sonic boom and the damage inflicted.

As a routine matter, the Air Force does pay up to a certain maximum amount specified in the Military Pay Claims Act, damages that occur through sonic booms. But this --

Q One of the most frequent kinds of damage from the sonic booms is shattered windows. Were there any shattered

windows here?

MR. STONE: According to the investigative report there were no shattered windows here; and I gather that the primary aspect of damage, which respondents have alleged, is cracking in the walls. And the engineer noted in his report a number of reasons why he thought that it was impossible that the cracking in the walls of this particular house could have been caused by sonic boom.

I think the Air Force takes the position generally that cracked glass is the primary danger, and that major structural damage has really not been proved yet to be correlated to sonic booms.

But I think that issue is not present in this case.

Q But in any event this suit was not filed until after an administrative denial of the claim?

MR. STONE: That's right. And the suit --

Q At least it was sought through the Air Force?

MR. STONE: That's right. And the suit was filed under the Tort Claims Act, which is, by the very terms of the Military Pay Claims Act, mutually exclusive with Tort Act Liability. Because only Military Pay Claims Act liability is authorized in the event that there is no claim under the Tort Claims Act, which we believe, incidentally, is a recognition of the fact that the Tort Claims Act does not cover liability in the absence of some sort of fault or wrong.

Q Is there a maximum that's allowed under the Pay Claims Act?

MR. STONE: Under the Pay Claims Act there is a \$15,000 maximum, except in certain -- that can be through certain special procedures, in certain special proceedings it can be waived if necessary.

Q May I get that again, Mr. Stone? Are you suggesting that under the Military Pay Claims Act, in that procedure there has to be a determination in the first instance, before an allowance is made to the claimant, that there would be liability under the Tort Claims Act?

MR. STONE: No. There has to be a determination that there would not be liability under the Tort Claims Act.

Q Before there may be, that's what I --

MR. STONE: That's right.

Q And the only inquiry is whether the sonic boom caused the damage --

MR. STONE: Exactly.

Q -- and the extent of the damage?

MR. STONE: Exactly.

Q Now, are you suggesting anything in the nature of the election of remedies here?

MR. STONE: No, we're not suggesting, I don't think, anything in that nature. We're suggesting that the respondent has failed successfully to achieve a remedy through the

administrative process authorized by the Military Pay Claims Act, that he is now suing under the Federal Tort Claims Act, and that that Act --

Q Well, did he have to go first for relief under the Military?

MR. STONE: No, I don't believe he did. We would not argue any exhaustion principle.

Q Yes.

Q Because, if for no other reason, they are mutually exclusive?

MR. STONE: Mutually exclusive, that's right.

Q And is it Congress that has said that no administrative payment, where it is covered by the Tort Claims Act, or is that a regulation?

MR. STONE: That's Congress that has said that. That's 10 U.S.C. 2733(b).

Q So that you argue that Congress thereby itself indicates at least some kind of damage is not covered by this --

MR. STONE: Tort Claims Act. That's right. And what -- let me get back to the language of the Tort Claims Act itself. Even though negligence was the major concern, we of course acknowledge that the Act was worded, not purely in terms of negligence, but rather in terms of injury caused by the negligent or wrongful act or omission of an employee under circumstances that would give rise to State liability.

In the view of the Court of Appeals, the addition of the word "wrongful", and that is the important word for purposes of this case, means that Congress intended to waive the immunity from tort action by the government for any act which would be grounds for a tort suit under the law of the State where the act in question occurred.

And since a person may be liable in North Carolina to a tort suit for ultrahazardous activity without any question of fault, the Court reasons that the government is correspondingly liable here. And disregarding the question of whether the operation of supersonic flights constitutes an ultrahazardous activity, which I don't believe the Court properly determined, which, in any event, is what would require a fact-finding proceeding of some sort, we believe the Court was in very serious error when it read the word "wrongful" in the Tort Claims Act to apply to absolute liability for ultrahazardous activity.

Q Well, as I get that, Mr. Stone, does it work like this, then: If the discretionary exception is properly applied, nevertheless, under the Military Pay Claims there might have been, had the Air Force satisfied itself as to the causal connection of the sonic boom to this damage --

MR. STONE: Right.

Q -- there might have been a payment under that Act?

MR. STONE: Yes. Yes, Mr. Justice Brennan.

Now, there are two different problems here. There is both the discretionary function problem, which I shall get to, and the question whether there was any wrongful or negligent act. Both -- in order for there to be Federal Tort Claim Act liability, both of those conditions have to be fulfilled. There has to be a nondiscretionary function by a federal employee, and there has to be a wrongful or negligent act.

Q And neither is -- if either is not present, then you have to go another route?

MR. STONE: Then your only remedy is from the Air Force administrative procedure.

Our essential position in this case is, and I think it is Hornbook tort law, that strict or absolute liability for the conduct of an ultrahazardous activity is imposed not because a person has engaged in conduct which is in any way negligent or wrongful, but merely because the activity is one which poses a likelihood of damage, regardless of the level of care exercised.

And as the commentators, I think unanimously, agree, it is the unique characteristics of this type of liability that it is imposed not because of a wrongful act but because of a policy judgment that the person who engages in an ultrahazardous activity should bear the risk of harm caused by that

activity. And whatever the word "wrongful" means in addition to the word "negligence", it simply makes no sense to say that an act is wrongful because it gives rise to liability under State law, especially when the underlying assumption of that State law is not that the conduct is wrongful but, on the contrary, that it is deemed to give rise to liability for policy reasons in spite, explicitly in spite of its not being wrongful.

Q Are there any private aircraft that create a sonic boom?

MR. STONE: To my knowledge, Mr. Chief Justice, there are not so far; but I don't know the answer to that. That's not in the record.

Q So it's military aircraft only?

MR. STONE: To my knowledge, it is a problem that has been exclusively in the domain of military aircraft; but that is not in the record, I don't know the answer to that question. Whether -- I'm quite certain that there are private companies which are engaged in building of planes that can fly at more than supersonic speeds; but whether they're being used for any other than military purposes, I don't know.

Q Well, they are all privately built, there are no government --

MR. STONE: Yes, that's right.

Q -- agencies constructing military aircraft.

MR. STONE: What I understand is that there are plans for the use of planes flying at these sonic-boom oriented speeds by private industry; but I have not been able to find evidence that they are yet flying.

Q Isn't the Concord one of them?

MR. STONE: Excuse me?

Q The Concord, isn't that one of them? It's not ours, but ---.

MR. STONE: I don't know.

I would conclude this portion of the argument by referring to the very extensive legislative history of the Act, which we discuss, for these purposes, at pages 13 to 16 of our brief, which indicate that the word "negligence" was intended to cover the great bulk of cases brought under the statute, and the word "wrongful" was quite explicitly meant to have a very, very narrow purpose of primarily including certain kinds of trespass which were not necessarily negligent.

And this Court, in Dalehite, very explicitly agreed with this reading of the legislative history.

Q Does the Tort Claims Act cover intentional wrongs?

MR. STONE: It excludes most intentional wrongs. Section 2680(f), I think it is, quite explicitly excludes assaults and false imprisonments and intentional ---

Q Well, what's deliberate trespass, isn't that intentional?

MR. STONE: Well, those deliberate torts which are excluded are excluded by name, and deliberate trespass is not excluded.

Q And therefore would fall within "wrongful"?

MR. STONE: And therefore would fall within "wrongful" that's right.

Q Well, if the Air Force knows that it's inevitable that there will be sonic booms on this flight, they know that, it's inevitable, this sonic boom; they don't know that every sonic boom will cause damage, but they know there is a serious risk of it, and they do it deliberately. I mean, they fly --

MR. STONE: That's right.

Q -- and deliberately impose this risk of lawsuits. That wouldn't be under the term of intentional trespass?

MR. STONE: I think that's precisely the kind of situation which gives rise to strict liability for ultra-hazardous activity, where there is a statistical certainty that at some point, if you continue to carry on this activity, some kind of damage will occur. But it is considered inherently a reasonable activity to perform, and liability is considered to be imposed regardless of any fault.

Q But doesn't it get close to being intentional?

MR. STONE: Well, this is a question that is raised in all the commentaries with respect to where the strict liability is an intentional tort. I don't think that plays into the Tort Claims Act, in any event, because the exceptions in the Tort Claims Act are not to intentional torts by category, but to certain specific torts, all of which are intentional.

Q I take it there's a difference, too, where you're talking about an intentional tort, whether you mean whether the actor intended to do the particular act or whether he did it with some sort of bad intent towards the recipient?

MR. STONE: I think that's right, Mr. Justice Rehnquist. And the mere fact that he intended to do the act, and knew that it was a statistical probability, indeed a statistical certainty, that some damage would ultimately occur, is not, I think, been considered by any of the commentators to be an intentional tort for process and restatement of torts type categorization process.

Q And it's not wrongful, either?

MR. STONE: And we say not wrongful, and this Court quite specifically, in Dalehite, said that activity of this nature was not wrongful. And that was not dealing with sonic booms, but it was dealing with this broad category which is defined in terms of relative certainty that some sort of

damage would occur.

Q Have you ever been on a horse when one of those sonic booms hit?

MR. STONE: I have not been, Mr. Justice Douglas. I understand that's one of the more unpleasant aspects of the sonic booms.

Q Well, speaking of what's wrongful or not, perhaps aircraft that fly over horse country, where people are out doing their own business in a peaceful, ordinary way, when this thing hits, --

MR. STONE: Mr. Justice Douglas, there are --

Q -- the question is, who is to suffer the loss?

MR. STONE: There indeed is a question as to who should suffer the loss in this situation and in many situations in which governmental activity, regardless of finding of fault or wrong, causes damage to an individual.

Q I suppose you're asking --

MR. STONE: And Congress has not chosen to --

Q I suspect your answer would be that a boom, if a boom is to have any harmful effect, if you get thrown off a horse when the boom goes off, you know what causes you to get thrown off the horse; you're hurt. I suppose your answer would be that he may not ever recover under the Tort Claims Act, but you're likely to get it under the Military Pay Claims Act?

MR. STONE: That's exactly right, Mr. Justice Brennan. But the Tort Claims Act, in very specific terms, says that the activity must be wrongful. And this Court, in Dalehite, very specifically --

Q In this, North Carolina has what is called the Uniform Aviation Statute -- I can't find the text of that statute -- is it in these papers anywhere?

MR. STONE: Oh, I'm told that it's not. I --

Q You referred to trespass, and my impression was -- although I don't have the text of the State statute before me -- that that's exactly what the State makes this; that it says that from the point of view of overflying aircraft a landowner owns all the way up to the heavens, in the old town law concept, and that an airplane that invades the airspace above his real estate is guilty of trespassing. And any damages involved are damages that result from trespass.

And you just conceded that there is Federal Tort Claim Act liability in the event of trespass, have you not?

MR. STONE: Mr. Justice Stewart, I don't know the answer to whether North Carolina law categorizes this as a trespass.

Q We don't have the text of the statute?

MR. STONE: We have a reference in our petition to North Carolina General Statute 63-14. This is a footnote on

page 26 of the petition, and I think that the reason we have not gone into this in detail in North Carolina law is that the Court of Appeals, which held in respondent's favor, assumed that the theory of North Carolina law, which it was basing its holding of Tort Claims Act liability on, was a strict -- conventional strict liability for ultrahazardous activity theory; and not a trespass theory.

Q Well, strict liability resulting from trespass, and there wasn't that kind of physical trespass.

MR. STONE: Oh. Oh. Excuse me --

Q And there wasn't that kind of trespass in the Dalehite case.

MR. STONE: -- excuse me. Let me answer that -- let me answer the question by saying that I don't think that -- I think that the kind of trespass, even a trespass would have to be wrongful in some sense.

Q Well, it is wrongful, just by virtue of the fact it's a trespass, is it not? If I walk on somebody else's property -- forgetting airplanes in this statute -- that's a trespass whether I have an evil intent or not.

MR. STONE: I think unless there is some element of fault, even though it can be labeled a trespass, it's not necessarily wrongful.

Q Of course if there's no damage, there's no line of action; it's still a trespass.

MR. STONE: It's tortious. It may be tortious, but it is not necessarily wrongful. And, in any event -- excuse me.

Q A trespass -- I should have thought it could at least be argued that a trespass is, per se, wrongful, the invasion of somebody else's real estate.

MR. STONE: Well, I would suggest that we don't know whether North Carolina law specifically would focus on --

Q I should have thought it might be rather important in this case.

MR. STONE: Well, it would be rather important --

Q I can understand the theory on which the Court of Appeals rested. That's it.

Q Do you think Congress used the word "wrongful" in the Act to mean anything that was a legal wrong under State law, or do you think it had some narrower definition?

MR. STONE: Oh, quite -- we believe quite certainly that it had a much narrower definition. That if it meant something that would give rise to liability under State law, different words would have been used. And the Court said in Dalehite that different words would have been used; and the Court said in Dalehite that if wrongful had meant simply tortious, in the sense of giving rise to liability, that there are other models for compensation, such as the Maritime Act, for example, which specify that any act which is considered tortious gives rise to federal liability.

Q Mr. Stone, suppose this plane that was giving off sonic booms, or creating them, had instead or at the same time it was doing this booming lost its power and fallen right on a house and demolished it; a Tort Claims Act case?

MR. STONE: That, I gather, has been held in different ways in the circuits. That is, a falling which is --

Q It's been held --

MR. STONE: -- a falling which occurs regardless of fault, I think we would argue is still not compensable necessarily under the Tort Claims Act.

Q If it fell out of the sky because it was -- because of a bomb had been placed on it and exploded, so it would be a nonnegligent falling, you would say that wasn't covered by the Tort Claims Act?

MR. STONE: That's right, Mr. Justice White, we would say that that was not a wrongful -- not a wrongful act by a federal employee.

Q I don't recall the Fourth Circuit case, but there was one perhaps 17 or 18 years ago, shortly after Dalehite, in which the pilot thought his plane was going to crash and so he put it on automatic control and headed it out to sea, and then he jumped with a parachute, and the automatic pilot wasn't working and the plane circled and landed on a house in Baltimore.

MR. STONE: I believe, Mr. Chief Justice, that that's

the Praylou case, and, indeed, that case was decided very shortly after Dalehite, and this Court held that -- this Court denied certiorari in the case. The Fourth Circuit held that there was liability, but one of the theories argued in that case was the theory of res ipsa loquitur, and that when this Court denied certiorari, the papers before the Court emphasized heavily that the theory of res ipsa loquitur was in the case, so that in effect negligence was alleged and we have always assumed that the Court denied certiorari primarily because there was a problem of negligence and not on an understanding that Dalehite was being quietly reversed four months later on its holding that there was no absolute liability.

Mr. Justice Stewart, let me add to your question that I simply don't know precisely how North -- I have taken this on the assumption that the Court of Appeals correctly interpreted North Carolina law, especially since the Court of Appeals held for respondents on a theory most favorable to them, and I haven't looked any further into it.

But I would certainly be happy to make a further submission about North Carolina law, if the Court deems it crucial to this case.

Q I can't speak for the rest of the Court, but it strikes me that it might be material, since you do see the --

MR. STONE: Well, we would be happy to address ourselves to this question in a supplemental brief of some sort.

Q I'd be very happy if you did so.

MR. STONE: I see I have very little time, and I have not yet gotten to the second question, which is whether the Tort Claims Act precludes recovery on the basis of the Section 2680(a) exemption for discretionary -- the discretionary function.

I would say in brief that I think that the fact that this activity, inherently the planning and operation of this flight, was inherently a discretionary function within the meaning of the 2680 exemption, is uncontroverted by anyone in this case, including respondents and the Court of Appeals. That the activity was inherently discretionary follows very much a fortiori from the Dalehite case.

The ground on which the Court of Appeals refused to apply the discretionary function exception was not that the activities were not discretionary, but that the discretion was moved by the Air Force regulation 5534, which is reprinted as Appendix C to our petition, and that is indeed the regulation promulgated pursuant to the Military Claims Act, which deals with procedures applicable to supersonic flights and recovery for supersonic flights.

And I think it's quite clear that that regulation has nothing to do with the discretionary nature of the activities involved in this case.

The Court cited specifically two aspects of regula-

tion 5534. It first noted that the regulation instructs the Air Force to insure "maximum protection for civilian communities in carrying out the flights."

And from this the Court appears to have reasoned that if any damage to a civilian occurs, the conduct of the flight in some way loses its discretionary nature.

Now, the short answer to this contention, I think there are several other answers also, is that the provision for maximum protection of civilians is, in its own words, made applicable only whenever feasible, and, accordingly, flights are required to avoid populated areas, "as much as possible"; language, which on its face leaves the Air Force with considerable discretion, which is not even alleged to have been abused in this case.

In addition, of course, I don't think that that regulation could have changed, widened the scope of government liability under the Tort Claims Act anyway.

The Court also refused to apply the discretionary function exemption on the ground that the regulation specifies that "the Air Force must accept responsibility" for damage caused by sonic boom, and from this the Court reasoned that there is no discretion to fly supersonic airplanes without compensating injured civilians.

I submit to the Court that this aspect of the lower court's holding is really a play on words, because whatever

discretion the Air Force has under its own regulation to pay or refuse to pay damages to injured persons has nothing to do with the discretionary function provision of the Tort Claims Act, which relates only to the nature of the activity engaged in, and not to the obligation to pay a claim.

MR. CHIEF JUSTICE BURGER: Mr. Stone, we'll enlarge your time five minutes, and give Mr. Allen five minutes. You can divide it, allocate it any way you wish.

MR. STONE: Thank you, Mr. Chief Justice.

And I would add again that I don't think Air Force regulations, dealing with repayment of claims, can confer Tort Claims Act jurisdiction on the federal courts in cases which are specifically excluded from jurisdiction by that Act.

When respondents sought relief from the Act, from the Air Force, pursuant to this regulation, as I said earlier, the Air Force engineer who investigated the damaged premises concluded that the damage was really far smaller in amount than respondents had claimed, and that, in any event, it had not been -- it was not the type of damage that could be caused by a sonic boom.

I think that one suspects that the court below was motivated in this case essentially by a feeling that the government ought to bear the risk of damage caused by its operation of supersonic flights. Indeed, I suppose the theory

would extend to the risk of most any government operation in which there was some likelihood of damage being imposed or even which damage was inflicted at all.

Congress has simply not chosen, and very deliberately not chosen, to undertake this kind of risk. Prior to 1946, as I said earlier, --

Q Mr. Stone, could the Air Force decide that "we will send supersonic planes over Washington at 1,000 feet" -- because it would be cheaper? I'm sure you don't want to go all that distance.

MR. STONE: I don't want to go all that distance, of course I don't have to in this case, Mr. Justice Marshall. But I suppose if the Air Force could produce important governmental considerations which weighed into its decision to fly supersonic flights a thousand feet over Washington, that at least on its face the discretionary function exemption of the Tort Claims Act would apply.

Q My trouble with Dalehite and the other is that you don't take the position that they don't have to justify their regulations?

MR. STONE: Oh, I think we --

Q You do not take that position?

MR. STONE: I think we do. I think that precisely what Dalehite held, and precisely what the discretionary function exemption of the Tort Claims Act comes to tell us is

that tort suits --

Q Right.

MR. STONE: -- tort suits ought not to be the vehicle by which regulations and discretionary activities, either pursuant to regulations or otherwise, ought to be reviewed.

Now, if the regulation is negligibly carried out in some way, then the Tort Claims Act covers the case, but precisely what that exemption meant to tell you was that this is not the vehicle, the Tort Claims Act is not the vehicle to review the reasonability of regulations or high-level government plans.

Q Well, that's exactly what was implied in my brother Marshall's question, as I understood it. The government doesn't have to show that the regulation, where it is applied, is reasonable or --

MR. STONE: No.

Q -- or correct or anything else, but simply that there they were, that there was a discretionary function even though the discretion was, arguably, an unreasonable exercise.

MR. STONE: In fact, that is --

Q Or unwise.

MR. STONE: -- precisely what the -- if you read the language of 2630(a):

"The provisions of this chapter and section 1346(b) -- which is the Tort Claims Act -- "shall not apply to any claim based upon an act of 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 be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty..."

Q Right.

MR. STONE: In other words, Congress has not taken the risk of Tort Claims suits for improper regulations, and it has not taken the risk of Tort Claims suits for conduct that is not wrongful; and this Court has explicitly said so. And after this Court read the plain language of the statute to preclude relief in Dalehite, Congress, through a very extensive private relief bill, set up an ad hoc commission which it authorized to compensate the victims of the Texas City explosion; and throughout all of the debates that preceded this relief provision, there was no suggestion whatsoever of amending the Tort Claims Act in any way that would change the holding of the Dalehite decision, nor has there been any such discussion since then.

The Act still stands. It still applies negligence or wrongful activity. It still excepts liability arising from the performance of discretionary functions. And we believe that for that reason the decision below must be reversed by

this Court.

Q Mr. Stone, as I read the respondents' brief, they contend that even though they don't prevail on statutory grounds, they're entitled to a remand on Fifth Amendment grounds, under United States vs. Causby. I didn't notice the government addressing itself to that issue in their brief.

Now, what's the government's position on that?

MR. STONE: Well, Mr. Justice Rehnquist, the Court of Appeals ordered that the trial court was to allow plaintiffs to change their complaint around so as to fit an unjust taking provision under the Fifth Amendment. I suppose the government is not -- would not oppose in principle an expansion of the complaint to fit that ground. The complaint was rather unartfully drawn. It was a home-drawn complaint. And I suppose it could be read fairly broadly to include lots of claims.

I think we would definitely take the position that the Causby case does not in any way control this case. There were very, very different circumstances in Causby, and the planes were flying 50 feet overhead, constantly, over the plaintiff's property, and there was, in effect, a constant easement that had been taken from the plaintiffs; and it was on that basis that the Court of Appeals held that there had been a compensable taking.

Q And basically here you would say there was

simply no "taking", whatever else there --

MR. STONE: No, I don't think this -- this kind of very occasional infliction of damage, I think just bears no resemblance to taking; and I think this Court could really take -- could take notice of that.

But I think I would be hesitant to argue that the complaint, that the complaint was too narrow to encompass that theory. I just think the theory is virtually frivolous in the context of this case.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Stone.

Mr. Allen.

You will have five additional minutes, in addition to your thirty minutes, Mr. Allen.

ORAL ARGUMENT OF GEORGE E. ALLEN, SR., ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. ALLEN: Mr. Chief Justice, and may it please the Court:

I don't think I'm going to need the five additional minutes, unless I'm asked a lot of questions and a lot of time is consumed in that way, sir.

Upon reading the comprehensive brief of the government, and the learned and able argument of my distinguished friend here, inquiring into the minds of the Congressmen who enacted the Federal Tort Claims Act, they quote references

and quotations to the Congressional Record, rather inconclusive of the intentions of the Congressmen. It reminds me of the observation of the great Chief Justice Marshall in the case of Gibbons v. Coughlin,[?] in which he said: powerful and ingenuous minds, by a course of well-digested but refined metaphysical reason, so entangled and pervert the understanding as to obscure the principles which were before quite plain, and induced doubts where if the mind were to follow its own common-sense course, none will be perceived.

In such a case he said we should recur to common sense, fundamental principles and by those principles test the arguments or examine the arguments that are to be tested.

Now, let us follow that advice. This case is not as difficult as my good friends on the other side would have use believe. Reduced to its simplest analysis, it is just this:

Nelms lives with his family at the foothills in North Carolina in a home, which is not a mansion; that is all the home they have. The Federal Government, conducting training missions with supersonic planes, from California to North Carolina, pass over his house at a distance -- I don't know what the distance was, but it was close enough for the sonic booms generated to hit the man's house like a ton of bricks. They shattered the walls, they broke the windows, and the damage was so extensive that a building contractor

said it would cost more to repair the house than to rebuild it.

Nelms, seeking damages to rebuild his home, filed suit in the District Court in North Carolina. That Court followed the theories of the government and dismissed the complaint.

Q Do all of these allegations of damage appear in the complaint itself?

MR. ALLEN: Yes, sir, they appear in affidavits that were filed. We've never had any trial on that issue of fact.

Nelms was a poor man, too poor to employ counsel, so the District Court employed -- asked local counsel to represent him.

After the decision was against Nelms, he appeals to the Fourth Circuit at Richmond in propria persona, and when the case got there Chief Judge Haynsworth asked the Clerk of the Court to call me and ask me if I would represent Nelms in that Court, saying that he felt it was the type of case that I would like.

Of course I agreed. Never have refused the appointment of a court to represent an indigent person.

So I went down to the Clerk's office, examined the record, and there I found myself, 87 years old, semi-retired, trying to get out of work, in the midst of one of the biggest questions of the day.

Well, of course, the first thing I did was to look up the Federal Tort Claims Act, and of course I found that it provides that the government shall be liable, just as an individual would be, under the right circumstances, and liable according to the law of the place where the act of omission took place. Naturally, then, I turned to see what the North Carolina law was.

And I found that North Carolina had adopted the Uniform Aeronautical Act, which provides for strict liability, that is, liability without negligence.

The North Carolina Statutes are set out in the Appendix to our response to the petition for certiorari, in the blue paper. And reference in our brief is made to that Appendix.

Then I found another thing, that the Air Force itself, which is an arm of the Federal Government, which is the defendant in this case, had made regulations which resulted in the same liability that the Statutes of North Carolina had made.

Q Well, are they not limited to cases which are not covered?

MR. ALLEN: Sir?

Q Are those regulations limited?

MR. ALLEN: No, sir.

Q They're not?

MR. ALLEN: No, sir. They're not. They are set out in the record in this case, fully; and the regulation itself is mentioned by Judge Butzner in his opinion.

Q The North Carolina Statute, which appears on Appendix 2 of your response, seems to say that it is a matter of State law that the landowner owns the space over the land.

MR. ALLEN: Yes, sir.

Q And subject to the right of flight, as described in 63-13, and that flight is described as flight that is not dangerous or injurious to the persons or property beneath. So if -- that makes, under State law that makes the landowner the owner of the space above his land, and therefore any invasion of that space, except in the limited manner described by 63-13, would be a trespass, wouldn't it?

MR. ALLEN: That's right.

Q Doesn't that make this quite different, therefore, from the Dalehite case?

MR. ALLEN: That's right. That's what Judge Butzner held.

Q As a matter of State law?

MR. ALLEN: That's right.

Now, notwithstanding laws that I have mentioned, the government claims that it's not liable because of this discretionary function in the statute.

Now, in our claim, supported by an abundance of

authority, cases cited in the brief, that neither the government nor an agency of the government has any discretion to violate the positive law of a State.

It's outside of the area of discretion.

I think Judge Parker, the late John J. Parker who, by the way, was one of the greatest appellate judges that ever sat on the appellate court in this country -- I know, because I argued many a case before him. He should have been approved when he was nominated for this Court.

[Laughter.]

But the labor people defeated him.

Now, Judge Parker, -- I might be a little inaccurate, so I'm going to state exactly what he held in the Praylou case, and what became of the Praylou case.

The Praylou case went up, as I recall, from South Carolina, and South Carolina had adopted the same universal, uniform Aeronautical Rights that North Carolina had; and therefore the Court held, referring to that case, the exact question that we have before us here.

Judge Parker said this, or held this: "Congress did not intend to exclude from coverage of the Federal Tort Claims Act liability arising from operation of government aircraft merely because under State law liability for injury was made absolute and not dependent upon negligence, nor did Congress intend that there should be liability in States where liability

under State law is based on negligence and no liability in great majority of States which have adopted the Uniform Aeronautics Act."

Q What's that decision, Mr. Allen?

MR. ALLEN: That's the Praylou case, from the Fourth Circuit.

Q Praylou?

Q That's the case where the plane fell on the house in Baltimore, isn't it?

MR. ALLEN: No, sir, I don't think that's it; this case arose in South Carolina, because they applied the South Carolina law.

Q Do you happen to have the citation?

MR. ALLEN: Yes, we have the citation, if the Justice please, it's in --

Q In your brief, no doubt; but I can't find it.

MR. ALLEN: It's 208 F. 2d, cited in our brief on page --

Q Thank you.

MR. ALLEN: -- page 10, of our brief.

Q Thank you.

MR. ALLEN: Our brief is the red one, sir.

Q Yes. I have it, thank you.

MR. ALLEN: Now, this Court refused certiorari in the Praylou case. Now, I know that the saying is it doesn't

mean anything to refuse certiorari; but it does mean something in some cases, because when -- if the decision in Praylou on the identical question was as arose and would be disastrous to the Federal Government, as the government claims now that it would be in the Nelms case, I think, I'm sure some member of this honorable Court would have sensed it and granted certiorari.

Q Was the Praylou case decided before or after the Dalehite case, do you know?

MR. ALLEN: Afterwards.

Q Afterwards?

MR. ALLEN: Afterwards.

Q Thank you.

MR. ALLEN: Now, when the Nelms case came before the Fourth Circuit, what was that Court supposed to do? The identical question had been raised and decided in the Praylou case, and this Court had refused certiorari. This Court had let the decision stand. Surely, there was nothing for the Fourth Circuit to do except to follow the Praylou case; which it did.

This Court, in what is known as the famous chicken case, before the Federal Tort Claims Act was enacted, decided that government planes passing over a farmer's chicken farm frightened the chickens so that they would fly up against the walls of the buildings and butt their brains out; and some of

the hens stopped laying, and those few that continued to lay, their eggs were worthless for raising chickens, no doubt because the males were so frightened that they couldn't perform their duties in fertilizing the eggs.

[Laughter.]

Now, this Court, this high Court held in that case, but under the Fifth Amendment, that man was entitled to compensation; although not one square foot of his property was taken. They said that it was practically destroyed for the purpose of raising chickens.

Now, according to the argument of the government, Nelms would have been better off if the Federal Tort Claims Act hadn't been passed. He would have had some chance to recover under the Fifth Amendment.

Now, I want to have something to say in passing about the regulation.

Q Before you go into that, Mr. Allen, --

MR. ALLEN: Sir?

Q -- do you read the Tort Claims Act or the decisions under it as affecting the basic Fifth Amendment rights for a taking?

MR. ALLEN: I don't think it can do so. I think an Act of Congress can't affect --

Q Your prior statement sounded as though you --

MR. ALLEN: Sir?

Q Your prior statement sounded as though you felt the Tort Claims Act had impinged on the rights --

MR. ALLEN: No, not at all. I only meant to say that if we try to recover under the Tort Claims Act, we would have been better off if there hadn't been any Tort Claims Act. That the Fifth Amendment would have served.

Now, I want to come to that in another connection a little bit later.

Just a word about these regulations.

A Federal statute authorizes the President of the United States, a Commander in Chief of the Army and Navy, to make regulations for the Army, Navy, and Air Force. Of course he doesn't actually make them himself, he delegates that to respective agencies; in this case, the Air Force.

But when made the Courts hold that they are presumed to have been made by the President, and they have the force of law.

Feeling that I might not have time to complete my brief, I decided to write a brief on that issue, before I received the government's brief. We found 31 cases, three from this high Court, that hold that regulations of that type have the force of law. We found one, the Ward case, making practically a scrap of paper out of a regulation. The Ward case was a District Court case in Pennsylvania.

So, lo and behold, when I got the brief of the

government, they cited the Ward case. We had already cited it in our brief, because that was one of the cases we found -- true, it was contrary to us; but we wanted to cite all the cases.

They cited the Ward case. They didn't say one word about all these other cases, not even these that this Court had decided.

Perhaps the gentlemen belong to that school of thought that the last cases are the only ones of importance. And they stop with the last advance sheet of the digest system, don't go back, and the first case they find they stop. Well, now, Dean Pound told us that you might as well throw away all of your lawbooks that have been on the shelf for thirty years, when you only go back the one year.

Now, what's become of the Ward case? I understand it's before the Third Circuit, and that the Third Circuit is awaiting the decision of this Court in this case before it decides the Ward case.

Now, I want to pay my respects to the famous Dalehite case. Of course, the lawyers for the plaintiff had one big thing against them in that case: 500-and-some persons were killed, millions of dollars' worth of property destroyed, hundreds of persons injured. Now, the amount of the damage ought not to have had anything to do with the decision. But, apparently it did.

But, aside from that, in the Dalehite case, there was no statute involved as a guide to the Court; there was no regulation involved as a guide to the Court; and, according to the Court's own meaning the ultrahazardous doctrine didn't apply because the Court found that the explosion was the result of an accident, pure and simple. Absolutely unforeseeable by the exercise of the highest degree of care, to say nothing of the exercise of ordinary care.

I don't think the case has any control over issues in this case, and that's what Judge Butzner said. Judge Butzner of the Fourth Circuit.

We might approach this case from another angle. We know that the Federal Government has no powers except those granted in the Constitution, either expressly or by necessary implication.

Now we have a Federal Statute and a State Statute on the same subject. What are we to do? We are required by the law to examine those statutes and if they are not irreconcilably, if they are not wholly irreconcilable, then we must let them stand. We must construe the two statutes so as to let them both stand if we can.

Now, you have a unique situation here. The Federal Statute actually creates the right of action at the State level, because it says that the Federal Government will be liable if an individual in the State under like circumstances

would be liable. And it says further that the liability must be according to the State level.

Now, you have the discretionary function in the Federal Statute; what are you going to do with that when you come to construe these statutes, remembering at all time the limited powers of the Federal Government and the unlimited powers of the State Government, except as they are restricted by the Federal Constitution and its own Constitution and by Federal Statute authorized by the Federal Constitution.

You will have to construe the discretionary function provision of the Federal Tort Claims Act to the effect that there is no discretion on the part of the Federal Government, or any agency of the Federal Government or any person representing the Federal Government, no discretion to violate the positive, unambiguous State law. Then both statutes can live together.

Now, that construction, in my humble judgment, would be more in keeping with the intention of the Congress to spread the liability over all the taxpayers instead of requiring the poor taxpayer who sustained the loss to bear it all.

Q Mr. Allen, let me put a hypothetical question to you, which may or may not shed any light on the problem. Suppose we were engaged in a war, enemy attacks on an American establishment, and anti-aircraft guns were used to repel the attack. Of course, as we know, anti-aircraft gunfire,

if it doesn't hit the enemy airplane, ultimately has to fall down, back to earth, and suppose it falls on either people or houses or cows, animals, and does some damage. Do you think it's covered by the Tort Claims Act?

MR. ALLEN: I don't think that the Federal Government has any right, even for the benefit in wartimes or any other times, to destroy property and put the burden of all that damage on that property owner rather than on all the people through taxes, letting all of the citizens bear it. I don't think they would have a right to do that.

Q And that would be a highly discretionary governmental function, would it not, to shoot these enemy --

MR. ALLEN: Yes, sir; it would. But, in no instance has the government any discretion to take property or destroy property without paying for it. They're prohibited by the Fifth Amendment to the Constitution.

Q Well, what do you think that exception about discretionary action means, then?

MR. ALLEN: Well, --

Q It would be the highest order of discretion, would it not, if the ground forces were ordered to repel the enemy attack by use of anti-aircraft fire?

MR. ALLEN: That's right. That's right. It certainly is, sir.

But still if they destroy the property of a private

person, you have property being destroyed for public purposes; private property being destroyed for public purposes, without compensation.

Now, what's the difference -- it's just a question of magnitude. Suppose a government tank runs over a house. I'll illustrate this again.

When I first came to the bar, we had a Highway Commission that was vested with absolute and uncontrollable discretion to run highways wherever they saw fit to run them. But there was another law which provided that they couldn't run a highway through a man's garden or orchard within a certain distance of his residence.

Well, now, they couldn't exercise that uncontrollable discretion and violate that other statute.

So, any way you look at it, you've got some rules of law, and your discretion can't be exercised in violation of those positive rules.

Now, you had no law in the Dalehite case, you had no rules of that kind, no statutes saying anything of the kind. You had nothing but the ultrahazardous act, and of course that wasn't applicable in view of the findings of fact that the Court made.

Just before -- after I had written our brief in this case, a few days before I left home, there came across my desk two articles written on the Nelms case, one from the

New York Law Review, from the University of New York, and the other from a couple of students at the University of Washington at Seattle. I read those two articles with a great deal of interest. There we have a younger generation taking a new look at this situation, and I became more convinced than ever of the confusion that exists in this country in reference to the Tort Claims Act, and particularly the discretionary function.

Q Do you happen to have the citations of those two Law Reviews?

MR. ALLEN: Well, I have one of them, sir. I have the New York --

Q You may supply both of them to the Clerk, Mr. Allen, --

MR. ALLEN: Sir?

Q You may supply both to the Clerk, --

MR. ALLEN: All right, sir; I'll do that.

Q -- after the argument, if you don't have them at hand now.

MR. ALLEN: Now, the one from Washington State, the only citation I can give there is the names of the two gentlemen that wrote it. It seems that they wrote the brief in a lower court argument case.

Now, the New York Review, I don't think it's out yet, but it will be published in the April issue of the New

York University Law Review. And the title of it is, "Torts: Federal Tort Claims Act. Government may be strictly liable to a homeowner for damage resulting from a sonic boom. *Nelms vs. Laird*."

There's a very good discussion there. And the other case is a brief written by -- I have the names here somewhere -- two students. I'll give the memorandum to the Clerk, and won't take the time now.

Q Very good, Mr. Allen.

MR. ALLEN: Now, after reading those articles, as I said, I was more convinced than ever of the predicaments we are in, the state of confusion we are in on this subject. And I'm going to offer this solution, which is the only one I can think of that will clear up the matter; and will be in harmony, I think, with the intention of the Congress.

That is, wherever there is a State statute fixing the liability, or even a regulation of the Air Force, which is a part of the government, then they take this discretionary function provision out of the area of discretion, and the government should pay.

Now, I believe the rules require me to indicate to this honorable Court what action I think it should take, what special relief, I believe is what the rule says.

I think the Fourth Circuit should be affirmed in its ruling on the Federal Tort Claims Act, and the case remanded

for trial to the Court on the question of proximate cause and damages.

And that as to the Fifth Amendment the case should be remanded with trial before the court, with a view, if we make a submissible case on the question of taking of private property for public purposes without compensation.

I thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Allen.

Mr. Stone.

The case is submitted.

[Whereupon, at 2:09 o'clock, p.m., the case was submitted.]

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