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Payton v. United States, -_F.2d _ (5th Cir. 1981).

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Georgia Patsy almost certainly will appeal this case to the Supreme Court. What effect the Fifth Circuit's decision will have, if allowed to stand, depends largely on the commitment of the district judges to scrutinize the adequacy of the administrative remedies available to the civil rights plaintiffs. The majority suggests that the exhaustion requirement and the minimum standards it provides will give the states incentive to develop speedy and effective administrative procedures. If the trial courts share the majority's expressed commitment to the spirit of the civil rights legislation and strictly scrutinize the effectiveness of the administrative remedies available to the particular plaintiff, the majority's hopes may be realized. Otherwise, Judge Hatchett's prediction of chilled civil rights litigation may well come true.

The majority opinion pragmatically implies that potential relief within the state administrative system may not be colorblind. In effect, the decision suggests that a white plaintiff claiming reverse discrimination may well have a better chance of obtaining state relief than black claimants have traditionally had. Though not saying so explicitly, the majority thus recognizes that Congress passed the Civil Rights Act of 1871 (the "Ku Klux Klan Act") specifically to protect blacks harassed by the Ku Klux Klan and unable to get protection or redress from the states.¹⁹ If the majority is correct, then their decision may well relieve the federal court of the burden of reverse discrimination suits for which effective state redress exists, while preserving federal forums for litigants who cannot in fact get effective state relief.

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PAYTON V. UNITED STATES, — F.2d — (5th Cir. 1981).

Twenty-seven years ago in *Dalehite v. United States*¹ the Supreme Court held that the negligent actions of government officials resulting in a fatal nitrate fertilizer explosion did not subject them to liability under the Federal Tort Claims Act,² because their ac-

19. See, e.g., Justice Douglas's discussion of the background of the Civil Rights Act in *Monroe v. Pape*, 365 U.S. 167, 172-83 (1960).

1. 346 U.S. 15 (1953).

2. 28 U.S.C. § 1346(b) states, in part:

tions were discretionary. Section 2680(a) of the Act protected the "discretion of the executive or the administrator to act according to [his] judgment of the best course."³ In February 1981, the Fifth Circuit held in *Payton v. United States*⁴ that the "discretionary function" exemption would not shield the negligence of the Board of Parole in paroling to a psychopathic criminal who killed three women upon his release from prison.

Thomas Whisenant killed Sheryl Lynn Payton in 1976. She was the third woman he had brutally murdered that year. Three years earlier the Board of Parole had granted Whisenant his release, seemingly ignoring his violent prison record, his history of violent crime, and psychiatric reports recommending against release. At Whisenant's trial for the murder⁵ of Mrs. Payton, a psychiatrist testified that the Board of Parole had made a grievous error bordering on gross negligence in releasing Whisenant. The husband and children of Whisenant's last victim brought this suit under the Federal Tort Claims Act, alleging that the Board's negligent decision to release Whisenant had proximately caused Mrs. Payton's death.⁶ The government claimed that the Board's decision was discretionary and thus fell within the "discretionary function" exemption of the Federal Tort Claims Act. The district court agreed and dismissed the suit for lack of subject matter jurisdiction. On appeal the Fifth Circuit reversed and remanded.

Noting that "the very purpose of the Tort Claims Act was to

(b) Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or 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.

28 U.S.C. § 1346(b) (1976). Section 2680(a) reads as follows:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) 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 be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a) (1976).

3. *Dalehite v. United States*, 346 U.S. 15, 34 (1953).

4. No. 79-2052 (5th Cir. Feb. 2, 1981).

5. Whisenant was convicted for the murder.

6. *Payton*, slip op. at 3355.

waive the government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability,"⁷ Judge Fay, writing for the court, concluded that the parole decisionmaking process tended to equalize treatment under generalized rules by structuring discretion. Thus, the parole-granting process did not on its face fall within the discretionary function exemption.⁸

Because the discretionary function notion is not merely a statutory invention, that characterization was only the starting point of Fay's analysis of the validity of this cause of action. The discretionary function notion stems from the constitutional doctrine of separation of powers. Quoting Judge McGowan of the District of Columbia Court of Appeals, Judge Fay emphasized the importance of preserving a functional separation of powers among the coordinate branches of government. Within these parameters, Fay set out an analysis sensitive to the constitutional and prudential limits of judicial review of discretionary executive decisions.

The opinion distinguishes between the discretionary policy decision to reject the rehabilitative approach of parole evaluations in favor of the present system, and the highly structured process of applying the current system. Freedom from judicial scrutiny is necessary in making policy decisions, to ensure "the ability of administrators to govern by aggressive and effective decisionmaking."⁹ Scrutiny of the latter would not intrude on executive decisionmaking but does introduce the question of "whether this individual can be expected to absorb his loss as incident to an acceptable social or political risk of governmental activities."¹⁰ The

7. *Id.* at 3359 (quoting *Rayonier, Inc. v. United States*, 352 U.S. 315, 319 (1957)).

8. Until 1973 the Federal Board of Parole made release decisions on the basis of meeting with the inmate and a caseworker. Board members did not refer to any formal criteria or guidelines—their decisions were personal psychological judgments. As a result, there was a great deal of arbitrariness in the system. In 1973, responding to criticism about the old system, the Board established a new, formal set of guidelines for parole decisionmaking. The guidelines included a matrix of an "offense severity" index and a "salient factor score" index. The "offense severity" index represents the assignment of weights, from one to six, to the crimes that most commonly come before the Board. The "salient factor score," an actuarial device, incorporates various bits of information about the particular inmate to predict the risk of repeated behavior. Plotting the inmate's "salient factor score" and "offense severity" rating on the matrix will give the parole examiner a range of months for the length of time the inmate should be incarcerated before receiving parole. Although the Board is not bound to apply the guidelines strictly, any deviation from them must be supported in writing. These factors provided the basis for Judge Fay's conclusion that the process was somewhat mechanical and ministerial. *Id.* at 3359-63.

9. *Id.* at 3364; see *United States v. Muniz*, 374 U.S. 150, 163 (1963).

10. *Id.* at 3365; see Note, *Separation of Powers and the Discretionary Function Excep-*

answer in this case, said Fay, was no.

To support his conclusions, Judge Fay catalogued the expanding judicial doctrine creating a public duty to supervise those within the government's charge. In the past five years courts in various jurisdictions have recognized a duty to supervise dangerous mental patients, a duty to notify appropriate officials of the release of dangerous mental patients and parolees, and a duty to warn potential victims. Judicial review of the decision of the Board of Parole to release Whisenant would be consistent with this developing doctrine, Fay declared, and would not threaten governmental processes.

Judge Fay concluded his analysis by considering the possible benefits of stricter judicial scrutiny of such governmental activity and the amenability of such suits to judicial standards of review. Requiring increased governmental accountability, Fay reasoned, would serve as an incentive for more responsible administration. The actions of government personnel in these cases need not evade review for lack of standards, because either the 'reasonable man' tort standard or a professional standard could easily provide the appropriate framework for analysis.

The Fifth Circuit's decision in *Payton v. United States*, while both finely reasoned and constructed, is also a forthright statement of judicial and governmental responsibility. The court has recognized that the expansion of government is often accompanied by an increased risk of harm to individual citizens. The government can not escape responsibility for compensating for that increased risk when it materializes into actual harm. By waiving the governmental cloak of sovereign immunity to some extent, Congress had provided the means for fairly ensuring that the costs of dangerous governmental activity do not fall entirely on a few. The Fifth Circuit's decision is an affirmative declaration that at least this court will not allow that governmental cloak of sovereign immunity to hide and protect negligent parole board decisions.

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