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Applying the Discretionary Function Exception to the Waiver of Sovereign Immunity in Airport Litigation

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I. INTRODUCTION

CONGRESS PASSED the Federal Tort Claims Act in 1946, which waived sovereign immunity for certain tort claims filed against the United States. Many states have also passed their own acts that waive sovereign immunity for tort claims filed against them.

One of the most litigated exceptions to these acts has been the "discretionary function" exception. Under this exception, the government's actions are immune from suit if they are based upon the "performance or the failure to exercise or perform a

discretionary function . . . ."[1] Courts have struggled to determine what is and what is not a discretionary function and have developed several tests to determine the types of government actions that fall within this exception.

This article will address several issues, including: (1) the history of sovereign immunity and its impact on airport litigation in the United States; (2) the waiver of sovereign immunity by the federal and state governments; (3) the various tests that courts have developed related to the discretionary function exception; and (4) the courts' inconsistent application of the discretionary function exception. Then, this article concludes with a proposed solution to the courts' inconsistent application of the discretionary function exception.

II. THE HISTORY OF SOVEREIGN IMMUNITY IN THE UNITED STATES

The doctrine of sovereign immunity developed from the common law maxim, "the King can do no wrong . . . ."[2] In other words, the sovereign "cannot be summoned to appear before himself in his own courts—a doctrine which was transplanted in modified form from the common law of England to this country."[3]

One of the first U.S. Supreme Court cases to mention the applicability of sovereign immunity to this country's jurisprudence is *The Siren*.[4] In *The Siren*, Justice Stephen Field emphasized that the United States "cannot be subjected to legal proceedings at law or in equity without [its] consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress."[5] By the middle of the nineteenth century, the courts in this country readily accepted this doctrine.[6]

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[1] Federal Tort Claims Act, 28 U.S.C. § 2680(a) (2012).

[2] Wendler v. City of Great Bend, 316 P.2d 265, 270 (Kan. 1957).

[3] *Id.*

[4] The Siren, 74 U.S. (7 Wall.) 152, 154 (1868).

[5] *Id.*

[6] Marcia Swihart Orgill & Bellane Meltzer Toren, Comment, *Sovereign Immunity and the Discretionary Function Exception of the Alaska Tort Claims Act*, 2 ALASKA L. REV. 99, 100 (1985).

III. APPLICATION OF SOVEREIGN IMMUNITY TO PUBLIC AIRPORTS PRIOR TO THE PASSAGE OF THE FEDERAL TORT CLAIMS ACT AND THE CORRESPONDING STATE STATUTES

Courts in this country were not as willing to find municipal governments immune under the doctrine of sovereign immunity as compared to their broad application of this doctrine to the federal and state governments. In *Wendler v. City of Great Bend*, the Kansas Supreme Court recognized this distinction and noted that "our courts have almost from the beginning denied tort immunity to municipal governments performing 'proprietary' or 'permissive' functions. The State is usually deemed immune regardless of the kind of function it is performing. What justifies the difference between the State and its municipal subdivisions is baffling."[7]

Justice William Brennan elaborated on this distinction in *Owen v. City of Independence* as follows:

> The governmental-proprietary distinction owed its existence to the dual nature of the municipal corporation. On the one hand, the municipality was a corporate body, capable of performing the same "proprietary" functions as any private corporation, and liable for its torts in the same manner and to the same extent, as well. On the other hand, the municipality was an arm of the State, and when acting in that "governmental" or "public" capacity, it shared the immunity traditionally accorded the sovereign.[8]

Many public airports did not enjoy the protection of sovereign immunity during the first half of the twentieth century because courts considered the operation of a public municipal airport to be a proprietary endeavor.[9] By 1957, at least seventeen states had determined that the operation of a municipal airport was a proprietary function, which could subject the municipality to liability.[10]

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[7] *Wendler*, 316 P.2d at 270 (internal citations omitted).

[8] Owen v. City of Independence, 445 U.S. 622, 644–45 (1980).

[9] *Wendler*, 316 P.2d at 273.

[10] *Id.*; *see also* Mayor of Baltimore v. Crown Cork & Seal Co., 122 F.2d 385, 391 (4th Cir. 1941); Patton v. Adm'r of Civil Aeronautics, 112 F. Supp. 817, 825 (D.C. Alaska 1953), *rev'd on other grounds*, 217 F.2d 395 (9th Cir. 1954); City of Mobile v. Lartigue, 127 So. 257, 260 (Ala. Ct. App. 1930); Peavey v. City of Miami, 1 So. 2d 614, 636–37 (Fla. 1941); Caroway v. City of Atl., 70 S.E.2d 126, 130 (Ga. Ct. App. 1952); Dep't of Treasury v. City of Evansville, 60 N.E.2d 952, 956 (Ind. 1945); Godfrey v. City of Flint, 279 N.W. 516, 517–18 (Mich. 1938); Heitman v. Lake City, 30 N.W.2d 18, 21–22 (Minn. 1947); Brummett v. City of Jackson, 51 So. 2d 52, 53 (Miss. 1951); Behnke v. City of Moberly, 243 S.W.2d 549, 553 (Mo. Ct.

The Kansas Supreme Court came to this conclusion in *Wendler v. City of Great Bend.*[11] In *Wendler,* the plaintiff owned an aircraft that was destroyed in a hangar fire at the Great Bend Municipal Airport.[12] The plaintiff sued the City of Great Bend, alleging that the fire resulted from the City's negligence.[13] The City argued that it was immune under the doctrine of sovereign immunity.[14]

In its analysis, the Kansas Supreme Court emphasized:

> Persuasive is the fact that we have found no decision, and the defendant has cited none, in which any court of last resort in this country has held the operation and maintenance of an airport by a municipality to be a governmental function affording the municipality governmental immunity from tort liability in such operations, except where the municipality has been *expressly* exempt from such liability by statute.[15]

The court found that the City was acting in its proprietary capacity by operating a public airport.[16] Therefore, the doctrine of sovereign immunity did not apply, and the airport was subject to liability.[17]

IV. THE WAIVER OF SOVEREIGN IMMUNITY BY THE FEDERAL GOVERNMENT AND THE STATES

In 1946, Congress waived immunity for all torts committed by the U.S. government, except for certain enumerated exceptions, by passing the Federal Tort Claims Act.[18] This Act resulted from "a feeling that the Government should assume the obligation to pay damages for the misfeasance of [its] employees in carrying

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App. 1942); Granite Oil Sec. v. Douglas Cnty., 219 P.2d 191, 198 (Nev. 1950); Rhodes v. City of Asheville, 52 S.E.2d 371, 376 (N.C. 1949); City of Blackwell v. Lee, 62 P.2d 1219, 1220 (Okla. 1936); Mollencop v. City of Salem, 8 P.2d 783, 785 (Or. 1932); McLaughlin v. City of Chattanooga, 177 S.W.2d 823, 825 (Tenn. 1944); Johnson v. City of Corpus Christi, 243 S.W.2d 273, 275 (Tex. Civ. App.—El Paso 1951, no writ).

[11] *Wendler,* 316 P.2d at 273–75.

[12] *Id.* at 267–68.

[13] *Id.* at 268.

[14] *Id.* at 267.

[15] *Id.* at 272.

[16] *Id.* at 274–75.

[17] *Id.*

[18] Dalehite v. United States, 346 U.S. 15, 27–30 (1953); Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 812, 842–44 (codified at 28 U.S.C. §§ 1346(b), 1402(b), and 2671–2680).

out its work."[19] Congress, however, chose not to waive immunity for:

> 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.[20]

The states soon followed Congress's example, and "[i]n 1957 Florida became the first American jurisdiction to abolish the rule that government entities are immune from tort liability when acting in a governmental, rather than a proprietary, capacity."[21] Since that time, most other states have also waived sovereign immunity except in certain limited circumstances and have included an exception to this waiver for actions that constitute a discretionary function.[22]

The discretionary function exception to the general waiver of sovereign immunity has been a major source of litigation in most jurisdictions in this country.[23] Courts have struggled to determine what actions are discretionary.[24] One commentator noted that "it is notoriously difficult to translate ordinary words into legal dictates. Doing so with 'discretion' has been an effort of near-Herculean proportions."[25] The state and federal courts have developed several tests to determine whether an action is immune because it is a discretionary function.[26] Commentators and courts have distilled these tests into the following categories: (1) the semantic approach; (2) the Good Samaritan approach; (3) the policy-balancing approach; and (4) the planning/operational approach.[27]

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[19] *Dalehite*, 346 U.S. at 24.

[20] *Id.* at 18 (quoting 28 U.S.C. § 2680(a) (1948)).

[21] Mary F. Wyant, Comment, *The Discretionary Function Exception to Government Tort Liability*, 61 MARQ L. REV. 163, 163 (1977).

[22] *Id.* at 167–68.

[23] Orgill & Toren, *supra* note 6, at 103.

[24] *Id.* at 104.

[25] John Cannan, *Are Public Law Librarians Immune from Suit? Muddying the Already Murky Waters of Law Librarian Liability*, 99 LAW LIBR. J. 7, 14 (2007).

[26] Orgill & Toren, *supra* note 6, at 104

[27] *Id.* at 104–09; Caban v. United States, 671 F.2d 1230, 1232 (2d Cir. 1982).

A. The Semantic Approach

Under the semantic approach, the court defines what is or is not a discretionary act and then applies this definition to the facts before it.[28] These cases often depend on the dictionary definition of discretion, generally finding that any "decision involving some exercise of judgment is worthy of immunity."[29]

Although many courts have discussed this approach in their opinions, it is seldom used because all actions at some level involve the use of discretion.[30] The California Supreme Court described this problem as follows:

> [I]n rejecting the state's invitation to enmesh ourselves deeply in the semantic thicket of attempting to determine, as a purely literal matter, "where the ministerial and imperative duties end and the discretionary powers begin. . . . [I]t would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail."[31]

Thus, the semantic approach is overly broad because at some level, a court could find that any action involves some form of discretion and is, therefore, immune.[32]

In the context of lawsuits involving public airports, one could consider almost any action taken by an airport as discretionary: from the design of the taxi cab loading area to the decision of when and where to inspect the airport terminal building floors for slip hazards. As a result, the semantic approach, when taken to the extreme, can quickly become the exception that swallows the general waiver of sovereign immunity. Consequently, very few states still apply the semantic approach.[33]

B. The Good Samaritan Approach

The Good Samaritan approach is derived from the U.S. Supreme Court case of *Indian Towing Co. v. United States.*[34] In that

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[28] State v. Abbott, 498 P.2d 712, 720 (Alaska 1972); Johnson v. State, 447 P.2d 352, 356–58 (Cal. 1968); Dep't of Health & Rehab. Servs. v. Yamuni, 529 So.2d 258, 260 (Fla. 1988); Hudson v. Town of E. Montpelier, 638 A.2d 561, 564 (Vt. 1993).

[29] Cannan, *supra* note 25, at 15.

[30] *Abbott*, 498 P.2d at 720; *Johnson*, 447 P.2d at 356–57; *Yamuni*, 529 So.2d at 260; *Hudson*, 638 A.2d at 564.

[31] *Johnson*, 447 P.2d at 357.

[32] Orgill & Toren, *supra* note 6, at 105.

[33] Cannan, *supra* note 25, at 17.

[34] Indian Towing Co. v. United States, 350 U.S. 61, 64–65 (1955).

case, the Indian Towing Company was towing a barge loaded with cargo that was damaged when the barge ran aground.[35] The Indian Towing Company alleged that the barge ran aground because the U.S. Coast Guard had negligently maintained a nearby lighthouse.[36]

On appeal, the United States argued that the Coast Guard could not be held liable for its negligent maintenance of the lighthouse because a private individual cannot maintain a lighthouse, and the Federal Tort Claims Act provided that "'[t]he United States shall be liable . . . in the same manner and to the same extent as a *private individual* under like circumstances . . . .'"[37] In other words, the United States argued that the Federal Tort Claims Act did not remove immunity for activities that are uniquely governmental.[38] The United States, however, conceded that its maintenance of the lighthouse did not involve a discretionary function.[39]

The Supreme Court emphasized that "it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner."[40] Using this logic, the Supreme Court held:

> The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act.[41]

Despite the fact that the discretionary function exception was not at issue in *Indian Towing*, state and federal courts have used this opinion to develop the Good Samaritan approach to determine whether a governmental action constitutes a discretionary

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[35] *Id.* at 62.

[36] *Id.*

[37] *Id.* at 63 (quoting 28 U.S.C. § 2674 (1948)) (emphasis added).

[38] *Id.* at 64.

[39] *Id.*

[40] *Id.* at 64–65.

[41] *Id.* at 69.

function.[42] These courts have held that sovereign immunity should only bar claims for "the *initial* act of governmental discretion, 'such as a decision to undertake a project,' but does not extend the immunity to lower levels of decisionmaking, such as the 'the establishment of plans and specifications by administrators on an intermediate level of government.'"[43] Thus, this approach tends to narrow the discretionary function exception and, in turn, expand the government's liability for all actions taken after the initial planning phase.[44]

In the context of a public airport, the initial plan to establish an airport or to alter the operations at the airport would be protected by sovereign immunity; however, any decision regarding the maintenance or subsequent functioning of the airport might be subject to liability.[45] Therefore, the judicial branch may question many actions involving the consideration of public policy at an airport such as when to use airport funds to repair, maintain, or improve the airport.

C. The Policy-Balancing Approach

In the late 1970s and early 1980s, many federal courts began applying the policy-balancing approach.[46] Under this approach, the government's actions are immune if the subject "action involved the balancing of policy factors."[47] Many courts supported this approach because it "protects courts from 'involve(ment) in making . . . decisions(s) entrusted to other branches of the government.'"[48]

This approach appears to strike a balance between the semantic approach and the Good Samaritan approach because it allows discretion beyond the initial government decision, but the everyday activities carrying out these decisions are not immune unless the government employee actually weighs policy factors.

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[42] Cessna Aircraft Co. v. Metro. Topeka Airport Auth., 940 P.2d 84, 94 (Kan. Ct. App. 1997); Alpha Alpha, Inc. v. Southland Aviation, 697 So. 2d 1364, 1372 (La. Ct. App. 1997); Forrester v. Port Auth. of N.Y. & N.J., 527 N.Y.S.2d 224, 227 (N.Y. App. Div. 1988).

[43] Orgill & Toren, *supra* note 6, at 106.

[44] *Id.*

[45] *Id.* at 106–07.

[46] Caban v. United States, 671 F.2d 1230, 1232 (2d Cir. 1982).

[47] *Id.*

[48] *Id.* at 1233 (alterations in original) (quoting Canadian Trans. Co. v. United States, 663 F.2d 1081, 1087 (D.C. Cir. 1980)).

D. THE PLANNING/OPERATIONAL APPROACH

The U.S. Supreme Court created the planning/operational approach in *Dalehite v. United States.*[49] The plaintiffs in *Dalehite* sued the United States alleging that it negligently manufactured and transported fertilizer under a government program, and that this negligence resulted in the explosion that killed Henry Dalehite.[50]

The Supreme Court found that the plaintiffs did not have a cause of action against the United States because the government's actions were a discretionary function.[51] The Court determined:

> It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act *includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations.* Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of [§] 2680(a) would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion.[52]

In short, the Court held that "the alleged 'negligence' does not subject the Government to liability.[53] The decisions held culpable were all responsibly made at a *planning rather than operational level* and involved considerations more or less important to the practicability of the Government's fertilizer program."[54]

This last statement by the Court has led to much confusion regarding the application of the planning/operational approach. As one commentator described:

> The Planning/Operational Standard was supposed to be a relatively simplistic and effective means of granting discretionary immunity to activities truly worthy of it. However, the surrender of the Semantic Standard's relative ease of administration and the

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[49] Dalehite v. United States, 346 U.S. 15, 42 (1953).
[50] *Id.* at 18–23.
[51] *Id.* at 41.
[52] *Id.* at 35–36 (emphasis added) (citations omitted).
[53] *Id.* at 42.
[54] *Id.* (emphasis added).

> requirement to determine whether the nature of an activity fell under the Planning/Operational Standard's aegis led to ad hoc implementation and inconsistent, even strange, results as courts struggled to determine what acts were or were not the creation of policy.[55]

Courts that want to decrease the scope of the exception in order to limit immunity will apply the exception to decisions that are made solely at the planning phase. In contrast, courts that want to increase the scope of the exception and increase immunity will apply the exception to actions that implement the decision made at the planning level. Thus, courts have not consistently applied the planning/operational approach.

V. EVOLUTION OF THE PLANNING/OPERATIONAL APPROACH

The Supreme Court's next plunge into the quagmire of the discretionary function analysis occurred in *Varig Airlines*.[56] In *Varig Airlines*, the Supreme Court addressed two consolidated cases to determine if the United States could be held liable for the Federal Aviation Administration's (FAA) alleged negligence "in certificating certain aircraft for use in commercial aviation."[57] In the first lawsuit, a Boeing 707 was certified in 1958 by the Civil Aeronautics Agency (the FAA's predecessor) as having met the agency's minimum safety requirements.[58] In 1973, a fire broke out in one of the Boeing 707's aft lavatories during a flight from Rio de Janeiro to Paris.[59] The pilots landed the airplane, but 124 of the passengers died from smoke inhalation.[60] The owner of the Boeing 707, Varig Airlines, and the families of the deceased passengers sued the United States, alleging that it was negligent when it issued the safety certificate for the airplane.[61]

In the second of the two consolidated lawsuits, a DeHavilland Dove aircraft, owned by John Dowdle, caught fire, crashed, and burned near Las Vegas, Nevada.[62] Prior to the crash, one of the

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[55] Cannan, *supra* note 25, at 20.

[56] United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 813 (1984).

[57] *Id.* at 799.

[58] *Id.* at 800.

[59] *Id.* at 799–800.

[60] *Id.* at 800.

[61] *Id.*

[62] *Id.* at 802.

aircraft's previous owners obtained a supplemental-type certificate from the FAA that authorized him to install a cabin heater as a major change in the type and design of the aircraft.[63] After the crash, Dowdle sued the United States for property damage, alleging that the FAA was negligent in issuing the certificate for the installation of the heater.[64]

The plaintiffs in both cases argued that *Indian Towing* had overruled *Dalehite*.[65] The Supreme Court rejected this argument and reaffirmed the logic in *Dalehite*, even though the Court admitted that "[its] reading of the Act . . . has not followed a straight line . . . ."[66] The Court reasoned that *Indian Towing* did not overturn *Dalehite* because the government in *Indian Towing* "conceded the discretionary function exception was not implicated [in that case]."[67]

Although the Supreme Court concluded that it is impossible to specifically define the discretionary function exception, it provided some guidance on what to consider when determining whether to apply the exception: (1) one should examine the conduct of the government actor and determine if it is the type of act Congress intended to protect, instead of merely examining the government actor's position; and (2) determine whether the acts of regulatory agencies within their role as a regulatory agency are covered by the exception.[68]

Using these factors, the Court determined that the FAA's policy to spot-check manufacturers' compliance with its regulatory guideline was "the sort of governmental conduct protected by the discretionary function exception to the Act."[69] Specifically, the Court found that "[t]he FAA has a statutory duty to promote safety in air transportation, not to insure it. . . . [Therefore, the plaintiffs' claims] against the FAA for its alleged negligence in certificating aircraft for use in commercial aviation are barred by the discretionary function exception of the Federal Tort Claims Act."[70]

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[63] *Id.* at 802–03.

[64] *Id.* at 803.

[65] *Id.* at 811.

[66] *Id.* at 811–12.

[67] *Id.* at 812.

[68] *Id.* at 813–14.

[69] *Id.* at 815–16.

[70] *Id.* at 821.

A more recent Supreme Court case to analyze the discretionary function exception is *Berkovitz v. United States*.[71] In this case, an infant contracted polio after ingesting an oral polio vaccine that the Food and Drug Administration (FDA) had approved for release to the public.[72] The plaintiffs alleged that the FDA was negligent because it "violated federal law and policy regarding the inspection and approval of polio vaccines."[73]

The Supreme Court determined that federal courts should apply the following two-prong test when analyzing whether the discretionary function exception applies:

> [A] court must first consider whether *the action is a matter of choice for the acting employee.* This inquiry is mandated by the language of the exception; conduct cannot be discretionary unless it involves an element of judgment or choice. . . . [The] exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.[74]

If the challenged conduct is a matter of choice, "a court must [then] determine whether that judgment is of the kind that the discretionary function exception was designed to shield[:] . . . governmental actions and decisions based on considerations of public policy."[75]

The plaintiffs asserted two claims against the government: (1) the government "violated a federal statute and accompanying regulations in issuing a license" to the manufacturer to produce the vaccine; and (2) the government violated "federal regulations and policy in approving the release of the particular lot" of the vaccine containing plaintiff's dose.[76]

The Court determined that the discretionary function exception did not bar the plaintiffs' claims that the federal government did not comply with federal law in licensing and approving the vaccine.[77] It remanded the case for further fact-finding regarding the plaintiffs' claims that the government determined that the vaccine "complied with regulatory standards, but that the determination was incorrect"; the Court found that such de-

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71 Berkovitz v. United States, 486 U.S. 531, 536 (1988).

72 *Id.* at 533.

73 *Id.*

74 *Id.* at 536 (emphasis added).

75 *Id.* at 536–37 (citing Dalehite v. United States, 346 U.S. 15, 35 (1953)).

76 *Id.* at 539–40.

77 *Id.* at 542–45, 548.

cisions would involve the government's exercise of a policy choice.[78]

The Supreme Court determined, however, that the discretionary function exception barred the plaintiffs' claim that the government was negligent in allowing the manufacturer to release that particular dose of vaccine because the FDA's spot-check program was similar to the FAA's program in *Varig Airlines.*[79]

Another Supreme Court case in the evolution of the planning/operational approach is *United States v. Gaubert.*[80] In *Gaubert,* the United States, pursuant to the Home Owners' Loan Act of 1933, "undertook to advise about and oversee certain aspects of the operation of a thrift institution," the Independent American Savings Association (IASA).[81] The Supreme Court had to determine if these actions were within the discretionary function exception.[82]

The United States, through the Federal Home Loan Bank Board, "sought to have IASA merge with Investex Savings, a failing Texas thrift."[83] As part of the merger, the government requested that IASA's chairman, Thomas Gaubert, enter an agreement removing him from IASA's management because of Gaubert's other financial dealings.[84] The government did not institute formal proceedings against IASA because "they relied on the likelihood that IASA and Gaubert would follow their suggestions and advice."[85]

Three years after the merger, Gaubert sued the federal government for "$100 million in damages for the alleged negligence of federal officials in selecting the new officers and directors and in participating in the day-to-day management of IASA."[86]

The Court summarized its discretionary function analysis as follows:

> [I]f a regulation mandates particular conduct, and *the employee obeys the direction,* the Government will be protected because the action will be deemed in furtherance of the policies which led to

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[78] *Id.* at 544–45.
[79] *Id.* at 546–547.
[80] United States v. Gaubert, 499 U.S. 315, 322 (1991).
[81] *Id.* at 317–18.
[82] *Id.*
[83] *Id.* at 319.
[84] *Id.*
[85] *Id.*
[86] *Id.* at 320.

> the promulgation of the regulation. If the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy. On the other hand, *if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption* that a discretionary act authorized by the regulation involves consideration of the *same policies* which led to the promulgation of the regulations.[87]

In what appears to be a deviation from the language in *Dalehite*, the Court emphasized that an act does not necessarily have to involve policy making at the planning level to receive immunity.[88] The Court emphasized that "[d]ay-to-day management of banking affairs, like the management of other businesses, regularly requires judgment as to which of a range of permissible courses is the wisest. Discretionary conduct is not confined to the policy or planning level."[89] In short, the Court stressed that none of its prior holdings suggested that "decisions made at an operational level could not also be based on policy."[90]

Furthermore, the Court refined the second prong of the two-prong test from *Berkovitz* by emphasizing that "[w]hen established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be *presumed* that the agent's acts are grounded in policy when exercising that discretion."[91] Stated another way, the Supreme Court told the lower courts that they no longer had to determine if the government employee actually exercised the type of discretion that is protected by the exception, if the employee's actions could have been based upon policy decisions or implied by policy espoused in a statute, regulation, or guideline.[92]

Gaubert argued that the government's actions were not covered because they involved the government controlling the day-to-day activities of IASA, including the hiring of consultants, the conversion of IASA from a state-charted savings and loan to a federally charted savings and loan, the placement of IASA sub-

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87 *Id.* at 324 (emphasis added) (citations omitted).

88 *Id.* at 325.

89 *Id.*

90 *Id.* at 325–26.

91 *Id.* at 324 (emphasis added). *See* Berkovitz v. United States, 486 U.S. 531, 536 (1988).

92 *See Gaubert*, 499 U.S. at 324–25.

sidiaries in bankruptcy, the mediation of salary disputes, and review of a complaint that IASA had considered filing.[93]

The Supreme Court determined that "[t]here [were] no allegations that the regulators gave anything other than the kind of advice that was within the purview of the *policies* behind the statutes."[94] Therefore, the Court found that the discretionary function exception barred Gaubert's claims.[95]

One commentator determined that the U.S. government, since *Gaubert*, has succeeded on 76.30% of its motions for summary judgment based upon the discretionary function exception.[96]

VI. THE DISCRETIONARY FUNCTION EXCEPTION IN THE CONTEXT OF AIRPORT LITIGATION IN STATE COURTS

A. Mississippi's Liberal Use of the Planning/Operational Approach

In 2012, the Mississippi Supreme Court in *Pratt v. Gulfport-Biloxi Regional Airport Authority* handed down a decision under the guise of the planning/operational approach.[97] The court's application of this approach, however, appears similar to the semantic approach.[98] Under the court's reasoning, almost any act by a Mississippi airport authority could be considered immune.

In *Pratt*, Dr. Jerry Pratt sued the Gulfport-Biloxi Regional Airport Authority after he "slipped and fell down a set of stairs at the Gulfport-Biloxi Regional Airport."[99] The airport used the metal stairs "as a temporary means of accessing the tarmac from the terminal" while the airport was under construction.[100] As an additional safety precaution, the airport's employees added anti-slip tape to the stairs.[101] Prior to falling, Dr. Pratt began to climb down the stairs.[102] The stairs were wet from the rain, which

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93 *Id.* at 327–28.

94 *Id.* at 333 (emphasis added).

95 *Id.* at 332, 334.

96 Stephen L. Nelson, *The King's Wrongs and the Federal District Courts: Understanding the Discretionary Function Exception to the Federal Tort Claims Act*, 51 S. Tex. L. Rev. 259, 292–93 (2009).

97 Pratt v. Gulfport-Biloxi Reg'l Airport Auth., 97 So. 3d 68, 73 (Miss. 2012).

98 *See id.* at 72–76.

99 *Id.* at 70.

100 *Id.*

101 *Id.*

102 *Id.* at 71.

caused Dr. Pratt to slip and fall down the stairs onto the tarmac.[103]

The Mississippi Supreme Court determined that in order to find that the airport's actions were within the discretionary function exception, it "must ascertain whether the activity in question involved *an element of choice or judgment.* If so, [the court] also must decide whether that choice or judgment involved social, economic, or political-policy considerations."[104] To determine if the activity involved an element of choice or judgment, "the [c]ourt must first ascertain whether the activity was discretionary or ministerial."[105] An act "is discretionary if 'it is not imposed by law and depends upon the judgment or choice of the government entity or its employee[s].'"[106] Conversely, "[a] ministerial function is one positively imposed by law and required to be performed at a specific time and place, removing an officer's or entity's choice or judgment."[107]

In its analysis, the court radically departed from the argument framed by the parties by stating:

> [T]he parties agreed that the activity at issue—placing anti-slip tape on the temporary airstairs—was not a ministerial function, as there are no laws or regulations pertaining to this activity. . . . However, that is not the "function" at issue. The function with which we are concerned is the *operation of the airport.* The state does not have a statutory obligation to provide and operate airports for its citizens. A decision by the state, county, municipality, or other governmental entity to operate an airport is discretionary. Therefore, barring a rule or regulation pertaining to a certain activity, decisions that are part of the airport's day-to-day operations are also discretionary.[108]

Then, the court found that the Airport Authority was immune because "the airport authority's decision to make improvements to the facility took economic factors into consideration. The use of the airstairs . . . [and] adding anti-slip tape to the stairs . . . are daily operational decisions that fall under the overall operation of the airport."[109]

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103 *Id.*

104 *Id.* at 72 (emphasis added) (quoting Miss. Transp. Comm'n v. Montgomery, 80 So. 3d 789, 795 (Miss. 2012)).

105 *Id.* (citing Dancy v. E. Miss. State Hosp., 944 So. 2d 10, 16–18 (Miss. 2006)).

106 *Id.* (quoting *Montgomery*, 80 So. 3d at 795).

107 *Id.*

108 *Id.* at 72.

109 *Id.* at 75.

Under Mississippi's application of the planning/operational approach, it appears that almost any action by an airport authority employee in running an airport is immune because a court could easily find that it is supported by the city's discretionary decision to have a public airport.

B. Alaska's Conservative Use of the Planning/Operational Approach

In *Japan Air Lines Co. v. State*, Alaska applied the planning/operational approach in a lawsuit involving an airport.[110] A Boeing 747 owned by Japan Air Lines was damaged while taxiing at Anchorage International Airport because the taxiway was covered with black ice.[111] Japan Air Lines' insurer sued the State for the property damage to the Boeing 747 that resulted from the aircraft sliding on the taxiway.[112]

The Alaska Supreme Court determined that "decisions that rise to the level of planning or policy formulation will be considered discretionary acts which are immune from tort liability, whereas decisions that are merely operational in nature, thereby implementing policy decisions, will not be considered discretionary and therefore will not be shielded from liability."[113]

The court found that the plaintiff's claim was not barred by the discretionary function exception because "[o]nce the basic policy decision to build . . . a taxiway at Anchorage International Airport was made, the *state was obligated to use due care* to make certain that the taxiway met the standard of reasonable safety for its users."[114]

More recently, the Alaska Supreme Court revisited the planning/operational approach in airport litigation in *State Department of Transportation and Public Facilities v. Sanders*.[115] In *Sanders*, the plaintiff struck a baggage train operated by United Airlines while driving his motorcycle on a public road.[116] The plaintiff sued the state of Alaska because "the Airport had adopted a practice of allowing aircraft support vehicles, including baggage trains, to operate on [the public road] without complying with

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[110] Japan Air Lines Co. v. State, 628 P.2d 934, 936 (Alaska 1981).

[111] *Id.* at 935.

[112] *Id.* at 935–36.

[113] *Id.* at 936.

[114] *Id.* (emphasis added).

[115] State Dep't of Transp. & Pub. Facilities v. Sanders, 944 P.2d 453, 456 (Alaska 1997).

[116] *Id.* at 455.

certain motor vehicle regulations promulgated by the Department of Public Safety."[117]

The court emphasized that "[u]nder the planning/operational test, liability is the rule, immunity the exception."[118] This court, like the court in *Japan Air Lines*, determined that the State's decision to allow baggage trains to operate on the public road was immune under the discretionary function exception; however, "once the State decided to open the road to such vehicles, it was obligated to do so in a non-negligent manner."[119]

C. Idaho's Use of the Planning/Operational Approach

In *Tomich v. City of Pocatello*, the Idaho Supreme Court's application of the planning/operational approach in an airport case produced results similar to the Good Samaritan approach.[120] In *Tomich*, Todd and Max Tomich jointly owned a 1967 Citabria 7ECA, which they tied down and parked at an airport owned by the City of Pocatello, Idaho.[121] The City did not charge them a tie-down fee, and they continued to park and tie down the airplane at this airport from 1984 to 1991.[122]

Eventually, a windstorm caused the tie-downs to fail, and "the plane tumbled down the runway and [was] destroyed."[123] The Tomiches sued the City, alleging that the City failed to "provide and maintain a safe area in which to tie down aircraft."[124]

On appeal, the City argued it was immune under the discretionary function exception to the Idaho Tort Claims Act because "it passed an ordinance embodying the policy decision not to maintain the airport's tie-downs because of budget constraints."[125]

Under Idaho's version of the planning/operational test, "[r]outine matters not requiring evaluation of broad policy factors will likely be 'operational,' whereas decisions involving a consideration of the financial, political, economic, and social ef-

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117 *Id.*

118 *Id.* at 456 (internal quotation marks omitted).

119 *Id.* at 460.

120 Tomich v. City of Pocatello, 901 P.2d 501, 503 (Idaho 1995).

121 *Id.*

122 *Id.*

123 *Id.*

124 *Id.*

125 *Id.* at 504.

fects of a particular plan are likely 'discretionary' and will be accorded immunity."[126]

The court determined:

> The ordinance reflects a desire to limit the city's liability . . . not a decision to reduce or eliminate maintenance at the airport. . . . Here, rather than reach a policy decision on airport maintenance, the city tried to make a policy decision that it would not be liable for anything that happened at the airport. Therefore, the discretionary function exception does not immunize the city.[127]

Thus, Idaho's application severely limits the discretionary function exception and appears to be similar to the Good Samaritan approach because the court second-guessed the City's decision not to repair the tie-downs.[128] Furthermore, the court found that the City had a duty to run the airport reasonably despite the City basing its decision to not replace the tie-downs on budgetary considerations.[129]

D. Louisiana's Planning/Operational Approach

In *Alpha Alpha, Inc. v. Southland Aviation*, the Louisiana Court of Appeals used what appears to be the Good Samaritan approach in an airport case.[130] In that case, Alpha Alpha purchased a twin-engine aircraft, the *Merlin*, from Associated Aircraft Sales and leased it to Travelair Charters.[131] In order to avoid Texas ad valorem taxes, a representative of Associated Aircraft Sales, Steven Weintraub, arranged to temporarily park the *Merlin* at Southland Field, a public airport in Sulphur, Louisiana.[132] Mr. Weintraub requested hangar space for the *Merlin*, but the airport manager told him, "the hangars were being remodeled and were not available."[133] The airport manager also told him that the *Merlin* would be safely parked on the ramp.[134] According to Mr. Weintraub, he and the airport manager

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126 *Id.* (quoting Lawton v. City of Pocatello, 886 P.2d 330, 336 (Idaho 1994)).

127 *Id.* at 505.

128 *See id.*; *see also* Indian Towing Co. v. United States, 350 U.S. 61, 64–65 (1955).

129 *See Tomich*, 901 P.2d at 505.

130 Alpha Alpha, Inc. v. Southland Aviation, 697 So. 2d 1364, 1372 (La. Ct. App. 1997).

131 *Id.* at 1366.

132 *Id.*

133 *Id.*

134 *Id.* at 1366–67.

agreed that "he would pay [the manager] for the tie-down fees when [he] returned to fly the aircraft back to Texas . . . ."[135]

Unknown individuals vandalized the *Merlin* at the airport on two separate occasions.[136] Alpha and Travelair sued the West Calcasieu Port, Harbor, and Terminal District; the Industrial Development Board of the City of Sulphur, who owned the airport; and the West Calcasieu Airport Managing Board d/b/a Southland Aviation, who managed the airport, alleging that these defendants were negligent in their duties as compensated depositaries.[137]

The defendants argued that "the decision on the need for security provided [for] the aircraft at Southland Field was a decision made at the ministerial level by Southland Aviation, the airport managing board, and that the board is immune from liability under the discretionary function doctrine . . . ."[138]

The court of appeals set forth Louisiana's version of the planning/operation approach as follows:

> First, the court must determine whether the government's action was a matter of choice. If the action was not a matter of choice because some statute, regulation, or policy prescribed a specific course of action to follow, then the exception does not apply and there is no immunity. If, on the other hand, the action involved an element of choice or discretion, then the court must determine whether that discretion is the type that is shielded by the exception because it is grounded in social, economic, or political policy. It is only those actions that are based on public policy that are protected by La.R.S. 9:2798.1.[139]

The court held that the discretionary function exception did not apply and that the defendants were not immune from suit because once the airport decided to become a public-use airport and to become "a depositary of the *Merlin* . . . the defendants had no choice but to abide by applicable legal standards in discharging that function."[140]

Yet again, a state court ostensibly applied the planning/operational approach, but in effect, it applied the Good Samaritan approach. Despite the fact that the city had a valid argument that the exception did not apply, i.e. its diescretion to accept

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135 *Id.* at 1367.
136 *Id.*
137 *Id.* at 1367–68.
138 *Id.* at 1371.
139 *Id.* at 1372 (internal citations omitted).
140 *Id.*

incoming aircraft, the court determined that the airport had a duty to act reasonably once it decided to allow the plaintiffs to park the *Merlin* at the airport.[141]

E. KANSAS'S APPLICATION OF THE GOOD SAMARITAN APPROACH

The Kansas Court of Appeals employed a version of the Good Samaritan approach, although not titling it as such, in *Cessna Aircraft Co. v. Metropolitan Topeka Airport Authority.*[142] In that case, "Cessna Aircraft Company (Cessna) and Sun Life Insurance Company of America (Sun Life) [sued] the Metropolitan Topeka Airport Authority (MTAA) to recover damages for aircraft destroyed in a hangar fire at Forbes Field Airport."[143]

The fire began because a contractor was using a propane torch to replace the hangar's roof.[144] The fire destroyed the hangar along with "13 airplanes—10 owned by Cessna and 3 which Cessna leased from Sun Life."[145] The case proceeded to trial, and the jury returned a verdict against the airport and several other defendants.[146]

The court of appeals noted that the airport:

> [U]ndertook to provide its tenants . . . with fire and police protection. Moreover, [it] adopted rules and regulations restricting persons from entering hangars without permission and from performing work on a hangar without written permission from airport management. Other regulations restricted the use of flame operations and the storage of flammable materials in hangars. MTAA further represented that it would provide Cessna with the same type of services offered its other tenants.[147]

In its amicus curiae brief, the League of Kansas Municipalities argued that the airport was immune because the airport's act of providing fire protection to its lessees was discretionary.[148]

The court rejected this argument and held that "once a governmental entity undertakes to provide those services, and to adopt mandatory regulations and policies in connection with those services, discretionary immunity does not protect the gov-

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[141] *Id.*

[142] Cessna Aircraft Co. v. Metro. Topeka Airport Auth., 940 P.2d 84, 94 (Kan. Ct. App. 1997).

[143] *Id.* at 90.

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.* at 92.

[148] *Id.* at 94.

ernmental entity from liability for a failure to provide services in accord with those regulations and policies."[149]

F. New York's Application of the Good Samaritan Test

In *Forrester v. Port Authority of New York and New Jersey*, Graeme Forrester's flight landed at Kennedy Airport.[150] He went to the taxi loading area at the airport, and the taxi dispatcher directed him to a cab.[151] As he walked around the cab to get into the front passenger seat, he was hit by another cab.[152]

He "sued [Trans World Airlines] and the Port Authority, which operates Kennedy Airport and subleases certain areas of the Airport to airlines, [including the taxi loading area], premised upon their negligent design and maintenance of the taxi loading area."[153]

The Port Authority argued that it was immune because its design of the taxi loading area constituted a discretionary function.[154] The court rejected this argument and held that "[r]egardless of whether the operation of a taxi loading zone constitutes a governmental function, such immunity would not absolve the Port Authority from liability for a design devised without adequate study or one lacking a reasonable basis."[155]

The *Forrester* court appears to use the Good Samaritan test because, even if the design of the taxi loading areas involved the types of decisions that were meant to be protected by the exception, the court is unlikely to find the airport immune if it did not act reasonably in carrying out such decisions.

G. Oregon's Policy Ranking Approach

The Oregon Court of Appeals applied the discretionary function exception to a case involving a crash at the Flying M Ranch.[156] In that case, the plaintiffs sued the state of Oregon for wrongful death after their decedent died as a passenger in an

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149 *Id.*

150 Forrester v. Port Auth. of N.Y. & N.J., 527 N.Y.S.2d 224, 225 (N.Y. App. Div. 1988).

151 *Id.* at 225–26.

152 *Id.* at 226.

153 *Id.*

154 *Id.* at 227.

155 *Id.*

156 Walker v. Mitchell, 891 P.2d 1359, 1360 (Or. Ct. App. 1995).

aircraft that crashed as it took off from the Flying M Ranch Airport.[157]

The plaintiffs alleged that the state's Aeronautics Division negligently classified the Flying M Ranch Airport as a personal use airport, which "exempt[ed] it from the dimensional standards, including standards governing runway length and 'glide slope,' applicable to 'public use' airports . . . ."[158] They further alleged that this misclassification contributed to the decedent's death.[159]

The State argued that the act of classifying an airport as a personal use airport versus a public use airport was immune from liability because it was a discretionary function.[160]

The court of appeals determined that for the Division's actions to fall within the discretionary function exception, the actions must involve an "'assessment and ranking of the policy objectives explicit or implicit in the statute' and for the judgment that one or more of these objectives will be served by a given action."[161]

Using this approach, the court found that based upon the record before it, it could not tell whether the Division's decision to classify the Flying M Ranch as a "private use" airport was necessarily based upon the ranking and assessment of policy objectives.[162] This approach appears closer to what the Supreme Court's planning/operational approach has evolved into because a court must assess the government's immunity based upon whether the action in question involved the balancing and ranking of policy objectives.

VII. THE DISCRETIONARY FUNCTION EXCEPTION IN THE CONTEXT OF AIRPORT LITIGATION IN FEDERAL COURTS

Because of the limited guidance given by the U.S. Supreme Court, lower federal courts have also had difficulty determining what sorts of actions fall within the discretionary function exception of the Federal Tort Claims Act.

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157 *Id.*

158 *Id.* at 1360–61.

159 *Id.*

160 *Id.*

161 *Id.* at 1365.

162 *Id.*

In *AIG Aviation Insurance Services, Inc. v. United States*, the U.S. District Court for the District of Utah analyzed the discretionary function exception under both the Federal Tort Claims Act and the Utah Governmental Immunity Act.[163] In that case, South Coast Helicopter landed a Bell helicopter at the Brigham City, Utah, airport for refueling.[164] The airport's manager told the helicopter's pilot that he could buy fuel from Flying J, "a private corporate operator . . . ."[165] As the helicopter flew from the ramp area to the Flying J Hangar, it "struck two unmarked power lines suspended approximately 30 feet above the taxiway. The helicopter crashed and was a total loss, less salvage."[166]

South Coast and AIG Aviation Insurance Services, South Coast's insurer, sued the United States and the Brigham City Corporation.[167] Specifically, the plaintiffs alleged that the United States, through the actions of the FAA, "was negligent in specifying, approving, operating, maintaining, and inspecting the airport facilities, and in not requiring that the power lines in question be buried," and that the City was negligent because it failed to bury or mark the power lines.[168] The United States moved to dismiss the case under the Federal Tort Claims Act, and the City moved for dismissal under the Utah Governmental Immunity Act.[169]

The plaintiffs argued that the discretionary function exception did not apply to their claims against the United States because two federal directives mandated that the FAA correct the hazardous power line.[170] Therefore, the FAA's decision regarding the power lines did not involve a choice or judgment and should not be immune under the Act.[171] First, they argued that the FAA Airport Safety Data Program Order 5010.4 required the FAA to inspect the airport and to "'[l]ook for and report all items on the airport that could be hazardous, such as unmarked obstructions . . . and other safety hazards on or near the runway.'"[172] The plaintiffs relied upon the fact that the FAA had

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163 AIG Aviation Ins. Servs., Inc. v. United States, 885 F. Supp. 1496, 1502 (D. Utah 1995).

164 *Id.* at 1497.

165 *Id.*

166 *Id.*

167 *Id.* at 1497–98.

168 *Id.* at 1498.

169 *Id.*

170 *Id.*

171 *Id.*

172 *Id.* at 1498–99.

inspected the airport five times prior to the incident and did not list the power lines in any of its reports from these inspections.[173]

The district court found that the FAA's actions, however, fell within the discretionary function exception because the FAA's inspector was impliedly vested "with discretion to determine which items 'could be' hazardous."[174] Thus, the court reasoned that this act involved choice or judgment on the part of the inspector.[175] Then, it determined that "the inspector's decision not to report the power lines" was immune from suit under the discretionary function exception because the inspector's judgment was "grounded in the relevant policy scheme."[176]

The plaintiffs also argued that the FAA violated "FAA Advisory Circular 150/5300-13, dated September 29, 1989," because it failed to "'report the obstructing power lines following the construction and marking of the taxiway' and . . . 'fail[ed] to clear or require the clearance of the taxiway.'"[177] The court determined that the circular's requirements did not apply, and the court dismissed the case against the United States.[178]

Next, the court addressed the City's motion to dismiss under the Utah Act.[179] Under the Act, a court must answer the following questions in the affirmative for the exception to apply:

(1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?
(2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective?
(3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?
(4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty

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173 *Id.* at 1499.
174 *Id.*
175 *Id.*
176 *Id.* at 1500.
177 *Id.*
178 *Id.* at 1500–02.
179 *Id.* at 1502.

> to do or make the challenged act, omission, or decision?[180]

The court answered these questions in favor of the City and determined that the City was immune from the plaintiffs' claims because the City's decision not to bury the power lines was balanced with its budgetary restrictions against the danger posed by the power lines.[181]

The federal courts have also inconsistently applied the discretionary function exception to lawsuits involving customs agents detaining passengers at public airports.[182] In *DePass v. United States*, Derrick Anthony DePass sued the United States under the Federal Tort Claims Act, alleging that he was improperly detained at the Baltimore-Washington International Airport by "the United States Customs Service, the Maryland Aviation Administration, the Maryland Department of Transportation, Eastern Airlines, Inc., and Burns Security, Inc."[183] Mr. DePass also alleged that the defendants' detainment was an assault and battery.[184]

The defendants argued that Mr. DePass did not provide "satisfactory proof of United States citizenship upon his arrival at BWI from Montego Bay, Jamaica on an Eastern Airlines flight."[185]

After dismissing all of the defendants except the United States, the district court addressed the United States' motion to dismiss based upon the discretionary function exception under the Federal Tort Claims Act.[186] Because of the seemingly contradictory results in *Dalehite* and *Indian Towing*, the court determined that "the Supreme Court has failed to set clear guidelines to determine when this exception applies."[187] Therefore, it rejected the planning/operational approach recommended by the plaintiff because under the plaintiff's version of the test,

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180 *Id.* at 1503–04.

181 *Id.* at 1504–05.

182 *Compare* DePass v. United States, 479 F. Supp. 373 (D. Md. 1979), *with* Caban v. United States, 671 F.2d 1230 (2d Cir. 1982).

183 *DePass*, 479 F. Supp. at 374.

184 *Id.*

185 *Id.*

186 *Id.*

187 *Id.* at 375; *see* Dalehite v. United States, 346 U.S. 15 (1953); Indian Towing Co. v. United States, 350 U.S. 61 (1955).

only discretionary acts of the government made at the planning level are immune from suit.[188]

The court determined that Congress intended the exception to include those actions that involve governmental policy, no matter the rank of the governmental official involved.[189] The court held that DePass's claims against the United States were barred by the discretionary function exception because the applicable statutes and regulations do not dictate to immigration inspectors how they must determine that someone is a U.S. citizen.[190] Furthermore, the court found that the inspector's actions were the types of actions that Congress intended to protect under the discretionary function exception because "each time an immigration inspector examines someone to determine whether he is a United States citizen, the inspector is in effect setting a policy that affects our international relations and which has social, economic, and political repercussions in this country as well."[191]

Three years later, the Second Circuit contradicted *DePass* in *Caban v. United States.*[192] In *Caban,* Salvador Caban alleged that he was damaged when the Immigration and Naturalization Service (INS) improperly detained him at John F. Kennedy International Airport.[193] Despite Mr. Caban producing a Puerto Rican birth certificate, a New York driver's license, a social security card, and other documentation, INS detained Mr. Caban and took him to an INS detention center.[194] After Mr. Caban filed suit, the government moved for summary judgment and argued that Mr. Caban's claim was barred by the discretionary function exception.[195]

In its analysis, the Second Circuit Court of Appeals lamented that "[t]he discretionary function exception to the FTCA has presented courts with problems almost from the time of its enactment in 1946. The principal difficulty is simply that all federal employees exercise a certain amount of discretion in the discharge of their responsibilities."[196] The court warned that a

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[188] *DePass,* 479 F. Supp. at 375. It should be noted that this case preceded the Supreme Court opinions in *Varig Airlines, Berkowitz,* and *Gaubert.*

[189] *Id.* at 375.

[190] *Id.* at 376–77.

[191] *Id.* at 377.

[192] Caban v. United States, 671 F.2d 1230, 1233 (2d Cir. 1982).

[193] *Id.* at 1230.

[194] *Id.* at 1231.

[195] *Id.* at 1232.

[196] *Id.*

literal interpretation of the exception, such as under the semantic approach, would lead to the exception swallowing "the general rule that waives the United States' immunity to suits arising out of its employees' actions."[197]

After discussing the history of the various discretionary function tests, the court adopted and used the "policy balancing test," which requires a court to find that a governmental official's actions fall within the exception if the action requires the official to "consider and weigh competing policies in arriving at his decision . . . ."[198] Using this test, the court determined that Caban's claim against the United States was not barred by the discretionary function exception because the INS agents' actions in detaining Mr. Caban did not require the agents "to consider and weigh competing polices."[199] The court emphasized that "if Caban were suing the INS for adopting [the regulation regarding an applicant's entry rights into the United States], he would find his case properly dismissed" because this involved the weighing of competing policies.[200]

Nearly two decades later, the federal courts again addressed a case similar to *DePass* and *Caban* in *Bradley v. United States.*[201] After she returned from Jamaica, Yvette Bradley "was stopped [by] United States Customs Inspectors at Newark International Airport."[202] She alleged she "was singled out for a luggage search, subjected to a pat down search, and ultimately released by Customs officers."[203]

Bradley sued the United States, the Customs Service, and the customs agents, alleging that she was searched "because she is a black woman."[204] The defendants argued that their actions were immune under the discretionary function exception.[205] Applying the Supreme Court's test from *Gaubert*, the court determined that the customs agents' actions were immune from suit under the discretionary function exception because the customs

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197 *Id.*

198 *Id.* at 1232–33.

199 *Id.* at 1233.

200 *Id.*

201 Bradley v. United States, 164 F. Supp. 2d 437, 441–42 (D. N.J. 2001), *aff'd*, 299 F.3d 197 (3d Cir. 2002).

202 *Id.* at 442.

203 *Id.*

204 *Id.*

205 *Id.* at 454.

agents' decision to search Ms. Bradley was a discretionary act that implicated public policy.[206]

VIII. WHERE AIRPORT LITIGATION CURRENTLY STANDS WITH RESPECT TO THE DISCRETIONARY FUNCTION EXCEPTION

The case law interpreting the discretionary function exception to the general waiver of sovereign immunity is legion. However, courts, practitioners, and commentators seem to be as confused today about the proper scope of the discretionary function exception as they were when *Dalehite* was decided in 1953. While analyzing the discretionary function exception under the Federal Tort Claims Act, one commentator noted that the exception is confusing to both scholars and federal judges, and it is "the most criticized and litigated exception" to the Federal Tort Claims Act.[207] Likewise, "[s]tate court judges have struggled as hard as their federal brethren to strike the right balance between plaintiffs and policy makers" when interpreting this exception.[208]

This confusion is readily apparent in the context of airport litigation. Mississippi courts have declared that the day-to-day operations of a public airport are discretionary and should be afforded immunity.[209] Justice Robert Jackson summarized the policy of the courts that have liberally applied the discretionary function exception when he commented that "[o]f course, it is not a tort for government to govern . . . ."[210]

On the other hand, Alaska, Kansas, Louisiana, and New York courts have determined that airports must act reasonably after the initial planning phase.[211] The Louisiana Court of Appeals aptly described the policy behind these courts' decisions when it

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[206] *Id.*; *see* United States v. Gaubert, 499 U.S. 315, 323 (1991).

[207] Nelson, *supra* note 96, at 262.

[208] Bruce A. Peterson & Mark E. Van Der Weide, *Susceptible to Faulty Analysis: United States v. Gaubert and the Resurrection of Federal Sovereign Immunity*, 72 NOTRE DAME L. REV. 447, 489 (1997).

[209] *See* Pratt v. Gulfport-Biloxi Reg'l Airport Auth., 97 So. 3d 68, 75–77 (Miss. 2012).

[210] Dalehite v. United States, 346 U.S. 15, 57 (1953) (Jackson, J. dissenting).

[211] *See* Japan Air Lines Co. v. State, 628 P.2d 934, 938 (Alaska 1981); Cessna Aircraft Co. v. Metro. Topeka Airport Auth., 940 P.2d 84, 94 (Kan. Ct. App. 1997); Alpha Alpha, Inc. v. Southland Aviation, 697 So. 2d 1364, 1371–72 (La. Ct. App. 1997); Forrester v. Port Auth. of N.Y. & N.J., 527 N.Y.S.2d 224, 226 (N.Y. App. Div. 1988).

declared that "there is a difference between exercising discretion and abdicating responsibility."[212]

Even the federal courts have failed to consistently apply the Supreme Court's planning/operational approach. The exact same case can come before two different district courts, the United States can argue that it is immune under the discretionary function exception in both cases, and one court might find that the United States is immune while the other court finds that the United States is liable.

In addition, it appears that some states, because of their expansive interpretation of the discretionary function exception, may have actually decreased their public airports' liability as compared to such liability prior to the states' waiver of sovereign immunity.[213]

IX. A WORKABLE SOLUTION

Because the courts have had approximately sixty-eight years to develop a feasible test for consistently deciding what is a discretionary function and have failed to do so, this article recommends that Congress and the state legislatures step in and actually define the term "discretionary function." By defining what is and what is not a discretionary function, the legislative branch can send a message to the courts that the current system does not work. Furthermore, the legislative branch can act quickly and need not wait for a case to come before it in order to alter the state of the law.

For example, 28 U.S.C. § 2671 contains the definitions section of the Federal Tort Claims Act.[214] This section defines terms used in the Act such as "employee of the government" and "acting within the scope of his office or employment."[215] Congress and the state legislatures can clear up the confusion created by the discretionary function exception, as currently written, by simply defining what "a discretionary function or duty" is in the definitions sections of their respective tort claims acts.

The definition, however, must be carefully crafted to strike a balance between the legislative purpose of the tort claims acts,

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[212] *Alpha Alpha*, 697 So. 2d at 1372.

[213] *Compare* Brummett v. City of Jackson, 51 So. 2d 52, 53 (Miss. 1951) (holding that airport could be held liable for negligently maintaining tie downs), *with Pratt*, 97 So. 3d at 72 (holding that airport was immune for negligently maintaining ladder to exit terminal onto tarmac).

[214] 28 U.S.C. § 2671 (2012).

[215] *Id.*

which is to give wronged parties redress from the government for torts it commits, and the purpose of the discretionary function exception, which is to prevent the judiciary from second-guessing the policy decisions of the other branches of government.[216]

Based upon tests created by other commentators for courts to apply and a test previously adopted by the Utah Supreme Court under Utah's discretionary function test, Congress and the state legislatures should add the following definition to their respective tort claims acts in order to strike the proper balance mentioned above.

A discretionary function is an act, omission, or decision that:

1. involves a matter of choice by a government employee;
2. is essential to the realization of a governmental policy, program, or objective;
3. involves the actual and legitimate evaluation of a policy decision on the part of the government employee with the requisite constitutional, statutory, or lawful authority to direct policy.[217]

A. An Act, Omission, or Decision That Involves a Matter of Choice

This element is already part of the planning/operation approach. However, it should also be incorporated into any statutory definition of discretionary function because it would be a poor policy decision if governmental actors could be immune for violating a statute or regulation. Without this language, a court might reward the government for committing negligence by ignoring a deliberative policy decision.

B. An Act, Omission, or Decision That is Essential to the Realization of A Governmental Policy, Program, or Objective

To ensure that plaintiffs are made whole if the government acted negligently, and to inhibit the judiciary from second-guessing another branch of government, the government employee's act or omission should not only involve a governmental policy, program, or objective, but such act or omission should

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[216] *See* Dalehite v. United States, 346 U.S. 15, 32–33 (1953).

[217] *See* Peterson & Van Der Weide, *supra* note 208, at 486; AIG Aviation Ins. Servs., Inc. v. United States, 885 F. Supp. 1496, 1504 (D. Utah 1995).

also be essential to the realization of this policy, program, or objective. For example, the government should not be immune from an employee's negligent driving or an employee ignoring an obvious trip hazard on government property because such actions do not typically involve the realization of a governmental policy, program, or objective.

C. An Act, Omission, or Decision That Involves the Actual and Legitimate Evaluation of a Policy Decision on the Part of a Government Employee with the Requisite Constitutional, Statutory, or Lawful Authority to Direct Policy

This element is designed to correct many of the problems with the policy/balancing approach. Several commentators have criticized the policy/balancing approach because under recent application of the test by the U.S. Supreme Court, the government employee's conduct does not actually have to involve the weighing of policy choices.[218] Instead, the employee's conduct must merely be "susceptible to" the weighing of policy consideration.[219] By including the word "actual" in the definition, the legislature would emphasize that this is a subjective test where the court should examine whether the employee actually balanced policy factors in reaching the employee's decision to act (or not act) instead of creating a legal fiction where the court invents hypothetical scenarios in which the employee *could have* weighed policy factors.

The word "legitimate" is included to avoid the government attempting to create a fictitious policy decision. For example, the municipal government in *Tomich* passed an ordinance to avoid maintaining the tie-downs at its municipal airport.[220] Obviously, as the *Tomich* court noted, the airport attempted to avoid liability by acting like it weighed legitimate policy decisions.[221]

By including the word "legitimate" in the definition, a court should examine the government's weighing of policy factors. It should not second-guess the government's decision, but it also should not allow the government to try to abdicate responsibility by creating a fictitious weighing of policy factors.

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[218] *See* Peterson & Van Der Weide, *supra* note 208, at 487–90; Andrew Hyer, Comment, *The Discretionary Function Exception to the Federal Tort Claims Act: A Proposal for a Workable Analysis*, 2007 B.Y.U. L. Rev. 1091, 1107 (2007).

[219] United States v. Gaubert, 499 U.S. 315, 324–25 (1991).

[220] Tomich v. City of Pocatello, 901 P.2d 501, 504–05 (Idaho 1995).

[221] *Id.* at 505.

For example, if a municipal airport argues that it could not afford to repair its tie-downs due to budgetary constraints, the court would examine the government's budget in order to determine if the government actually had the funds for repairs or if all of the airport's funds were already allocated. If the airport's funds were allocated, then the airport would be immune.

Finally, the phrase "employee with the requisite constitutional, statutory, or lawful authority to direct policy" ensures that the government will not attempt to use the discretionary function exception to shield everyday decisions by rank and file employees. For example, the maintenance crew in *Pratt* most likely made the decision to use the air stairs to exit the gate and reach the tarmac.[222] Thus, the definition addresses Justice Antonine Scalia's concern that "the level at which the decision is made is often *relevant* to the discretionary function inquiry, since the answer to that inquiry turns on *both* the subject matter *and* the office of the decisionmaker."[223]

X. APPLICATION OF THE DEFINITION UNDER A HYPOTHETICAL

With the advent of digital recording, many airports are dramatically increasing the number of video cameras that record video of the airport's premises. In light of this, plaintiffs in trip and fall cases whose falls occurred at public airports are beginning to argue that the airports had actual notice of a dangerous condition because of their ability to monitor the video cameras.[224] Most airports, however, cannot constantly monitor their security cameras without significantly increasing the number of airport employees dedicated to this task.

During a trip and fall case, the airport will inevitably argue that the decision regarding the number of employees it dedicates to monitoring its surveillance cameras is immune because it is a discretionary function. By applying the proposed definition to this scenario, one can see that it strikes the proper balance between the concerns of both the government and plaintiffs.

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[222] Pratt v. Gulfport-Biloxi Reg'l Airport Auth., 97 So. 3d 68, 71–72 (Miss. 2012).

[223] *Gaubert*, 499 U.S. at 335 (Scalia, J., concurring) (emphasis in original).

[224] *See* Jain v. Memphis Shelby Cnty. Airport Auth., No. 08-2119, 2010 WL 711319 (W.D. Tenn. 2010).

First, deciding how many employees to hire to monitor an airport's surveillance system involves a matter of choice because there is no statute, rule, or regulation that mandates how many employees to dedicate to monitoring the surveillance system. When, where, and how to monitor the cameras is essential to the government's safety objectives and to promote national security. Ultimately, the court must decide if the decision regarding monitoring the cameras involves the actual and legitimate evaluation of a policy decision on the part of a government employee with the requisite constitutional, statutory, or lawful authority to direct policy. The court must examine an airport officer or its board members' decision on how many employees to hire to monitor the cameras. If the airport's board or officers weighed the decision and considered such things as budgetary constraints, a court should find the airport's actions immune under the discretionary function exception.

XI. CONCLUSION

It appears that many jurisdictions are now using some form of the planning/operational approach. The application of this approach, however, differs from jurisdiction to jurisdiction. Some jurisdictions apply it very conservatively, and it appears similar to the Good Samaritan approach derived from *Indian Towing*. Conversely, other jurisdictions have applied it liberally, which appears more like the approach described in *Pratt* and results in something more akin to the semantic approach.

It is time for the legislative branch to solve the issues created by the current discretionary function exception found in most tort claims acts. By focusing its definition on actual and legitimate policy evaluations by government employees with the requisite constitutional, statutory, or lawful authority to direct policy, the legislature can solve many of the pitfalls of the current tests adopted by the various courts to determine what is a discretionary function.


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