

1989

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Recommended Citation

Thomas H. (Speedy) Rice, *Berkovitz v. United State: Has a Phoenix Arisen from the Ashes of Varig*, 54 J. AIR L. & COM. 757 (1989)
<https://scholar.smu.edu/jalc/vol54/iss3/4>

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BERKOVITZ V. UNITED STATES: HAS A PHOENIX ARISEN FROM THE ASHES OF VARIG?

THOMAS H. (SPEEDY) RICE*

INTRODUCTION

IN ITS 1984 term the United States Supreme Court handed down the long-awaited decision of *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)* (hereinafter referred to as "*Varig*").¹ The *Varig* opinion used broad and sweeping language to discuss the discretionary function exception to the Federal Tort Claims Act (FTCA)² as it applied to the Federal Aviation Administration's (FAA) regulatory conduct. As a result of that decision, attorneys for the government espoused, and many courts adopted, the opinion that the government was no longer liable for any negligence arising out of a regulatory agency's conduct.³ Some circuits, however, did not adopt

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¹ 467 U.S. 797, *rev'g* 692 F.2d 1205 (9th Cir. 1982) and 692 F.2d 1209 (9th Cir. 1982), *reh'g denied*, 468 U.S. 1226 (1984). The Supreme Court consolidated the Ninth Circuit decisions of *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines) v. United States*, 692 F.2d 1205 (9th Cir. 1982) and *United Scottish Ins. Co. v. United States*, 692 F.2d 1209 (9th Cir. 1982).

² The FTCA is a series of acts passed by Congress to permit the government to be sued under certain circumstances. The acts include 28 U.S.C. §§ 1291, 1346(b)-(c), 1402, 1504 (repealed in 1982), 2110, 2401(b) 2402, 2411, 2412(c) and 2671-80 (1982 & Supp. IV 1986) [hereinafter collectively referred to as FTCA].

³ The government's reliance is based primarily upon the language in *Varig* that "whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals." *Varig*, 467 U.S. at 813-14; *see also* *Natural Gas Pipeline Co. of Am. v. United States*, 742 F.2d. 502, 504-05 (9th

the government's analysis of *Varig* and attempted to distinguish what they considered to be "non-discretionary" conduct.⁴

The government lawyers' position of complete immunity for regulatory activities, and the contrary position by the plaintiff's bar that only discretionary decisions were immune naturally resulted in conflicting decisions among the United States Courts of Appeal.⁵ The split among the courts was more evident in the polio vaccination cases which resulted in the Supreme Court granting certiorari in *Berkovitz v. United States*.⁶ Prior to discussing the *Berkovitz* decision a review of the FTCA and the major Supreme Court decisions preceding *Berkovitz* is necessary.

THE FEDERAL TORT CLAIMS ACT AND THE DISCRETIONARY FUNCTION EXCEPTION

Congress enacted the FTCA⁷ as a limited waiver of the United States' sovereign immunity from legal actions for certain types of specified torts committed by federal agen-

Cir. 1984) (citing *Varig*, the court held that the alleged failure of the FAA discover defects while inspecting an aircraft modification facility was within the exception because it represented government regulation of private activities).

⁴ See *Hylin v. United States*, 755 F.2d 551, 553 (7th Cir. 1985) (interpreting *Varig* as holding that the discretionary function exception bars tort claims against the government when agencies require their employees to exercise discretion in performing enforcement and inspection activities); *National Carrier, Inc. v. United States*, 755 F.2d 675, 678 (8th Cir. 1985) (distinguishing "discretionary judgments concerning agency policy and non-discretionary responsibilities to carry out federal regulations" and holding that the failure to condemn or identify contaminated beef cannot be considered a protected discretionary act even though conducted by a regulatory agency); *Leone v. United States*, 690 F. Supp. 1182, 1188 (E.D.N.Y. 1988) (failure of FAA medical examiners to apply clearly articulated medical standards did not involve policy decisions, therefore the discretionary function exception did not apply). But see *Collins v. United States*, 783 F.2d 1225, 1229 n.3 (5th Cir. 1986) (specifically disagreeing with *Hylin*).

⁵ See *supra* notes 3 - 4 and accompanying text.

⁶ 108 S. Ct. 1954, *cert. granted*, 108 S. Ct. 692 (1988). The Court granted certiorari to resolve conflicts among the lower courts regarding the effect of the discretionary function exception on claims arising from the government's regulation of polio vaccines. *Id.* at 1958. Compare *Berkovitz v. United States*, 822 F.2d 1322 (3d Cir. 1987), *rev'd*, 108 S. Ct. 1954 (1988) with *Baker v. United States*, 817 F.2d 560 (9th Cir. 1987) and *Loge v. United States*, 622 F.2d 1268 (8th Cir. 1981), *cert. denied*, 456 U.S. 944 (1982).

⁷ FTCA, *supra* note 2.

cies through its employees.⁸ An individual asserting a claim against the United States for the negligent acts or omissions of government employees must follow the procedural requirements as outlined in the FTCA.⁹ For example, the FTCA first requires exhaustion of the administrative remedies within the allegedly negligent federal agency.¹⁰ A lawsuit may be instituted when the government fails to settle the plaintiff's claim and a district court may award damages against the United States only when a private individual could be held liable in like circumstances under the relevant state law.¹¹ Congress, however, excluded certain claims from the act's coverage¹² when it enacted the FTCA out of concern that these

⁸ See *Dalehite v. United States*, 346 U.S. 15, 17, *reh'g denied*, 347 U.S. 924 (1954).

⁹ See generally 28 U.S.C. §§ 1346(b), 2671-80 (1982).

¹⁰ 28 U.S.C. § 2675 (1982); see *Genson v. Ripley*, 681 F.2d 1240, 1241 (9th Cir.), *cert. denied*, 459 U.S. 937 (1982) (declining case where plaintiff failed to file administrative claims against the Smithsonian Institute); *Three-M Enter., Inc. v. United States*, 548 F.2d 293, 294 (10th Cir. 1977) (holding that notice to quit the United States Postal Service did not represent filing of an administrative claim); *Claremont Aircraft, Inc. v. United States*, 420 F.2d 896, 897 (9th Cir. 1970) (suit barred because claimant failed to file suit within six months after Air Force denied claim).

¹¹ 28 U.S.C. § 1346(b) (1982); see *Richards v. United States*, 369 U.S. 1, 2, 5-12 (1962) (applying state laws when negligence occurred); *Indian Towing Co. v. United States*, 350 U.S. 61, 63-65 (1955) (recognizing that the FTCA does not exclude governmental activities simply because a private individual does not provide similar functions).

¹² 28 U.S.C. § 2680 (1982) generally excludes the following:

- (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.
- (b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.
- (c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.
- (d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.
- (e) Any claim arising out of an act or omission of any employee of

claims would inhibit certain functions of the government.¹³

The discretionary function exception¹⁴ exempts discretionary functions or duties on the part of federal agencies or governmental employees from the FTCA.¹⁵ Congress, however, never defined or expressed within the FTCA

the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed. Sept. 26, 1950, ch. 1049, § 13(5), 64 Stat. 1043.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives. (June 25, 1948, ch. 646, 62 Stat. 984; July 16, 1949, ch. 340, 63 Stat. 444; Sept. 26, 1950, ch. 1049, §§ 2(a)(2), 64 Stat. 1038, 1043; Aug. 18, 1959, Pub. L. 86-168, title II, § 202(b), 73 Stat. 389; Mar. 16, 1974, Pub. L. 93-253, § 2, 88 Stat. 50.

Id.

¹³ *Dalehite*, 346 U.S. at 27-30. The Court stated that while Congress desired to waive government immunity for some of its employees' tortious acts, "it was not contemplated that the Government should be subject to liability arising from acts of a governmental nature or function." *Id.* at 28.

¹⁴ 28 U.S.C. § 2680(a)(1982).

¹⁵ *Id.* Section 2680 provides that the FTCA shall not apply to "any claim 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." *Id.*

what constitutes a discretionary function.¹⁶ A review of the legislative history of the FTCA reveals only one paragraph relating to Congress' intent in including the discretionary function exception within the enumerated exceptions to the FTCA.¹⁷ Congress' intent was to insulate legislative and regulatory decisions from review by the judiciary through tort damages suits.¹⁸ The legislative history indicates strongly, however, that the common law torts of all federal employees should be subject to a tort claim under the FTCA.¹⁹

PRE-BERKOVITZ DECISIONS BY THE UNITED STATES
SUPREME COURT INVOLVING THE DISCRETIONARY
FUNCTION EXCEPTION

Prior to *Berkovitz* there were three leading Supreme Court cases interpreting the discretionary function exception, *Dalehite v. United States*,²⁰ *Indian Towing Co. v. United States*,²¹ and *United States v. Varig*.²² In addition, there was one court of appeals decision summarily affirmed by the Supreme Court.²³

Dalehite v. United States

In *Dalehite*, the government developed and implemented a plan to produce fertilizer for shipment to war-ravaged Europe and the Orient.²⁴ The fertilizer was being stored in large quantities in Texas City, Texas for loading on various cargo ships.²⁵ While one of the cargo ships was still at dockside, the fertilizer caught fire and the ship ex-

¹⁶ See 28 U.S.C. §§ 1346(b), 2671-80 (1982).

¹⁷ H.R. REP. NO. 1287, 79th Cong., 1st Sess. 5-6 (1945).

¹⁸ *Id.*; see also *Dalehite*, 346 U.S. at 33.

¹⁹ H.R. REP. NO. 1287, 79th Cong., 1st Sess. 5-6 (1945); see also *Dalehite*, 346 U.S. at 24-35.

²⁰ 346 U.S. at 15.

²¹ 350 U.S. at 61.

²² 467 U.S. at 797.

²³ *Eastern Airlines v. Union Trust Co.*, 221 F.2d 62 (D.C. Cir.), *aff'd sub nom. United States v. Union Trust Co.*, 350 U.S. 907 (1955).

²⁴ *Dalehite*, 346 U.S. at 19-22.

²⁵ *Id.* at 22.

ploded.²⁶ The explosion and fire leveled most of the city and killed numerous people.²⁷ As a result, the plaintiffs brought a negligence action against the United States for the damages caused thereby.²⁸

The plaintiffs alleged that the government shipped, or permitted to be shipped, into a populated area, without adequate investigation or warnings, a highly explosive fertilizer.²⁹ The plaintiffs also alleged that government employees were negligent in the labeling, handling and loading of the fertilizer for transit.³⁰ The Supreme Court reviewed the FTCA's legislative history³¹ and held that the United States was not liable for damages as a result of any negligence in connection with the fertilizer program.³²

In perhaps the most quoted language from the opinion, the Court commented: "[w]here 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."³³ The court implied that the test to decide whether a government act is culpable depends on whether the decision made was at the planning level or at the operational level.³⁴ Additionally, the Court stated that the decisions held culpable in *Dalehite* were all reasonably made at the *planning level*, and, therefore, not actionable.³⁵ If, on the other hand, the decisions were

²⁶ *Id.* at 23.

²⁷ *Id.*

²⁸ *Id.* Since the plaintiffs could not show any individual acts of negligence, the suit alleged that the government was liable for participation in the manufacture and transportation of the defective fertilizer. *Id.*

²⁹ *Id.*

³⁰ *Id.* at 23-24. The plaintiffs alleged that "the Federal Government had brought liability on itself for the catastrophe by using a material in fertilizer which had been used as an ingredient of explosives for so long that industry knowledge gave notice . . . that material might explode." *Id.*

³¹ *Id.* at 24-31.

³² *Id.* at 42.

³³ *Id.* at 36.

³⁴ *Id.* at 42.

³⁵ *Id.*

made at the *operational level*, they would have been actionable under the FTCA.³⁶

The difficulty in applying a test to determine what was a planning-level decision and what was an operational-level decision was apparent within the majority and dissenting opinions of *Dalehite*.³⁷ The majority held that no liability existed for the entire operation, including the negligent mislabeling of the bags of fertilizer.³⁸ Justice Jackson, in dissent, agreed with the planning-level/operational-level test.³⁹ In applying the test, however, he determined that only the initial decision to implement the fertilizer program should have been considered a discretionary function, and not the negligent acts of those responsible for carrying out the details.⁴⁰

Indian Towing Co. v. United States

Less than three years after *Dalehite*, the Supreme Court decided *Indian Towing Co. v. United States*.⁴¹ In that case, the plaintiff suffered economic losses when his tugboat and barge ran aground, resulting in the destruction of the cargo on board.⁴² The vessel ran aground because the lighthouse was not working and the Coast Guard did not issue any warning.⁴³ The government conceded that the Coast Guard's failure to properly maintain the lighthouse or to warn seaman of its inoperation was the cause of the

³⁶ *Id.* The Court stated that: "In short, the alleged 'negligence' does not subject the Government to liability. The decisions held culpable [by the trial court] 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." *Id.*

³⁷ *Id.* at 36-42, 47-60.

³⁸ *Id.* at 41.

³⁹ *Id.* at 58.

⁴⁰ *Id.* The dissent argued that, "[w]e cannot agree that all the way down the line there is immunity for every balancing of care against cost, of safety against production, of warning against silence." *Id.*

⁴¹ 350 U.S. 61 (1955).

⁴² *Id.* at 62.

⁴³ *Id.*

accident.⁴⁴

The Supreme Court granted certiorari to determine the extent of the government's liability under the FTCA.⁴⁵ The relevant provisions of the FTCA that the Court reviewed were: (1) section 1346(b), which provides that the liability of the United States is in accordance with the laws of the place where the act or omission occurred;⁴⁶ (2) section 2674, which states that the United States shall be liable in the same manner and extent as a private individual under like circumstances;⁴⁷ and (3) section 2680(a), the discretionary function exception.⁴⁸

In *Indian Towing*, the government sought to avoid any analysis of the discretionary function exception by admitting that the lighthouse maintenance and warnings were at the "operational level".⁴⁹ Instead, the government argued that the operation of the lighthouse was a uniquely governmental function.⁵⁰ Therefore, under section 2674, the government could not be held liable in the same manner as a private individual.⁵¹

Despite the government's concession the Supreme Court undertook an analysis of the discretionary function exception.⁵² In discussing the scope of the exception the Supreme Court noted that:

The Coast Guard need not undertake the lighthouse ser-

⁴⁴ *Id.* at 62-63, 70. The government did not admit responsibility, but did not deny the allegations in their response. *Id.*

⁴⁵ *Id.* at 63. The Court stated: "Because the case presented an important aspect of the still undetermined extent of the Government's liability under the [FTCA], we granted certiorari." *Id.*

⁴⁶ *Id.*; 28 U.S.C. § 1346(b) (1982).

⁴⁷ *Indian Towing*, 350 U.S. at 63; 28 U.S.C. § 2674 (1982).

⁴⁸ *Indian Towing*, 350 U.S. at 63-64; 28 U.S.C. § 2680(a) (1982); see *supra* note 15 and accompanying text for the text of section 2680(a).

⁴⁹ 350 U.S. at 64. The opinion notes that "[t]he Government does not deny that the [FTCA] does provide for liability in some situations on the 'operational level' of its activity." *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* The government's position was that "the language of § 2674 . . . imposing liability 'in the same manner and to the same extent as a private individual under like circumstance' must be read as excluding liability in the performance of activities which private persons do not perform." *Id.*

⁵² *Id.* at 64-69.

vice. 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. . . or give warning that it was not functioning.⁵³

Furthermore, contrary to the broad analysis of *Dalehite*, the Court stated that where the Coast Guard failed in its execution of its duty and caused damage to the petitioners, the United States would be liable for such damages.⁵⁴ The Court commented that the FTCA was designed to compensate the victims of negligence and hold the government liable for negligently performed activities in the same manner as a private individual.⁵⁵

Dalehite and *Indian Towing* remained the leading Supreme Court cases interpreting the discretionary function exception for nearly 30 years. During that time the federal courts struggled with understanding and applying the distinction between a "planning-level" decision and an "operation-level" decision, especially with regard to FAA regulatory activities.⁵⁶

⁵³ *Id.* at 69.

⁵⁴ *Id.* The Court stated: "If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the [FTCA]." *Id.*

⁵⁵ *Id.* at 68. The Court stated that the "broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities and circumstances like unto those in which a private person would be liable." *Id.*

⁵⁶ See, e.g., *Gibbs v. United States*, 251 F. Supp. 391 (E.D. Tenn. 1965). The court stated: "Having decided to enter the broad field of the regulation of the flight and repair and modifications of aircraft and licensing of pilots, the Government becomes responsible for the care with which those activities are conducted." *Id.* at 400. The case was dismissed against the United States for lack of proximate cause. See also *In re Air Crash Disaster Near Silver Plume, Colo.* on Oct. 2, 1980, 445 F. Supp. 384, 405-09 (D. Kan. 1977) (the court, in a lengthy discussion of the FTCA, stated that where an employee of the FAA fails to perform an "operational duty" such as the required inspection of seat belts, the government can be held liable for the injuries that result from this negligence; however, the court found a lack of proximate cause); *Rapp v. Eastern Air Lines, Inc.*, 264 F. Supp. 673 (E.D. Pa. 1967), *vacated without opinion*, 521 F.2d 1399 (3d Cir. 1975) (holding that a cause of action existed against FAA for negligent inspection and certification). But see *Colorado Flying Academy, Inc. v. United States*, 724 F.2d 871 (10th Cir. 1984) (decisions of FAA employee in designing Denver terminal control area were covered by the discretionary function exception), *cert. denied*, 476 U.S. 1182 (1986); *George v. United States*, 703 F.2d 90 (4th Cir. 1983) (failure of FAA to promul-

United States v. Varig

In *Varig*, the United States Supreme Court held that the liability for the negligence of the FAA in certifying aircraft for use in commercial aviation was barred by the discretionary function exception of the FTCA.⁵⁷ Former Chief Justice Burger, writing the opinion for a unanimous Court, first reviewed the brief legislative history and the confusing judicial interpretations of the discretionary function exception.⁵⁸ Admitting that the Supreme Court's reading of the FTCA had not always followed a straight line, the Court resurrected *Dalehite* and its almost blanket application of the discretionary function exception.⁵⁹

While the Court did not mention or repudiate the planning-level/operational-level test, the Court distinguished previous cases holding the government liable under the FTCA.⁶⁰ The Court distinguished the *Indian Towing* case, which had been used as a guide in interpreting the planning-level/operational-level test, as not involving the discretionary function exception in view of the government's concession that it involved operational level activity.⁶¹

The Court enunciated several factors in the determination of whether the acts of government employees are protected by the discretionary exception:

First, it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case Thus, the basic

gate regulations banning the use of coterminous, dissimilar metals within the fuel lines was within discretionary function exception); *Garbarino v. United States*, 666 F.2d 1061 (6th Cir. 1981) (failure to enact stricter safety standards was a planning level activity covered by the discretionary function exception); *Takacs v. Jump Shack, Inc.*, 546 F. Supp. 76 (N.D. Ohio 1982) (negligent inspection and certification by FAA of parachute packing barred by discretionary function exception).

⁵⁷ 467 U.S. 797, 798 (1984).

⁵⁸ *Id.* at 807-14.

⁵⁹ *Id.* at 811-12.

⁶⁰ *Id.* at 812-13. The Court distinguished *Indian Towing*, 350 U.S. at 61 and *Eastern Airlines*, 221 F.2d at 62.

⁶¹ *Varig*, 467 U.S. at 812. The Court stated: "Significantly, the government conceded that the discretionary function exception was not implicated in *Indian Towing*" *Id.*

inquiry . . . is whether the challenged acts of a Government employee — whatever his or her rank — are of the nature and quality that Congress intended to shield from tort liability. Second, whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals.⁶²

The Court's primary consideration was whether the discretionary function exception immunized the FAA certification process involved in this case from tort liability.⁶³ The respondents' claim was that the FAA was negligent for failing to inspect the aircraft design process before allowing certification.⁶⁴ The government viewed the FAA as a regulatory agency whose function was to monitor the compliance of private individuals with FAA regulations.⁶⁵ The government argued that this regulatory activity is designed to encourage compliance with minimum safety requirements and, as such, is the sort of conduct protected by the discretionary function exception.⁶⁶ After reviewing the technical and administrative requirements of aircraft type certification, the Court held that the FAA's compliance review was the type of activity protected by the discretionary function exception.⁶⁷

According to the Court, the respondents' argument that the FAA was negligent in failing to inspect certain elements of the aircraft design, challenged two aspects of

⁶² *Id.* at 813-14.

⁶³ *Id.* at 814.

⁶⁴ *Id.* at 814-15. The Court summarized the respondents' argument as follows: "[T]he negligent failure of the FAA to inspect certain aspects of aircraft type design in the process of certification gives rise to a cause of action against the United States under the Act." *Id.* at 815.

⁶⁵ *Id.* The Court stated that the government's view of the FAA was that its function was "merely to police the conduct of private individuals by monitoring their compliance with FAA regulations." *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 819. The Court stated that the "FAA's implementation of a [spot-check] mechanism for compliance review is plainly discretionary activity of the 'nature and quality' protected by [the discretionary function exception]." *Id.*

the certification procedure.⁶⁸ The first aspect challenged the decision by the FAA to implement a spot-check for reviewing an aircraft manufacturer's compliance with FAA regulations.⁶⁹ The second aspect challenged the application of the spot-check inspection to the particular aircraft in *Varig* and *United Scottish*.⁷⁰ The Court viewed the implementation of a "spot-checking" program to ensure manufacturers' compliance with safety standards as the best way to accomplish the goal of safe air transportation and to deal with the realities of limited FAA personnel and resources.⁷¹ The Court emphasized that protection of regulatory activities was the underlying reason for the enactment of the discretionary function exception of the FTCA.⁷² The Court stated that Congress intended to preclude the judiciary from second-guessing legislative and administrative decision making.⁷³

In the Court's opinion, both claims were barred by the discretionary function exception of the FTCA because agency determination of private individual's safety is a discretionary function of the agency's authority.⁷⁴ Further, the Court noted that the "spot-check" program called for the FAA, pursuant to specific authority, to take risks in order to advance the government's purpose.⁷⁵ Because the FAA acted under authority and in advancement of a governmental purpose, the negligence of the agency falls squarely within the discretionary function exception.⁷⁶ The Court went on to hold that the actions of

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 820.

⁷² *Id.* at 814.

⁷³ *Id.* The Court stated: "Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.*; see also *Dalehite*, 346 U.S. at 27.

⁷⁴ *Varig*, 467 U.S. at 819-20. The Court held that "[w]hen an agency determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary regulatory authority of the most basic kind." *Id.*

⁷⁵ *Id.* at 820.

⁷⁶ *Id.* at 820. The Court noted:

FAA employees under the spot-check program were protected by the discretionary function exception.⁷⁷ In its summary, the Supreme Court held that the action against the FAA was barred by the discretionary function exception.⁷⁸

Eastern Airlines v. Union Trust Co.

The last case worth mentioning was the Supreme Court's summary affirmance of *Eastern Airlines v. Union Trust Co.*⁷⁹ While the Supreme Court did not issue an opinion, the Court's summary affirmance of the lower court decision is a decision on the merits, and binding upon the lower courts.⁸⁰

The *Eastern Airlines* case arose out of a mid-air collision between a Bolivian P-38 and an Eastern Airlines DC-4 while both aircraft were on final approach to land at Na-

In administering the "spot-check" program, these FAA engineers and inspectors necessarily took certain calculated risks, but those risks were encountered for the advancement of a governmental purpose and pursuant to the specific grant of authority in the regulations and operating manuals. Under such circumstances, the FAA's alleged negligence in failing to check certain specific items in the course of certificating a particular aircraft falls squarely within the discretionary function exception of § 2680(a).

Id.

⁷⁷ *Id.* The Court held that "the acts of FAA employees in executing the 'spot-check' program in accordance with agency directives are protected by the discretionary function exception as well." *Id.*

⁷⁸ *Id.* at 821.

In rendering the United States amenable to some suits in tort, Congress could not have intended to impose liability for the regulatory enforcement activities of the FAA challenged in this case. The FAA has a statutory duty to *promote* safety in air transportation, not to insure it. We hold that these actions against the FAA for its alleged negligence in certificating aircraft for use in commercial aviation are barred by the discretionary function exception of the [FTCA].

Id.

⁷⁹ 221 F.2d 62 (D.C. Cir.), *aff'd sub nom.* United States v. Union Trust Co., 350 U.S. 907 (1955).

⁸⁰ 12 J. MOORE, H. BENDIX & B. RINGLE, MOORE'S FEDERAL PRACTICE § 400.05-1, p. 4-25 (2d ed. 1988). "In sum, dismissals of appeals from state court for want of a substantial federal question and summary affirmances of lower federal court judgments for like reasons are decisions on the merits, and are binding on lower courts. . . ." *Id.*

tional Airport in Washington, D.C.⁸¹ The plaintiffs alleged, among other acts of negligence, that the tower personnel negligently cleared two aircraft to land on the same runway at the same time.⁸² The United States argued that neither the tower operators nor the United States could be held liable because their duties involved the exercise of discretion.⁸³

The Court of Appeals for the District of Columbia reviewed both the *Dalehite* and *Indian Towing* decisions and the duties required of air traffic control tower personnel.⁸⁴ The court held that while tower operators were in a sense exercising discretion, they were not performing the type of discretionary function covered by section 2680(a).⁸⁵ As a result of this decision, the United States has been held liable for the negligent acts of air traffic controllers in numerous cases.⁸⁶

⁸¹ *Eastern Airlines*, 221 F.2d at 64.

⁸² *Id.* at 78-77. In addition to this act of affirmative negligence, three acts of negligent omission were alleged including: (1) failure of the control tower personnel to issue a timely warning to the Eastern plane as to the P-38 being on final approach; (2) failure to warn the P-38 that Eastern was on final approach; and (3) failure to keep both planes advised of the activities of the other. *Id.*

⁸³ *Id.* at 74-77. The government argued that "the tower operators' duties are public in nature and involve the exercise of discretion and judgment, with the result that neither the operators nor the United States can be held liable for their negligent performance." *Id.*

⁸⁴ *Id.* at 78.

⁸⁵ *Id.* The court held that "[t]he tower operators acted, and failed to act, at an operational level. While they were in a sense exercising discretion as to what they should and should not do, they were not performing the sort of discretionary function contemplated by section 2680(a) and clearly described in the *Dalehite* decision." *Id.*

⁸⁶ See, e.g., *Brooks v. United States*, 695 F.2d 984 (5th Cir. 1983) (United States liable for air traffic controller's negligence in failing to provide pilot with Notices to Airmen report); *Hartz v. United States*, 387 F.2d 870 (5th Cir. 1968) (failure of air traffic controller to report facts material to the safe operation of aircraft could give rise to liability); *United States v. Furumizo*, 381 F.2d 965 (9th Cir. 1967) (United States liable for negligence of air traffic controller who cleared a private plane for take off in the wake of a large commercial transport); *Ingrahm v. Eastern Air Lines, Inc.*, 373 F.2d 227 (2d Cir.), cert. denied, 389 U.S. 931 (1967) (government held liable for air traffic controller's failure to accurately report current and changing weather conditions); *United Air Lines, Inc. v. Wiener*, 335 F.2d 379 (9th Cir.), cert. dismissed, 379 U.S. 951 (1964) (violation of air traffic control rules by controller resulted in government liability under the FTCA).

THE CONFLICT CREATED BY THE SUPREME COURT IN
VARIG

The language and timing of the prior United States Supreme Court decisions on the discretionary function exceptions are interestingly symmetrical. In *Dalehite*, the Supreme Court, using broad language, left the legal profession uncertain as to just what boundaries existed in applying the discretionary function exception and the "planning level" vs. "operational level" test.⁸⁷ It seemed logical to conclude that if Congress had meant to exempt all regulatory activity from tort liability they would have said so in the FTCA. Yet, given the facts of *Dalehite* and the broad language of the Supreme Court,⁸⁸ arguably the acts of all decision-making employees of regulatory agencies could fall within the exception. In the regulatory environment it is nearly impossible to escape discretion at any decision-making level, regardless of how "operational" it may be. Additionally, under the reasoning of *Dalehite* the discretionary function exception for planning-level activities also seems to apply to the conduct of all employees carrying out the decision.⁸⁹

A little over two years after *Dalehite*, the Supreme Court found it necessary to revisit the discretionary function exception in *Indian Towing*.⁹⁰ For some reason, even though the government conceded that the conduct in question in *Indian Towing* was at the "operational-level", the Supreme Court felt compelled to discuss the discretionary function exception and put some limit on the extent of conduct to which it would apply.⁹¹ Essentially, the Supreme Court

⁸⁷ See *supra* notes 24-40 and accompanying text for a discussion of *Dalehite*.

⁸⁸ *Dalehite*, 346 U.S. at 36. The Court stated: "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". *Id.*

⁸⁹ *Id.* The Court stated that "[i]f 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" *Id.*

⁹⁰ 350 U.S. 61 (1955); see *supra* notes 41-56 and accompanying text for a discussion of *Indian Towing*.

⁹¹ *Indian Towing*, 350 U.S. at 69.

stated that it was an exercise of discretion for the Coast Guard to undertake the lighthouse service; however, if the Coast Guard was negligent in carrying out that service, the government would be held liable.⁹² The conduct of mislabeling fertilizer bags in *Dalehite* and the failure to properly maintain a lighthouse in *Indian Towing* appear to be similar types of conduct. Within a few short years, however, the Supreme Court reached a different conclusion regarding the government's liability for negligent performance of a regulatory agency's employee(s).⁹³

The lower courts wrestled with this distinction for nearly thirty years before the Supreme Court undertook another review of the discretionary function exception.⁹⁴ In *Varig*, as previously discussed, the Supreme Court thoroughly reviewed the history of the discretionary function exception.⁹⁵ The Court dismissed the *Indian Towing* rationale as inapplicable and resurrected *Dalehite*.⁹⁶ The Court's rambling language, however, created a vague standard for the determination of what would be protected discretionary conduct and what conduct would result in governmental liability. The Supreme Court indicated that it was the nature of the conduct which governed the application of the discretionary function exception.⁹⁷ The "nature" could be established by determining whether the challenged acts were of the "nature and qual-

⁹² *Id.*

⁹³ *Id.* In *Dalehite*, the Court disposed of the plaintiffs' claim of negligent fire fighting, holding that "there is no analogous liability" in tort law. 346 U.S. at 44.

⁹⁴ *Varig*, 467 U.S. at 797.

⁹⁵ See *supra* notes 57-78 and accompanying text for a discussion of *Varig*.

⁹⁶ *Varig*, 467 U.S. at 812-13, 814 n.12.

⁹⁷ The Court stated:

[I]t is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case. As the Court pointed out in *Dalehite*, the exception covers '[n]ot only agencies of government . . . but all employers exercising discretion.' Thus, the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee — whatever his or her rank — are of the nature and quality that Congress intended to shield from tort liability.

Id. at 813 (citation omitted).

ity" that Congress intended to shield from tort liability.⁹⁸

The Supreme Court then provided two separate and somewhat contradictory tests for determining what acts Congress intended to shield. The Court first indicated, in very broad language, that the discretionary function plainly was intended to encompass discretionary acts of the government when regulating the conduct of private individuals.⁹⁹ The Court noted that Congress seemed to emphasize protection for regulatory activities by including the discretionary function exception within the FTCA.¹⁰⁰

Within the same discussion, the Supreme Court then implied that the nature of the conduct that Congress intended to shield could be determined by the type of decision that was made.¹⁰¹ Under the Court's rationale, one could determine whether the discretionary function exception applies to a particular decision if that decision was grounded in "social, economic, and political policy."¹⁰² If the answer to this narrower test was yes, then the Court determined that Congress wished to prevent judicial "sec-

⁹⁸ *Id.*

⁹⁹ *Id.* at 813-14. The Court held:

[W]hatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals. Time and again the legislative history refers to the acts of regulatory agencies as examples of those covered by the exception, and it is significant that the early tort claims bills considered by Congress specifically exempted two major regulatory agencies by name.

Id. (citation and footnote omitted).

¹⁰⁰ *Id.* at 814.

¹⁰¹ *Id.* The Court stated:

[The] emphasis upon protection for regulatory activities suggests an underlying basis for the inclusion of an exception for discretionary functions in the Act: Congress wished to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. By fashioning an exception for discretionary governmental functions, including regulatory activities, Congress took "steps to protect the Government from liability that would seriously handicap efficient government operations."

Id. (quoting *United States v. Muniz*, 374 U.S. 150, 163 (1963)).

¹⁰² *Id.*

ond-guessing" of these types of legislative and administrative decisions through the medium of a tort action.¹⁰³ It is not surprising, given the goals of conflicting litigants, that these two seemingly contradictory standards would be pitted against each other in arguments across the country.

The government took the position that *Varig* stood for blanket immunity for all regulatory activities of regulatory agencies.¹⁰⁴ Plaintiff's lawyers, on the other hand, argued that if the decisions of the government employees were not grounded in social, economic and political policy, then the discretionary function exception did not apply. This resulted in contradictory and confusing decisions throughout the Courts of Appeals.

In the four years following the decision, *Varig* was cited in 207 cases in the lower federal courts. It was only a matter of time before the divergent positions taken by the government lawyers and by the plaintiffs' bar created a conflict among the circuits which would warrant the Supreme Court's review of the *Varig* decision. This conflict arose most clearly in cases involving polio vaccines regulated by the Food and Drug Administration.¹⁰⁵

THE POLIO CASES

Griffin v. United States

The series of polio cases began ten years prior to the *Varig* decision with *Griffin v. United States*.¹⁰⁶ In *Griffin*, the plaintiffs sought to recover damages from the United

¹⁰³ *Id.*

¹⁰⁴ See Dillman, The Impact Of *Berkovitz* On *Varig*, presented at the Litigation in Aviation Seminar by the Section of Tort and Insurance Practice of the American Bar Association (Oct. 27, 28, 1988). Dillman states that "[p]erhaps the one thing that is clear from *Berkovitz* is that the Government can no longer assert that *Varig* provides a blanket protection for all regulatory activities of all regulatory agencies." *Id.*

¹⁰⁵ *Berkovitz v. United States*, 108 S.Ct. 1954 (1988). The Court granted certiorari "to resolve a conflict in the Circuits regarding the effect of the discretionary function exception on claims arising from the Government's regulation of polio vaccines." *Id.* at 1958.

¹⁰⁶ 500 F.2d 1059 (3d Cir. 1974).

States for injuries sustained allegedly as a result of ingestion of a Sabin oral, live-virus polio vaccine.¹⁰⁷ The government appealed an adverse judgment by the district court challenging the court's failure to bar the claim under the discretionary function exception.¹⁰⁸ The Third Circuit acknowledged that the plaintiffs were only challenging the manner of implementation of the regulation and not the decision to regulate.¹⁰⁹ The plaintiffs contended that, in approving a particular lot of vaccine for release to the public, the Department of Biological Standards ("DBS") failed to comply with the standards established by the Surgeon General.¹¹⁰

The court then analyzed the decision of DBS and determined that its "judgment . . . was that of a professional

¹⁰⁷ *Id.* at 1061. Mary Jane Griffin participated in a vaccination program sponsored by the Montgomery County Medical Society. After developing polio as a result of the vaccination, she brought suit against the Medical Society, Charles Pfizer & Co., and the United States. Mrs. Griffin settled with Pfizers' Co. and dismissed the actions against the Medical Society. *Id.* at 1062.

¹⁰⁸ *Id.* The government also appealed the district court's findings of negligence and proximate cause, the damages awarded, and the district court's refusal to enforce a joint tortfeasor release in the settlement between the Griffins and Charles Pfizer & Co. *Id.* The government lost all these appeals except for the last, which was remanded to the district court. *Id.* at 1069-73.

¹⁰⁹ *Id.* at 1064. The court explained:

[A]t the outset, we emphasize what is not being challenged on this appeal. Plaintiffs do not challenge the Surgeon General's determination to approve a live-virus immunization program. Neither do plaintiffs challenge the regulation which established the standard against which all manufactured lots were to be measured. These were matters involving balancing of policy considerations in advancing the public interest. Plaintiffs, in the instant case, challenge solely the manner by which the regulation was implemented.

Id. (citation omitted).

¹¹⁰ *Id.* The court stated:

The regulation enumerates five criteria as evidence of nonvirulence: the number of animals showing lesions characteristic of poliovirus infection, the number of animals showing lesions other than those characteristic of poliovirus infection, the severity of the lesions, the degree of dissemination of the lesions, and the rate of occurrence of paralysis not attributable to the mechanical injury resulting from inoculation trauma.

Id. at 1065 (footnote omitted). The court ruled that the scientists had to make a comparative analysis of the five criteria, with no one criteria being dispositive, to decide if the neurovirulence of each particular lot exceeded a reference standard.

Id. at 1065-68.

measuring neurovirulence."¹¹¹ Applying its analysis to the language of *Dalehite*, the court determined that this type of judgment "was not that of a policy-maker promulgating regulations by balancing competing policy considerations in determining the public interest."¹¹² In the court's view, at issue was a scientific determination, not a policy-making determination.¹¹³ The court concluded by holding that the government may be liable where its employees fail to comply to statutory and regulatory requirements.¹¹⁴

Loge v. United States

In another pre-*Varig* decision, the Eighth Circuit Court of Appeals in *Loge v. United States*¹¹⁵ addressed the issue of whether the government could be liable for negligent failure to conduct mandatory tests as required by the departmental regulations.¹¹⁶ In addition, the court considered whether the negligent failure to conduct mandatory tests for a subsequently approved specific polio vaccine lot could serve as a basis for liability.¹¹⁷ In *Loge*, the plaintiff had contracted paralytic polio after contact with her infant son who was innoculated with a trivalent, live poliovirus vaccine known as Orimune.¹¹⁸

¹¹¹ *Id.* at 1066. The court stated: "We acknowledge that under DBS' construction of the regulation, the implementation called for a judgmental determination as to the degree to which each of the enumerated criteria indicated neurovirulence in monkeys. The judgment, however, was that of a professional measuring neurovirulence." *Id.*

¹¹² *Id.* The court further stated: "Neither was it a policy planning decision nor a determination of the feasibility or practicability of a government program." *Id.*

¹¹³ *Id.* The court noted that the government is not shielded by the discretionary function when the government official's activity "exceeds the authority conferred." *Id.* at 1069. In those instances, "[l]iability . . . is predicated not on a negligent or unwise policy determination, but on the failure of Government employees to conform to and act consistently with the authority delegated." *Id.*

¹¹⁴ *Id.* The court held that, "[t]he Government may be liable where its employees, in carrying out their duties, failed to conform to pre-existing statutory and regulatory requirements." *Id.*

¹¹⁵ 662 F.2d 1268 (8th Cir. 1981), *cert. denied*, 456 U.S. 944 (1982).

¹¹⁶ *Id.* at 1271-73.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1269.

The Eighth Circuit reviewed the regulations under which the government approved and distributed the polio vaccine, as well as the case law under the discretionary function exception.¹¹⁹ The court noted that the Secretary of the Health, Education and Welfare (HEW), which at the time had authority over polio vaccination testing, did not have discretion to disregard the mandatory regulatory commands regarding licensing requirements prior to manufacture, or regarding the release of particular lot for distribution to the public.¹²⁰ The court went on to affirm the district court's order of dismissal, but reversed and remanded the district court's dismissal of the plaintiffs' claims alleging liability based on the government's violation of the regulations.¹²¹

Baker v. United States

The issue of whether a regulatory agency could be held liable for the distribution of a polio vaccine next arose in *Baker v. United States*.¹²² The plaintiff in this case contracted polio after his nephew was inoculated with a trivalent, live, oral poliovirus vaccine.¹²³ The plaintiff brought an action against the United States under the FTCA alleging that the HEW negligently failed to require the mandatory testing prior to issuing a license allowing the laboratory to manufacture and distribute the vaccine.¹²⁴ The district court dismissed the action for lack of subject matter jurisdiction because the action was barred by the discretionary function exception.¹²⁵

The Ninth Circuit focused its inquiry on whether Congress intended to shield from tort liability the govern-

¹¹⁹ *Id.* at 1270-73.

¹²⁰ *Id.* at 1273. The court stated that HEW had "no discretion to disregard the mandatory regulatory commands pertaining to criteria a vaccine must meet before licensing its manufacture, or releasing a particular lot of vaccine for distribution to the public." *Id.* (citing *Griffin*, 500 F.2d at 1063-9).

¹²¹ *Id.* at 1275.

¹²² 817 F.2d 560 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 2845 (1988).

¹²³ *Id.* at 561.

¹²⁴ *Id.* at 561-62.

¹²⁵ *Id.* at 561.

ment's failure to follow its own regulations.¹²⁶ The Ninth Circuit cited *Dalehite*, *Varig* and numerous Ninth Circuit decisions since *Varig*,¹²⁷ but noted that none of these cases had addressed the precise issue of "whether a governmental agency, *when regulating the conduct of private individuals*, may be subject to tort liability for the alleged negligence of an agency employee in failing to follow a specific mandatory regulation."¹²⁸ The court recognized that this issue posed a close and difficult question.¹²⁹

The Ninth Circuit summarized its view of the discretionary function exception and recognized inclusion of a government agency's failure to follow its own regulatory commands would not extend the exception too far.¹³⁰ The government argued that the Supreme Court's opin-

¹²⁶ *Id.* at 563. The court focused on whether the "government's alleged failure to follow its own regulatory commands is the type of decision Congress intended to shield from tort liability in order to preserve a zone within which choice by governmental personnel can be exercised without threat of suit under the FTCA." *Id.*

¹²⁷ *Id.* at 564; see *Mitchell v. United States*, 787 F.2d 466 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 163 (1987) (agency's decision to rely on FAA recommendations to not mark ground wires protected by discretionary function exception); *Cunningham v. United States*, 786 F.2d 1445 (9th Cir. 1986) (OSHA decisions and inspections concerning plant safety standards protected); *Baie v. Secretary of Defense*, 784 F.2d 1375 (9th Cir.), *cert. denied*, 479 U.S. 823 (1986) (decision interpreting regulations governing medical benefits for retired military personnel falls within exception); *Proctor v. United States*, 781 F.2d 752 (9th Cir. 1985), *cert. denied*, 476 U.S. 1183 (1986) (FAA's alleged negligent conduct in certifying aircraft by actual inspection of discrete parts of aircraft falls within exception); *Chamberlin v. Isen*, 779 F.2d 522 (9th Cir. 1985) (patent examiner's conduct in rejecting a patent application protected); *Begay v. United States*, 768 F.2d 1059 (9th Cir. 1985), *cert. denied*, 108 S. Ct. 1110 (1988) (decision of Public Health Service not to warn miners of radiation dangers they were exposed to was clearly within ambit of the exception); *Natural Gas Pipeline Co. of Am. v. United States*, 742 F.2d 502 (9th Cir. 1984) (alleged FAA negligence in conducting actual inspections for certification within the exception).

¹²⁸ *Baker*, 817 F.2d at 564 (emphasis added).

¹²⁹ *Id.*

¹³⁰ *Id.* The court stated:

The discretionary function exception shelters actions taken on the basis of erroneous facts, the failure to exercise available discretion in any way, the failure to perform supervisory tasks, and the failure to enforce effectively regulatory orders. It would not extend this exception greatly to include within it the facts of this case.

ion in *Varig* undercut prior decisions in *Loge* and *Griffin* and that whenever a tort action was based upon regulatory inspection and enforcement activities, the discretionary function exception barred such claims against the government.¹³¹ The Ninth Circuit declined to go that far,¹³² holding that when the plaintiff alleges that a governmental employee negligently failed to obey a mandatory regulatory command, the discretionary function exception to the FTCA does not insulate the government from liability.¹³³

Berkovitz by Berkovitz v. United States

A conflict between the circuits arose when, faced with a similar fact situation, the Third Circuit Court of Appeals refused to follow its precedent and the reasoning of the Eighth and Ninth Circuits. In *Berkovitz by Berkovitz v. United States*¹³⁴ the court again faced a case where an individual contracted polio as a result of taking a live polio vaccine.¹³⁵ The question before the court, on interlocutory appeal, was whether its holding in *Griffin v. United States*¹³⁶ remained binding following the Supreme Court's pronouncement in *Varig* on the scope of the discretionary function exception.¹³⁷ The court acknowledged that the Berkovitzs' complaint alleged violations of regulations identical to those at issue in *Griffin*.¹³⁸

The government asked the court to interpret *Varig* broadly to mean that the discretionary function exception

¹³¹ *Id.* at 565.

¹³² *Id.* The court cited to *Collins v. United States*, 783 F.2d 1225, 1231 (5th Cir. 1986), which held that the allegedly negligent acts of government employees in terminating an imminent danger order for a salt mine and failing to reclassify the mine as grassy, thereby permitting the mine to remain open, did not fall within the discretionary function exception. *Baker*, 817 F.2d at 565.

¹³³ *Id.* at 566.

¹³⁴ 822 F.2d 1322 (3d Cir. 1987), *rev'd*, 108 S. Ct. 1954 (1988).

¹³⁵ *Berkovitz by Berkovitz*, 822 F.2d at 1323-24.

¹³⁶ See *supra* notes 106-114 and accompanying text for a discussion of *Griffin*.

¹³⁷ See *supra* notes 57-78 and accompanying text for a discussion of *Varig*.

¹³⁸ *Berkovitz by Berkovitz*, 822 F.2d at 1325. *Griffin*, like *Berkovitz*, contracted polio pursuant to the injection of a polio vaccine. *Id.*

applies to all claims arising from the regulatory activities of the government.¹³⁹ The government relied on the language in *Varig* that the discretionary acts of the government "acting in its role as a regulator of the conduct of private individuals"¹⁴⁰ are within the discretionary function exception.¹⁴¹ The court rejected this per se rule and instead agreed with the Fifth Circuit's decision in *Collins*.¹⁴² The court construed *Varig* as requiring the courts to distinguish between regulatory actions which are discretionary and those which are non-discretionary.¹⁴³ In addressing the Berkovitzs' contentions that the alleged negligent acts or omissions were in violation of non-discretionary duties, the Third Circuit developed three categories of conduct which it determined fell within the discretionary function exception.¹⁴⁴

The court then analogized the Food and Drug Administration's (FDA) duties to those of the FAA's which the Supreme Court addressed in *Varig*.¹⁴⁵ The Berkovitzs' argued that the FDA had no discretion to license or release vaccines which it knew did not comply with FDA regula-

¹³⁹ *Id.* at 1327 (citing the government's brief at 18).

¹⁴⁰ The Supreme Court in *Varig* stated: "Whatever else the discretionary function exception may include it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals." 467 U.S. at 813-14.

¹⁴¹ *Berkovitz by Berkovitz*, 822 F.2d at 1327.

¹⁴² *Collins v. United States*, 783 F.2d 1225 (5th Cir. 1986).

¹⁴³ *Berkovitz by Berkovitz*, 822 F.2d at 1329. The court stated: "We therefore construe *Varig* as requiring the courts to distinguish between those FTCA suits based on regulatory actions which are discretionary, and which therefore cannot be maintained, and those based on alleged negligence in the performance of a non-discretionary regulatory action." *Id.*

¹⁴⁴ *Id.* The court stated:

After *Varig*, it is clear that the discretionary function exception exempts the United States from claims based on 1) discretionary planning level acts and omissions, 2) discretionary operational level acts and omissions, and 3) non-discretionary operational level acts and omissions taken in furtherance of planning level discretionary decisions.

Id. (citations omitted).

¹⁴⁵ *Id.* at 1330-31. The court stated: "However, the FDA's statutory duty is not different in substance from the duty that the Supreme Court in *Varig* found rests with the FAA." *Id.* at 1330.

tions.¹⁴⁶ However, the court concluded that this was simply a negligence argument.¹⁴⁷ The court concluded that the FDA's discretionary decision to examine or test samples could not lead to subsequent governmental liability for negligence in implementing the decision.¹⁴⁸ The court reversed the district court's order denying the government's motion for summary judgment and remanded with instructions that the district court grant the government's motion.¹⁴⁹

TREATMENT OF *BERKOVITZ* BY THE SUPREME COURT

On certiorari, the United States Supreme Court reversed the Third Circuit and held in a unanimous opinion that the discretionary function exception precludes liability only when governmental conduct involves the permissible exercise of policy judgment.¹⁵⁰ Just as the Court used the decision of *Indian Towing* to retreat from the broad holding of *Dalehite*, it now used *Berkovitz*, a mere four years after *Varig*, to retreat from the broad holding of *Varig* and the position the government espoused from that holding.

The Supreme Court began its analysis with a review of the discretionary function exception and the decisions of *Varig* and *Dalehite*.¹⁵¹ The Court reiterated that the discre-

¹⁴⁶ *Id.* at 1331. The court stated that "Berkovitz argues that once the FDA had information that the vaccine did not comply with the regulations, it had no discretion to approve either the license for production or the lot for release." *Id.*

¹⁴⁷ *Id.* The court concluded that, "[o]n examination, however, this argument is simply that the FDA acted negligently." *Id.*

¹⁴⁸ *Id.* at 1332. The court concluded that:

It follows that when the FDA makes the discretionary choice to examine or test samples which it has discretion not to test, it cannot be held liable for subsequent negligence at the operational level in implementing its decision to test.

Id.

¹⁴⁹ *Id.* The Supreme Court subsequently reversed this decision in *Berkovitz v. United States*, 108 S. Ct. 1954 (1988).

¹⁵⁰ *Berkovitz v. United States*, 108 S. Ct. 1954 (1988). The Supreme Court stated that "[t]he discretionary function exception applies *only* to conduct that involves the permissible exercise of policy judgment." *Id.* at 1960 (emphasis added).

¹⁵¹ *Id.* at 1958-60.

tionary function exception shows the division between the conflicting legislative desire of imposing some tort liability on the federal government while at the same time insulating certain governmental functions from liability.¹⁵² The Court then reviewed each of its enunciations on the application of the discretionary function exception in *Varig* and applied limiting explanations to each one.¹⁵³ The Court, quoting *Varig*, stated:

'It is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case (citation omitted).' In examining the nature of the challenged conduct, 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 (citation omitted). Thus, the discretionary function exception *will not apply* when a federal statute, regulation or *policy* specifically prescribes a course of action for an employee to follow.¹⁵⁴

The Court then reasserted its position that the employee's exercise of choice or judgment is determinative of the applicability of the discretionary function exception.¹⁵⁵

The Court did not end its analysis of the application of the discretionary function exception there. Instead, the Court went on to address the issue of challenged conduct that involves an element of judgment.¹⁵⁶ The Court began its analysis by commenting that just because judgment is involved it does not necessarily follow that the

¹⁵² *Id.* at 1958. The Court, citing *Varig*, stated that the exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *Id.* (citation omitted).

¹⁵³ *Id.* at 1958-60.

¹⁵⁴ *Id.* at 1958 (emphasis added).

¹⁵⁵ *Id.* at 1959. The Court stated that "if the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect." *Id.* (citing *Westfall v. Erwin*, 108 S. Ct. 580, 583 (1988) (recognizing that conduct cannot be discretionary if prescribed by law)).

¹⁵⁶ *Id.*

conduct is protected.¹⁵⁷ The Court stated that there must be a determination of whether the judgment is of the kind that Congress intended the discretionary function exception to shield.¹⁵⁸ Citing to the language in *Varig* that Congress wished to prevent judicial "second guessing" of decisions grounded in "social, economic, and political policy," the Court held that the exception, when properly construed, protects only governmental decisions which are based on public policy considerations.¹⁵⁹

The Supreme Court explained that the holding in *Varig* was based on the facts of the particular cases before them at that time.¹⁶⁰ The Court affirmed that the challenged acts protected from liability in *Varig* were within the range of choice afforded by federal policy and law, and were the results of policy determinations.¹⁶¹ Interestingly, the Court breathed a new life into *Indian Towing* by noting the distinction made in *Indian Towing* between conduct involving discretionary judgment and conduct outside permissible limits of policy judgment.¹⁶²

The Supreme Court then specifically addressed the government's argument that the exception precluded liability for any and all acts arising out of the regulatory pro-

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* The Court stated: "In sum, the discretionary function exception insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment." *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 1959 n.3. The Court stated:

The decision in *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955), also illuminates the appropriate scope of the discretionary function exception. The plaintiff in that case sued the Government for failing to maintain a lighthouse in good working order. The Court stated that the initial decision to undertake and maintain lighthouse service was a discretionary judgment. The Court held, however, that the failure to maintain the lighthouse in good condition subjected the Government to suit under the FTCA. The latter course of conduct did not involve any permissible exercise of policy judgment.

Id.

grams of federal agencies.¹⁶³ The Court, in restating and clarifying the scope of the discretionary function exception, specifically rejected the government's argument of blanket immunity.¹⁶⁴ The Court explained that this exception did not cover all regulatory agency acts but only those acts which are discretionary in nature.¹⁶⁵

The Supreme Court further resurrected *Indian Towing* by noting that it had twice before rejected the government's argument that all regulatory functions were immune.¹⁶⁶ The Court then distinguished *Varig* by stating that in *Varig*, the court ignored the precise argument the government made in *Berkovitz* and instead focused on the particular nature of the regulatory conduct at issue in *Varig*.¹⁶⁷ As if to make sure the message went out loud and clear to the government, the Court reiterated: "To the extent we have not already put the Government's argument to rest, we do so now. The discretionary function exception applies only to conduct that involves the permissible exercise of policy judgment."¹⁶⁸

In addressing each of the Berkovitz's claims, the Court found that the discretionary function exception applied to some of them but not to others. The Court summarized the petitioners' claims as follows: first, that the DBS violated a federal statute and accompanying regulations when it issued the license for the Lederle Laboratories for the production of Orimune;¹⁶⁹ and second, that the Bureau of Biologics of the FDA violated federal regulations and policy when it approved the release of the particular

¹⁶³ *Id.* at 1959-60.

¹⁶⁴ *Id.* at 1959. The Court stated: "That argument is rebutted first by the language of the exception, which protects 'discretionary' functions rather than 'regulatory' functions." *Id.* at 1960 (citing *Dalehite*, 346 U.S. at 33-34).

¹⁶⁵ *Id.* The Court held that the exception "was designed to cover not all acts of regulatory agencies and their employees, but only such acts as are 'discretionary' in nature." *Id.* (citing *Dalehite*, 346 U.S. at 33-34 and H.R. REP. NO. 1287, 79th Cong., 1st Sess. 6 (1945)).

¹⁶⁶ *Id.* (citing *Rayonier, Inc. v. United States*, 352 U.S. 315, 318-19 (1957) and *Indian Towing*, 350 U.S. at 64-65).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

lot containing Kevan Berkovitz's dose.¹⁷⁰

The Court then made a significant statement that is important with respect to the timing of future government motions to dismiss for lack of jurisdiction. The Court noted that because the decision it was reviewing was a motion to dismiss, it (the Court) would accept all of the factual allegations in the Berkovitzs' complaint as true in order to determine whether, under the circumstances, it would be appropriate to dismiss the complaint.¹⁷¹

After reviewing the statutory and regulatory provisions, the Court determined that the DBS, prior to issuing a product license, must receive all the data the manufacturers are required to submit, examine the product and data and then make a determination that the product complies with the applicable safety standards.¹⁷² In applying this analysis to the Berkovitzs' allegation that the DBS issued a license without receiving the appropriate data, the Court held that:

The DBS has no discretion to issue a license without first receiving the required test data; to do so would violate a specific statutory and regulatory directive. Accordingly, to the extent that petitioners' licensing claim is based on a decision of the DBS to issue a license without having received the required test data, the discretionary function exception imposes no bar.¹⁷³

¹⁷⁰ *Id.* The Court did not address the applicability of the discretionary function exception to a claim against the DBS for failure to revoke Lederle Laboratories' license since petitioners did not raise this issue in their petition for writ of certiorari. *Id.* at 1960 n.6.

¹⁷¹ *Id.* at 1960-61. The Court specifically stated, "[b]ecause the decision we review adjudicated a motion to dismiss, we accept all of the factual allegations in petitioners' complaint as true and ask whether, in these circumstances, dismissal of the complaint was appropriate." *Id.*

¹⁷² *Id.* at 1961-62. Federal law requires a manufacturer of live oral polio vaccine to receive a product license prior to marketing the product. In order to receive this license the manufacturer must comply with several federal regulations. These regulations require that the manufacturer make a sample of the vaccine and conduct safety tests at each manufacturing stage. The manufacturer, upon completing the manufacturing and testing process, must submit a license application, the test data, and the vaccine sample to the DBS. *Id.* at 1961.

¹⁷³ *Id.* at 1962.

The Court found the Berkovitzs' second allegation regarding the licensing of Orimune unclear.¹⁷⁴ If the Berkovitzes alleged either (1) that the DBS licensed the drug without determining whether the vaccine complied with regulatory standards, or (2) that after determining the vaccine failed to comply, the DBS then released the vaccine, then the discretionary function exception did not bar their claim.¹⁷⁵ The Court held that the DBS had no discretion to deviate from mandated statutory and regulatory procedures.¹⁷⁶

Whether the discretionary function exception applied to the possible claim that the DBS incorrectly determined that the drug complied with regulatory standards required a different analysis.¹⁷⁷ The Court determined that the applicability of the discretionary function exception depended on whether DBA officials "permissibly exercised policy choice."¹⁷⁸ Finding that the parties did not address this question in detail and did not provide the Court with sufficient information with which to make a determination, the Court hesitated to decide that question.¹⁷⁹ The Court remanded the case to the district court for a decision of this issue, should the Berkovitzs' choose to press

¹⁷⁴ *Id.* The Court noted that petitioners' charge could be read in three different ways: (1) that the DBS licensed Orimune without a determination of compliance with regulatory standards, (2) that the DBS found Orimune violated regulatory standards but nonetheless issued a license, or (3) that the DBS determined compliance but erred in that determination. *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 1962-63. The Court stated: "When a suit charges an agency with failing to act in accord with a specific mandatory directive, the discretionary function exception does not apply." *Id.* at 1963.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* The Court noted that the question turned on "whether the manner and method of determining compliance with the safety standards at issue involves agency judgment of the kind protected by the discretionary function exception." *Id.* The Court further stated that "application of the discretionary function exception to the claim that the determination of compliance was incorrect hinges on whether the agency officials making that determination permissibly exercised policy choice." *Id.*

¹⁷⁹ *Id.* The Court stated that the parties had given the Court "no indication of the way in which the DBS interprets and applies the regulations setting forth the criteria for compliance." *Id.*

that claim.¹⁸⁰

The Court did find, however, that the regulatory scheme governing the release of vaccine lots was substantially similar to the regulatory scheme discussed in *Varig*.¹⁸¹ Under that analysis, the discretionary function exception prohibits any challenges to the government's policies regulating the release of vaccine lots.¹⁸² Again, in an apparent attempt to limit a broad statement of law, the Court commented:

[T]he discretionary function exception, however, does not apply if the acts complained of do not involve the permissible exercise of policy discretion. Thus, if the Bureau's policy leaves no room for an official to exercise policy judgment in performing a given act, or if the act simply does not involve the exercise of such judgment, the discretionary function exception does not bar a claim that the act was negligent or wrongful.¹⁸³

When analyzed under these principles, the Berkovitzs' claims against the government for the release of the vaccine lot from which Kevan Berkovitz received his dose survived the government's motion to dismiss.¹⁸⁴

The Supreme Court correctly pointed out that it was only the petitioners' complaint which alleged that the government's action did not involve an exercise of policy or permitted discretion.¹⁸⁵ The Court stated, however, that:

Petitioners, of course, have not proved their factual allegations, *but they are not required to do so on a motion to dismiss*. If those allegations are correct . . . the discretionary function exception does not bar the claim. Because petitioners may yet show, *on the basis of materials obtained in discovery or otherwise*, that the conduct challenged here did not involve the

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 1964.

¹⁸² *Id.* The Court stated "[t]he discretionary function exception bars any claims that challenge the [government's] formulation of policy as to the appropriate way in which to regulate the release of vaccine lots." *Id.*

¹⁸³ *Id.* (citing *Indian Towing*, 350 U.S. at 69).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 1965.

permissible exercise of policy discretion, the invocation of the discretionary function exception to dismiss petitioners' lot release claim was improper.¹⁸⁶

The Court reversed the Court of Appeals and remanded the case for further proceedings consistent with the opinion.¹⁸⁷

WHERE DO WE GO FROM *BERKOVITZ*?

In its broadest sense, *Berkovitz* makes two things clear: One, that *Varig* is still good law; and two, it was never meant to immunize governmental conduct to the extent that the government asserted after *Varig*. *Berkovitz* also alters the timing and tactics to be considered by both the plaintiff's bar and the government in asserting a federal tort claim and the discretionary function exception.

The Court in *Berkovitz* stated that the discretionary function exception will not apply where there is a federal statute, regulation, or *policy* that prescribes the employee's course of action.¹⁸⁸ This creates the ability to delay the government's motion for dismissal for lack of jurisdiction under the discretionary function exception until after reasonable discovery has taken place. It also increases, however, the necessity for pre-litigation investigation and carefully drafted pleadings. Rule 11 of the Federal Rules of Civil Procedure requires:

The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost

¹⁸⁶ *Id.* (citation omitted) (emphasis added).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 1958.

of litigation¹⁸⁹

Rule 11, in essence, prohibits an attorney from filing a complaint alleging the violation of a federal statute, regulation or policy that specifically prescribes a course of conduct for government employees in the hopes of proving such allegation later through discovery. In order to have some good faith basis for this type of allegation, early investigation of the case, including a Freedom of Information Act request of the governmental agencies involved will be necessary. The request will have to be drafted so as to include disclosure of any agency policy or policies that might affect the conduct thought to give rise to liability.

Once the plaintiff's attorney believes that there is a good faith basis to make an allegation of a violation of a specifically-directed statute, regulation or policy, then the attorney must clearly set forth in the pleadings the conduct and violation in order to defeat an early motion by the government for dismissal for lack of subject matter jurisdiction. As the Supreme Court pointed out in *Berkovitz*, a court is required to accept all of the factual allegations in the complaint as true and ask whether, under those circumstances, dismissal of the complaint is appropriate.¹⁹⁰

Prior to *Berkovitz*, plaintiff's attorneys had to assess the strengths and merits of an FTCA case with the view that more likely than not, as a matter of law, the government would be immune. That issue, however, would usually be decided early in the case without high cost and years of effort. Likewise, the government was reasonably successful in shielding much of its conduct from review by discovery by filing early motions for dismissal. After *Berkovitz* the risk and expense for both sides has increased.

From the plaintiff's perspective there is an increased duty and cost to thoroughly investigate governmental statutes, regulations *and policies* in assessing the merits of a

¹⁸⁹ FED. R. CIV. PROC. 11.

¹⁹⁰ *Berkovitz*, 108 S. Ct. at 1961.

tort claim. Prior to *Berkovitz*, the statutes and published regulations involved were usually available. Prior decisions, however, had held that an agency's policies did not create a duty to the public and were not to be considered in reviewing a government employee's conduct.¹⁹¹ Even though a Freedom of Information Act request is not very costly or time consuming, the material produced as a result of it could be voluminous. This effort, however, only gets the plaintiff to the stage of being able to file a proper complaint within Rule 11; the development of the facts and evidence necessary to prove the case at its conclusion will probably require additional discovery.

Likewise, a review of internal policies now exposes the government to greater risk that its conduct will be the basis of liability. Having written policies for years with the view that they were not a basis for potential liability, agency administrators did not have to allow for discretion. The number of governmental policies, such as those found in *Berkovitz*, that have been written with mandatory directives remains to be seen in future cases.

With regard to the FAA, one need only return to the *United Scottish* case which was combined with the *Varig* decision. The *United Scottish* case involved the crash of a DeHaviland Dove aircraft on October 8, 1968.¹⁹² Shortly after taking off from Las Vegas, Nevada the aircraft caught fire, crashed and burned, killing all four people aboard.¹⁹³ The FAA issued a supplemental-type certificate for a modification to the heater system in the nose of the aircraft.¹⁹⁴ Since only two aircraft were involved, the regulations permitted less pre-installation documentation, provided that the FAA inspector *examine and approve* the

¹⁹¹ See, e.g., *Clemente v. United States*, 567 F.2d 1140, 1144-45 (1st Cir. 1977), cert. denied, 435 U.S. 1006 (1978) (stating that the "duty to comply with the directives of their superiors is owed by the employees to the government and is totally distinguishable from a duty owed by the government to the public on which liability could be based").

¹⁹² *Varig*, 467 U.S. at 802.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

completed installation before the supplemental-type certificate was issued.¹⁹⁵

An actual inspection of the installation by an FAA inspector was mandatory for certification because the only previous specifications provided to the FAA were Polaroid pictures of the completed installation.¹⁹⁶ The district court found that the heater, as installed, exhibited numerous design deficiencies, which should have alerted any reasonable competent FAA or general aviation district office inspector to the fact that the overall quality of the design and fabrication of the heater system was inconsistent with FAA regulations.¹⁹⁷ The trial court also found that the accident would not have occurred if a non-negligent, proper inspection had been made.¹⁹⁸ After *Berkovitz* it is unlikely that this case would not result in liability on behalf of the government.

More recently, the United States District Court for the Eastern District of New York held that a negligent medical examination of a pilot by an aviation medical examiner gives rise to liability on behalf of the United States.¹⁹⁹ That *Berkovitz* was a necessary and important case in assisting lower courts on the boundaries of the discretionary function exception is evidenced by its citation in 23 cases within five months after the decision was handed down.²⁰⁰

¹⁹⁵ FAA, ORDER TYPE CERTIFICATION MANUAL 31-32 (1967) (requiring a physical inspection of the "prototype modification" if compliance cannot be determined adequately from the evaluation of the technical data).

¹⁹⁶ Joint Appendix at 281-83, *Varig*, 467 U.S. at 797 (deposition of Charles H. McMillan, Assistant Chief, Engineering-Manufacturing Branch, FAA, Ft. Worth, Texas; Mr. McMillan signed the supplemental-type certificate for the Dove after-modification).

¹⁹⁷ *Id.* at 209 (transcript of Finding of Fact No. 21, *United Scottish Ins. Co. v. United States*, Civ. No. 71-36-E (S.D. Cal. July 30, 1975)).

¹⁹⁸ *Id.* at 210 (transcript of Finding of Fact No. 27, *United Scottish*, Civ. No. 71-36-E (S.D. Cal. July 30, 1975)).

¹⁹⁹ *Leone v. United States*, 690 F. Supp. 1182, 1190-91 (E.D.N.Y. 1988).

²⁰⁰ See, e.g., *Doe v. Stephens*, 851 F.2d 1457 (D.C. Cir. 1988) (failure of plaintiff to cite a governmental regulation which prohibits the otherwise discretionary conduct of the United States Attorney in issuing a subpoena supported District Court's dismissal of plaintiff's claim as within the discretionary function exception); *Wells v. United States*, 851 F.2d 1471 (D.C. Cir. 1988) (alleged negligent decision of Environmental Protection Agency administrator to conduct further

CONCLUSION

As litigants for both sides learn to craft the words of *Berkovitz* to each particular case before the lower courts, we can expect to see the lower courts continue to struggle with exactly where the discretionary function exception lies. Under the reasoning of *Berkovitz*, however, we should definitely see more cases in which the government is held liable for the conduct of its employees. If history holds true to course, it will be twenty-eight to thirty years before the Supreme Court hands down another leading decision on the discretionary function exception. Until then, the burden is on plaintiff's attorneys to carefully read the language of *Berkovitz* and capture the Phoenix as it arises from the ashes of *Varig*.

study while refusing to take immediate action with respect to lead pollution in an area surrounding smelters, came within the discretionary function exception of the FTCA, notwithstanding contention by residents of neighborhoods near smelters that administrator's decision was based only upon scientific considerations; the court found that the administrator's decision was also based upon social, economic and political policy considerations); *Mercado Del Valle v. United States*, 856 F.2d 406 (1st Cir. 1988) (plaintiff's failure to point to any specific factual information to rebut inference that supervision of ROTC recruits was discretionary rather than mandatory warrants dismissal under the discretionary function exception); *Patterson v. United States*, 856 F.2d 670, 674 (4th Cir. 1988) (Office of Surface Mining field investigators are not authorized to exercise discretion in making policy judgment, therefore the discretionary function exception is not applicable to an allegedly negligent inspection of a fire at a coal refuse pile); *McMichael v. United States*, 856 F.2d 1026 (8th Cir. 1988) (consolidated cases were filed against the United States under the FTCA seeking to recover for death and injuries resulting by explosion at a munitions plant. In the case before the Eighth Circuit, the initial discretion granted by the regulation to the Department of Defense was broad; however, the inspectors violated the Department's own policy directives by failing to comply with specific procedures mandated by the Defense Department. Hence, the discretionary function exception was not applicable); *Jurzec v. American Motors Corp.*, 856 F.2d 1116 (8th Cir. 1988) (decision whether or not to issue safety warnings regarding the resale of United States Postal Service jeeps with an alleged rollover tendency was immune under the discretionary function exception as well as the decision that once a safety warning is dictated, the matters of particular language, color and size of the warning are also within the discretion of the Postal Service); *Gleason v. United States ex rel Army Corps of Eng'rs*, 857 F.2d 1208 (8th Cir. 1988) (United States Army Corps of Engineers participation in the approval of the design of a bridge falls within the planning-level process, and is accordingly immune under the discretionary function exception).

Comments

