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CERTIFICATION OF UNFIT PILOTS: IS THE UNITED STATES FLYING BLIND?

VICKI L. MINTER

I. INTRODUCTION

COULD THE UNITED STATES be liable for licensing an unfit pilot? The surprising reality is, yes. The following case study will demonstrate how, under certain circumstances, the government can and has incurred liability in its pilot certification process. The difficult part is determining when, in fact, the government can be held responsible for its negligence in this area. At the heart of this issue is the "discretionary function exception" of the Federal Tort Claims Act (FTCA). This exception serves to protect the government from liability in certain situations. Because of the various interpretations of the exception by different United States courts, the actual boundaries of the discretionary function exception are unknown.

This Comment will trace Supreme Court interpretations of the discretionary function exception, the application of those interpretations in the circuit courts, and the application of the exception in suits specifically involving the Federal Aviation Administration (FAA). The discussion will also explore the difficulties in applying the discretionary function exception. The Comment will then attempt to decipher the limits of the exception, in order to predict when the government can be held liable for licensing a pilot who turns out to be unfit.

Due to the murky and confusing case law surrounding the subject, any attempt to predict governmental liability may be difficult. This confusion illustrates the need for a

new, uniform standard for determining the applicability of the discretionary function exception. A proposal for a new, uniform standard will be the focus of part VI of this Comment.

While there is no doubt that the government should be liable for its negligence in the pilot certification process, liability should be limited to those circumstances when the negligent government conduct is outside the scope of authorized conduct, or when the decision at issue does not require the authorized decision-maker to balance policy objectives. Before addressing the primary substantive issues, the historical background of governmental liability, or the lack thereof, must be introduced.

II. HISTORICAL BACKGROUND

A. SOVEREIGN IMMUNITY

The English maxim "the king can do no wrong" is the basis for the doctrine of sovereign immunity.¹ The federal courts have adopted and applied the doctrine of sovereign immunity completely immunize the federal government from suit.² Applying sovereign immunity, the government must first consent to suit before a case against it can be initiated.³ Under the law at the turn of the century, an injured person's sole remedy, regardless of the degree of government fault, was to petition Congress to introduce and pass a private claim bill, which would grant the injured person relief.⁴ In 1907, the Supreme Court justified the doctrine of sovereign immunity in *Kawananakoa v. Polyblank*,⁵ where Justice Holmes

¹ Brian Blakeley, Comment, *Discretion and the FAA: An Overview of the Applicability of the Discretionary Function Exception of the Federal Tort Claims Act to FAA Activity*, 49 J. AIR L. & COM. 143, 145 (1983) (citing WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS 970-71 (4th ed. 1971)).

² Victor E. Schwartz & Liberty Mahshigian, *In the 1990's the Government Must be a Reasonable Person in its Workplaces: The Discretionary Function Immunity Shield Must be Trimmed*, 46 WASH. & LEE L. REV. 359 (1989).

³ Blakeley, *supra* note 1, at 145.

⁴ Schwartz & Mahshigian, *supra* note 2, at 359.

⁵ 205 U.S. 349 (1907).

stated: "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."⁶ The doctrine of sovereign immunity, however, was at least partially displaced by the enactment of the FTCA.⁷

B. THE FEDERAL TORT CLAIMS ACT⁸

The end of World War II brought a flood of private claim bills, to which Congress responded by passing the FTCA in 1946.⁹ The FTCA abolished total sovereign immunity, instead effecting a limited waiver of governmental immunity.¹⁰ The act was created by Congress "with the two-fold purpose of mitigating the harshness of the doctrine of sovereign immunity and relieving itself of the burden of dealing with the thousands of private claims bills that were annually being submitted to Congress."¹¹ The FTCA authorizes suits for the recovery of damages against the United States for:

injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to

⁶ *Id.* at 353.

⁷ 28 U.S.C. §§ 2671-2680 (1988).

⁸ Criticizing the effectiveness of the FTCA, Judge McKay stated in his concurrence *Allen v. United States*, 816 F.2d 1417, 1424-25 (10th Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988):

It undoubtedly will come as a surprise to many that two hundred years after we threw out King George III, the rule that "the king can do no wrong" still prevails at the federal level in all but the most trivial matters. . . . [The FTCA] is largely a false promise in all but "fender benders" and perhaps some cases involving medical malpractice by government doctors.

Id.

⁹ Schwartz & Mahshigian, *supra* note 2, at 359-60.

¹⁰ 28 U.S.C. § 2680 (1988).

¹¹ Blakeley, *supra* note 1, at 146 (citing Osborne M. Reynolds, Jr., *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L.J. 81, 81-82 (1968)).

the claimant in accordance with the law of the place where the act or omission occurred.¹²

This blanket waiver of immunity, however, is subject to numerous exceptions.¹³ These exceptions clearly indicate "that Congress exercised care to protect the Government from claims, however negligently caused, that affected the governmental functions."¹⁴ For example, the federal government is exempted from claims for punitive damages.¹⁵ Moreover, the FTCA limits the amount of a contingent fee the plaintiff's attorney may charge in such cases to twenty-five percent in litigated cases and twenty percent in settled cases.¹⁶ Congress also made jury trials unavailable,¹⁷ immunized the government from strict liability,¹⁸ and completely excluded certain other claims.¹⁹ One such exclusion is the discretionary function exception, which states that the waiver of immunity does not apply to:

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 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

While the Act gives no reasons for excepting discretionary acts from possible liability, the language implies "that the purpose of the exception is to avoid subjecting the gov-

¹² 28 U.S.C. § 1346(b) (1988).

¹³ See 28 U.S.C. § 2680 (1988).

¹⁴ *Dalehite v. United States*, 346 U.S. 15, 32 (1953).

¹⁵ *Schwartz & Mahshigian*, *supra* note 2, at 360 (citing 28 U.S.C. § 2674 (1988)).

¹⁶ *Id.* (citing 28 U.S.C. § 2674 (1988)).

¹⁷ *Id.* (citing 28 U.S.C. § 1346(b) (1988)).

¹⁸ *Id.* (citing *Laird v. Nelms*, 406 U.S. 797, 803 (1972)).

¹⁹ *Id.* Congress specifically excluded claims relating to governmental activities (e.g. loss or miscarriage of postal matter, collection of taxes and customs duty, detention of goods by law enforcement officers, fiscal operations of the Treasury) and claims stemming from particular types of torts (e.g., assault, battery, false imprisonment, malicious prosecution, libel, slander). *Id.* at n.8 (citing 28 U.S.C. § 2680 (1988)).

²⁰ 28 *Blakeley*, *supra* note 1, at 148 (citing *Dalehite*, 346 U.S. at 32).

ernment to liability for acts of a 'governmental nature.' ”²¹ The meaning of “discretionary” is often ambiguous, as demonstrated by the following case discussion.

III. SUPREME COURT INTERPRETATIONS OF THE DISCRETIONARY FUNCTION EXCEPTION AND APPLICATION BY THE CIRCUIT COURTS: OBVIOUS CONFUSION!

A. EARLY CASES

1. *Dalehite v. United States and Indian Towing Co. v. United States*

Dalehite v. United States,²² an early Supreme Court interpretation of the discretionary function exception, involved an action to recover damages caused by a large explosion on two ships harbored at Texas City, Texas. As a result of a post-World War II program to increase the food supply in areas under military occupation, the ships had been loaded with fertilizer to be distributed abroad. The fertilizer was produced at government-owned facilities and according to government specifications that required ammonium nitrate as the primary ingredient in the fertilizer. An explosion occurred, after which hundreds of plaintiffs sued the government, alleging that the United States was negligent in its use of ammonium nitrate, a chemical known to be explosive.

While the district court found that the government had committed specific acts of negligence, the Supreme Court held that the claim of negligence fell within the discretionary function exception.²³ The Court declined to define the exact parameters of the discretionary function shield, but did offer some guidelines for determining what types

²¹ *Id.*

²² 346 U.S. 15 (1953).

²³ *Id.* at 43.

of acts are protected by the exception.²⁴

The Court stated that the exception did not protect the type of discretion necessarily exercised by judges, but rather protected "the discretion of the executive or the administrator to act according to one's judgment of the best course, a concept of substantial historical ancestry in American law."²⁵ The Court further recognized that the function includes "more than the initiation of programs and activities," extending also to "determinations made by executives or administrators in establishing plans, specifications or schedules of operations."²⁶ The Court conceded that such discretion necessarily exists where there is policy-based judgment, and that acts of subordinates in effectuating government operations could not be actionable.²⁷ Applying these standards, the Court held that the actions of the government employees involved in production of the fertilizer were protected because performance was effectuated "under the direction of a plan developed at a high level under a direct delegation of plan-making authority from the apex of the Executive Department".²⁸ Thus, the allegedly negligent decisions were made at a "planning level" rather than an "operational level," thereby shielding such decisions from liability.²⁹ Unfortunately, this "planning-level/operations-level" distinction did not establish a bright-line test defining what acts the discretionary function exception protected from liability, leaving the lower courts to grapple with the is-

²⁴ *Id.* at 35.

²⁵ *Id.* at 34 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)).

²⁶ *Id.* at 35-36.

²⁷ *Id.* at 36.

²⁸ *Id.* at 40.

²⁹ *Id.* at 42. This decision created the often used "planning/operational level" distinction. Under this test, decisions that are made at a planning level are protected by the exception, whereas decisions made at an operational level are not. Blakeley, *supra* note 1, at 153. A district court decision helped distinguish these terms by stating that planning level decisions are those involving "the evaluation of factors such as the financial, political, economic and social effects of a given plan or policy." *Swanson v. United States*, 229 F. Supp. 217, 220 (N.D. Cal. 1964). Conversely, operational level decisions are those encompassing "normal day-by-day operations of the government. *Id.*

sue.³⁰ Shortly after *Dalehite*, however, the Court formulated an alternative approach to determine the parameters of the discretionary function exception.³¹

Three years after *Dalehite*, the Supreme Court decided *Indian Towing Co. v. United States*,³² establishing the "Good Samaritan" theory for determining the limits of the discretionary function exception. In *Indian Towing* a ship ran aground because the Coast Guard allegedly failed to repair a lighthouse and failed to alert plaintiffs that the lighthouse was out of service. The Court rejected the argument that the United States should not be liable because the maintenance of the lighthouse was a governmental function, finding untenable the governmental/proprietary distinction for the purposes of determining "discretion."³³ The Court instead established the "Good Samaritan" theory of governmental liability, holding that "while the Coast Guard had no duty to undertake lighthouse service, once it exercised its discretion to do so it was under an obligation to use due care in its operations."³⁴ In reaching this decision, the Court relied on

³⁰ Schwartz & Mahshagian, *supra* note 2, at 363. Thirty-three years after *Dalehite*, the Supreme Court was still experimenting with the "planning-level/operations-level" distinction in *United States v. Varig Airlines*, 467 U.S. 797 (1984).

³¹ See *Indian Towing Co. v. United States*, 350 U.S. 61 (1955).

³² 350 U.S. 61 (1955).

³³ *Id.* at 68. Municipal corporations have governmental and proprietary (non-governmental) functions. *Id.* at 65. Under a number of state tort claims acts, the governmental functions of municipal governments are automatically considered "discretionary" for the purposes of the tort claims act. *Id.* The Court in *Indian Towing* refused to draw such a distinction. *Id.* In rejecting this distinction, the Court noted that all government activity is inescapably uniquely governmental, quoting an earlier Supreme Court decision for this proposition: "Government is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it." *Id.* at 67-68 (quoting *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 383-84 (1947)).

³⁴ Blakeley, *supra* note 1, at 151 (citing *Indian Towing*, 350 U.S. at 65).

The Court affirmed the *Indian Towing* approach in the 1957 case of *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957), which involved a claim for damages allegedly caused by the negligence of federal employees who allowed a forest fire to start and failed to use due care to put the fire out. *Id.* at 319. The plaintiffs specifically alleged that the employees allowed highly flammable, dry grass and brush to accumulate near a railroad track, where sparks from a train ignited fires on the adjoining land. *Id.* at 317. The Court rejected the lower court's reliance

"hornbook tort law" for the proposition that after someone has undertaken to warn the public of danger, inducing reliance, that person must conduct his or her "good samaritan" behavior in a careful manner.³⁵

Today, however, a plaintiff in a negligent certification case may argue that *Indian Towing* stands for the proposition that the discretionary function exception does not cover situations where the "government undertakes an activity which induces reliance,"³⁶ and that the pilot certification process is just such an activity. This approach implies that the discretionary function exception may not immunize the certification process for pilots from liability if the plaintiff can prove that the government was not obligated to conduct the certification process, but rather undertook the responsibility, inducing reliance by the public. Such an argument would likely fail, however, because the government could probably prove that conducting the pilot certification process is a governmental obligation rather than a voluntarily assumed duty.

2. *Application of the Early Interpretations by the Circuit Courts*

The circuit courts took a variety of approaches in applying the tests enunciated in *Dalehite* and *Indian Towing*. In *Smith v. United States*³⁷ the Fifth Circuit criticized the *Dalehite* "planning-level/operations-level test for resting

on *Dalehite* that the discretionary function exception covered employees acting as public firemen. *Id.* at 317-18. As in *Indian Towing*, the Court refused to recognize the "uniquely governmental" function (of public firemen) as a basis for immunity from liability. *Id.* at 318-19. Instead, the Court remanded the decision to determine whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred. *Id.* at 321.

³⁵ *Indian Towing*, 350 U.S. at 64-65.

³⁶ Blakeley, *supra* note 1, at 153.

³⁷ 375 F.2d 243 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967). In *Smith* the plaintiff alleged that the government's failure to arrest or prosecute certain persons resulted in injury to the plaintiff's business. Plaintiff Smith served on a jury in a civil rights damages case where the jury returned a verdict for the defendant. Smith alleged that his participation in the jury verdict caused certain civil rights groups to picket his grocery business. Smith claimed that the FBI's refusal to sufficiently investigate and prosecute the boycotters resulted in injury to his business.

on a distinction so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation."³⁸ In addition to applying this test, the lower courts had to somehow apply the decision in *Indian Towing*, and determine how that decision affected the planning-level/operations-level test.³⁹ Some courts decided to use the *Indian Towing* "Good Samaritan" test only after determining that the activity could be characterized as operational, and therefore, outside of the scope of the discretionary function exception.⁴⁰

In the Third Circuit case of *Griffin v. United States*,⁴¹ the plaintiffs sued the government to recover damages for injuries sustained as a result of ingesting an oral, live-virus vaccine. Plaintiffs claimed that the Division of Biologic Standards (DBS) failed to comply with established governmental standards by approving a particular lot of vaccine to be used on the public.⁴² The *Griffin* court applied

³⁸ *Id.* at 246 (quoting *Indian Towing*, 350 U.S. at 68). The Fifth Circuit in this case held that the discretionary function exception was applicable to exempt the government from liability for exercising the discretion inherent in the prosecutorial function of Attorney General in his refusal to bring suit. *Id.* at 248.

³⁹ Blakeley, *supra* note 1, at 154.

⁴⁰ *Id.* (citing *Medley v. United States*, 543 F. Supp. 1211, 1221-22 (N.D. Cal. 1982)). *Medley* involved an allegation that the FAA negligently plotted a dangerous route over the Sierra Nevada mountains on its aeronautical chart. The court found that the choice of the particular route selected was an operational-level decision, and, relying on *Indian Towing*, found that the FAA had a duty to use due care once it undertook this act. *Medley*, 543 F. Supp. at 1222.

⁴¹ 500 F.2d 1059 (3d Cir. 1974).

⁴² *Id.* at 1064. In an attempt to precisely explain the challenge on appeal, the court noted that the plaintiffs

did not challenge the Surgeon General's determination to approve a live-virus immunization program. Neither did plaintiffs challenge the regulations 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. In reference to the standards the government allegedly violated, the court stated:

The regulation enumerates five criteria as evidence of neurovirulence: 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

Dalehite to determine that the type of judgment involved was not at the policy-making level, but instead required only scientific determination.⁴³ In conclusion, the court held that the United States may be liable where governmental employees simply fail to comply with statutory and regulatory requirements.⁴⁴

Scientists, of course, must use their own judgment in balancing the necessary criteria in order to determine whether the vaccine lots met the required standards. The court, however, 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," but rather a scientific determination, where government scientists were required to comply with necessary statutory and regulatory requirements in making their determinations.⁴⁵

Had the Third Circuit been faced with a claim that the United States negligently licensed an unfit pilot, the court most likely would have analyzed the type of judgment used in the FAA certification process to determine if the decision to certify required "balancing competing policy considerations in determining the public interest,"⁴⁶ or whether the type of judgment involved following specific statutory and regulatory requirements. If the latter is the case, the court would then decide whether the government employees followed these requirements. If the court found that the statutory and regulatory requirements were violated, the United States would not be protected by the discretionary function exception. Thus, while the certification process does depend on the discre-

of occurrence of paralysis not attributable to the mechanical injury resulting from inoculation trauma.

Id. at 1065. The court ruled that the scientists were to take these five criteria and to make a comparative analysis, in order to decide whether the neurovirulence of each lot exceeded the reference standard. *Id.* at 1068.

⁴³ *Id.* at 1066.

⁴⁴ *Id.* at 1069.

⁴⁵ *Id.* at 1066.

⁴⁶ *Griffin*, 500 F.2d at 1066.

tion of government employees, "[t]he violation of a non-discretionary command takes what otherwise might be characterized as a 'discretionary function' outside the scope of the statutory exception."⁴⁷

The Ninth Circuit applied a "planning-level/operations-level" test in *Grunnet v. United States*,⁴⁸ but relied on its own previous cases to determine the scope of the discretionary function exception. In *Grunnet* the plaintiff filed a wrongful death case against the United States. The plaintiff alleged that her daughter died in Jonestown, Guyana, as a member of the People's Temple, due to the government's negligent acts. Grunnet essentially claimed that the government acted negligently in not properly warning her daughter about the dangers of the People's Temple and in withholding important information about the Temple, all of which allegedly led to the violent deaths of the Temple's members.⁴⁹

The court stated that "[t]he prevailing test in the Ninth Circuit for determining whether an act or omission is discretionary for purposes of the exemption is whether it occurred on the 'planning level' of governmental activity or on the 'operational' level."⁵⁰ Furthermore, the court

⁴⁷ *Id.* at 1068-69. The court held: "We do not hold that the Government may be liable for policy determinations made by its officials. Rather, we hold only that the Government may be liable where its employees, in carrying out their duties, fail to conform to pre-existing statutory and regulatory requirements." *Id.* at 1069.

⁴⁸ 730 F.2d 573, 575 (9th Cir. 1984).

⁴⁹ *Id.* at 574. Grunnet alleged four specific acts of negligence by the government:

(1) failure to warn Patricia of the danger the People's Temple posed to her; (2) failure to provide Congressman Ryan with all of the information on the People's Temple possessed by the executive branch of the government that would determine whether his visit [to Guyana] "would cause or provoke violent reactions causing the deaths of the members of People's Temple in Jonestown, Guyana;" (3) undertaking investigations into the People's Temple when the government knew that such investigations might displease the leaders and further endanger the lives of the members of the Temple; and (4) failure to warn Grunnet or Patricia's other relatives of the danger which the People's Temple posed to Patricia.

Id.

⁵⁰ *Id.* at 575 (citing *Ducey v. United States*, 713 F.2d 504, 515 (9th Cir. 1983)).

"also consider[s] 'the ability of the judiciary to evaluate the act or omission and whether judicial evaluation would impair the effective administration of the government.'"⁵¹ Based on these principles, the court held that the alleged negligent acts involved decisions made at a planning level rather than an operational level, and that the decisions involved fell "squarely within the discretionary function exception."⁵²

B. A GIANT STEP FOR THE GOVERNMENT

1. United States v. Varig Airlines

Amid the interpretive turmoil in the circuit courts and nearly thirty years after *Indian Towing*, the Supreme Court reexamined its earlier interpretations of the discretionary function exception in *United States v. Varig Airlines*.⁵³ *Varig Airlines* involved a claim for damages against the FAA for alleged negligent certification of an airplane. Plaintiffs claimed that the Civil Aeronautics Agency⁵⁴ negligently inspected and certified a Boeing 707 aircraft.⁵⁵ In deciding this case, the Court distinguished *Indian Towing* on the grounds that, unlike *Indian Towing*, this case involved op-

⁵¹ *Id.* (quoting *Nevin v. United States*, 696 F.2d 1229, 1230 (9th Cir.), *cert. denied*, 464 U.S. 815 (1983)).

⁵² *Id.* Regarding the claim that the government failed to adequately warn Congressman Ryan, the court stated:

Generally, the State Department's decision to share an internal investigation with a member of Congress is a matter of Executive privilege. While there may be some exceptions to the general rule that the Executive branch has no affirmative obligation to disclose internal matters, . . . [citations omitted] the fact that a proposed foreign visit by a member of the legislative branch may somehow result in danger to third parties in the foreign land does not trigger any such exception. Because there is no allegation here that the State Department withheld information regarding possible peril to Congressman Ryan himself resulting from his proposed visit to Guyana, we do not decide if there is an affirmative duty on the part of the government to warn a Congressman of imminent danger to himself of which it has advance notice.

Id. at 576-76.

⁵³ 467 U.S. 797 (1984).

⁵⁴ The Civil Aeronautics Agency was the predecessor to the Federal Aviation Administration.

⁵⁵ The Boeing 707 was owned by S.A. Empresa De Viacao Aerea Rio

erational-level activity.⁵⁶ The Court then adhered to its earlier decision in *Dalehite*, utilizing the planning-level/operations-level distinction.⁵⁷

While the Court conceded that it is impossible to precisely define the scope of the discretionary function exception, the Court mentioned two factors to use in determining whether or not governmental decisions are protected from liability.⁵⁸ The Court first noted that 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."⁵⁹ The Court then quoted *Dalehite* for the proposition that the discretionary function exception applies to individual employees exercising discretion and not just governmental agencies.⁶⁰

Hence, the Court set forth a basic two-part inquiry for determining the application of the exception:

[First,] 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.⁶¹

The Court suggested that an underlying basis for creating a discretionary function exception to the Act was that "Congress wished to prevent judicial 'second-guessing' of

Grandense ("Varig Airlines") and was in flight when a fire broke out in one of the lavatories. A majority of the plane's passengers died as a result of the fire.

Varig Airlines, although based on the discretionary function exception, is perhaps more applicable to the discussion of negligent pilot certification since it involves the similar issue of negligent airplane certification. *Varig Airlines* is most useful, however, for discussing the historical application of the exception, in light of the more recent decision, *Berkovitz v. United States*, discussed in Part III(C).

⁵⁶ *Varig*, 467 U.S. at 812 (as opposed to "planning level" activity).

⁵⁷ *Id.* at 813.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* (quoting *Dalehite v. United States*, 346 U.S. 15, 33 (1953)).

⁶¹ *Varig*, 467 U.S. at 813-14.

legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."⁶² The Court determined that Congress, by protecting the government from liability, enacted the exception in order to avoid hindering efficient government operations.⁶³ Based on these considerations, the Supreme Court held that the action was barred by the discretionary function exception because the FAA's determination of a private individual's safety was a discretionary function.⁶⁴

Varig has been construed by the government to stand for the proposition that regulatory activities are immune from tort liability under the exception.⁶⁵ In contrast, the plaintiff's bar has argued that the discretionary function exception should not apply to decisions of federal employees "not grounded in social, economic and political policy."⁶⁶ Had Congress truly intended to exempt all regulatory decisions and activities from liability, it could have specifically done so in the FTCA.⁶⁷ The broad language used by the Court in *Varig*, however, has remained a touchstone for those favoring protection of all regulatory activities.

2. Application of *Varig* by the Circuit Courts

The *Varig* decision failed to clarify the parameters of governmental immunity, and the conflict among the circuits continued.⁶⁸ The government argued that *Varig* immunized all regulatory activities of regulatory agencies.⁶⁹ Plaintiffs, however, argued that the discretionary function exception only protected decisions of government em-

⁶² *Id.* at 814.

⁶³ *Id.*

⁶⁴ *Id.* at 819-20.

⁶⁵ Thomas H. Rice, *Berkovitz v. United States: Has a Phoenix Arisen from the Ashes of Varig?*, 54 J. AIR L. & COM. 757, 774 (1989).

⁶⁶ *Id.*

⁶⁷ *Id.* at 771.

⁶⁸ *Id.* at 774.

⁶⁹ *Id.*

ployees based on social, economic, and political grounds.⁷⁰ This conflict eventually warranted a review of the *Varig* decision in *Berkovitz v. United States*.⁷¹ In the years between *Varig* and *Berkovitz*, however, the courts grappled with the application of the exception.

As the broad implications of the *Varig* decision became apparent, the Third Circuit, which had hesitantly applied the discretionary function exception in *Griffin*, embraced the principles established in *Varig*.⁷² For example, in the 1986 decision of *Merklin v. United States*,⁷³ the court summarily applied the *Varig* principles to find the action there barred by the discretionary function exception.⁷⁴ In *Merklin* a former foreman of a radioactive ore processing plant sued the United States for compensation for injuries sustained while working near radioactive materials.⁷⁵ Merklin claimed the Atomic Energy Commission (AEC), which employed the ore plant, failed to properly inspect the plant, breaching its alleged duty to ensure that working conditions at the facility were not unreasonably dangerous.⁷⁶

The court relied on two guidelines established in *Varig* to determine whether the discretionary function barred Merklin's claim. "First, we must ascertain 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.'"⁷⁷ Second, the *Merklin* court observed that the discretionary function exception plainly applies to "the discretionary acts of the Government acting in its role as a regulator of the con-

⁷⁰ *Id.*

⁷¹ 486 U.S. 531 (1988) (discussed in Part III(C)).

⁷² See discussion *supra*, Part III(A)(2).

⁷³ 788 F.2d 172 (3d Cir. 1986).

⁷⁴ *Id.* at 175.

⁷⁵ Merklin was diagnosed as having cancer of the larynx, throat, and lymph nodes of the neck, which allegedly resulted from his contact with radioactive substances.

⁷⁶ *Merklin*, 788 F.2d at 173.

⁷⁷ *Id.* at 174 (quoting *United States v. Varig Airlines*, 467 U.S. 797, 813 (1984)).

duct of individuals."⁷⁸ In reference to the first guideline, the court determined that Congress intended the exception to protect agency decisions involving policy judgment from liability.⁷⁹ In support of this proposition, the court noted that the Atomic Energy Act granted the AEC substantial discretion in enforcing the Act's provisions.⁸⁰ The court held that the discretionary function exception barred the claim because Merklin's theory would "hold the AEC liable in its capacity as a regulator."⁸¹

Three years after the Supreme Court's holding in *Varig*, the Ninth Circuit faced the problem of deciding whether the government could be liable for negligent distribution of polio vaccine. In *Baker v. United States*⁸² the plaintiff contracted poliomyelitis after his nephew was inoculated with trivalent, a live, oral poliovirus vaccine.⁸³ The plaintiff alleged that the poliomyelitis was caused by the negligence of the Department of Health, Education and Welfare (HEW) in failing to require mandatory tests prior to issuing a license to the laboratory to manufacture the vaccine.⁸⁴

⁷⁸ *Id.*

⁷⁹ *Id.* (citing *Varig*, 467 U.S. at 814).

⁸⁰ *Id.* The court cited 42 U.S.C. § 2035(c) (1988), which created an inspection division "to gather information" to determine if plants are complying with the Atomic Energy Act. *Id.*

⁸¹ *Merklin*, 788 F.2d at 174. The court stated: "When 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.* (quoting *Varig*, 467 U.S. at 819-20). The court distinguished an Eighth Circuit case, *McMichael v. United States*, 751 F.2d 303 (8th Cir. 1985), on the ground that the decisions in *McMichael* did not involve policy judgment, but rather precise, technical applications. *Merklin*, 788 F.2d at 175. The *McMichael* case at least seemed factually similar, as it was based on allegedly negligent inspection by the Defense Department of a munitions plant. The *Merklin* court stated: "We believe that *McMichael* must be read narrowly to apply only to those situations where no policy judgment is implicated. We find the instant case differs distinctly from *McMichael* in that the AEC's discretion in conducting plant inspections appears unbounded." *Id.*

⁸² 817 F.2d 560 (9th Cir. 1987), *cert. denied*, 487 U.S. 1204 (1988).

⁸³ The plaintiff, Baker, was permanently injured as a result of the exposure.

⁸⁴ *Baker*, 817 F.2d at 561-62.

The Vaccine is composed of all three Sabin strains of live poliovirus corresponding to the three different types of polio and therefore called "trivalent." A characteristic of live Sabin polio vaccine is that

In determining whether this claim was barred by the discretionary function exception, the *Baker* court focused on whether Congress intended to protect the government from liability for failing to follow its own regulations.⁸⁵ The court attempted to use the guidelines set forth in *Varig* in making its determination, but noted that *Varig*, *Dalehite*, and numerous Ninth Circuit cases did not address the specific issue in *Baker*.⁸⁶ The court turned to an Eighth Circuit case, *Loge v. United States*,⁸⁷ which is factually similar, but which was decided before *Varig*. The *Loge* court relied on *Griffin v. United States*⁸⁸ for its holding that the government's negligent failure to require tests pursuant to 21 C.F.R. § 630.10(b) was not protected from liability under the discretionary function exception.⁸⁹ The government, of course, maintained that *Varig* undercut *Loge* and *Griffin*, in that the discretionary function exception barred claims based on regulatory inspection and enforcement activities.⁹⁰ The court, however, declined to hold that the exception arbitrarily barred such claims and held that the FTCA does not bar a claim based on a gov-

not only is the vaccine's recipient immunized from polio, but unimmunized persons who come into close contact with the vaccinated person also may be immunized through a "shed virus" that spreads from the person vaccinated to the person in close contact. Because Sabin strains contain the live polio virus, either or both persons could develop polio. Consequently, the Secretary has promulgated regulations pertaining to safety, purity, and potency standards that serve to protect susceptible persons from contracting the disease.

Id. at 561; see 21 C.F.R. §§ 630.10-.19 (1983).

⁸⁵ *Baker*, 817 F.2d at 563.

⁸⁶ *Id.* at 564. The precise issue was "whether a government 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." *Id.* The court noted that the failure was "contrary to the applicable statute, to license a vaccine that had not been tested by its manufacturer in exactly the manner required by the HEW's own regulations." *Id.*

⁸⁷ 662 F.2d 1268 (8th Cir. 1981), *cert. denied*, 456 U.S. 944 (1982). Plaintiff contracted polio after her son was inoculated with a polioviral vaccine, and as a result of contracting the disease, became paraplegic. Plaintiff sued the United States and unknown employees of HEW claiming the government was negligent in regulating, testing, and licensing the vaccine.

⁸⁸ See *supra* notes 41-44 and accompanying text.

⁸⁹ *Loge*, 662 F.2d at 1272-73.

⁹⁰ *Baker*, 817 F.2d at 565.

ernmental employee's failure to obey mandatory regulatory commands.⁹¹

C. A FURTHER ATTEMPT AT CLARIFICATION

1. Berkovitz v. United States

Some of the confusion was cleared up four years after *Varig*, in *Berkovitz v. United States*.⁹² This case was one of several involving an individual contracting polio from a live polio vaccine. The Supreme Court unanimously held that the discretionary function exception covered only governmental decisions involving the permissible exercise of policy judgment.⁹³ The Court held firm to its position that conduct could not be considered discretionary unless it involved an element of choice.⁹⁴ Furthermore, the Court stated that merely because judgment must be used does not necessarily mean that the conduct would be considered discretionary.⁹⁵ The Court held that in deciding such cases, it must first be determined whether the judgment involved was the kind Congress intended to immunize from liability.⁹⁶ The kinds of decisions Congress apparently intended to protect were those administrative decisions grounded in social, economic, and political policy, and therefore, the exception protects "only governmental actions and decisions based on considerations of public policy."⁹⁷

The Court noted its two previous decisions holding that not all regulatory activities were immune.⁹⁸ And, in order to clearly reject the government's "blanket immunity"

⁹¹ *Id.* at 566.

⁹² 486 U.S. 531 (1988).

⁹³ *Id.* at 539. "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." Rice, *supra* note 65, at 781.

⁹⁴ *Berkovitz*, 486 U.S. at 536.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 537.

⁹⁸ See *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957); *Indian Towing*, 350 U.S. 61 (1955); *supra* notes 32-34.

claim, the Court stated: "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."⁹⁹

The Court then reviewed the relevant statutory and regulatory provisions and held that the agency must collect all the required material from manufacturers and examine this data as well as the product to see if the product meets safety standards before issuing a product license.¹⁰⁰ The Court held that the discretionary function exception does not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.¹⁰¹ The Court ruled that the agency had no discretion to go against mandated statutory and regulatory procedures¹⁰² and that the Berkovitz's claims survived the government's motion to dismiss.¹⁰³ The *Berkovitz* case makes two assertions regarding *Varig*: "One, that *Varig* is still good law; and two, it was never meant to immunize governmental conduct to the extent

⁹⁹ *Berkovitz*, 486 U.S. at 539.

¹⁰⁰ *Id.* at 542.

¹⁰¹ *Id.* at 544.

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.

Id. at 542-43.

¹⁰² *Id.* at 542.

¹⁰³ *Id.* at 548. Because the Court was reviewing a motion to dismiss, the Court accepted all the allegations in the Berkovitz's complaint as true. The Court stated:

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

Id. at 547-48.

that the government asserted after *Varig*.”¹⁰⁴

2. Application of Berkovitz by the Circuit Courts

In the 1989 case of *Kennewick Irrigation District v. United States*¹⁰⁵ the Ninth Circuit applied the slightly less confusing principles of *Berkovitz*. *Kennewick* involved an action by the district and others to recover for property damage and personal injuries arising out of breaks in the district's main irrigation canal, which was designed and constructed by the federal government. The court applied the two-step test established by *Berkovitz* for determining whether the discretionary function exception applies.¹⁰⁶ First, was the action a matter of choice for the employee?¹⁰⁷ The Ninth Circuit noted that the exception was not applicable when a specific course of action for the employee to follow is prescribed by federal statute, regulation or policy.¹⁰⁸ Second, if the conduct is deemed to involve judgment, is the discretionary function exception designed to shield that type of judgment?¹⁰⁹ To be protected, the judgment must be “‘grounded in social, economic, and political policy.’”¹¹⁰

In applying the *Berkovitz* principles and barring the claim against the government for negligent design, the Ninth Circuit determined that the government's decisions in designing the canal involved judgment regarding the balancing of many technical, economic, and social considerations.¹¹¹ The decisions of the government, however, in constructing the canal were not based on public policy, but instead were based on “technical, scientific engineer-

¹⁰⁴ See Rice, *supra* note 65, at 788.

¹⁰⁵ 880 F.2d 1018 (9th Cir. 1989).

¹⁰⁶ *Id.* at 1025.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* More specifically, discretion may be removed where the government incorporated specific safety standards into the contract, imposing certain duties on the government's agent. *Id.* at 1026.

¹⁰⁹ *Id.* at 1025.

¹¹⁰ *Id.* (quoting *Varig Airlines*, 467 U.S. at 814).

¹¹¹ *Id.* at 1033.

ing considerations."¹¹² Therefore, the exception did not bar plaintiff's claim based on the negligent construction of the canal.¹¹³

Recently, in *Routh v. United States*¹¹⁴ the Ninth Circuit further clarified application of the discretionary function exception. The court used *Kennewick* as its main authority stating that *Kennewick* contained the most extensive discussion of the discretionary function exception based on the underlying decisions of the Supreme Court.¹¹⁵

In *Routh* the United States Forest Services had awarded a private company a contract to clear a road in Alaska. The plaintiff, an employee of the company, was injured when trees he was maneuvering fell onto his backhoeing machine. In his complaint against the government, plaintiff Routh claimed that the backhoe had no falling object protection system and that the United States's contracting officers were aware of the deficiency and failed to notify the contractor of the deficiency. The Ninth Circuit held that the officers' failure to require the contractor to provide the safety equipment was not a discretionary function shielded from tort liability.¹¹⁶

In deciding whether the officers' actions were shielded

¹¹² *Id.* at 1031.

¹¹³ *Id.* at 1032. The Ninth Circuit made a similar distinction in *Summers v. United States*, 905 F.2d 1212 (9th Cir. 1990). In *Summers* the plaintiff, four and one-half-year-old Kendra Summers, sustained injuries at Rodeo Beach when she stepped on the hot embers of a fire ring at the beach. For some time prior to plaintiff's injury, fires were permitted at any location on Rodeo Beach.

At the time of Kendra's injuries, however, the Park Service had changed its policy to confine fires to three specific fire rings located on the beach. Despite the change in policies visitors continued to build fires outside of the designated rings. Applying the guidelines of *Berkovitz*, the court held that the National Park Service's failure to warn visitors about the danger of hot coals on Rodeo Beach resembled more of a "departure from the safety considerations established in the Service[s] . . . policies than a mistaken judgment in a matter clearly involving choices among political, economic, and social factors." *Id.* at 1215. Thus, the Service's failure to recognize and act upon the danger was not protected under the discretionary function exception. *Id.* at 1217.

¹¹⁴ 941 F.2d 853 (9th Cir. 1991).

¹¹⁵ *Id.* at 854 n.2. The court noted that *Kennewick* was based on the underlying Supreme Court decisions of *Dalehite v. United States*, *United States v. Varig Airlines*, and *Berkovitz v. United States*. *Id.*

¹¹⁶ *Id.* at 857.

under the discretionary function exception, the court again used the two-step analysis established in *Kennewick*.¹¹⁷ First, the court had to determine whether the conduct was discretionary, i.e., whether the action taken was a matter of choice for the officers.¹¹⁸ The court specified that an action will not be considered discretionary if a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow."¹¹⁹ If the court concludes that the challenged conduct involved discretionary judgment, the court must then determine whether the discretionary action is "of the kind that the discretionary function exception was designed to shield,"¹²⁰ i.e., whether the judgment is "grounded in social, economic and political policy."¹²¹ These two steps can be consolidated into two simple questions: 1) Was the conduct discretionary? 2) Was the decision a policy decision?¹²²

Although the contract itself required the contracting officers to notify the contractor of any noncompliance with safety regulations, the court determined that discretion was nonetheless involved.¹²³ The discretion existed in the officers' determination of whether the falling object protection system was a necessary safety provision.¹²⁴ After determining that the officers' actions involved discretion, the court applied the second consideration— whether the judgment was grounded in social, economic, and political policy.¹²⁵ The government argued that the officers' decisions were policy-related, claiming that in making such a decision an officer "must balance the policy objectives of promoting work place safety against practical considerations, most notably, the disruptive impact that a stop-work

¹¹⁷ *Id.* at 855.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* (quoting *Kennewick*, 880 F.2d at 1025).

¹²² *Routh*, 941 F.2d at 855-56.

¹²³ *Id.* at 855.

¹²⁴ *Id.*

¹²⁵ *Id.* at 856.

order would have on government operations.”¹²⁶ The court rejected this argument, holding that the officers’ decision was not policy-based.¹²⁷

The court analogized the type of decision-making involved in *Routh* to the type of decision-making in *Kennewick*, which was not protected by the exception. In *Kennewick*, the court determined that the discretionary function exception protected the decisions concerning the *design* of the canal, but not the decisions involving the *construction* of the canal.¹²⁸ The court recognized that the contracting officer must use discretion during construction, but that the discretion used was based on “technical, scientific, or engineering considerations,”¹²⁹ not policy considerations.¹³⁰ The court noted that “virtually all government actions affect costs since the action itself requires resources,”¹³¹ but the court held that the decisions were not shielded from liability “because they were not based on public policy.”¹³² Likewise, the court in *Routh* held that the decision of the contracting officer—whether a situation created a violation of the safety provisions of the contract—was not based on public policy.¹³³

In reaching this decision, the *Routh* court distinguished the Eighth Circuit’s decision in *Tracor/MBA, Inc. v. United*

¹²⁶ *Id.*

¹²⁷ *Id.* at 857.

¹²⁸ *Routh*, 941 F.2d at 856 (citing *Kennewick*, 880 F.2d at 1031).

¹²⁹ *Id.* (citing *Kennewick*, 880 F.2d at 1031).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Routh*, 941 F.2d at 857. The court’s rationale was based on the presumption that the contractor had a fixed price contract and a fixed completion date, and therefore, any implementation of safety measures would be a cost to the contractor, not to the United States. *Id.* The court was also not persuaded that the delay that might be caused by a stop-work order (until compliance) would be much of an economic concern to the United States. *Id.* at 856. In a footnote, the court noted that the government’s argument raised serious concerns, namely that the contracting officer would be “engaging in a cost-benefit analysis, quantifying, by a dollar amount, the cost of risk to human life or limb when deciding whether to issue stop-work orders.” *Id.* at 857 n.3.

States.¹³⁴ In *Tracor/MBA* government inspectors were required to ensure that manufacturers of explosives complied with safety requirements. The inspectors had a review checklist for procedure compliance.¹³⁵ *Tracor* claimed that the inspections were conducted negligently. The court held that the decisions of the inspectors were protected by the discretionary function exception because the decisions fell within the discretion contemplated by the regulations.¹³⁶ The *Routh* court emphasized that the safety manual in *Tracor* "took into account necessary public policy trade-offs among cost of manufacture, difficulties in maintenance, risk to handlers, reliability of function and other factors relevant to the manufacture of military weapons and defensive systems."¹³⁷ But as to the contracting officer's decision in *Routh*, the court stated: "No comparable regulations have been shown to exist here from which we can conclude that the government agents' conduct was within the ambit of the political, social and economic considerations embodied in the regulations."¹³⁸

This discussion of the Supreme Court's interpretations

¹³⁴ 933 F.2d 663 (8th Cir. 1991). The United States adopted regulations requiring manufactures of explosives to comply with specific safety standards.

¹³⁵ The government had a "forty-seven step procedures review checklist for safety compliance." *Id.* at 665.

¹³⁶ *Id.* at 667. The court found that the inspectors' decisions when checking ventilation and flame-retardancy of clothing were within the discretion contemplated by the checklist. *Id.* The court stated:

[A]ll of the points on the checklist upon which *Tracor* relies merely state a very general course of conduct for the inspectors to follow. For example, the checklist tells the inspector to check the ventilation every 30 days. *Tracor* does not argue that the inspectors failed to check the ventilation. Instead, *Tracor* contends that the inspectors performed an inadequate inspection of the ventilation. The checklist, however, prescribed no procedures for testing the ventilation and did not specify what action an inspector should take if he found inadequate ventilation. Likewise, the checklist did not specifically tell the inspector how to check the flame-retardancy of clothing. The method of ensuring the flame-retardancy of the clothing, like testing the ventilation, was left to the inspector's choice. Accordingly, the inspector's conduct was discretionary and protected by the discretionary function exception.

Id.

¹³⁷ *Routh*, 941 F.2d at 857.

¹³⁸ *Id.*

and the various courts of appeals' applications of the discretionary function exception laid the foundation for applying the exception to future cases. In order to properly decide whether the United States could or should be liable for licensing unfit pilots, however, it is necessary to review specific cases involving suits against the FAA.¹³⁹

IV. APPLICATION OF THE DISCRETIONARY FUNCTION EXCEPTION IN SUITS AGAINST THE FAA

Very few cases have actually addressed the issue of whether the United States should be liable for negligent certification of pilots. Furthermore, the few cases which do involve this specific issue have produced varying results. Numerous suits against the FAA in general, however, involved application of the discretionary function exception. These cases, in addition to the few cases specifically addressing the issue of negligent certification, are helpful in deciphering the boundaries of the exception.

*Swanson v. United States*¹⁴⁰ is a helpful early interpretation of the application of the discretionary function exception to an aviation case. Plaintiffs sued the United States to recover damages for the wrongful death of their husband and father. The decedent worked as a technical representative of the Lockheed Aircraft Corporation at a

¹³⁹ 14 C.F.R. 61, 67 (1993) (containing the actual regulations for pilot certification). The Federal Aviation Act provides:

Any person may file with the Secretary of Transportation an application for an airman certificate. If the Secretary of Transportation finds, after investigation, that such person possesses proper qualifications for, and is physically able to perform the duties pertaining to, the position for which the airman certificate is sought, he shall issue such certificate, containing such terms, conditions, and limitations as to duration thereof, periodic or special examinations, tests of physical fitness, and other matters as the Secretary of Transportation may determine to be necessary to assure safety in air commerce. 49 U.S.C. app. § 1422(b)(1) (1988).

A pilot is required to obtain a medical certificate as a condition to receiving an airman's certificate, which certifies a pilot's aviation skills. See 14 C.F.R. § 61.3(c) (1993); 14 C.F.R. Part 67 (1993).

¹⁴⁰ 229 F. Supp. 217 (N.D. Cal. 1964).

California Air Force base. While participating in a test flight, the decedent was involved in a fatal plane crash. The test flight was the final step of a Material Improvement Project, conducted by Military Air Transport Service to develop a fail-safe system for the plane's elevator mechanism.¹⁴¹

In determining whether the discretionary function exception barred the plaintiffs' claim, the court noted that the negligence related to either the design or installation method of the modification.¹⁴² The plaintiffs did not argue that the decision to develop the fail-safe modification was a negligent act. Because of its reliance on the *Dalehite* planning-level/operations-level theory the court noted the lack of this argument.¹⁴³ The court recognized that "every action of a government employee . . . involves the use of some degree of discretion,"¹⁴⁴ yet the discretionary function exception applies only when the plaintiff "claims that conduct at the planning level is the cause of his injuries."¹⁴⁵ The exception does not apply to conduct at the operations level even if that conduct was necessary to carry out a planning-level decision.¹⁴⁶ Decisions made at the planning level are those involving questions of policy, requiring the decision-maker to balance financial, political, economic, and social factors.¹⁴⁷ Conversely, decisions made at the operations level involve the ordinary daily operations of the government, and even though these decisions require the use of discretion, they typically do not require the decision-maker to balance policy

¹⁴¹ "The elevator mechanism is functionally similar to the rudder, except that instead of being used to change the direction of the plane, it is used to change altitude. . . . The modification was an attempt to provide a 'fail-safe' system in case the normal system failed." *Id.* at 218-19. The modification was for emergency purposes, in the event that the normal system failed. *Id.*

¹⁴² *Id.* at 220.

¹⁴³ *Id.* at 219. The court noted that although parts of *Dalehite* were no longer controlling due to the *Rayonier* decision, several circuit courts had adopted the planning-level/operations-level distinction. *Id.*

¹⁴⁴ *Id.* at 219-20.

¹⁴⁵ *Id.* at 220.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

considerations.¹⁴⁸

The court concluded that the decision to develop a modification was a planning-level decision, but the design or installation of the modification was operations-level conduct, even though the conduct was necessary for carrying out the planning-level decision.¹⁴⁹ The discretionary function exception, therefore, did not bar this claim.¹⁵⁰

The 1982 Ninth Circuit decision in *Medley v. United States*¹⁵¹ illustrates the types of FAA conduct that are considered discretionary within the meaning of the exception, and conversely, FAA conduct that is not protected by the exception. *Medley* consolidated three actions that arose out of two airplane crashes. Plaintiffs asserted that both crashes occurred while the pilots were following a route marked out on a sectional aeronautical chart published by the FAA. The FAA placed the route on the chart in response to a private citizen's suggestion that a particularly dangerous California canyon be noted on the sectional chart. The Acting Director of the Air Traffic Control Division of the Western Regional Office of the FAA recommended that two routes be placed on the next San Francisco sectional chart. Unfortunately, only one of the routes was actually placed on the 19th edition of the chart, along with a misleading elevation figure. Once the FAA discovered the mistake, the route was removed from

¹⁴⁸ *Id.* The court gave examples of conduct at the operations level that have not been considered discretionary within the meaning of 28 U.S.C. § 2680(a). These included the decision to make low level plane flights to make a survey (citing *Dahlstrom v. United States*, 228 F.2d 819 (8th Cir. 1956)), and the operation of an air traffic control tower (citing *Eastern Air Lines v. Union Trust Co.*, 221 F.2d 62 (D.C. Cir 1955)). *Id.*

¹⁴⁹ *Swanson*, 229 F. Supp. at 221. The court stated that this case was similar to *United States v. Hunsucker*, 314 F.2d 98 (9th Cir. 1962), where the plaintiff alleged that his land was damaged by the government's failure to provide proper drainage from an Air Force Base. *Swanson*, 229 F. Supp. at 221. The Ninth Circuit noted that in *Hunsucker*, the discretionary function exception did not bar plaintiff's claim because the plaintiff was complaining about inadequate drainage, rather than the decision to reactivate the base, which was policy related. *Id.*

¹⁵⁰ *Id.*

¹⁵¹ 543 F. Supp. 1211 (N.D. Cal. 1982).

the 20th edition, but somehow reappeared on the 21st edition chart. The plaintiffs claimed that as a result of following the chart, the two pilots became trapped in a "blind canyon" and consequently crashed into the canyon wall. Specifically, plaintiffs claimed that the FAA negligently prepared the chart and failed to adequately instruct on the chart's proper use.

The court determined that the plaintiffs based their claims on six distinct categories of government conduct.¹⁵² The court applied the *Dalehite* planning-level/operations-level distinction in conjunction with the "prevailing test" developed by the Ninth Circuit in *Lindgren v. United States*.¹⁵³ Based on the planning-level/operations-level distinction, the court held that the discretionary function exception protected the FAA official's decision to add a route to the sectional chart.¹⁵⁴ The court concluded that such a decision was infrequent, not day-to-day, and was based on public safety and policy con-

¹⁵² *Id.* at 1216. The six categories are as follows:

- (1) The decision to chart routes over the Kearsarge Pass area to be published on the San Francisco sectional chart.
- (2) The failure to warn of the Center Basin hazard.
- (3) The choice of where to chart route over the Kearsarge Pass area.
- (4) How the route was placed in the sectional chart.
- (5) The failure of FAA officials to review the chart to be sure that the proposed routes had been accurately depicted.
- (6) Failure to warn pilots of the danger of the route, and failure to promptly remove the route from the chart, after publication of the chart and discovery of the hazards of the route.

Id.

¹⁵³ 665 F.2d 978 (9th Cir. 1982). The prevailing test distinguishes between acts or omissions occurring at the planning level and those occurring at the operational level:

Not every discretionary act is exempt. Obviously, attending to many day-to-day details of management involves decisions and thus some element of discretion. The exercise of this kind of discretion does not fall within the discretionary function exemption. The distinction generally made in the application of the discretionary function exemption is between those decisions which are made on a policy or planning level, as opposed to those made on an operational level.

Id. at 980.

¹⁵⁴ *Medley*, 543 F.2d at 1218.

siderations.¹⁵⁵ The court rationalized that holding “otherwise could impair the effective administration of the FAA as there could be a chilling effect on FAA officials who should be free to make decisions affecting the safety of the public without fear or threat of lawsuits and personal liability.”¹⁵⁶ With regard to the status of the decision-maker, however, the court recognized that had the Acting Director acted outside the scope of his authority, the exemption would not apply, “because there can be no discretion to engage in unauthorized activities.”¹⁵⁷

The second category of allegedly negligent government conduct was the government’s failure to warn pilots of the nearby canyon and failure to inform pilots that safer routes existed.¹⁵⁸ The court recognized that a decision whether to inform pilots of the presence of a natural danger is usually considered a discretionary function, but the court determined that this situation was unique because the government’s conduct actually created a hazardous situation.¹⁵⁹ The court held that the decision not to warn of a danger created by the government was an operational-level decision, and therefore, was not protected by the discretionary function exemption.¹⁶⁰

The court held that the third category of conduct, choosing which route to place on the chart and also the

¹⁵⁵ *Id.* The court recognized that the decision may not have been an exercise of good judgment, but was nonetheless a policy-related decision. *Id.* at 1219.

¹⁵⁶ *Id.* The court further reasoned that permitting review of this type of decision “would cause the decision-maker to refrain from making such decisions for fear of personal liability, and this result would be more deleterious to the public safety than the individual negligence sought to be reviewed.” *Id.*

¹⁵⁷ *Id.* (citing *Birnbaum v. United States*, 588 F.2d 319 (2d Cir. 1978)).

¹⁵⁸ *Medley*, 543 F. Supp. at 1220.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 1221. The court further noted that placing such a warning on the sectional chart would not be administratively burdensome, which was a factor the Ninth Circuit weighed in determining whether conduct was protected by the exemption. *Id.* at 1218, 1221. The sixth category of conduct, which included the government’s failure to promptly remove the dangerous route from the chart, was also held to be operational-level conduct for the same reasons that the failure to warn of the canyon was found non-discretionary. *Id.* at 1223-24.

alleged negligent preparation of the chart,¹⁶¹ was also non-discretionary conduct within the meaning of the exemption.¹⁶² The court held that these activities were clearly operational-level decisions, rationalizing its decision based on the "good samaritan" rule set forth in *Indian Towing*.¹⁶³ The government had no duty to assist pilots through this dangerous area, but once it undertook this duty and induced reliance, the government had a duty to proceed with due care.¹⁶⁴ "When this duty of care is discharged in a negligent manner, the government is guilty of negligence and it cannot escape liability by invoking the discretionary function exception, for there is no discretion to conduct discretionary operations negligently."¹⁶⁵

The 1985 case of *Heller v. United States*¹⁶⁶ is helpful in determining government liability for negligent pilot certification. The FAA issued a transport pilot certificate to plaintiff Heller, a commercial airline pilot. Heller had a first-class medical certificate in connection with his pilot certificate. Pursuant to federal regulations, Heller's doctor notified the FAA that Heller had developed an unusual medical problem.¹⁶⁷ Upon receiving this information, the FAA medical examiner withdrew the plaintiff's medical certificate, and denied his recertification. This withdrawal meant that Heller could no longer work as a commercial airline pilot. After reapplication and petitioning for an exemption, the FAA reissued Hel-

¹⁶¹ Plaintiffs claimed that the chart was inaccurate because of the omission of the safer northerly route and the misleading elevation figure. *Id.* at 1222.

¹⁶² *Id.*

¹⁶³ *Id.* (citing *Indian Towing*, 350 U.S. at 64-65).

¹⁶⁴ *Medley*, 543 F. Supp. at 1222 (citations omitted).

¹⁶⁵ *Id.* With regard to the fifth category of conduct, the FAA's alleged failure to review the inaccurate chart, the court held that if such a duty to review existed then the discharge of that duty was an operational-level function, and thus, non-discretionary within the meaning of the exemption. *Id.* at 1223.

¹⁶⁶ 620 F. Supp. 270 (M.D. Fla. 1985), *aff'd*, 803 F.2d 1558 (11th Cir. 1986).

¹⁶⁷ Heller's physician conducted several tests on Heller, including an electrocardiogram (EKG), and on the basis of those tests, diagnosed Heller as having a myocardial infarction.

ler's certificate.¹⁶⁸

Heller sued the government, alleging that the FAA negligently denied his medical certificate.¹⁶⁹ He claimed that his medical certificate was suspended due to "careless and negligent investigation, data collection, data production, and diagnostic procedures and activities of agents and employees of the FAA."¹⁷⁰ The trial court, relying on *Varig*, stated that the entire commercial aircraft certification procedure was discretionary within the meaning of the discretionary function exception.¹⁷¹ The trial court dismissed the complaint, stating:

The FAA's implementation of a mechanism for medical certification, as well as aircraft certification, issuance, re-

¹⁶⁸ On January 30, 1980, the FAA accepted a letter from Dr. Richard L. Masters as a petition on behalf of Heller requesting an exemption from Part 67 of the Federal Aviation Regulations. In order to be eligible for a first class medical certificate, the applicant must have no established medical history or clinical diagnosis of myocardial infarction. *Id.* at 1562 (citing Federal Aviation Administration, 14 C.F.R. § 67.13(e)(1)(i) (1993)).

The Federal Air Surgeon has the discretion to issue a special medical certificate to

an applicant who does not meet the applicable provisions of § 67.13 [first-class medical certificate], § 67.15 [second-class medical certificate], or § 67.17 [third-class medical certificate] if the applicant shows to the satisfaction of the Federal Air Surgeon that the duties authorized by the class of medical certificate applied for can be performed without endangering air commerce during the period in which the certificate would be in force.

14 C.F.R. § 67.19(a).

¹⁶⁹ *Heller*, 620 F. Supp. at 271.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* The trial court then quoted part of the Supreme Court's decision in *Varig*:

as in *Dalehite* it is unnecessary—and indeed impossible—to define with precision every contour of the discretionary function exception . . . first, it is the nature of the conduct, rather than the status of the act, that governs whether the discretionary function exception applies in a given case . . . 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 liability . . . second, whatever else the discretionary function 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.

Id. (quoting *United States v. Varig*, 467 U.S. 797, 813 (1984) (citations omitted)).

view, and reissuance, is plainly a discretionary activity of the nature and quality protected by § 2680(a). Medical licensing authority of the FAA is clearly a role where the government is acting in its role "as a regulator of the conduct of private individuals."¹⁷²

To hold the entire FAA medical certification process outside the scope of the exception would handicap efficient government operations. Furthermore, such a decision concerning medical determinations by the surgeon would place the determinations in constant jeopardy of potential tort suits. The safer, and ultimately better, policy is to err in favor of grounding a pilot of suspect qualification, thereby fulfilling the overriding responsibility to the public. Finally, the individual acts and decisions in issuing and suspending, or reissuing, a medical or commercial pilot certificate are discretionary acts of a policy and decision-making nature within the scope of section 2680(a).¹⁷³

On appeal, Heller argued that the government's negligent failure to consult his 1968 EKG¹⁷⁴ was not a discretionary activity and that the denial of his medical certificate was a result of the negligent application of 14 C.F.R. section 67.13(e)(1)(i), which did not require the FAA to balance policy concerns.¹⁷⁵ The Eleventh Circuit applied the guidelines set forth in *Varig*¹⁷⁶ and another Eleventh Circuit case, *Alabama Electric Cooperative, Inc. v.*

¹⁷² *Id.* at 271-72 (citations omitted).

¹⁷³ *Id.*

¹⁷⁴ The court accepted as true Heller's allegations that there was no material difference in the 1968 EKG that the government had on file and the EKG on which disqualification was based, and that the government failed to make the comparison, resulting in negligent disqualification. *Heller*, 803 F.2d at 1562.

¹⁷⁵ *Id.*

¹⁷⁶ *Varig* requires consideration of the following issues: 1) whether the act was of the nature and quality that Congress intended to shield from liability, and 2) whether the government, by these discretionary acts, is acting as a regulator of the conduct of private individuals. *Id.* at 1563 (citing *Varig*, 467 U.S. at 813). The court held: "When 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.* (quoting *Varig*, at 815).

United States,¹⁷⁷ in rejecting Heller's contentions on appeal.¹⁷⁸ The court concluded that the FAA medical certification process involved in this case necessarily implicated policy considerations relating to air safety as well as medical judgment, and therefore fell within the discretionary function exception of the FTCA.¹⁷⁹ More specifically, the court, relying on *Payton v. United States*,¹⁸⁰ rejected Heller's first contention — that the negligent failure to consider the 1968 EKG was not protected by the discretionary function exception. The court held that the FAA's failure to consider Heller's 1968 EKG also fell within the scope of the exception.¹⁸¹

Heller's second contention, that the FAA negligently applied section 67.13(e)(1)(i), was also ultimately rejected by the court.¹⁸² Plaintiff relied on dictum found in the D.C. Circuit case *Beins v. United States*,¹⁸³ which stated that the medical standard under section 67.13(e)(1)(i) fell within a category of determinations not protected by the discretionary function exception.¹⁸⁴ *Beins* also involved an

¹⁷⁷ 769 F.2d 1523 (11th Cir. 1985). *Alabama Electric* stated that the key inquiry in determining whether the discretionary function exception applied is "whether or not the professional discretion involves policy considerations." *Id.* at 1529 n.2.

¹⁷⁸ *Heller*, 803 F.2d at 1564.

¹⁷⁹ *Id.* at 1565-66.

¹⁸⁰ 679 F.2d 475 (5th Cir. 1982). In this case, the Fifth Circuit held that a parole board's negligent failure to "acquire, read, or give adequate consideration" to certain records that would show that the parolee was a danger to society fell within the discretionary function exception. *Id.* at 482. The court reasoned that the decision not to consider the records ultimately implicated its discretionary function. *Id.*

The Eleventh Circuit in *Heller* quoted the Fifth Circuit:

In fulfilling this task, the Board must exercise its judgment by determining the materiality of certain studies and documents and the propriety of relying thereon in reaching its final assessment. Further, the manner and degree of consideration with which the Board examines these materials is inextricably tied to its ultimate decision.

Heller, 803 F.2d at 1564 (quoting *Payton*, 679 F.2d at 482).

¹⁸¹ *Heller*, 803 F.2d at 1564.

¹⁸² *Id.* Plaintiff contended that his certificate was denied due to a negligent finding that he had an "established medical history or clinical diagnosis" of myocardial infarction, and that this finding only implicated medical judgment, not policy-making concerns, and therefore fell outside of the exception. *Id.*

¹⁸³ 695 F.2d 591 (D.C. Cir. 1982).

¹⁸⁴ *Id.* at 603.

allegedly negligent application of expert reports and the FAA's evaluations of the plaintiff regarding the vision and neurological standards. The *Beins* court stated that when applying the discretionary function exception to the medical certification process, the court must examine the regulations at issue to determine whether they give FAA officials a range of policy judgment or only require standard medical judgment.¹⁸⁵ In dictum, the court stated that section 67.13(e)(1)(i), dealing with myocardial infarction, "require[s] the FAA to evaluate a medical condition, not to weigh and balance the effect of the condition on the pilot's ability to perform his duties safely."¹⁸⁶

The *Heller* court expressly rejected the dicta in *Beins*, concluding:

[I]n the context of medical examinations conducted by the FAA to determine whether persons shall be certificated to pilot in air commerce, the determination of whether an applicant has an "established medical history or clinical diagnosis" of myocardial infarction involves not only a medical judgment but also necessarily implicates policy concerns.¹⁸⁷

The court reasoned that the emphasis of the statute at issue was safety, that the regulation was "intended to provide guidance for medical experts in their determination of whether the airman is suffering from a disorder that prevents him from performing his duties safely," not benefit the airmen.¹⁸⁸ The court held that a determination of

¹⁸⁵ *Id.* at 602.

¹⁸⁶ *Id.* at 603.

¹⁸⁷ *Heller*, 803 F.2d at 1565.

¹⁸⁸ *Id.* at 1566. The court quoted the history of § 67.13(e)(1)(i) to illustrate the regulation's emphasis on safety:

The [Flight Safety] Foundation recommends, in effect, that [the] existence of [a history of myocardial infarction] is an appropriate basis for disqualification for any class of medical certificate. This recommendation is based on the medical fact that [this condition] can[not] be as precisely studied in the individual as to provide assurance that they will not interfere with the safe piloting of aircraft. In reality, the likelihood of occurrence of partially or totally incapacitating states directly attributable to these conditions is so great, and the ability to provide acceptable medical assurance of nonoccurrence of

whether a history of myocardial infarction would affect air safety involved more than medical judgment and is "influenced by the fact that the ultimate decision is whether this particular applicant should be permitted to fly."¹⁸⁹ The court noted that in applying this medical standard, the FAA would be conservative in its decision-making in order to avoid real safety risks.¹⁹⁰ The court therefore held that the application of section 67.13(e)(1)(i) necessarily implicates policy concerns protected by the discretionary function exception.¹⁹¹

The discretionary function exception also barred the claim in the post-*Berkovitz* case of *Pepper v. United States*.¹⁹² The suit in *Pepper* arose out of a fatal airplane crash that occurred when a plane lost power during takeoff and struck trees at the end of the runway. Plaintiffs sued under the FTCA claiming that the trees obstructed air navigation within the meaning of 14 C.F.R. Part 77, and that the FAA negligently failed to eliminate the obstruction.¹⁹³

The court dismissed the complaint for lack of subject matter jurisdiction because the discretionary function exception barred the claim.¹⁹⁴ The court's dismissal rested on the assumption that the FAA never undertook to remedy the "obstruction."¹⁹⁵ The court cited *Berkovitz* for the proposition that "the FTCA's 'discretionary function' ex-

such states in any given individual is so inadequate, that these conditions existing in airmen constitute a definite hazard to safety in flight.

Id. (quoting 24 Fed. Reg. 7307, 7309 (1959)).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* The court recognized that a number of the FAA medical standards expressly require the FAA to balance safety objectives. *Heller*, 803 F.2d at 1566; see 14 C.F.R. §§ 67.13(d)(1)(ii), .13(d)(2)(ii), .13(f)(2); 67.15(d)(1)(ii), .15(d)(2)(ii), .15(f)(2); 67.17(d)(1)(ii), .17(d)(2)(ii), .17(f)(2) (1993). But the court also noted that some regulations, such as § 67.13(e)(1)(i), do not expressly incorporate safety objectives. *Heller*, 503 F.2d at 1566. Nevertheless, the court held that this regulation implicated policy concerns, and was therefore protected. *Id.*

¹⁹² 21 Av. Cas. (CCH) ¶ 17,775 (W.D. Mich. 1988).

¹⁹³ *Id.* at 17,776.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

ception, 28 U.S.C. § 2680(a), destroys jurisdiction to hear claims based upon a regulatory agency's failure to take action desired by a member of the public, where such action is not explicitly required by statute or regulation."¹⁹⁶ The court held that because the FAA had discretion to deal with the situation, and chose not to take remedial steps, the court could not hear the claim.¹⁹⁷ The court mentioned, however, that if the FAA had made an effort to remedy the obstruction, the discretionary function exception would not apply.¹⁹⁸

Another important case on the issue of government liability for negligent certification is *Leone v. United States*,¹⁹⁹ in which a district court took a notably different stance than that taken by the Eleventh Circuit in *Heller* two years earlier.²⁰⁰ In *Leone* plaintiff's decedents died in an airplane crash when the pilot of the plane apparently suffered a heart attack. The regulation involved, 14 C.F.R. § 67.17(e)(1), was essentially the same regulation at issue in *Heller*,²⁰¹ and provided that in order for a third-class medical certificate to be issued, the applicant must be free of cardiovascular problems.²⁰² The plaintiffs sued the federal government alleging that aviation medical examiners negligently examined the pilot for evidence of heart dis-

¹⁹⁶ *Id.* The court noted that statutes and regulations pertaining to navigable airspace do not require the FAA to remove obstructions. *Id.* (citing 49 U.S.C. app. § 1348(a) (1988); 14 C.F.R. pt. 77 (1993); *Reminga v. United States*, 631 F.2d 449, 456-57 (6th Cir. 1980)). "Their language [the statutes' and regulations' language] connotes discretion rather than mandatory requirements, general policy standards rather than specific directions." *Id.*

¹⁹⁷ *Pepper*, 21 Av. Cas. at 17,776.

¹⁹⁸ *Id.* (citing *Berkovitz v. United States*, 486 U.S. 530, 539 n.3 (1988)). "Once an agency undertakes to execute a made decision, it must act with due care." *Id.*

¹⁹⁹ 690 F. Supp. 1182 (E.D.N.Y. 1988).

²⁰⁰ A broad reading of *Heller* could stand for the proposition that the FAA medical certification process is discretionary.

²⁰¹ The regulation at issue in *Heller* was 14 C.F.R. § 67.13(e)(1) (1993), which uses the exact same language as § 67.17(e)(1), but applies to first-class medical certificates, rather than third-class medical certificates. See *Heller*, 803 F.2d at 1558.

²⁰² *Leone*, 690 F. Supp. at 1183. Section 67.17(e) specifically provides that an applicant must have:

ease prior to issuing the pilot his FAA certification.²⁰³ More specifically, plaintiffs alleged that the FAA physicians failed to adequately inquire into the pilot's medical history and failed to sufficiently examine him for evidence of heart problems.²⁰⁴

The court looked to the principles established in *Varig*, but refused to read the decision so expansively as to extend the discretionary function exception to all activities undertaken pursuant to regulatory authority.²⁰⁵ The court noted that the Supreme Court did not hold in *Varig* that all regulatory activities are discretionary, stating: "the law remains that regulatory decisions . . . that do not involve policy judgments are not protected by the discretionary function exception."²⁰⁶ More specifically, the court noted that where granting a license would require "balancing of several factors and the grant or refusal to grant is made without reliance upon any readily ascertainable rule or standard, the courts will hold the judgment to be discretionary."²⁰⁷ Conversely, "where the grant involves nothing more than the matching of facts against a clear rule or standard, the grant will be considered operational and not discretionary."²⁰⁸

"(1) No established medical history or clinical diagnosis of—

(i) Myocardial infarction;

(ii) Angina pectoris; or

(iii) Coronary heart disease that has required treatment or, if untreated, that has been symptomatic or clinically significant." 14 C.F.R. § 67.17(e) (1993).

²⁰³ *Leone*, 690 F. Supp. at 1183.

²⁰⁴ *Id.* Specifically, plaintiffs claim the physicians were negligent in their examinations in:

(1) failing to question or inadequately questioning Mr. Small about his medical history; (2) failing to or inadequately performing a stethoscopic examination of Mr. Small's heart; (3) failing to or inadequately examining Mr. Small's skin by failing to see a catheterization scar or obtain information about it; and (4) failing to find the medical history or clinically significant signs of angina or coronary heart disease.

Id.

²⁰⁵ *Leone*, 690 F. Supp. at 1187 (rejecting the government's argument).

²⁰⁶ *Id.* at 1188.

²⁰⁷ *Id.* at 1185 (quoting *Hendry v. United States*, 418 F.2d 774, 782 (2d Cir. 1969)).

²⁰⁸ *Id.*

Applying these principles to the facts of the case, the court determined that the alleged negligence involved was a "failure to apply clearly articulated medical standards in the context of a physical examination,"²⁰⁹ and that the Aviation Medical Examiners made no policy decisions.²¹⁰ The discretionary function exception, therefore, did not serve to protect the United States from liability.²¹¹

Nor did the discretionary function exception protect the FAA in the 1990 case of *Hayes v. United States*,²¹² a particularly relevant case involving a suit against the FAA arising out of the pilot certification process. In *Hayes* Nancy Yates sought certification as a Learjet command pilot. She asked her friend, FAA aviation safety inspector Marcus Belcher, to administer the test. After taking the written part of the test, Nancy proceeded to take the actual "flight" test. Because FAA inspector Belcher lacked sufficient recent experience in the Learjet Model 35 to act as co-pilot or safety pilot, Jack Hayes, an experienced pilot, occupied the right front seat as safety pilot. This

²⁰⁹ *Id.* at 1188.

²¹⁰ *Id.*

²¹¹ *Id.* In another post-*Berkovitz* aviation case, *Fleming v. United States*, 21 Av. Cas. (CCH) ¶ 18,335 (W.D. Pa. 1989), a pilot and co-pilot sought damages for injuries sustained when their aircraft crashed while attempting to land with the aid of a government-operated navigational aid termed a Non-Directional Beacon (NDB). The NDB was alleged to have been improperly placed for use as a separate navigational device. Plaintiffs contended that their use of the NDB was necessary because the airport's Instrument Landing System (ILS) facility was not working at the time of the crash. The government argued that its previous acquisition of the existing NDB as a federal navigational facility was a discretionary act protected by the discretionary function exception.

Relying on *Berkovitz*, the court concluded that governmental conduct that induced reliance did not, in and of itself, create an actionable claim under the FTCA. *Id.* at 18,338. Rather, the claimant was required to show that the challenged conduct did not involve an element of judgment or choice, or that the judgment or choice did not concern an area intended to be protected from liability. *Id.* The court determined that the government's conduct arguably involved settled policy matters. *Id.* The court held that the discretionary function did not apply if the FAA was required to operate the NDB when the airport's ILS was out of service. *Id.* at 18,339. Since it was unknown whether the government was required to operate the NDB at the time of the crash, the court denied the government's motion for summary judgment on the issue of the discretionary function exception. *Id.*

²¹² 899 F.2d 438 (5th Cir. 1990).

placed inspector Belcher in the "potty" seat located immediately behind the cockpit in the passenger compartment.

To pass the test, Yates had to demonstrate competence at several maneuvers, including a "V1 cut."²¹³ FAA regulations require inspectors to administer pre-flight briefings to coordinate responsibilities among crew members.²¹⁴ Inspector Belcher, however, did not conduct such a briefing, believing it was unnecessary given the flight experience of both Yates and Hayes. Yates attempted a V1 cut, but did not perform the maneuver satisfactorily.²¹⁵ Apparently, Belcher thought this first V1 cut fell in a "gray area," one performed neither satisfactorily nor unsatisfactorily. Belcher therefore had Yates attempt the maneuver again. The second attempt resulted in a crash that destroyed the plane, killing Yates and injuring Belcher and Hayes.

The Learjet company, Hayes and Hayes's wife sued the government, alleging that FAA inspector Belcher negligently failed to conduct the required pre-flight briefing, and negligently gave an impermissible second chance at

²¹³ *Hayes*, 899 F.2d at 442; see 14 C.F.R. pt. 61 app. A (1986).

A "V1 cut" in a twin-engine Learjet requires the applicant to demonstrate a takeoff with a simulated one-engine failure at a speed in excess of "V1" that in the judgment of the examiner is appropriate to the airplane type under the prevailing conditions. V1 is the velocity at which, once exceeded, the plane must take off. Below that speed, the takeoff can be aborted.

Hayes, 899 F.2d at 442.

²¹⁴ *Hayes*, 899 F.2d at 442 (citing Southwest Supplement to F.A.A. Order 8710.4).

²¹⁵ *Id.*

When V1 was achieved, Hayes reduced power on the right engine to idle speed. The airplane then "yawed" (slowly turned) to the left, although yawing to the right was to be expected. The airplane continued out of alignment off the runway and became airborne. Immediately thereafter, Belcher, who could see the yoke in Yates' hands but could not see Hayes, saw a sharp jerky movement of the yoke to the right. This movement apparently was an intervention by Hayes. During the flight test, the safety pilot is not to hold the yoke, but is to stand by prepared to intervene in case of impending danger. After this attempt at a V1 cut, Yates managed to land the plane safely.

Id.

the V1 cut. The government argued that Belcher's decision to let Yates have a second chance at the V1 cut was an exercise of the FAA's discretionary function. The government specifically relied on *Berkovitz*, urging that Belcher's decision to let Yates have a second attempt at the V1 maneuver met the two prong test established in *Berkovitz*.

The court squarely rejected the government's argument, holding that while Belcher's decisions may have required the exercise of discretion within the meaning of the first prong, his decisions were not of the type Congress intended to protect.²¹⁶ The court determined that "Belcher's actions were merely part of his day-to-day 'operational function' and not policy-related at all," and therefore, the discretionary function exception did not apply.²¹⁷

Finally, the most recent relevant case is the Ninth Circuit's decision in *Foster v. United States*.²¹⁸ Much like *Leone* and *Heller*, this case questioned the permissible discretion of FAA medical examiners. In *Foster* an FAA flight surgeon denied commercial pilot Joseph O'Brien a Class II medical certificate. Eventually, however, the FAA issued O'Brien a special Class II certificate under FAA regulations, valid for one year and contingent on positive results of regular physical and cardiovascular examinations. This special certificate required O'Brien to cease flying if he experienced any adverse medical changes. O'Brien suffered a heart attack but did not report it to the FAA and continued flying. O'Brien and Foster's decedent were killed when the helicopter O'Brien was piloting crashed.

Foster sued the United States and FAA surgeon Frank Austin, alleging that Austin negligently issued a special Class II certificate to O'Brien.²¹⁹ The Ninth Circuit noted that Austin's actions "were clearly discretionary conduct

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ 923 F.2d 765 (9th Cir. 1991).

²¹⁹ *Id.* at 766-67.

which may be protected by the discretionary function exception,"²²⁰ but that "the discretionary function exception would be inapplicable if Austin's discretion to grant special issue Class II certificates was not the type of decision intended to be shielded from tort liability."²²¹ The court accepted the Eleventh Circuit's rationale in *Heller*, holding that "Austin's decision to issue a special issuance Class II medical certificate to O'Brien is an inherently policy-oriented decision that requires consideration of social and economic policies."²²² The discretionary function exception served to bar this action against the government.²²³

V. PREDICTION AND HYPOTHETICAL SITUATIONS REGARDING SUITS AGAINST THE FAA FOR NEGLIGENT CERTIFICATION

As the previous case discussions show, the FAA may be held liable for licensing a pilot who later turns out to be unfit. Predicting when the discretionary function exception shields the FAA from tort liability, however, is not easy. The cases discussed below certainly provide guidelines for determining the scope of the exemption, but nevertheless, those guidelines, when applied by various courts, result in differing opinions.

One may safely assume that any non-discretionary decision or any discretionary decision that does not require the balancing of policy objectives *could* be the subject of a tort suit against the United States, i.e., that the discretionary function exception will not shield the decisions from liability. Beyond that broad prediction, however, difficulty arises in predicting the scope of the discretionary function exception with regard to suits for negligent certification. For example, the Eleventh and Ninth Circuits would likely hold any claim involving the medical certifica-

²²⁰ *Id.* at 768.

²²¹ *Id.*

²²² *Id.* at 769.

²²³ *Id.*

tion process immune from liability.²²⁴ The Eastern District of New York, however, would only immunize such a decision if the medical standard involved requires the balancing of policy objectives, rather than mere medical discretion.²²⁵ The Fifth Circuit would likely apply the *Dalehite* "planning-level/operations-level" distinction, which would only protect a decision involving the medical certification process if the decision is made at a "planning level."²²⁶ Under this theory, decisions made at the day-to-day "operations level" are not considered discretionary within the meaning of the discretionary function exception. The use of this distinction in determining the scope of the exemption would necessarily subject the government to liability more often than not, because any negligence on the part of air surgeons and flight instructors/inspectors would likely occur at an "operations-level" rather than at a "planning-level."

The regulations relevant to this discussion are 14 C.F.R. Parts 61 and 67. Part 61 contains regulations for the certification of pilots and flight instructors. Part 67 contains regulations for medical certification.

A. MEDICAL CERTIFICATION

From the prior case discussion, it appears that a Part 67 regulation that simply lists medical standards to be met by an applicant does not require a Federal Air Surgeon to balance policy objectives. A decision made with regard to Part 67, therefore, would likely not be protected by the discretionary function exception.²²⁷ For example, section 67.17(b) states that in order to be eligible for a third-class medical certificate, an applicant must have: "(1) Distant

²²⁴ See *supra* note 166-91 and corresponding text discussing *Heller v. United States*; see also *supra* note 221-26 and corresponding text discussing *Foster v. United States*.

²²⁵ See *supra* note 199-211 and corresponding text discussing *Leone v. United States*.

²²⁶ See *supra* note 212-20 and corresponding text discussing *Hayes v. United States*.

²²⁷ *Id.*; see *supra* note 199-211 and corresponding text discussing *Leone v. United States*.

visual acuity of 20/50 or better in each eye separately, without correction, or . . . [standards for corrected vision]. (2) No serious pathology of the eye. (3) Ability to distinguish aviation signal red, aviation signal green, and white.”²²⁸ While Section 67.17 arguably requires the exercise of some medical discretion, it probably does not require a surgeon to balance policy objectives. Furthermore, courts would probably consider the surgeon’s duty under this section “operations-level” conduct as opposed to “planning-level” conduct within the meaning of the *Dalehite* distinction. Therefore, courts will likely not consider a decision made regarding this particular section discretionary within the meaning of the exception.²²⁹

Turning to Sections 67.13(e)(i) and 67.17(e)(1),²³⁰ which are the provisions at issue in *Heller* and *Leone* and which focus on the cardiovascular system of an applicant, these provisions, like section 67.17(b), arguably establish direct mandate and leave no room for policy-related discretion. The Eastern District of New York, in fact, made such a determination.²³¹ But as discussed, the Eleventh Circuit in *Heller* held that a decision concerning section 67.17(b), and apparently all other decisions regarding the medical certification process, is discretionary within the meaning of the exemption.²³²

Other regulations contained in Part 67 seem inherently discretionary. For example, section 67.19(a) provides:

At the discretion of the Federal Air Surgeon, a medical certificate may be issued to an applicant who does not meet the applicable provisions of §§ 67.13 [First-class medical certificate], 67.15 [Second-class medical certi-

²²⁸ 14 C.F.R. § 67.17(b) (1993).

²²⁹ At this point it is necessary to point out that this prediction may be inaccurate, due to the fact that some courts, like the Eleventh Circuit in *Heller*, may choose to hold the entire medical certification process discretionary within the meaning of the exemption. See *supra* note 187-91.

²³⁰ See *supra* notes 168, 201 and corresponding text.

²³¹ See *supra* note 191 and corresponding text.

²³² See *supra* note 194 and corresponding text.

cate], or 67.17 [Third-class medical certificate] if the applicant shows to the satisfaction of the Federal Air Surgeon that the duties authorized by the class of medical certificate applied for can be performed without endangering air commerce during the period in which the certificate would be in force.²³³

This section clearly allows the Federal Air Surgeon "discretion" to bend the rules and grant an applicant a medical certificate when the applicant does not meet the required standards. Application of this provision arguably requires surgeons to balance policy objectives, especially public safety, when determining whether to grant the certificate. More specifically, the surgeon must be convinced that granting the certificate does not "endanger[] air commerce."

Section 67.19(b) enumerates the factors that the Federal Air Surgeon "may" consider in making this determination,²³⁴ and section 67.19(d) allows the surgeon discretion to limit or condition the effect of the special medical certificate.²³⁵ Neither provision states a direct mandate that the surgeon must follow. Instead, the use of the word "may" in both provisions illustrates the intent of Congress to leave the issuance of special medical certificates to the complete discretion of the surgeon.²³⁶ A decision made in conjunction with this section, therefore, will likely be protected by the exemption.²³⁷ A specific provision of section 67.19 does, however, appear to issue a direct mandate by abrogating a surgeon's discretion in choosing whether or not to follow the provision. Section 67.19(c) provides:

In determining whether the special issuance of a third-

²³³ 14 C.F.R. § 67.19(a) (1993).

²³⁴ *Id.* § 67.19(b).

²³⁵ *Id.* § 67.19(d).

²³⁶ "The Federal Air Surgeon may consider the applicant's operational experience" 14 C.F.R. § 67.19(b) (1993). "In issuing a medical certificate under this section, the Federal Air Surgeon may do any or all of the following:" 14 C.F.R. § 67.19(d) (1993).

²³⁷ See *Foster*, *supra* note 221 and corresponding text.

class medical certificate should be made to an applicant, the Federal Air Surgeon *considers* the freedom of an airman, exercising the privileges of a private pilot certificate, to accept reasonable risks to his or her person and property that are not acceptable in the exercise of commercial or airline transport privileges, and, at the same time, *considers* the need to protect the public safety of persons and property in other aircraft and on the ground.²³⁸

This provision states that the surgeon “considers,” not “may consider.” Subsection (c) appears to be a direct mandate that the surgeon must consider these factors. Therefore, the discretionary function exception arguably should not shield a decision by the surgeon to disregard such factors. In “considering” the required factors, however, the surgeon must exercise discretion, balancing the policy concern of public safety. The discretionary function exception, therefore, arguably protects any decision reached as a result of balancing these factors. Also, as pointed out in *Heller*, whenever a medical decision is made to ground a pilot, courts will likely view the grounding as a necessary precaution for public safety.

B. PILOT CERTIFICATION

The same argument used in the discussion of medical certification is useful in predicting what acts during pilot certification are protected by the discretionary function exception. For example, a regulation requiring an applicant to successfully perform a “V1-cut” maneuver²³⁹ appears to be a mandatory standard. Application of this standard does not require policy-related decision-making. A flight instructor conducting a flight test, however, must use discretion in administering the test, as that instructor is responsible for both the safety of the plane’s occupants and, to some extent, anyone or anything that might be in the plane’s way. For example, if an applicant fails to perform a maneuver satisfactorily on the first try, the inspec-

²³⁸ 14 C.F.R. § 67.19(c) (1993) (emphasis added).

²³⁹ *Id.* § 61 app. A (1993).

tor must exercise a certain amount of discretion in deciding whether to allow the applicant a second chance. The exercise of such discretion necessarily implicates policy concerns, such as public safety. But as discussed, the Fifth Circuit in *Hayes v. United States*²⁴⁰ reasoned differently.²⁴¹ The Fifth Circuit held that even if the decision to allow a second attempt involved the exercise of discretion, the inspector's actions were part of his day-to-day "operational" functions and were not policy related.²⁴² Another court, however, might well have considered this decision discretionary within the meaning of the exception.

As shown in the preceding discussion, the existing case law provides guidelines for determining the scope of the discretionary function exception. Unfortunately, those guidelines do not clearly define the exception's boundaries. Therefore, a unified standard is needed.

VI. PROPER APPLICATION OF THE DISCRETIONARY FUNCTION EXCEPTION

Some commentators argue that the discretionary function exception is currently construed too broadly, acting as a "shield for serious acts of government negligence."²⁴³ A broad application of the exception does not place incentives on the government to act with due care.²⁴⁴ Others argue that the discretionary function exception should be construed more narrowly and should extend only to conduct that is clearly intended by Congress to be shielded from immunity.²⁴⁵ One proposition suggests that the shield should only protect "decisions to initiate or not to initiate particular programs, projects,

²⁴⁰ 899 F.2d 438 (5th Cir. 1990).

²⁴¹ See *supra* note 219-20 and corresponding text.

²⁴² *Id.*

²⁴³ Schwartz & Mahshigian, *supra* note 2, at 360. Schwartz and Mahshigian would have Congress clarify the exception to "make clear that the government has no 'discretion' to negligently expose its workers or others to harmful chemicals and substances." *Id.*

²⁴⁴ *Id.* at 370.

²⁴⁵ See Blakeley *supra* note 1, at 174.

laws or regulations.”²⁴⁶

The exception should not be construed more broadly or more narrowly, but rather, it should be construed differently. First, the *Dalehite* “planning-level/operations-level” distinction should be completely discarded. This distinction has created a “murky bog on which sure-footing is impossible.”²⁴⁷ Moreover, the distinction is irrational and arbitrarily throws out operations-level decisions, which, as illustrated by *Hayes*, may involve policy-related decisions. Some government employees are required to balance social, economic, political, and safety concerns on a daily basis, even at the operations level. These decisions should be protected by the discretionary function exception. Any authorized decision that requires a government employee to weigh policy objectives should be protected, regardless of the level at which it was made.

Furthermore, a new standard is needed to lend predictability to an area of law that has become increasingly confusing and has resulted in numerous differing opinions in the federal courts.²⁴⁸ The new standard should also offer protection for activities that are uniquely governmental in nature.²⁴⁹

In 1987, such an approach was constructed with regard to the discretionary function exception to the Iowa Tort Claims Act, an act which closely parallels the Federal Tort Claims Act and has apparently caused just as much confusion.²⁵⁰ Kenneth Purcell’s “Exhaustion of Discretion” test would focus on whether the conduct involved required the exercise of discretion, i.e., policy-related decisions.²⁵¹ The “Exhaustion of Discretion” test has two steps:

The court first would ask whether the legislature intended

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 173.

²⁴⁸ Kenneth P. Purcell, *A Unified Standard for Construing the Discretionary Function Exception of the Iowa Tort Claims Act*, 73 IOWA L. REV. 183, 198 (1987).

²⁴⁹ *Id.* at 199.

²⁵⁰ *Id.*

²⁵¹ *Id.*

to exhaust the discretion necessary to realize its stated policy purpose, with its passage of the authorizing statute. If the answer to this question is yes, any subsequent action by a state actor to implement the policy would be operational in nature and not protected by the discretionary function exception. If the answer to this first question is no, the court would go on to ask whether the implementation of the legislative policy decision required a subsequent state actor to choose between two or more possible courses of action, and whether that choice involved the weighing of social, economic, and political factors that made it a uniquely governmental decision. If the answers to both the questions in this second inquiry are yes, the state action is planning in nature, and, thus, protected by the discretionary function exception. If the answer to either of these questions is no, the state action is operational in nature and not protected by the exception.²⁵²

The only difficulty with the articulation of this test is its use of the terms "operational in nature" and "planning in nature." The terms reflect the "murky bog" of the irrational "planning-level/operations-level" distinction which should be buried forever. Eliminating these terms, Purcell's test adequately protects authorized decision-making that requires the decision-maker to balance policy objectives, regardless of the level at which these decisions are made. Furthermore, the exception would not protect decisions that do not require policy-balancing, thereby encouraging government employees to use due care when carrying out their mandated duties.

VII. CONCLUSION

As the prior discussion demonstrates, the FAA can be subject to liability when it negligently certifies a pilot. Problems arise when attempting to determine what types of FAA certification-related decisions the discretionary function exception protects. As discussed in Part V, a few of the appellate courts have established trends for deter-

²⁵² *Id.* at 199-200.

mining the parameters of the exemption, which makes the results of negligent certification suits more predictable. Nevertheless, no unified standard exists in the courts of the United States. The courts instead adhere to a confusing, unworkable, and often irrational set of guidelines for determining the applicability of the discretionary function exception.

A new, uniform standard is needed. This standard should shield all decisions made by authorized government employees that require the employees to balance policy objectives. Conversely, the new, uniform standard should subject the government to liability both when employees make decisions outside their designated authority and when the authorized decision-making does not require the decision-maker to balance policy objectives. Such a standard would protect the government when government employees must necessarily exercise discretion and make policy decisions. Moreover, this standard would encourage government employees to act with due care, because the exemption would not immunize all discretionary governmental activity.

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