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Comments

DISCRETION AND THE FAA: AN OVERVIEW OF THE APPLICABILITY OF THE DISCRETIONARY FUNCTION EXCEPTION OF THE FEDERAL TORT CLAIMS ACT TO FAA ACTIVITY

BRIAN BLAKELEY

I. INTRODUCTION

IN 1946, Congress enacted the Federal Tort Claims Act¹ (FTCA or Act), which was acknowledged as “a general waiver of governmental immunity in tort, limited only by enumerated exceptions.”² One of the exceptions enumerated in the Act is that the federal government may not be held liable for the performance or the failure to perform a discretionary function.³ One district court has stated that decisions interpreting the discretionary function exception “do not comprise a particularly coherent body of case law.”⁴ Com-

¹ The Federal Tort Claims Act, Pub. L. No. 79-601, §§ 401-424, 60 Stat. 842 (codified as amended at 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401-2402, 2411-2412, 2671-2680 (1976)). For a discussion of the special problems involved in bringing an action against the government under the Federal Tort Claims Act, see Silverman, *The Ins and Outs of Filing a Claim under the Federal Tort Claims Act*, 45 J. AIR L. & COM. 41 (1979)).

² Reynolds, *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L.J. 81, 82 (1968) quoting Comment, *The Federal Tort Claims Act*, 56 YALE L.J. 534, 536 (1947).

³ 28 U.S.C. § 2680(a) (1976).

⁴ *Blessing v. United States*, 447 F. Supp. 1160, 1172 (E.D. Pa. 1978) (holding that a motion to dismiss by the United States be denied where plaintiff's allegations that the Occupational Safety and Health Administration had negligently inspected the prem-

mentators generally have not been so kind: one has referred to the discretionary function exception as a "monstrous joker now threatening to engulf the entire Act in a twilight zone."⁵ The confusion which in general surrounds the discretionary function exception has not been avoided by courts that have ruled on its scope and application in cases where the liability of the Federal Aviation Administration (FAA) for negligent conduct is at issue.⁶

After a review of the relevant background material,⁷ this comment analyzes cases involving the FAA and the discretionary function exception and attempts to clarify the types of FAA activity that courts are likely to find to be discretionary.⁸ Typically, cases in which the FAA has been alleged to have been negligent and in which the discretionary function exception may be relevant fall into three broad categories. First, the FAA has been sued several times for alleged negligence in producing aeronautical charts.⁹ Next, a significant number of cases involve the alleged negligent acts of air traffic controllers.¹⁰ Finally, a great number of recent cases discuss the potential of FAA liability for the negligent inspection and certification of aircraft.¹¹ After an analysis of cases from

ises of a private employer would permit development of facts that would avoid a bar by the discretionary function exception to the Federal Tort Claims Act).

⁵ Stromswold, *The Twilight Zone of the Federal Tort Claims Act*, 4 AM. U. L. REV. 41, 42 (1955). For more recent views on general applications of the discretionary function exception, see Harris & Schnepfer, *Federal Tort Claims Act: Discretionary Function Exception Revisited*, 31 U. MIAMI L. REV. 161 (1976); Reynolds, *supra* note 2; Zillman, *The Changing Meanings of Discretion: Evolution in the Federal Tort Claims Act*, 76 MIL. L. REV. 1 (1977); Comment, *The Discretionary Function Exception and the Suits in Admiralty Act: A Safe Harbor for Negligence?*, 4 U. PUGET SOUND L. REV. 385 (1981); Comment, *Federal Tort Claims: A Critique of the Planning Level — Operational Level Test*, 11 U.S.F. L. REV. 170 (1976).

⁶ Compare *Allnutt v. United States*, 498 F. Supp. 832 (W.D. Mo. 1980) (FAA failure to depict power lines on an aeronautical chart held to be within the scope of the discretionary function exception) with *Reminga v. United States*, 631 F.2d 449 (6th Cir. 1980) (publication of an aeronautical chart which erroneously depicted the location of a television tower held not to be within the scope of the discretionary function exception). See *infra* notes 83-93 and accompanying text.

⁷ See *infra* notes 13-77 and accompanying text.

⁸ See *infra* notes 78-220 and accompanying text.

⁹ See *infra* notes 78-116 and accompanying text.

¹⁰ See *infra* notes 117-155 and accompanying text.

¹¹ See *infra* notes 156-220 and accompanying text. FAA tort cases which do not fall

each of these three areas, this comment concludes with the suggestion of a more rational approach to the application of the discretionary function exception.¹²

II. HISTORICAL BACKGROUND AND LEGISLATIVE HISTORY

Under the doctrine of sovereign immunity, a sovereign government cannot be sued by one of its subjects unless it consents to the suit.¹³ The doctrine is based upon the English maxim "the king can do no wrong."¹⁴ In 1793, the Supreme Court rejected the doctrine as inconsistent with the theory of

conveniently into these categories and which are not elsewhere discussed in this comment include *United States v. Lockheed*, 656 F.2d 390 (9th Cir. 1979) (holding the FAA not liable for the conversion of a plane seized for failure to adhere to safety regulations); *Federal Ins. Co. v. United States*, 15 Av. Cas. (CCH) 17,103 (D. Ka. 1978) (holding the FAA liable for negligently failing to maintain an airstrip); *Starr v. United States*, 393 F. Supp. 1359 (N.D. Tex. 1975) (holding that the FAA was not liable for failing to prevent trespassers at a local airport). Federal Tort Claims Act cases involving military aviation include *Laird v. Nelms*, 406 U.S. 797 (1972) (holding that the FTCA precludes a finding of liability against the United States for sonic boom damage on a theory of strict liability); *Ward v. United States*, 471 F.2d 667 (3d Cir. 1973) (reversing the dismissal of a claim against the United States for sonic boom damage); *Moyer v. Martin Marietta Corp.*, 481 F.2d 585 (5th Cir. 1973) (holding the Air Force liable for the wrongful death of a civilian test pilot caused by a design defect in an ejection seat); *Abraham v. United States*, 465 F.2d 881 (5th Cir. 1972) (holding an Air Force decision of where to route aircraft causing sonic boom damage to be within the scope of the discretionary function exception); *United Air Lines v. Wiener*, 335 F.2d 379 (9th Cir. 1964), *cert. dismissed*, 379 U.S. 951 (1964) (holding the United States liable for the mid-air collision of an Air Force training jet and an airliner); *Dahlstrom v. United States*, 228 F.2d 819 (8th Cir. 1956) (holding that unauthorized activity in a government aircraft is not within the scope of the discretionary function exception). See generally Annot., 47 A.L.R. FED. 85 (1980); Brydges & Fagan, *The Federal Tort Claims Act As It Relates to Aviation Accidents*, 48 INS. COUNS. J. 244 (1981); Tigert & Honigberg, *Defending the Government in Aviation Accident Cases*, 15 FORUM 224 (1981).

¹² See *infra* notes 221-239 and accompanying text.

¹³ W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 970-71 (4th ed. 1971). For an in-depth analysis of the historical origins of governmental immunity, see Edwin Borchard's exhaustive eight-part study that appeared between 1924 and 1928 in the Yale and Columbia law reviews: Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 129, 229 (1924); Borchard, *Governmental Responsibility in Tort*, 36 YALE L.J. 1, 757, 1039 (1926); Borchard, *Governmental Responsibility in Tort*, 28 COLUM. L. REV. 577, 734 (1928).

¹⁴ W. PROSSER, *supra* note 13, at 970. Borchard wrote that the phrase "the King can do no wrong," although long misunderstood, was originally intended to convey the idea that the King could do no wrong *with impunity*. Borchard, *supra* note 13 in 34 YALE L.J. 1, 2 n.2.

a nation founded on popular sovereignty.¹⁵ In 1824, however, the Court reversed itself on this issue and held that the United States government could not be sued without its consent.¹⁶ The Court gave no justification for the adoption of the doctrine of sovereign immunity¹⁷ and it was not until 1868 that Justice Miller wrote that the doctrine was necessary to avoid involving the government in "endless embarrassments, and difficulties, and losses which would be subversive of the public interests."¹⁸ What came to be the modern justification for the doctrine was not expressed by the Court until 1907, when Justice Holmes stated that "[a] sovereign is exempt from suit. . . 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."¹⁹

Congress enacted the Federal Tort Claims Act with the two-fold purpose of mitigating the harshness of the doctrine of sovereign immunity²⁰ and relieving itself of the burden of dealing with the thousands of private claims bills that were annually being submitted to Congress.²¹ Under the Act, the United States is liable for the negligent or wrongful acts of its employees in the same manner that a private person would

¹⁵ *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

¹⁶ *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat) 338 (1824). Three years earlier the Court had stated in dicta that the United States could not be sued without the consent of the federal government. *Cohens v. Virginia*, 19 U.S. (6 Wheat) 357, 385 (1821).

¹⁷ W. PROSSER, *supra* note 13, at 971. Prosser wrote that "[j]ust how this feudal and monarchistic doctrine ever got itself translated into the law of the new and belligerently democratic republic in America is today a bit hard to understand." *Id.* Borchard wrote that the doctrine of sovereign immunity was introduced to America "without sufficient understanding" and survived "mainly by reason of its antiquity." Borchard, *supra* note 13, in 34 *YALE L.J.* 1, 2.

¹⁸ *Gibbons v. United States*, 75 U.S. (8 Wall) 269, 274 (1868) (holding that the United States could not be held liable for the actions of a government agent in forcing the plaintiff to fulfill a void contract to furnish oats to the military).

¹⁹ *Kwanakoa v. Polybank*, 205 U.S. 349, 353 (1907).

²⁰ *Reynolds*, *supra* note 2, at 81-82. Congress took the first step toward mitigating the doctrine of sovereign immunity in 1855 when it established the Court of Claims and thereby consented to contract actions against the United States. W. PROSSER, *supra* note 13, at 971.

²¹ *Reynolds*, *supra* note 2, at 81. Before the passage of the Federal Tort Claims Act, the private bill was the only means by which a citizen could seek compensation for an injury or loss caused by the tortious act of a government employee. *Id.*

be liable.²² The waiver of immunity is not complete, however, because the Act contains numerous exceptions for situations in which immunity has been retained.²³ By far the most controversial and most litigated of these exceptions is one providing that the Act shall not apply to a claim "[b]ased 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."²⁴

The Act does not define "discretionary function" and, unfortunately, the legislative history of the Act has proved to be of little help in determining the intended scope of the exception.²⁵ A relevant discussion of the exception appears in only one paragraph of the House Report on the Act.²⁶ This paragraph states that the exception is intended to bar actions for damages which attempt to test the constitutionality of legislation or the legality of a rule or regulation.²⁷ The paragraph also states that the exception does not bar actions against the government for the common-law torts of employees of both

²² 28 U.S.C. § 1346(b) (1976). This section provides that the district courts: shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Id.

²³ 28 U.S.C. § 2680 (1976) lists 13 exceptions to the waiver of tort immunity by the United States. Besides the discretionary function exception, which is the subject of this comment, the misrepresentation exception often plays a significant role in aviation litigation. This exception provides that the Federal Tort Claims Act shall not apply to any claim arising out of misrepresentation. *Id.* § 2680(h). See *infra* note 193.

²⁴ 28 U.S.C. § 2680(a) (1976) (emphasis added).

²⁵ Note, *The Federal Tort Claims Act: Discretion and the Air Traffic Controller*, 38 J. AIR L. & COM. 413, 414-15 (1972).

²⁶ H.R. REP. NO. 1287, 79th Cong., 1st Sess. 5-6 (1945). The paragraph was adopted from the record of the House Judiciary Committee's hearings on the exception as it appeared in an earlier version of the Federal Tort Claims Act. See HEARINGS ON H.R. 5373 & 6463 BEFORE THE HOUSE COMM. ON THE JUDICIARY, 77th Cong., 2d Sess. 33 (1943). The most complete judicial analysis of the legislative history of the Federal Tort Claims Act appears in *Dalehite v. United States*, 346 U.S. 15, 26-31 (1952).

²⁷ H.R. REP. NO. 1287, *supra* note 26.

regulatory and nonregulatory agencies.²⁸ In between these two extremes the paragraph provides guidance only by giving a few examples of activity that is intended to remain immune under the exception: the decision to expend federal funds or execute a federal project would come within the scope of the exception,²⁹ as would the discretionary acts of regulatory agencies.³⁰

Neither the Act nor its legislative history clearly expresses the policy reasons for excepting discretionary acts from the general waiver of tort immunity granted by the Act. The language of both imply, however, that the purpose of the exception is to avoid subjecting the government to liability for acts of a "governmental nature."³¹ The recognition of this basis for the exception is, unfortunately, of little use in defining the scope of the exception because of the lack of any criteria provided by which to define "governmental."³² Beyond the language of the exception itself and its scant legislative history, the lower courts may look to two Supreme Court decisions³³ to aid their efforts in applying the exception.

III. DECISIONS OF THE SUPREME COURT

The major Supreme Court case interpreting the discretionary function exception is *Dalehite v. United States*.³⁴ In *Dalehite*, the Court examined the liability of the United States for the explosion of two ships laden with ammonium nitrate fertilizer,³⁵ which destroyed much of Texas City, Texas.³⁶ The fer-

²⁸ *Id.*

²⁹ *Id.* The report states that the exception is intended to prevent a construction of the Federal Tort Claims Act which would allow an action for damages against the United States "growing out of an authorized activity, such as a flood control or irrigation project." *Id.*

³⁰ *Id.* The report gives as an example that the exception is intended to prevent actions against the Federal Trade Commission or the Securities and Exchange Commission based upon an alleged abuse of discretion. *Id.*

³¹ See *Dalehite*, 346 U.S. at 32.

³² See *Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955), discussed *infra* notes 54-55 and accompanying text.

³³ *Dalehite*, 346 U.S. 15, discussed *infra* notes 34-50 and accompanying text; *Indian Towing*, 350 U.S. 61, discussed *infra* notes 51-56 and accompanying text.

³⁴ 346 U.S. 15 (1952).

³⁵ *Id.*

tilizer had been produced according to the specifications of the federal government and under its control.³⁷ The plaintiffs, those injured by the explosion, claimed that the entire body of federal officials and employees involved in the production of the fertilizer had been negligent.³⁸ The Court held that all of the acts of negligence alleged by the plaintiffs to have occurred in the production and shipping of the fertilizer — from the cabinet level decision to institute the fertilizer program to the Coast Guard's failure to regulate the storage and loading of the fertilizer — were within the scope of the discretionary function exception and that the United States therefore was immune from liability.³⁹

In *Dalehite* the Court did not define the precise limits of the discretionary function exception but stated that the exception included "more than the initiation of programs and activities."⁴⁰ The Court stated that the exception also includes "determinations made by executives or administrators in establishing plans, specifications or schedules of operations"⁴¹ and that "[w]here there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable."⁴²

The Court in *Dalehite* found that the federal employees involved in the production of the fertilizer were following "a

³⁶ *Id.*

³⁷ *Id.* at 19-21. The United States planned to export the fertilizer to help meet its obligation as an occupying power to feed the populations of Germany, Japan and Korea. *Id.* at 19. Ammonium nitrate had long been used as a component in explosives and much of the ammonium nitrate used in the export fertilizer program was produced in federal munitions plants. *Id.* at 21.

³⁸ *Id.* at 18.

³⁹ *Id.* at 15, 37, 42-43. The Court also found the decision of those in charge of the fertilizer program not to experiment further with the fertilizer to determine the possibility of explosion, as well as the drafting of the basic plan of production for the fertilizer, to be discretionary functions. *Id.* at 37-40. The Court also held that the Coast Guard could not be found liable for negligence in fighting the fire caused by the explosion because there was no analogous private liability. *Id.* at 43-44. The Federal Tort Claims Act provides that the liability of the United States shall be limited to that of "a private individual under like circumstances." 28 U.S.C. § 2674 (1976).

⁴⁰ *Dalehite*, 346 U.S. at 35.

⁴¹ *Id.* at 35-36.

⁴² *Id.* at 36.

plan developed at a high level"⁴³ and that their acts were therefore within the scope of the discretionary function exception.⁴⁴ Although this language and the holding of *Dalehite* imply that the Court found all the employees to have acted "in accordance with official directions,"⁴⁵ the Court did not expressly discuss the possibility that some employees may have acted in contravention of their directions and thereby contributed to the cause of the explosion.⁴⁶

Justice Jackson dissented in *Dalehite* and wrote that only the initial decision to implement the fertilizer program should be considered an immune discretionary function, not the careless deeds of those in charge of detail.⁴⁷ Jackson agreed with the majority's views that policy-level decisions should be within the scope of the exception, but disagreed with the majority's determination of where policy-making ended.⁴⁸ Jackson reasoned that although the official decisions involved in manufacturing the fertilizer involved "a nice balancing of various considerations", the balancing was the same kind that private manufacturers do at their own peril.⁴⁹ Jackson stated that the scope of the discretionary function exception should not be stretched to immunize the government when its officers act without appropriate care for the safety of others.⁵⁰

Within three years of *Dalehite*, the Supreme Court decided *Indian Towing Co. v. United States*,⁵¹ which established a "good Samaritan" basis of liability for the government. *Indian Towing* did not directly involve the discretionary function exception but has been instrumental in aiding lower courts in their

⁴³ *Id.* at 40.

⁴⁴ *Id.*

⁴⁵ *Id.* at 36. See *supra* text accompanying note 42.

⁴⁶ But see *Dalehite*, 346 U.S. at 56 n.10 (indicating that the district court did find federal employees negligent in carrying out their directions).

⁴⁷ *Dalehite*, 346 U.S. at 58.

⁴⁸ *Id.* at 57-58.

⁴⁹ *Id.* at 60.

⁵⁰ *Id.*

⁵¹ 350 U.S. 61 (1955).

efforts to define its scope.⁵² In *Indian Towing*, those injured when a barge ran aground alleged that the Coast Guard acted negligently in failing to repair a lighthouse and failing to warn the plaintiffs that the lighthouse was inoperative.⁵³

The government admitted in *Indian Towing* that the alleged acts of negligence were not at the discretionary level but argued that the maintenance of a lighthouse was a "uniquely governmental" activity and that under the Federal Tort Claims Act the government could be found liable only in circumstances where a private individual could be so found.⁵⁴ The Court rejected this argument and held 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.⁵⁵ The Court stated that "it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner."⁵⁶

IV. INTERPRETING *DALEHITE* AND *INDIAN TOWING*

After the decisions of the Supreme Court in *Dalehite* and *Indian Towing*, it is possible for courts faced with determining

⁵² See, e.g., *Smith v. United States*, 375 F.2d 243, 246 (5th Cir. 1967), cert. denied, 389 U.S. 841 (1967), discussed *infra* note 59.

⁵³ *Indian Towing*, 350 U.S. at 62.

⁵⁴ *Id.* at 64. The government was attempting to read into the Federal Tort Claims Act the distinction made in the law of municipal corporations whereby such corporations are not held liable for tortious acts if they are the result of a governmental function. *Id.* at 65. The Court referred to the distinction between non-governmental and governmental activity as a quagmire that the Federal Tort Claims Act did not incorporate. *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 64-65. The "good Samaritan" requirements of the RESTATEMENT (SECOND) OF TORTS provide that:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or
(b) the harm is suffered because of the other's reliance upon the undertaking.

RESTATEMENT (SECOND) OF TORTS §§ 323, 324A (1965).

the scope of the discretionary function exception to apply it in several distinct ways.⁵⁷ First, based on the broad range of activity found to be discretionary in *Dalehite* and the fact that virtually all acts involve discretion of some kind, a court could hold almost any act of a government employee to be discretionary.⁵⁸ As the Fifth Circuit Court of Appeals has stated, most conscious acts involve choice and "[u]nless government officials (at no matter what echelon) make their choices by flipping coins, their acts involve discretion in making decisions."⁵⁹ A determination holding that a relatively routine decision by a government employee was within the scope of the exception would not be contrary to *Dalehite* because the Court in that case found some very low-level, operational-type activity to be discretionary.⁶⁰ A court taking this approach could distinguish *Indian Towing* on the basis that the activity there involved was admitted by the government to be operational and that the case did not directly deal with the discretionary function exception.⁶¹ One reason for applying such a broad definition of discretionary activity would be to avoid finding the United States liable for activity which could potentially lead to extensive claims against the government. This position echoes the reasoning of Justice Miller when he stated that the government should be immune from the torts of its agents to avoid involving the government in "losses which would be subversive of the public interests."⁶² Commentators have suggested that the unstated basis for the Court's holding in *Dalehite* was just such a desire on the part of the Court to avoid subjecting the government to massive claims.⁶³

Secondly, a court could take the "good Samaritan" ap-

⁵⁷ Reynolds, *supra* note 2, at 103.

⁵⁸ *Id.*

⁵⁹ *Smith v. United States*, 375 F.2d 243, 246 (5th Cir.) (holding that the FBI's failure to arrest persons suspected of injuring the plaintiff's business was protected activity under the discretionary function exception), *cert. denied*, 389 U.S. 841 (1967).

⁶⁰ *See, e.g., Dalehite*, 346 U.S. at 41. The Court found decisions concerning the contents of the fertilizer bag labels and bills of lading to be discretionary. *Id.*

⁶¹ *Indian Towing*, 350 U.S. at 64.

⁶² *Gibbons*, 75 U.S. (6 Wall.) at 274. *See supra* note 18.

⁶³ Reynolds, *supra* note 2, at 97.

proach of *Indian Towing*⁶⁴ and effectively ignore *Dalehite*. Under this view, immunity under the discretionary function exception ends when the government undertakes an activity which induces reliance. In such a situation, it could be held that the government has a duty of due care regardless of whether its acts may somehow be seen as involving planning-level activity.⁶⁵ A holding which finds the government liable on the rationale of *Indian Towing* for acts which would arguably be within the scope of the discretionary function exception as defined in *Dalehite* could be justified on the basis that *Indian Towing* is a later case and therefore controlling.⁶⁶ The policy basis for narrowly defining the breadth of the discretionary function exception in this manner is simply the converse of the rationale for defining the exception broadly: it is more equitable for the government to bear the loss engendered by the negligence of its agents than to leave the loss on the plaintiffs, where its effect is likely to be catastrophic.⁶⁷

Courts have, for the most part, attempted to steer a middle course between these two extreme possibilities and apply the planning-level/operational-level test suggested by the language of *Dalehite*.⁶⁸ Under this test, decisions made at the planning level are immune from liability under the discretionary function exception but decisions made at the operational level of activity are not immune.⁶⁹ The lower courts seldom choose to articulate what they consider to be the criteria for determining whether activity is at the planning-level or operational-level.⁷⁰ A rare discussion of the meaning of the

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

⁶⁵ *Id.*

⁶⁶ Reynolds, *supra* note 2, at 103. See also Smith, 375 F.2d at 246.

⁶⁷ See *Dalehite*, 346 U.S. at 60 (Jackson, J., dissenting).

⁶⁸ The terms "planning level" and "operational level" to distinguish activity which is and is not within the scope of the discretionary function exception were used by the Court in *Dalehite*, 346 U.S. at 42.

⁶⁹ *Downs v. United States*, 522 F.2d 990, 997 (6th Cir. 1975) (holding that an FBI agent's implementing FBI procedures for dealing with hijackers was an operational activity).

⁷⁰ See, e.g., *Reminga v. United States*, 631 F.2d 449, 458 (6th Cir. 1980), discussed *infra* notes 83-89 and accompanying text; *Ward v. United States*, 471 F.2d 667, 669 (3d Cir. 1973) (holding that an Air Force decision on where to make flights causing sonic booms was made at the planning level).

terms appears in *Swanson v. United States*,⁷¹ which involved the negligent design modification of an aircraft by the Air Force. The District Court for the Northern District of California found this activity to be at the operational-level and not within the discretionary function exception.⁷² The court stated that the "planning level notion" refers to decisions involving "the evaluation of factors such as the financial, political, economic and social effects of a given plan or policy."⁷³ The court defined "operations-level decisions" as those involving "normal day-by-day operations of the government."⁷⁴

The planning-level/operational-level test has been criticized as being extremely difficult to apply.⁷⁵ The Fifth Circuit Court of Appeals has stated that the test rests on "a distinction, so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation."⁷⁶ In addition to the definitional problems involved with the planning-level/operational-level test, courts which choose to apply the test are also faced with the difficulty of interpreting how the holding of *Indian Towing* affects the test. Courts usually apply the "good Samaritan" rule of *Indian Towing* only after they have determined that the activity involved was operational and therefore not within the scope of the discretionary function exception.⁷⁷

The remainder of this comment analyzes the manner in which courts have applied the discretionary function exception in cases where plaintiffs have alleged negligent conduct on the part of the FAA.

⁷¹ 229 F. Supp. 217 (N.D. Cal. 1964).

⁷² *Id.* at 221.

⁷³ *Id.* at 220.

⁷⁴ *Id.*; see Harris & Schnepfer, *Federal Tort Claims Act: Discretionary Function Exception Revisited*, 31 U. MIAMI L. REV. 161, 171-72 (1976). These commentators state that courts now follow the standards of *Swanson* and that this leads to predictable results in cases where the planning-level/ operational-level test is applied. *Id.* at 172-73. *But see* Comment, *Federal Tort Claims: A Critique of the Planning-Level-Operational-Level Test*, 11 U.S.F. L. REV. 170, 172 (1976).

⁷⁵ See, e.g., *Smith*, 375 F.2d at 246. *But see* Harris & Schnepfer, *supra* note 74.

⁷⁶ *Smith*, 375 F.2d at 246.

⁷⁷ See, e.g., *Medley v. United States*, 543 F. Supp. 1211, 1221-22 (N.D. Cal. 1982), discussed *infra* notes 94-105 and accompanying text.

V. MISLEADING AERONAUTICAL CHARTS

The Administrator of the FAA is authorized by the Federal Aviation Act of 1958,⁷⁸ "to arrange for publication of aeronautical maps and charts necessary for the safe and efficient movement of aircraft."⁷⁹ No statutory provision requires the FAA to publish aeronautical charts or to depict any certain features on charts that the agency may choose to publish. In 1965, the FAA entered into an agreement with the Department of Defense and the Commerce Department to establish the Inter-Agency Air Cartographic Committee (IACC).⁸⁰ The IACC's purpose is to develop aeronautical chart specifications and publish aeronautical charts.⁸¹ All actions of the IACC are reviewable by the FAA.⁸²

In *Reminga v. United States*,⁸³ the survivors of a pilot killed when his aircraft struck the support wires of a television tower brought an action alleging negligence on the part of the FAA.⁸⁴ The plaintiffs claimed the FAA acted negligently in publishing an aeronautical chart on which the location of the tower was erroneously portrayed, that the pilot relied on the chart, and that this reliance was the proximate cause of the crash.⁸⁵ The plaintiffs also asserted that the FAA was negligent in failing to require that the tower be marked with lights.⁸⁶

The Sixth Circuit Court of Appeals held for the plaintiffs and thereby implicitly ruled that the erroneous placement of the tower on the chart was not protected by the discretionary function exception.⁸⁷ The Sixth Circuit did not attempt to analyze whether the decision as to where to place the tower

⁷⁸ 49 U.S.C. §§ 1301-1542 (1976)(as amended).

⁷⁹ *Id.* § 1348(b) (1976).

⁸⁰ See *Baird v. United States*, 15 Av. Cas. (CCH) 17,476, 17,477 (D. Kan. 1979).

⁸¹ *Id.* This comment examines only the potential liability of the United States for its chart publishing activity. For a discussion of the liability of private chart publishers, see McCowen, *Liability of the Chartmaker*, 47 INS. COUNS. J. 359 (1980).

⁸² *Baird*, 15 Av. Cas (CCH) at 17,476.

⁸³ 631 F.2d 449 (6th Cir. 1980).

⁸⁴ *Id.* at 451.

⁸⁵ *Id.*

⁸⁶ *Id.* at 454.

⁸⁷ *Id.* at 452.

on the chart was one made at the planning level or the operational level. Instead, the court cited *Indian Towing* for the proposition that once the FAA undertook to portray the tower on its chart it was required to use due care in the task.⁸⁸ In dicta the court noted that the decision not to mark the tower as a hazard was discretionary.⁸⁹

A case similar to *Reminga* is *Allnutt v. United States*,⁹⁰ which involved an action brought by the survivors of a pilot killed when his aircraft struck power lines which were not shown on a chart published by the IACC.⁹¹ A Missouri district court held for the United States after determining that a planning-level decision was made not to attempt to portray obstructions below an altitude of 200 feet.⁹² The *Allnutt* court cited *Reminga* for its reasoning that the government has a duty to accurately portray features it attempts to represent on charts but no duty to portray all possible features.⁹³

Another case involving a misleading aeronautical chart is *Medley v. United States*,⁹⁴ in which the United States was denied a motion for summary judgment. The plaintiffs in *Medley* alleged that the FAA was negligent in plotting a dangerous route over the Sierra Nevada mountains on an FAA chart.⁹⁵ Although aware that the selected route was

⁸⁸ *Id.* See also *Knight v. United States*, 498 F. Supp. 316, 324 (E.D. Mich. 1980) (holding that the FAA had no duty to issue a warning of the location of a tower built after publication of FAA chart).

⁸⁹ *Reminga*, 631 F.2d at 458. See also *Columbia Helicopters, Inc. v. United States*, 314 F. Supp. 946 (D. Or. 1969) (holding that the FAA was not negligent in failing to require markings on a 154-foot tower which was visible and on chart). But see *United States v. Washington*, 351 F.2d 913, 916 (9th Cir. 1965) (holding that the placement of government owned power lines is a discretionary function but failure to mark the power lines is operational mismanagement and beyond the scope of the discretionary function exception).

⁹⁰ 498 F. Supp. 832 (W.D. Mo. 1980).

⁹¹ *Id.* at 833.

⁹² *Id.* at 842. The court wrote that the "traditional inquiry" in determining if an action is discretionary is the policy/operational dichotomy and that while the cases give "no clear standards," courts have tended "to examine all relevant factors." *Id.* at 835-36.

⁹³ *Id.* at 838.

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

⁹⁵ *Id.* at 1214. *Medley* was a consolidation of three lawsuits involving two separate aircraft crashes. The plaintiffs alleged that both crashes occurred as a result of the pilots following a mountain pass route marked on the San Francisco Aeronautical

hazardous to small aircraft, the FAA did not change the route or place a warning on the chart.⁹⁶ The District Court for the Northern District of California purported to apply the planning-level/operational-level test,⁹⁷ and held that the decision to chart a route through the mountains was made at the planning level (the FAA does not normally plot routes on its charts),⁹⁸ but that the choice of the particular route selected was an operational decision.⁹⁹ The court noted that the FAA has a duty to use due care if it undertakes a good Samaritan act.¹⁰⁰

While the holding in *Medley* is easily justified under a good Samaritan analysis, it is more difficult to justify under the planning-level/operational-level test on which the court purports to depend. The court found the FAA decision to plot a route over a dangerous area in the Sierra Nevada mountains to be a planning-level decision.¹⁰¹ The policy determination implicit in such a decision is that the particular portion of the Sierra Nevadas in question is hazardous to aircraft and that aid should be given to pilots attempting to cross the mountains at that point.¹⁰² The *Medley* court then found the FAA's selection of one of several possible routes to plot on its chart to be operational.¹⁰³ Each of the routes which could have been selected by the FAA presumably had distinct advantages and disadvantages. It could be argued that the decision

Chart. The plaintiffs asserted that this route led the pilots into a blind canyon which, due to the performance capabilities of their aircraft, they were unable to climb out of. *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 1218.

⁹⁸ *Id.* The court found that FAA officials do not make decisions to place routes on section charts on a day-to-day basis and that the decision to place the mountain pass route on the San Francisco chart "was based upon considerations of public safety, after having been alerted to a natural hazard confronting pilots traversing the Sierra mountains." *Id.*

⁹⁹ *Id.* at 1222. The court analogized the choice of routes as similar to acts of design and construction of government projects, which have been held to be operational acts. *Id.*

¹⁰⁰ *Id.* The court also held that having chosen a hazardous route to place on the chart, the FAA had a duty to warn of the hazard. *Id.* at 1220.

¹⁰¹ *Id.* at 1218.

¹⁰² *Id.*

¹⁰³ *Id.* at 1222.

of which route to place on the chart involved an implicit policy determination of which of the choices was the safest.¹⁰⁴ In holding this decision to be operational, the *Medley* court has in effect said that the decision that a general area is hazardous involves a policy determination, but the decision that a particular area is not hazardous does not.¹⁰⁵

Reminga and *Medley* illustrate the different approaches which courts take when faced with interpreting the discretionary function exception. In *Reminga*, the Sixth Circuit applied the good Samaritan rule without discussion of the planning-level/operational-level test.¹⁰⁶ Implicit in this approach is the concept that the good Samaritan rule operates independently of the planning-level/operational-level test. Conversely, in *Medley*, the court cited and followed the good Samaritan rule of *Indian Towing* but only after extensive analysis of the facts from the standpoint of the planning-level/operational-level test.¹⁰⁷ This approach implies that the good Samaritan rule applies only if acts are first found to be operational. Either approach may be inferred from *Indian Towing*. *Indian Towing* clearly held that where the government undertakes to warn of danger, it must proceed with due care.¹⁰⁸ The government admitted in *Indian Towing*, however, that the negligent acts involved were operational.¹⁰⁹ *Indian Towing* may therefore be interpreted as holding that the good Samaritan rule applies without regard to the planning-level/operational-level test or that it applies only after a decision is found to be operational.

There can be no assurance which approach a court will take when faced with a case involving alleged negligence on the part of the FAA in publishing a misleading aeronautical chart. Case holdings indicate, however, that either path will

¹⁰⁴ The plaintiffs in *Medley* contended that numerous safer routes were available to pilots. *Id.* at 1216.

¹⁰⁵ The government in *Medley* argued that the choice of routes was a discretionary function. *Id.* at 1215-16.

¹⁰⁶ *Reminga*, 631 F.2d at 452.

¹⁰⁷ *Medley*, 543 F. Supp. at 1218-22.

¹⁰⁸ *Indian Towing*, 305 U.S. 64-65.

¹⁰⁹ *Id.* at 64.

lead to the same result: the FAA will be found liable if it provides inaccurate or misleading information in its charts and this information is found to be the proximate cause of an accident. Consistent with this view are *United States v. Murray*¹¹⁰ and *Sullivan v. United States*.¹¹¹ In both cases the FAA was held liable for injuries caused when aircraft crashed while attempting to land on unlighted runways. FAA aeronautical charts had wrongly indicated that airport lights were available.¹¹² In *Sullivan*, the District Court for the Northern District of Alabama found the preparation and circulation of the chart to be an operational task and applied the good Samaritan rule of *Indian Towing*.¹¹³ The court did not undertake any analysis of why the preparation and circulation of the chart was of an operational character. In *Murray*, the government did not contend that the acts of negligence involved were discretionary, and the Tenth Circuit proceeded directly to the good Samaritan rule.¹¹⁴

Conversely, if the FAA does not undertake to provide information, courts will not apply the good Samaritan rule and will hold in favor of the government. *Baird v. United States*¹¹⁵ is a recent illustration of this principle. In *Baird*, the Court of Appeals for the Tenth Circuit affirmed the lower court's finding that, based on IACC specifications, the government had not undertaken the task of explaining which of several runways at an airport were lighted and therefore could not be found liable for failing to provide the information on its chart.¹¹⁶

VI. AIR TRAFFIC CONTROLLERS

The Administrator of the FAA is authorized to prescribe

¹¹⁰ 463 F.2d 208 (10th Cir. 1972).

¹¹¹ 299 F. Supp. 621 (N.D. Ala.), *aff'd*, 411 F.2d 794 (5th Cir. 1969). See also *Fidelity Bank v. United States*, 13 Av. Cas (CCH) 18,356 (E.D. Pa. 1976) (holding the FAA liable for injuries caused by pilot reliance on an airport diagram).

¹¹² *Murray*, 463 F.2d at 210; *Sullivan*, 299 F. Supp. at 625.

¹¹³ *Sullivan*, 299 F. Supp. at 626.

¹¹⁴ *Murray*, 463 F.2d at 209.

¹¹⁵ 653 F.2d 437 (10th Cir. 1981), *cert. denied*, 102 S. Ct. 1004 (1982).

¹¹⁶ *Id.* at 440-41.

air traffic rules and regulations for the protection of aircraft, persons and property.¹¹⁷ It is under this authority that air traffic controllers perform the critical function of directing the takeoff and landing of aircraft. In doing so, controllers rely primarily on the detailed regulations of the *Air Traffic Control Manual*.¹¹⁸ Negligent acts on the part of air traffic controllers can have severe consequences and have frequently led to claims against the FAA under the Federal Tort Claims Act.¹¹⁹

*Eastern Air Lines v. Union Trust Co.*¹²⁰ is the leading case in determining the extent of FAA liability for the negligent acts of air traffic controllers. *Eastern* involved the mid-air collision of two aircraft which were on final landing approach to Washington National Airport.¹²¹ The Circuit Court of Appeals for the District of Columbia found the proximate cause of the collision to be negligence on the part of an air traffic controller in clearing both aircraft to land on the same runway at the same time and in failing to warn the pilots that their aircraft were on a collision course.¹²²

The government argued in *Eastern* that the duties of air traffic controllers involve discretion and that the discretionary function exception therefore barred any claim against the United States for injuries and property damage which were a result of the crash.¹²³ The court rejected this argument and held that discretion was exercised when the FAA decided to operate the control tower but that tower personnel had no discretion to operate the tower in a negligent manner.¹²⁴ The court reached this conclusion primarily by applying the ra-

¹¹⁷ 49 U.S.C. § 1348(c) (1976).

¹¹⁸ FAA, AIR TRAFFIC CONTROL ORDER 7110.65C (1982).

¹¹⁹ See generally Note, *The Federal Tort Claims Act: Discretion and the Air Traffic Controller*, 38 J. AIR L. & COM. 43 (1972); Annot., 46 A.L.R. FED. 24 (1980).

¹²⁰ 221 F.2d 62 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 911 (1957).

¹²¹ *Id.* at 64. The collision in *Eastern* involved an Eastern DC-4 airliner being struck from above and behind by a P-38 military aircraft which had been purchased by the Bolivian Government and was being piloted by a Bolivian National. The Bolivian pilot survived the crash. *Id.*

¹²² *Id.* at 78.

¹²³ *Id.* at 74-75.

¹²⁴ *Id.* at 77.

tionale of *Costley v. United States*,¹²⁵ a case decided by the Fifth Circuit Court of Appeals prior to *Dalehite* and *Indian Towing*. *Costley* held that once the army exercised discretion in admitting a serviceman's wife to a military hospital, it no longer had any discretion with regard to whether she was to be treated with due care.¹²⁶ This is the same "good Samaritan" type analysis that the Supreme Court would use in *Indian Towing*, which was decided ten months after *Eastern*.¹²⁷ The court in *Eastern* also reasoned that the types of decisions made by controllers do not involve any consideration important to the practicability of the government's program of controlling air traffic at public airports and that their actions are therefore at the operational level.¹²⁸ *Dalehite* was cited by the court as the basis of this conclusion.¹²⁹

The court in *Eastern* first discussed the FAA's undertaking to aid aircraft in takeoff and landing as imposing a duty of due care under a rationale parallel to the good Samaritan rule of *Indian Towing*,¹³⁰ and second distinguished *Dalehite*, which the court stated "neither overruled or impaired" the rationale of *Costley* and other similar holdings.¹³¹ The court compared the finding in *Dalehite*, that the Coast Guard had exercised discretion in not regulating the loading of the fertilizer with the initial decision to regulate air traffic control.¹³² The court concluded that if the Coast Guard had chosen to regulate the loading, as the FAA had chosen to regulate air traffic, it would have been liable for any acts of negligence at

¹²⁵ 181 F.2d 723 (5th Cir. 1950). The court in *Eastern* also cited *Somerset Seafood Co. v. United States*, 193 F.2d 631 (4th Cir. 1951) and *United States v. Gray*, 199 F.2d 239 (10th Cir. 1952).

¹²⁶ *Costley*, 181 F.2d at 725.

¹²⁷ *Eastern* was decided Feb. 8, 1955. *Indian Towing* was decided Nov. 21, 1955.

¹²⁸ *Eastern*, 221 F.2d at 78.

¹²⁹ *Id.* The court also rejected the government's argument that the case should be dismissed on the ground that there was no analogous private liability as required for recovery under the Federal Tort Claims Act. *Id.* at 73. 28 U.S.C. § 1346(b) (1976) provides that the government may be found liable under the Federal Tort Claims Act only if a private person would be liable. See *supra* note 22.

¹³⁰ *Eastern*, 221 F.2d at 75.

¹³¹ *Id.* at 75-77. See *supra* note 125.

¹³² *Id.* at 77.

the operational level.¹³³ This comparison ignored the fact that while the Coast Guard was not involved in loading the fertilizer in *Dalehite*, other government agents were in charge of bagging the fertilizer and their acts were found by the Court to be discretionary.¹³⁴ Arguably, air traffic controllers exercise more discretion than the government employees in charge of bagging fertilizer who were found by the Supreme Court in *Dalehite* to be exercising discretionary functions.¹³⁵

The government again argued that the acts of air traffic controllers involve discretion in *Ingham v. Eastern Airlines*.¹³⁶ In *Ingham*, the failure of a controller to report a decrease in visibility to a pilot was held by the Second Circuit Court of Appeals to be the proximate cause of the crash of the pilot's aircraft.¹³⁷ The court also held that the controller did not have discretion as to whether to report the weather change because the *Air Traffic Controllers Manual* required that the change in visibility conditions be reported to the pilot.¹³⁸ The court followed the rationale of *Eastern* and *Indian Towing* in holding that once the FAA undertook to establish an air traffic control system, it was under a duty to operate the system with due care.¹³⁹ *Eastern* and *Ingham* firmly establish that actions of air traffic controllers are not immune from liability under the planning-level/operational-level test.¹⁴⁰ In cases in which the negligence of controllers is at issue, courts generally cite one or both holdings and do not attempt to apply the planning-level/operational-level test.¹⁴¹

¹³³ *Id.*

¹³⁴ *Dalehite*, 346 U.S. at 40-41.

¹³⁵ See Reynolds, *supra* note 2, at 104.

¹³⁶ 373 F.2d 227 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967).

¹³⁷ *Id.* at 233.

¹³⁸ *Id.* (citing FAA, AIR TRAFFIC CONTROLLERS MANUAL 265.2 (1979)).

¹³⁹ *Ingham*, 373 F.2d at 238.

¹⁴⁰ See generally Note, *The Federal Tort Claims Act: Discretion and the Air Traffic Controller*, 38 J. AIR L. & COM. 413 (1972).

¹⁴¹ See, e.g., *Foss v. United States*, 623 F.2d 104 (9th Cir. 1980) (where the court held the FAA liable for a controller's failure to warn a pilot of a hazardous flight pattern); *Miller v. United States*, 522 F.2d 386 (6th Cir. 1975), *discussed infra* text accompanying notes 148-152; *Gill v. United States*, 429 F.2d 1072 (5th Cir. 1970), (holding that the FAA has a duty to report weather changes to pilots); *Hartz v. United States*, 387 F.2d 870 (5th Cir. 1968), *discussed infra* text accompanying notes 144-147.

A more difficult issue involving air traffic controllers, in which the discretionary function exception can sometimes have an effect, is determining the standard of care by which to judge the acts of controllers. *Ingham* has been cited and followed by courts as establishing the proposition that a controller does not exercise due care if he does not follow FAA regulations.¹⁴² Other authority may be read to imply that a controller's duty of care may be broader than what is required by FAA procedures.¹⁴³ In *Hartz v. United States*,¹⁴⁴ the Fifth Circuit Court of Appeals held that the negligent act of an air traffic controller in failing to warn a light aircraft of jet turbulence was the proximate cause of the crash of the aircraft.¹⁴⁵ The court held against the FAA and expressly disapproved "the view that the duty of an FAA controller is circumscribed within the narrow limits of an operations manual and nothing more."¹⁴⁶ This statement by the Fifth Circuit was clearly dicta, however, because the controller's failure to warn the pilot of the turbulence was in contravention of FAA regulations.¹⁴⁷

*Miller v. United States*¹⁴⁸ is illustrative of how the discretionary function exception can relate to the issue of the standard of care required of air traffic controllers. *Miller* involved the crash of a commercial airliner during a landing approach at Greater Cincinnati Airport.¹⁴⁹ The Sixth Circuit Court of Appeals affirmed the district court's holding that controllers were not negligent in providing weather information and as-

¹⁴² See, e.g., *Ross v. United States*, 640 F.2d 511 (5th Cir. 1981) (holding that the instrument approach manual was advisory and without the force of an FAA regulation and therefore could not be used to determine a controller's negligence); *Miller v. United States*, 522 F.2d at 387.

¹⁴³ See, e.g., *Gill*, 429 F.2d at 1075 stating that "the government's duty to provide services with due care to airplane pilots may rest either upon the regulations of procedure manuals spelling out functions of air traffic controllers or upon general pilot reliance." In *Gill*, however, the lower court finding of liability on the part of the FAA was reversed on other grounds. *Id.*

¹⁴⁴ 387 F.2d 870 (5th Cir. 1968).

¹⁴⁵ *Id.* at 872.

¹⁴⁶ *Id.* at 873.

¹⁴⁷ *Id.*

¹⁴⁸ 522 F.2d 386 (6th Cir. 1975).

¹⁴⁹ *Id.*

signing a runway to the aircraft because their actions complied with FAA procedures.¹⁵⁰ The Sixth Circuit rejected the plaintiffs' argument that the FAA should be held liable for the crash for the failure to promulgate more stringent procedures.¹⁵¹ The court held that the discretionary function exception precludes the imposition of liability for failure to impose a more strict set of air safety regulations.¹⁵²

One aspect of *Dalehite* which courts have consistently followed is that the decision not to adopt stricter regulations is within the scope of the discretionary function exception.¹⁵³ By following *Dalehite* in this respect, courts have implicitly recognized that the promulgation of regulations inherently involves governmental policy-making activity. Thus, a plaintiff faced with a determination that controllers acted in compliance with FAA regulations will almost certainly fail if he argues that stricter regulations should have been imposed.¹⁵⁴ Such an argument implies, however, that the standard of care of controllers is determined by FAA regulations. A better approach for a plaintiff would be to assert the language of *Hartz* which implies that a controller's duty may in some instances be broader than what is required by FAA procedures.¹⁵⁵ Framing the issue in this manner would avoid a direct confrontation with the clearest and least ambiguous application of the discretionary function exception—the decisions of government officials as to what regulations to impose.

¹⁵⁰ *Id.* at 387.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See, e.g., *First Nat'l Bank v. United States*, 552 F.2d 370 (10th Cir.), *cert. denied*, 434 U.S. 835 (1977) (holding that the failure of the government to require more complete fungicide labels was discretionary); *Blaber v. United States*, 332 F.2d 629 (2d Cir. 1964) (holding that the safety regulation of independent contractors of the Atomic Energy Commission was discretionary); *Blessing v. United States*, 447 F. Supp. 1160 (E.D. Pa. 1978) (holding that the types of regulations imposed by the Occupational Safety and Health Administration were within the scope of the discretionary function exception); *Fielder v. United States*, 423 F. Supp. 77 (C.D. Cal. 1976) (holding that the FAA's duty to impose hang glider safety regulations was discretionary).

¹⁵⁴ See *supra* text accompanying notes 151, 152.

¹⁵⁵ *Hartz*, 387 F.2d at 873.

VII. CERTIFICATION OF AIRCRAFT

The Administrator of the FAA has a duty to prescribe and enforce minimum safety standards for the design, production and maintenance of aircraft and related equipment.¹⁵⁶ This duty is accomplished through a three-step certification process.¹⁵⁷ The process begins at the design stage of an aircraft.¹⁵⁸ FAA aerospace engineers first study design criteria proposed by a manufacturer.¹⁵⁹ Later, FAA test pilots make extensive test flights in a prototype of the aircraft.¹⁶⁰ If the FAA finds that the design of the aircraft meets its safety standards, a type certificate is issued.¹⁶¹

The manufacturer of an aircraft must next satisfy the FAA that the aircraft it produces will conform to the prototype.¹⁶² When this is accomplished, the FAA issues a production certificate.¹⁶³ Finally, when the FAA finds that a finished aircraft conforms to the design criteria of the previously issued type certificate and is in a safe operating condition, an airworthiness certificate is issued.¹⁶⁴ After an aircraft is in service, regular periodic maintenance inspections are required.¹⁶⁵ The FAA also issues certificates authorizing the use of aircraft in commercial activities.¹⁶⁶

In recent years, a number of courts have considered whether a cause of action exists against the FAA if the agency performs its certification activities in a negligent manner.¹⁶⁷

¹⁵⁶ 49 U.S.C. § 1421(a)(1) (1976).

¹⁵⁷ *Id.* § 1421(a)(2).

¹⁵⁸ *Id.* § 1423.

¹⁵⁹ Tomkins, *Liability of the United States for Negligent Certification of Aircraft*, 17 FORUM 569, 570 (1982).

¹⁶⁰ *Id.*

¹⁶¹ 49 U.S.C. § 1423(a) (1976).

¹⁶² Tomkins, *supra* note 159, at 570-71.

¹⁶³ 49 U.S.C. § 1423(b) (1976).

¹⁶⁴ *Id.* § 1423(c).

¹⁶⁵ Tomkins, *supra* note 159, at 571.

¹⁶⁶ 14 C.F.R. § 298.42 (1975).

¹⁶⁷ The potential for FAA liability for negligent certification of aircraft has been much commented upon. *See generally* Dombroff, *Certification and Inspection: An Overview of Government Liability*, 47 J. AIR L. & COM. 229 (1982); Harrison and Kolezynski, *Government Liability for Certification of Aircraft?*, 44 J. AIR L. & COM. 23 (1978); Hatfield, *Nonliability of the Government for Certification of Aircraft*, 17 FORUM 602 (1982); Iser, *It's a Bird, It's a plane, It's the FAA: Government Liability for Negligent Airworthiness Certification*, 31 HAS-

The Circuit Courts of Appeals are split on this issue.¹⁶⁸ The Supreme Court has recently granted writs of certiorari for two Ninth Circuit Court of Appeals cases¹⁶⁹ that hold that the discretionary function exception does not bar a claim against the FAA for negligent aircraft certification.¹⁷⁰ These cases, *United Scottish Insurance Co. v. United States* and *V.A.R.I.G. Airlines v. United States*, will be discussed after a review of the case law that precedes them.¹⁷¹

In *Rapp v. Eastern Airlines*,¹⁷² decided in 1967, the District Court for the Eastern District of Pennsylvania clearly held that a cause of action does exist against the FAA for negligent aircraft certification, but because *Rapp* involved an aircraft which crashed into navigable waters of the United States, the case was decided under the Suits in Admiralty Act¹⁷³ and not under the Federal Tort Claims Act. The Suits in Admiralty Act does not contain exceptions to liability parallel to those found in the Federal Tort Claims Act.¹⁷⁴ *Rapp* involved the crash of a commercial airliner which ingested birds into its engines on takeoff. The ingestion of the birds caused the aircraft's engines to lose power, which in turn caused the plane to crash into Boston Harbor.¹⁷⁵ The aircraft's engines had been certified by the Civil Aeronautics Board despite the fact that the Board was aware that the engines would lose power if they ingested birds. The district court held the government liable for the crash and ruled that the FAA has a duty to

TINGS L.J. 247 (1979); Tomkins, *Liability of the United States for Negligent Certification of Aircraft*, 17 FORUM 569 (1982); Comment, *Federal Tort Claims Act — Government Liability for Negligent Safety Inspection of Aircraft*, 15 SUFFOLK U. L. REV. 158 (1981).

¹⁶⁸ Compare *Garbarino v. United States*, 661 F.2d 552 (6th Cir. 1981) with *V.A.R.I.G. Airlines v. United States*, 692 F.2d 1205 (9th Cir. 1982), *cert. granted*, 103 S. Ct. 2084 (1983) and *United Scottish Ins. v. United States*, 692 F.2d 1209 (9th Cir. 1982), *cert. granted*, 103 S. Ct. 2084 (1983).

¹⁶⁹ *V.A.R.I.G. Airlines v. United States*, 692 F.2d 1205 (9th Cir. 1982), *cert. granted*, 103 S. Ct. 2084 (1983); *United Scottish Ins. v. United States*, 692 F.2d 1209 (9th Cir. 1982), *cert. granted*, 103 S. Ct. 2084 (1983).

¹⁷⁰ *V.A.R.I.G.*, 692 F.2d at 1208-09; *United Scottish*, 692 F.2d at 1212.

¹⁷¹ See *infra* notes 201-208 and accompanying text.

¹⁷² 264 F. Supp. 673 (E.D. Pa. 1967), *vacated by agreement*, 521 F.2d 1399 (3d Cir. 1975).

¹⁷³ 46 U.S.C. §§ 741-752 (1975).

¹⁷⁴ See *supra* note 23.

¹⁷⁵ *Rapp*, 264 F. Supp. at 675-76.

establish the safety of the design of aircraft.¹⁷⁶ The district court's decision in *Rapp* was later vacated by agreement. For this reason and because the case was not decided under the Federal Tort Claims Act, courts have not felt compelled to follow its holding.¹⁷⁷

In *Gibbs v. United States*,¹⁷⁸ another early case, a district court again stated that the FAA has a duty to perform its inspection and certification activities without negligence.¹⁷⁹ This language was dicta, however, because in *Gibbs* the District Court for the Eastern District of Tennessee found in favor of the government after determining that FAA negligence was not the proximate cause of the light aircraft crash that was the basis of the action.¹⁸⁰

The applicability of the discretionary function exception in cases involving claims against the FAA for the negligent certification of aircraft was first examined in 1975 in *Hoffman v. United States*.¹⁸¹ *Hoffman* involved the crash of an aircraft operated by American Aviation, a company issued an Air Taxi/Commercial Operator (ATCO) certificate by the FAA.¹⁸² One of the requirements for obtaining an ATCO certificate is that the operator carry liability insurance.¹⁸³ The FAA issued an ATCO certificate to American Aviation with knowledge that the company did not carry the requisite insurance.¹⁸⁴ A prior FAA memorandum had instructed field personnel not to deny ATCO certificates on the basis of the

¹⁷⁶ *Id.* at 676.

¹⁷⁷ *See, e.g.,* Takacs v. Jump Shack, 17 Av. Cas. (CCH) 17,186 (N.D. Ohio 1982). *But see* Arney v. United States, 479 F.2d 653 (9th Cir. 1973). In *Arney*, the Ninth Circuit reversed the lower court's granting of a summary judgment and held that plaintiffs had stated a cause of action against the FAA for negligently issuing a ferry flight permit. *Arney* was also decided under the Suits in Admiralty Act and so is not compelling authority in an action under the Federal Tort Claims Act.

¹⁷⁸ 251 F. Supp. 391 (E.D. Tenn. 1965).

¹⁷⁹ *Id.* at 395.

¹⁸⁰ *Id.* *See also* Bristow v. United States, 309 F.2d 465 (6th Cir. 1962) (affirming the dismissal of a plaintiff's claim that the Civil Aeronautics Board allowed an unairworthy plane to fly on the basis of the lower court's finding that the plane was in fact airworthy).

¹⁸¹ 398 F. Supp. 530 (E.D. Mich. 1975), *aff'd*, 600 F.2d 590 (6th Cir. 1979).

¹⁸² *Id.* at 532.

¹⁸³ 14 C.F.R. § 298.42(a)(1) (1978), *cited in Hoffman*, 398 F. Supp. at 532.

¹⁸⁴ *Hoffman*, 398 F. Supp. at 532.

insurance requirement.¹⁸⁵ The plaintiffs in *Hoffman* alleged that the FAA negligently issued the ATCO certificate.¹⁸⁶ The FAA contended that the decision not to enforce the insurance requirement was a discretionary act and that the government was immune from liability under the discretionary function exception.¹⁸⁷

The District Court for the Eastern District of Michigan reasoned that the decision to promulgate the insurance regulation was discretionary but that the FAA had no discretion to ignore its own regulation.¹⁸⁸ The court applied the planning-level/operational-level test and determined that the issuance of the ATCO certificate was an operational task because the regulations involved "clear standards to be applied to fact situations in order to determine basic eligibility."¹⁸⁹ The court reasoned that FAA regulations required insurance of ATCO certificate holders and that no discretion was involved in determining whether applicants in fact had insurance.¹⁹⁰

The lower court dismissed the complaint in *Hoffman*, however, because the plaintiffs could not prove that FAA negligence was the proximate cause of the aircraft crash.¹⁹¹ The Sixth Circuit Court of Appeals affirmed the decision on this basis¹⁹² and tersely noted that if it were forced to reach the "complex legal issues involving the Federal Tort Claims Act" it would hold the plaintiffs' claim barred by the discretionary function and misrepresentation exceptions.¹⁹³ The court of-

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 534.

¹⁸⁸ *Id.* at 539.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Hoffman*, 600 F.2d at 590.

¹⁹³ *Id.* at 591. Several lower courts have held that the misrepresentation exception bars a claim against the FAA for the negligent certification of aircraft. *See, e.g.*, *Summers v. United States*, 480 F. Supp. 347 (D. Md. 1979); *Lloyd v. Cessna Aircraft Co.*, 429 F. Supp. 181 (E.D. Tenn. 1977). The Ninth Circuit Court of Appeals, however, expressly rejected the applicability of the misrepresentation exception in aircraft certification cases in the companion cases of *V.A.R.I.G.* and *United Scottish*, discussed *infra* in text accompanying notes 201-208. The upcoming Supreme Court opinion on these

ferred no rationale for this determination.

*In re Air Disaster Near Silver Plume*¹⁹⁴ also involved the crash of an ATCO certificate holder's aircraft.¹⁹⁵ The District Court for the District of Kansas applied the planning-level/operational-level test, as did the district court in *Hoffman*, but concluded that the FAA activity involved was discretionary.¹⁹⁶ In *Silver Plume*, the plaintiffs alleged that the FAA allowed an ATCO certificate holder to operate its aircraft when the FAA knew or should have known that the holder was operating in violation of its certificate.¹⁹⁷ The court stated that FAA regulations required the FAA to investigate suspected violations by certificate holders but that the extent of an investigation and the sanctions imposed were left discretionary under the regulations.¹⁹⁸ The plaintiffs' claim in *Silver Plume* was dismissed on this ground and also because the plaintiffs could not prove that government negligence was the proximate cause of the air crash involved.¹⁹⁹ The court in

cases should effectively settle this issue. See also *Block v. Neal*, 103 S. Ct. 1089 (1983) (holding that the misrepresentation exception did not bar a claim against the Farmers Homes Administration for failing to properly inspect the construction of plaintiff's home.) The leading Supreme Court case on the misrepresentation exception prior to *Neal* was *United States v. Neustadt*, 366 U.S. 696 (1961), in which the Court held that the exception barred a claim by the purchaser of a home who relied upon a negligent inspection and appraisal by the Federal Housing Administration (FHA). Courts wishing to do so have found it easy to analogize FHA inspection activities with FAA inspection activities and hold that the misrepresentation exception applies to both. In *Neustadt*, however, the plaintiffs were claiming damages only for financial loss. Most FAA certification cases involve claims of personal injury or property damage. The Court in *Neustadt* noted that the scope of the misrepresentation exception was intended to be limited to the common law tort of misrepresentation, which has been confined largely to invasions of financial interest. *Id.* at 711 n.26. This traditional limitation of the misrepresentation exception to essentially financial matters had led one lower court to reject the exception as a defense in a negligent certification case prior to the Ninth Circuit's recent holdings in *V.A.R.I.G.* and *United Scottish*. See *In re Silver Plume*, 445 F. Supp. 384, 407 (D. Kan. 1977), discussed *infra* in text accompanying notes 194-200. For one commentator's view of why the misrepresentation exception should apply in negligent certification cases, see Hatfield, *Nonliability of the Government for Certification of Aircraft*, 17 FORUM 602, 623-24 (1982).

¹⁹⁴ 445 F. Supp. 384 (D. Kan. 1977).

¹⁹⁵ *Id.* at 388-89.

¹⁹⁶ *Id.* at 402.

¹⁹⁷ *Id.* at 387.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 410.

Silver Plume concluded, however, that the FAA has a duty to perform inspections in a non-negligent manner and that the breach of this duty may create a cause of action against the United States.²⁰⁰

Finally, in *United Scottish Insurance Co. v. United States*,²⁰¹ the Ninth Circuit Court of Appeals affirmed a lower court's finding of liability on the part of the FAA for the negligent inspection and certification of an aircraft. *United Scottish* involved the crash of an air taxi aircraft caused by a defective cabin heater.²⁰² The FAA was found to have negligently inspected and certified the aircraft after the heating system had been installed.²⁰³ The Ninth Circuit rejected the government's contention that liability was barred by the discretionary function exception based on the reasoning that no policy-type discretion was involved in applying the objective FAA airworthiness standards to particular aircraft.²⁰⁴

The companion case of *V.A.R.I.G. Airlines v. United States*²⁰⁵ involved the crash of a Boeing 707 near Paris caused by a lavatory fire.²⁰⁶ The FAA had certified the lavatory unit.²⁰⁷

²⁰⁰ *Id.* at 409. While *Rapp* and *Gibbs* had earlier stated that the FAA has a duty to perform its certification activities without negligence and the lower court in *Hoffman* impliedly recognized this, these cases did not discuss the basis of this duty. The court in *Silver Plume*, in stating that a cause of action could exist for negligent certification of an aircraft, followed the reasoning of *Clemente v. United States*, 567 F.2d 1140 (1st Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978). In *Clemente*, the First Circuit reversed a decision holding the government liable for failing to warn aircraft passengers that the aircraft which they chartered was overweight and lacked a proper crew. *Id.* at 1143. The First Circuit Court of Appeals stated that a cause of action would have existed if the plaintiffs had shown that the elements of the good Samaritan doctrine had been met. *Id.* at 1145. An important element of this doctrine is reliance on the defendant's affirmative acts. See *supra* note 56. Fulfillment of the elements of the good Samaritan doctrine was the basis of the causes of action in *United Scottish* and *V.A.R.I.G.*, discussed *infra* in text accompanying notes 201-208.

²⁰¹ 692 F.2d 1209 (9th Cir. 1982), *cert. granted*, 103 S. Ct. 2084 (1983). In an earlier opinion, the Ninth Circuit remanded the lower court's finding of liability on the part of the United States with instructions that the district court determine if the elements of the good Samaritan doctrine had been met. *United Scottish*, 614 F.2d 188, 194 (9th Cir. 1979). See *supra* note 56, 200. The opinion here discussed is the Ninth Circuit's affirmance of the district court's finding for the plaintiffs on remand.

²⁰² *United Scottish*, 692 F.2d at 1210.

²⁰³ *Id.*

²⁰⁴ *Id.* at 1212. See *supra* text accompanying notes 189-190.

²⁰⁵ 692 F.2d 1205 (9th Cir. 1982), *cert. granted*, 103 S. Ct. 2084 (1983).

²⁰⁶ *Id.*

²⁰⁷ *Id.*

In holding that the discretionary function exception did not bar a claim against the FAA, the Ninth Circuit compared the duties of FAA inspectors with those of the lighthouse keepers in *Indian Towing*.²⁰⁸

Contrary to *United Scottish* and *V.A.R.I.G.* is the holding by the Sixth Circuit Court of Appeals in *Garbarino v. United States*.²⁰⁹ In *Garbarino*, decided prior to *United Scottish* and *V.A.R.I.G.*, the Sixth Circuit affirmed the lower court's dismissal of a plaintiff's claim for negligent certification of an aircraft based on the discretionary function exception.²¹⁰ Unlike *United Scottish*, however, the plaintiffs in *Garbarino* did not assert that the FAA was negligent in applying its own regulations. Rather, the plaintiffs asserted that the FAA was negligent in not considering the effect of a potential crash on an aircraft when it promulgated its certification standards.²¹¹ Because the assertion of the plaintiffs in *Garbarino* that the FAA should have enacted stricter safety regulations falls into the area most clearly covered by the discretionary function exception,²¹² it can be argued that *Garbarino* is consistent with *United Scottish* and *V.A.R.I.G.*, where established regulations were negligently applied. In order for the Sixth Circuit to reach a decision in accord with *United Scottish* and *V.A.R.I.G.*, however, it would be forced to retreat from its dicta in *Hoffman*, which involved the failure of the FAA to enforce one of its established regulations.²¹³

The District Court for the Northern District of Ohio, within the Sixth Circuit, decided *Takacs v. Jump Shack Inc.*²¹⁴ prior to the Ninth Circuit's decisions in *United Scottish* and *V.A.R.I.G.*. In *Takacs*, the survivors of a man killed when his parachute failed to open brought an action against the FAA

²⁰⁸ *Id.* at 1209.

²⁰⁹ 666 F.2d 1061 (6th Cir. 1981).

²¹⁰ *Id.*

²¹¹ *Id.* at 1063.

²¹² See *supra* note 153 and accompanying text.

²¹³ See *supra* text accompanying notes 192-193.

²¹⁴ 17 Av. Cas. (CCH) 17,186 (N.D. Ohio 1982).

for negligent certification of the parachute.²¹⁵ The court held that the claim was barred by the discretionary function exception.²¹⁶ The court stated that the decision to certify the parachute involved "a balancing of a myriad of factors" and was made at the planning level.²¹⁷ This holding is inconsistent with the holding in *United Scottish* and *V.A.R.I.G.* that the certification process is operational.²¹⁸ The court in *Takacs* stated that "there are sound policy considerations" for not extending government liability to certification cases because to do so would in effect "make the Government the insurer of all activity which comes under the Government's safety inspections."²¹⁹ It is arguable that the court's holding was based more on these policy considerations than on an objective application of the planning-level/operational-level test.

The uncertain boundaries of the planning-level/operational-level test have allowed courts to reach different conclusions as to whether FAA certification activity falls within the scope of the discretionary function exception.²²⁰ This conflict should be resolved when the Supreme Court renders its opinion in *United Scottish* and *V.A.R.I.G.*

VIII. CONCLUSION

In *Indian Towing*, the government argued that the United States should not be held liable for negligently maintaining a lighthouse because the keeping of a lighthouse is a "uniquely

²¹⁵ *Id.* at 17,187.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ See *supra* text accompanying note 201-208.

²¹⁹ *Takacs*, 17 Av. Cas. (CCH) at 17,187. See also *Colorado Flying Academy v. United States*, 16 Av. Cas. (CCH) 17,362 (D. Colo. 1981). In *Colorado Flying Academy*, the district court dismissed the plaintiffs' claim that the FAA was negligent in certifying a light aircraft design in which a "blindspot" prevented the pilot from seeing an approaching aircraft. The court held that the plaintiffs failed to show any negligence on the part of the FAA and that the discretionary function exception would bar the claim regardless of any such showing. See also *Firemen's Fund Ins. v. United States*, 527 F. Supp. 328 (E.D. Mich. 1981) (holding that the discretionary function exception did not warrant a summary judgment for the United States on a claim of negligent certification of a Lear Jet engine design).

²²⁰ Compare *Takacs*, 17 Av. Cas. (CCH) 17,186 with *United Scottish*, 692 F.2d 1209.

governmental" function.²²¹ The Court rejected this argument as an attempt to impose on the Federal Tort Claims Act the law of municipal corporations whereby such corporations are immune from liability if their acts are governmental in nature.²²² The Court referred to the distinction between "non-governmental" and "governmental" activity as a quagmire²²³ and stated that "[t]here is nothing in the Tort Claims Act which shows that Congress intended to draw distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation."²²⁴ The planning-level/operational-level test, however, has clearly evolved into but another murky bog on which sure-footing is impossible.²²⁵ Courts can and do manipulate this test to achieve results consistent with the policy considerations which they perceive to be important.²²⁶

For example, it cannot be said with any rational certainty that air traffic controllers exercise any more or less discretion in directing aircraft than do FAA engineers when they examine a completed aircraft to see if it is built to the same specifications as its prototype. All courts now agree, however, that the acts of air traffic controllers are not discretionary²²⁷ while at least some courts have held that FAA certification activity is discretionary.²²⁸ The dichotomy in the case holdings in these two areas clearly is based not so much on the acts of the federal employees involved as it is on largely unarticulated policy considerations. On the one hand, courts feel that the government should be responsible for the acts of air traffic controllers because pilots and aircraft passengers place themselves completely at their mercy.²²⁹ On the other hand, some courts believe that to allow recovery against the government for certification activity would in effect make the gov-

²²¹ *Indian Towing*, 350 U.S. at 64.

²²² *Id.* at 64-65.

²²³ *Id.* at 65.

²²⁴ *Id.* at 68.

²²⁵ *See Smith*, 375 F.2d at 246.

²²⁶ *See, e.g., Takacs*, 17 Av. Cas. (CCH) 17,186.

²²⁷ *See, e.g., Ingham*, 373 F.2d at 238.

²²⁸ *See, e.g., Takacs*, 17 Av. Cas. (CCH) at 17,187.

²²⁹ *See, e.g., Eastern Air Lines*, 221 F.2d at 78.

ernment an insurer and expose it to broad liability.²³⁰

Because of its manipulative nature and its failure to yield consistent results after over thirty years of application, the planning-level/operational-level test should be completely abandoned as a means of determining whether an act is within the scope of the discretionary function exception. The scope of the exception should be narrowed so that it extends only to activity most clearly intended by Congress to be covered by it. Only decisions to initiate or not to initiate particular programs, projects, laws or regulations should be held to be within the scope of the exception.²³¹ If the discretionary function exception is narrowed in such a manner, two important checks remain to prevent the exposure of the government to potentially great liability in particular areas.

First, the other exceptions to the Federal Tort Claims Act would prevent the most catastrophic claims against the government. For example, the Act does not apply to the combatant activities of the military in time of war²³² or to any claim for damages caused by the fiscal operations of the Treasury.²³³ Nor does the Act apply in any situation where an employee of the government has exercised due care in the execution of a statute or regulation.²³⁴

Second, in areas not covered by specific exceptions, a strict application of the good Samaritan doctrine alone would severely limit many claims against the government. A test based on the elements of the Good Samaritan doctrine provided by the Restatement of Torts²³⁵ may be stated as follows:

1. Has the government undertaken an affirmative act?
2. Has the government proceeded with a lack of due care?
3. Has the government's affirmative act caused reliance or increased the risk of harm to the injured party?

²³⁰ See, e.g., *Takacs*, 17 Av. Cas. (CCH) at 17,187.

²³¹ See *supra* text accompanying note 151.

²³² 28 U.S.C. § 2680(j) (1976).

²³³ *Id.* § 2680(i).

²³⁴ 28 U.S.C. § 2680(a).

²³⁵ See *supra* note 56.

The first element of this test begins where the suggested narrow definition of the discretionary function exception leaves off. That is, if the government has not undertaken an affirmative act, the exception should bar any claim against the United States. The second element of this test requires that the government act in a negligent manner before liability may be imposed. It should here be noted that the Supreme Court has held that, even independent of the Good Samaritan doctrine, proof of government negligence is required in order to assert a claim under the Federal Tort Claims Act.²³⁶ This requirement of proof of government negligence, in conjunction with the requirement of reliance or increased risk of harm, prevents the United States from becoming an absolute insurer in areas such as its certification activities.

A test similar to the one here suggested is usually applied by courts only after a finding that the government activity involved was operational and therefore not within the scope of the discretionary function exception.²³⁷ It is suggested, however, that the Good Samaritan test affords sufficient protection of government resources without the need ever to resort to the planning-level/operational-level test. The Supreme Court will soon decide whether a cause of action can be maintained against the FAA for the negligent certification of aircraft.²³⁸ While this decision could be based on grounds other than the discretionary function exception,²³⁹ it is hoped by this commentator that the Court will base its holding on the exception and in the process forever pave over the murky bog that is the planning-level/operational-level test.

²³⁶ *Laird v. Nelms*, 406 U.S. 797 (1972).

²³⁷ *See, e.g., United Scottish*, 692 F.2d 1209.

²³⁸ *See supra* note 169 and accompanying text.

²³⁹ E.g., the Court could reverse *V.A.R.I.G.* and *United Scottish* by holding that the misrepresentation exception bars a cause of action against the FAA for negligent certification activity. *See supra* note 193.

