NEGLIGENCE OF FEDERAL AVIATION ADMINISTRATION DELEGATES UNDER THE FEDERAL TORT CLAIMS ACT

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INTRODUCTION

THE FEDERAL Aviation Administration (FAA) has been authorized by statute to delegate various responsibilities to private individuals who are either designated “representatives” or are “certificated.” The legislative history of the statute indicates that the purpose of this delegation was to avoid a substantial increase in the number of Federal employees; no desire is indicated to have these individuals categorized as “employees” within the meaning of the Federal Tort Claims Act (FTCA), or to assume Federal responsibility for their acts. Until Congress includes these persons within the coverage of the FTCA as employees, the traditional concept of the “independent contractor” doctrine should block governmental liability for their negligent acts and omissions. Admittedly, there is no clearly defined rule as to the relationship existing between a federal agency and private individuals; however the customary absence of a contractual relationship between these individuals and the Government, the absence of federal pay, and most important, the absence of positive control and direction by the FAA, casts them in the traditionally-accepted role of independent contractors. In this role, there is no indication that Congress intended the United States to become an insurer against the negligent acts and omissions of FAA certificate holders.

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I. LEGISLATIVE AUTHORITY FOR FAA DELEGATION

Section 314 of the Federal Aviation Act of 1958\(^1\) authorizes\(^2\) delegation of powers and duties by the Federal Aviation Administrator to private persons.\(^3\) Section 314(a) states:

In exercising the powers and duties vested in him by this chapter the Administrator may, subject to such regulations, supervision,

\(^1\) 49 U.S.C. § 1355 (1970). Section 6(c)(1) of the Department of Transportation Act, 49 U.S.C. § 1655(c)(1) (1970), transferred most functions, powers and duties of the Federal Aviation Administrator and the Federal Aviation Agency to the Secretary of Transportation. In 49 C.F.R. § 1.47 (1975) the Secretary of Transportation in turn delegated to the Administrator of the Federal Aviation Administration. It should be borne in mind that "the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity, is not subject to a construction establishing a civil liability." 73 Am. Jur. 2d Statutes § 432 (1974); Kirk v. United States, 270 F.2d 110, 117 (9th Cir. 1959). See, Marival, Inc. v. Planes, Inc., 306 F. Supp. 855, 860, n.1 (N.D. Ga. 1969) (dictum).

\(^2\) The nature of legislative delegation, its constitutionality, and the purpose of the act involved so as to effectuate a Congressional policy is well recognized. See, e.g., Maryland v. United States, 381 U.S. 41, 51 n.32 (1965); Alexander Wool Combing Co. v. United States, 334 U.S. 742 (1948). An interest in expanded delegation within the FAA was expressed in a memorandum from the Secretary of Transportation to Department of Transportation Administrators and Assistant Secretaries (Jan. 27, 1969). It expressed an intent to vest authority to make decisions" . . . as close as possible to the point where a service is actually performed." The FAA operated on a more centralized basis until 1961, at which time it undertook a program of comprehensive decentralization of authority to Regional Directors. In 1965, further decentralization was effected by the creation of eighteen area offices within the continental United States, eight in Alaska, four in the Pacific, one in Balboa, and one in Puerto Rico. This was done to establish a management and decision level closer to actual aeronautical operations.

\(^3\) The legislative history of the statute indicates that the alternative to delegation of such powers and duties to private persons was an increase in the number of federal employees:

The report of the Department of Commerce submitted to this committee showing the need for this legislation stated that the Civil Aeronautics Administration through use of qualified private persons in lieu of regular CAA employees has eliminated the need for the employment of approximately 10,000 Government personnel to carry out safety inspection services.

S. REP. NO. 803, 81st Cong., 1st Sess. 3 (1949); See also U.S. DEPARTMENT OF TRANSPORTATION, FACTS AND FUNCTIONS (1971). The significance of legislative history is seen in a case dealing with a statute authorizing the designation of a person to employ a caretaker for National Guard property. In Maryland v. United States, 381 U.S. 41, vacated, 382 U.S. 159 (1965), the Supreme Court looked to the legislative history, holding that civilian caretakers were not regarded as federal employees. The statutory language and legislative history regarding the intent of extra-agency delegation or sub-delegation will bear significant weight. Sub-delegation within an agency is the subject of Note, Subdelegation by Federal Administrative Agencies, 12 Stan. L. Rev. 808 (1960); its reasoning as to the
and review as he may prescribe, delegate to any properly qualified private person, or to any employee or employees under the supervision of such person, any work, business, or function respecting 1) the examination, inspection, and testing necessary to the issuance of certificates under Subchapter VI of this chapter and 2) the issuance of such certificates in accordance with standards established by him. The Administrator may establish the maximum fees which such private persons may charge for their services and may rescind any delegation made by him pursuant to this subsection at any time and for any reason which he deems appropriate. (footnotes added)

Congressional delegations of power to federal agencies, or to private parties subject to agency regulations, have undergone few judicial investigations in recent years. In United States v. Rock Royal Co-Op, Inc. the Supreme Court acknowledged the Congressional power to effectuate delegation or sub-delegation by a legislative scheme, noting that "[I]t is no argument against the consti-

intra-agency sub-delegation would seem applicable to the extra-agency delegation involved in the Federal Aviation Act of 1958. This would seem especially true since the FAA is not involved here with any power to initiate cases nor the rendering of final decisions. The largeness of delegation and subdelegation is acknowledged in 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 9.02, at 619 (1958), where it is stated that, "The extent of permissible subdelegation by federal officers depends primarily upon the intent of Congress."

4 Title VI concerns the Safety Regulation of Civil Aeronautics, including airman, aircraft, air carrier operating, and airport operating certificates in addition to the maintenance of equipment. A precatory note to all FAA delegations, especially within an agency which has safety as a primary goal, is found in Note, supra note 3. The article poignantly observes that agency designates might exercise more care if they knew that the United States would not be liable. Having safety as its primary goal, the FAA is unquestionably responsible for care in the selection of delegates. See, e.g., Rapp v. Eastern Air Lines, Inc., 264 F. Supp. 673 (E.D. Pa. 1967).

8 Though the Secretary may establish fees, he has not done so. 14 C.F.R. pt. 187 (1976) concerns fees and does not provide for payment of any. The attitude of the FAA has been that fees between applicants and its representatives will be based on what the traffic will bear. See, e.g., FAA Order No. 8520.3A, Guide for Aviation Medical Examiners, which provides in paragraph L that "The Federal Aviation Administration does not recommend fees to be charged by Examiners for the physical examination of airman applicants. It is suggested that the fee be commensurate with that established for like services in the area." One inherent danger with this practice is that the designated private person is paid by the applicant, not by the agency which he is serving in some quasi-representative capacity; this method of payment may lead to less objective evaluations.

6 I K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 2.14 (1958). This is so even with respect to delegation of extremely broad power.

7 307 U.S. 533, 574 (1939).
tutionality of an act to say that it delegates broad powers to executives to determine the details of any legislative scheme.” It is by virtue of such “certification” that the FAA unquestionably provides some indicium of ostensible authority upon which individuals could rely. A review of material relating to licenses, certificates, franchises, and similar rights received from a public authority initially indicates that a delegate’s receipt of an FAA certificate logically implies some official status and authority to bind the agency. In the absence of actual FAA employment, the position of a delegate holding FAA authority would flow from his certificate, without any federal office.8

The plethora of cases questioning sub-delegation within an agency do not deal with an enabling statute which specifically provides for delegation to individuals outside the agency. Since the dangers of “irresponsible” or less competent subordinates remains constant in both situations, the language used by legal writers and courts9 suggests that their reasoning applies to delegations both within and without an agency.

A. Certificated “Representatives”

Delegation of authority to “private persons”11 is primarily found

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8 When a federal office is involved which is filled by a person who is acting under color of authority in discharging the duties of that office, his actions are those of an officer de facto, and would normally be binding on the public or third parties. McDowell v. United States, 159 U.S. 596 (1895); United States ex rel. Dors v. Lindsley, 148 F.2d 22 (7th Cir.), cert. denied, 325 U.S. 838 (1945). Despite the distinct absence of federal office, the possession of a certificate by which a private person holds himself out as an FAA representative does lend some credence to the aviation public’s belief that a delegate is authorized to make some technical appraisals for the FAA.

9 1 K. Davis, supra note 6. The principal problem in delegation to “lay groups” is “unbounded discretion in private parties”; however, because of the generally technical or mechanical requirements provided by the FAA administrative orders, this discretion is limited. The delegation to lay groups is discussed in Note, Delegation of Power to Private Parties, 37 Colum. L. Rev. 447 (1937), which describes the requirement of an “adequate standard” in the guidance of private action and for judicial review as the soundest theory in evaluation of rulemaking power. Such legal writings generally deal with the problem of the delegation of the powers of adjudication and rule making, rather than conformity to regulatory standards, and are therefore only indirectly beneficial.


11 Delegations not to individuals, but to “pilot schools” (including ground schools, flying schools and pilot training courses) are certificates described in 14 C.F.R. pt. 141 (1976), rather than the personal representative certificates described in 14 C.F.R. pt. 183 (1976). Delegations to entities other than individuals
in part 183 of Title 14 of the Code of Federal Regulations, which provides for the "certification" of representatives.¹⁹ The certification of representatives found in part 183 was expressed in its present language when still part of the Regulations of the Administrator of the Civil Aeronautics Administration.¹⁵ The selection of those representatives includes two types of selections made by the Flight Standards Service.¹⁴

The selection of Air Traffic Control Tower Operator Examiners provided for in part 183.11(d)¹⁵ no longer occurs; their training and examination takes place at the FAA Aeronautical Center in Oklahoma City, Oklahoma.

1. Designated "Representatives"

Subpart C of part 183 specifies the designation for which certi-
"certification" is granted. Though part 183.21 makes no mention of legal representation for Aviation Medical Examiners in the event of a lawsuit alleging negligence in examination, FAA Order 8520.3A does deal with their legal responsibilities. Paragraph C of Chapter 1 of that order is entitled "Legal Responsibilities of Designated Aviation Medical Examiners," and merely points out in part that,

If the examination is cursory and the Examiner fails to find a disqualifying physical defect which should have been discovered in the course of a thorough and careful examination, the FAA and the Medical Examiner have placed a safety hazard in the air and must bear the responsibility for the results of such action. If the airman is thereafter involved in an accident, caused or contributed to by his disability, and as a result passengers or persons on the ground lose their lives, both the FAA and the examining physician may be subject to suit for their negligence. (emphasis added)

However, the order does not indicate that the Department accepts responsibility for the negligent acts of medical examiners, and the Department of Justice maintains that position. The status of a medical examiner as licensed to practice medicine, and thereby qualified as a member of a highly educated and well-trained group,

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16 This "certification" is described in 14 C.F.R. § 183.13 (1976), and merely describes the documentary evidence of FAA representation (These appurtenances of representative authority are somewhat clumsily defined.) The "Certificate of Designation" seen in 14 C.F.R. § 183.13(a) (1976) is a diploma which indicates membership in the medical or forensic pathologist classification. The "Certificate of Authority" in 14 C.F.R. § 183.13(b) (1976) is a mobile identification card which defines the particular subclass of Flight Standards responsibility of 14 C.F.R. §§ 183.25-183.31 (1976). The procedures for medical certification are found in 14 C.F.R. § 183.11 (1976).

17 Guide for Aviation Medical Examiners (June 1970). This Guide is the Federal Air Surgeon's interpretation of the Medical Standards and Certification found in 14 C.F.R. pt. 67 (1976), and its distribution is restricted to designated examiners in order to prevent prior familiarization by applicants. In FAA Order No. 8520.2A, at Para. 56(3)(b) (Feb. 19, 1970) the AME is advised of his assumption of responsibility. Specific reference is made to physical examinations conducted at a clinic, when certain parts of the examination are delegated by the AME to another physician: "In such cases the AME shall review, certify, and assume responsibility for the accuracy and completeness of the total report of examination. . . ." (emphasis added).

18 It notes the existence of some 475,000 applications for airmen medical certificates yearly, over ninety-nine per cent of which are conducted by designated private practitioners. These examinations, being given in accordance with 14 C.F.R. at 67 (1976), are subject to reconsideration by the Federal Air Surgeon or his authorized representative within the FAA. The Federal Air Surgeon, or his authorized representative within the FAA, may select Examiners from qualified physicians who apply, and these designations are renewable yearly.
has no real counterpart among the other FAA representatives.  Although FAA Order 8520.3A (the Guide for Aviation Medical Examiners) is similar to the orders implementing the designations of other representatives since it provides directions for the conduct of the work, it is also distinctive because it does not provide for their training or attempt any real supervision.

The other non-medical representatives are listed in Subpart C, and are selected for one year by local Flight Standards Inspectors. These representatives are Pilot Examiners to serve general aviation, technical personnel examiners listed in part 183.25, includ-

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19 The broad license given to medical examiners by the FAA which constitutes a significant mark of their independence is a result of the prestige of the medical profession. See Note, Delegation of Power to Private Parties, 37 Col. L. Rev. 447, 456 (1937), which explains the reasoning behind the inability to exercise any significant influence over the medical profession:

Thus the inability of the legislature to prescribe in advance the requirements of a medical school, a diploma from which is condition precedent to the issuance by a state board of a license to practice medicine, may justify delegation to the American Medical Association of the power to determine such requirements from year to year.

20 Each of these examiners accepts the necessary applications for flight tests prerequisite to the issuance of pilot certificates and ratings in accordance with the requirements for designations found in FAA Order No. 8420.5A, Designation of Pilot Examiners (May 8, 1973). That order requires the conducting of tests under the general supervision of the local Flight Standards Inspector (an FAA employee), and issues temporary pilot certificates and ratings in the discretion of the Flight Standards Inspector. Chapter 5 of the order deals with the training and supervision of examiners, which is the responsibility of the FAA district office maintaining the examiner's file. In addition to a recommended yearly meeting, each examiner "should be advised and encouraged" to attend safety meetings, flight clinics and flight instructors refresher clinics to keep abreast of new developments. Paragraph 43a also provides that "a new examiner should be coached in the same manner as an inspector newly assigned to the field." In addition, paragraph 44 provides "spot checks" of examiners by means of flight tests, paragraph 46 for testing of the examiner's students, and paragraph 49 for the maintenance of a file record of each examiner. A breath of independence may be thought to exist in the paragraph 37a(2) requirement that the examiner does not need "constant instruction in maintaining the required standards and procedures," but the examiner is clearly independent upon FAA "standards and procedures." See FAA, PILOT EXAMINER'S MANUAL (1971) which provides general directions in the training and supervision of these examiners, noting in paragraph 16e as to "Professional Conduct," that "Each designated examiner must represent the Administrator in a manner which will reflect credit on the FAA." However, the manual does not deal with vicarious responsibility.

21 General aviation aircraft are defined as "All domestic civil aircraft except those used by the scheduled, supplemental, and intrastate public air carriers who report to the Civil Aeronautics Board or to a state aeronautical agency." THE-SAURUS OF FAA DESCRIPTIONS (2d ed. 1965).
ing designated mechanic examiner (DME), designated parachute rigger examiner, designated air traffic control tower operator examiner, designated flight engineer examiner, designated flight navigator examiner, and designated aircraft dispatcher examiner.

Paragraph 183.27 deals with those examiners designated for air clubs at military posts outside of the United States, but since none are in existence, there is no FAA Order concerning them.

2. Manufacturers' Designated "Representatives"

Manufacturers' representatives are cloaked with FAA authority and yet are employees of private organizations which are subject to FAA regulation. Part 183.29 concerns a number of representatives who are also directed by FAA guidelines in the inspection of designated mechanic examiner (DME), designated parachute rigger examiner, designated air traffic control tower operator examiner, designated flight engineer examiner, designated flight navigator examiner, and designated aircraft dispatcher examiner.

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The requirements for selection and duties of such designations are found in FAA Orders No. 8310.4A, at ch. 6 & 8310.5A, at ch. 2. In Order No. 8310.4A paragraph 4439(d) authorizes a DME to conduct oral and practical tests by means of certain procedures as to the kinds involved (general, airframe structures, airframe systems and components, powerplant theory and maintenance, and powerplant systems and components). The subjective nature of the DME's decisions is implied by the language in paragraph 4a of Chapter 2, which provides that "[h]e must have the ability to evaluate an applicant's performance, and is charged with the responsibility to impartially judge and grade each completed project." One of the few references in the FAA Orders dealing with the supervision of representatives is Chapter 2 of 8310.5A, which states "[w]hen an examiner is confronted with a question or problem concerning his performance, he should not hesitate to consult with his supervising FAA inspector." This supervision and consultation in each of the Orders is only of a general nature because of the limited number of inspectors.

The requirements for selection and duties of such designations are found in FAA Order No. 8310.4A, at ch. 6 and are not as extensive as are the others. The requirements for a parachute rigger are found in 14 C.F.R. § 65.111 (1976).

The requirements for selection and duties of these designations are found in FAA Order No. 7220.1, at ch. 3 but are misleading in being described as "examiner designations." Despite use of the word "designation," as expressed for representatives of the Administrator in 14 C.F.R. pt. 183 (1976), and the existence of specific authority, there are no such designees serving as "representatives"; rather all such examiners are FAA employees. Although the Director "may" select such representatives, he has not done so. The requirements for an air traffic control tower operator are found in 14 C.F.R. pt. 65(B) (1976).

The requirements for selection and duties of designated flight engineer examiner are found in FAA Order No. 8410.1, at § 3, those of designated flight navigator examiner in id. at § 4, and those of designated aircraft dispatcher examiners in id. at § 5. The three types of examiners are jointly referred to as Air Carrier Airman Examiners and are selected by the FAA Air Carrier District Office. As for authority, paragraph 9 requires that "detailed instructions" be furnished each examiner by the designating FAA inspector or District Office. The requirements for a dispatcher are found in 14 C.F.R. pt. 65(C) (1976).

Such representatives [(a) structural engineering (b) powerplant engineering (c) systems and equipment (d) radio engineering (e) engine engineering (f) pro-
of mechanical parts in the "type" certification of the design or modification in design of aircraft and engines or propellors, rather than the examination of personnel. This group is clearly dependent upon FAA technical standards and generally is not required to base its decisions on human characteristics of applicants.

Other than medical examiners, the training, supervision, discretion, checks and evaluations of all representatives so far dealt with, are understandably similar. Although a greater financial investment is required for the customary work of some designees, the common denominator for all non-medical representatives is the indirect supervision of the FAA. Supervision is achieved by coaching, spot checks, clinics, file records, and meetings with FAA District or Regional office personnel, and more importantly, dependence upon the "standards and procedures" of the FAA. For example, the "Qualifications of all Designated Engineering Representatives" (DER's) includes employment of these engineers by, and at the recommendation of an "engineering consulting agency, manufacturer, air carrier, or certificated repair station"; the individual must have "a responsible position in connection with the type of work for which he is to be designated"; he must have a position in his employer's organization with sufficient authority to enable him to

The development of an aircraft, engine or propellor begins with the design by the manufacturer, which is examined by Designated Engineering Representatives (DER's — 14 C.F.R. pt. 183.29 (1976)) who are generally engineers, and who grant approval of a "type design" submitted by the manufacturer. It is from this type design that a prototype model of aircraft, engines or propellors is constructed. This model is examined by Designated Manufacturing Inspection Representatives (DMIR's — 14 C.F.R. pt. 183.31 (1976)) who are generally technicians. If none have been appointed, it will be done by an FAA manufacturing inspector. If the examination indicates that the prototype conforms to the type design, additional flight tests are conducted for aircraft, and other tests for engines and propellors, before a "type certificate" is issued. The actual production stage follows, when the DMIR's become more actively involved in the granting of a production certificate for the aircraft engine or propellor.

FAA Order No. 8110.4, at ch. 5, para. 195a(1).

Id. at para. 195a(3).
"administer effectively the pertinent FAR"; he is required to have at least one year of experience in direct contact with the FAA, enabling the FAA to evaluate his cognizance of technical problems. The DER must consult and coordinate with the FAA, approve production and service changes, and approve a manufacturer's service bulletins. The DER is responsible for assuring that he or his employer maintains a complete file of all data approved by him. Paragraph 203 provides for "Training and Supervision", and the branch chief in the appropriate FAA Regional Office is responsible for indoctrination of each designee appointed by that office. The indirect supervision provided by paragraph 203b, which states that "In general, the designee will be guided by the same requirements, instructions, and procedures applicable to FAA employees in the performances of similar duties."

The last group of representatives in 14 C.F.R. Part 183.31 are Designated Manufacturing Inspection Representatives, (DMIR's) who are selected and directed by FAA Order 8130.2A, (Airworthiness Certification of Aircraft and Related Approvals), Chapter 7 of which is entitled "Production Approval and Surveillance Procedures." The representatives of these manufacturers must

30 Id. at para. 195a(5).
31 Id. at para. 195a(6).
32 The Order reasons that data storage is for transfer to the FAA in the event the employer goes out of business, but realistically, the threat of investigation appears to be offered in the pursuit of safety.
33 However, a certain reservation as to military aircraft is seen in FAA Order No. 8120.2, chapter 12, entitled Production Approval and Surveillance Procedures. Paragraph 139 provides that
   Certain segments of the DOD (Department of Defense) do not recognize FAA Designees as bona fide government representatives in matters of FAA type certificated products intended for the military; therefore, when an agency of the DOD procures FAA certificated products from a manufacturer where DMIR's are utilized, it must be determined if the designee's certifications and related approvals will be acceptable to that agency.
34 Paragraph 74c of FAA Order No. 8130.2A, chapter 7 is somewhat confusing in describing the use of a DMIR designee at the discretion of the "responsible FAA manufacturing representative." That representative is not a 14 C.F.R. § 183.27 (1976) DER, but rather an FAA employee. The sequence of job responsibilities would therefore be first with the FAA representative, then with a DER if one has been designated for the design of the prototype aircraft or elements thereof, and finally with a DMIR if the FAA representative has designated one for the purpose of determining whether the constructed prototype conforms with the type design.
35 Only manufacturers with an approved production inspection system, a
also be recommended by the manufacturer, have a good working knowledge of FAR's and be at a sufficiently high level in management to administer the pertinent FAR effectively. A DMIR “will be allowed to perform his duties only under the direct supervision of the manufacturing inspector.”  

The order refers to the FAA inspector, but is somewhat misleading because it forcefully indicates something more than the general supervision of all representatives. Though it may be true that the FAA exercises more supervision in these final phases of manufacture, it appears that the language of general supervision in other FAA orders is the only real substantive supervision.

B. Individuals Who Are Not Designated “Representatives”

There are other individuals who are not labelled “representatives” by the regulations. These individuals, however, do serve in a capacity whereby the FAA relies upon their expertise, and their certification is required. The only remaining delegable FAA authority which deals with the evaluation of individuals is that of pilot schools. These delegatees must be described as quasi-representatives because they are not described as designated “representatives” by regulation.  

The authorization to test establishes high minimum standards for schools and individuals who apply to certify pilots; however, this testing does not really offer much in the way of direct FAA supervision. Though the number of test failures or accidents involving graduates of a particular pilot school would serve as a testament to the quality of the curriculum, there is no way of proving the relationship between a student’s weakness in an area of

parts manufacturer approval, a production certificate, or a technical standard order authorization are eligible to utilize DMIR’s. FAA Order No. 8130.2A para. 70(b).

36 Id. at para. 74(c).

37 See 14 C.F.R. pt. 141 (1976). The FAA Order explaining the requirements and duties is No. 8420.3. The testing of pilots for certification is somewhat objective, however, since it is contingent upon the passing of a standard written test. The subjective element in the testing is revealed in the practical application by means of the flight testing. Passing of the written test, prepared by the FAA, and reasonable aptitude in actual flight, as determined by flight maneuvers described by the FAA, does not provide great latitude in the granting of pilot certificates. The teaching of flying is through “flight instructors,” described in 14 C.F.R. pt. 61(G) (1976), and requirements as to their duties are found in FAA Order No. 8420.1B.
study by a subsequent accident or incident resulting from what appears to have been a test deficiency in that area.

Other individuals not designated "representatives" in 14 C.F.R. Part 183, but yet requiring "certification", are listed in 14 C.F.R. Part 65. However, this "certification" is not synonymous with the designation of a representative capacity because some may be full-time employees of the FAA, a manufacturer, repair station, or generally independent.

Those individuals serving in a technical-manufacturing function are also cloaked with FAA authority, and yet not designated "representatives" by regulation. FAA supervision of such individuals can only be accomplished by their willing adherence to FAA-provided minimum standards for mechanical parts and servicing. This is best seen where, in addition to the issuance of production certificates, the FAA also issues Parts Manufacturer Approvals and Technical Order Authorization. Since the manufacturer of aircraft parts must warrant to the FAA that maximum standards established by the FAA have been met, only the quality of the manufacturer's complete testing would disclose any latent defects.

Delegated responsibility regarding the maintenance, preventive maintenance and alterations for all certificated holders is set forth in Subpart L of 14 C.F.R. Part 121. Section 601 empowers the

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88 Subpart B—Air Traffic Control Tower Operations; all are FAA employees and therefore defended by the United States, even when sued personally.

89 Subpart C—Aircraft Dispatchers; Subpart D—Mechanics; Subpart E—Repairmen.

40 Subpart D—Mechanics; Subpart E—Repairmen.

41 Subpart E—Repairmen (qualified to perform maintenance on aircraft components).

42 Subpart F—Parachute Riggers are generally independent.

43 Issued for the production of modification and replacement parts for a type certificated product. Regulations governing persons holding one of these are contained in 14 C.F.R. pt. 21(K) (1976).

44 Issued for the production of materials, parts and appliances for which performance standards have been established in 14 C.F.R. pt. 37 (1976). In substance, the FAA approves the manufacturing facilities and quality control systems of the holders of Parts Manufacturing Approvals and Technical Standard Order Authorizations for the manufacture of materials, parts, or appliances. The applicable FAA Order is No. 8150.1, and the general effect of it allows the manufacturer to personally certify that the applicable standard has been met.

NEGLIGENCE OF FAA DELEGATES

Administrator to prescribe reasonable rules and regulations for inspection, servicing and overhaul, including examinations and reports by properly qualified private persons accepted by the FAA in lieu of those made by its officers and employees.

Under section 605 each air carrier is charged with the duty of making, or causing to be made, all inspections, maintenance, overhaul, and repair of equipment. The requirements as to maintenance, preventive maintenance, rebuilding, and alteration are found in 14 C.F.R. Part 43, with the persons authorized to perform the same provided for in Part 43.3. The holders of these certificates are subject to maintenance certification procedures, whereby they are examined by an FAA inspector in order to determine whether such persons are capable of making repairs or alterations. It appears that after the FAA's initial determination of capability, there is little more than indirect supervision of these certificate holders.

II. THE FEDERAL TORT CLAIMS ACT (FTCA)

The FTCA definition of a federal employee includes officers or employees of any Federal agency, members of the mili-

45 continuous airworthiness maintenance program, reflect the duties and responsibilities imposed on air carriers under Title VI of the Federal Aviation Act, and do not constitute a delegation of the Administrator's authority to the air carrier under § 314 of the Act, 49 U.S.C. § 1355 (1970).

46 These include the holder of a mechanic certificate (14 C.F.R. pt. 65(D) (1976)), holder of a repairman certificate (id. at pt. 65(E)), a person working under their direct supervision, the holder of a commercial operator certificate, and the holder of a pilot certificate (for an aircraft not used in air carrier service, and a manufacturer).

47 This is in accord with FAA Order No. 8310.4A. Additional guidelines for such inspections are found in the 8300 series of FAA Orders: (1) No. 8300.2A—Maintenance Data Analysis Program; (2) No. 8300.4—Maintenance Division—General Practices and Procedures. The general performance rules for repairs and maintenance are found in 14 C.F.R. § 43.13 (1976) and are expanded upon in FAA Advisory Circular 43.13-1, and FAA Advisory Circular 43.13-2. The guidance for an FAA inspector in determining the quality to repairs and maintenance are found in FAA Order No. 8320.7. In addition to the 8320.7 surveillance procedures, other maintenance review requirements are found in FAA Order No. 8330.1 and FAA Order No. 8340.1A. The testing of a mechanic is provided for in FAA Order No. 8310.5A. In substance, repairman certificates are generally only issued to specialists in parts, systems, or units, such as radios, radar, etc. In comparison, a mechanic requires broader knowledge as to the entire aircraft, engine, etc., and would therefore appear to have greater license in making repairs based on his judgment, rather than through procedures provided by the manufacturer of a unit.

48 As there was for the representative listed in 14 C.F.R. pt. 183 (1976).
tary or naval forces of the United States, and persons acting on behalf of a Federal agency in an official capacity, temporarily in the service of the United States, whether with or without compensation.\textsuperscript{49}

Both the language of the statute and use of the word "employee" in legal comments seemingly include a wide variety of personnel.\textsuperscript{50} The paucity of legal writings treating the question of who is a federal employee, and more importantly, what private persons could be considered employees, initially favors the position that merely entrusting a person with some duty indicates employment status.\textsuperscript{51}

The FTCA is limited by the doctrine of \textit{respondeat superior},\textsuperscript{52}

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50 The FAA Tort Claims Handbook, FAA Order No. 2250.1A (Jan. 23, 1969), repeats the definition almost verbatim in ch. 1, at § 1(e): "Includes officers and employees of the agency and persons acting on behalf of the agency in an official capacity, temporarily or permanently in the service of the agency, with or without compensation."

51 Such is seen in an early analysis of the FTCA in Gottlieb, \textit{The Federal Tort Claims Act—A Statutory Interpretation}, 35 GEO. L.J. 1 (1946), in which it was reasoned that "volunteers" would probably not be considered employees. The article expresses the opinion in note 36 that the FTCA would probably exclude tort claims arising out of the activities of persons volunteering their services in aid of Federal Bond drives, inasmuch as such persons act in their private rather than an official capacity and can produce no papers of appointment by the United States. Thus, the article ascribes the traditional significance to receipt of "papers" or other certificate from the United States as previously noted. However, the employee requirement would be strictly construed, by the doctrine of \textit{respondeat superior}. See, e.g., McSwain v. United States, 422 F.2d 1086 (3d Cir. 1970); Frazier v. United States, 412 F.2d 22 (6th Cir. 1969); Witt v. United States, 319 F.2d 704 (9th Cir. 1963); United States v. Taylor, 236 F.2d 649 (6th Cir. 1956), \textit{cert. dismissed pursuant to stipulation}, 355 U.S. 801 (1957); King v. United States, 178 F.2d 320 (5th Cir. 1949), \textit{cert. denied}, 339 U.S. 964 (1950). Such strict construction would not, however, mean that only a person officially on a federal payroll can come within the definition of a federal employee. Martarano v. United States, 231 F. Supp. 805, 807 (D. Nev. 1964). Even compensation or use of a government vehicle would not necessarily qualify a person as an employee of the United States. Harris v. Boreham, 233 F.2d 110 (3d Cir. 1956); Fries v. United States, 170 F.2d 726 (6th Cir.), \textit{cert. denied}, 336 U.S. 954 (1948).

52 United States v. Campbell, 172 F.2d 500 (5th Cir. 1949), \textit{cert. denied}, 337 U.S. 957 (1949). The word employee is to be read as having the same general meaning in the act as the term "servant" has in the doctrine. Brucker v. United States, 338 F.2d 427, 430 (9th Cir. 1964) (in which the court ruled that an Army sergeant club member was not a government servant simply because the government encouraged the activity and derived benefit from it); United States v. Holcombe, 277 F.2d 143, 146 (4th Cir. 1960); Strangi v. United States, 211 F.2d 305
and the employment status is probably a federal question. Difficulties arise in judicial determinations of whether an individual is an employee or an independent contractor. The courts examine the "total situation" in order to apply the customary agency guidelines to determine the existence of control, and the "primary emphasis" is the control exercised "in the day to day performance" of his work. Though it is a general statement laced with exceptions, the degree of control exercised by the United States over the person in the performance of his duties is considered to be the primary factor in determining whether an individual is an employee.

While the "right to control," coupled with the certification given by the FAA, appears to delegate binding FAA authority, a study of the cases dealing with the doctrine of respondeat superior indicates that even where the enabling statute specifically calls for "delegation," such delegation does not include liability for the negligent acts or omissions of the delegates. The significance of the word "delegation" is illustrated in Maryland v. U.S. where the Supreme Court held that under the National Defense Act the Secretary was merely authorized to "designate" the person to employ a caretaker, and the caretaker should not have been considered as directly employed by federal authorities. The Court stated that a construction of the National Defense Act in United States v. Holly was not supported by the legislative history.

(5th Cir. 1954); Thomas v. United States, 204 F. Supp. 896 (D. Vt. 1962); Restatement (Second) of Agency § 220 (1957).

United States v. Becker, 378 F.2d 319 (9th Cir. 1967); Blackwell v. United States, 321 F.2d 96 (5th Cir. 1963); United States v. Hainline, 315 F.2d 153 (10th Cir. 1963); Pattno v. United States, 311 F.2d 604 (10th Cir.), cert. denied, 373 U.S. 911 (1962); Courtney v. United States, 230 F.2d 112 (2d Cir. 1956); But see Buchanan v. United States, 305 F.2d 738 (8th Cir. 1962); Fries v. United States, 170 F.2d 726 (6th Cir.), cert. denied, 336 U.S. 954 (1948).

Strangi v. United States, 211 F.2d 305 (5th Cir. 1954).


Liability of the United States for negligence of a government employee is determined by the law of respondeat superior of the state in which the act or omission occurred. Williams v. United States, 350 U.S. 857 (1955); McSwain v. United States, 442 F.2d 1086 (3d Cir. 1970).

381 U.S. 41, 50 (1965).

192 F.2d 221 (10th Cir. 1951).
In *Holly* the circuit court was also concerned with the statute\(^1\) which authorized the employment of caretakers for the care and maintenance of National Guard materials. National Guard regulations delegated authority to Adjutants General to employ caretakers at pay and with benefits established in the regulations. The circuit court noted that the federal statute created the position and generally outlined the duties, that the pay was from federal funds, and stated that the "federal government maintains a reasonable measure of direction and control over the method and means of a caretaker’s performing his service."\(^2\) The *Holly* court compared its reasoning with that in *Williams v. United States*\(^3\) where National Guard members were held to be in state service and therefore not employees of the United States until activated. The *Holly* court thus ruled that where an individual was acting in the course of his employment as a caretaker of United States property, "as contemplated by the foregoing statutes and regulations," such an individual was an employee of the federal government.

In reversing the opinion in *Holly*, the *Maryland* Court ruled that a person employed as a maintenance officer by the National Guard and who was a National Guard pilot on the weekend was an employee of the State of Maryland and not a Federal employee within the FTCA, regardless of whether he was functioning as a pilot or as squadron maintenance officer. This reasoning seemingly supports the position that FAA delegates are not Government employees because, though not State employees, they are either self-employed or employees of a manufacturer of repair stations.

Though a more convincing argument for some quasi-employment status can be made when the statute speaks of "delegation," employment status is actually non-existent. The cases concerning the doctrine of *respondeat superior* do not rest upon the language of the agreement creating the status, but upon the terms of the relationship by which there is a retention of agency control. Even the retention of some degree of control by the FAA, either through certification of individuals after testing, general supervision,\(^4\) sup-

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\(^2\) 192 F.2d at 223.  
\(^3\) 350 U.S. 857 (1955).  
\(^4\) In *Logue v. United States*, 412 U.S. 521 (1973) the Supreme Court noted
ploying of testing materials, spot checks, or detailed instructions, would not give the degree of control necessary to refute the argument of independent contractor status. Certification by the FAA simply cannot provide sufficient control.

As was indicated above, 14 C.F.R. Part 183 specifies the designations for which certification as FAA "representatives" is required. Other individuals not designated "representatives," but yet requiring "certification" for FAA approved work, are listed in C.F.R. Part 65. Neither judicial language nor legal treatises indicate that the individuals who are delegated authority by the statute should be treated any differently for the purpose of FAA representation. The small number of cases dealing with the matter of FAA certificate-holders have spoken only of "certification," indicating that the possession of the certificate would be the basis of any vicarious liability. Whether a holder of a repairman certificate would be considered an employee of the United States was discussed, but not answered, in Kropp v. Douglas Aircraft Co., Marival, Inc. v. Planes, Inc., and Gibbs v. United States. Case treatment of certificates, licenses, and similar authority indicates that much more than the fact that the acts or omissions occurred under the certified authority would be required to render the United States liable for negligent acts or omissions of certificate holders. This can be seen in Lavitt v. United States in which the court said that it would be "stretching" governmental responsibility too far merely because the United States required a conditional certification or

the power to control detailed physical performance of a contract as the critical factor. Even though the contract required compliance with the Federal Bureau of Prisons' rules and regulations which prescribed the standard of treatment, the control was insufficient. In Kropp v. Douglas Aircraft Co., 329 F. Supp. 447 (E.D.N.Y. 1971), the court stated that "such general supervisory power without more, is the hallmark of the independent contractor relationship." But see Matarano v. United States, 231 F. Supp. 805 (D. Nev. 1964) (held Federal employee because of "direct supervision" of all operations); Delgado v. Akins, 236 F. Supp. 202 (D. Ariz. 1964).

An independent contractor is not an employee of the Government and recovery cannot therefore be had against the United States for his negligent acts. United States v. Page, 350 F.2d 28, 34 (10th Cir. 1965) and cases cited therein.


177 F.2d 627, 630 (2d Cir. 1949).
approval before making a loan, and *Haynes v. United States* where an individual licensed by the Department of Agriculture was found to be neither an employee of a federal agency nor a person acting on behalf of a federal agency in an official capacity. Basic considerations in this conclusion were that the individual's application for employment was to the state, payment was by the state, and the state determined his hours of work and overtime.73

### III. INDEPENDENT CONTRACTORS

The absence of any clearly defined rule74 regarding the relationship created between a federal agency and individuals has been acknowledged by numerous courts; however, no reported decision has either ruled on FAA delegation of authority to private individuals or United States tort liability for the acts of private individuals having no contractual relationship with the federal agency involved or not employed by an employer having such a contractual relationship.74 An early approach to the question of governmental

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74 Compare Dushon v. United States, 243 F.2d 451 (9th Cir. 1957), cert. denied, 355 U.S. 933 (1958) (employee of independent contractor had to take an exam as to rules for operating on government-owned railroad track and acquire a certificate of examination, the court ruling it was not a permit for operation, but a means of identifying that such person appeared qualified to operate a railroad car), with Fisher v. United States, 356 F.2d 706 (6th Cir. 1966), cert. denied, 383 U.S. 819 (1966) (holder of a star mail contract ruled an independent contractor).

73 In *Strangi v. United States*, 211 F.2d 305, 307 (5th Cir. 1954), the court saw the distinction between the master-servant and independent contractor relationships as lying "largely in the degree of control or right of control," but avoided deciding the issue by stating that there was no definite or absolute rule.

74 An exception to the rule vitiating liability for the acts of an independent contractor is occasionally seen when a public franchise is involved. In these cases, tort liability of even carefully selected independent contractors may be transferred to the contractor's individual or corporate employer. These situations normally arise when the individual or corporation can lawfully carry on its activity only under a franchise by public authority which involves an unreasonable risk of harm to others. See *Restatement of Torts*, §§ 416-25 (1934), cited in *Venuto v. Robinson*, 118 F.2d 679 (3d Cir.), cert. denied, 314 U.S. 627 (1941) (a case involving carriage by truck); *American Transit Lines v. Smith*, 246 F.2d 86 (6th Cir. 1957), cert. denied, 355 U.S. 889 (1957), wherein the court cited Ohio case law for the proposition that "the holder of a public franchise cannot, by employing an independent contractor, delegate its duties under the franchise so as to absolve itself." See also *Proctor v. Colonial Refrigerated Transp., Inc.*, 494 F.2d 89 (4th Cir. 1974). Admittedly, a public franchise is much like an FAA certificate in that both constitute a license to operate; however, in the public franchise situation, it would simply be a question of whether a contractor can
responsibility is illustrated in *Lavitt v. United States.* In that case, action was brought under the FTCA to recover damages from the United States for the burning of a potato warehouse through the alleged negligence of three potato inspectors who were claimed to have been United States employees. The circuit court held that since the inspectors were appointed by a local committee in connection with a federal loan, no action could be maintained under the FTCA. The local committee was not a federal agency and the inspectors appointed by them were not persons acting on behalf of a federal agency within the meaning of the statute. The Court found an absence of federal authority, not only in selection of personnel, but also regarding fee authorization. As to the committee, the court ruled that,

Its employees or officers were not and could not be selected by the United States or the Department of Agriculture, or discharged by either. . . . Here the government had only a remote interest in the amount of the inspection fees. These fees were really paid by the borrower . . . but all fees only indirectly affected the United States. . . . The absence of the ultimate control of the United States—to hire and fire—was undoubtedly the compelling factor in the decision. It is questionable whether a present decision involving the FTCA would allot the same significance to the factors considered by the *Lavitt* court, but the reasoning of later decisions seemingly leads to the same conclusion. Absence of control has been found in a legion of cases which have shown an assortment of constraints

avoid tort liability by delegation of its franchised responsibility, whereas in the FAA situation, the statute specifically provides for such delegation, and the FTCA does not expressly extend its coverage to such employees. *See Kropp v. Douglas Aircraft Co.*, 329 F. Supp. 477 (E.D.N.Y. 1971), where the court found “that the Government failed to provide Kropp a safe place to work, which duty is not delegable. . . .” (emphasis added), thereby indicating a duality, i.e., tort liability for non-delegable duties, and absence liability where delegation is expressly allowed.

75 177 F.2d 627, 630 (2d Cir. 1949).

76 “Federal agency,” under the FTCA, 28 U.S.C. § 2671 (1970) includes the executive departments and independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

77 *See, e.g.*, Gowdy v. United States, 412 F.2d 525 (6th Cir.), *cert. denied*, 396 U.S. 960 (1969) (reservation of right to inspect work performed by independent contractor did not impose duty of inspection or control on the gov-
inhibiting the degree of independence possessed by those individuals who have been delegated FAA authority. Expressions of independence are found in the performance of work with individual labor and equipment, and on non-federal premises. In addition, there is no government compensation, and the services contracted for are obtained by the owner of the aircraft or aircraft part. Though inspections are performed in accordance with FAA standards, the FAA has no control over the details of the work, nor is there positive control and direction.78

The independent contractor relationship may be limited when the government is interested in more than a finished product and concerns itself with the method and means by which the finished product is developed.79 FAA delegation to private persons is based

78 For the traditional restrictive concept of sovereign immunity, compare the role of state licensed motor vehicle inspection stations. Their immunity is derived from the rule that sovereign immunity applies not only to the state itself, but to those agencies through which the state acts. See 57 Am. Jur. 2d, Municipal, School, & State Tort Liability § 24 (1971).

79 In Kropp v. Douglas Aircraft Co., 329 F. Supp. 447, 468-69 (E.D.N.Y. 1971), the court used those very words and stated that "[a] master-servant relationship is not created merely because the work being done is subject to the
on the choice of qualified examiners and inspectors upon whom the FAA can rely, unless subsequent review calls into question the quality of their work. For the very reason the legislative history of Section 314 of the Federal Aviation Act of 1958 provided for delegation—the lack of FAA manpower—this delegation cannot be coupled with constant direction and inspection.

Though the performance of work in accordance with federal regulations lends additional control to strengthen the relationship and arguably clarify government tort liability, regulations are merely an additional consideration. Regulations are normally found, and are the subject of judicial language, when there is a contract between the government and a contractor. The question of the extent of government tort liability as to employees of the contractor or third-parties then arises. Even without basing federal liability on the existence of a contract between the government and a contractor, a plausible argument could be made to base liability on direction, inspection and acceptance of a Government-appointed officer. Accord, Hopson v. United States, 136 F. Supp. 804 (W.D. Ark. 1956); cf. Cannon v. United States, 328 F.2d 763, 766 (7th Cir. 1964).

The "indirect supervision" is by means of periodic coaching, spot checking, clinics, and meetings.


However, the existence of the contract, even considered in conjunction with regulations, is generally insufficient grounds for extension of federal tort liability to an independent contractor or third persons; the existence of affirmative control is still required. See Kropp v. Douglas Aircraft Co., 329 F. Supp. 447, 468 (E.D.N.Y. 1971) in which the court agreed that the awarding of a contract to a private person gives the United States only the right of general supervision. See also United States v. Page, 350 F.2d 28, 31 (10th Cir. 1965):

The fact that the work and duties of the independent contractor and of his employees originate in a contract, in plans, or in regulations issued by the Government does not create a duty by it to the employees where there was not such an affirmative control and direction by Government officials over the employees or interference in the work of the contractor as to create conditions where there was in fact no independent contractor.

Contrary positions have been taken where additional vestiges of control exist. See Maryland ex rel. Pumphrey v. Manor Real Estate & Trust Co., 176 F.2d 414 (4th Cir. 1949) (contract, detailed supervision, government regulations in manual); Delgado v. Akins, 236 F. Supp. 202 (D. Ariz. 1964) (a person under pay of government, was issued handbook defining under Department of Agriculture, document as to personnel action, identification cards, Motor Vehicle Accident Report Kit).

Liability for warranties as to goods inspected by "representatives" of manufacturers, to whom they are primarily responsible, 14 C.F.R. § 183.29 (1976)
negligent government supervision of a safety program over which it had assumed administration. While this argument can scarcely be labelled specious, it obverts the principles of agency regarding independent contractors, and obliquely shifts responsibility from the party having primary responsibility—those individuals to whom the FAA delegates authority. In the case of those not self-employed, secondary responsibility rests in the employer, further insulating the FAA because of the absence of direct control and supervision.

In Kropp v. Douglas Aircraft Co. the plaintiff claimed that the government was liable for an air crash because of its failure to effectively supervise and control a private contractor's training and flight crew selection, and its failure to effectively supervise the maintenance and inspection of the aircraft while it was bailed to the contractor. As indicated by the instructive opinion of Kropp, or for those individuals requiring certification, 14 C.F.R. pt. 65 (1976), is avoided because the FTCA "does not by its terms include liability imposed by other doctrines having their origin in warranties, in product liability, or in absolute liability." United States v. Page, 350 F.2d 28, 33 (10th Cir. 1965). In Page, the court ruled that the United States would not be liable as the supplier of molds to an independent contractor when the molds were manufactured and used only by the contractor, were never out of its possession and were used in its own plant where the contract was being performed. The position of the FAA, especially without any contract, and being neither the supplier nor the manufacturer, fails to support an agency basis for the negligent acts or omissions of a manufacturer.

Where there is a contract, the United States is said to owe a duty to see that adequate precautions are taken by the independent contractor. Jones v. United States, 399 F.2d 936 (2d Cir. 1968). The government also has the right to prescribe safety requirements in addition to any set out in a contract. See United States v. Page, 350 F.2d 28, 30 (10th Cir. 1965) which said that even where a contract exists, the fact that the contract may have reserved to the United States the right to inspect the work and facilities of the independent contractor, and the right to stop the work, does not in itself override or alter the general rule of non-liability for the torts of the contractor because no duty is created to employees or third parties. This includes the reservation to inspect for the adherence to contract safety provisions.

See also Shippey v. United States, 321 F. Supp. 350 (S.D. Fla. 1970), in which the court found no significant control over the day-to-day Inspection Service.

Such as a manufacturer's designated representative.

Cf. Grogan v. United States, 341 F.2d 39 (6th Cir. 1965) in which the claim was based on the government's failure to inspect scaffolding used by an independent contractor; though the government had reserved the right, no duty had been created.

the United States is entirely free of liability when it has a contract with a private contractor specifying general rights of supervision and control over the work, including: obligations to comply with federally-established safety standards; when material and workmanship is subject to government approval; the dates of periodic government inspections; when the government may stop work in the public interest or when safety measures are not being observed; or when a large government safety program with special training for the contractor's employees is involved. It stands to reason that in the absence of a contract with the FAA there would be no greater liability on the part of the United States for the negligence of FAA representatives.

The bulk of the cases cited herein concern work done for the government, under contract, for which tort liability to employees of independent contractors or to third parties will not lie. The reasoning of those decisions seems entirely applicable, to preclude federal liability on the basis of the FAA's right to inspect and approve aircraft and parts when a third party aircraft owner or passenger is injured, even if aircraft and aircraft parts production and repair are considered "inherently dangerous." Just as the

88 Using as examples the standards appearing in Air Force technical orders or those required by a United States Contracting Officer, citing Craghead v. United States, 423 F.2d 664 (10th Cir. 1970); United States v. Page, 350 F.2d 28 (10th Cir. 1965); Roberson v. United States, 382 F.2d 714 (9th Cir. 1962); Bailey v. United States, 291 F. Supp. 800 (W.D. Okla. 1968).
89 Strangi v. United States, 211 F.2d 305 (5th Cir. 1954).
90 Yates v. United States, 365 F.2d 663 (4th Cir. 1966); Blaber v. United States, 332 F.2d 629 (2d Cir. 1964); Galbraith v. United States, 296 F.2d 631 (2d Cir. 1961).
91 Lipka v. United States, 369 F.2d 288 (2d Cir. 1966), cert. denied, 387 U.S. 935 (1967); Strangi v. United States, 211 F.2d 305 (5th Cir. 1954).
93 Such reasoning is seen in 1 L. Jayson, Handling Federal Tort Claims, § 162, at 5-173 (1974):
  If the government representatives on the job are negligent in their inspection duties, or fail to require or enforce proper safety measures, or if they are negligent in supervision, it does not necessarily follow that a contractor's employee, injured thereby may obtain recovery against the United States; . . . .

94 See Kropp v. Douglas Aircraft Co., 329 F. Supp. 447, 470 (E.D.N.Y. 1971), stating that "The better and more widely accepted rule appears to be that the 'dangerous instrumentality' principle has no place in actions brought under the
government should not be held liable under the FTCA simply because of its ownership of dangerous property, more should be required than the existence of negligence by a party who possesses "ownership" of an FAA certificate. Although the plaintiff contended in *Kropp v. Douglas Aircraft* that the duties of the Government were "inextricably intertwined" with those of the private contractor (aircraft manufacturer), the court found that the function of Navy personnel was to *review* the contractor's performance, and that the government did not select ground or flight personnel, reserving only the right to approve proposed flight personnel. Thus, the court in *Kropp* found a situation quite similar to that where the FAA selects delegates.

Further similarity is found in *Kropp* concerning maintenance, repair and inspection; the Navy there merely provided spot review of the work of the contractor after it had been "certified" by the contractor's inspectors. Much like the indirect interest of the FAA in the contract of delegates as private contractors with third parties, the court in *Kropp* further found that the government had not assumed control over performance by the contractor, and that it was not the duty of the Navy to train or assign any personnel as to its aircraft constructed by and bailed to the contractor. The court's language seemingly supports by analogy the FAA position that it is too far removed from direct supervision and control over the activities of its delegates to be liable for their negligent acts and omissions.

Since this article has indicated that under the traditional concept of *respondeat superior*, the FAA should not be liable for the negligent acts or omissions of independent contractors, the question arises as to the outcome in those cases in which negligence of FAA

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90 Id. at 471.
91 Id.
92 The *Kropp* court also noted a "small ratio" of Navy inspectors accepted the certification of the contractor's inspectors without "physically checking" the work. *Id.*
93 The absence of government liability would make the possession of insurance for FAA certification advisable. The response to this suggestion is that such insurance is either unavailable or prohibitively expensive.
delegates may have been alleged but not responded to by the court.\footnote{100} When the question involves the behavior of a single delegate, such as a medical examiner, pilot examiner, or certificated mechanic, it can be summarily responded to on the basis of the independent contractor doctrine. However, on certain occasions inspections by delegates have been directly approved by FAA personnel, thereby mixing the alleged negligence of FAA delegates with negligent acts or omissions of FAA personnel. The confluence of these responsibilities has resulted in a failure of the few courts dealing with the combined act to define the differences in positions of the two,\footnote{101} as well as the applicability of the FTCA to these situations.

The liability of the FAA for negligent airworthiness certification has been espoused\footnote{102} on the basis of \textit{Rapp v. Eastern Air Lines, Inc.}\footnote{103} and would gain modest support from the citation of \textit{Rapp} in \textit{Arney v. United States}.\footnote{104} The argument on behalf of government liability in certification could traditionally only be argued from the point of view of the employment relationship, and thus becomes somewhat abstruse when passing from the acts or omissions of FAA

\footnote{100} The lack of court response may be attributed to the plaintiff's contributory negligence, a failure of proof as to defendant's negligence, or a finding of negligence on other grounds.

\footnote{101} Compare \textit{Arney v. United States}, 479 F.2d 653 (9th Cir. 1973) (in which the "government inspector" referred to was an FAA employee) with \textit{Gibbs v. United States}, 251 F. Supp. 391 (E.D. Tenn. 1965) (involving the possible negligence of "an inspector employed by the FAA," and "two independent inspectors, who were not employed by the Government") and \textit{Marival, Inc. v. Planes, Inc.}, 306 F. Supp. 835 (N.D. Ga. 1969). In \textit{Marival}, the court equated an "authorized inspector" (non-FAA) with a "Government inspector," but escaped a final conclusion on the subject by stating: "\[W\]e feel that the question of whether the Federal Aviation inspector appointed pursuant to 49 U.S.C. § 1425(b) was an 'employee of the government' within 28 U.S.C. §§ 1346(b), 2671, is not appropriate for decision at this time . . . ." 306 F. Supp. at 857. \textit{But cf. Emelwon, Inc. v. United States}, 391 F.2d 9 (5th Cir.), \textit{cert. denied}, 393 U.S. 841 (1968), in which the court concluded that the United States could be held liable under Florida law for the negligent spraying by aircraft of an independent contractor.


\footnote{104} 479 F.2d 653, 658 (9th Cir. 1973): "The purpose of the certification of aircraft under the 1958 Act and regulations was to reduce accidents, and the government may be liable for negligence in improper issuance of a type airworthiness certificate" (citing \textit{Rapp}, emphasis added).
employees to those of delegates.\textsuperscript{106} A reconsideration of the traditional view has not indicated any reason other than certification to explain why liability for those aviation functions generally overseen by the FAA\textsuperscript{106} should stand on any different footing than the work of any other independent contractor.

The dividing line for potential federal tort liability clearly should be the negligent acts and omissions of FAA employees, which normally take place only in the type certification process; even then liability is subject to the misrepresentation exception found in the FTCA. The confluence of FAA employee and FAA delegate responsibilities may on occasion make it a difficult factual matter to separate the action or inaction of the two, but ordinarily the inspection and approval by an FAA employee is easily discernible. This difficulty is not really met in either Gibbs or Rapp, since both involved the act of FAA employees only, though in the former the source of any negligence was not clear cut. In Gibbs, the aircraft design data for proposed aircraft modification was evaluated by an FAA employee and additional data was requested by the FAA. Two certificated mechanics certified that the alterations were in accordance with the regulation. This homogeneous activity raises serious questions concerning the quality of the FAA employee's participation.\textsuperscript{107} In Arney the inspector involved was an FAA employee, and summary judgment was found inappropriate since there would have to be a determination of whether the FAA inspector had been negligent.

The only case dealing with the acts of an FAA designee, without

\textsuperscript{106} None of the cases dealing with airworthiness or type certification attempt to refute the independent contractor doctrine, but seemingly attempt to link the negligent conduct of a certificate holder with the operational negligence of an FAA employee. The government did not assert the misrepresentation exception of the FTCA [28 U.S.C. § 2680(h) (1970)] as to the issuance of a certificate in Gibbs or Rapp, but was successful with it in Marival.

\textsuperscript{107} These functions include airworthiness repairs, mechanical work, or maintenance.

\textsuperscript{107} The court acknowledged the mixed activity and by implication questioned the behavior of both: "Thus, we have . . . two independent inspectors, who were not employed by the Government, approving the modification of the aircraft, and . . . an inspector employed by the FAA who approved the data attached. . . ." (emphasis added). 251 F. Supp. at 399. In addition, the court found fault with the FAA for its improper coordination and laxity in returning the aircraft to service. \textit{Id.} at 400. However, as noted above, the defense of misrepresentation was not alleged by the United States.
the possible contributory negligence of an FAA employee, is *Marival, Inc. v. Plaines, Inc.*\(^8\) In that case it was alleged by the third-party complainant that an "authorized inspector" negligently made an annual aircraft inspection and negligently certified its airworthiness. The government successfully defended, but the court failed to answer the question of whether such a delegate was a federal employee.\(^9\) In the court's citation of the traditional cases concerning the independent contractor doctrine there is little doubt that its answer would have been that although the FAA had the right of general supervision and control, it did not possess the "degree of control" over the details of the work required to make it responsible under the principles of agency law. Thus, the court recognized the significance of the "employee" status and, by implication, indicated that United States liability for the acts of FAA delegates must stand on different footing from the acts of FAA employees. There is no indication from subsequent case law that the United States must be considered an insurer for the negligence of its certificate holders.

**ADDENDUM**

Subsequent to completion of this article, the Supreme Court returned its decision in *United States v. Orleans,*\(^11\) responding to the question of whether a community action agency funded under the Economic Opportunity Act of 1964 was a federal instrumentality or agency for purposes of FTCA liability. On one of the recreational outings sponsored by the community action agency receiving financial assistance from OEO, one of the children riding in a private automobile was injured, and the parent filed suit under the FTCA. The district court found that the agency had been created for the purpose of carrying out the community action programs contained in the act, funds were not received from any source other than OEO, and OEO closely supervised the agency and its activities. Nevertheless, the community action agency was not an

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\(^{10}\) The court did not believe that the question of whether he was an "employee" of the Government within 28 U.S.C. §§ 1346(b) and 2671 (1970) was "appropriate for decision" on either a motion to dismiss or a motion for summary judgment. 306 F. Supp. at 857.

\(^{11}\) 96 S. Ct. 1971 (1976).
instrumentality of the United States, nor were its employees federal employees.

The 6th Circuit Court of Appeals reversed the District Court, basing its decision on the funding and voluminous regulations of OEO. A contrary opinion by the 8th Circuit in *Vincent v. U.S.* caused the review by the Supreme Court. The court stated that:

The Tort Claims Act was never intended, and has not been construed by this court, to reach employees or agents of all federally funded programs that confer benefits on people.

The Court cited *Logue v. United States* in noting that the power "to control the detailed physical performance of the contractor" is the critical element in distinguishing an agency from a contractor. In referring to a contractor involved in a grant-in-aid program, who must comply with federal regulations, the court carefully avoided any suggestion of liability by the respective agency noting that:

the regulations do not convert the acts of entrepreneurs . . . into federal government acts. (cases cited)

. . .

The regulations do not give the Office of Economic Opportunity power to supervise the daily operation of a community action agency or a neighborhood program.

The Supreme Court thereby reasoned that:

To convert the local executors of a locally planned program or project which receives conditional federal funding into federal employees distorts well-established concerts of master and servant relationships and extends the meaning of the Federal Tort Claims Act beyond the intent of Congress.

The *Orleans* case would thereby strengthen the classical concept of independent contractor status and similarly refute the position that FAA designees should be considered employees of the United States within the meaning of the FTCA.

111 513 F.2d 1296 (8th Cir. 1975).


114 96 S. Ct. at 1977-78.

115 Id.