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THE LIABILITY OF THE UNITED STATES FOR NEGLIGENT INSPECTION - 1983

CHARLES F. KRAUSE*
JOSEPH T. COOK**

I. INTRODUCTION: THE FEDERAL TORT CLAIMS ACT

Pursuant to the congressionally mandated waiver of sovereign immunity found in the Federal Tort Claims Act (FTCA), the United States can be held liable in tort for injury or loss of property, or personal injury or death caused by 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.

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Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by 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.

Section 2671 states as follows:

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term 'Federal Agency' includes the executive departments, the military departments, 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
ries arising from the negligent acts or omissions of government employees. The FTCA, however, only supplants common law sovereign immunity in the limited manner established by Congress. Therefore, courts have no jurisdiction to hear cases which involve government activity outside the waiver of sovereign immunity provisions found in the FTCA.²

The limitations on the application of the FTCA are numerous. The plaintiff first must make an administrative claim to the agency which allegedly has acted negligently through its employee(s).³ If the plaintiff is denied an administrative settlement, the plaintiff then must plead and prove that a private person could be held liable for the same or similar conduct as that of the United States. Under the FTCA, the United States can only be held liable "in the manner and to the same extent as a private individual under like circumstances. . . ."⁴

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² See Honda v. Clark, 386 U.S. 484 (1967) (holding that although the government is ordinarily immune from suit, when Congress enacted the statutory scheme to return seized enemy assets to United States creditors, it defined the conditions under which such actions will be permitted); Fitch v. United States, 513 F.2d 1013 (6th Cir. 1975) (claim for wrongful induction into the Armed Forces barred by "misrepresentation" exception to Federal Tort Claims Act); Peterson v. United States, 428 F.2d 368 (8th Cir. 1970) (action to recover money damages for deprivation of constitutional rights under fourth and fifth amendments allegedly resulting from illegal and unreasonable search of residence by federal officers was dismissed because plaintiff failed to first present his claim to appropriate federal agency and obtain final denial thereof).


⁴ Id. at § 1346(b), 2674 (1976). For a comprehensive discussion of the peculiarities associated with FTCA litigation, see generally, L. Jason, Handling Federal Tort Claims 1-3 (1980); Silverman, The Ins and Outs of Filing a Claim Under the Federal Tort Claims Act, 45 J. Air L. & Com. 41 (1979).
Specific exceptions to the application of the FTCA are found in Section 2680 of Title 28 of the United States Code.\(^6\)

\(^6\) 28 U.S.C. § 2680(a)-(n) (1976). Section 2680 states as follows:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

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

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

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

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

(k) Any claim arising in a foreign country.

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

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

(n) Any claim arising from the activities of a Federal land bank,
One of these exceptions, the discretionary function defense, protects the United States from claims which are "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee of the government, whether or not the discretion involved be abused." The leading cases on the discretionary function defense are Dalehite v. United States and Indian Towing Co. v. United States.

In Dalehite, the United States was sued for damage that resulted from the explosion of ammonium nitrate fertilizer. The fertilizer had been manufactured for and under the direction of the United States. The plaintiffs alleged that the United States was negligent in using a material in the fertilizer that was known to have explosive properties and in permitting shipment through populated areas. The United States Supreme Court determined that the governmental activity involved decisions which took place at the planning level, and not at the operational level. The Court stated that "[w]here there is room for policy judgment and decision there is room for discretion." Therefore, by applying the discretionary function exception to the case, the Supreme Court held the federal government not liable.

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a Federal intermediate credit bank, or a bank for cooperatives.

Id. 28 U.S.C. § 2680(a) (1976). Section 2680(a) states as follows:

The provisions of this chapter and section 1346(b) of this title shall not apply to any claim based upon an act or omission of an employee of the Government, exercising due care in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

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* 346 U.S. at 23.
* Id. at 18-20.
* Id. at 23.
* Id. at 42.
* Id. at 36.
* Id. at 15.
In *Indian Towing*, the Supreme Court refined the *Dalehite* position by holding that even when activity is uniquely governmental, a breach of duty at the operational level is not protected by the discretionary function defense.\(^{16}\) The *Indian Towing* case arose when a tug towing a barge went aground on an island, damaging the cargo carried by the barge. The grounding was caused by the United States Coast Guard's failure to properly maintain a lighthouse located on the island.\(^{16}\) The plaintiffs sued for property damage alleging that the Coast Guard had not checked the battery for the light and a sun relay switch and that the Coast Guard further had failed to warn mariners that the light was not operating.\(^{17}\) The government's defense was that because no private entity conducted any similar or like activity, the lighthouse maintenance was uniquely governmental and thus protected under the discretionary function exception to the FTCA.\(^{16}\) The Supreme Court rejected the use of this defense, holding that once the government undertakes to provide a service, the service must be provided with due care.\(^{19}\)

A second exception to liability under the FTCA excludes cases arising out of misrepresentation.\(^{20}\) According to the Supreme Court in *United States v. Neustadt*,\(^{21}\) the government will not be liable for damages flowing from any misrepresentation whether intentional or negligent. In *Neustadt*, sellers of a house requested the Federal Housing Administration (FHA) to appraise their home in order to assure that FHA mortgage insurance would be available to a purchaser.\(^{22}\) The FHA inspection disclosed no defects.\(^{23}\) After the Neustadts purchased the home, allegedly relying upon the FHA's "no defect" inspection, cracks appeared in the walls and ceilings of the

\(^{16}\) 350 U.S. at 61.
\(^{17}\) Id. at 62.
\(^{18}\) Id.
\(^{19}\) Id. at 64.
\(^{20}\) Id. at 69.
\(^{23}\) Id. at 698.
The cracks were due to shifting subsoil beneath the house foundation. The Neustadts sued the United States seeking to recover the difference between the true value of the house, when considering the sifting subsoil and the purchase price. The plaintiffs alleged that they "would not have purchased the property for $24,000.00 but for the carelessness and negligence of the [FHA]." The Supreme Court held that the FHA's inspection and certification of no defect was merely a representation and that the misrepresentation exception to the FTCA protected the government from liability.

The discretionary function and misrepresentation exceptions to the FTCA form important governmental defenses. The government asserts these defenses against plaintiffs who sue in tort for damages suffered due to a negligent governmental inspection of an aircraft. This article will focus on the developing law of governmental liability for negligent inspection of aircraft and suggest practical solutions to leading problems.

II. THE FEDERAL AVIATION ADMINISTRATION AND CERTIFICATION OF AIRCRAFT

According to the Federal Aviation Act of 1958, the Administrator of the Federal Aviation Administration (FAA) has a duty to promote safety of flight of civil aircraft by prescribing minimum safety standards governing the designs, materials, construction, and performance of aircraft, aircraft engines, and propellers. Pursuant to that mandate, the Administrator

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24 Id. at 700.
25 Id.
26 Id. at 700-01.
28 Neustadt, 366 U.S. at 702.
30 49 U.S.C. § 1421(a)(1) (1976). Section 1421(a) states as follows:
The Secretary of Transportation is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time: (1) Such minimum standards governing the design, materials, workmanship, construction and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety. . . .
also is empowered to establish regulations regarding the inspecting, servicing, and overhauling of aircraft and their various component parts. Consistent with those duties and powers, the Administrator is authorized to issue certificates for aircraft and their component parts and to require the manufacturers and modifiers of aircraft to fulfill certification requirements prior to the issuance of a certificate.

In order to accomplish the tasks set out by Congress, the Administrator has established various regulations regarding the certification and the inspection of aircraft and component parts. These regulations are found in Title 14, parts 21 and 23 of the Code of Federal Regulations (CFRs). The thrust of the regulations is to require that all airplanes flown with United States registrations meet basic minimum safety standards for design and for manufacture.

Part 21 of the CFRs sets forth the procedures to be followed when the manufacturer of an airplane seeks to obtain the certification necessary for the marketing of his plane. First, the manufacturer must obtain approval of the basic design. This approval will result in a type certificate. Once the type certificate is issued, and a prototype is produced and is shown to meet the FAA's standards, a production certificate may be issued which authorizes the manufacturer to produce numerous airplanes in conformance with the type certificate. Following the issuance of the production certificate, each individual airplane leaving the production line is inspected to determine whether it conforms to the type certificate as authorized by the production certificate. Each plane passing that inspection is then issued an airworthiness certificate.

When a major modification or a substantial change is con-

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Id.

1 Id. § 1421(a)(3).
2 Id. § 1423.
4 Id. § 21.21. "Type certificate" specifies the make and the basic model of aircraft, such as a DC-10, the operating limitations, the certificate data sheet, the applicable regulations with which the Federal Aviation Administration records compliance, and any other conditions or limitations prescribed for the product. Id. §§ 21.21, 21.41.
5 Id. § 21.135.
6 Id. § 21.183.
templated in an airplane that has already been issued an airworthiness certificate, a supplemental type certificate (STC) must be obtained. Approval of an STC application is usually based upon a review of plans and specifications for proposed change and a conformance inspection following the performance of the work involved. In both the manufacture of a new plane (type certificate to airworthiness certificate evolution) and the major modification of an existing plane (STC evolution), the FAA is empowered to perform actual inspections of various phases of manufacture or modification. When an FAA mechanic or engineer inspects a new or modified aircraft and advises the manufacturer or modifier that the plane does not meet some specific standard, the manufacturer or modifier must correct the deficiency or fail in his quest for the appropriate certificate. Conversely, when an FAA mechanic or engineer inspects and approves a product, that approval logically signals an end to further effort by the manufacturer or modifier to satisfy the relevant regulations.

It is clear that the drafting of regulations or the decision not to draft a regulation covering a specific area is within the discretion of the agency concerned. Thus, the failure to have regulations covering certain areas, such as the failure to require upper body restraints on commercial carriers, cannot be the basis for governmental liability because of the discretionary function exception. Similarly, if a regulation exists but can be criticized because it is insufficient, the government is still protected by the discretionary function defense.

Some certification standards and requirements are couched in sufficiently broad language as to permit the manufacturer or the modifier to choose one of several approaches to meet the requirement. Similarly, some standards may be so vague that reasonable persons differ as to whether or not a given

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37 *Id.* § 21.113.
38 *Id.* § 21.115.
40 *Id.*
41 *Id.*
installation or fabrication does indeed meet the requirements. Section 23.954 of Title 14 of the CFRs is such a standard. Section 23.954 requires the following:

The fuel system must be designed and arranged to prevent the ignition of fuel vapor within the system by—(a) direct lightning strikes to areas having a high probability of stroke attachment; (b) swept lightning strokes on areas where swept strokes are highly probable; and (c) corona or streamering at fuel vent outlets.43

When considering this regulation, reasonable persons may differ as to what area in a fuel system has a "high probability of stroke attachment."44 For example, in approving or accepting a fuel system design propounded by a manufacturer or modifier, two FAA engineers exercising their own judgment or discretion, as authorized by the regulations, might arrive at two different determinations. It is the exercise of their judgments that allows the United States to be protected from liability by the FTCA.45

In contrast to the vagueness of Section 23.954, a substantial number of regulations are phrased in precise and measurable language. For example, Section 23.965 of Title 14 of the CFRs requires the following:

Each fuel tank must be able to withstand the following pressures without failure or leakage: . . . (1) for each conventional metal tank and non-metallic tank with walls not supported by the airplane structure, a pressure of 3.5 PSI, or that pressure developed during maximum, ultimate acceleration with a full tank, whichever is greater.46

When considering this regulation, reasonable persons could not differ as to what pressure a fuel tank must be able to withstand. If an FAA mechanic or engineer inspected a fuel tank installation, measured the abilities of the tank to withstand pressures, failed to discover that the installation would

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44 Id.
not stand pressures in excess of 3.0 PSI, and then approved the installation, it would appear that the mechanic's or engineer's inspection was negligently performed.

The distinction to be drawn between the first example and the second example is that in the first, the inspector and the FAA knew that the regulation was not precise and they therefore were exercising their own judgment in granting approval. In the second situation, the inspector, because of his negligence, failed to detect a deficiency. The inspector did not say to himself or to his supervisors, "The tank will not sustain the required pressures, but let's pass it anyway, because it's a good plane." To the contrary, the negligent conduct prevented the detection of the precise and measurable defect. It is the sort of conduct in the second example which is the subject of this article.

III. GOVERNMENT LIABILITY FOR NEGLIGENT INSPECTION

As noted before, in order to establish the liability of the United States under the FTCA, a plaintiff must demonstrate that a private person in like circumstances would also be liable. If a private person in like circumstances has no duty, then the government has no duty. Caution, however, should be exercised in this area. "Like circumstances" does not require that for every governmental activity an identical non-governmental activity exist. Indian Towing Co. v. United States exemplifies this proposition. In Indian Towing the Supreme Court held that the United States Coast Guard had a duty to maintain lighthouses in a non-negligent fashion despite the fact that no private person maintained lighthouses. The Court found that the "private person in like circumstances" standard is broad enough that once the government acts like a private person and undertakes a duty to warn others, and the others rely upon that duty, then the duty must be accomplished in a non-negligent fashion.

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7 Id.
10 Id. at 69.
Recently, a federal court in *United Scottish Insurance Co. v. United States*\(^{61}\) (*United Scottish I*) held that in the area of negligent inspection, the "private person in like circumstances" duty established by the FTCA can be met by the application of the good samaritan doctrine.\(^{62}\) The good samaritan doctrine, stated in Sections 323 and 324A of the Restatement (Second) of Torts, imposes liability on a person who negligently renders a service to another when it is clear that the service is required to protect a person or his things if the recipient of the service relies upon it or if the negligent performance of the service increases the risk of harm.\(^{63}\) Additionally, the doctrine imposes liability when a person renders a service which he should know is needed for the protection of a third person or his things if the negligent performance of the service results in physical harm. Therefore, liability is limited to situations in which the risk of harm is increased, reliance upon the actor is shown, or the actor assumes an obligation owed to a third person by another.\(^{64}\)

\(^{61}\) 614 F.2d 188 (9th Cir. 1979). Following the decision reported at 614 F.2d 188 (9th Cir. 1979), the United Scottish case was remanded for further proceedings. Following those proceedings, judgment was again entered against the United States, and the United States again appealed. The decision in the second United Scottish appeal is reported at 692 F.2d 1209 (9th Cir. 1982). Hereinafter, the first appellate decision at 614 F.2d 188 (9th Cir. 1979) will be referred to as United Scottish I, and the second decision at 692 F.2d 1209 (9th Cir. 1982) will be referred to as United Scottish II.

\(^{62}\) 614 F.2d at 192, 195.

\(^{63}\) *Restatement (Second) of Torts* § 323 (1965) Section 323 provides:

> One who undertakes, gratuitiously, 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.

*Id.*

\(^{64}\) *Restatement (Second) of Torts* § 324A (1965). Section 324A provides:

> One who undertakes, gratuitiously, or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if:
A. History

Before discussing United Scottish I, several cases should be reviewed in which the government faced potential liability under the FTCA for negligent inspection as part of aircraft certification. None of these decisions, however, squarely confronted all of the principal issues. The cases will be discussed in chronological order.

In Bristow v. United States\(^5\) the plaintiffs sued for wrongful death and personal injury damages arising from a plane crash which occurred during takeoff at an air show.\(^5\) The plaintiffs theorized that the government’s failure to inspect the plane was the cause of their injuries.\(^5\) The trial court found that the cause of the crash was pilot error and that the condition of the plane was not a factor.\(^5\) Therefore, the court did not rule upon whether the United States was liable for negligent inspection.\(^5\)

In Gibbs v. United States\(^6\) the district court found that the government had a duty to conduct its inspection and its certification activities in a non-negligent fashion.\(^6\) The court further found that the government had been negligent.\(^6\) The case arose when a local commuter flight crashed, killing ten persons.\(^6\) The suit against the United States alleged negligent inspection and certification of the airline and of the plane that crashed.\(^6\) Although the plane had undergone modifications

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(a) His failure to exercise reasonable care increases the risk of such harm, or
(b) He has undertaken to perform a duty owed by the other to the third person; or
(c) The harm is suffered because of reliance of the other or the third person upon the undertaking.

\(^5\) 309 F.2d 465 (6th Cir. 1962).
\(^6\) Id.
\(^5\) Id. at 466.
\(^6\) Id.
\(^5\) Id.
\(^6\) Id.
\(^6\) Id. at 400.
\(^6\) Id.
\(^6\) Id. at 393-94.
\(^6\) Id. at 394.
and had received an STC prior to the accident, the plaintiffs claimed that the modified airplane was not airworthy. As in Bristow, the court found that the cause of the crash was operator error, not government negligence, so liability did not attach to the United States.

The case of Rapp v. Eastern Airlines arose from the crash of an Eastern Airlines Electra following the ingestion of birds into the engines during takeoff. The case against the government was based upon the fact that the government had issued a type certificate for the airplane attesting to the airworthiness of the plane. The plaintiffs asserted that the government knew, or should have known, that the plane's engines were capable of ingesting birds on takeoff, and the plane was therefore, not airworthy. Although the trial court found in favor of the plaintiffs and against the United States, the matter was appealed to the United States Court of Appeals for the Third Circuit. While the appeal was pending, the United States settled the case, and as a condition to that settlement, the Third Circuit entered an order vacating the judgment below. The final result is that while Rapp is of limited value as authority for the proposition that the government has a duty to inspect in a non-negligent fashion, the government was sufficiently concerned about the issue to settle the case pending appeal and to insist upon an order vacating the judgment below.

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65 Id. at 395.
66 Id. at 400.
68 Id. at 675.
69 Id. at 676.
70 Id. at 679.
71 521 F.2d 1399 (3d Cir. 1970).
72 The Rapp case has led a tortured life, and the district court decision has occasionally been incorrectly cited as having been affirmed on appeal. See, e.g., Arney v. United States, 479 F.2d 653, 658 (9th Cir. 1973). The confused aspect of the case's history springs from the fact that another appeal from the same complex trial was taken under the name of Scott v. Eastern Air Lines, 339 F.2d 14 (3d Cir.), cert denied, 393 U.S. 979 (1968). That case was affirmed by the Third Circuit on issues totally unrelated to negligent inspection and certification. Unfortunately, the Shepard citator lists the Scott case as an affirmance of the Rapp decision.
Marivale, Inc. v. Planes, Inc. involved the buyer and seller of a Cessna 310 aircraft. The buyer asserted against the seller the theories of fraudulent misrepresentation and breach of warranties. The seller brought a third-party action against the United States, alleging reliance upon a federal airworthiness certificate and claiming that if the plane were indeed as bad as the purchaser claimed, the government inspection should have detected the problem areas. The court, distinguishing between a claim for negligent certification and a claim for negligent inspection, granted the government's motion to dismiss. The court held that this was a claim for negligent certification and that the misrepresentation exception to the FTCA applied.

In Arney v. United States the court cited both Rapp and Gibbs for the proposition that the government can be held liable for negligent conduct in certification of aircraft. The jurisdictional basis for the action, however, was the admiralty jurisdiction of the federal courts. As a result, the "private person in like circumstances" limitation of the FTCA did not apply. The case arose following the crash of a twin engine Beechcraft after a long range fuel system had been installed. Following the installation of the fuel system, the FAA inspected the plane and issued a special ferry permit. The trial court granted the government's motion for summary judgment, apparently because the court determined that the plaintiffs were guilty of contributory negligence and thus were barred from recovery. On appeal, the Ninth Circuit reversed

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74 Id. at 856.
75 Id. at 857.
76 Id. at 858-60.
78 306 F. Supp. at 860.
79 479 F.2d 653 (9th Cir. 1973).
81 Arney v. United States, 479 F.2d at 655.
82 Id. at 655.
83 Id. at 656.
84 Id. at 657.
and remanded for further proceedings, concluding in part that the United States can be held liable for negligence in certification cases.

Although the court in *In Re Air Crash Disaster Near Silver Plume, Colorado on October 2, 1980* arrived at a decision similar to the decisions in *Gibbs* and *Bristow*, the court provided a much more thorough discussion of the issue of duty with respect to certification and inspection. The action was a consolidation of seventeen cases arising from the 1970 crash of a chartered Martin 404 aircraft. After a detailed discussion of the facts, the court analyzed the duty aspects of FAA certification in depth. The conclusion of the court was that the FAA does have an actionable duty to perform certification inspections in a non-negligent fashion, and that breach of that duty may be the basis for liability. In that particular crash, however, the court found that the negligent activities of the United States were not the proximate cause of the injuries suffered, and thus liability did not attach.

In *Lloyd v. Cessna Aircraft Co.*, the plaintiff sued an aircraft manufacturer for the death of plaintiff's decedent following a crash. Cessna filed a third party complaint against the United States, seeking contribution or indemnity and alleging negligent certification. Cessna claimed that if the plane was defective, as asserted by the plaintiff, then the government should have detected the defects and prevented Cessna from distributing the product. The court held that any negligent conduct by government employees involved in the inspection was really nothing more than a misrepresentation as to the

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85 *Id.* at 661.
86 *Id.* at 658.
88 *Id.* at 387. The plane was carrying the Wichita State University football team. *Id.* at 393.
89 *Id.* at 388-400.
90 *Id.* at 405-09.
91 *Id.* at 409.
92 *Id.* at 410.
94 *Id.* at 182.
95 *Id.*
true condition of the aircraft involved. Relying on the misrepresentation exception to the FTCA, the court granted summary judgment for the United States.

The last significant reported decision on the issue of negligent inspection/certification prior to United Scottish I is Clemente v. United States. In this case, the famous baseball star, Roberto Clemente was killed when his chartered DC-7 cargo plane crashed shortly after takeoff from Puerto Rico. The plaintiffs alleged that FAA employees acted negligently in failing to properly inspect the plane involved and in failing to warn potential passengers that the plane was not airworthy. In September 1972, the FAA had published an internal order mandating certain inspections in an effort to discourage specific kinds of unairworthy operations. The trial court held that the order established a duty and that its breach constituted negligence. On the issue of liability only, the trial court found for the plaintiffs.

On appeal, the First Circuit focused on the existence of a duty on the part of the FAA to inspect and to warn of unairworthy aircraft. The appellate court held that the internal order did not establish an actionable duty. Curiously, although the appellate court did discuss a variety of air traffic control cases involving the FAA, it did not mention prior certification/inspection cases discussed in this article.

### B. United Scottish Insurance Co. v. United States

The United Scottish case, which included two appellate decisions identified here as United Scottish I and United Scottish II.

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96 Id. at 187.
101 Id. at 566-67.
102 Id. at 568.
103 Id. at 571.
104 Id. at 576.
105 567 F.2d at 1143.
106 Id. at 1145.
107 614 F.2d 188 (9th Cir. 1979).
Scottish II,\textsuperscript{108} revolves around the crash of a twin engine DeHavelland Dove air taxi plane during a flight between Nevada and California. Approximately three years prior to the crash, the plane had been modified with the installation of a gasoline-fueled cabin heater which had been installed in the nose of the aircraft in front of the passenger compartment and below the pilot's cockpit.\textsuperscript{109} Pursuant to the applicable law,\textsuperscript{110} the party installing the heater applied to the FAA for an STC. During the flight the plane caught fire.\textsuperscript{111} The plane crashed, killing all four occupants.\textsuperscript{112} The plaintiffs\textsuperscript{113} alleged and the trial judge found that an FAA employee, while inspecting the heater installation, had negligently failed to detect a defective condition in the installation.\textsuperscript{114} The court further found that the government issued the STC based upon the negligently performed inspection and that the defect, which should have been detected by the FAA inspector, was the proximate cause of the crash.\textsuperscript{115} Judgment was entered against the United States.\textsuperscript{116}

The United States appealed the judgment on several grounds,\textsuperscript{117} but the Ninth Circuit reversed and remanded on

\textsuperscript{108} 692 F.2d 1209 (9th Cir. 1982).
\textsuperscript{109} 614 F.2d at 189-90. Most of the facts of the United Scottish case reported herein can be found at 614 F.2d 188. Additional facts, for the reader's interest, are provided by co-author, Joseph T. Cook, who represented the United States at the first United Scottish trial and during the first appeal.
\textsuperscript{111} United Scottish I, 614 F.2d at 190.
\textsuperscript{112} Id. at 189.
\textsuperscript{113} The plaintiffs included the widows and children of the co-pilot and one passenger, and the children of a female passenger, all suing for wrongful death damages. Additionally, the owner-operator of the plane sued for the value of the plane and loss of its use, and the owner-operator's liability insurance carrier sued seeking to recover indemnification for settlements made to the families of the passengers. Id.
\textsuperscript{114} Id. at 190.
\textsuperscript{115} Id.
\textsuperscript{116} Id. at 189.
\textsuperscript{117} Id. at 190. The government asserted (1) that the plaintiffs had not shown and the court had not found a "private person" liability in any applicable state law to be applied to the United States; (2) that violation of FARs by a government safety inspector is not a basis for liability under the FTCA; (3) that the misrepresentation defense found at 28 U.S.C. § 2680(h) (1976) precludes recovery; and (4) that the court was clearly erroneous in its factual findings regarding the cause of the crash and the owner-operator's contributory negligence. Id. at 190-91.
a narrow basis.\textsuperscript{118} The Ninth Circuit held that there had been no showing during the trial and no determination by the trial court as to how a private person would be liable under like circumstances.\textsuperscript{119} The appellate court stated that because the jurisdictional basis of the FTCA limits the government's liability to situations in which a private person under like circumstances can be held liable, a trial court must find and conclude that a private person \textit{can} be held liable under like circumstances.\textsuperscript{120} The case was reversed and remanded for further proceedings on that question.\textsuperscript{121}

The trial re-opened, further evidence was presented, and briefs were filed relative to the choice of law and the issues of duty and breach of duty. Following that process, the trial court again entered judgment on behalf of the plaintiffs against the United States, holding that the good samaritan doctrine, formulated in sections 323 and 324A of the Restatement Second of Torts,\textsuperscript{122} imposes a duty on a private person under circumstances existing when the FAA inspector negligently inspected the heater installation.\textsuperscript{123} The case was again appealed to the Ninth Circuit in \textit{United Scottish II}.

During the second appeal, the United States asserted that the circumstances required by the good samaritan doctrine were not met in this particular case, that Congress never intended the government to be liable for inspections conducted by FAA personnel as part of the certification process, and that two specific exceptions to the FTCA barred any liability.\textsuperscript{124} The specific exceptions were the discretionary function exception\textsuperscript{125} and the misrepresentation exception.\textsuperscript{126} The Ninth Circuit decision in \textit{United Scottish II} will be discussed with the holding of the consolidated appeal of \textit{Varig Airlines v. United

\begin{itemize}
  \item \textsuperscript{118} \textit{Id.} at 198.
  \item \textsuperscript{119} \textit{Id.} at 195.
  \item \textsuperscript{120} \textit{Id.} at 198.
  \item \textsuperscript{121} \textit{Id.}
  \item \textsuperscript{122} \textit{See supra} text accompanying note 53.
  \item \textsuperscript{123} \textit{United Scottish II}, 692 F.2d 1209, 1210 (9th Cir. 1982).
  \item \textsuperscript{124} \textit{Id.} at 1211.
  \item \textsuperscript{125} 28 U.S.C. § 2680(a) (1976). \textit{See supra} note 5 for the text of section 2680(a).
  \item \textsuperscript{126} 28 U.S.C. § 2680(h) (1976). \textit{See supra} note 5 for the text of section 2680(h).
\end{itemize}
States and Mascher v. United States in Section D.

C. Varig Airlines v. United States; Mascher v. United States

A companion certification and inspection case was heard and decided by the Ninth Circuit at the same time as United Scottish II. The case was actually the consolidation of two filings, Mascher and Varig, arising from the same air crash. The facts of Varig Airlines follow.

In 1973, a Varig Airline flight crash landed in a field just short of its destination. Post-accident investigation revealed that a fire had broken out onboard the aircraft and that it had spread with sufficient rapidity to force the crew to elect to crash land rather than to try to reach the destination airport. The crash landing was successful from a technical sense, and the cockpit crew members escaped uninjured. The remaining crew members and all but one of the passengers were killed, not by crash forces, but by inhalation of toxic fumes and smoke created by the inflight fire.

A post-crash investigation revealed evidence suggesting that the fire had started in the waste paper container located in one of the aft lavatories on the plane. Examination of a presumably identical “sister” airplane in the Varig fleet revealed a metal waste paper container that did not meet the fire containment standards. The civil air regulations that were in

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127 No. 81-5366 (D. Cal. 1982).
128 No. 81-5366 (D. Cal 1982).
129 Most of the essential facts are contained in S. A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines) v. United States, 692 F.2d 1205 (9th Cir. 1982). More detailed information concerning the crash can be found in the Report of the Investigation Committee of the French Republic, as published in the Journal Officiel of the Republic of France on April 6, 1976. A copy of the report is attached to the Mascher plaintiff’s memorandum in support of Varig’s motion to strike affirmative defenses, filed in the United States District Court for the Central District of California in Civil Action No. 79-0914-WPG on October 21, 1978. Additional background has been provided by co-author Joseph T. Cook, who was co-counsel with Robert R. Smiley for the Mascher plaintiffs during the appeal.
130 692 F.2d at 1206-07.
131 Id. at 1207. The metal waste paper container, which was supposed to be able to “contain possible fires,” had numerous holes drilled in it, apparently to accommodate hydraulic lines, electrical wire bundles and plumbing. Id.
effect at the time the plane was manufactured required, with respect to cabin interiors, that "all receptacles for used towels, papers, and waste shall be of fire-resistant material, and shall incorporate covers or other provisions for containing possible fires."  

Varig and survivors of the deceased passengers sued the United States alleging that when the airplane was originally certified after manufacture, an FAA inspector had inspected the waste container and had negligently authorized and approved its use, despite the obvious deficiencies which rendered it incapable of containing possible fires. The trial court granted the motion of the United States for summary judgment on the grounds that the FAA certification activities did not come within the good samaritan doctrine and that both the discretionary function and misrepresentation defenses to the FTCA applied.

It is significant to note that in United Scottish I after a full trial on the merits, the factfinder made a determination that the government had been negligent in its inspection, and that in Varig Airlines, in granting the government’s summary judgment motion, the trial court assumed that the government inspector had been negligent. The government thus argued before the Ninth Circuit that damages caused by the negligence of its employees should be uncompensated. The Ninth Circuit, however, viewed the government’s liability in a different light.

D. Analysis of United Scottish II and Varig Airlines

In order to obtain maximum benefit from the Ninth Circuit’s reasoning, it must be remembered that United Scottish II and Varig Airlines were consolidated for argument and were decided by the same panel, with the decisions filed on the same day. The two cases should be read together. The

132 Id. (citing Civil Air Regulations).
133 See, Varig Airlines, 692 F.2d at 1207.
134 Id. at 1206.
136 United Scottish I, 614 F.2d at 190.
138 Varig Airlines, 692 F.2d at 1207.
government raised three principle defenses in both cases: (1) absence of duty, (2) the misrepresentation defense, and (3) the discretionary function defense. The two decisions address the three issues differently. For ease of analysis, each issue will be discussed separately with reference to the court's reasoning in *United Scottish I*, *United Scottish II*, and *Varig Airlines*.

1. Absence of Duty

The initial question in suits against the United States for negligent inspection of aircraft which leads to certification arises in the context of the existence and the extent of any duty owed by the United States to those suffering damages as a result of a crash. In *United Scottish I*, the appellate court held that if a private person would be liable for the negligent inspection of an aircraft, then so would the United States. The court suggested, but did not hold, that if the state whose law was to be applied followed sections 323 and 324A of the Restatement Second of Torts as to the good samaritan doctrine and the facts on remand supported that doctrine, then the United States would be liable.

In the *Varig Airlines* decision, the Ninth Circuit reasserted that the United States would be liable under the good samaritan doctrine, stating that if the United States negligently performed a service, such as an inspection, that increased the risk of injury to an injured person or caused the injured person to rely on the proper performance of the service, liability would attach. The court held that reliance of the traveling public on FAA inspection is general knowledge. Furthermore, the court reasserted its prior position as set forth in *Arney v. United States* that breach of Federal Aviation Regulations (FARs) by the government can give rise to liability.

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137 *United Scottish I*, 614 F.2d at 198.
138 Id.
139 *Varig Airlines*, 692 F.2d at 1207.
140 Id. at 1208.
141 479 F.2d 653 (9th Cir. 1973). See *supra* notes 79-82 and accompanying text for a discussion of *Arney v. United States*. 
In *United Scottish II*, the court stated that the government’s claim that a regulatory duty was being performed, rather than a service, had no merit. The Ninth Circuit disposed of the government’s reliance on *Roberson v. United States*, which had held that a government inspection was not a service to others, by pointing out that in *Roberson* the government inspection was to protect the government’s own interest under a contract. By contrast, the inspection performed on aircraft pursuant to certification under the CRFs is not done for the self-interest of the United States. Rather, the court stated that “the FAA’s regulatory activities are performed for the public as a whole. When voluntarily performing activities solely for the public, the FAA performs a service for others.”

On remand, following *United Scottish I*, the trial court, in addressing the good samaritan doctrine, did not hold that the service performed by the United States increased the risk of harm to the plaintiffs. Rather, the trial court held that the plaintiffs had relied upon the proper performance of the service and that, therefore, section 323(b) of the Restatement Second of Torts applied. The United States took issue with the trial court’s holding, citing the case of *Clemente v. United States*. Using the *Varig Airlines* case as a vehicle, the court distinguished *Clemente*. In *Clemente*, the First Circuit held that because the FAA directive relating to the negligently performed inspection was internal in nature, no indication existed that anyone had ever relied upon it. By contrast, the civil air regulations for waste receptacles (*Varig Airlines*) and for appropriate structural supports for fuel lines in aircraft (*United Scottish*) are national in scope and are mandated by federal statute. Section 1421 of Title 49 of the United States

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142 *United Scottish II*, 692 F.2d at 1211.
143 382 F.2d 714 (9th Cir. 1967).
144 Id. at 1211.
147 *United Scottish Ins. v. United States*, 567 F.2d at 1145.
Code requires that the FAA conduct a comprehensive inspection for compliance with all safety regulations prior to the issuance of an airworthiness certificate.\textsuperscript{149} The \textit{Varig Airlines} court further noted that "49 U.S.C. 1301 . . . requires the FAA 'to promote safety of flight of civil aircraft in air commerce and to perform its 'duties in such manner as will best tend to reduce or eliminate the possibility, or recurrence of accidents in air transportation . . . ."\textsuperscript{150} Given that statutory background, and the underlying specific regulations regarding the design and the manufacture of aircraft, the Ninth Circuit held that "[t]here is general knowledge . . . that regulations designed . . . [for] safety exist and that the United States inspects . . . aircraft for compliance . . . . The United States should expect that members of the public will rely on the proper performance by the FAA of its duty to inspect and certify."\textsuperscript{151} In affirming the trial court's decision in \textit{United Scottish II}, the Ninth Circuit stated that "[h]aving chosen to make aircraft safety inspections and to certify the results, the government reasonably could expect that members of the public would rely on the government's certification of airworthiness. The careful performance of aircraft inspections is the essence of the government's duty, once the inspections are undertaken."\textsuperscript{152} In sum, \textit{United Scottish I}, \textit{United Scottish II}, and \textit{Varig Airlines} clearly hold that the United States can be liable under the good samaritan doctrine for the negligent inspection of aircraft pursuant to a certification program because the inspection is a "service" and because the flying public reasonably relies on those inspections.

In a last bid to avoid inevitable liability, the United States contended throughout its argument before the Ninth Circuit in both \textit{Varig Airlines} and \textit{United Scottish II} that if the United States were to come under the good samaritan doctrine in certification cases, it would be liable for every acci-
dent resulting from regulated activity.\textsuperscript{153} The government argued, in effect, that it would become an insurer of safety. The Ninth Circuit disposed of the argument, holding that “[t]he United States will be liable only when injury has resulted from the negligent performance of its duty. The voluntary assumption of the inspection and certification function carries with it the duty to inspect and certify with reasonable care.”\textsuperscript{154}

2. Misrepresentation Defense

The next issue raised by the government in its defense was the misrepresentation exception.\textsuperscript{155} The government, in essence, claimed that the plaintiffs' action was for the misrepresentation of an unairworthy airplane as airworthy, through the device of an airworthiness certificate. In both Varig Airlines and United Scottish II, the Ninth Circuit dismissed this argument. In United Scottish II, specifically, the court stated that “[t]he basis of the plaintiff's claim . . . is not the misrepresentation or misinformation contained in the certificate, but the negligence of the FAA's inspection on which the airworthiness certificate was issued.”\textsuperscript{156}

3. Discretionary Function Defense

The last line of defense taken by the United States in these certification cases was the universally used and often abused

\textsuperscript{153} Varig Airlines, 692 F.2d at 1208.

\textsuperscript{154} Id.

\textsuperscript{155} 28 U.S.C. § 2680(h) (1976). See supra note 5 for the text of section 2680(h).

\textsuperscript{156} United Scottish II, 692 F.2d 1211. Interestingly, the court did not cite or rely upon two Ninth Circuit cases which, it is believed, would have provided another sound foundation for the rejection of the government's misrepresentation defense. Both Green v. United States, 629 F.2d 581 (9th Cir. 1980) and Ramirez v. United States, 567 F.2d 854 (9th Cir. 1977) stand for the proposition that the government's misrepresentation defense applies only to commercial transactions, and cannot be used by the government in cases resulting from personal injury or wrongful death. See also United States v. Neustadt, 366 U.S. 696, 711 n.26 (1961). The holdings of United Scottish II and Mascher and Varig would deny the misrepresentation defense to the United States for both commercial losses and personal injury losses, and is thus more broad. The court's dismissal of the United States misrepresentation argument in Mascher and Varig can be found in 692 F.2d at 1208.
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discretionary function defense. The position taken by the United States was rejected. In United Scottish II as well as in Varig Airlines, the court pointed out that the discretionary function defense is intended to provide protection to government activities in the areas of plans, policy, judgment, and decision making. The court was of the opinion that inspecting aircraft for compliance with regulations, however, is not the kind of activity that relies upon policy choices or decisions. Thus, the Ninth Circuit held that the inspection did not fall within the coverage of the discretionary function defense. In United Scottish II the court further stated that “[a]ll aircraft must comply with FAA requirements in order to be certified as airworthy and thereafter placed in operation. FAA officials enforce the requirements by inspecting the aircraft, but cannot in any way change or waive safety requirements.” In Varig Airlines the court also stated that “[a] proper inspection will discover facts. The facts will show either compliance or noncompliance. Aircraft must comply with the regulations in order to be certified.”

In contrast to the Ninth Circuit’s handling of the discretionary function defense in both United Scottish II and Varig Airlines the Sixth Circuit recently affirmed a summary judgment in favor of the United States in the case of Garbarino v. United States. In Garbarino, however, the plaintiff’s allegations regarding negligent inspection and certification were limited to a claim that the FAA had failed to enact adequate regulations to ensure crashworthiness. The Sixth Circuit held that the discretionary function defense protects the United States from liability when charged with failure to promulgate adequate safety regulations. It seems clear that the discretionary function defense is proper in the face of such allegations and that the Sixth Circuit’s decision is not at odds

188 Varig Airlines, 692 F.2d at 1208-09; United Scottish II, 692 F.2d at 1212.
189 United Scottish II, 692 F.2d at 1212.
190 Varig Airlines, 692 F.2d at 1209.
191 666 F.2d 1061 (6th Cir. 1981).
192 Id. at 1065.
193 Id.
with the Ninth Circuit's holdings in *United Scottish II* and *Varig Airlines*.¹⁶⁴

IV. Conclusion

By combining the effects of *Clemente*,¹⁶⁵ *Garbarino*,¹⁶⁶ *United Scottish I*,¹⁶⁷ *United Scottish II*,¹⁶⁸ and *Varig Airlines*,¹⁶⁹ it can reasonably be stated that a cause of action can be asserted against the United States under the FTCA for negligent inspection leading to certification if the following occur: (1) The plaintiff alleges that the cause of the crash was a defect in the plane that was a violation of publicly disseminated and objectively measurable or determinable government standards or regulations;¹⁷⁰ (2) The plaintiff alleges that the injured parties reasonably relied upon the FAA to inspect the aircraft in question, pursuant to the administrator's obligation under the Federal Aviation Act;¹⁷¹ (3) The plaintiff alleges that the defect in the airplane was contrary to the objectively determinable or measurable regulation or standard, and was the cause of his injury; and (4) The plaintiff alleges that the failure to detect the defect resulted from negligent performance of an actual inspection of the airplane by an FAA employee in the course of his duties.

Care should be taken not to allege: (1) That the regulations were insufficient or non-existent;¹⁷² (2) That the regulations in question were internal or in any way not the subject of "public or common knowledge"¹⁷³ (3) That the plaintiff's (or plaintiff's decedent's) reliance was on an airworthiness certificate

¹⁶⁴ On May 16, 1983 the Supreme Court granted the United States' petition for a writ of certiorari in both *United Scottish II* and *Varig Airlines*. 103 S.Ct. 2084 (1983). The questions presented are the duty question, the applicability of the discretionary function defense, and the applicability of the misrepresentation defense.

¹⁶⁵ 567 F.2d 1140 (1st Cir. 1977), cert. denied, 435 U.S. 1006 (1978).
¹⁶⁶ 666 F.2d 1061 (6th Cir. 1981).
¹⁶⁷ 614 F.2d 188 (9th Cir. 1979).
¹⁶⁸ 692 F.2d 1209 (9th Cir. 1982).
¹⁶⁹ 692 F.2d 1205 (9th Cir. 1982).
¹⁷⁰ See supra notes 157-60 and accompanying text.
¹⁷¹ See supra notes 150-52 and accompanying text.
¹⁷² See supra notes 161-63 and accompanying text.
¹⁷³ See supra notes 102-06 and accompanying text.
or other document as contrasted with an actual physical inspection of the plane by an FAA employee.

As a practical matter, the above limitations pose a significant pleading problem for a plaintiff in a negligent inspection case. Such a circumstance, however, is not contrary to the intent of Congress in passing the FTCA. Furthermore, by narrowing the scope of potential liability, the consequences of limitless liability and the government-as-insurer envisioned by the Sixth Circuit in Garbarino and the First Circuit in Clemente are greatly lessened. Policy grounds can no longer serve as a justification for denying liability.

As a final point, it is interesting to note the brief concurring opinion filed in United Scottish II by Judge Richard Chambers. Judge Chambers wrote “[m]ost of us thought when the Federal Tort Claims Act was passed, that the discretionary exception to the Federal Tort Claims Act would preclude recovery on the facts of the two cases we decided today, but the developing law seems to have overtaken us. Thus, I concur.”

That statement sets forth the reality and the essence of our common law system which allows and indeed thrives upon development of the law in accordance with changing circumstances in society. The enormous reliance on air travel today, combined with the fact that the vast majority of commercial aircraft are built in the United States and inspected and certified by the FAA, are ample reason for the flying public to rely upon the FAA for inspection and for enforcement of compliance with minimum standards required by the CFRs. It is only when an FAA employee is negligent in performing such an inspection and those who relied upon him are injured that the United States will be liable to compensate the injured.

The Court of Appeals for the Ninth Circuit has taken a step forward for air safety. The development of the law relating to negligent inspection resulting in certification will be most interesting to follow.

174 United Scottish II, 692 F.2d at 1212.