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Thomas E. Rosen

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The Federal Tort Claims Act:
Discretion and the Air Traffic Controller

Air traffic controllers are charged with the responsibility of supervising the general safety of aircraft flights, particularly safe takeoffs and landings. The magnitude of a controller's responsibility cannot be overstated; errors in judgment could result in disaster. In carrying out their grave responsibility, air traffic controllers act pursuant to regulations set forth in the Air Traffic Control Procedures Manual of the Federal Aviation Administration. One type of regulation may require the controller to transmit a weather advisory if it is relevant, while another regulation may require transmission of changes in weather conditions only as necessary. Under the former regulation, the controller has a definite obligation to transmit the weather information to aircraft when the information has relevance, e.g., when the aircraft is about to enter turbulent weather. Under the latter type of regulation, the controller has a discretionary obligation to determine whether the changed weather conditions warrant the transmission of information.

The liability of the United States, if any, for the negligent conduct of air traffic controllers, as its employees, is determined under the Federal Tort Claims Act. Under the Act, the federal govern-
ment is liable, as a private employer would be, for the torts of its employees,4 and the law of the state in which the tortious conduct occurs is applied.5 But even if the government employee is negligent under local law, the government may escape liability pursuant to an exception to the Act. Section 2680(a)6 exonerates the federal government from liability when its employee acts or fails to act (i) in carrying out a statute or regulation with due care, or (ii) in exercising or performing a discretionary function or duty. It is submitted that when a government employee acting pursuant to a regulation specifically giving him "discretion,"7 the employee is performing a discretionary function or act envisioned by the second part of section 2680(a).8

An obvious problem encountered in analyzing the exception is the statutory meaning of the term "discretion." The non-statutory definition of discretion is a "free decision; individual judgment; undirected choice."9 If this definition were applied, however, the exception would swallow the rule and the government would escape liability in every instance.10 Unfortunately, no definition was pro-

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4 Id.
5 Id.
6 28 U.S.C. § 2680(a) (1970): "Exceptions: 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."
7 Id.
9 The second part of the section 2680(a) exception is also referred to hereinafter as the "discretionary function exception" or the "exception."
10 WEBSTER, WEBSTER'S NEW COLLEGIATE DICTIONARY 237 (2d ed. 1954).
11 As two courts have phrased this notion: "Most conscious acts of any person, whether he works for the government or not, involve choice. Unless government officials (at no matter what echelon) make their choices by flipping coins, their acts involve discretion in making decisions." Smith v. United States, 375 F.2d
vided by Congress; the Congressional reports suggest a definition by illustration, but it is inadequate. Consequently, in determining whether the exception applies, the courts must look to the controlling Supreme Court decisions.


See Dalehite v. United States, 346 U.S. 15, 29 at n.21 (1953), for the Assistant Attorney General's explanation that Congress adopted in its report. This paragraph is most often quoted for setting out the boundaries of the exception:

The first subsection of section 402 exempts from the bill claims based upon the performance or non-performance of discretionary functions or duties on the part of a Federal agency or government employee, whether or not the discretion involved be abused, and claims based upon the act or omission of a government employee exercising due care in the execution of a statute or regulation, whether or not valid. This is a highly important exception, intended to preclude any possibility that the bill might be construed to authorize suit for damages against the government growing out of an authorized activity, such as a flood-control or irrigation project, where no negligence on the part of any government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious, or that the statute or regulation authorizing the project was invalid. It is also designed to preclude application of the bill to a claim against a regulatory agency, such as the Federal Trade Commission or the Securities and Exchange Commission, based upon an alleged abuse of discretionary authority by an officer or employee, whether or not negligence is alleged to have been involved. To take another example, claims based upon an allegedly negligent exercise by the Treasury Department of the blacklisting or freezing powers are also intended to be excepted. The bill is not intended to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion. Nor is it desirable or intended that the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort. However, the common-law torts of employees of regulatory agencies would be included within the scope of the bill to the same extent as torts of nonregulatory agencies. Thus, section 402(5) and (10), exempting claims arising from the administration of the Trading With the Enemy Act or the fiscal operations of the Treasury, are not intended to exclude such common-law torts as an automobile collision caused by the negligence of an employee of the Treasury Department or other Federal agency administering those functions."

I. SUPREME COURT INTERPRETATION

The Supreme Court made a detailed examination of the discretionary function exception in the landmark decision of Dalehite v. United States, but the holding has done little to alleviate the difficulty in drawing the illusive line between an actionable and an unactionable negligent exercise of "discretion." Dalehite involved claims arising from the explosion of ammonium nitrate fertilizer that had been manufactured, packaged, stored and generally controlled by the government pursuant to an overriding plan to increase the food supply of some foreign countries. The plan was established by the Executive Department and delegated to the Field Director's Office.

The Court found the acts of the government employees to be within the exception reasoning that determinations made by executives and administrators in establishing the details of the plan involved policy judgments crucial to the overall plan, and therefore, were precisely the type of decisions excepted by the Act. The Court further held:

Where there is room for policy judgment and decision, there is discretion. It necessarily follows that the acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.

This language can be interpreted to mean that the exception immunizes (i) the non-negligent acts of all subordinates carrying out discretionary decisions of supervisors, or (ii) the negligent discretionary acts of subordinates. The latter interpretation recognizes that at times some subordinates exercise the same quality of

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15 Id. at 40. See Jayson, Application Of The Discretionary Function Exception, 24 Fed. B.J. 153, 159 (1964): "[T]he Supreme Court concluded that each of the following governmental decisions challenged by the plaintiffs in that case were discretionary: (1) the cabinet level decision to institute the fertilizer export program; (2) the decision as to whether further experimentation with FGAN was needed to determine the possibility of its explosion under conditions likely to be encountered in shipping; (3) the drafting of the basic 'Plan' of manufacture of the FGAN; and (4) the failure of the Coast Guard to regulate and police the storage or loading of the FGAN in some different fashion."
17 Id. at 36.
decisions that executives and administrators exercise and that the exception applies to those subordinates only in those situations.  

The Supreme Court added another dimension to the exception by stating that decisions "responsibly made at a planning level rather than operational level" involve important considerations for government programs, and are therefore discretionary within the terms of the statutory exception. Although the Court expressly declined to define when discretion ends, the above dictum might have been an attempt to outline the parameters of exempt, "high level" discretion. It is arguable that the Court's standard for immunity not only exempts a decision made on the "planning level," but also exempts the actions of operational level subordinates carrying out the planning level decisions or exercising planning level discretion. Consequently, while the Court did not precisely define discretion, it did determine an area protected by the exception.

Two years after Dalehite, the Supreme Court in Indian Towing Co., Inc. v. United States23 confused the application of the exception. Damages were alleged to have been caused by the negligence of Coast Guard personnel in failing to repair the light in a lighthouse or to give warning that the light was not operating. The Court, in finding liability, held Dalehite was not controlling because no discretionary function was involved. Once the government exercised discretion in undertaking to provide lighthouse service, it was obligated to do so with due care. The Court seized the planning level—operational level dictum of Dalehite in stating that the negligent act of the lighthouse employee was at the "operational level of governmental activity"26 and was therefore not immune.

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23 Williams v. United States, 115 F. Supp. 386 (N.D. Fla. 1953), aff'd on other grounds, 218 F.2d 473 (5th Cir. 1955). This writer agrees with the feasibility of this interpretation.
24 346 U.S. 15, 42 (1953).
25 Id.
26 Id. at 35.
27 Id. at 62.
28 Id. at 64.
29 Id. at 64. The Court held that the historic distinction between governmental and proprietary activities should not be applicable under the Act. The government should be held to the same standard of care that a private person would in the same situation, regardless of whether a private person could or would undertake the activity.
Indian Towing implies that the only immune planning level discretion is that of choosing a course of conduct, with all subsequent decisions being operational and therefore actionable if negligently made. This directly conflicts with the Dalehite language that "the 'discretionary function or duty' that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities." 7

The effect Indian Towing has upon Dalehite is uncertain since the Supreme Court has not again directly dealt with the scope of the discretionary function exception. 8 Dalehite and Indian Towing are compatible only if the Dalehite theory applies to the second part of section 2680 (a), while Indian Towing's logic applies to the first part of that section. Accordingly, if there is negligence in a planning level decision, there is no liability under Dalehite; but if there is negligence in carrying out the plan (presumably pursuant to a statute or regulation), there is liability under Indian Towing.

II. AIR TRAFFIC CONTROL CASES

When an air traffic controller exercises "planning level" discretion, Dalehite should control and the government should escape liability even if discretion is abused. Nevertheless, the discretionary function exception has been held not applicable to the negligent acts or omissions of air traffic controllers; the planning level—operational level dichotomy is the test used to determine liability. 9

7 Dalehite v. United States, 346 U.S. 15, 35 (1953). It should be noted that Justice Reed delivered the majority opinion in Dalehite, in which he was joined by three other Justices. Justice Frankfurter, who delivered the majority opinion in Indian Towing was a dissenter in Dalehite, and Justice Reed was a dissenter in Indian Towing. The Indian Towing decision was five to four, whereas Dalehite was four to three, with two Justices not taking part.

8 In Rayonier, Inc. v. United States, 352 U.S. 315, 319 (1957), the Court stated: "To the extent that there was anything to the contrary in the Dalehite case it was necessarily rejected by Indian Towing." This language, however, refers to the government's liability as a private person; not to the discretionary function exception. The Court mentioned the exception in Hatahley v. United States, 351 U.S. 173, 181 (1956), but the exception was not discussed because acts of wrongful trespass do not involve discretion. Also, in Nelms v. Laird, 442 F.2d 1163 (3d Cir. 1971), rev'd, 404 U.S. 1037 (1972), the Court found it unnecessary to treat the scope of the exception because the claim was based on strict liability for ultrahazardous activity and Dalehite held such suits against the government to be unauthorized.

The leading case demonstrating this approach is United States v. Union Trust, which involved a collision of aircraft cleared by a controller for landing on the same runway at approximately the same time. The district court held the United States liable because the negligence of the controller did not involve decisions responsibly made at a planning level involving policy considerations important to the government's air traffic control system.

Agreeing with the district court, the District of Columbia Circuit recognized that the controller exercised discretion, but acted or failed to act on an operational level so that he was not exercising the type of discretion contemplated by the statute and "clearly described in the Dalehite decision." Although the court of appeals used Dalehite language for support, the holding is an application of Indian Towing theory: the planning level discretion terminated when the government decided to undertake responsibility for the air traffic control system, thus the subsequent negligence of the controller subjected the United States to liability.

Furthermore, the court of appeals in Union Trust equated the controller's act to that of the driver of a mail truck exercising discretion when negligently driving through a red traffic light. This comparison is rational since the controller, like the mail truck driver, made a negligent decision in carrying out the details necessary to the performance of his job. The majority of functions per-
formed by controllers are similar operational details, such as properly aligning and spacing airplanes for succeeding takeoffs, that do not involve section 2680(a) discretion. But there are situations when controllers make higher quality, "planning level," decisions in connection with the overall plan of air traffic control. For example, when the plan involves a regulation requiring the controller to transmit only the weather information he feels is necessary, the controller has an obligation to use his "discretion" as contemplated in section 2680(a) to determine necessity rather than a definite obligation to transmit the information. If this was meant to be an operational level decision, there would be no need for a regulation specifically bestowing discretionary choice—it would simply be part of the controller's routine to convey all relevant weather advisories and not transmit the others, just as it is part of his job to decide how much information pilots need about other aircraft in the vicinity or how many feet to leave between taxiing aircraft to assure safety. Rather than invariably comparing the status of subordinates, such as mail truck drivers and air traffic controllers, it is more reasonable for the courts to recognize that there are qualitative differences in certain of their decisions.

Nevertheless, there is a "cascading crescendo of cases holding that the 'discretionary function' exception does not insulate the government from liability for the negligence of its air traffic controllers." In Ingham v. Eastern Airlines, Inc., a negligent controller violated a specific regulation requiring him, when visibility was below a specified standard, to report any subsequent changes in the weather as necessary. The United States raised the discretionary function defense, arguing that when visibility was above the minimum the controller could use his discretion, as contemplated by section 2680(a), in reporting changing weather conditions. The Second Circuit rejected this defense and held the

39 See note 2 supra.
42 373 F.2d 227 (2d Cir. 1967).
43 See note 2 supra.
government liable following *Indian Towing* and *Union Trust*. The court reasoned that the planning level decision to establish and operate an air traffic control system terminated immune discretionary functions;"“the *Dalehite* interpretation was completely overlooked. *Dalehite* held that there could be discretionary functions subsequent to the initiation of a program, and, *Dalehite*, not *Indian Towing*, controls the application of the discretionary function exception.""

Moreover, the Second Circuit concluded that even if the planning level could be extended to embrace the discretionary creation of the regulation, the controller nevertheless had to comply with the regulation and was not exercising immune discretion in deciding the transmission of the weather changes was not necessary."” It is not disputed that the controller had to comply with the regulation, but the regulation gave him the burden of making a section 2680(a) decision. If he made a conscious decision that it was not necessary to transmit the weather information, he was performing an unactionable discretionary function."" The suggested qualitative approach necessitates the difficult determination of the qualitative level of discretion in each case, but it conforms with the *Dalehite* interpretation in an area not considered in the strict planning level —operational level test of *Indian Towing*.

III. ANALOGOUS CASES IN OTHER AREAS

Government employees exercising discretion in activities other

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44 373 F.2d at 238 citing 221 F.2d 62 at 77:
When the government decided to establish and operate an air traffic control system, that policy was the exercise of ‘discretion’ at the planning level, and could not serve as the basis of liability . . . But once having made that decision, the government employees were required thereafter to act in a reasonable manner. A failure to do so rendered the government liable for the omission or commission . . . ‘Discretion was exercised when it was decided to operate the tower, but the tower personnel had no discretion to operate it negligently.’

45 *Indian Towing* did not involve the discretionary function exception. “The [g]overnment concedes that the exception of [section] 2680—relieving from liability for negligent ‘exercise of judgment’ . . . is not involved here.” 350 U.S. 61, 64 (1955).

46 373 F.2d at 238.

47 See note 14 *supra*. Although the FAA is distinguishable from the S.E.C. and F.T.C. in that the former deals with life and death; the F.A.A. nevertheless is a governmental agency. Nowhere in the Act is it indicated that section 2680(a) should not apply to employees of the F.A.A. or similar agencies.
than air traffic control have been found to be exercising the planning level quality of discretion when the nature of the discretion appears to be much closer to operational level quality of discretion than that exercised by controllers. An example is provided by cases dealing with damages caused by authorized sonic boom flights. In *Ward v. United States*, the district court stated: "The general who ordered the flights, the colonel who planned and supervised the flights and the officers who flew the aircraft were all required to exercise their judgment. Where in the execution of national policy, there is room for judgment, the discretionary function exemption applies." A controller acting pursuant to a regulation giving him discretionary duties exercises at least the quality of discretion in controlling airplanes as the colonel in *Ward* exercised in supervising the flights, and each is executing national policy. The distinction may be in the character of national policy involved, but neither section 2680(a) nor *Dalehite* distinguishes between types of national policy.

The unactionable planning decisions of the colonel in *Ward* are equatable to the planning level decisions of an FAA administrator; the administrator's delegation of those decisions upon the controller makes those decisions of the controller likewise unactionable. Recognizing there are operational level employees who make both "planning" and "operational" decisions, it should be determined which type of decision is involved before it is determined whether the government is liable. If the quality of the decision is "planning," the exception applies and no liability results; if the quality is operational, there might be liability depending on the facts and the particular state law.

Another sonic boom case, *Maynard v. United States*, involved a decision to conduct operational training flights in supersonic aircraft being made by the commander of the Strategic Air Command, but the actual selection of the flight route being made by

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49 Id. at 375.
50 The national policy in *Ward* was national security, *i.e.*, supersonic training flights by the Air Force were essential to the maintenance of the United States defense; whereas when an air traffic controller acts, the national policy is the maintenance of an efficient and safe national transportation system. The decision of the air traffic controller is essential to the furtherance of that system.
51 430 F.2d 1264 (9th Cir. 1970).
the chief of the navigational section of the Air Force base to which the aircraft was assigned. The Ninth Circuit held that since *Dalehite* made the distinction between operational level and planning level discretionary acts but refused to draw any line, it would find the act of the subordinate made in furtherance of governmental policy and under official direction unactionable. This holding exemplifies the failure of the courts to attempt line drawing, and indicates the need for a test more in accordance with the *Dalehite* reasoning. In this situation, the result would be the same using the proposed quality of discretion standard, since the operational level chief’s decision was of a planning level quality.

A related group of cases dealing with the discretionary function exception involve congressionally created public information services such as the Weather Bureau. A leading case in this area, *National Manufacturing Co. v. United States*, held that the forecasting of flood conditions by weathermen would not subject the United States to liability. A statute authorized the weather bureau to establish and maintain current information on flood forecasts whenever in the opinion of the Chief of the Weather Bureau this service was advisable; the Eighth Circuit’s holding relied in part upon the statute’s grant of discretion.

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52 Id. at 1266.
54 Id. at 278.
55 33 U.S.C. § 706 (1970) provides:

There is authorized an expenditure as required, from any appropriations heretofore or hereafter made for flood control, rivers and harbors, and related purposes by the United States, for the establishment, operation, and maintenance by the Weather Bureau of a network of recording and nonrecording precipitation stations, known as the Hydroclimatic Network, whenever in the opinion of the Chief of Engineers and the Chief of the Weather Bureau such service is advisable in connection with either preliminary examinations and surveys or works of improvement authorized by the law for flood control, rivers and harbors, and related purposes, and the Secretary of the Army upon the recommendation of the Chief of Engineers is authorized to allot the Weather Bureau funds for said expenditure.

56 The court’s finding of no liability was not solely because of the discretionary function exception. The court held no liability for the government because (i) recovery was barred by a federal statute providing no liability to the United States for any damage from flooding; (ii) the Federal Tort Claims Act did not repeal the flood control statute; (iii) the Federal Tort Claims Act did not accord a right of action because a purely governmental function was involved; and (iv) the discretionary function exemption excepted the claims. 210 F.2d at 278.
A controller acting pursuant to a regulation conferring a discretionary function acts on the same qualitative level the Chief of the Weather Bureau was acting in *National Manufacturing*, since in either case their authorized judgments would dictate whether the information would be transmitted. The only distinction is that the discretionary function is granted in one case by statute, while in the other by an agency regulation. But this distinction is not relevant since the second part of section 2680(a) contemplates acting pursuant to both statutes and regulations. Although the Chief of the Weather Bureau and the controller perform the same qualitative discretionary functions, use of the planning level—operational level test based on the status of the employee results in liability only for the act of the controller.

The line of cases dealing with government projects such as flood control and construction operations have applied the exception to activities involving the same quality of discretion that a controller exercises in certain situations. In *California v. United States* the Department of the Interior constructed a canal to irrigate arid lands and to improve navigation, but injury resulted from the flooding of a nearby highway. The district court held that the decisions in carrying out the general canal plan, i.e., the location and size of the canal, levee, culvert, pipe line or ditch, were discretionary acts for which the government could not be held liable. The employee who planned the size of the ditch, for example, was exercising section 2680(a) discretion in carrying out the general plan of canal building. Similarly, a controller can exercise section 2680(a) discretion in carrying out the general plan of the air traffic control system. The district court in *California*, correctly relying upon *Dalehite* theory, impliedly recognized that there are qualitative distinctions in the decisions required by an operational level employee's job; it is possible for him to exercise section 2680(a) discretion.

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89 *Id.* at 344. The court explicitly stated: "It may be that some of the structures complained of were constructed at the wrong locations or were inadequate in size, yet if the injury or loss resulted from the exercise of discretion, sovereign immunity still attaches."
In *Boston Edison Co. v. Great Lakes Dredge and Dock Co.*,\(^6^0\) the First Circuit held that conducting, as well as planning and supervising, of dredging activities by governmental contractors involved immune discretionary functions.\(^6^1\) The mere conducting of the already designed plan must have been on an operational level as opposed to a planning level under Dalehite dicta, yet liability did not attach. Similarly, the Tenth Circuit held in *Harris v. United States*\(^6^2\) that the decision of Fish and Wildlife Service officials and the United States Corps of Engineers to destroy willows by spraying chemical herbicides that damaged plaintiff's adjoining crops was within the exception.\(^6^3\) The employees' judgment in *Harris* that the spraying was necessary is of the same quality as the judgment of a controller that transmitting of weather information is necessary, however, using the planning level—operational level standard of *Indian Towing*, as the courts have done in air controller cases, would have resulted in liability for the United States.

IV. CONCLUSION

The nature of decisions made by government employees can be classified as policy, planning and operational. Policy and planning decisions are the type contemplated by section 2680(a) and the Supreme Court in *Dalehite* to exonerate the United States from liability if made negligently. It should be recognized that an "operational level" employee, such as an air traffic controller, can at times exercise planning discretion. Therefore, the quality of discretion his job demands him to exercise should be determinative of governmental liability rather than the level on which his job is classified.

The reason the courts have found the government liable for an operational level employee's negligent planning level decisions is that the purpose of the Federal Tort Claims Act was "to allow the government to be sued for common law torts committed by their employees in the course of their employment"\(^6^4\) as a private person would be in the same situation. But the literal language of

\(^{60}\) 423 F.2d 891 (1st Cir. 1970).

\(^{61}\) *Id.*

\(^{62}\) 205 F.2d 765 (10th Cir. 1953).

\(^{63}\) *Id.*

the statutory exception together with the Supreme Court's holding in *Dalehite* perceive a much broader exception than the legislature might have contemplated. To alleviate the difficulty encountered by the courts in attempting to adhere to the legislative purpose of the Act, which necessitates an incorrect reliance on *Indian Towing*, either Congress should modify the statute or the courts should recognize the policy reasons for holding contrary to the express terms of the statute.

*Thomas E. Rosen.*