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GOVERNMENT LIABILITY FOR CERTIFICATION OF AIRCRAFT?

JOHN R. HARRISON* and PHILLIP J. KOLCZYNSKI**

INTRODUCTION

ONE OF the more unique forms of regulation of aviation in the United States involves the certification of aircraft and aircraft appliances by the Federal Aviation Administration (FAA) and its delegates in the aviation industry. As the government has come to be involved in air crash litigation with increasing regularity, a number of cases have raised the question whether the government should be liable in damages for negligence in its performance of this certification function. It is the purpose of this article to address that question, which remains very much unsettled at the present time. (The related question of potential government liability for negligence in certifying pilots and other personnel is not considered here.)

The authors submit that a close examination of the regulatory process involved in certification will reveal that it is a form of regulating adjudication which Congress delegated to agency discretion. We also suggest that the certification process, which is a "passive" one unlike the "active" provision of services such as air traffic control, does not give rise to any governmental duty to individual members of the general public. Further, it would appear that even if a cause of action for "negligent certification" might exist, it would properly be held to fall within the "discretionary function" or "misrepresentation" exceptions to the general tort

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liability of he federal government. Thus, the government should not be held liable for negligence in certifying aircraft.

THE CERTIFICATION PROCESS

The Federal Aviation Act of 1958 (the Act)[1] provides for the development of a comprehensive regulatory system to promote aviation safety. This legislation authorizes the FAA to regulate the aviation industry by establishing minimum safety standards.[2] The Act also gives the Administrator of the FAA[3] extensive discretion to promulgate regulations and issue orders or perform acts as "he shall deem necessary" to exercise and perform his powers and duties under the Act.[4] As part of his general safety power the Administrator prescribes 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.[5]

In order to market its product, an aviation manufacturer must satisfy certification or licensing requirements prescribed by the Act.[6] The certification process requires that the manufacturer-applicant initially submit such design and performance data as the Administrator deems necessary to determine that the design of an aircraft meets the minimum standards promulgated by the FAA.[7] Upon evaluation of the manufacturer's data, the Administrator, or the person to whom he has delegated his certificating authority, makes a final determination, based on both objective and subjective criteria, that an applicant for an aircraft certificate has sufficiently complied with regulatory minimum safety standards to receive a license.

FAA aircraft certification is a three-tiered process. First a Type

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[1] 72 Stat. 731, *as amended*, 49 U.S.C. §§ 1301 *et seq.* (1970 & Supp. V 1975), *formerly* Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973.

[2] 49 U.S.C. § 1421(a) (1970).

[3] 49 U.S.C. § 1303 (1970). The Administrator shall hereinafter be substituted in lieu of "Secretary" where authority has been delegated to the FAA pursuant to the Department of Transportation Act, 49 U.S.C. §§ 1651 *et seq.* (1970).

[4] 49 U.S.C. § 1354(a) (1970).

[5] 49 U.S.C. § 1421(a)(1) (1970).

[6] 49 U.S.C. § 1423(a)-(c) (1970).

[7] 49 U.S.C. § 1423(a)(2) (1970).

Certificate must be obtained.[8] In turn, the manufacturer may obtain a Production Certificate based on the manufacturer's ability to attain conformity of production models with the "type," i.e., the prototype, and begin the manufacture of production models.[9] Both Type and Production Certificates apply to the finished aircraft as well as certain appliances to be used in the aircraft.[10] As a condition of the issuance of the Production Certificate, quality control procedures are included in the phases of production before final assembly of the aircraft.[11]

Upon final assembly and distribution of the aircraft, the last stage of the certification process involves the issuance of the Airworthiness Certificate.[12] It is unlawful to operate an aircraft in air commerce without a current Airworthiness Certificate or in violation of its provisions.[13] An Airworthiness Certificate is issued when the Administrator finds that the aircraft conforms to its Type Certificate and is in condition for safe operation.[14] Should a person desire to make a major change in the aircraft's design by modification, so that it no longer conforms to the type design approved in the Type Certificate, he must obtain a Supplemental Type Certificate.[15] The manufacturer who holds the original Type Certificate and incorporates a major change merely applies for an "amendment" of his original license.[16]

The Act permits the Administrator to delegate the examination, inspection and testing necessary to the issuance of certificates, and the actual issuance of such certificates, to any properly qualified private person or such person's employee.[17] Under a Delegated Option Authority (DOA) the manufacturers of small airplanes can obtain authority to test, inspect, and certificate their own products independent of direct FAA supervision.[18] Another form

[8] 49 U.S.C. § 1423(a) (1970); 14 C.F.R. Part 21, subpart B (1977).

[9] 49 U.S.C. § 1423(b) (1970); 14 C.F.R. Part 21, subpart G (1977).

[10] 14 C.F.R. § 21.11 (1977).

[11] 14 C.F.R. §§ 21.139, 21.143 (1977).

[12] 14 C.F.R. Part 21, subpart H (1977).

[13] 49 U.S.C. § 1430(a)(1) (1970).

[14] 49 U.S.C. § 1423(c) (1970).

[15] 14 C.F.R. § 21.111-21.119 (1977).

[16] 14 C.F.R. § 21.113 (1977).

[17] 49 U.S.C. § 1355(a) (1970).

[18] 14 C.F.R. §§ 21.231-21.293 (1977).

of delegation, especially useful in the type certification of larger, more complex aircraft, is the appointment of Designated Engineering Representatives (DER).[19] These specialists approve the manufacturer's engineering test data under guidelines prescribed by the Administrator. Manufacturers may also nominate an employee as a Designated Manufacturing Inspection Representative (DMIR).[20] These delegates of the Administrator are permitted to issue Airworthiness Certificates when they inspect an aircraft and find that it conforms to its Type Certificate and is in a condition for safe operation.

Once an aircraft and its engine are certificated as airworthy, the holders of Type and Production Certificates, as well as aviation manufacturers, are under a continuing duty to report to the FAA any failure, malfunction or defect resulting in certain enumerated serious problems, which were not attributable to improper maintenance or usage.[21] The Act also establishes a procedure for "any person" to file a complaint with the FAA claiming violations of the statute or regulations.[22] If there is reasonable ground for the complaint, the FAA has a statutorily-imposed duty to investigate such matters. Regardless of the source of the information, if the Administrator is made aware that an unsafe condition exists in a product, or is likely to exist or develop in other products of the same type design, he may compel corrections, impose flight limitations, or prohibit the operation of an aircraft by means of an Airworthiness Directive.[23] If at anytime the Administrator should determine by reinspection that safety and the public interest require amendment, suspension or revocation of any aircraft certificate, he may issue an order taking such action after first according the holder of a certificate an opportunity to be heard.[24]

REGULATORY ADJUDICATION

The Administrative Procedure Act (APA)[25] reveals a congressional intent to allow agencies to perform a judicial function

[19] 14 C.F.R. § 183.29 (1977).
[20] 14 C.F.R. § 183.31 (1977).
[21] 14 C.F.R. § 21.3 (1977).
[22] 49 U.S.C. § 1482(a); 14 C.F.R. § 13.1 (1977).
[23] Morton v. Dow, 525 F.2d 1302 (10th Cir. 1975).
[24] 49 U.S.C. § 1429 (1970).
[25] 60 Stat. 237, *as amended*, 5 U.S.C. §§ 551 *et seq.* (1970).

known as "regulatory adjudication" when exercising discretion in the granting of a license, or certificate, to an applicant.[26] Since according to the APA a certificate is a license, an "Order" issuing or denying an aircraft certificate is a final disposition by the Administrator and is subject to review only by the courts of appeal of the United States or the United States Court of Appeals for the District of Columbia.[27] Thus, when the FAA issues an "Order" granting an aircraft certificate, an order which is final and reviewable only by the circuit courts, the Administrator has performed an adjudicatory function. When the Administrator decides to grant or deny certification, he must assess the effects of his decision on the general public as well as on the applicant. This assessment involves an analysis of various safety, economic, environmental, and transportation policy factors which regulatory agencies are particularly well equipped to make.

It is the expressed intent of Congress that the Administrator establish minimum standards and processes to encourage safety. The Administrator has given certain officials the discretionary power to implement the certification process in a manner calculated to promote safety. Judicial review of regulatory adjudication should be confined to a determination of whether the Administrator has acted outside the scope of discretion delegated by Congress.[28] Readjudication of the act of certification would undermine the administrative expertise, uniformity, and finality brought to bear by orders of the Administrator of the FAA, and result in court-created standards for certification rather than the minimum standards Congress intended by the Act.

Several district courts have rendered opinions in air crash cases which imply that a cause of action exists against the government for erroneous certification. We suggest that closer examination

[26] *See* H.R. REP. No. 1980, 79th Cong., 2d Sess. 1195 (1946). Regulatory adjudication is a final disposition by an "order" resulting from a process which is "adjudicative." I.T.T. v. Local 134, 419 U.S. 428, 443 (1974). The APA defines "adjudication" as the "agency process for the formulation of an order." 5 U.S.C. § 551(7) (1970). An "order" is defined as a final disposition, whether affirmative or negative, of an agency in a matter other than rule-making but including licensing. 5 U.S.C. § 551(6) (1970).

[27] 49 U.S.C. § 1486(a) (1970); *Cf.* Board of Supervisors of Fairfax City, Va. v. McLucas, 410 F. Supp. 1052 (D.D.C. 1967).

[28] Scanwell Laboratories, Inc. v. Thomas, 521 F.2d 941 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 910 (1976).

of these cases will show that the certification of aircraft by the FAA does not give rise to a duty of due care flowing to individual members of the public. Furthermore, an examination of the Federal Tort Claims Act (FTCA)[29] will reveal that when an FAA official certificates an airplane, such an adjudication is the performance of a "discretionary function," or, even if erroneously made, it is an unintentional "misrepresentation" for which the sovereign immunity of the United States has not been waived.

NO ACTIONABLE DUTY ARISES AS A RESULT OF THE CERTIFICATION OF AIRCRAFT BY THE FAA

A cause of action against the United States for a negligent act or omission must arise within the purview of the FTCA.[30] The FTCA is a limited waiver of the sovereign immunity of the United States for the "negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[31] A potential plaintiff must establish initially that the United States, ". . . if [treated as] a private person," would owe a duty of due care to the injured individual.

It has been held that the government cannot assert its sovereign capacity as a defense to distinguish the duties it owes to individuals from those duties owed by private persons to others.[32] However, this does not mean that all regulations promulgated by the sovereign are intended to create a duty to the individual. Many governmental regulations and directives merely establish reciprocal responsibilities between the sovereign and its official staff.[33]

Certain directives, which order that services (such as air traffic control) be provided to the public, have been held to create, in the provision of such services, a duty of care to members of the

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[29] 28 U.S.C. §§ 2671 *et seq.* (1970).

[30] 28 U.S.C. § 2679(a)-(b) (1970).

[31] 28 U.S.C. §§ 2672, 2674 (1970).

[32] *See, e.g.,* Eastern Airlines v. Union Trust Co., 221 F.2d 62 (D.C. Cir. 1955), *aff'd sub nom.* United States v. Union Trust Co., 350 U.S. 907 (1955).

[33] *See* Clemente v. United States, 567 F.2d 1140, 1144 (1st Cir. 1978), *cert. denied,* 98 S.Ct. 1876 (1978).

public.[34] Having assumed the responsibility for providing these services, the government must perform them with due care.[35] These directives, however, must be distinguished from those which require that certain employees or delegates of an agency carry out regulatory responsibilities imposed by the agency's enabling statute. Although regulations or directives establish safety standards or provide for inspections to ensure compliance with such standards, the benefits of these governmental acts flow to the body politic and not to any individual or group of individuals so as to render the United States liable for negligence in their performance.[36]

The Act is such a regulatory statute. It was designed to secure the safety and welfare of the flying public as an entity and not to establish a legal duty of care to any particular individual.[37] The general rule is that a statute which does not purport to establish civil liability, but merely makes provisions to secure the safety or welfare of the public as an entity, is not subject to a construction establishing civil liability.[38]

Courts have implied a private cause of action from a statute which includes a general grant of jurisdiction to the district courts to enforce the provisions of the statute.[39] Courts are particularly prone to such construction where it is clear that the congressional intent of the regulatory statute would be furthered by implying such a right.[40] The Act is devoid of such general jurisdictional provisions, and there is no evidence that Congress intended the

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[34] *See, e.g.*, Dickens v. United States, 545 F.2d 886 (5th Cir. 1977); Ingham v. Eastern Airlines, Inc., 373 F.2d 227 (2d Cir. 1967), *cert. denied*, 389 U.S. 931 (1967).

[35] Indian Towing Co. v. United States, 350 U.S. 61 (1955).

[36] Kropp v. Douglas Aircraft Co., 329 F. Supp. 447 (E.D.N.Y. 1971); Gerneth v. City of Detroit, 465 F.2d 784 (6th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973).

[37] *See* Clemente v. U.S., 567 F.2d 1140 (1st Cir. 1977); Sanz v. Renton Aviation, Inc., 511 F.2d 1027, 1029 (9th Cir. 1975) (per curiam); Moungey v. Brandt, 250 F. Supp. 445, 450-53 (W.D. Wis. 1966); Porter v. Southeastern Aviation, Inc., 191 F. Supp. 42, 43 (M.D. Tenn. 1961), Moodey v. McDaniel, 190 F. Supp. 24, 28 (N.D. Miss. 1960).

[38] 73 AM. JUR. 2d *Statutes* § 432 (1974).

[39] J.I. Case Co. v. Borak, 377 U.S. 426 (1964).

[40] *See* Cort v. Ash, 422 U.S. 66 (1975), where the Supreme Court provides a checklist to help the lower courts determine if a statute creates a private remedy. *See also* Note, *Implying Civil Remedies From Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963).

creation of a private cause of action.[41] On the contrary, the Act expressly left intact the rights and remedies of an individual in the common law.[42]

There is substantial authority for the proposition that regulatory statutes do not expose the government to civil liability by their provisions.[43] For example, *Kirk v. U.S.*[44] emphasized that a regulatory statute, which imposed a duty on the Secretary of Army to establish and supervise a program of river improvement and flood control, did not expose the government to civil liability for the death of a dam project construction worker, absent the express or implied approval of Congress. On appeal, the Ninth Circuit affirmed the holding of the district court, stating that the statute at bar created no legal duty on the part of the United States towards the unfortunate construction worker. The appellate court also held that regulations authorized by the statute did not create a legal duty to individuals, reasoning that,

> Every government employee must trace the duties of his job to some law, regulation or order,but this does not mean that in every such case there is thereby established a duty of care on the part of the employee and the government toward those who may be incidentally benefitted if those are properly performed or toward those who may be incidentally injured if those duties are not properly performed.[45]

Most courts which have construed the provisions of the Act and the regulations promulgated thereunder have held that the Act does not create a private cause of action for individuals.[46]

The Ninth Circuit analyzed the Act in *Sanz v. Renton Aviation*

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[41] *See* S. REP. No. 1811, 85th Cong., 2d Sess. 9 (1958).

[42] 49 U.S.C. § 1506 (1970).

[43] *See, e.g.*, Gerneth v. City of Detroit, 465 F.2d 784 (6th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973); Kirk v. United States, 270 F.2d 110 (9th Cir. 1959); Davis v. United States, 395 F. Supp. 793 (D. Neb. 1975), *aff'd*, 536 F.2d 758 (8th Cir. 1976).

[44] 161 F. Supp. 722 (D. Idaho 1959), *aff'd*, 270 F.2d 110 (9th Cir. 1959).

[45] 270 F.2d at 118.

[46] *E.g.*, Sanz v. Renton Aviation, Inc., 511 F.2d 1027 (9th Cir. 1975); Dickens v. United States, 378 F. Supp. 845, 854 (S.D. Tex. 1974), *aff'd*, 545 F.2d 886 (5th Cir. 1977); Rosdail v. Western Aviation, Inc., 297 F. Supp. 681, 684 (D. Col. 1969); *contra*, Gabel v. Hughes Air Corp., 350 F. Supp. 612, 615 (C.D. Cal. 1972); *see also* Note, The Applicability of Federal Common Law to Aviation Tort Litigation, 63 Geo. L. J. 1083, 1094-97 (1975).

Inc.[47] and held that Congress did not intend to create a federal cause of action against aircraft operators in favor of all members of the public who suffer injury, from whatever cause, through the use of rented aircraft. The court reasoned that the public policy underlying the Act which might support the implication of a private cause of action is that pertaining to "the promotion of safety in air commerce."[48] However, the court noted that safety would not be enhanced by holding the operator of an airplane liable when he was not at fault for the crash. Similarly, in an alleged negligent certification case, aviation safety will not be advanced by the readjudication of the certification processes.

Notwithstanding the absence of congressional intent to create an actionable duty through the Act, several district courts have sought to justify the existence of a cause of action against the United States based on the certification of aircraft. In *Gibbs v. United States*,[49] the court postulated, using the logic of *Indian Towing v. United States*,[50] "that having decided to enter the broad field of regulation of the flight and repair modification of aircraft, the government becomes responsible for the care with which those activities are conducted."[51] This case, however, is not authority for the proposition that a cause of action exists for negligent certification, since the above-mentioned comments were mere dicta. The court held that there was no negligence on the part of the FAA which proximately caused the crash.[52]

A careful analysis of the complicated facts in *Gibbs* reveals that, at the time of the crash, the aircraft did not have a valid Type Certificate or Supplemental Type Certificate in effect. The court found that something had gone wrong, and that there was a lack of coordination between those involved in the certification process.[53] The court failed to distinguish between the responsibilities of the mechanics, an Authorized Inspector, and the one FAA

[47] 511 F.2d 1027 (9th Cir. 1975).

[48] *Id.* at 1029.

[49] 251 F. Supp. 391 (E.D. Tenn. 1965).

[50] 350 U.S. 61 (1955) (The Coast Guard, having assumed a duty to provide navigational guidance by means of lighthouses, is liable to the same extent as a private individual if it negligently allows the lights to go out).

[51] 251 F. Supp. at 400.

[52] *Id.* at 401.

[53] *Id.* at 400.

employee involved, so as to accurately assign negligence for the error in a manner which would point to negligent certification by the government.

The reasoning used in *Gibbs*, which would impose liability for regulation by certification, has been rejected in *Clemente v. U.S.*[54] In this recent decision, the First Circuit distinguished between a situation where the government has assumed a responsibility to provide services to individual members of the public via air traffic control, and those governmental functions such as certification wherein a particular agency is merely carrying out its regulatory responsibilities from which the individual members of the public derive incidental benefits.

In a case brought under the Suits in Admiralty Act,[55] *Rapp v. Eastern Air Lines, Inc.*,[56] the court implied that the FAA had a duty under the Act towards third persons, relying on the statutory language that the Administrator "shall . . . perform his . . . duties in such a manner as will best tend to reduce or eliminate the possibility of, or recurrence of, accidents in air transportation."[57] The *Rapp* court reasoned that the government was negligent for issuing a Type Certificate when it knew that the aircraft's engines were capable of ingesting birds, and further in failing to provide for additional tests to determine the outcome if a Lockheed Electra should ingest a flock of birds.[58] *Rapp* is of no precedential value, since it was remanded and vacated by the Third Circuit Court of Appeals, and settled prior to trial on remand.

The reasoning in *Rapp* reflects a recurring problem. Perhaps there is an element of sympathy, or a sociological reason, whereby litigants have been able to convince courts that the FAA could have done something more to prevent a crash, and that the agency's decision to certificate an aircraft without requiring this additional something (presently painfully obvious through the benefit of hindsight) amounts to negligent certification. This reasoning presumes the existence of the duty and foreseeability ele-

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[54] *See* note 35, *supra*.

[55] 46 U.S.C. §§ 741 *et. seq.* (1970).

[56] 264 F. Supp. 673 (E.D. Pa. 1967), *rev'd and vacated*, 521 F.2d 1399 (3d Cir. 1970).

[57] 49 U.S.C. § 1421(b) (1970).

[58] 264 F. Supp. at 680-81.

ments and, at the same time, ignores the extensive discretion involved when the Administrator determines the nature and extent of testing. To say that the FAA should have denied certification because an engine might lose power in the highly unlikely event that an airplane encounters a flock of over 100 starlings (as it did in *Rapp*) is tantamount to requiring the Administrator to certifiy only engines which can withstand anything that might go down the intake.

In *Arney v. United States,*[59] another admiralty case, the allegation of negligent certification of a modified fuel system raised the issue of duty. The district court granted summary judgment to the United States.[60] The Ninth Circuit Court of Appeals reversed the summary judgment on the ground that there was a genuine issue of material fact as to whether the fuel system was negligently certificated, defective as originally constructed, or negligently modified.[61] On remand the case was resolved by a nominal settlement, precluding any disposition on the question of duty. It is noteworthy that the Ninth Circuit erroneously cited the district court opinion in *Rapp*[62] for the proposition that there could be a cause of action against the United States for negligent certification, apparently unaware that the Third Circuit had reversed and vacated the judgment against the United States handed down by the district court in that case.[63]

In *Ciccarelli v. United States,*[64] a wrongful death action resulting from an air crash, the question of duty was raised through the government's motion to dismiss the plaintiffs' allegation that the Act was designed to protect a certain class of persons, thereby imposing on the FAA a duty to the members of that class. The plaintiffs alleged negligence in the issuance of Type, Production, and Airworthiness Certificates. Viewing the pleadings in a light most favorable to the plaintiffs, the court denied the government's motion, and concluded that the Act did impose a duty of due care in certification toward those classes of people such as air-

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[59] 479 F.2d 653 (9th Cir. 1973).

[60] *Id.* at 655.

[61] *Id.* at 660.

[62] *Id.* at 658.

[63] 521 F.2d 1399 (3d Cir. 1970).

[64] Civ. No. S-1940, (E.D. Cal. Feb. 15, 1972).

craft pilots, owners, and passengers. *Ciccarelli* is of questionable precedential value since the action against the United States was abandoned before trial on the merits.

Rapp and *Ciccarelli* are the only cases which lend some support to the theory that a cause of action for negligent certification might exist against the United States. Neither is an authoritative interpretation of the Act, nor should they be considered dispositive of the question of duty. The FAA cannot guarantee safety for the flying public by means of the certification process and should not be placed in the position of an insurer against injuries from negligently manufactured airplanes. Since the common law places the ultimate liability (and often strict liability) on the manufacturer for harm caused by a defective product, the courts should not imply a cause of action against the United States from a regulatory statute enacted by Congress to safeguard the public as a whole.

THE CERTIFICATION PROCESS IS A DISCRETIONARY FUNCTION FOR WHICH THERE CAN BE NO LIABILITY UNDER THE FTCA

The taxpayers cannot afford to insure against liability each and every political decision and regulatory act performed by the functionaries of their government. To expose all decisions of government officials to review by damage suits would inhibit their initiative by making them fearful that each of their decisions would have to suffer judicial scrutiny. Therefore, when Congress partially abrogated the sovereign immunity of the United States by enacting the FTCA, it created a "discretionary function exception,"[65] to protect the regulatory acts of government from judicial review in the guise of a tort suit.

Although a substantial body of common law has developed concerning the performance of "discretionary" acts by government functionaries, Congress failed to define which functions it considered "discretionary." The *Dalehite* case[66] determined that the "exception" should be broadly construed, and that "where there is room for policy judgment and decision there is discretion."[67]

[65] 28 U.S.C. § 2860(a) (1970).

[66] Dalehite v. United States, 346 U.S. 15 (1953).

[67] *Id.* at 36.

The Supreme Court, in refusing to define where discretion ends, indicated that not only were the planning level policy decisions of administrators protected by the exception, but that the acts of employees who carry out those discretionary plans were also exempt from suit.[68] The Court has not further defined the meaning of "discretionary function" since *Dalehite*.[69]

Various measures of discretion have been devised by the lower courts to determine whether to apply the discretionary function exception:

1) Does the person whose judgment is attacked function at the discretionary planning level or does he merely execute policy at an operational level?[70]

2) Is the act involved of a nature and quality which Congress intended to put beyond review?[71]

3) Did the decision-maker look to considerations of government policy?[72]

4) Were clear standards set forth for measuring individual facts so that the discretionary balance of several factors is not necessary?[73]

Many courts have applied these tests with diverse results, yet few cases have dealt with the viability of the discretionary function defense in cases of alleged erroneous certification. Those courts which have dealt with this issue have not thoroughly analyzed the certification process to determine whether there is room for "policy judgment." The typical certification determination amounts to a regulatory adjudication. An FAA official makes both an objective and subjective appraisal of test results submitted to him by the manufacturer, and in his judgment determines whether there has been adequate compliance with federal regulations to merit the issuance of a certificate.

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[68] *Id.* at 33.

[69] *See, e.g.*, Indian Towing v. United States, 350 U.S. 61 (1955) (interpretation of § 2674 of the Act and not the discretionary function exception); Rayonier, Inc. v. United States, 352 U.S. 315, 319 (1957) (government liability is to be measured by that of private individual and expressly rejected the "uniquely government capacity" argument).

[70] United States v. Union Trust Co., 221 F.2d 62, 76 (D.C. Cir. 1955).

[71] Downs v. United States, 522 F.2d 990, 997 (6th Cir. 1975).

[72] Hoffman v. United States, 398 F. Supp. 530 (E.D. Mich. 1975).

[73] Hendry v. United States, 418 F.2d 774 (2d Cir. 1969).

In *Cicarelli*,[74] the district court in dictum addressed the applicability of the discretionary function exception, and merely speculated that certification might be considered an operational function.[75] Another district court, in *Hoffman v. U.S.*,[76] denied the motion for summary judgment of the United States by narrowly construing the discretionary function exception as inapplicable to the functions performed by an official under a regulation which is specific as to the minimum requirements for a certificate.[77] The court applied the test developed in *Hendry v. United States*,[78] which requires a matching of clear standards against given facts. It reasoned that the FAA's issuance of an Air Taxi/Commercial Operator (ATCO) Certificate without requiring strict compliance with one of the regulations of the Civil Aeronautics Board (CAB)[79] (concerning a requirement that the carrier obtain liability insurance), was a non-discretionary act outside the scope of the discretionary function exception to the FTCA.[80] The focus switched from this issue at trial, when the court held that the failure of the FAA to enforce its own regulation requiring evidence of compliance with the CAB economic regulation[81] before issuing an ATCO Certificate in no way proximately caused the crash which prompted plaintiff's lawsuit.[82] As a result, the trial court found that "no cause of action existed against the United States."[83]

Since an appeal and cross-appeal to the Sixth Circuit have been taken in *Hoffman*,[84] the reasoning of the district court merits some attention. The *Hoffman* court believed a clear-cut standard for FAA conduct was involved, thereby leaving little room for discretion.[85] A more careful judicial analysis of the regulatory process in question would have revealed that it was the "applicant"

[74] Note 64 *supra*.

[75] *Id.*

[76] 398 F. Supp. 530 (E.D. Mich. 1975).

[77] *Id.* at 539.

[78] 418 F.2d 774 (2d Cir. 1969).

[79] 14 C.F.R. § 298.42 (1977).

[80] 398 F. Supp. at 539.

[81] 14 C.F.R. § 135.15 (1977).

[82] Hoffman v. United States, 14 Av. Cases, 17,646 (E.D. Mich. 1977).

[83] *Id.*

[84] Hoffman v. United States, Nos. 77-1290, 1291 (6th Cir. May 19, 1977).

[85] Notes 76-81, *supra*, and accompanying text.

who had to satisfy clearly ascertainable standards promulgated in a CAB regulation, after which an applicant would be eligible for an ATCO Certificate. The FAA had formulated a national policy of selectively not enforcing one of its own regulations[86] in this regard, and permitted ATCO Certification despite the failure of an applicant to meet CAB insurance requirements. Under this policy any known violation of the CAB rule would be forwarded to the CAB for enforcement. In dictum, the court implied that this might be a case of negligent certification.[87] However, the court failed to note that the regulation, which only imposed certain requirements on applicants, did not by its terms place any restrictions on the FAA's freedom to grant or deny certificates as it sees fit, even to technically ineligible applicants.

As to the government's discretionary function defense, the court in *Hoffman* called for an analysis of "whether the decision maker necessarily looked to considerations of public policy,"[88] and described this question as a factor in determining the applicability of the discretionary function exception. Yet, ironically, the court failed to take this factor into account when it glossed over the fact that a senior FAA official had formulated a national policy instructing FAA field personnel not to withhold ATCO certification merely because an applicant had not complied with the CAB insurance requirement. This last point should be particularly persuasive to the Sixth Circuit, since in *Downs v. United States*,[89] which was decided after the denial of a summary judgment in *Hoffman*, the Sixth Circuit emphasized that the discretionary function exception was intended to protect policy making, whatever the rank of those so engaged.[90]

Some of the lower courts have failed to heed the express dictate of *Dalehite*, that "where there is room for policy judgment and decision there is discretion."[91] In that case the Supreme Court explained that the exception covers "all employees exercising [this]

[86] FAA Notice 8430.120; *see* 398 F. Supp. at 532.

[87] *Id.* at 534.

[88] *Id.* at 538.

[89] 522 F.2d 990 (6th Cir. 1975) (FBI agents' discretionary handling of a hostage situation did not fall within the discretionary function exception).

[90] 522 F.2d at 997.

[91] 346 U.S. at 36.

discretion."[92] If courts are permitted to penetrate the cloak of protection afforded by the discretionary function exception, and award money damages in satisfaction of a tort suit in cases of alleged erroneous certification, the FAA will become the insurer of all who manufacture aircraft under the auspices of an FAA Type Certificate. Likewise, an Airworthiness Certificate would be turned into an express warranty of safety to the flying public—a result clearly not intended by Congress.

CERTIFICATION, EVEN IF UNWARRANTED, IS AT MOST A MISREPRESENTATION AS TO THE AIRWORTHINESS OF AN AIRCRAFT AND CANNOT PROVIDE A BASIS FOR SUIT UNDER THE FTCA

When Congress enacted a limited waiver of sovereign immunity by means of the FTCA, it expressly excluded "any claims arising out of . . . misrepresentation."[93] The term misrepresentation has been construed in accordance with traditional tort concepts, and it is well settled that this exception includes claims arising out of negligent as well as intentional misrepresentation.[94]

The Supreme Court spoke on the "misrepresentation exception" in *United States v. Neustadt*,[95] where the misrepresentation defense barred a claim by a purchaser of a home who, in reliance upon a negligent inspection and appraisal by personnel of the Federal Housing Administration, had been induced to pay more for property than it was actually worth. While defending the applicability of the misrepresentation exception against the contention that the conduct before the bar was ordinary negligence, the Court instructed,

> To say . . . that a claim arises out of 'negligence,' rather than 'misrepresentation,' when the loss suffered by the injured party is caused by the breach of a 'specific duty' owed by the government to him, i.e., the information upon which that party may reasonably be expected to rely . . . is only to state the traditional and commonly understood legal definition of the tort of 'negligent mis-

[92] *Id.*

[93] 28 U.S.C. § 2680(h) (1970).

[94] Fitch v. United States, 513 F.2d 1013, 1015 (6th Cir. 1975), *cert. denied*, 423 U.S. 866 (1976).

[95] 366 U.S. 696 (1961).

representation' . . . which there is every reason to believe Congress had in mind when it placed the word 'misrepresentation' before the word 'deceit.'[96]

Professor Prosser has noted that many forms of negligent conduct involve some element of misrepresentation.[97] Thus, in drawing a distinction between negligence, for which the U.S. may be held liable, and misrepresentation, which is exempted from suit, the district and circuit courts have generally ruled that where the government's misrepresentation was only incidental to an operational decision, the exception would not apply.[98] For example, the lower courts have held that the negligent performance of operational tasks, such as the failure of air traffic controllers to warn pilots of hazardous conditions, did not justify the application of the "misrepresentation exception."[99] Thus, a distinction can be made between situations where there is reliance, wherein the government actively fails to perform a specific affirmative duty, such as to communicate a warning, and those functions where an act, such as certification, simply constitutes a passive representation to the general public that there has been compliance with certain minimum standards.

Cases applying the misrepresentation exception to situations reasonably analogous to the certification process clearly support the proposition that the United States would not be held liable for the certification representation. *In re Silver Bridge Disaster Litigation*[100] cited *Neustadt*[101] and held that even if the Bureau of Public Roads of the United States permitted a statement to be published, which could be considered an actionable representation of safety as to a bridge that subsequently collapsed, and which was a representation upon which the members of the public had a right to rely, the plaintiff would be barred from suing the government

[96] *Id.* at 706-07.

[97] W. PROSSER, THE LAW OF TORTS 683 (4th ed. 1971).

[98] *See, e.g.*, Ingham v. Eastern Airlines Inc., 373 F.2d 227 (2d Cir. 1967), *cert. denied*, 389 U.S. 931 (1967); Beech v. United States, 345 F.2d 872 (5th Cir. 1965); 59 VA. L. REV. 73 (1973).

[99] United Airlines, Inc. v. Wiener, 335 F.2d 379 (9th Cir. 1964), *cert. dismissed*, 379 U.S. 951 (1964); Wenninger v. United States, 234 F. Supp. 499 (D. Del. 1964), *aff'd*, 352 F.2d 523 (3d Cir. 1965); Ingham v. Eastern Airlines, Inc., 373 F.2d 227 (2d Cir. 1967).

[100] 381 F. Supp. 931 (S.D. W. Va. 1974).

[101] 366 U.S. 696, *cited*, 381 F. Supp. at 977.

by virtue of the misrepresentation exception.[102] An unreported action, *Bibbig v. United States*,[103] was brought under the FTCA seeking damages for the crash of a motorized glider, which allegedly had been ". . . negligently inspected and issued an airworthiness certificate."[104] The government raised the misrepresentation defense against this allegation and a motion for dismissal was summarily granted after a review of the precedent in this area.[105]

In *Marival, Inc. v. Planes, Inc.*,[106] an airplane purchaser brought an action to recover damages from the defendant seller because of the latter's misrepresentation and breach of implied warranties concerning the condition of the aircraft. The defendant filed a third-party action against the United States under the FCTA, on the theory that the FAA had negligently renewed an Airworthiness Certificate for such aircraft, upon which the defendant had relied. The defendant/third-party plaintiff's contention was that if the aircraft was unairworthy, the government authorized inspector negligently performed his annual inspection, thereby rendering the FAA negligent in the issuance of the craft's airworthiness certificate.[107] The *Marival* Court never decided the issue of whether an inspection performed by a person not employed by the FAA, an Authorized Inspector,[108] could result in FAA liability for erroneous certification.[109] However, the court did comment in dictum that certification by the FAA was "not designed as a commercial warranty upon which a party may sue the government."[110]

The court granted the government's motion for dismissal, explaining that the misrepresentation exception protected the sover-

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[102] 381 F. Supp. at 977.

[103] Civ. No. C-4606 (D. Col. May 3, 1973).

[104] *Id.*

[105] *Id.*

[106] 306 F. Supp. 855 (N.D. Ga. 1969).

[107] *Id.* at 857.

[108] Authorized Inspectors are appointed under the authority of 49 U.S.C. § 1425(b) (1970). Their functions are described in 14 C.F.R. §§ 65.91-65.95 (1977).

[109] Regarding the likelihood of FAA liability for the negligence of independent contractors such as "representatives," "delegates," and "designees," *see* Dilk, *Negligence of FAA Delegates Under the Federal Tort Claims Act*, 42 J. AIR L. & COM. 573 (1976).

[110] 306 F. Supp. at 860 n.1.

eign from suit.[111] The court reasoned that even though alleged negligent conduct in the government's inspection may have resulted in a misrepresentation of the airplane's airworthiness, the injuries arose from the misrepresentation and not from the negligent conduct.[112] The court further emphasized that "it was precisely this type of action, involving direct reliance on governmental communication of facts, rather than direct injury from negligent conduct, which the misrepresentation exception was designed to meet."[113]

The recent decision in *Lloyd v. Cessna Aircraft Co.*,[114] has further emphasized the weaknesses of an action for negligent certification. The plaintiff in *Lloyd* was a manufacturer who brought a third-party action against the United States, based on alleged negligence of the FAA in inspecting and testing an aircraft prior to the agency's issuance of a Supplemental Type Certificate and an Airworthiness Certificate. After reviewing all the decisional law relevant to the misrepresentation defense, the court concluded that since the government did not cause any direct physical harm to the aircraft, any negligent conduct by an inspector authorized to sign on behalf of the FAA could amount to nothing more than a misrepresentation as to the true condition of the aircraft involved.[115] The *Lloyd* court expressly re-affirmed what has been impliedly recognized since *Neustadt*: that the misrepresentation exception is just as applicable to actions involving personal injury, wrongful death, or property damage as it is to those involving only financial and commercial loss.[116]

In view of the trend exemplified by *Marival* and *Lloyd*, it is likely that if the misrepresentation exception had been raised and dealt with by the courts in certification cases like *Ciccarelli*,[117] a cause of action for negligent certification would probably have been held jurisdictionally precluded. In those areas where Congress

[111] *Id.* at 860.

[112] *Id.*

[113] *Id.*

[114] 429 F. Supp. 181 (E.D. Tenn. 1977).

[115] 429 F. Supp. 186-87.

[116] 429 F. Supp. at 187; *see also*, Bartie v. United States, 216 F. Supp. 10, 18, 19 (W.D. La. 1963); Vaughn v. United States, 259 F. Supp. 286, 289 (N.D. Miss. 1966); ALI, RESTATEMENT (SECOND) OF TORTS, § 311 (1965).

[117] Civ. No. S-1940 (E.D. Cal. Feb. 15, 1972).

has expressly not waived sovereign immunity, the district court is without jurisdiction.[118]

The misrepresentation defense was raised in a motion for summary judgment and ignored in a recent unreported case, *Cearly v. United States.*[119] The court considered the question of whether the FAA had negligently issued a Supplemental Type Certificate covering a newly installed gasoline heater. Three years after certification, a leak apparently developed in the fuel lines leading to the heater. A fire resulted, which caused the air crash that killed the plaintiffs' decedents. The United States lost its motion for summary judgment, and the government was foreclosed from arguing the misrepresentation issue at trial. Counsel for the United States have raised this issue again in a recent brief submitted to the Ninth Circuit on appeal.[120]

Had the trial court conducted an in-depth analysis of the nature of the negligence alleged, it would have realized that the only connection between the passengers and the FAA was their indirect reliance on what arguably could be considered an implication of airworthiness resulting from the issuance of a Supplemental Type Certificate. The alleged negligent inspection of the heater installation and the representation that the heater system satisfied the requirements for an airworthiness certificate, even if in fact it did not, presents a classic example of a situation where the courts have applied the misrepresentation exception.

CONCLUSION

Plaintiffs who have suffered harm from defectively designed or manufactured aviation products, and who have attempted to make the United States a defendant on the basis that the FAA failed to discover the defect in the certification process, have been met by at least three defenses at law. First, since the regulatory responsibilities imposed by the Act were designed to secure the safety of the general public instead of establishing a legal duty of care to individuals, there can be no cause of action in tort against the

[118] Honda v. Clark, 386 U.S. 484 (1967); Fitch v. United States, 513 F.2d 1013 (6th Cir. 1975); Peterson v. United States, 428 F.2d 368 (8th Cir. 1970).

[119] Civ. No. 70-138 (S.D. Cal. April 2, 1975), *appeal docketed*, No. 76-2813-17 (9th Cir. Jul. 30, 1975).

[120] *Id.*

United States. Second, the discretionary function exception to the FTCA immunizes the United States from lawsuit when the agency fails to detect a manufacturing or design defect during the certification process, since Congress intended to exempt this type of regulatory act from liability. Third, the decisional trend recognizes that the issuance of a certificate implying that an aircraft is airworthy, which in retrospect proves to be unairworthy, is nothing more than misrepresentation, a mistake which Congress has expressly exempted from lawsuit.

The authors also articulate the inherent distinction based upon the separation of powers between administrative agencies and the courts. Since Congress has given the FAA the primary jurisdiction to regulate and to certificate aircraft, it is improper for the district courts to arrogate to themselves the adjudicative function (which includes technical expertise as well as discretion) of retroactively determining whether an aircraft was properly certificated.

Certainly, the Administrator can not guarantee the reliability of products used in air commerce, nor does the regulatory scheme devised by Congress require the agency to insure against risks inherent in air travel. Aviation safety is an ideological objective. The Administrator cannot mandate safety. Within the regulatory concept of the certification process there may be endless opportunity for the discovery of error. Yet inherent in the FAA's regulatory auditing process, which contemplates a review of tests reasonably necessary to demonstrate compliance with minimum standards, lies the reality that not all errors and defects can be discovered. Also, it would be physically impossible to establish regulatory standards objective and stringent enough to prevent the occurrence of any accident, and the cost of the absolute, or endless redundancies, calculated to achieve the impossible goal of perfect safety, would economically paralyze the aviation industry. Such over-regulation would be contrary to the Administrator's responsibility to foster the development of civil aeronautics and to undertake or supervise the developmental work and scientific testing necessary to create improved aircraft.[121]

Courts should also consider the economic policy implications of imposing liability on the United States for the erroneous certifica-

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[121] 49 U.S.C. § 1353 (1970).

tion of aircraft. Eventually, it is the taxpayer who must pay twice if the FAA is compelled to implead and cross-claim against the manufacturer or defend itself in a certification action. "We," the taxpaying public, must pay initially for the regulatory services of the FAA and "we" must pay again when the agency is forced to step outside its regulatory role and into the courtroom. In the procurement of navigation and radar systems from the manufacturing industry, the FAA occasionally becomes a plaintiff to remedy a contractual breach. In this posture, the agency operates as a business ensuring that the taxpayers get the benefit of their bargain. However, when a manufacturer markets an aviation product which is found to be defective and not in conformity with the standards promulgated by the FAA in the Federal Aviation Regulations,[122] the proper function of the agency is to enforce the regulations, not defend a tort suit. The FAA protects the interests of the taxpaying flying public by issuing an Airworthiness Directive to remedy the defect. This Directive compels conformity with the regulations under pain of civil fine, suspension, or revocation of the operator's certificate.[123] It is the manufacturer who is best able to reduce the risk of harm from his product, who can utilize quality control to prevent a recurrence of the defect, and who can discharge the common law duty of due care to those foreseeably injured by his product.

Beyond this concept of fault and restitution, courts have also recognized that if the manufacturer launches a defective product into the stream of commerce which creates an unreasonable risk of harm, the manufacturer will be held strictly liable and will be required to bear a large part of the financial loss for injuries caused by a defect in his product. It is believed that the manufacturer should bear this loss and remedy any defect to prevent a recurrence, and, considering the financial impact of large adverse judgments, the manufacturer should insure against such risks. The principle of commutative justice assists the manufacturer by allowing the burden to be spread among the consumers who enjoy the benefits of air travel.[124]

[122] 14 C.F.R. Parts 1 *et. seq.* (1977).

[123] 49 U.S.C. §§ 1429a, 1471 (1970); 14 §§ C.F.R. 13.15, 13.19, 21.181 (1977).

[124] *See*, Morris, *Enterprise Liability and the Actuarial Process—the Insignificance of Foresight*, 70 YALE L.J. 554, 583-87, 593-99 (1961).

To impose liability on the United States for alleged errors in certification distorts the commutative system of justice, which contemplates spreading the loss once, primarily to the manufacturer, and then only to the flying public, not to the general public. All taxpayers have paid once for the regulatory services of the FAA. Individual members of the flying public will have to pay more for air travel as a result of product liability litigation. Yet the taxpaying general public should not have to pay a second time when FAA is drawn into product liability litigation as a defendant or when the FAA is required to implead, or is impleaded by, the very manufacturer which the agency regulates, and who is best able to bear the loss.