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Federal Tort Claims Act: Discretionary Function Exception Revisited

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FEDERAL TORT CLAIMS ACT: DISCRETIONARY FUNCTION EXCEPTION REVISITED

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Several commentators have maintained that the federal courts have taken confusing and inconsistent positions with regard to the discretionary function exception to the Federal Tort Claims Act. The authors attempt to refute this position by analyzing more recent opinions and finding a trend. This trend has led to a less confusing and more definite framework depending upon various factors which will appear in every case. By analyzing these factors while keeping in mind the purposes of both the Act and the exception, the authors conclude that the outcome of any dispute in this area will be susceptible to a higher degree of predictability.

I. INTRODUCTION

Originally enacted in 1946, the Federal Tort Claims Act[1] allows monetary recovery against the United States government[2] for dam-

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1. 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 (1970).

2. All claims initially must be presented to the appropriate federal agency for a decision on liability. If the claim has been "finally denied" by the agency, the dissatisfied claimant may seek court review.

Under the original Act the heads of each federal agency could consider, adjust, and determine any claims for damages only when such damages were under a certain amount. Today, no court action can be maintained unless the claimant has first presented his claim to the federal agency and the claim has been formally denied. 28 U.S.C. §§ 2672, 2675 (1970).

ages, loss of property, personal injury, or death caused by negligent or wrongful acts of federal government employees[3] while acting within the scope of their employment.[4] The doctrine of sovereign immunity,[5] as acknowledged by Chief Justice Marshall in *Cohens v. Virginia*,[6] previously had barred recovery in tort actions against the government.[7] The United States cannot be sued without its consent.[8] This doctrine, imported from England, sought to prevent interference by the judiciary with the performance of ordinary governmental functions.[9]

The Tort Claims Act is intended to waive "the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability."[10] Congress recognized the desirability of spreading among all taxpayers losses suffered through negligent acts rather than imposing the entire burden on the injured party.[11] However, a section of the Act, presently 28 U.S.C. section 2680(a) (1970), expressly excepts from the Act's coverage

> [a]ny 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.[12]

Thus, when a government official is exercising a "discretionary function," no tort suit can be maintained; the government has not

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3. Liability of the United States in tort is "in the same manner and extent as a *private individual* under like circumstances," but no liability exists for "interest prior to judgment or for punitive damages." 28 U.S.C. § 2674 (1970) (emphasis added). District courts have exclusive jurisdiction over such claims. 28 U.S.C. § 1346(b) (1970).

4. "The statute is unique in Anglo-American jurisprudence in its explicit exception for discretion." Dalehite v. United States, 346 U.S. 15, 32-33 n. 27 (1953).

5. For a discussion of this doctrine, see Cramton, *Non-statutory Review of Federal Administrative Action: The Need for Statutory Reform of Soverign Immunity, Subject Matter Jurisdiction, and Parties Defendant*. 68 MICH. L. REV. 387, 396-436 (1970).

6. 19 U.S. (6 Wheat.) 264, 378 (1821).

7. To waive immunity, Congress has passed statutes in several areas of law to allow suits against the government. *See* text accompanying note 29 *infra*.

8. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 380 (1821).

9. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704 (1949).

10. Rayonier, Inc. v. United States, 352 U.S. 315, 319 (1957).

11. *Id.* at 319-20.

12. 28 U.S.C. § 2680(a) (1970) (emphasis added).

consented to being sued; and the doctrine of sovereign immunity applies.[13] An unresolved question, however, remains: Which discretionary acts were immunized by Congress? Since government agencies are engaged in different types of activities, the federal courts encountered problems and confusion in attempting to construe and apply section 2680(a).[14] The courts have not construed the exception as applying to all discretionary acts of the government.[15] Several recent federal cases have demonstrated a wide variety of situations which face the courts when applying the exception. Judicial scrutiny of an assortment of discretionary governmental activities has occurred in such instances as where: (1) the chief FBI agent at the scene of a hijacking ordered his agents to open fire to disable the plane, but this order also resulted in the hijacker's response of shooting two hostages;[16] (2) through an allegedly negligent application by an HEW division of scientific standards promulgated in certain Surgeon General regulations, a plaintiff sustained injuries from ingestion of Sabin oral live-virus polio vaccine;[17] (3) the NLRB delayed for 4 years the initial back pay specifications against an employer following an enforcement order by the court of the Board's reinstatement order since this work was assigned to an inexperienced officer who was instructed to handle less complicated matters first;[18] and (4) a government agency awarded a contract by determining that the lowest bidder had complied with the specific bid invitation requirements.[19]

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13. Analogously, immunity has been extended to protect government officials sued in their individual capacity for discretionary activities undertaken as part of their official duties. "The doctrine of immunity [also] reflects the view that an official may be excessively hampered if he is subject to the tedious and potentially embarrassing process of litigation, regardless of the ultimate outcome." Estrada v. Hill, 401 F. Supp. 429 (N.D. Ill. 1975), *quoting* Barr v. Matteo, 360 U.S. 564 (1959).

14. Reynolds, *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L.J. 81 (1968); Comment, *Discretionary Function Exception to Federal Tort Liability*, 2 CUMBERLAND-SAMFORD L. REV. 383 (1971).

15. Moyer v. Martin Marietta Corp., 481 F.2d 585, 596 (5th Cir. 1973), *quoting* Smith v. United States, 375 F.2d 243 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967).

16. Downs v. United States, 522 F.2d 990 (6th Cir. 1975); *see* text accompanying notes 78-81 *infra*.

17. Griffin v. United States, 500 F.2d 1059 (3d Cir. 1974); *see* text accompanying notes 143-46 *infra*.

18. J.H. Rutter Rex Mfg. Co. v. United States, 515 F.2d 97 (5th Cir. 1975), *cert. denied*, 424 U.S. 954 (1976); *see* text accompanying note 111 *infra*.

19. Scanwell Laboratories, Inc. v. Thomas, 521 F.2d 941, 948 (D.C. Cir. 1975) (dictum), *cert. denied*, 425 U.S. 910 (1976); *see* text accompanying notes 91-93 *infra*.

The cases which have proceeded to litigation thus far demonstrate that the determination of which activities constitute discretionary functions within the exception is by no means obvious. Standards applied by courts have contained specious distinctions. It is maintained, and the writers intend to show, that the confusion in the past among the courts has been replaced in these and other recent opinions with the development of a more consistent approach based primarily upon whether the decisionmaking process encompassed policy considerations.[20]

II. LEGISLATIVE HISTORY

The language of the exception[21] has not provided standards for its application. In order to consider the original intent of Congress, courts have searched the rather inconclusive legislative history of the Act.

Despite this lack, the courts and commentators have been in general agreement as to the purpose of the Act.[22] The Federal Tort Claims Act was enacted by Congress as Title IV of the Legislative Reorganization Act of 1946[23] in an effort to relieve itself of the massive number of private relief bills which were presented before each session.[24] These burdensome bills, by unduly occupying congres-

20. *See* text accompanying note 67 *infra*.

21. *See* text accompanying note 12 *supra*.

22. *See, e.g.*, Dalehite v. United States, 346 U.S. 15, 24 (1953); L. JAYSON, HANDLING FEDERAL TORT CLAIMS: ADMINISTRATIVE AND JUDICIAL REMEDIES, chs. 2, 12 (1974); Reynolds, *supra* note 14, at 81-85.

23. Act of Aug. 2, 1946, Pub. L. No. 79-601, §§ 401-24, 60 Stat. 842.

24. H.R. REP. No. 1287, 79th Cong., 1st Sess. 2 (1945) noted the magnitude of the task of disposing of private claims:

> In the Sixty-eighth Congress about 2,200 private claim bills were introduced, of which 250 became law, then the largest number in the history of the Claims Committee.
>
> In the Seventieth Congress 2,268 private claim bills were introduced, asking more than $100,000,000. Of these, 336 were enacted, appropriating about $2,830,000, of which 144, in the amount of $562,000, were for tort.
>
> In each of the Seventy-fourth and Seventy-fifth Congresses over 2,300 private claim bills were introduced, seeking more than $100,000,000. In the Seventy-sixth Congress approximately 2,000 bills were introduced, of which 315 were approved, for a total of $826,000.
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> In the Seventy-seventh Congress, of the 1,829 private claim bills introduced and referred to the Claims Committee, 593 were approved for a total of $1,000,253.30. In the Seventy-eighth Congress 1,644 bills were introduced; 549 of these were approved for a total of $1,355,767.12. So far during the present Congress about 1,279 private claim bills have been introduced. Of these, 225 have been enacted, appropriating about $965,353.06.

sional time, hindered Congress' attempts to legislate in areas of more vital national concern.[25] A more simplified recovery procedure was needed. Furthermore, the vehicle of private bills for relief acted to prejudice the claims of applicants.[26] Consequently, Title IV was enacted, although not without opposition,[27] to provide for the administrative and judicial adjustment of tort claims against the federal government.

Since 1925,[28] legislation waiving the government's sovereign immunity in tort had been introduced for congressional consideration. Congress had previously passed several statutes whereby the government had consented to suits in such areas as breach of contract, patent infringement, and maritime torts.[29] Each bill proposed various methods of granting relief to tort claimants.[30] The earlier tort claims bills contained rather specific reservations from the

25. 92 CONG. REC. 10048 (1946) (remarks of Representative Michener, quoting a part of the committee report).

26. Statement of Estes Kefauver, *Hearings Before Joint Comm. on the Organization of Congress Pursuant to H. Con. Res.* 18, 79th Cong., 1st Sess., pt. 1, at 68 (1945).

Mr. Kefauver indicated that the Senate as a whole, with its increased workload, gave little consideration to private relief bills. Legitimate claims would encounter difficulties unless political sponsors for the relief bill could be found.

27. 92 CONG. REC. 10048 (1946) (remarks of Representative Michener quoting a part of the committee report).

Opponents of the bill feared that Congress was opening the floodgates to fraudulent suits against the government. *See* 92 CONG. REC. 6372-73 (1946) (remarks of Senator George). Furthermore, they saw Congress as abdicating its responsibility by giving away the taxpayer's money.

28. Act of March 3, 1925, 43 Stat. 1112 (codified at 46 U.S.C. § 781 (1970)).

29. H.R. REP. No. 1287, *supra* note 24, at 2-3.

30. In H.R. REP. No. 1287, *supra* note 24, the House pointed out the numerous bills which had been introduced to waive governmental immunity in tort claims.

> For many years bills on this subject have been introduced from time to time attempting to approach the matter in various ways. During the Seventieth Congress a bill, H.R. 9285, which endeavored to deal with this matter passed both Houses but encountered a pocket veto at the hands of President Coolidge, which it is understood was principally based on the fact that the function of acting as counsel for the Government in such cases was to be reposed by that bill in the Comptroller General instead of in the Attorney General.
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> In the Seventy-sixth Congress H.R. 7236 passed the House on September 12, 1940, but the pressure of other urgent matters prevented its consideration in the Senate before the close of the session.
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> In the Seventy-seventh Congress a similar bill, S. 2221, was passed by the Senate and was approved in substance by this committee. Previous to such action, hearings were held before a subcommittee of the Committee on the Judiciary on H.R. 6463 and an earlier bill, H.R. 5373, both introduced by Representative Celler.

waiver of immunity.[31]

The discretionary function exception, as presently worded in the Act, appeared for the first time in a 1942 bill.[32] Hearings on that bill are relevant in determining the intent of the exception since no hearings were held on the 1946 Act. The testimony of one speaker[33] at the 1942 hearings noted that the intent of the exception was to prevent the use of the Act as an authorization for testing "the propriety of a discretionary administrative act" through a damage suit in tort. The inclusion of the exception within the Act sought to mandate a court's normal exercise of restraint through judicial construction to avoid invalidating legislation or discretionary administrative action.[34] The restraint applied to acts when they formed the basis of a suit in tort as well as when they were challenged in some other way.

The House Report devoted only one paragraph to an attempt to explain some of the boundaries of the exception.[35] The report contained a few specific examples of discretionary functions which were intended to be excluded from the Act.[36] The validity of such discretionary acts could not be tested by a tort suit "even though negligently performed and involving an abuse of discretion."[37] The House Report did note, however, that "common-law torts of employees of regulatory agencies" would not be excluded through the exception "to the same extent as torts of nonregulatory agencies."[38]

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31. Dalehite v. United States, 346 U.S. 15, 26 (1953). Among the reservations were activities of the SEC and in the area of collection of taxes.

32. *Id.* at 26 n.12, *citing* H.R. 6463, 77th Cong., 2d Sess.; S. 2207, 77th Cong., 2nd Sess. (1942).

33. The testimony was of then Assistant Attorney General Francis M. Shea.

34. Dalehite v. United States, 346 U.S. 15, 27 n.14 (1953), *citing Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 29 (1942).

35. H.R. REP. No. 1287, *supra* note 24, at 5-6.

36. Among the excluded activities were:

> [A]uthorized 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. . . .
>
> [A] claim against a regulatory agency, such as the Federal Trade Commission or the Securities and Exchange Commission . . . whether or not negligence is alleged to have been involved. . . .
>
> [C]laims based upon an allegedly negligent exercise by the Treasury Department of the blacklisting or freezing powers . . . .

Id. For a discussion of this paragraph, see Note, *The Discretionary Exception and Municipal Tort Liability: A Reappraisal*, 52 MINN. L. REV. 1047, 1053 (1968).

37. H.R. REP. No. 1287, *supra* note 24, at 6.

38. *Id.*

From these explicit examples of discretionary functions protected by the Act, it may be inferred that decisions of a broad and general nature would not be a basis of liability. Congress, however, has allowed the courts great leeway in interpreting the scope of section 2680(a). In classifying these governmental decisions, courts are faced with questions of degree. It should be of no surprise, therefore, that the decisions initially lacked consistency in the interpretation of the exemption.[39] Recently, however, federal courts have tended to develop a more uniform approach toward the meaning of the discretionary function exception and have thus reached results more consistent with Congress' original intent.[40]

III. Initial Court Interpretations of the Discretionary Exemption

The leading case on the discretionary function exception is *Dalehite v. United States*,[41] a 4-3 opinion of the United States Supreme Court. Decided in 1953, the case arose out of the Texas City disaster of 1947 in which fertilizers, containing combustible amonium nitrate, exploded and burst into flames. The government had controlled the manufacture of this fertilizer as part of an export plan. The petitioners claimed that the government was negligent in failing to warn those handling the fertilizer of its explosive propensities. When viewing the government's activities, the majority found it unnecessary, apart from the instant case, to define precisely where discretion ended.[42]

> It is enough to hold, as we do, that the "discretionary function or duty" that cannot form a basis for suit under the Tort Claim Act includes more than the initiation of programs and activities. It also includes *determinations made by executives or administrators* in establishing plans, specifications or schedules of operations. Where there is *room for policy judgment and decision there is discretion*. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.[43]

39. *See* section III *infra*.
40. *See* section IV *infra*.
41. 346 U.S. 15 (1953).
42. *Id.* at 35.
43. *Id.* at 35-36 (emphasis added) (footnote omitted).

The Court, in holding the government immune from liability, emphasized that the acts which the district court had found to be negligent "were all responsibly made at a planning rather than operational level."[44] This statement has provided the springboard for a large body of case law utilizing the "planning level" versus the "operational level" dichotomy as the standard for interpreting the scope of the discretionary function exception.

The *Dalehite* majority stressed the status of the government decisionmaker rather than the nature of the decision made.

> The acts found to have been negligent were thus performed under the direction of a plan developed at a high level under a direct delegation of plan-making authority from the apex of the Executive Department.[45]

The dissenting opinion, on the other hand, did "not predicate liability on any decision taken at 'Cabinet level' or any other high-altitude thinking," but rather, on the "type of discretion which government agencies exercise in regulating private individuals."[46] The dissent viewed the majority opinion as choosing

> to fix an amorphous, all-inclusive meaning to the word, and then to delimit the exception not by whether the act was discretionary but by who exercised the discretion. The statute itself contains not the vaguest intimation of such a test . . . .[47]

The broad manner in which the *Dalehite* majority treated the meaning of discretion has been interpreted as having been modified[48] by subsequent Supreme Court opinions in *Indian Towing Co. v. United States*[49] and *Rayonier, Inc. v. United States*.[50]

In *Indian Towing* recovery against the United States under the Tort Claims Act was sought for damages to plaintiff's tugboat, allegedly caused by the negligence of the Coast Guard in the operation of a lighthouse. The government conceded that the discretionary function exception was not applicable to its activities in operating

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44. *Id.* at 42.

45. *Id.* at 39-40.

46. *Id.* at 57, 58 n.12 (Jackson, Black & Frankfurter, J.J., dissenting).

47. *Id.* at 58 n.12.

48. *See, e.g.*, Smith v. United States, 375 F.2d 243, 246 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967). *Contra*, Duncan v. United States, 355 F. Supp. 1167, 1170 (D.D.C. 1973).

49. 350 U.S. 61 (1955).

50. 352 U.S. 315 (1957).

a lighthouse. Instead, it contended that the section of the Act[51] which imposed liability on the government "in the same manner and to the same extent as a private individual under like circumstances" would exclude liability for the performance of "uniquely government functions" which private persons do not perform.[52]

The Court found that no such distinction between municipal and proprietary functions had been impliedly incorporated into the Act. Once the government "undertakes to warn the public of a danger and thereby induces reliance [it] must perform . . . [its] '*good Samaritan*' task in a careful manner."[53] Thus, the government may even be held responsible for lack of due care in undertakings it was not obligated to assume in the first instance.

In *Rayonier* suit was brought against the United States seeking to recover damages caused by the alleged negligence of Forest Service employees in fire fighting. The Service had entered into an agreement with the state to suppress any fires in an area of public lands. The owners of the adjacent lands, aware of this contract, relied on the Service to control and extinguish any fires in the area. The Court, apparently reapplying the "good Samaritan" test, reaffirmed its position in *Indian Towing* and reinforced its limitation on *Dalehite* regarding municipal and proprietary functions. "To the extent that there was anything to the contrary in the *Dalehite* case it was necessarily rejected by *Indian Towing*."[54]

Taken together, these cases have been viewed as limiting the broad discretion permitted the government by *Dalehite* before the imposition of liability. Thus, if a duty of care towards an individual or a class of individuals is imposed on the government by law or is voluntarily assumed, that duty of care must be discharged in a non-negligent manner.

IV. Modern Approach by Federal Courts

A. *Introduction*

Several commentators recently have come to the conclusion that the federal courts have interpreted and applied the discretion-

51. 28 U.S.C. § 2674 (1970).
52. 350 U.S. at 64.
53. *Id.* at 64-65 (emphasis added).
54. 352 U.S. at 319 (footnote omitted).

ary function exception in a confused and inconsistent manner.[55] Most of these observations were based on comparisons between some fairly recent cases and others decided in the aftermath of *Dalehite*. For example, a leading 1953 decision, *Harris v. United States*,[56] viewed the *Dalehite* interpretation of the discretionary function exception in almost absolutist terms, immunizing a broad range of discretionary acts from liability.[57] Today, federal courts do not view the exception as an all-encompassing provision which includes every discretionary act by a government official.[58] Thus, a comparison of current cases with certain cases in the 1950's would reveal an inconsistency. Confusion may be compounded by the fact that these older cases have not been overruled and consequently remain viable as possible precedent.

It is submitted that courts today, although using a variety of terminology,[59] appear to be consistent in approach: when referring to negligent acts, they examine the nature of the decision to determine whether the activity will be immunized at the "planning level" or whether liability will attach at the "operational level." The courts do vary in their holdings as to the effect of *Indian Towing* and *Rayonier* on *Dalehite's* interpretation of the exception.[60] Yet agreement exists that *Dalehite* did not establish an absolutist view which would immunize a broad range of discretionary acts.

No "litmus paper" test can be developed for predicting which activities will be shielded from liability. Since the courts are faced with numerous types of governmental activities, they must, of ne-

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55. 57 GEO. L.J., *supra* note 14, at 110; 2 CUMBERLAND-SAMFORD L. REV., *supra* note 14; Comment, *Inadequacies Of Federal Sovereign Immunity: A New Perspective*, 61 GEO. L.J. 1535 (1973); Recent Developments, *Discretionary Functions — The Planning — Operational Dichotomy Revisited*, 41 WASH. L. REV. 340 (1966).

56. 205 F.2d 765 (10th Cir. 1953), *cited in* 57 GEO. L.J. *supra* note 14, at 108; *and in* 2 CUMBERLAND-SAMFORD L. REV., *supra* note 14, at 390.

57. Drawing an analogy to the immunized acts which the Supreme Court had categorized as discretionary in *Dalehite*, the Tenth Circuit, in *Harris*, saw no distinction in the decision to destroy willows and eradicate mosquitoes by the use of a chemical herbicide sprayed from a plane. 205 F.2d at 766-67.

58. *See, e.g.*, Smith v. United States, 375 F.2d 243 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967).

59. For instance, the terms policy and planning have been used interchangeably. In addition, some court decisions have referred to "discretionary" vs. "ministerial" functions. *E.g.*, Scanwell Laboratories, Inc. v. Thomas, 521 F.2d 941 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 910 (1976).

60. *Compare* Smith v. United States, 375 F.2d 243 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967), *with* Maynard v. United States, 430 F.2d 1264 (9th Cir. 1970).

cessity, proceed on a case-by-case basis. Generalizations cannot easily be made, but certain common characteristics have evolved. In each case, the judiciary should identify the determinative factors which require classifying a decision as discretionary as opposed to one with governmental interests which the exemption was not intended to encompass.

In deciding whether to apply the exception, courts have generally adopted the usage of various criteria.[61] Despite the varied weight granted certain of these criteria, the courts have apparently adopted their usage with the result of narrowing any possible interpretation that *Dalehite* exempted *all* discretionary acts.

Modern cases make it clear that the absolutist interpretation of the discretionary function exception taken by the *Dalehite* majority has not been adopted.[62] In order to fall within the scope of the exception, it is not sufficient for the government to demonstrate merely that some choice was part of the decisionmaking process.[63] Rather, courts scrutinize the nature of the judgment to determine whether a balancing of certain policy factors was involved.[64] "Congress intended 'discretionary functions' to encompass those activities which entail the formulation of governmental policy, whatever the rank of those so engaged."[65] Thus, the federal courts have not adopted the approach of focusing on the status of the decisionmaker to determine the applicability of section 2680(a). Although not always expressly stating, the courts have analyzed the nature of the decision itself to ascertain if the activity included the formulation of policy.

Generally, courts have not defined the concept of discretion which underlies section 2680(a). However, as the district court noted in *Swanson v. United*,[66]

> [i]n a strict sense, every action of a government employee, except perhaps a conditioned reflex action, involves the use of some degree of discretion. The *planning* level notion refers to decisions involving questions of *policy*, that is, *the evaluation of factors*

61. *See* text accompanying note 67 *infra*.

62. *See, e.g.*, J.H. Rutter Rex Mfg. Co. v. United States, 515 F.2d 97 (5th Cir. 1975), *cert. denied*, 424 U.S. 954 (1976).

63. *Id.*

64. Griffin v. United States, 500 F.2d 1059, 1064 (3d Cir. 1974).

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

66. 229 F. Supp. 217 (N.D. Cal. 1964).

> *such as the financial, political, economic, and social effects of a given plan or policy. . . .*
>
> The *operations level decisions*, on the other hand, involves decisions *relating to the normal day-by-day operations* of the government. Decisions made at this level may involve the exercise of discretion but not the evaluation of policy factors.[67]

Many of the recent federal court decisions have at least implicitly incorporated several of these same factors in determining whether policymaking functions had been exercised.

When confronted with governmental decisions requiring the weighing of scientific factors, the judiciary has approached the problem in a unique manner. Scientific determinations involve the matching of objective facts. This is distinguished from a balancing of competing policy considerations in determining the public interest, which, on the other hand, merits subjective analysis. Thus, scientific decisionmaking has been interpreted as the mere execution of policy judgments previously formulated. No discretion is exercised, and hence the courts have not, generally, applied the exception.[68]

Similarly, activities on the operational level are not within the purview of the discretionary function exception.[69] Notwithstanding the difficulty courts have experienced in discerning the precise dividing line between those activities at the operational level and those at the planning level, operational tasks tend to involve the execution of policy judgments rather than the forumulation of them. Thus, once an activity has been chosen to be undertaken, performance must not be done negligently. The failure to do so will result in the imposition of liability since the exception will not apply.[70]

B. *Application of Discretionary Function Exception to Particular Government Activities*

It appears that recent federal cases have implicitly incorpo-

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67. *Id.* at 219-20 (emphasis added).

68. *See* section IV, B, 6 *infra*. *But see* Daniel v. United States, 426 F.2d 281 (5th Cir. 1970).

69. *See, e.g.*, text accompanying notes 112-16 *infra*.

70. Indian Towing Co. v. United States, 350 U.S. 61 (1955); American Exchange Bank v. United States, 257 F.2d 938 (7th Cir. 1958).

It should be noted, however, that abuse of discretion still is not actionable if the activity is protected "policymaking" under section 2680(a). Myers & Myers, Inc. v. United States Postal Serv., 527 F.2d 1252 (2d Cir. 1975).

rated the policy factors enunciated in *Swanson*[71] as relevant in determining the kind of discretion which the Federal Tort Claims Act sought to immunize. Examination of the courts' application of section 2680(a) to various types of governmental decisionmaking activities will reflect this proposition.

1. PROMULGATION OF RULES AND REGULATIONS

Adopting rules and regulations is a protected activity under the initial part of section 2680(a)[72] "in the execution of a statute or regulation." It is evident that criteria stated in *Swanson* are considered in the promulgation of or failure to promulgate regulations. The decision whether to adopt regulations requires the consideration of a wide range of policy factors, depending upon the particular situation. The government's failure to promulgate a stricter set of air safety regulations,[73] or the failure to formulate rules designed to prevent the negligent discharge of firearms by National Guardsmen during a riot,[74] illustrate instances where tort liability has not been imposed for failure to promulgate rules deemed necessary by a private litigant.[75] The discretionary function exception, when so applied, acts to insulate the rulemaking functions of government and thus succeeds in accomplishing what some courts have seen as one of the Act's intended purposes—to allow a government decisionmaker the freedom to choose a course of action without the threat of governmental liability lurking in the background.[76]

2. APPLICATION OF RULES, REGULATIONS, AND STATUTES

In contrast to the broad retention of sovereign immunity in cases where regulations are initially promulgated, liability may be imposed, under proper circumstances, in cases where the regulations are applied by government employees. Generally, to determine if liability may be imposed, courts must examine whether the statute or regulation in question contemplates the establishment of a

71. *See* text accompanying note 67 *supra*.

72. *See* text accompanying note 12 *supra*.

73. Miller v. United States, 522 F.2d 386 (6th Cir. 1975).

74. Smith v. United States, 330 F. Supp. 867 (E.D. Mich. 1971).

75. *See also* Marr v. United States, 307 F. Supp. 930 (E.D. Okla. 1969).

76. *See* note 13 *supra* regarding these same considerations as being relevant in extending individual immunity. *See also* Miller v. United States, 378 F. Supp. 1147 (E.D. Ky. 1974), *aff'd*, 522 F.2d 386 (6th Cir. 1975).

rule by an official for future government behavior as compared to the mere application of an old, understood rule.[77] In the first instance, since the official is forced to rely upon factors such as those enunciated in *Swanson*, the government will be immune from liability. In the second situation, however, the official has been accorded no such discretion. His blind adherence to the constraints of the rule will amount to the type of enforcement which will immunize the government. However, improper application of the regulation by deviation from its constraints, for example, will result in the imposition of liability. Failure to follow guidelines will be considered an operational activity.

The many cases decided by the federal courts clearly reflect adherence to these general principles. In *Downs v. United States*,[78] the chief FBI agent on the scene ordered his men to fire their guns in order to disable a hijacked plane which had landed for refueling. The hijacker responded by shooting two hostages. Suit was then brought against the government. The Sixth Circuit, in upholding recovery, held that the chief FBI agent's actions did not constitute formulation of policy so as to fall within the exception. Prior to this hijacking, the FBI had developed the policy to be employed in such a situation.[79] Thus, although the agent was called upon to use his judgment in dealing with the hijacking, the judgment was not

> of "the nature and quality" which Congress intended to put beyond judicial review. . . . Congress intended "discretionary functions" to encompass those activities which entail the formulation of governmental policy, whatever the rank of those so engaged.[80]

Failure to follow FBI standard procedures was thus viewed as an operational level decision.[81]

In contrast to the *Downs* situation, the regulation applied in *Kiiskila v. United States*[82] called for an exercise of a different kind

77. Hendry v. United States, 418 F.2d 774 (2d Cir. 1969).

78. 522 F.2d 990 (6th Cir. 1975).

79. The policy was set out in an FBI Handbook and in a secret memorandum issued by the Departments of Justice and Transportation.

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

81. *See also* Brown v. United States, 374 F. Supp. 723 (E.D. Ark. 1974) (where a federal statute imposed upon the Bureau of Prisons a positive duty to provide suitable quarters, recovery was allowed where plaintiff was injured because of overcrowded and understaffed jails).

82. 466 F.2d 626 (7th Cir. 1972).

of governmental discretion. The commanding officer of a military base issued an order permanently excluding the plaintiff, a civilian employee, from the base for an alleged violation of a fort regulation against picketing, pamphletting, etc. Although the commander could choose not to invoke the regulation, the decision whether to apply it required discretion of the type contemplated by section 2680(a). The commander had to consider security, discipline, and morale. The court therefore rejected a claim that the commander's decision merely involved applying a clear rule to a clear factual situation.[83]

In cases involving the application of rules and regulations, certain governmental activities have consistently appeared in court opinions throughout the years. One line of cases is centered around the destruction which is unavoidably caused by sonic booms from supersonic aircraft. These flights, authorized and conducted in accordance with the direction of the Strategic Air Command, are considered essential to the security of the nation. Making the decision to fly these missions requires a political choice and hence is a protected discretionary function.[84] These flights, however, are flown under the restrictions of Air Force regulations which control altitude, route, speed, etc.[85] Thus, although the decision to make the flights might be protected, any negligent deviation by a pilot from his strict instructions can result in the imposition of liability upon the government.[86]

In another series, numerous cases were filed against the government based upon the many different activities of the Federal Aviation Administration (FAA). In *Hoffman v. United States*,[87] the FAA negligently failed to follow one of its own regulations requiring a minimum amount of insurance as a condition to a plane owner's

83. Even abuse of discretion in these circumstances would be protected. *See* note 70 *supra*. *See also* Davis v. Federal Deposit Insur. Corp., 369 F. Supp. 277 (D. Colo. 1974) (statute placed decision of what action to take with reference to a bank's allegedly unsound practices in the FDIC's discretion).

84. Abraham v. United States, 465 F.2d 881 (5th Cir. 1972); Maynard v. United States, 430 F.2d 1264 (9th Cir. 1970).

85. Ward v. United States, 471 F.2d 667 (3d Cir. 1973); Abraham v. United States, 465 F.2d 881 (5th Cir. 1972); Nelms v. Laird, 442 F.2d 1163 (4th Cir. 1971), *rev'd on other grounds*, 406 U.S. 797 (1972).

86. Ward v. United States, 471 F.2d 667 (3d Cir. 1973) (The court remanded the case for the purpose of discovery in order to determine whether there was such operational negligence).

87. 398 F. Supp. 530 (E.D. Mich. 1975).

receiving an air taxi/commercial operator (ATCO) certificate. When the plane subsequently crashed, the plaintiff sued the government for damages. The FAA regulation presented clear standards to be applied to specific fact situations involving determination of basic eligibility for a certificate.[88] Failure to adhere to this mandatory insurance regulation involved no discretion—blind adherence being required—and thus liability was imposed upon the government for the negligent performance of an operational task.[89]

Another series of cases involved the awarding or renewal of government contracts. Many times, the particular government agency will have specified certain guidelines to aid in determining the awarding of a contract. The discretionary function exception will protect the government in its discretion to promulgate such rules.[90] Similarly, no liability will be imposed unless the government official negligently deviates from an existing standard which permits the official no discretion in his decision.

In *Scanwell Laboratories, Inc. v. Thomas*,[91] the FAA was required to decide whether the lowest bidder on a government contract had complied with all the requirements of the bid. An FAA procurement regulation mandated material compliance with all the specifications in its invitation for bids before a contract could be awarded.[92] Another regulation, however, allowed for minor irregularities in the bid and provided that the contract could be awarded anyway.[93] The decision to treat one of the requirements of the bid as a minor irregularity was a matter of choice for the FAA official. Since no previous rule existed to direct a course of action, the degree

88. *See* text accompanying notes 141-42 *infra*.

89. Hoffman v. United States, 398 F. Supp. 530 (E.D. Mich. 1975). *See also* Ingham v. Eastern Air Lines, Inc., 373 F.2d 227 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967) (FAA directive not followed); Murray v. United States, 327 F. Supp. 835 (D. Utah 1971), *amended and aff'd on other grounds*, 463 F.2d 208 (10th Cir. 1972) (FAA manual); Sawyer v. United States, 297 F. Supp. 324 (E.D.N.Y. 1969), *aff'd*, 436 F.2d 640 (2d Cir. 1971) (knowingly clearing two aircraft to land on the same runway at the same time violates civil air regulations); Sullivan v. United States, 299 F. Supp. 621 (N.D. Ala. 1968), *aff'd per curiam*, 411 F.2d 794 (5th Cir. 1969) (FAA manual).

Another FAA case where regulations had not been followed did not involve a plane crash. Duncan v. United States, 355 F. Supp. 1167 (D.D.C. 1973) (FAA's failure to issue a medical certificate to a pilot of a private airline pursuant to criteria established by regulation).

90. *See* section IV, B, 1 *supra*.

91. 521 F.2d 941 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 910 (1976).

92. 41 C.F.R. § 1-2.301(a) (1975).

93. 41 C.F.R. § 1-2.405 (1975).

of choice which the official could exercise was a protected decision under section 2680(a).

In *Myers & Myers, Inc. v. United States Postal Service*,[94] the determination of whether to renew a contract with a star route carrier for transporting mail was considered a discretionary activity. The Second Circuit, however, noted that the Postal Service, by denying the carrier a hearing prior to what seemed to be a debarment from a government contract, might have acted in violation of one of its own regulations.[95] The official lacked discretion to disregard regulations, and this point provided the grounds to distinguish this case from *Scanwell Laboratories*, in order that the exemption would not apply.

3. DECISIONS WITHIN THE INHERENT DISCRETION OF THE AGENCY

Courts have recognized that certain types of governmental decisions are inherently within the discretion of the administrator. Rather than interfere with the political process by allowing the propriety of an agency decision to be tested by a tort action, courts have noted that the Tort Claims Act was not intended to affect the distribution of political responsibility.[96] Thus, in *Smith v. United States*,[97] the Fifth Circuit held that the refusal of the Attorney General to bring suit for an alleged violation of a statute which forbade harassment of a federal juror was within the absolute and inherent discretion of the prosecutorial function. According to the court, the exclusive responsibility for conducting litigation rests with the Attorney General. He must weigh numerous factors, taking into account national policy, prosecutorial resources, and the circumstances of the particular case. Such policy decisions are committed to the Executive by the Constitution and are protected governmental activities since they affect the political interests of the nation.

The exception was also applied in *Monarch Insurance Co. v. District of Columbia*.[98] The United States was allegedly negligent in its preparation and implementation of plans to suppress a riot and protect against domestic violence. The government had delayed in

94. 527 F.2d 1252 (2d Cir. 1975).

95. 39 C.F.R. § 957 (1975).

96. Smith v. United States, 375 F.2d 243 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967).

97. *Id.*

98. 353 F. Supp. 1249 (D.D.C. 1973), *aff'd mem.*, 497 F.2d 684 (D.C. Cir.), *cert. denied*, 419 U.S. 1021 (1974).

sending troops and police into this affray. Extensive damage claims resulting from the riot were paid by the plaintiff insurance company. Rejecting an allegation that the government lacked discretion in its obligation to restore order and protect private property, the district court found that policy considerations pervaded every phase of planning and executing a riot control program.[99] The court evidently was of the opinion that social and political factors were involved in the administrative decision.[100]

At odds with *Smith* and *Monarch Insurance* is *Swanner v. United States*.[101] Section 2680(a) did not immunize from tort liability the government's failure to provide police protection for Swanner, a special IRS informer who was working in an undercover investigation of illicit whiskey operations. Swanner's house was bombed, injuring him and several members of his family. Since the United States was aware of the dangerous nature of the undercover work and had knowledge of threats made about informers generally and about Swanner specifically, the government owed him a special duty of reasonable care in providing protection. Although not elaborating as to why the failure to provide protection was not a decision within the meaning of section 2680(a), the court cited *In re Guarler*[102] for the proposition that a special duty was owed to Swanner in these circumstances. From the establishment of a national government by the Constitution, a governmental duty arises to protect citizens who inform on violations of the law from lawless acts of violence. Once the government has a reasonable belief that one of its employees is in danger as a result of performing his duties, the duty to protect that employee exists without the necessity of a formal request for protection. Apparently, the court found that a special duty was owed to Swanner, unlike the general duty found to be owed to the public as a whole in *Smith*. This special duty left no room for the exercise of discretion, and therefore, failure to provide protection was an operational activity. With reference to the *Swanson* model on policymaking factors, the government's decision

99. *Id.* at 1258.

100. *See also* Redmond v. United States, 518 F.2d 811 (7th Cir. 1975) (dictum) (SEC had discretion to maintain law and order in the securities field and had no duty to warn the public about the background of securities dealers).

101. 309 F. Supp. 1183 (M.D. Ala. 1970). This case was originally reported in 275 F. Supp. 1007 (M.D. Ala. 1967) and reversed and ordered for new trial in 406 F.2d 716 (5th Cir. 1969).

102. 158 U.S. 532 (1895).

to undertake an undercover investigation and the determinations of the manner in which Swanner was to be employed required consideration of political, social, and economic factors. Once the project was begun, however, the government would not be protected from negligence in proceeding with the operation by failing to provide protection for its agents.

Section 2680(a) was found to apply to decisions by a committee of officers of the Army National Guard and the Army General Staff as to the training of a federalized state National Guard engaged in quelling a riot.[103] Although quoting *Dalehite* extensively and referring to the "very high level" of these officials, the court scrutinized the nature of the decisionmaking function. The committee was obligated to formulate policies and rules affecting training. Adopting the methods and means for restoring order in a city faced with a riot is a decision which the Constitution delegated to the executive branch, not to the judiciary. Thus, this case rested on the court's view of the proper distribution of governmental powers.

The discretionary exemption likewise was applied to protect decisions by a State Department official which involved judgments and discretion affecting foreign policy.[104] In *Four Star Aviation, Inc. v. United States*,[105] the appellant mortgagee had repossessed an airplane in Venezuela and flown it to Puerto Rico. The American official—the head of the office of Caribbean affairs—had not objected to returning the plane to Venezuela upon inquiry from the Puerto Rican Secretary of State. The appellant sought to recover the value of the plane for this allegedly negligent decision by the United States official. The court denied recovery since the political and international factors which confronted the decisionmaker were within his protected domain.

In *United States v. Carson*,[106] allegedly negligent advice rendered by the Farmer's Home Administration (FHA) was held to be a protected discretionary decision under the exception. In this action, the FHA sued on two notes owed by the defendants, and the defendants counterclaimed under the Tort Claims Act. Having loaned money to the defendants for planting and maintaining a citrus grove, the FHA advised plaintiffs about agricultural practices

103. Smith v. United States, 330 F. Supp. 867 (E.D. Mich. 1971).
104. Four Star Aviation, Inc. v. United States, 409 F.2d 292 (5th Cir. 1969).
105. *Id.*
106. 360 F. Supp. 842 (S.D. Tex. 1973).

necessary to keep the citrus trees which had survived a severe frost alive. This advice was given even though the FHA knew that most of the trees were already dead. Rather than finding the FHA's activity a negligent performance of operational tasks, the court recognized that, as a lender, the FHA had a right to protect its security interest. The manner of accomplishing this result was within its discretion. The court did not elaborate on the considerations which rendered this activity discretionary. Apparently financial, economic, and social factors were relevant to the nature of the advice which itself was inherently within the discretion of the agency.[107]

Agency decisions to award contracts to bidders on the basis of various criteria have been found to be within the ambit of the exception.[108] In *Myers & Myers, Inc. v. United States Postal Service*,[109] the Postal Service had discretion to renew contracts of its star route carriers for transporting mail. An award of these contracts involved numerous policy factors including the contractor's past performance, the nature of the routes, the needs of the postal users, due consideration of the public interest, and the cost of the transportation service. Furthermore, obtaining contracts for small businesses by government agencies was found to be a discretionary matter for administrators of the Small Business Administration. Thus, recovery on grounds of discrimination was precluded.[110]

Internal housekeeping decisions may also be found to be within the inherent discretion of an agency. In *J.H. Rutter Rex Manufac-*

107. *See also* Porter v. United States, 473 F.2d 1329 (5th Cir. 1973) (the Warren Commission, given a broad mandate to investigate pursuant to an Executive Order, could decide whether to publish the writings of the alleged presidential assassin and the United States could not be liable in tort for infringement of common law copyright); United States v. Gregory Park, Section II, Inc., 373 F. Supp. 317 (D.N.J. 1974) (where HUD was allegedly negligent in administering its projects, the discretionary function exception applied); McGarry v. United States, 370 F. Supp. 525 (D. Nev. 1973) (U.S. Atomic Energy Commission is exercising its discretion at the highest planning level in determining the extent to which it will undertake to supervise the safety procedures of private contractors who operate and maintain nuclear testing facilities; therefore the exception applied); Mims v. United States, 349 F. Supp. 839 (W.D. Va. 1972) (U.S. negligently assuming ownership of land was exercising protected discretion); Boruski v. Division of Corp. Finance, 321 F. Supp. 1273 (S.D.N.Y. 1971) (the SEC's withholding of registration approval is within the exception).

108. Myers & Myers, Inc. v. United States Postal Serv., 527 F.2d 1252 (2d Cir. 1975); Scanwell Laboratories, Inc. v. Thomas, 521 F.2d 941 (D.C. Cir. 1975) (dictum), *cert. denied*, 425 U.S. 910 (1976); Gowdy v. United States, 412 F.2d 525 (6th Cir.), *cert. denied*, 396 U.S. 960 (1969).

109. 527 F.2d 1252 (2d Cir. 1975).

110. *See also* People's Brewing Co. v. Kleppe, 360 F. Supp. 729 (E.D. Wis. 1973).

turing Co. v. United States,[111] the Fifth Circuit applied the exception to immunize the National Labor Relations Board's decision with regard to distributing its workload at an understaffed office. An inexperienced officer had been assigned to work on this company's situation. He was instructed to handle less complicated matters first in order to gain experience. This decision resulted in a 4-year delay in the NLRB's filing of initial back pay specifications against this employer. The court held, however, that the NLRB decision to establish priorities in carrying out its past orders required a balancing of cost-benefit considerations to advance the public interest and hence constituted a policymaking determination.

Courts, however, have indicated that the United States would be liable for negligence where certain administrative decisions were "operational in character" particularly when the decision was for execution and not formulation of policy. Decisions involving the day and hour of test firing of a rocket and the amount of thrust to be developed by the rocket engines did not require the kind of discretion within the exception so as to insulate the government from tort liability.[112] The court examined the nature of the decision and rejected any absolutist interpretation of *Dalehite*, but it gave no indication as to why these particular decisions were on the operational and not the planning level. Social, political, and economic factors were not under consideration here since the initial decision to fire a test rocket, which demanded policy considerations, was not at issue. "[O]nce the government has exercised its discretion and has decided to proceed in a matter, then the government is liable for negligent acts done in the course of such proceedings."[113]

The government is under no duty to provide certain types of services to the public. But once it has exercised its inherent discretion through an initial policy decision to undertake the service, future decisions are deemed operational. In *Sullivan v. United States*,[114] the United States undertook to provide vital information

111. 515 F.2d 97 (5th Cir. 1975).

112. Pigott v. United States, 451 F.2d 574 (5th Cir. 1971).

113. S. Schonfeld Co. v. SS Akra Tenaron, 363 F. Supp. 1220, 1221 (D.S.C. 1973) (tort claim was not barred by discretionary function exception for the negligent handling of cargo by a government agent after the cargo had been lawfully detained).

114. 299 F. Supp. 621 (N.D. Ala. 1968), *aff'd*, 411 F.2d 794 (5th Cir. 1969) (per curiam).

115. *See also* Chanon v. United States, 350 F. Supp. 1039 (S.D. Tex. 1972), *aff'd on other grounds*, 480 F.2d 1227 (5th Cir. 1973) (per curiam) (the government had to exercise due care in gathering weather information although there was no liability in this case since no negli-

to airplane pilots indicating the lighting conditions and procedures at airfields at night. Thus, the preparing and circulating of the charts were seen as operational tasks. The government could not claim immunity under the exception for injuries sustained as a result of the crash of an aircraft which was attempting to land at an unlit airfield when a chart had stated otherwise.[115]

The manner of conducting an investigation by the FBI might be subjected to recovery under the Tort Claims Act. In *Porter v. United States*,[116] since there was no allegation of negligence, the Fifth Circuit denied recovery for the staining and discoloration of some documents handled by the FBI during their statutorily authorized investigation. The court left open the question of recovery for damage to property during an investigation where negligence was demonstrated. A court would have to scrutinize the nature of the discretion exercised and ascertain the point where the negligent act had occurred. Thus, it would seem that if an agent misplaced an article or accidentally dropped and damaged it, the actions would be operational.

These cases illustrate the proposition that courts will scrutinize the nature of the decisions made by government officials in order to ascertain whether the activity is inherently within the agency's discretion. If the agency decision requires a consideration of the *Swanson* criteria, the exception will be applied.

4. PUBLIC WORKS PROJECTS

The government, in choosing to undertake numerous public works projects, may injure innocent third parties in some situations. Frequently, the individuals involved seek recovery against the government. To prevent the threat of liability, the exception acts to immunize the government in certain of these circumstances.

The initial decision to undertake a public works project is protected from the imposition of liability since the discretionary exemption clearly was intended to apply in such a situation. Once the decision to undertake the project is made, however, the design chosen and the details or methods of carrying out the plan may be a

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gence was demonstrated); Logue v. United States, 334 F. Supp. 322 (S.D. Tex. 1971), *rev'd on other grounds*, 459 F.2d 408 (5th Cir. 1972), *vacated and remanded on other grounds*, 412 U.S. 521 (1973) (once the decision to transfer a prisoner was made, the deputy marshall had a duty to take reasonable precautions at the jail to protect the prisoner).

116. 473 F.2d 1329 (5th Cir. 1973).

protected governmental function if it requires the type of policy-making contemplated by section 2680(a). If no choices are involved, once the government chooses to undertake a project, it must do so with due care. A negligent act may lead to the imposition of liability upon the government.

The Tenth Circuit, in *Spillway Marina, Inc. v. United States*,[117] held that the choice by the Army Corps of Engineers whether to release or store water in a reservoir which was part of a flood control system depended upon variable factors such as navigation conditions and needs, irrigation requirements, and rainfall. Therefore, no action could be maintained for the inevitable damages resulting from the lowering of the water level.[118] Similarly, in another case, the decision of the Secretary of the Army to cause the dredging of a river was a discretionary act within the meaning of section 2680(a).[119]

If, after the initial decision to undertake a project has been made, the government officials must balance various policy factors in approving the design, such governmental activity will be protected also. In approving the design plans for an interstate highway submitted by a state, the Secretary of Commerce must decide if they are adequate to meet traffic needs. In *Daniel v. United States*,[120] the approval of the plans and specifications involved the balancing of several policy oriented criteria, as mandated by statute,[121] including safety, durability, and maintenance.[122] Consequently, "when an official is authorized to weigh potentially conflicting considerations in arriving at a decision, such decisions fall squarely within the discretionary exception."[123]

When the design aspect of a government project does not relate to policymaking activities, the activity will be considered operational. In *Stanley v. United States*,[124] the decedent fell while paint-

117. 445 F.2d 876 (10th Cir. 1971).

118. York Cove Corp. v. United States, 317 F. Supp. 799 (E.D. Va. 1970).

119. Boston Edison Co. v. Great Lakes Dredge & Dock Co., 423 F.2d 891 (1st Cir. 1970).

120. 426 F.2d 281 (5th Cir. 1970).

121. 23 U.S.C. § 109(a), (b) (1970).

122. *See also* Delgadillo v. Elledge, 337 F. Supp. 827 (E.D. Ark. 1972); Dolphin Gardens, Inc. v. United States, 243 F. Supp. 824 (D. Conn. 1965).

123. *In re* Silver Bridge Disaster Litigation, 381 F. Supp. 931, 968-69 (S.D.W. Va. 1974) (dictum).

124. 347 F. Supp. 1088 (D. Me. 1972), *vacated on other grounds*, 476 F.2d 606 (1st Cir. 1973).

ing a naval radio tower because of the absence of guard rails. Since the evidence did not show that the railings would have interfered with the electronic performance of the tower, no competing policy considerations existed. The deletions were thus considered as being at the operational level.

In *Seaboard Coast Line Railroad v. United States*,[125] though the government's decision to construct a drainage ditch was a policy judgment, the government was required to exercise due care in performing the task. Once the decision was made, the government was no longer exercising a discretionary, policymaking function. The operational function of building the drainage ditch had to be performed in a non-negligent manner.[126]

The court distinguished the case from *Daniel* by stating that in *Daniel* there had been no allegation that the plans and specifications were prepared by the government, that its construction was performed by the government, or that the highway was owned or controlled by the government.[127] In reality, the distinguishing factor was that the construction of the ditch did not require the weighing of any policymaking criteria.

In *Driscoll v. United States*,[128] a base civil engineer had undertaken to provide traffic control services at the base but chose not to install traffic control devices at the scene of a subsequent accident. On appeal from the granting of summary judgment, the Ninth Circuit held that the decision could not be deemed operational as a matter of law. On remand, the district court was required to determine whether the engineer's decision as to the design of the traffic control system involved the weighing of policy criteria. Only after this determination was made would the question of negligence be considered.

5. ISSUANCE OF LICENSES AND CERTIFICATES

Courts have distinguished various types of license and certifica-

125. 473 F.2d 714 (5th Cir. 1973).

126. *Id.*, *citing* Indian Towing Co. v. United States, 350 U.S. 61 (1955). *See also* Moyer v. Martin Marietta Corp., 481 F.2d 585 (5th Cir. 1973) (acceptance of an aircraft with a negligently designed pilot's ejection seat is not immune under the exception). This case was criticized in Clark, *Discretionary Function and Official Immunity: Judicial Forays into Sanctuaries from Tort Liability*, 16 AIR FORCE L. REV. 33 (Spring 1974).

127. 473 F.2d at 717 n.2.

128. 525 F.2d 136 (9th Cir. 1975).

tion cases based on whether the issuance of the license depended on weighing several policy criteria or whether the issuance was determined by clear, previously established standards.

> [W]here . . . the grant or refusal to grant [a license] is made without reliance upon any readily ascertainable rule or standard, the courts will hold the judgment discretionary. . . . [But] where the grant involves nothing more than the matching of facts against a clear rule or standard, the grant will be considered operational and not discretionary.[129]

Although no litmus paper test has been proposed, several factors become relevant in cases involving issuance of certificates and licenses.

> [I]t is pertinent to inquire whether the complaint attacks on the one hand the nature of rules which a government agency has formulated, or on the other hand the way in which these rules are applied.[130]

Taxay v. United States,[131] for example, concerned the refusal by the "Regional Flight Surgeon, as affirmed by the Federal Air Surgeon and the Federal Aviation Administrator"[132] to renew plaintiff's designation as an Aviation Medical Examiner. The applicable statute granted the Administrator the authority to "delegate to any properly qualified private person" any of the functions relating to the testing required for the issuance of certificates.[133] This power was one step in the process of the administrator's determination of the requisites for achieving air commerce safety. Pursuant to regulation,[134] decisions for reappointing doctors were within the complete discretion of the Administrator, and of those to whom the Administrator delegated such discretion. As the Administrator, through his delegate, had acted within this framework, no violation of plaintiff's rights had occurred which could be asserted under the Tort Claims Act. The placing of personnel to carry out the intent of the statute to assure air safety was executed at the planning level of governmental activity. Furthermore, the determination of the qualifications of

129. Hendry v. United States, 418 F.2d 774, 782 (2d Cir. 1969).
130. *Id.*
131. 345 F. Supp. 1284 (D.D.C. 1972), *aff'd mem.*, 487 F.2d 1214 (D.C. Cir. 1973).
132. *Id.* at 1285.
133. 49 U.S.C. § 1355(a) (1970).
134. 14 C.F.R. § 183.15(c) (1976).

physicians as aviation medical examiners was within the sole discretion of the Administrator.

Similarly, in *Coastwise Packet Co. v. United States*,[135] the Coast Guard's initial failure to issue a certificate of inspection for a schooner was a discretionary activity within the exception. Such a certificate was required before the ship could carry passengers for hire. The alleged negligence of the Coast Guard in applying various safety standards was not the type of activity for which Congress had intended to hold the government liable in tort. The First Circuit noted that in this case the decisions were not based on

> single, known, objective standard which, because of administrative negligence, the Coast Guard failed to apply. . . . When no standard exists, then the process of certifying, insofar as it involves groping for a standard, is within the discretionary exemption of the Act.[136]

Thus, the Coast Guard had discretion in formulating standards for inspection in order to fulfill its statutory duty to promote safety.[137] The court distinguished between the types of certification cases and found only some to be within the discretionary function exception.

The exception was deemed inapplicable in *Hendry v. United States*[138] where the decision to withhold a seaman's license was predicated on professional medical judgments rather than public policy factors. The delicensing procedure did not convey discretion to the doctor "to identify and consider public safety goals. The only discretion apparently contemplated was that inherent in the judgments of any medical doctor in private pratice."[139] These judgments are commonly ruled upon by the courts in tort suits against private physicians.

Similarly, in *Duncan v. United States*,[140] the Federal Air Surgeon's refusal to reissue an airman's medical certificate, as affirmed by the FAA administrator, was held to be an operational activity. The Regulations had established clear medical standards. If the

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135. 398 F.2d 77 (1st Cir.), *cert. denied*, 393 U.S. 937 (1968).

136. *Id.* at 79.

137. *See also* Hooper v. United States, 331 F. Supp. 1056 (D. Conn. 1971) (granting of permit to construct a power station was a discretionary act of the Army Corps of Engineers).

138. 418 F.2d 774 (2d Cir. 1969). For a further explanation of the distinction between certain professional judgments and policymaking, see section IV, B, 6 *infra*.

139. *Id.*

140. 355 F. Supp. 1167 (D.D.C. 1973).

applicant matched these criteria, the administrator had no discretion to deny the certificate.

In *Hoffman v. United States*,[141] the issuance of an ATCO certificate to an aircraft company was not immune under section 2680(a) from a tort suit. The granting of an ATCO certificate depended on certain conclusive standards which were required by regulations.[142] Since the issuance of the certificate depended on clear standards, failure of the FAA to follow its own regulations was considered operational since no discretion could be exercised. Because the ATCO certificate was issued to an airline for a plane which subsequently crashed, the injured passengers could be compensated by suing the government.

6. EXPERT EVALUATIONS

Governmental decisions encompassing expert evaluations are not always within the ambit of the exception. In the area of scientific and medical judgments, for instance, controversy exists as to whether the exception will apply.

The lines of conflict are drawn in *Griffin v. United States*.[143] The Division of Biologic Standards (DBS), a division of HEW, approved a particular lot of polio vaccine for release to the public. The injured party contended that the DBS had failed to comply with standards established by the Surgeon General as to the effect of the vaccine on the central nervous system. DBS judged the vaccine's effect by making scientific evaluations of five criteria. Rejecting a claim of immunity under section 2680(a), the court held that the judgment by DBS in making scientific measurements were those of a professional and

> not that of a policy-maker promulgating regulations by balancing competing policy considerations in determining the public interest. Neither was it a policy planning decision nor a determination of the feasibility or practicability of a government program.[144]

141. 398 F. Supp. 530 (E.D. Mich. 1975).

142. 14 C.F.R. § 135.15 (1976), an FAA regulation, requires that an ATCO certificate cannot be issued unless the airline holds CAB economic authority. A CAB regulation, mandates that CAB economic authority cannot be conveyed unless the requisite liability insurance is carried by the airline. 14 C.F.R. § 298.42(a)(1) (1974).

143. 500 F.2d 1059 (3d Cir. 1974).

144. *Id.* at 1066. This decision was based largely on language found in *Hendry v. United States*, 418 F.2d 774 (2d Cir. 1969).

The mere fact that the agency evaluated several factors in making its decision did not necessarily invoke section 2680(a), especially where the judgments were those of a professional and not those of a policymaker.

The *Griffin* dissent, however, claimed that the exercise of professional judgment in this case required policy decisions as to the amount of weight to be accorded each of five factors.[145] In his dissenting opinion, Judge Van Dusen could find no distinction between these scientific activities and those found immune from liability by the *Dalehite* majority.[146]

The logical extension of the dissenting opinion would in effect revitalize the absolutist approach adopted by *Dalehite*, exempting all discretionary governmental activities from liability. It is submitted that even though the DBS exercised some choice, this was insufficient to invoke section 2680(a). The nature of the decision should be controlling. Whether policymaking has been exercised involves the weighing of political, social, and economic factors. Policymaking should not be equated with mere scientific judgments which a court is fully capable of scrutinizing. Scientific judgments often relate to objective facts, processes, and conclusions which are subject to court review. Courts should not be allowed to second-guess policymakers who must weigh subjective criteria affecting public policy. The application of the exception to the policymaking situation prevents this type of interference.[147]

V. CONCLUSION

At the outset, it is important to keep in mind that one of the basic purposes of the Act—and more specifically of the exception itself—is to allow a government official the freedom to choose a course of conduct without the threat of governmental liability lurking in the background.[148] Initial decisions placed emphasis on the

145. 500 F.2d 1059, 1073 (3d Cir. 1974) (Van Dusen, J., dissenting).

146. *See* text accompanying notes 41-45 *supra*.

147. *See* Hendry v. United States, 418 F.2d 774 (2d Cir. 1969); Duncan v. United States, 355 F. Supp. 1167 (D.D.C. 1973).

148. In order to define the limits of discretionary immunity it is helpful to refer to the primary reasons advanced for the existence of the Tort Claims Act. One commentator has noted three principal reasons for the continuance of discretionary immunity:

> [1] such immunity promotes the separation of powers which is one of our constitutional keystones. . . .
>
> [2] [i]n areas of policymaking, courts are not organized to investigate and

wrong element in the stated purpose. The *Dalehite* majority focused on the decisionmaker; thus, leading to a subconscious interpretation that any decision by a governmental official vested with some authority or status would immunize the government from a suit in tort. In effect, the Federal Tort Claims Act would have been rendered a nullity had this interpretation been allowed to stand.

Subsequent decisions have come to grips with this dilemma and have recognized that most conscious acts of persons involve some degree of choice. The "nature and quality of the discretion"[149] in question has now become the focus for discussion. It appears that each decision on whether to immunize the government will be decided on its own facts. Certain factors or situations are discernable, however, in coming to a clearer understanding of the situation and as a greater aid to prediction.

If the decision can be viewed as emanating from the planning level, immunity exists. The planning aspects are synonymous with policy considerations such as financial, political, economic, and social effects.[150] This is readily distinguishable from operational or day-to-day activities where immunity would not exist.

As a further clarification, some acts are clearly within the exemption. Matters dealing with foreign policy are presumptively immune. Inherent discretion is also seen as being within prosecutional agencies.

At the opposite end of the spectrum are decisions that are clearly subject to liability if performance causes damage. Departmental decisions arrived at on the basis of clear and readily available standards or guidelines that had previously been set offer a good example. It is the in-between or gray area where various factors become important.

It is submitted that those commentators who view the discretionary function exception as a confusing exercise in judicial inconsistancies are incorrect in their appraisal of the situation. By focusing on a trend, with due regard to the original intent of Congress,[151]

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weigh all the factors which enter into the decisions of other branches. . . . [and]

[3] [to prevent] enormous and unpredictable liability which could result from judicial reexamination of major executive and legislative decisions.

Reynolds, *supra* note 14, at 121-23.

149. Smith v. United States, 375 F.2d 243, 246 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967).

150. Swanson v. United States, 229 F. Supp. 217, 220 (N.D. Cal. 1964).

151. Recent discussions before Congress concerning proposed amendments to the Fed-

it is readily apparent that later decisions, which look to the type of decision rather than the decisionmaker, have laid down a reasonably clear framework for analyzing various acts. This approach appears to have carried forth the original intent of Congress.

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eral Tort Claims Act have been aimed at limiting the intentional tort immunity. No dissatisfaction with the discretionary function exception was apparent. Smith, *Statement on H.R. 10439 Before the House Committee on the Judiciary by the Chairman of the Tort Law Committee of the Federal Bar Association, March 27, 1974*, 34 FED. B.J. 79 (1975).