

The Discretionary Function Exception and the Suits in Admiralty Act: A Safe Harbor for Negligence?

Congress traditionally has delegated broad discretion to government agencies carrying out their statutory duties.¹ This grant of discretion has immunized certain government actions from liability.² The Federal Tort Claims Act³ (FTCA) contains an explicit provision, the discretionary function exception,⁴ that shelters all "discretionary" acts from judicial scrutiny, regardless of whether they are negligent or otherwise. This provision is not present in the Suits in Admiralty Act⁵ (SIA). Nevertheless, several circuit courts have questioned whether to impute certain exceptions of FTCA into the SIA. This issue arises from the 1960 amendments to the SIA allowing admiralty suits against

1. K. DAVIS, ADMINISTRATIVE LAW TEXT (1972). Davis states, "Congress may and does lawfully delegate power to administrative agencies, and it may and does lawfully delegate to such agencies the much more dangerous power to make law and to exercise discretion in cases involving identified parties." *Id.* at 26. An example of a broad Congressional grant of discretion to an agency is seen in 14 U.S.C. § 2 (1977), which describes the primary duties of the Coast Guard. They include (a) enforcement and assistance in the enforcement of federal laws on the high seas, (b) administration, promulgation and enforcement of regulations for the promotion of safety on the seas on all matters not delegated to other executive departments, (c) development, establishment, maintenance and operation of aids to navigation, icebreaking facilities and rescue missions, (d) engaging in oceanographic research, and (e) maintenance of a state of readiness to function in the Navy during war.

2. *See, e.g.*, 28 U.S.C. § 2680 (1976). These statutory exceptions to liability prevent individuals from bringing suit against the United States on these grounds. *See* notes 4, 19 *infra*.

3. 28 U.S.C. § 1346 (1976). The Federal Tort Claims Act (FTCA) authorizes suits against the United States for tort claims caused by the negligent or wrongful acts or omissions of its employees acting within the scope of employment. The FTCA's scope is limited, however, by several exceptions that allow the government to retain sovereign immunity in certain circumstances. 28 U.S.C. § 2680 (1976). For the FTCA's text and related discussion, see notes 16-21 and accompanying text *infra*.

4. 28 U.S.C. § 2680 (1976). This exception, like the others in § 2680, limits the government's liability when certain circumstances are present. The discretionary function exception provides that § 1346 does not apply to claims "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." *Id.* § 2680(a).

5. 46 U.S.C. § 742 (1976). The Suits in Admiralty Act (SIA) allows proceedings in personam against the United States for injuries caused on the water in the same manner as if a private individual were responsible. For the SIA's text and related discussion, see notes 9-15 *infra*.

the United States if the plaintiff could maintain a suit against a private individual.⁶ Thus, the amendments substantially broadened the federal government's amenability to suit. To avoid this newly imposed liability, the government has asked courts to apply the FTCA's limitations of liability, particularly the discretionary function exception, to the SIA. The First and Seventh Circuit Courts of Appeals have accepted the government's argument.⁷ The Fourth and Fifth Circuits, however, have refused to apply these limitations to the SIA absent a clear expression of congressional intent.⁸

This comment will examine first the FTCA and the SIA and their legislative histories. Further, this comment will focus on the different circuits' responses to the issue of whether the SIA should be read in light of the discretionary function exception. This examination will expose the insufficiency of the First and Seventh Circuits' rationale for implying the FTCA exceptions into the SIA. This comment will conclude that the 4th and 5th Circuits' approach best follows congressional intent, sound rules of statutory construction, and avoids the adverse effects of imputation of the FTCA exception into the SIA.

With the advent of World War I and government entry into the otherwise privately owned merchant shipping business, Congress decided to remove the sovereign immunity barrier for those injured in the course of governmental shipping activities.⁹

6. 46 U.S.C. § 742 (1976). Congress amended the SIA in 1960 to allow all claims in admiralty against the United States to be maintained, rather than only actions involving government cargo and government merchant vessels, which the original SIA permitted. For the text and discussion of this amendment, see notes 12-15 and 114-19 and accompanying text *infra*.

7. See, e.g., *Bearce v. United States*, 614 F.2d 556 (7th Cir. 1980); *Gercey v. United States*, 540 F.2d 536 (1st Cir. 1976). See notes 22-42 and accompanying text *infra*.

8. See, e.g., *Lane v. United States*, 529 F.2d 175 (4th Cir. 1975); *De Bardeleben Marine Corp. v. United States*, 451 F.2d 140 (5th Cir. 1971). See notes 56-83 *infra*.

9. For an excellent summary of the pre-1960 SIA background based upon legislative history, see *De Bardeleben Marine Corp. v. United States*, 451 F.2d 140, 143 (5th Cir. 1971). The Fifth Circuit Court of Appeals stated: "Congress felt that the liability of the Government should be coextensive with that of private shipowners and shippers who theretofore had been primary participants in merchant shipping." *Id.*

Another source of information on the historical background is G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* (2d. ed. 1975). The authors trace the government's entrance into the shipping business and eventual waiver of sovereign immunity to the United States' participation in the two World Wars. *Id.* at 980-83. At various times, the United States assumed roles previously undertaken by private individuals. For example, during World War II, the government entered the field of marine insurance through the War Shipping Administration because of private underwriters' reluctance to write war risk insurance. *Id.* at 981. With the increased government participation in the shipping

Enacting the SIA in 1920,¹⁰ Congress authorized suits against the United States only in cases involving government merchant vessels and cargo "where if such vessel . . . or if such cargo were privately owned . . . a proceeding in admiralty could be maintained."¹¹ Problems arose, however, as to jurisdiction and proper interpretation of the statute,¹² prompting Congress in 1960 to

business, i.e. "owner, demise charterer, shipper, underwriter, employer, etc., etc.," there came the waiver of sovereign immunity, subjecting the United States to the same liability as a private individual in admiralty. *Id.* at 982-83.

10. Suits in Admiralty Act of 1920 (SIA), ch. 95, 41 Stat. 525-28 (1920), *codified at* 46 U.S.C. §§ 741-52 (1976).

11. The full text of the section reads:

That in cases where if such vessel were privately owned or operated, or such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libellant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

Id., ch. 95, §2.

12. See generally S. REP. No. 1894, 86 Cong., 2d Sess., *reprinted in* [1960] U.S. CODE CONG. & AD. NEWS 3583. The Senate Report accompanying the 1960 amendments states that the primary purpose of the amendments was to clarify jurisdictional problems. *Id.* According to the Report, federal district courts in admiralty had exclusive jurisdiction over claims involving government merchant vessels under the SIA but under The Public Vessels Act (PVA), 43 Stat. 1112-13 (1925), 46 U.S.C. § 781-90 (1976) and the Tucker Act (*codified at* 28 U.S.C. § 1346(a)(2) (1976)), cases involving public vessels had different jurisdictional requirements. S. REP. No. 1894, 86th Cong. 2d Sess., *reprinted in* [1960] U.S. CODE CONG. & AD. NEWS 3583, 3584. Due to hazy distinctions between "merchant" and "public" vessel status, plaintiffs were often left in confusion as to where to file a claim. *Id. Accord*, N. HEALY & B. CURRY, ADMIRALTY 863 (1965 ed.) ("almost as disturbing as the dismissals for want of 'jurisdiction' was the mass of litigation over whether a particular vessel was a 'public vessel' or was 'employed as a merchant vessel'").

The jurisdictional provisions of the Public Vessels Act and the Tucker Act caused additional confusion. Under the Public Vessels Act, the United States district courts in admiralty have exclusive jurisdiction over claims for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including

take steps to remedy these difficulties,¹³ resulting in a substantial broadening of the scope of governmental liability for maritime claims.¹⁴ As amended, the SIA now encompasses all maritime claims, not just those involving government merchant vessels and cargo, if the same claim could be brought against a private individual.¹⁵

Between the 1920 enactment of the SIA and the 1960 amendments, Congress passed the FTCA, waiving sovereign immunity for tort claims arising from the negligent or wrongful acts of federal government employees.¹⁶ The Supreme Court noted that the FTCA "was not an isolated and spontaneous

contract salvage, rendered to a public vessel of the United States. 46 U.S.C. §781 (1976). The Tucker Act, however, provides concurrent jurisdiction in the district courts and the Court of Claims for civil action[s] or claim[s] against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . ." 28 U.S.C. §1346(a)(2) (1976). Therefore, since determining the character of the claims asserted was as difficult as ascertaining the status of the vessel involved, misfilings occurred. The Report also noted that misfilings often were disastrous due to differing statutes of limitation; the limit for the Tucker Act was six years, while the SIA and PVA provided for a two-year limit. S. REP. No. 1894, 86th Cong. 2d Sess., *reprinted in* [1960] U.S. CODE CONG. & AD. NEWS 3583, 3584. Examples of these jurisdictional dilemmas the Report cited were: *Calmar S.S. Corp. v. United States*, 345 U.S. 446 (1953); *Aliotti v. United States*, 221 F.2d 598 (9th Cir. 1955); *Eastern S.S. Lines v. United States*, 187 F.2d 956 (1st Cir. 1951). The 1960 amendments, which allow for transfer of cases, were intended to ensure that filing suit in the wrong court would not shorten or lengthen the applicable statute of limitations. S. REP. No. 1894, 86th Cong., 2d Sess., *reprinted in* [1960] U.S. CODE CONG. & AD. NEWS 3583.

13. The congressional cure for these problems was the Act of Sept. 13, 1960, Pub. L. No. 86-770, 74 State. 912. The bill included three sections: section 1 amended 28 U.S.C. § 1406 by adding a subsection (c); section 2 added § 1506 to follow the new section, and section 3 amended the SIA, 46 U.S.C. § 742, by amending the first sentence of section 2 of the 1920 Act. For text and further discussion of these amendments, see notes 115-18 and accompanying text *infra*.

14. *De Bardeleben Marine Corp. v. United States*, 451 F.2d 140, 145 (5th Cir. 1971).

15. 46 U.S.C. § 742 (1976). The SIA reads, in pertinent part, "in cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States . . ." (added emphasis indicates amended wording). *Id.*

16. 28 U.S.C. § 1346(b) (1976). The statute provides for:

claims against the United States . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his employment, under the circumstances where . . . a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

flash of congressional generosity"¹⁷ but rather the result of thirty years of congressional debate over the justness of sovereign immunity.¹⁸ Unlike the SIA, Congress expressly limited the waiver of sovereign immunity from tort claims by enumerating specific exceptions based on particular policy considerations.¹⁹

17. *Feres v. United States*, 340 U.S. 135, 139 (1950). The decision determined three individual claims, each injury resulting from the negligence of armed forces members. The issue in each was whether the FTCA provided a remedy for those sustaining injury "incident to service." Noting Congress' intent in the FTCA was to mitigate the unjust consequences of sovereign immunity and provide a remedy to those who had been without, the Court nevertheless disallowed government liability for the soldiers' injuries, reasoning that the government was liable only in instances where a private individual would be. *Id.* at 140. Since there was no analogous liability of a private individual for injuries sustained while in the armed forces, the Court would not find the government liable. *Id.* at 146.

18. *See Dalehite v. United States*, 346 U.S. 15, 24 (1955) (one of the first Supreme Court interpretations of the FTCA). The Court examined legislative history preceding the Act, which expressed the long-felt desire that the "[g]overnment should assume the obligation to pay damages for the misfeasance of employees in carrying out its work." *Id.* at 24. Ironically, the Court denied jurisdiction under the FTCA because the discretionary function exception precluded the claim.

Legislative history indicates that another contributing factor leading to the enactment of the FTCA applied on more practical grounds. An increasing number of bills were bombarding Congress requesting compensation for government-caused injuries and damages. H.R. REP. NO. 1287, 79th Cong., 1st Sess. p. 2. The House Report states:

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 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.

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 approved for a total of \$1,355,767.12.

Therefore, in an effort to avoid the inefficient procedure of passing thousands of individual private claim bills, Congress authorized suit against the United States in U.S. district courts.

In *Feres v. United States*, 340 U.S. 135 (1950), the Court found, via legislative history, that "[t]he volume of these private bills, the inadequacy of congressional machinery for determination of facts, the importunities to which claimants subjected members of Congress, and the capricious results, led to a strong demand that claims for tort wrongs be subjected to adjudication." *Id.* at 140.

19. These exceptions are contained in 28 U.S.C. § 2680 (1976). They include (a) the discretionary function exception, (b) claims based on transmission of letters or postal matters, (c) claims with respect to custom taxes or retention of goods by customs officers, (d) claims based on admiralty jurisdiction, (e) claims arising out of the administration of

The discretionary function exception, precluding liability for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function . . . whether or not the discretion involved be abused,"²⁰ has been a source of constant controversy.²¹ Never adequately defined, the discretionary

Title 50, (f) damages incurred by quarantines imposed by the United States, (g) (repealed), (h) claims based on assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract relations, (i) damages caused by the Treasury's fiscal regulations, (j) claims based on combatant activities during war, (k) claims arising in a foreign country, (l) claims based on the TVA's activities, (m) claims arising from the Panama Canal Company, and (n) activities and claims due to the activities of the Federal land bank, intermediate credit bank, or bank for cooperatives. For a discussion of the policy considerations underlying the discretionary function exception, see notes 43-55 and accompanying text *infra*.

20. 28 U.S.C. § 2680(a) (1976).

21. Commentators criticize because of its imprecise nature and difficulties in determining situations in which it is applicable. See, e.g., 2 F. HARPER & F. JAMES, *TORTS* (1956 ed.); Reynolds, *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L. REV. 81 (1968); Peck, *The Federal Tort Claims Act: a Proposed Construction of the Discretionary Function Exception*, 31 WASH. L. REV. 207 (1956). Courts and commentators continually struggle to define precisely what constitutes a discretionary function, concocting various standards to achieve a workable definition. See, e.g., *Indian Towing Co. v. United States*, 350 U.S. 61 (1955) (the Court applied the "Good Samaritan rule" to the government, which provides that once one undertakes to warn the public of danger, he must do so in a careful manner); *Dalehite v. United States*, 346 U.S. 15 (1953) (the Court stated that the discretionary function exception includes actions of executors and administrators in planning activities, but does not include acts of subordinates carrying out government operations); *Feres v. United States*, 340 U.S. 135 (1950) (the Court distinguished between governmental and proprietary functions).

The Washington Supreme Court has devised four questions relevant in determining the existence of a discretionary function under Washington's discretionary function exception. In *Evangelical United Brethren v. State*, 67 Wash. 2d 246, 407 P.2d 440 (1965), the court offered the following test:

(1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment and the expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

Id. at 255, 407 P.2d at 445.

Others criticize the courts' extension of the exception into areas not truly involving discretionary functions while failing to protect functions that do involve discretion. See, e.g., James, *The Federal Tort Claims Act and the Discretionary Function Exception: The Sluggish Retreat of an Ancient Immunity*, 10 U. FLA. L. REV. 184 (1957). James contends the exception has overtaken the Act, in importance, and has extended the Act beyond its original purpose. One court suggests the discretionary function exception is a

function exception shields the negligent acts of government officials from liability if the injuries resulted from the exercise of broad discretion entrusted to the government employee. This provision precipitated the conflict between the First and Seventh Circuits and the Fourth and Fifth Circuits, because the government urged judicial extension of this exception to the SIA.

*Gercey v. United States*²² best illustrates the First Circuit approach to this issue. The decedent's parents brought a wrongful death action under the SIA against the United States, alleging the Coast Guard negligently failed to adopt a comprehensive program designed to notify the public of vessels failing to meet certain safety standards.²³ In *Gercey*, the only action the Coast Guard had taken was removal of Coast Guard certificates from such vessels.²⁴ The court recognized that the decision whether to institute a comprehensive program was within the Coast Guard's discretion.²⁵ The court based this decision on a reading of 46 U.S.C. § 391a²⁶ and § 391,²⁷ mandating only that the Coast

superfluous addition to the FTCA, reflecting excessive congressional caution. *Kendrick v. United States*, 82 F. Supp. 430 (N.D. Ala. 1949). Given these criticisms of the exception, which has been described by Harper and James as an "ill-conceived and poorly thoughtout attempt to solve some of the most sensitive problems concerning the proper limits of governmental liability," 2 F. HARPER & F. JAMES, note 21 *supra*, § 29.15, various commentators have proposed new constructions for the discretionary function exception. Peck suggests shifting the burden of proof to the government to demonstrate that a discretionary function actually was involved. Peck, note 21 *supra*, at 225. The court in *King v. Seattle*, 84 Wash. 2d 239, 525 P.2d 228 (1974), used this approach. For the state to be entitled to the protection of discretionary immunity, it had to show that the policy decision of refusing to issue a building permit to plaintiffs involved a conscious balancing of risks and advantages. Merely alleging that the act was a discretionary function was insufficient. *Id.* at 246, 525 P.2d at 233. An adequate solution is yet to be found.

22. 540 F.2d 536 (1st Cir. 1976).

23. *Id.* at 537. Plaintiffs listed several actions the Coast Guard could have taken to enhance public safety, including: (1) informing the public of vessels deemed unsafe through either a public notice or a sign placed on the vessel; (2) periodically checking to determine whether such vessels are operating despite decertification; (3) informing any purchaser of the vessel's condition; and (4) notifying all local Coast Guard units of decertified vessels. *Id.*

24. *Id.*

25. *Id.* at 538.

26. 46 U.S.C. § 390a (1976) provides that:

The Secretary shall, at least once every three years, cause to be inspected each passenger-carrying vessel, and shall satisfy himself that every such vessel (1) is of a structure suitable for the service in which it is to be employed; (2) is equipped with the proper appliances for lifesaving and fire protection in accordance with applicable laws, or rules and regulations prescribed by him; (3) has suitable accommodations for passengers and the crew; and (4) is in a condition to warrant the belief that it may be used, operated, and navigated with safety

Guard make some periodic inspections of vessels, leaving the precise method to the Coast Guard's discretion. Thus, the court found no express or implied duty in the Coast Guard to implement procedures suggested by plaintiffs as more effective.²⁸ The court characterized the Coast Guard's decision as a basic policy judgment for which Congress designed the discretionary function exception.²⁹

Thus, despite the absence of an express discretionary function exception in the SIA, the *Gercey* court found that sound principles required imputing the discretionary function exception.³⁰ Without this immunity for decision-making, the court reasoned, independent judicial review would disrupt all legislative and administrative decisions involving the public interest.³¹

to life in the proposed service and that all applicable requirements of marine safety statutes and regulations thereunder are faithfully complied with.

27. 46 U.S.C. § 391 (1976), in pertinent part, provides:

The head of the department in which the Coast Guard is operating shall require the Coast Guard to inspect before the same shall be put into service, and at least once in every year thereafter, the hull of every steam vessel carrying passengers; to determine to its satisfaction that every such vessel so submitted to inspection is of a structure suitable for the service in which she is to be employed, has suitable accommodations for passengers and the crew, and is in a condition to warrant the belief that she may be used in navigation, with safety to life, and that the vessel is in full compliance with the applicable requirements of this title or Acts amendatory or supplementary thereto and regulations thereunder; and if deemed expedient, to direct the vessel to be put in motion or to adopt any other suitable means to test her sufficiency and that of her equipment.

28. 540 F.2d at 538.

29. The court cited *Griffin v. United States*, 500 F.2d 1059, 1064 (3d Cir. 1974), for the proposition that the discretionary function exception includes, and probably should be limited to, "policy judgments as to the public interest." 540 F.2d at 539. The Third Circuit nonetheless found no discretionary function in *Griffin*; instead, the court found the government negligent in its implementation of a policy decision. Implementation negligence, according to the Supreme Court in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), is not excused through the discretionary function exception. For a discussion of *Indian Towing*, see notes 71-73 *infra*.

30. While recognizing that the earlier Fifth Circuit decision, *De Bardeleben*, concluded differently in dictum, the court nonetheless rejected the case solely on the basis of a footnote. In *De Bardeleben Marine Corp. v. United States*, 451 F.2d 140 (5th Cir. 1971), the court dealt not with the discretionary function exception, but with another FTCA exception. Analogizing, however, the court reasoned that importing FTCA exceptions would produce "obviously unintended and irrational distinctions." *Id.* at 146 n.15 (citations omitted). Because it disagreed with the underlying factual premise, although in dictum, the *Gercey* court dismissed the *De Bardeleben* conclusion that none of the FTCA exceptions should be read into the SIA. Thus, because of a single premise in a single footnote, *Gercey* failed to deal with another line of reasoning regarding the importation of FTCA exceptions into the SIA.

31. 540 F.2d at 539. The court recognized that implementation of any policy deci-

Without explaining why, the court stated that such interference would create "an intolerable state of affairs."³² Thus, the court refused to consider whether the Coast Guard was liable for its failure to adopt a comprehensive program to protect the public from unsafe vessels.³³ Another First Circuit Court held similarly, recognizing the need to protect agency policy-making in the future.³⁴ After reviewing the split in the circuits, the Seventh Circuit Court of Appeals adopted the First Circuit's approach. In *Bearce v. United States*,³⁵ plaintiffs brought an action under the SIA to recover for the wrongful death of a speedboat operator who struck a Shore Arm Extension.³⁶ Plaintiffs argued that the Coast Guard negligently failed to provide any lighting to

sion would inevitably lead to private injuries. Therefore, given the government's inability to prevent all injuries, certain governmental decisions deserved protection from judicial review. *Id.*

32. *Id.*

33. Despite the court's reluctance to interfere with agency decision-making, it nevertheless suggested that given the "magnitude of th[e] tragedy," measures short of plaintiff's proposed system might, at little cost, avert some disasters. *Id.* at 539 n.3. It suggested that if Coast Guard stations were advised of recently decertified passenger vessels, officials might recognize obvious violations within their surveillance areas. *Id.* This was precisely one of plaintiff's suggestions. Concluding, the court expressed its hope that feasible means of lessening the likelihood of the recurrence of the events before it be found. *Id.* It is ironic that after refusing to consider areas within the Coast Guard's discretion, the court nevertheless offered its insights regarding better procedures the Coast Guard could utilize.

34. *Chute v. United States*, 449 F. Supp. 173 (D. Mass. 1978). The claim in *Chute* arose from the deaths of two passengers on a boat that collided with a submerged wreck. The plaintiffs claimed the government was negligent for improperly marking the wreck; the government asserted that the decision how, not whether, to mark the wreck was within its discretion, pursuant to 33 U.S.C. § 409 (1976), and thus, was protected by the discretionary function exception. *Id.* 449 F. Supp. at 183.

Although it concurred with the *Gercey* court in finding that the discretionary function exception should be implied in the SIA, the court nonetheless distinguished the case, finding it dealt with a policy decision not to act, whereas *Chute* involved implementation of a policy decision already made. *Id.* at 185. Relying on *Indian Towing Co. v. United States*, 350 U.S. 61 (1955) and *Somerset Seafood Co. v. United States*, 193 F.2d 631 (4th Cir. 1951), the court found the discretionary function exception inapplicable and the government negligent in inducing public reliance. 449 F. Supp. at 181. The court concluded that the government was liable for its failure to exercise due care by using a buoy insufficient to warn mariners of the wreck. *Id.* at 182. Thus, while dictum, *Chute* supports the *Gercey* holding.

35. 614 F.2d 556 (7th Cir.), *cert. denied*, ___ U.S. ___, 101 S.Ct. 112 (1980).

36. *Bearce*, an experienced sailor, was operating his boat in the Chicago harbor of Lake Michigan. The harbor is comprised of a series of breakwaters having only one light to guide boaters. Plaintiff was attempting to navigate through this secondary, less used entrance. *Bearce* was killed instantly when he mistakenly believed he had cleared the breakwater. *Id.* at 557-58.

prevent collisions with the breakwater.³⁷ Although the Coast Guard had previously attended public hearings and consequently recommended placing a red flashing light on the end of the Shore Arm Extension, it never acted on this recommendation.³⁸ The government claimed the acts were part of their discretionary duty and protected by the discretionary function exception.³⁹ The *Bearce* court agreed with the *Gercey* reasoning and therefore, did not hold the government liable for its failure to install the light.⁴⁰ The *Bearce* court stated that, despite the absence of any express discretionary function exception, basic policy considerations, such as budgetary concerns and administrative independence, prohibited the broad waiver of immunity plaintiffs asserted.⁴¹ To bolster their decision, the court also noted that the purpose of the 1960 amendments was to clear up jurisdictional confusion only, not to expand the scope of governmental liability.⁴²

The First and Seventh Circuits' premise for applying the discretionary function exception to the SIA is that government

37. The court did not address the question of whether the government indeed was negligent because it found that the discretionary function exception protected the government's failure to provide other lighting. The *Bearce* court relied upon the *Gercey* court—a court that also avoided the negligence issue for the same reason. *Id.* at 559.

38. The Illinois Boat Council held the meetings in 1966. *Id.* at 558. At this time, there was concern for navigational safety in the harbor. Following the meetings, the Coast Guard issued a report noting that the color of the exterior breakwater's light should be changed from white to green and that a red flashing light should be installed. The Coast Guard acted only on the first recommendation. The court characterized this decision as one made at the administrative level and, as such, falling within the discretionary function exception. *Id.* at 558, 560-61.

39. The government relied on 14 U.S.C. § 81 (1976): "in order to aid navigation and to prevent disasters, collisions and wrecks of vessels and aircraft, the Coast Guard may establish, maintain, and operate aids to maritime navigation required to serve the needs of the armed forces or of the commerce of the United States." 614 F.2d at 558-60.

40. 614 F.2d at 558-61. In fact, after characterizing the decision as a discretionary function, the court refused to review the decision at all—in effect letting the government off without compensating the plaintiffs.

41. The government's evidence at trial showed a priority list, with approved construction totalling \$300,000,000 that Congress had not yet funded. In view of these monetary concerns, the court held that allocations of these limited funds were policy judgments within the scope of the discretionary function exception. *Id.* at 561.

42. The court cited the Supreme Court opinion in *United States v. United Continental Tuna Corp.*, 425 U.S. 164 (1976), for the proposition that the SIA 1960 amendment was solely jurisdictional. 614 F.2d at 559. Thus, the court found that the broad interpretation of the Act eliminating the FTCA exceptions to liability under the SIA should be avoided. *But see* notes 120-23 *infra*. The court failed, however, to explain why it avoided a broad interpretation of the Act, yet permitted a strict reading of the amendments to demonstrate the SIA's limited purposes. *Id.* at 559-60.

agencies must allocate their limited resources to those activities that best promote the public interest.⁴³ Allocation of these resources involves careful consideration and delicate balancing of numerous factors. Given these limitations, the public cannot expect the government to adopt all programs regardless of expected costs and benefits.⁴⁴ Thus, it is within the agency's discretion to evaluate its goals in light of limited funds, equipment and manpower.⁴⁵ Agency expertise and judicial inability to investigate and weigh fully all pertinent factors in highly specialized areas convinced the First and Seventh Circuits that courts would be engaging in ineffectual second-guessing of the wisdom of executive and legislative conduct.

Although not explicitly stated, both *Bearce* and *Gercey's* assertion that the discretionary function exception should apply to the SIA is rooted in the separation of powers concept. Noted commentators have defined this doctrine a "constitutional

43. *Id.* The *Gercey* court stated that a determination to commit the Coast Guard's limited resources to the follow-up system the plaintiffs suggested involved consideration of numerous factors: the effectiveness of present measures, the degree of extra protection the alternative program offered, whether the increased protection warranted the commitment of limited resources, and the program's effect on other activities the agency sponsored. *Id.* at 561 n.9. Similar concerns were discussed in *United States v. Sandra & Dennis Fishing Corp.*, 372 F.2d 189 (1st Cir. 1967). The court, in deciding whether to hold the government liable for its negligent towing of the plaintiff's vessel, considered the amount of equipment available, how much money could be spent, and how much money Congress would appropriate. The court found no governmental obligation to have particular vessels available or have on board any particular equipment. *Id.* at 195.

The *Bearce* court echoed these sentiments, stressing that the allocation of funds for new navigational aids in the public interest was strictly discretionary especially given the reality of being able to implement only a limited number of aids. 614 F.2d at 561.

The court in *Magno v. Corros*, 630 F.2d 224 (4th Cir. 1980), although not discussing the discretionary function exception, did state that courts should be aware of budgetary considerations when dealing with alleged abuses of discretion. *Id.* at 229. Given the expense involved in lighting every obstruction, the court felt that it was improper for the courts to tell the Coast Guard how to spend its limited resources. *Id.* It felt that this would unnecessarily divert funds that should go to other regulatory activities. *Id.*

44. See *Griffin v. United States*, 500 F.2d 1059, 1064 (3d Cir. 1974) (in considerations involving public policy, agencies utilize a cost-benefit analysis to determine whether a certain program should be implemented); *Offshore Transport Corp. v. United States*, 465 F. Supp. 976, 980 (E.D. La. 1979) (imposition of an expensive course of conduct on the government over an extended period imposes an unreasonable burden).

45. See *Reynolds*, *supra* note 21, at 122. Reynolds notes that in areas of policy-making, courts are not well suited to the task of determining whether an agency has made a mistake and whether the mistake was unreasonable. *Id.* He suggests it is only by hindsight that a sound judgment can be made. "The judiciary is designed for deciding individual cases, laying down general rules, and necessarily considering social and economic factors to some extent. It cannot launch full-scale investigations and studies. . . ." *Id.*

arrangement for limiting power through diffusion of authority among various units of the government: the allocation of powers among the three branches of the national government."⁴⁶ This constitutional allocation⁴⁷ not only vests certain powers in the judicial, legislative, and executive branches, but is designed to protect the integrity and autonomy of each branch.⁴⁸ A constitutional keystone,⁴⁹ it provides the basis for courts' reluctance to review the propriety of actions committed to coordinate government branches. Each branch should be free to "plan, experiment and negotiate"⁵⁰ without fear of disruptive interference from others. Thus, it follows that the judicial branch should limit the

46. G. GUNTHER, *CONSTITUTIONAL LAW*, 400 (9th ed. 1975). The framers of the U. S. Constitution, influenced by their revolutionary attitude toward England where centralized power resulted in tyranny, and by political theorists, deliberately provided for such allocation. Until the late nineteenth century, the Supreme Court strictly adhered to this separation notion by strictly limiting each branch solely "to the exercise of the powers appropriate to its department and no other." *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1880). Some members of the Supreme Court, however, subsequently have diverged from a strict separation of powers mode. In *Myers v. United States*, 272 U.S. 52, 291 (1926) (Brandeis, J., dissenting), Justice Brandeis stated, "The separation of the powers of government did not make each branch completely autonomous. It left each, in some measure, dependent upon the others, as it left to each power to exercise, in some respects, functions in their nature executive, legislative and judicial."

47. U.S. CONSTITUTION art. 1, § 1 provides: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Article 2, § 1 reads: "The executive Power shall be vested in a President of the United States of America." Article 3, § 1 provides: "The judicial Power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish."

48. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978). Tribe notes that the integrity and independence of each branch operates to safeguard their interdependence "without which independence can become domination." *Id.* at 15. Thus, the framework serves dual purposes: it enables several sometimes antagonistic government forces to mesh in order to operate a government made up of many states, while also checking each branch to inhibit institutional oppression of the citizenry. *Id.*

49. *Buckley v. Valeo*, 424 U.S. 1 (1976). In *Buckley*, the Supreme Court referred to the separation of powers as "at the heart of the Constitution." *Id.* at 119. James Madison articulated the importance of separation of powers in Federalist Paper Number 48. Madison stated that "the powers properly belonging to one of the departments of government ought not to be directly and completely administered by either of the other departments." *THE FEDERALIST* No. 48 (J. Madison).

50. Reynolds, *supra* note 21, at 121. Reynolds states that separation of powers is advanced for the continuance of discretionary immunity. He says that lawsuits based on alleged administrative and legislative mistakes will inevitably cause harassment of officials, wasted time in preparation for and participation in courtroom battles, and overcautious actions with an eye toward the courtroom. *Id.* Because some unsatisfactory choices are inevitable, he views the reasonable person test as an inappropriate standard against which to measure government actions. *Id.* The possible liabilities flowing from "judicial interference" are reductions in freedom, independence, and efficiency.

scope if its examination of agency decision-making function. The discretionary function exception preserves the separation of powers by insuring limited judicial inquiry when responsibility for basic policy decisions resides in other branches.⁵¹

In addition to the separation of powers argument, courts and commentators suggest that, unless limited by the discretionary immunity doctrine, compensation for government negligence will place a huge burden on the public treasury, resulting in inefficient operation of the government and contravening a strong public interest in maintaining government solvency.⁵² Proponents of discretionary immunity envision great impracticalities arising from computing damages and providing relief on such a large scale.⁵³ Cloaking discretionary acts with immunity minimizes this burden.⁵⁴ Commentators further argue that potential litigation and subsequent damages awards encourage agency inaction by making agencies overly cautious in implementing programs designed for the public good.⁵⁵ These policy considerations have convinced the First and Seventh Circuits to

51. See *Johnson v. State*, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968). The *Johnson* court held that the parole officer's decision not to warn plaintiff of the risks presented by accepting a young parolee into her home did not come within the discretionary function's sphere requiring judicial restraint in reviewing such agency decisions. *Id.* at 797, 447 P.2d at 363, 73 Cal. Rptr. at 251.

52. See *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957). In *Rayonier*, plaintiffs sued for losses allegedly caused by the negligence of United States employees in allowing a forest fire to start on government land and in failing to act with due care to put it out. The government claimed that if the courts held it responsible for all negligence of the Forest Service, an unwieldy burden would be placed on the public treasury. *Id.* at 319. The court refused to accept this argument, seeing the burden more easily shouldered by the United States than by the individual. *Id.* at 320. See also Reynolds, *supra* note 21, at 123. *But see* notes 105-08 *infra*.

53. See, e.g., K. DAVIS, ADMINISTRATIVE LAW TREATISE (1958). Davis, without explanation, states that the machinery necessary to compute damages and provide relief will be too extensive and that it is better to have some losses go uncompensated. *Id.* § 25.13. As he sees it, "harms of this kind [uncompensated losses] have to be regarded as one of the necessary costs of living in organized society." *Id.* It would seem, however, that during the government's long history of liability for injuries it causes, some machinery has been developed to deal with the damages issue. Courts routinely determine damages, and the government to date has not become bankrupt from paying money judgments. See also note 108 *infra*.

54. "The Government each day makes decisions that conceivably could cause huge losses to millions of people. The possibility of so great a burden will be removed if major decisions requiring much discretion remain cloaked with immunity." Reynolds, *supra* note 21, at 123.

55. "The possibility of suit for every move creates an atmosphere of fear and pressure in which certain government employees must each day make many decisions affecting countless persons." Reynolds, *supra* note 21, at 121.

impute the FTCA discretionary function exception into the SIA.

The Fourth and Fifth Circuits, however, have taken a position directly contrary to the First and Seventh Circuits' by refusing to read the SIA in light of the FTCA exceptions. Beginning with *De Bardeleben Marine Corp. v. United States*,⁵⁶ the Fifth Circuit held that none of the FTCA exceptions could be imputed into the SIA.⁵⁷ There, the government admitted its negligent publication of a nautical chart, upon which the injured plaintiff had relied, but claimed immunity under an FTCA exception that disallowed claims for government misrepresentation.⁵⁸ Although plaintiffs sued under the SIA, the government argued that Congress had intended to import the FTCA exceptions into the SIA.⁵⁹ After extensive analysis of the SIA's legislative history, the court concluded there was no support for the government's inference⁶⁰ and that this interpretation would only

56. 451 F.2d 140 (5th Cir. 1971). Plaintiffs brought suit against the United States for damages resulting when they dropped anchor and inadvertently ruptured a natural gas pipeline. The explosion damaged plaintiff's tug and barge and injured the tug's mate. *Id.* at 141. Plaintiff had relied on a government-published chart that did not reflect the presence of the pipeline. *Id.* at 141-42. Although the government later revised the faulty chart, plaintiffs had no knowledge of these later changes. *Id.*

57. *Id.* at 145-46.

58. 28 U.S.C. § 2680(h) provides in part that § 1346(b) of the FTCA shall not apply to claims based on government misrepresentation. Subsection (h) also applies to actions based on interference with contract relations. *Canadian Transport Co. v. United States*, 430 F. Supp. 1168 (D.D.C. 1977), dealt with this provision in relation to the SIA. The court, after reviewing plaintiffs' claim for damages based on the Coast Guard's refusal to allow them entry into port, assumed that FTCA § 2680(h) should not be read into the SIA. *Id.* at 1170. Thus, the court found that if plaintiffs were to have a cause of action based on contract interference, the action had to be maintained under the SIA, which waived sovereign immunity in this area, rather than the FTCA, which immunized such government conduct. *Id. Canadian Transport*, therefore, also lends support to the Fourth and Fifth Circuits' interpretation of the 1960 amendment to the SIA.

59. 451 F.2d at 145.

60. *Id.* at 143-46. The court found several reasons why the government's arguments were unpersuasive: the statutory language itself, legislative history, and the liberal attitude toward waivers of sovereign immunity. *Id.* at 145. The court, realizing that there was no express purpose to waive immunity in the 1960 amendments, nevertheless found such a purpose given the clear import of the statute's language. The court reasoned that if clarification of the old statute were the sole purpose of the amendments, simply by defining the ambiguous terms, i.e. "merchant," "public vessel and cargo," would have accomplished it. As seen by the statute, Congress did more than merely explain what each term meant. See notes 114-19 *infra* and notes 13-14 *supra* and accompanying text.

The court summarized its reasons for not importing the FTCA exceptions into the SIA by quoting *Rayonier, Inc. v. United States*, 352 U.S. 315, 320 (1957), wherein the Supreme Court found "no justification for this Court to read exemptions into the Act [FTCA] beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it." 451 F.2d at 146.

reinject the confusion the 1960 amendments eliminated.⁶¹ Given the statute's broad waiver of immunity, the court could find no basis for limiting the SIA in the absence of substantial evidence that this was indeed Congress' intent.

The Fourth Circuit applied the *De Bardeleben* reasoning four years later in *Lane v. United States*.⁶² In *Lane*, plaintiff's boat sank when it unwittingly ran into a sunken barge.⁶³ Plaintiff claimed the United States was negligent in failing to mark the wreck; the government claimed the discretionary function exception protected its decision not to act because the controlling statute made marking of wrecks a discretionary matter.⁶⁴ The court noted that the suit came under the SIA, which does not have a discretionary function exception, and found "no basis upon which [to] import the many exceptions in the Tort Claims

61. 451 F.2d at 145. The court specifically stated:

It would be incongruous to impute to Congress a purpose to perpetuate confusion, not by reason of choosing the wrong forum, but by importing substantive standards of liability and governmental defenses by a retrospective analysis of what would have been the case prior to 1960. Reimportation of FTCA provisions or exceptions produces obviously unintended and irrational distinctions.

Id. at 145-46 (citations omitted). Despite this reasoning, the court did not find the government liable for plaintiff's damages. The government's duty to plaintiff was limited in time; this duty terminated at the time a prudent ship owner/navigator would have reasonably received the notice of faulty charts. Thus, principles of tort law protected the government from liability that it had in fact caused. *Id.* at 149.

62. 529 F.2d 175 (4th Cir. 1975).

63. *Id.* at 176-77. Testimony at trial revealed that the barge had been in that location about five years. During each of those five years, eight to ten boats had collided with it. Despite notices and requests over the years, the Army Corps of Engineers had not removed or marked the wreck. *Id.* at 177. Plaintiff alleged that this failure to take adequate precautions led to plaintiff's damages. *Id.* After this incident, a marine surveyor, employed by plaintiff's insurer, examined the area and requested the Army Corps of Engineers and the Coast Guard to take appropriate measures. Eventually some agency put up a marker. *Id.*

64. *Id.* at 177-79. Under 14 U.S.C. § 86 (1976), "The Secretary [of Transportation] may mark for the protection of navigation any sunken vessel or other obstruction existing on the navigable waters or waters above the continental shelf of the United States in such manner and for so long as, in his judgment, the needs of maritime navigation require." (emphasis added).

The statute's current wording is a result of a 1965 amendment; the prior act made such markings mandatory on the Coast Guard's part. 529 F.2d at 177. The amendment was designed to eliminate any confusion as to who should deal with these wrecks, giving the Coast Guard discretion to mark or remove them if the owner did not. S. REP. NO. 688, 89th Cong., 1st Sess., reprinted in [1965] U.S. CODE CONG. & AD. NEWS, 3140, 3140. Detailed regulations pertaining to the Coast Guard's duties in connection with maritime navigational aids are found in 33 C.F.R. §§ 60.01-1 to 72.05-10. See also Annot., 19 A.L.R. FED. 297 (1974).

Act into the Suits in Admiralty Act.”⁶⁵ Because there was no discretionary function exception to immunize the Coast Guard’s failure, the court remanded for a determination of whether the government had negligently failed to mark this particular wreck.⁶⁶ The court recognized that this discretion was to be exercised reasonably and with due care; the Coast Guard could not ignore real and substantial threats to navigation and still hide behind the cloak of discretion.⁶⁷ The Fourth Circuit reaffirmed this reasoning in dictum in *Doyle v. United States*,⁶⁸

65. 529 F.2d at 179.

66. *Id.* at 180. The court rejected the lower court’s determination that the United States’ duty to mark or remove wrecks abandoned by the owners was mandatory in light of the 1965 amendment to the Wreck Acts. These Acts allowed the agency to use its discretion in determining which wrecks actually were hazardous. This determination had to be exercised reasonably and with due care. *Id.* at 178-79. The court could not determine from the records whether the agency had reasonably exercised its authority and thus remanded to the lower court. *Id.* at 180. The reviewing court found the Coast Guard’s duty not satisfied solely by the National Oceanic Atmospheric and Administration’s publication of a chart with a wreck symbol representing the sunken barge, because the Wrecks Acts required some physical manifestation on the scene. *Id.*

67. *Id.* at 179.

68. 441 F. Supp. 701 (D.S.C. 1977). The Coast Guard actions that led to plaintiff’s cause of action involved a ferry cable crossing a canal, on which the deceased was operating his boat. The cable was part of a ferry cable system; when the ferry was in operation, the cable became taut and rose several feet above the water. Signs placed up- and downstream warned mariners of the ferry’s existence but not the potential danger. *Id.* at 705. The deceased’s estate brought this action to recover for his death caused by collision with the cable. Although the Coast Guard did not own or operate the ferry, it had noted it on charts and publications and had reason to know of the danger. *Id.* at 708. In addition, it had received complaints but had taken no action. Again, the court found the discretionary function exception inapplicable to the SIA under which the suit was brought. *Id.* at 708-09. The court found the government liable for its abuse of discretion in failing to adequately notify mariners of the danger. *Id.* at 709. A recent Fourth Circuit case relieved the government of liability. In *Magno v. Corros*, 630 F.2d 224 (1980), plaintiff initiated suit at the district court level. 439 F. Supp. 592 (D.S.C. 1977). Plaintiff was injured in the decedent’s boat when it collided with a dike built by the United States. Plaintiff sued decedent’s estate; the estate impleaded the United States and the Exxon Corporation, seeking indemnity. 439 F. Supp. at 595. The court held that the United States had not only the authority to construct the dike, 33 U.S.C. § 403, but also the discretion to decide whether to mark it. *Id.* at 599. Once, however, it decided to light the dike, it had to exercise its discretion reasonably under the precepts of Indian Towing Co. v. United States, 350 U.S. 61 (1955). The court rejected the government’s argument that its lighting was within the discretionary function exception because the exception was not to be implied into the SIA. 439 F. Supp. at 599-600. Given this premise, the court examined the sufficiency of the lighting and found the solitary light “grossly negligent and . . . a clear abuse of discretion.” *Id.* at 604. But, because of plaintiff’s awareness of the dike, the court applied a comparative negligence standard. *Id.* at 605. Despite the fact that this language deals with the implementation rather than the actual policy-making, it supports the theory that the discretionary function exception is not part of the SIA. The government appealed the lower court decision and prevailed. 630 F.2d 224 (4th

again refusing to imply the FTCA exceptions into the SIA.⁶⁹ This case differs from *Gercey* and *Lane* in that it involves negligent implementation of a policy decision rather than a negligent policy judgment itself.⁷⁰ Under the Supreme Court holding in *Indian Towing Co. v. United States*,⁷¹ negligent implementation is not protected by the discretionary function exception; only policy decisions themselves fall within that protected category.⁷² Once an agency decides to act, it leaves the protected zone of the discretionary function exception and must act reasonably and with due care.⁷³ Thus, although the *Doyle* court faced a negligent implementation case, it did uphold *Lane's* finding that the SIA did not contain the FTCA exceptions and that the Fourth Circuit did not recognize any.⁷⁴

Cir. 1980). The Court of Appeals held that the government has no duty to provide additional lighting at the dike. 630 F.2d at 228. The court distinguished *Lane* on two grounds: (1) 14 U.S.C. § 86, while applicable in *Lane*, was inapplicable in *Magno* because it involved a dike, and not an obstruction which § 86 covers; and (2) assuming § 86 was applicable, there was still no duty to mark the dike more clearly than it was in the first place. *Id.* at 228-29. It must be noted, however, that this court did *not* discuss the discretionary function exception nor its possible application to the SIA. Thus, the district court's discussion on this issue was not explicitly overturned on appeal.

69. Assuming *arguendo* that *Doyle* had found a discretionary function exception in the SIA, or good reasons for implying one, it still would have found the government responsible because the actions that led to the injuries were not within the discretionary function exception's scope. See note 68 *supra*.

70. See notes 67-68 *supra* and notes 71-73 and accompanying text *infra*.

71. 350 U.S. 61 (1955). Plaintiff sought recovery under the FTCA for damages caused by the negligence of the Coast Guard in its maintenance of a lighthouse it had previously decided to establish to aid mariners. *Id.* at 62. Plaintiff claimed the government was negligent in failing to keep the lighthouse in good working order, thus inducing public reliance. Plaintiff asserted that this failure was the cause of its grounding and subsequent damage to its cargo. *Id.* Specific acts of negligence included the Coast Guard's failure to check the battery and sun relay system, the failure of one of its officers to check the lighthouse, the failure to repair the light or give a warning it was not operational and there was a loose connection that could have been discovered upon proper inspection. *Id.*

72. *Id.* at 69. The court stated:

The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act.

Id.

73. *Id.* See also *Afran Transp. Co. v. United States*, 309 F. Supp. 650 (S.D.N.Y. 1969).

74. See note 68 *supra*.

The most recent case in opposition to the *Gercey* and *Bearce* line came from a district court in the Fifth Circuit. In *Offshore Transport Corp. v. United States*,⁷⁵ plaintiff sought recovery for damages incurred when its vessels struck charted but unmarked objects.⁷⁶ Given the natural hazards of the area, the Coast Guard had decided not to mark the submerged objects.⁷⁷ The court, relying on *De Bardeleben* and *Lane*, denied the importation of the FTCA exceptions into the SIA.⁷⁸ While the court did recognize that the Coast Guard's duty to mark or remove wrecks was discretionary rather than mandatory, given the limited agency resources,⁷⁹ the agency was forced to concentrate its efforts on frequently traveled areas where the probability of accidents was greatest.⁸⁰ Since the court refused to imply the FTCA exceptions in this SIA action, this element of discretion was not immune from judicial inquiry into its reasonableness. The court, in determining whether the Coast Guard's actions were reasonable, examined and weighed the evidence the agency presented⁸¹ and concluded that the Coast Guard had met

75. 465 F. Supp. 976 (D. La. 1979).

76. *Id.* at 977-78. Two of plaintiff's boats sustained damage upon collision with a submerged object. The first boat struck a stainless steel shaft lying six inches below the water's surface and sustained substantial hull damage. *Id.* at 977. Following this incident, the Coast Guard was notified of the first boat's sinking. Nearly three months later, a second boat was damaged while attempting to locate the cause of the first accident. At that time, the wreck was still unmarked despite notification of its location and danger. *Id.* at 978.

77. *Id.* at 978. The government cited several factors it considered in determining whether to mark this or any wreck or submerged object: location of the wreck, its size, the depth of the water, and the area's navigational patterns. *Id.* These factors, during a physical inspection of the wreck area, determined whether the object posed a hazard to navigation and thus whether the agency would take any action. *Id.*

78. *Id.* at 981.

79. *Id.* at 980. The court used the Coast Guard Act of 1949, 14 U.S.C. § 86 (1976) as a guideline. The court recognized that the Coast Guard's duty is discretionary, and thus, the real issue presented was whether the Coast Guard had abused its discretionary authority to protect vessels by neither marking the objects nor removing them. *Id.*

80. *Id.* The court stated:

It is uncontroverted that the resources of both agencies [Coast Guard and Army Corps of Engineers] are not adequate to remove or properly mark every wreck throughout the Gulf of Mexico. Therefore both agencies concentrate their efforts on those waters known to be frequented by vessels and where the threat to navigation is deemed to be the greatest.

Id.

81. Both the Coast Guard and Army Corps of Engineers presented evidence for the basis of their decision in regard to the area. Chiefs of both agencies stated that mariners generally avoid this (Shell Key) area given the plethora of natural hazards, shallow waters, shoals, and a coral reef. *Id.* at 978. The primary factor in determining whether to take any affirmative action was the estimated traffic pattern in the vicinity. *Id.* This area

the "needs of maritime navigation" and thus had not acted negligently.⁸² Through careful analysis and by giving deference to agency expertise, the court demonstrated its competence in scrutinizing agency decisions. The fact that a policy decision was involved did not constrain the *Offshore* court from examining the agency decision not to act.

The First and Seventh Circuits argue that the discretionary function exception plays a vital role in government operations because agencies must be free to use their discretion in allocating limited resources, and also that interferences with this function will greatly impair government operations.⁸³ Although not explicitly stated, this line of reasoning assumes that, given the opportunity, the courts continually will overturn administrative decisions. This is simply not the case. Courts pay great deference to agency decisions and will reach a contrary determination only if they find the agency action an abuse of the agency's discretion.⁸⁴ Thus, the scope of judicial review of agency actions is

was removed from the usual traveled channels the Coast Guard maintained. Although the Army Corps of Engineers did visit the area, the Coast Guard did not; it relied on a map survey in evaluating the use of the area. *Id.* Neither agency conducted its own traffic studies, nor did they conduct periodic traffic studies to determine whether conditions had changed. *Id.*

82. Despite the actions taken by the two agencies, as well as actions the agencies could have taken but did not take, the court found the failure to take affirmative steps in this area regarding the submerged objects was not an abuse of the discretion vested in the agencies because the evidence substantiated the reasonableness of their decision. *Id.* at 980. The court found the government's duty to exercise due care satisfied and thus there was no breach of the duty owed to the plaintiff. *Id.* at 982. The Coast Guard, upon notification of the first accident, issued a notice to mariners of the wreck area and advised them to use caution when traveling in the area. *Id.* at 978. In fact, plaintiff's experienced masters testified that Shell Key was generally avoided and that, but for the urgings of the vessel's charterer to take that course, they would not have done so given the natural hazards. *Id.* at 979. There was also no evidence that the plaintiff or the charterer notified the Coast Guard of its intent to take that route nor that they had requested action in that area. *Id.* This combination of factors persuaded the court to find the government not negligent.

83. See notes 43-46 and accompanying text *supra*.

84. See *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971). Judge Bazelon stated for the court:

For many years, courts have treated administrative policy decisions with great deference, confining judicial attention primarily to matters of procedure. On matters of substance, the courts regularly upheld agency action, with a nod in the direction of the "substantial evidence" test, and a bow to the mysteries of administrative expertise.

Id. at 597. It should be noted, however, that Judge Bazelon went on to say this deference in the extreme may be changing, especially when administrative actions affect fundamental personal interests in life, health, and liberty. *Id.* at 597-98. To protect these vital interests, Bazelon felt that it was even more crucial that these decisions be given "strict

limited and rarely do courts find the agency's decision totally unreasonable.⁸⁵ Courts respect agency expertise. So long as there is evidence that the agency's decision was reasonable and within the bounds of its discretion, the courts will uphold the agency's judgment.⁸⁶

Another concern underlying the First and Seventh Circuits' approach is that the separation of powers established by the Constitution proscribes judicial review of agency decisions. The framers of the Constitution, however, never intended the separation of powers to be absolute and inflexible.⁸⁷ The powers are intermixed; there are numerous overlaps of powers in the three branches that blur these neatly divided categories.⁸⁸ A classical example of this mixture of powers is the administrative agency.⁸⁹ Nowhere does the Constitution provide for administrative agencies, yet they are recognized today as a vital part of the govern-

judicial scrutiny." *Id.* at 598. See also L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 565-66 (1965).

85. B. SCHWARTZ, *ADMINISTRATIVE LAW* (1976). Schwartz says there are two reasons why the scope of judicial review is narrow. One reason is the deference given to the expertise of the administrative expert. This deference limits the extent to which the expert's discretion is scrutinized by a less qualified judge. *Id.* at 580. The alternative to this deference is that the judge will overrule an administrative decision based on technical matters within the agency's expertise. The second reason for the limited scope is based on a pragmatic concern: time. Courts' calendars are so full that courts simply do not have the time to investigate and come to their own evaluations on scientific and technical matters. *Id.*

86. See notes 76-83 and accompanying text *supra*.

87. GUNTHER, *supra* note 46, at 400.

88. *Id.* Gunther points to the relationship between the President and the legislature. The President becomes a participant in the legislative process through his veto powers; conversely, Congress can limit the President through exercise of its impeachment power. These restraints are authorized by the Constitution. As Gunther notes, these ambiguous areas have created competition among the branches that often are resolved by political forces dominant during certain time periods. *Id.*

89. See Federal Administrative Procedure Act of 1946, 60 Stat. 237 (1946), 5 U.S.C. §§ 551-559, 701-706 (1976). The foundation of federal administrative law, it authorizes federal agencies to publish information, rules, opinions, orders, and public records through the Federal Registry, 5 U.S.C. § 552 (1976), permits agencies to issue rules relating to a number of subjects, 5 U.S.C. § 553 (1976), and to engage in adjudications provided certain procedural guidelines are followed, 5 U.S.C. § 554 (1976). The Act (APA) grants agencies the authority to issue subpoenas to compel attendance at agency proceedings, 5 U.S.C. § 555 (1976); hold hearings so that the public may voice its opinions, 5 U.S.C. § 556 (1976); and impose sanctions, determine when licenses shall issue and when these licenses are suspended, revoked, or expired, 5 U.S.C. § 558 (1976). The vast amount of law that comes from these agencies, as reflected in the numerous volumes of the Code of Federal Regulations, as well as the safeguards Congress enacted to ensure the proper exercise of administrative authority, shows how much the agencies contribute to the workings of the government and the power they exert.

ment.⁹⁰ They perform roles traditionally delegated to the other branches; they resemble legislatures in their rule-making capacity and act as courts in their adjudicative capacity.⁹¹ Thus, the more appropriate inquiry is the extent to which one branch interferes with another.⁹² Because the judiciary was intended to oversee the other branches of the government,⁹³ judicial review

90. See Loevinger, *The Administrative Agency as a Paradigm of Government—A Survey of the Administrative Process*, 40 IND. L.J. 287 (1965). Loevinger finds the most telling aspect of the agency's contribution is the sheer volume of work it does. As far back as 1964, the workload of certain agencies was awesome. For example, during 1964, the Civil Aeronautics Board handled 66,966 applications received or proceedings initiated; the Federal Communications Commission received 961,041 applications, received 38,241 interference complaints, and investigated 21,803 interference cases, and made 14,468 inspections; and the Federal Trade Commission received 5,889 applications for complaints, issued 311 complaints, secured 416 assurances of discontinuances, received 1,800 requests for advice and opinions, issued 57,310 interpretations just under the Wool, Fur and Textile Acts, and made 11,837 inspections. *Id.* at 299-300. The list could go on indefinitely, but these samples, which have doubtless increased over the years, indicate the awesome power these agencies exert and the impact they have on the public. Much of this work could not be accomplished through the often slow and ineffective congressional process. Thus, agencies are valued for their flexibility, efficiency, and time saving aspects. See also B. SCHWARTZ, *ADMINISTRATIVE LAW: A CASEBOOK* (1977). Schwartz states:

[T]he State has had to bring ever-increasing parts of the population directly under its fostering guardianship. The representative legislative assembly is peculiarly inappropriate itself to perform these continuous tasks of regulation and guardianship. It has had to delegate their performance to the administrative process. Indeed, the need for an effective instrument through which these tasks could be performed has been perhaps the primary reason for the growth of that process.

Id. at 75.

91. B. SCHWARTZ, *ADMINISTRATIVE LAW* (1976). The author states:

Administrative agencies typically have both legislative and judicial powers concentrated in them. They have authority to issue rules and regulations which have the force of law (power that is legislative in nature) and authority to decide cases (power that is judicial in nature). It is through its exercise of rule-making and adjudicatory authority that the administrative agency is able to determine private rights and obligations . . . [R]ule-making and adjudication are the substantive weapons in the administrative armory.

Id. at 7.

92. See Gunther, *supra* note 46, at 401.

93. *Marbury v. Madison*, 5 U.S. (1 Cranch) 135 (1803). This landmark case established judicial review as an axiom of the American legal system. It was the Supreme Court's first elaborate statement of its judicial review powers; its reasoning is alive today. GUNTHER, *supra* note 46, at 1. In dealing with the powers and limitations of the legislature, the court stated, "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each." *Id.* at 10. The court oversees both executive and legislative branches; since the administrative branch is part of the executive branch, it too is subject to the courts' scrutiny.

of administrative agencies, if limited, does not violate the separation of powers doctrine.

The First and Seventh Circuits also ignore the effect of the Administrative Procedure Act (APA),⁹⁴ which provides for judicial review of administrative actions. The purpose of the APA was to give the aggrieved person access to judicial review⁹⁵ and to insure administrators would not abuse the discretion Congress granted them.⁹⁶ The provisions for judicial review were merely codifications of existing common law.⁹⁷ The APA permits review of all relevant questions of law, interpretation of statutory and constitutional provisions, and agency determination of the meaning/applicability of statutory terms to specific factual settings.⁹⁸ Following such review, the court is directed to "hold unlawful and set aside agency actions, findings and conclusions found to be arbitrary, capricious, an abuse of discretion or other-

94. 5 U.S.C. §§ 701-06 (1976). Section 704 provides that "agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." *Id.* § 704.

95. 5 U.S.C. § 702 (1976) states: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." This notion is reflected in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). The Court faced a challenge by a group of drug manufacturers of the FDA's requirement that drugs bearing proprietary names also carry the "established name." *Id.* at 137-39. In determining whether the Commissioner of the FDA exceeded his authority in issuing regulations designed to implement the statute, the Court first stated that the APA embodied the presumption of judicial review to one suffering a legal wrong because of agency action. *Id.* at 140. Citing *Rusk v. Cort*, 369 U.S. 367 (1962), the Court found that courts should restrict access to judicial review only upon a showing of "clear and convincing evidence of a contrary legislative intent." *Id.* at 141.

96. *Ortego v. Weinberger*, 516 F.2d 1005 (5th Cir. 1975). In examining the Secretary of Health, Education and Welfare's decision not to reopen applications made by the plaintiff for disability benefits, the court held that the district court could review agency decisions, but found the Secretary had not abused his authority. *Id.* at 1007, 1017. The court also recognized the need for limited judicial review to keep administrators in line. *Id.* at 1009. For remedies used when an abuse of discretion is found, see note 99 *infra*.

97. See *DAVIS*, *supra* note 1, at § 28.03. *Davis* notes that during the twentieth century, the courts began to recognize a presumption of reviewability as opposed to the prior presumption that there could be no review unless specifically authorized by law. *Id.* § 28.02. Thus, on its face, the APA made no change in the law of reviewability. As stated by the Attorney General's Manual on the APA, "The intended result of the introductory clause of section 10 is to restate the existing law as to the area of reviewable action." *Id.* § 28.03.

98. 5 U.S.C. § 706 (1976) provides: "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of an agency action."

wise not in accordance with law."⁹⁹ While the statute limits judicial review, courts should resolve any question of the APA's applicability in favor of judicial review.¹⁰⁰

99. 5 U.S.C. § 706 (1976). The APA allows, indeed mandates, that the reviewing court shall:

- (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (D) without observance of procedure required by law,
- (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
- (F) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.

There are, however, limitations on judicial review under the APA. Section 701 states that these provisions are inapplicable to the extent that a statute precludes judicial review or when agency action is committed to agency discretion by law. 5 U.S.C. § 701 (1976). The question is whether this latter exception should be construed to immunize action committed to agency discretion from *all* judicial review. Kenneth Davis, a renowned commentator on administrative law, feels that if a decision is committed to agency discretion, a reviewing court may not examine the decision even for an abuse of that discretion. See DAVIS, *supra* note 1, at § 28.05. Professor Jaffe, however, argues that the APA permits limited review to determine whether the agency has exercised its discretion within bounds. L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 359-63 (1965). *Accord*, Berger, *Administrative Arbitrariness: A Synthesis*, 78 *YALE L.J.* 965-1006 (1969).

The court in *Littell v. Morton*, 445 F.2d 1207 (4th Cir. 1971), reviewed both theories and chose the Jaffe/Berger approach, thus examining whether an abuse of discretion was present in the decision to deny compensation to an Indian attorney. One final authority on this issue supports the proposition that § 701 was not meant to immunize agency action committed to agency discretion from all judicial review. Schwartz and Wade state:

Such an interpretation [immunizing decisions from judicial review] ignores the traditional prohibition against arbitrary and unreasonable exercises of discretionary authority. When the A.P.A. speaks of action committed by law to agency discretion, it means discretion to act reasonably—an interpretation that is confirmed by the provision, already quoted, of section 10(e) giving the reviewing court power to reverse for abuse of discretion. If the exception for action committed to agency discretion is read to immunize discretion however arbitrarily exercised, it reduces this part of section 10(e) to mere nonsense. How can a court reverse for abuse of discretion if exercises of discretionary power are not subject to review at all?

B. SCHWARTZ AND H.W.R. WADE, *LEGAL CONTROL OF GOVERNMENT: ADMINISTRATIVE LAW IN BRITAIN AND THE UNITED STATES* 262 (1972) (citations omitted).

100. See *Sierra Club v. Bergland*, 451 F. Supp. 120 (1978). Plaintiffs brought an action against the government seeking declaratory and injunctive relief to halt the proposed improvement plans on the Tippah River Watershed. *Id.* at 122. In determining the reviewability of the agency's decision, the court cited *Citizens To Preserve Overton Park*

Although this Act does not include judicial review of suits asking for money damages for negligence,¹⁰¹ it does allow equitable remedies, such as compelling an agency to act or enjoining the agency from implementing a decision.¹⁰² These APA remedies are no more intrusive and disruptive to agency activities than requiring the agency to pay money to injured individuals; in fact, they may be more burdensome and a greater interference with that branch's autonomy. The courts have not interpreted the APA's permission of judicial review as a violation of the separation of powers doctrine.¹⁰³ Given this source of direct judicial review of agency actions, courts should also be entitled to review actions in the context of personal and property damages without violating separation of powers. This is especially true because the courts, as a practical matter, pay great deference to agency expertise and look only for abuses of discretion.¹⁰⁴

Another underlying rationale for the First and Seventh Circuits' approach is the detrimental effect such liability would have on the public treasury. The Supreme Court dismissed such an argument in *Rayonier, Inc. v. United States*.¹⁰⁵ The Court, dealing with the FTCA, noted that Congress knew losses due to government action would be compensated through public treasury funds, but saw greater injustice in allowing the entire burden to fall on the injured individual.¹⁰⁶ Because the cost is

v. Volpe, 401 U.S. 402 (1971), for the proposition that any conflict between § 701(a)(2) and § 706(2)(A) of the APA must be resolved in favor of judicial review. The Supreme Court found that the exception disallowing review of agency action because it has been committed to agency discretion is very narrow; only reasonably exercised discretion could be committed to a federal agency. *Id.* at 123.

101. 5 U.S.C. § 702 (1976) provides in part:

An action in a court of the United States seeking relief *other than money damages* and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that is against the United States or that the United States is an indispensable party.

(emphasis added).

102. *Id.* § 706. See note 99 *supra*.

103. The acceptance of the APA and judicial review of agency decisions is reflected not only at the federal level but at the state level as well. Most states have enacted administrative procedure legislation, most being based on the Model State Administrative Procedure Act. SCHWARTZ, *supra* note 90, at 4-5. The focus has shifted from the law that these agencies promulgate to the administrative process itself. Thus, there is greater examination of the use of agency powers and less questioning of the powers themselves. *Id.*

104. See note 85 *supra*.

105. 352 U.S. 315 (1957).

106. In *Rayonier*, plaintiffs sued for their losses sustained by reason of the United

spread out among the taxpayers, the resulting burden on the government is slight.¹⁰⁷ Thus, fears of government insolvency are groundless: this burden would harm the government only if it were so crushing that "it reflected the wholesale destruction of the social wealth in a way that would spell a breakdown for any system of liability."¹⁰⁸ If the burden on the treasury is indeed so great, Congress has the option of amending the SIA, thus shielding the government from broad liability.

Although the First and Seventh Circuits' claim that agency inaction results when courts review administrative actions, judicial review, in fact, fosters agency action. According to the First and Seventh Circuits, given budgetary constraints, agencies need the protection of the discretionary function exception in policy matters so that they can operate efficiently without time consuming, needless interference from other governmental branches.¹⁰⁹ These circuits, however, follow *Indian Towing Co. v. United States*,¹¹⁰ which holds that once an agency does act, it has to do so reasonably.¹¹¹ These agency actions, taken pursuant to the decision to act, are not protected by the discretionary function exception but are subject to traditional negligence standards.¹¹² Only the policy judgment itself, negligent or otherwise, is protected.¹¹³ Thus, the only time agencies are protected by this exception from judicial review and possible liability is when

States Forest Service's negligence in fighting a forest fire. Congress recognized that when it enacted the the Federal Tort Claims Act, it was waiving traditional comprehensive immunity and taking on "novel and unprecedented" liability that would inevitably put a strain on the public treasury. *Id.* at 319. Thus, despite the immense liability the United States could be subjected to, especially in this case where hundreds of square miles of trees were destroyed by one fire, Congress nevertheless found it would be unfair for individuals to bear the entire burden since the public benefited from the services provided by the government's employees. *Id.* at 320. See note 52 *supra*.

107. 352 U.S. 315, 320 (1957).

108. F. HARPER & F. JAMES, *supra* note 21, at § 29.15. The authors, in examining the question of whether it is desirable to compensate injuries out of public funds, note the trend toward compensating losses and distributing the losses. *Id.*

Even conservatives would do this [compensation] where the victim is innocent, where his injury is of a kind already recognized in private tort law, and where there is fault in conducting the enterprise. The device of government liability offers machinery for both compensation and distribution; it should be used to compensate the victims of government

Id.

109. See text accompanying notes 43-45 *supra*.

110. 350 U.S. 61 (1955). See notes 71-73 and accompanying text *supra*.

111. 350 U.S. at 69.

112. *Id.*

113. *Id.*

they exercise their discretion in deciding upon inaction. Assuming agencies try to avoid defending themselves in lawsuits, incurring time, expense and delays, the best approach is to decide not to develop and implement experimental programs that could possibly cause personal and/or property damage. Courts will not review this decision to do nothing, even if circumstances indicate public demand for such programs and imminent public injury without them. Inevitably, agency inaction will result, leading to inefficient, unproductive agency operations, and depriving the public of beneficial programs that agencies are authorized and best equipped to provide. Therefore, the discretionary function exception does not meet the goals the First and Seventh Circuits wish to further.

The Fourth and Fifth Circuits' reasoning is more persuasive than that of the First and Seventh. On its face, the SIA as amended does not limit its general waiver of sovereign immunity.¹¹⁴ Its legislative history also discloses no express congressional intent to limit the waiver.¹¹⁵ According to the Senate Report on the 1960 amendments, one purpose of the amendments was to prevent future misfilings in the wrong forum due to ambiguous jurisdictional language in the SIA.¹¹⁶ To accomplish this, the amendments permitted the free transfer of cases between district courts and the Court of Claims.¹¹⁷ This solution, however, dealt solely with the symptom and not the source of confusion because it only provided a remedy for misfilings but failed to eliminate the very reason for the misfilings: ambiguous statutory language. Thus, in an effort to clarify the statute's applicability, Congress added a third section eliminating the requirement that the claim involve government merchant vessels

114. 46 U.S.C. § 742 (1976). See note 15 *supra*.

115. See S. REP. No. 1894, 86 Cong., 2d Sess. reprinted in [1960] U.S. CODE CONG. & AD. NEWS 3583, *supra* note 12.

116. *Id.*

117. 28 U.S.C. § 1406(c) (1976) provides:

If a case within the exclusive jurisdiction of the Court of Claims is filed in a district court, the district court shall, if it be in the interest of justice, transfer such case to the Court of Claims, where the case shall proceed as if it had been filed in the Court of Claims on the date it was filed in the district court.

28 U.S.C. § 1506 (1976) provides:

If a case within the exclusive jurisdiction of the district courts is filed in the Court of Claims, the Court of Claims shall, if it be in the interest of justice, transfer such case to any district court in which it would have been brought at the time such case was filed, where the case shall proceed as if it had been filed in the district court on the date it was filed in the Court of Claims.

or cargo.¹¹⁸ Given the problems in determining what a merchant vessel or cargo was, Congress revised § 742 to allow all maritime claims against the government and not just those that could be identified as “merchant”-based. The effect was a substantial enlargement of governmental liability because plaintiff did not have to base his claim on whether a government vessel or cargo was involved; so long as the government was in some way responsible for plaintiff’s injury on navigable waters, plaintiff could sue the government. Because Congress’ purpose was to clear up the courts’ and the public’s confusion in interpreting the SIA, it seems unlikely that it would defer the determination of whether there were any limits to this broad waiver to the courts when it could have done so at the time the amendments were enacted. Congress earlier had imposed limits on the FTCA and easily could have explicitly included such provisions in its amendment to the SIA. Although legislative history is unclear on this point, the fact that Congress did not so limit the SIA expressly implies that it made a conscious decision, considering its past experience with the FTCA, not to incorporate the discretionary function exception into the SIA.¹¹⁹

The current disapproval of the sovereign immunity concept, inducing many courts to resolve doubts as to waivers of immunity against the government,¹²⁰ lends additional support to the assertion that the SIA’s waiver of immunity is unconditional. The *De Bardeleben* court, citing *Gulf Oil v. Panama Canal*

118. 46 U.S.C. § 742 (1976). See note 15 *supra*.

119. Although this may be a “negative pregnant” argument, the fact that Congress did not provide for the exception, either expressly or by reference in the legislative history, is at least circumstantial evidence that it did not consider any of the FTCA exceptions necessary or applicable to the SIA.

120. See *De Bardeleben Marine Corp. v. United States*, 451 F.2d 140 (5th Cir. 1971). The *De Bardeleben* court noted that the “tide of history is running clearly against the concept of sovereign immunity” and that this disfavor goes back as far as 1939 with *Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381 (1939). 451 F.2d at 146. In *Keifer*, a Regional Agricultural Credit Corporation, chartered by the Reconstruction Finance Corporation, sought to determine whether it was immune from suit as a governmental corporation. 306 U.S. at 387. The Court stated that “the government does not become the conduit of its immunity in suits against its agency merely because they do its work.” *Id.* at 388. Noting the current climate against governmental immunity, the court found the governmental corporation amenable to suit despite the absence of an express “sue and be sued” clause in the corporation’s charter. *Id.* at 390-991. The *De Bardeleben* court also noted that this “assault upon the citadel of immunity continues presently apace.” 451 F.2d at 146, referring to *Gulf Oil Corp. v. Panama Canal Co.*, 407 F.2d 24 (5th Cir. 1969).

Co.,¹²¹ stated that in interpreting the SIA and FTCA, which expose the government to almost unlimited liability, the correct judicial approach is to construe the waiver sensibly and with the Act's purpose in mind.¹²² Avoiding restrictive interpretations prohibits importing any unintended exceptions into a broad waiver of immunity, thereby promoting the very purpose of waiving sovereign immunity, which is to afford relief to those injured by governmental activities in the maritime world and to place the burden on the party best able to prevent or shoulder the costs. Earlier Supreme Court decisions, holding that broad statutory language authorizing suit should not be thwarted by unduly restrictive interpretations,¹²³ also support this liberal interpretation of the SIA waiver. Given these interpretations favoring unlimited waivers of immunity, courts should construe similarly the SIA's broad waiver of immunity without tacking on exceptions Congress never mentioned in amending the statute.

A further reason for disallowing the importation of the discretionary function exception into the SIA is that courts are competent to review administrative agency actions. Courts often deal with complex scientific and technical matters, examples

121. 407 F.2d 24 (5th Cir. 1969).

122. *Id.* at 28. The court dealt with an action brought by a vessel owner against the Panama Canal Company for damages incurred when the boat scraped ground while being piloted by the defendant's vessel through the Canal. *Id.* at 27. The company, a government corporate entity, defended on the ground that waivers of sovereign immunity should be strictly construed. The court found this defense untenable and outmoded, preferring a more sensible interpretation of such waivers. *Id.* at 28. In conclusion, the court stated:

A reasonable interpretation produces a reasonable result. An unreasonable interpretation produces a harsh absurdity. We put ourselves on the side of reason and if, with like reason, the shipowner brings itself within these principles, there is no more obstacle to the Panama Canal Company's carrying the burden, as it concededly does, for tortious damage caused by one of its vessels to a longshoreman on a New York pier.

Id. at 32.

123. See, e.g., *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215 (1945) (brought under the Public Vessels Act, § 1, 46 U.S.C. § 781 (1976)). Plaintiff alleged that damages to his vessel were due to the United States' negligent operation of a public vessel. *Id.* at 216. Defendant argued that the PVA be narrowly read to apply only to cases where a public vessel was the physical instrumentality by which the damage is done. *Id.* at 216-17. This was not the situation in *Canadian Aviator*; plaintiff there followed a naval patrol boat after being notified by the naval authorities that he was to be escorted into port. It was at that time that the vessel ran into a submerged wreck. Thus, it was the wreck and not the public vessel that caused the actual damage. *Id.* at 217. Nevertheless, the Court read the PVA broadly, finding a narrow reading that limited the Act's relief to be unjustifiable, and thus reversed the lower court's dismissal of plaintiff's suit. *Id.* at 229.

being medical malpractice cases and products liability cases. With expert testimony, judges and juries are quite capable of digesting volumes of complicated materials and rendering just, well-reasoned decisions. The *Offshore* and *Lane* courts demonstrate the courts' ability to examine maritime agency decisions not to take certain actions despite the fact that the subject matter is within the agency's expertise. If the courts do review agency decisions under the SIA, the government will not inevitably lose. In *Offshore*, the court found the agency's decision not to adopt certain measures in the accident area reasonable in light of surrounding circumstances.¹²⁴ The *Lane* court displayed its confidence in the lower court's competence by remanding for further consideration of the agency's actions.¹²⁵ Effective judicial review of government actions prevents undesirable agency inaction that the discretionary function exception fosters; so long as the government exercises its discretion soundly in making policy judgments, the courts will not find them negligent.¹²⁶ Thus, responsible agency operations are encouraged, ultimately benefiting the SIA's intended beneficiary, the public.

Because it encourages agencies to act responsibly, the Fourth and Fifth Circuit Courts' approach disallowing importation of the discretionary function exception into the SIA should be followed. There is a much stronger basis for not implying the FTCA exceptions into the SIA: the SIA's wording, its legislative history, proper statutory interpretation favoring absolute waivers of sovereign immunity, and more equitable results for injured parties. Despite the 1960 amendments to the SIA, which subjects the government to extensive liability, government operations continue to run efficiently without the discretionary function exception. Courts such as *Offshore* have little difficulty applying basic tort principles to most admiralty cases. Thus, there is no need to employ the discretionary function exception to protect government agencies. The split in the Courts of

124. For a discussion of how the court reached this decision, see notes 77-82 *supra*.

125. See notes 63-67 *supra*.

126. Basic tort principles still operate to protect the government from unlimited liability. In *De Bardeleben*, for example, the Coast Guard owed a duty to plaintiff but did not breach that duty since it was terminated at the time a prudent shipowner would have reasonably received the Notice to Mariner which warned the public of the correct situation. 451 F.2d 140, 149 (5th Cir. 1971). Thus, the plaintiff, in suits against the United States under the SIA, is still bound by the tort principles of any private litigant and must carry the burden of proof in demonstrating the government agencies' negligence.

Appeal remains, however, and until resolved by the Supreme Court or Congress, plaintiffs and the government will remain unsure whether the discretionary function exception provides a safe harbor for the government's negligence in maritime cases. Given the arguments posed by both sides, the uncertainty should be resolved in favor of the Fourth and Fifth Circuits' approach.

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