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Hylin v. United States: Can the Mine Safety and Health Administration do no Wrong?

Patrick G. Byrne
University of Kentucky

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INTRODUCTION

The Federal Tort Claims Act [hereinafter FTCA][1] provides that the United States may be liable for injuries caused by the negligent acts or omissions of government employees "in the same manner and to the same extent as a private individual under like circumstances."[2] The FTCA does not waive immunity in all respects; Congress was careful to except several important classes of tort claims.[3] Of particular relevance is the discretionary function exception[4], which precludes liability for the exercise of discretionary governmental functions.[5]

Prior to Supreme Court ruling in *United States v. S. A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*[6] [hereinafter *Varig*], federal courts which interpreted the discretionary function exception typically imposed liability on the United States for negligence in the implementation of a program, but not for the creation of a program.[7] In light of this distinction, federal courts have characterized the actions of the Mine Safety and Health Administration[8] pursuant to the Federal Mine Safety and

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[1] 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401-02, 2411-12, 2671-80 (1982); *see infra* notes 17-26 and accompanying text.

[2] 28 U.S.C. § 2674 (1982).

[3] 28 U.S.C. § 2680 (1982); *see infra* note 21 and accompanying text.

[4] 28 U.S.C. § 2680(a). For the full text, *see infra* note 22.

[5] *Id.*

[6] 467 U.S. 797 (1984), *rev'g*, 692 F.2d 1205 (9th Cir. 1982). United States v. S. A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 692 F.2d 1205 (9th Cir. 1982) [hereinafter *Varig*], and United States v. United Scottish Ins., 692 F.2d 1209 (9th Cir. 1982) [hereinafter *United Scottish*], were consolidated by the Supreme Court. The Supreme Court decision will be referred to and cited as *Varig*.

[7] *See infra* notes 49-51 and accompanying text.

[8] 30 U.S.C. § 811 (1982); 30 C.F.R. § 1.1-1.3 (1986).

Health Act[9] as nondiscretionary insofar as its conduct consists primarily of implementing and enforcing mandatory safety regulations.[10]

In *Varig*, the Supreme Court broadened the scope of the discretionary function exception, holding in part that the "discretionary function exception encompasses all discretionary acts of government when it regulates the conduct of private individuals."[11] Interpreting *Varig*, many federal courts have expanded the discretionary function exception to include almost any negligent operational act[12] performed by a regulatory agency.[13]

In *Hylin v. United States*,[14] the Court of Appeals for the Seventh Circuit applied the *Varig* decision to the Mine Enforcement and Safety Administration [hereinafter MSHA] for the first time.[15] In *Hylin*, the court held "that under *Varig Airlines*, the enforcement activities of MESA inspectors are protected by

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[9] 30 U.S.C. §§ 801-962 (1982); *see infra* note 94. The Act repealed and replaced the Federal Metal and Nonmetalic Mine Safety Act, 30 U.S.C. § 721 *et. seq.* (1976). For the purposes and scope of this Comment, both acts will be treated as principally the same. Federal courts have held that inspections under the Mine Safety and Health Act and the Metal and Nonmetalic Safety Act fall within the discretionary function. Russell v. United States, 763 F.2d 786, 787 (10th Cir. 1985).

[10] Hylin v. United States, 715 F.2d 1206, 1213 (7th Cir. 1983), *vacated and remanded*, 105 S. Ct. 65 (1984), *rev'd*, 755 F.2d 551 (7th Cir. 1985) (per curiam).

[11] *Varig*, 467 U.S. at 813-14.

[12] For a distinction between operational level and planning level acts, *see infra* notes 49-51 and accompanying text.

[13] *See, e.g.*, Proctor v. United States, 781 F.2d 752 (9th Cir. 1986) (holding that the Federal Aviation Administration's negligence in an actual inspection of an aircraft is protected by the discretionary function exception); Begay v. United States, 768 F.2d 1059 (9th Cir. 1985) (finding that the failure of the Public Health Service to warn workers of known radiation dangers was protected by the discretionary function exception); Totten v. United States, 618 F. Supp. 951 (E.D. Tenn. 1985) (holding that Air Force personnel who approved post accident cleanup operation following MX2 rocket test failure, which plan did not comply with military safety regulations, were protected by the discretionary function exception).

[14] Hylin v. United States, 715 F.2d 1206 (7th Cir. 1983), *vacated and remanded*, 469 U.S. 807 (1985), *rev'd*, 755 F.2d 551 (7th Cir. 1985) (per curium). The *Hylin* decision involved an inspection by the Mine Enforcement and Safety Administration pursuant to the Metal and Nonmetalic Mine Safety Act. The Federal Mine Safety and Health Act became effective after the accident that gave rise to the suit in *Hylin*. *Hylin*, 755 F.2d at 554, n.3. The inspection duties of the Mine Enforcement and Safety Administration are now performed by the Mine Safety and Health Administration. *See* note 9.

[15] The Federal Mine Safety and Health Act became effective only after the accident that gave rise to this suit. *Hylin*, 755 F.2d at 554, n.3. MESA inspectors are now referred to as MSHA inspectors.

the discretionary function exception."[16] This comment examines the Seventh Circuit's decision in *Hylin* and prior decisions of the federal courts in order to assess whether the Seventh Circuit has read the *Varig* opinion too broadly and consequently completely immunized the actions of MSHA.

I. THE FEDERAL TORT CLAIMS ACT AND THE DISCRETIONARY FUNCTION EXCEPTION

In 1946, Congress enacted the Federal Tort Claims Act[17] as a limited waiver of the United States' sovereign immunity for certain types of specified tortious acts of federal agents.[18] The FTCA's legislative history indicates an intent to waive immunity for torts committed by federal agents within the scope of their duty.[19] The FTCA's waiver of sovereign immunity reflects a congressional sentiment that the United States Government has a legal responsibility for its negligent conduct.[20]

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[16] *Id.* at 554.

[17] 28 U.S.C. § 1346(b) (1982) authorizes suits against the United States for damages:

> 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 office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act occurred.

Id.

[18] *Id.* An individual asserting a claim against a United States employee must follow the provisions outlined in 28 U.S.C. §§ 1346(b), 2671-80 (1982).

[19] Dalehite v. United States, 346 U.S. 15, 27-28 (1949). In *Dalehite*, the Supreme Court provided an extensive analysis of the FTCA's scant legislative history. The Court concluded:

> The legislative history indicates that . . . Congress desired to waive the Government's immunity from actions for injuries to person and property occassioned by the tortious conduct of its agents acting within their scope of business . . . [u]ppermost in the collective mind of Congress were the ordinary common-law torts.

Id. Prior to the FTCA, tort victims of actions by federal employees had to seek relief through a Congressional private bill waiving sovereign immunity. Downs v. United States, 522 F.2d 990, 995 (10th Cir. 1975). The purpose of the FTCA was to relieve Congress of this burden by entrusting the courts with the responsibility. *Id.*, citing United States v. Muniz, 374 U.S. 150, 153-54 (1963); *Dalehite*, 346 U.S. at 24-25; Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 703-04 (1949).

[20] *See Hearings Before a Subcommittee of the House on the House Committee on Claims on a General Tort Bill*, 72nd Cong., 1st Sess. 17 (1932) (discussing scope of

The FTCA imposes a number of particular limits on the waiver.[21] The most significant restriction is the discretionary function exception.[22] This exception is premised on the rationale that certain governmental activities are either legislative or executive in nature; hence, judicial control of these activities through tort suits would harm the balanced separation of powers.[23] The judiciary should be prevented from interfering with certain kinds of executive branch functions.[24] Limiting this interference and control is the purpose of the discretionary function exception.[25] The courts have struggled in determining whether the discretionary function exception should be extended to include the negligence of government employees who implement discretionary governmental activities.[26]

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proposed torts act). The federal courts are directed to follow the tort law of the state where the tort occurred. *See* 28 U.S.C. § 1346(b). Hence, the issue of federal liability is largely dependent upon state tort doctrines.

[21] Some procedural limits include: 28 U.S.C. § 1346(b) (vesting jurisdiction exclusively in federal district courts); 28 U.S.C. §§ 2401(b), 2675 (1982) (claim must first be presented to administrative agency allegedly responsible). For substantive limits, see 28 U.S.C. § 2680 (1982).

[22] 28 U.S.C. § 2680(a). Section 2680(a) provides:

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

Id.

[23] Blessing v. United States, 447 F. Supp. 1160, 1170-71 (E.D. Pa. 1978). The policy behind the discretionary function exception is to prevent the courts from using tort actions as "a vehicle for judicial interference with decisionmaking that is properly exercised by other branches of the government . . . . " *Id.* at 1170. The FTCA's legislative history indicates that the discretionary function exception was designed to embody the separation of powers theory. *Id.*; *see also Muniz*, 374 U.S. 150, 163 (discretionary function exception protects the Government from liability that "would seriously handicap efficient government operations"); *Dalehite*, 346 U.S. at 32 (Congress was careful to protect the Government from claims that would impede governmental functions).

[24] *Blessing*, 447 F. Supp. at 1170. "Statutes, regulations, and discretionary functions . . . are, as a rule, manifestations of policy judgments made by the political branches. In our tripartite governmental structure, the courts generally have no substantive part to play in such decisions." *Id.*

[25] For an excellent analysis of discretion as it applies to federal agencies, see Rogers, *A Fresh Look at Agency "Discretion"*, 57 Tul. L. Rev 776 (1983).

[26] *See* Harrison and Kolezynski, *Government Liability for Certification of Air-*

II. THE HYLIN DECISION

Hylin v. United States [27] involved a mine inspection and the enforcement of a safety standard by MESA pursuant to the Federal Metal and Nonmetalic Mine Safety Act.[28] In *Hylin*, inspectors enforced a mandatory safety standard requiring mine conveyors to be equipped with handrails or emergency stop devices.[29] The inspectors issued an order for the construction of conveyor handrails;[30] as a result, mine employees were forced to walk dangerously close to a defective junction box.[31] MESA inspectors had not scrutinized the box's condition even though they had observed its dangerous state.[32] Moreover, the inspectors knew that the placement of the handrails would foreclose the miners' preferred route -- forcing passage near the hazardous junction box.[33]

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craft?, 44 J. Air L. & Com. 23, 34 (1978). For the purpose of this comment the issue should be framed as whether the discretionary function exception should be extended to include the negligence of MSHA inspectors implementing safety regulations pursuant to the Mine Safety and Health Act.

[27] 715 F.2d 1206 (7th Cir. 1983), *vacated and remanded*, 469 U.S. 807 (1985), *rev'd*, 755 F.2d 551 (7th Cir. 1985) (per curium).

[28] *Id.* The Federal Metal and Nonmetalic Mine Safety Act was repealed in 1977 and replaced by the Federal Mine Safety and Health Act. *See supra* note 9.

[29] *Hylin*, 715 F.2d at 1208-09 (MSHA inspectors cited the mine for violating 30 C.F.R. § 55.9-7, which requires that all conveyors have handrails or emergency stop devices.).

[30] *Id.* at 1215. The mine operator could have installed an emergency stop device or the handrail. *Id.* The construction of an emergency stop device, however, "was not feasible, given the nature of the mine's continuous operation, and . . . the inspectors were aware of this fact." *Id.* The inspectors knew that the mine operator's response to the order "would be to install the handrails and that the result of this installation would be to redirect worker ingress through a narrow passageway past the junction box . . . ." *Id.* at 1216.

[31] *Id.* at 1208. One of the purposes of the handrail (also referred to as "barrier") is to prevent workers from crossing over the conveyor belt. *Hylin*, 715 F.2d at 1215. As a result of the handrail implementation, workers were forced "to walk down the left side of the belt and to pass by the faulty junction box." *Id.*

[32] *Id.* at 1208. The junction box was not inspected even though the inspectors had noticed its dangerous condition. *Id.* The cover of the box lacked effective means to keep it closed, the wires entering the box were inadequately insulated, and a short circuit or ground fault had caused two holes in the cover of the box. *Id.*

[33] *Id.* at 1209. At the time of the inspection, the MESA inspectors were aware that employees customarily traversed along the west side of the conveyor and crossed the conveyor on the way to an incline ramp. *Hylin*, 715 F.2d at 1209. This route was preferred to the other because it was wider and not obstructed by the dangerous junction box. *Id.*

While following this newly necessitated route, the plaintiff's decedent was electrocuted by the junction box.[34] The plaintiff sued the United States under the FTCA for alleged negligence of MESA inspectors.[35] The action was premised on Section 324A(a) of the *Restatement (Second) of Torts*;[36] that is, the inspectors' decision to implement handrails had increased the risk of injury from the defective junction box.[37]

Hylin presented two main issues for the Seventh Circuit: first, whether state law would recognize a cause of action if MESA inspectors were private citizens;[38] and second, whether the plaintiff's claim was barred by the discretionary function exception.[39] The court held that a valid cause of action existed[40] and that the claim was not barred by the exception.[41] The court opined that the MESA inspectors' conduct was not discretionary [42] inasmuch as it consisted primarily of implementing and enforcing mandatory regulations.[43]

The Supreme Court vacated and remanded the *Hylin* decision[44] for reconsideration in light of its ruling in *Varig*.[45] The only issue considered on remand was whether the discretionary function exception, as interpreted by the Supreme Court in

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[34] *Id.* at 1209.

[35] *Id.* at 1208. The issuance of the inspector's order was mandatory pursuant to 30 C.F.R. § 55.9-7. *Id.* at 1213. The plaintiff did not claim that the issuance of this order was negligence. Rather, "the inspectors' negligence was in failing to consider the consequences of their action. The MESA [now MSHA] Inspection and Investigation Manual instructs that [a]n inspector shall consider his action during the inspection and shall not create a dangerous situation in enforcing compliance with a standard." *Id.* at 1214.

[36] *Hylin*, 715 F.2d at 1210.

[37] *Id.*

[38] *Id.* at 1209.

[39] *Id.* at 1213.

[40] *Id.* at 1210; *see infra* notes 105-12 and accompanying text.

[41] *Hylin*, 715 F.2d at 1214.

[42] *Id.* The court relied heavily on Indian Towing v. United States, 350 U.S. 61 (1955) in its ruling. *Id.* For discussion of *Indian Towing*, *see infra* notes 62-66 and accompanying text.

[43] *Hylin*, 715 F.2d at 1214. The court stated: "[t]he great weight of authority suggests that where, as here, the disputed conduct consists of merely implementing and enforcing mandatory regulations, the requisite halo of policy-making is not present." *Id.*

[44] *Hylin*, 469 U.S. 807.

[45] *Hylin*, 755 F.2d at 552.

Varig, barred the plaintiff's claim.[46] The Seventh Circuit concluded: [i]f the regulatory inspection and enforcement activities of an agency require its employees to exercise discretion in performing their duties, the discretionary function exception bars tort claims against the government based upon those performances.[47] Based on this analysis, the court reversed its previous holding and resolved that the discretionary exception barred the plaintiff's action in *Hylin*.[48]

III. JUDICIAL DEVELOPMENT OF THE DISCRETIONARY FUNCTION EXCEPTION

A. Cases Prior to Varig

Prior to *Varig*, courts which interpreted the discretionary function exception often distinguished between acts of the federal government at the "planning" level from acts at the "operational" level.[49] Acts at the planning stage involve policy considerations of future effects on a large number of people, hence they fall within the exception.[50] Acts undertaken to imple-

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[46] *Id.*

[47] *Id.* at 553.

[48] *Id.* at 554. In order to fully understand and evaluate the Seventh Circuit's decision in *Hylin*, a summary of the *Varig* and pre-*Varig* cases is necessary. As a precautionary note, the scope of this comment requires a simplified treatment of the *Varig* and pre-*Varig* cases. For a more detailed analysis, *see, e.g.*, Plave, *The Supreme Court Narrows the Scope of Government Liability Under the Federal Tort Claims Act*, 51 J. Air L. & Com. 197 (1985); Corrigan, *Federal Tort Claims Act - U.S. Not Liable for Negligence in Certificating Aircraft for Use in Commercial Aviation*, 10 Air.L. 106 (1985); Young, *FAA Safety Check Falls Under the Tort Claims Exception*, 70 A.B.A.J. 172 (1984).

[49] *See, e.g.*, Smith v. United States, 375 F.2d 243, 246 (5th Cir. 1967), *cert denied*, 389 U.S. 841 (1967); White v. United States, 317 F.2d 13 (4th Cir. 1963); United States v. Gregory, 300 F.2d 11 (10th Cir. 1962); Dahlstrom v. United States, 228 F.2d 819, 823 (8th Cir. 1956); Blessing v. United States, 447 F. Supp. 1160 (E.D. Pa. 1978); Dolphin Gardens, Inc. v. United States, 243 F. Supp. 824, 826 (D. Conn. 1965).

[50] In Rogers, *A Fresh Look at Agency "Discretion,"* 57 TUL. L. REV. 776, 813 (1983), Professor Rogers suggests that the legislative history of the FTCA indicates that the focus for applying the discretionary function exception is "whether the claim is more appropriately resolved in a tort suit for damages, than in an APA [Administrative Procedure Act] suit for judicial review of agency action." The author explained this distinction as follows:

> Some [government decisions], by their nature, are best examined in the

ment and enforce such plans [operational level] do not fall within the exception inasmuch as there are no policy considerations of future effect; rather, operational acts are one-time actions or inactions which can only be reviewed after the fact.[51]

Two leading Supreme Court decisions which developed the foundation of the planning/operational distinction are *Dalehite v. United States*[52] and *Indian Towing v. United States*.[53] In *Dalehite*, the Federal Government shipped an explosive fertilizer into a populated area.[54] The fertilizer subsequently caught fire and exploded, causing numerous deaths.[55] Holding for the government, the Court stated that the discretionary function exception "includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations."[56] Moreover, the Court concluded that the excep-

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> context of a tort suit [as opposed to judicial review under the APA]. If the government activity or choice is of immediate effect and cannot be challenged until it is executed, judicial review is not a satisfactory means for the courts to check the executive. Instead, tort suits for damages provide the means for judicial control of acts of government employees. For example, the decision to employ or not to employ navigation aids by the Coast Guard applies to the future, affects numerous people, and accordingly can be reviewed for legality or abuse of discretion only under the APA: it is the exercise of a "discretionary function." The negligent maintenance of a particular aid, however, shares none of those characteristics. It is instead a one-time action or inaction, which can be reviewed only after the fact. Thus, there should be no tort immunity for such a particular negligent act because the purpose of the discretionary function exception does not apply.

Id. at 817 (footnotes omitted).

[51] Since most acts of planning involve public policy considerations of future effect and affect large numbers of people, the planning/operational distinction will serve the purposes of the discretionary function exception—as long as courts do not lose sight of the underlying basis of the exception. *Id.*

[52] 346 U.S. 15 (1953) (holding that the United States was not liable for damages arising out of an explosion because the certification process leading to the explosion was discretionary and the negligence occurred at the policy making level).

[53] 350 U.S. 61 (1955) (finding that the United States was liable under the FTCA for the Coast Guard's negligence in operating a lighthouse because the negligence was operational inasmuch as it did not involve policy making discretion).

[54] *Dalehite*, 346 U.S. at 22-23.

[55] *Id.* at 23.

[56] 346 U.S. at 35-36. In *Dalehite*, the government developed a plan to produce fertilizer for a war-torn Europe and the Orient. *Id.* at 19-22. Prior to being shipped overseas, an extremely explosive fertilizer was stored in large quantities in Texas City, Texas. *Id.* at 22-23. Subsequently, the fertilizer caught fire and the ships exploded—

tion extends to "acts of subordinates" in planning and carrying out high level policy decisions in accordance with official directions.[57]

The *Dalehite* definition of the planning level is vague.[58] The opinion suggests a limited construction of discretion[59] yet the holding reflects an expansive view,[60] extending the exception to almost any act of the government involving judgment.[61]

In *Indian Towing v. United States*,[62] the Court attempted to further define the limits of the descretionary function exception.[63] In *Indian Towing*, the United States Coast Guard negli-

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leveling much of the city and resulting in numerous deaths. *Id.* at 23. The Plaintiffs alleged that the government was negligent by knowingly creating a fertilizer with an explosive chemical make-up and shipping this explosive fertilizer into a populated area without adequate investigation or warning. *Id.* The Supreme Court held that the government was not liable for damages as a result of the fertilizer program, reasoning that the government decisions were made at the planning level. *Id.* at 42.

[57] *Dalehite*, 346 U.S. at 36. The Court went on to hold that "[w]here there is room for policy judgment and decision, there is discretion." *Id.* The breadth of this statement has confused courts in determining how far the exception should extend. *See infra* notes 58-61 and accompanying text.

[58] *See Blessing*, 447 F. Supp. at 1172-76 (discussing the unclear and confusing lower court decisions resulting from the *Dalehite* case).

[59] In *Dalehite*, the Court noted that certain policy decisions resulting in the government's liability were important to the functioning of the government's fertilizer program. 346 U.S. at 42. The Court distinguished agency decisions critical to the government programs from less critical decisions. *Id.* at 43. This distinction reflects a focus of inquiry on the nature of the decison making itself, rather than who is making the decision. Such a focus provides a narrow application of the discretionary function exception. *See Blessing*, 447 F. Supp. at 1174.

[60] The Court held that the government's negligent labeling of fertilizer bags was discretionary. Therein lies the difficulty in reconciling the court's language with its holding: it is hard to visualize how the labeling decision was truly critical to the overall practicability of the government program or how labeling depended on policy considerations. *Blessing*, 447 F. Supp. at 1174 n. 21; *see also Dalehite*, 346 U.S. at 47-60 (Jackson, J., dissenting) (reasoning that the initial decision to implement the fertilizer program should have been considered a discretionary function and not the negligent acts of those responsible for carrying out the details).

[61] Any governmental or regulatory act arguably involves judgment. Most operations retain some planning elements until final execution. *Blessing*, 447 F. Supp. at 1173 n. 19.

[62] 350 U.S. 61 (1955).

[63] *Id.* In *Indian Towing*, the plaintiff suffered economic loss when his tugboat ran aground. *Id.* at 62. The United States Coast Guard failed to properly maintain the lighthouse or warn seamen of its inoperation. *Id.* The court found that the significant inquiry for application of the discretionary function exception was whether a private person would be liable for negligence in similar circumstances. *Id.* at 68-69. Interestingly,

gently operated a lighthouse which resulted in a ship running aground.[64] Holding for the injured plaintiff, the Court opined that if the government decides to provide a discretionary service, then it must provide the service with due care.[65] The opinion suggests that the failure of a federal agency to correctly perform a mandatory function is an operational level act and not within the discretionary exception.[66]

After *Indian Towing*, courts uniformly applied the planning/operational distinction as the determinative test for application of the discretionary function exception.[67] When assessing the nature of the government's discretion, however, the focus often centered on the status of the employee involved rather than the nature of the conduct.[68] Thus, courts applying the planning/operational distinction were beginning to stray from the purpose of the discretionary function exception.[69]

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the government conceded that the actual operation of the lighthouse did not involve discretion. *Id.* at 64. The government argued that the language of the FTCA implies that activities which a private person could not perform [governmental activities] are excluded from liability. *Id.* The Court rejected this contention because there was no support in the legislative history. *Indian Towing*, 350 U.S. at 67.

[64] *Id.* at 62.

[65] *Id.* at 69. The Court emphasized the public's reliance on the Coast Guard's operation of the lighthouse. *Id.* Moreover, this reliance creates a duty to properly maintain and operate the lighthouse. *Id.*

[66] Interpreting *Indian Towing*, federal courts have gleaned this characterization. *See, e.g.*, Madison v. United States, 679 F.2d 736 (8th Cir. 1982) (finding negligent enforcement of safety regulations governing manufacture of ammunition as operational and not within the discretionary exception); Loge v. United States, 662 F.2d 1268 (8th Cir. 1981) (holding the disregard of mandatory regulations governing polio vaccine licensing as operational); Ingham v. Eastern Airlines, Inc., 373 F.2d 227 (2d Cir. 1967) (finding the disregard of air traffic control regulations as operational), *cert. denied*, 389 U.S. 931 (1967).

[67] *See supra* note 49.

[68] *See* Eastern Air Lines, Inc. v. Union Trust Co., 221 F.2d 62, 76-77 (D.C. Cir. 1955), *aff'd sub nom.*, United States v. Union Trust Co., 350 U.S. 907 (1955).

[69] The planning/operational distinction serves the purpose of the discretionary function exception as long as its application remains consistent with the underlying basis for the exception. *See supra* notes 52-55 and accompanying text. Since most acts of planning involve public policy considerations, are of future effect, and affect large numbers of people, this distinction serves the purpose of the discretionary function exception. However, when courts focus on the status of the actor—not the acts themselves—they lose sight of the distinction.

B. The Varig Decision

The Supreme Court broadened the applicability of the discretionary function exception in *United States v. S. A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*[70] and its companion case[71] *United States v. Scottish Insurance Co.*[72] *Varig* and *United Scottish* involved claims of negligence in the certification and inspection of aircrafts by the Federal Aviation Administration [hereinafter FAA].[73] In *Varig*, a commerical aircraft crashed due to the smoke and fire resulting from an unextinguished cigarette being placed in a lavatory trash receptacle.[74] In *United Scottish*, a faulty cabin heater caused a commercial aircraft to catch fire in midair and crash.[75] In both cases, the Supreme Court reversed the lower court's decision and held that the discretionary function exception shielded the FAA from liability[76] -- even though proper enforcement of FAA regulations could have prevented both fires.[77]

The Supreme Court treated *Varig* and *United Scottish* as factually parallel;[78] however, significant factual differences existed. In *United Scottish* the FAA actually inspected the aircraft heater,[79] but in *Varig* the FAA made a decision not to inspect the lavatory.[80] Hence, *United Scottish* involved an actual inspection that did not reveal safety defects, while *Varig* involved a

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[70] 467 U.S 797 (1984).

[71] *Id.* The Supreme Court joined these two cases because both concerned claims that the FAA approved unworthy aircraft for flight. *Id.* at 799-804.

[72] 467 U.S. 797 (1984). In *United Scottish*, a commercial aircraft caught fire in mid-air and crashed because of a faulty heater. *Id.* at 802. The Court reversed the lower court's decision and held that the FAA's negligence was within the discretionary function exception and thus the United States was protected from liability. *Id.* at 804-21.

[73] *Id.* at 799.

[74] S. A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines) v. United States, 692 F.2d 1205, 1206-07 (9th Cir. 1982), *rev'd*, 467 U.S. 797 (1984).

[75] United Scottish Ins. v. United States, 614 F.2d 188, 190 (9th Cir. 1979), *aff'd*, 692 F.2d 1209 (9th Cir. 1984), *rev'd*, 467 U.S. 797 (1984).

[76] *Varig*, 467 U.S. at 821.

[77] *Varig*, 692 F.2d at 1208; *United Scottish*, 614 F.2d at 190.

[78] *Varig*, 467 U.S. at 815. The court treated both cases as actions premised on "the negligent failure of the FAA to inspect certain aspects of aircraft type design in the process of certification . . . . " *Id.*

[79] *United Scottish*, 614 F.2d at 190.

[80] *Varig*, 16 Av. Case (CCH) 17577, 17585-87 (C.D. Cal. May 12, 1981).

decision not to inspect. The Court did not discuss this factual distinction and treated both cases as claims challenging the FAA's decision not to inspect.[81]

In *Varig*, the Court's analysis of *Dalehite* and its progeny failed to mention or repudiate the planning/operational distinction, indicating a dissatisfaction with the judicial development of the distinction.[82] The opinion rejected the *Indian Towing* discretionary function analysis as irrelevant.[83] Refusing to define the precise contours of the discretionary function exception,[84] the Court emphasized that federal courts should focus on the legislative history of the FTCA to infer "whether the challenged acts of a Government employee . . . are of the nature and quality that Congress intended to shield from tort liability."[85]

After reviewing the legislative history of the FTCA, the Supreme Court articulated two broad principles useful in determining when the discretionary function will protect the acts of government employees from liability.[86] First, "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies."[87] Hence, "the basic inquiry . . . is whether the challenged acts of a Government employee -- whatever his or her rank -- are of the nature and quality that Congress intended to shield from tort liability."[88] Second, the exception "was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals."[89]

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[81] *Varig*, 467 U.S. at 815.

[82] The *Varig* opinion never mentioned the planning/operation distinction even though it had been judicially recognized for over thirty years. *See supra* notes 52-53 and accompanying text. The Court's omission can be read as judicial abandonment of those cases that developed the distinction.

[83] *Varig*, 467 U.S. at 811-12.

[84] *Id.* at 813.

[85] *Id.*

[86] *Id.* at 807-15.

[87] *Id.* at 813. The Court cited *Dalehite* for this proposition, stating that "the exception covers '[n]ot only agencies of government . . . but all employees exercising discretion.'" *Id.*

[88] *Varig*, 467 U.S. at 813. The opinion's specific reference to "whatever his or her rank" reflects a repudiation of the development of the planning/operational distinction which often centered its focus on the status of the employee rather than the nature of his conduct. *See supra* notes 68, 69 and accompanying text.

[89] *Varig*, 467 U.S. at 814. The Court analyzed legislative history and concluded

The *Varig* opinion is confusing.[90] Applying the aforementioned principles, the Court focused exclusively on the issue of the alleged negligence of the FAA in failing to inspect an aircraft in the certification process.[91] In addition to failing to address the planning/operational distinction, the Court did not consider

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that:

> Congress wished to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. By fashioning an exception for discretionary governmental functions, including regulatory activities, Congress took "steps to protect the Government from liability that would seriously handicap efficient government operations." United States v. Muniz, 374 U.S. 150, 163 (1963).

Id. The Court's analysis demonstrates a concern for the aformentioned purpose of the discretionary exception. *See supra* notes 21-26, 49-51 and accompanying text.

[90] *See, e.g.*, Totten v. United States, 618 F. Supp. 951 (E.D. Tenn. 1985) (following a MX2 rocket test failure, Air Force personnel who approved a post accident cleanup operation plan, which did not comply with military safety regulations, were held protected by the discretionary function exception). *But see* Valley Towing Service v. United States, 609 F. Supp. 298, 301 (E.D. Mo. 1985) (court stated that the discretionary function exception applied to the Government's decision to erect navigational aids; but when the decision to construct such aids has been made, the Government can be liable for negligently maintaining those structures). Many federal courts have focused on the Supreme Court's regulatory/nonregulatory language, applying the discretionary function exception to almost any negligent act of regulatory agencies. *See, e.g.*, Begay v. United States, 768 F.2d 1059, 1064 (9th Cir. 1985) (holding that the Public Health Service's failure to warn workers of radiation dangers was a regulatory type of service and protected by the discretionary function exception); Heller v. United States, 620 F. Supp. 270, 272 (M.D. Fla. 1985) (holding that the medical licensing authority of the FAA is a role where the government is acting as a regulator of private conduct and is protected by the discretionary function exception); Gary Sheet & Tin Employees Federal Credit Union V. United States, 605 F. Supp. 916, 922 (N.D. Ind. 1985) (finding the regulatory activity of the National Credit Union Administration is protected by the discretionary function exception). *But see* McMichael v. United States, 751 F.2d 303, 306 (8th Cir. 1985) (finding that the Defense Department was not acting as a regulator in failing to exercise reasonable care to see that contractor took proper safety precautions in manufacturing explosive cartridges; thus, the case was distinguishable from *Varig* and the Government was not protected by the discretionary function exception).

[91] *Varig*, 467 U.S. at 814. The Court noted that the respondents' contention that the FAA was negligent in failing to inspect challenged two aspects of the FAA certification process. *Id.* at 819. First, the decision of the FAA to implement a spot-check system, and second, the application of that system to the particular aircraft involved. *Id.* The Court barred both claims under the discretionary function exception, holding in part that "[w]hen an agency determines the extent it will supervise the safety procedures of private individuals, it is exercising discretionary regulatory authority of the most basic kind." *Id.* at 819-20.

the issues relating to actual inspections negligently performed.[92] *Varig*'s lack of clarity has led the federal courts to an extremely broad interpretation of the discretionary function exception as it applies to acts of regulatory agencies -- including actions of MSHA inspectors pursuant to the Mine Safety and Health Act.[93]

IV. THE DISCRETIONARY FUNCTION EXCEPTION APPLIED TO NEGLIGENT INSPECTIONS OF THE MINE SAFETY AND HEALTH ADMINISTRATION

A. Cases Prior to Hylin

The Mine Safety and Health Act[94] [hereinafter Mine Safety Act] was enacted by Congress for the purpose of promoting

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[92] *See supra* notes 78-81 and accompanying text. The opinion did not distinguish the facts of *Varig* from *United Scottish*. The Court held that both *Varig* and *United Scottish* involved claims of negligent decisions not to inspect; however, the facts of *United Scottish* reveal a negligent inspection. *Varig*, 467 U.S. at 819-20. This omission has resulted in confusion. Reviewing courts have subsequently held that almost any act of regulatory agencies is within the discretionary function exception. *See supra* note 13.

[93] *See infra* note 140 and accompanying text.

[94] 30 U.S.C. §§ 801-962 (1982). Section 801 provides:

> (a) the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner;
> (b) deaths and serious injuries from unsafe and unhealthful conditions and practices in the coal or other mines cause grief and suffering to the miners and to their families;
> (c) there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines;
> (d) the existence of unsafe and unhealthful conditions and practices in the Nation's coal or other mines is a serious impediment to the future growth of the coal or other mining industry and cannot be tolerated;
> (e) the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such conditions and practices in such mines;
> (f) the disruption of production and the loss of income to operators and miners as a result of coal or other mine accidents or occupationally caused diseases unduly impedes and burdens commerce; and
> (g) it is the purpose of this chapter (1) to establish interim mandatory health and safety standards and to direct the Secretary of Health and Human Services and the Secretary of Labor to develop and promulgate improved mandatory health or safety standards to protect the health and

health and safety standards in the coal mining industry.[95] Under the Mine Safety Act, the Secretary of Labor is authorized to develop mandatory safety standards[96] that are enforced by MSHA.[97] The primary objective of the Act is the protection of the miner,[98] and it has been liberally interpreted in order to effect that purpose.[99]

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safety of the Nation's coal or other miners; (2) to require that each operator of a coal or other mine and every miner in such mine comply with such standards; (3) to cooperate with, and provide assistance to, the States in the development and enforcement of effective State coal or other mine health and safety programs; and (4) to improve and expand, in cooperation with the States and the coal or other mining industry, research and development and training programs aimed at preventing coal or other mine accidents and occupationally caused diseases in the industry.

Id. Section 802 provides:

(a) "Secretary" means the Secretary of Labor or his delegate;

. . .

(d) "operator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine;

. . .

(f) "person" means any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization;

(g) "miner" means any individual working in a coal or other mine;

. . .

(j) "imminent danger" means the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated;

. . .

(n)"Administration" means the Mine Safety and Health Administration in the Department of Labor.

Id. Section 803 provides: "Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this chapter." *Id.*

[95] *See* Marshall v. Kilgore, 478 F. Supp. 4, 7 (E.D. Tenn. 1979).

[96] 30 U.S.C. §§ 801(g), 961(a) (1982). For specific procedure followed in developing the mandatory safety and health standards, see 30 U.S.C. § 811 (1982).

[97] 30 U.S.C. § 811. The Mine Safety and Health Administration's [hereinafter MSHA] function is to enforce the mandatory health and safety standards as established by the Secretary of Labor in the Federal Register. For the established mandatory safety and health standards, see 30 C.F.R. §§ 56.1-56.20014 (1986) (mandatory safety and health standards for metal or nonmetal mines); 30 C.F.R. §§ 70.1-70.511 (1986) (mandatory safety and health standards for underground coal mines).

[98] 30 U.S.C. § 801(a); *see also* 1977 U.S. CODE CONG. & ADMIN. NEWS 3401-516 (discussing legislative history and purpose of the Act).

[99] Westmoreland Coal Co. v. Federal Safety and Health Review Comm'n, 606 F.2d 417, 420 (4th Cir. 1979).

Prior to the court of appeals decision in *Hylin v. United States*,[100] federal courts were unwilling to allow an action against the United States under the Federal Tort Claims Act for negligent mine inspection and enforcement.[101] Federal courts held that the FTCA merely waives sovereign immunity with reference to recognized causes of action.[102] Thus, under the Mine Safety Act,[103] the United States has no duty in tort unless there exists an applicable state law under which a private person in similar circumstances could also be liable.[104]

Plaintiffs' attorneys made several unsuccessful attempts to impose liability upon the government for injuries resulting from the negligent enforcement and implementation of mandatory regulations by federal mine inspectors.[105] One theory commonly advanced was an action in state tort law corresponding to the

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[100] Hylin v. United States, 715 F.2d 1206 (7th Cir. 1983), *vacated and remanded*, 469 U.S. 807 (1985) *rev'd* 755 F.2d 551 (7th Cir. 1985) (per curiam).

[101] *See* Raymer v. United States, 660 F.2d 1136, 1142 (6th Cir. 1981) (finding no action when inspectors granted extension to coal company in order to correct violation but subsequently failed to follow up on extension and continued violation resulted in miner's death); Russell v. United States, 631 F. Supp. 1, 3 (D. Utah 1983) (finding no cause of action against the United States for negligent inspection that failed to discover a faulty cage in mine shaft that severed and fell resulting in miner's death); Carroll v. United States, 488 F. Supp. 757 (D. Idaho 1980) (finding no cause of action when inspection failed to reveal defect in mining machine that caused miner's injuries); McCreary v. United States, 488 F. Supp. 538 (W.D. Penn. 1980) (held no cause of action when coal miner lost arm entangled in a negligently maintained conveyer belt which an earlier inspection had revealed but resulted in no action); Bernitsky v. United States, 463 F. Supp. 1121, 1123 (E.D. Penn. 1979) (held no cause of action when inspection failed to discover an unguarded tailpiece resulting in miner's death); Mercer v. United States, 460 F. Supp. 329 (S.D. Ohio 1978) (held no action when inspection failed to reveal violations of mandatory safety standards that resulted in miner's death); Mosley v. United States, 456 F. Supp. 671 (E.D. Tenn. 1978) (finding no cause of action when inspectors followed improper mandatory procedures that resulted in miner's death). *But see* Barnson v. United States, 531 F. Supp. 614, 622 (D. Utah 1982) (finding that plaintiff had a valid cause of action when a negligent inspection of a uranium mine resulted in radiation exposure that caused the death of several miners).

[102] Dalehite v. United States, 346 U.S. 15, 43 (1952); Feres v. United States, 340 U.S. 135, 142 (1950); *accord* United States v. Orleans, 425 U.S. 807, 813 (1976).

[103] Legislative history does not indicate that the Mine Safety and Health Act was intended to create a private cause of action. *See* 1977 U.S. CODE CONG. & ADMIN. NEWS 3401-516. Hence, federal courts have refused to recognize an implied right of private action under the Act. *See Carroll*, 488 F. Supp. at 759; *McCreary*, 488 F. Supp. at 539; *Bernitsky*, 463 F. Supp. at 1121; *Mosley*, 456 F. Supp. at 673.

[104] *E.g.*, *McCreary*, 488 F. Supp. at 539-40.

[105] *See supra* note 101.

Restatement (Second) of Torts, Section 324A.[106] Section 324A incorporates three theories: assumption of duty,[107] reliance,[108] and increase in the risk of harm.[109] Cases based on the assumption of duty and reliance theories were unsuccessful because both theories require a pre-existing duty or reliance.[110] Several federal cases had alluded to the applicability of the increase in the risk of harm theory, but found that the facts of the particular case at hand did not meet the requirements.[111] *Hylin* was the first case to hold that a valid cause of action existed under this theory.[112]

The significance of the cases decided before *Hylin* lies not in the holdings precluding governmental liability but rather in the rationale used to reach that conclusion. In actions premised on negligent enforcement of the Mine Safety Act's standards, federal courts have held for the government because the plaintiffs could not establish a legitimate state tort claim recognizing a cause of action.[113] The courts indicated an unwillingness to

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[106] Section 324A of the Restatement (Second) of Torts (1965) provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
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> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

[107] *Id.* at 324A(b).

[108] *Id.* at 324A(c).

[109] *Id.* at 324A(a).

[110] *E.g.*, *Hylin*, 715 F.2d at 1212.

[111] *Id.*; Raymer v. United States, 606 F.2d 1136, 1143 (6th Cir. 1981); Clemente v. United States, 567 F.2d 1140, 1145 (1st Cir. 1978); Blessing v. United States, 447 F. Supp. 1160, 1197 (E.D. Pa. 1978).

[112] *Hylin*, 715 F.2d at 1206. The plaintiff alleged that the "inspectors failed to exercise reasonable care in ordering the erection of the handrail, thus increasing the likelihood of electrocution . . . ." *Id.* at 1211. In the Seventh Circuit's initial ruling, the court held that a valid cause of action existed under Section 324A, as adopted by the Illinois Court in Pippen v. Chicago Hous. Auth., 399 N.E.2d 596 (1979). *Id.* at 1212.

[113] *See supra* note 101.

stretch tort doctrines to create government liability.[114] However, the courts did not refuse to recognize liability simply because the mine inspectors were part of a regulatory agency.[115]

B. Critical Analysis of Hylin

The Supreme Court vacated and remanded the *Hylin* decision.[116] The Seventh Circuit reconsidered the case pursuant to the *Varig* directive and reversed its previous holding.[117] The court concluded from *Varig* that the discretionary function exception protects all negligence of regulatory agencies exercising any discretion while performing regulatory inspection and enforcement activities.[118] Therefore, since mine inspectors exercise discretion in fulfilling their inspection and enforcement duties, the discretionary function exception bars tort claims based upon those performances.[119] Consequently, the court held that the inspection and enforcement duties carried out in *Hylin* were of the requisite discretion come within the exception.[120]

The Seventh Circuit's interpretation of *Varig* and the scope of the discretionary function exception goes too far. In *Varig*, the Court expressed a concern about whether the challenged act under the FTCA was of the nature and quality that Congress intended to shield from tort liability.[121] Furthermore, the Court

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[114] Actions based on the FTCA were meant to be limited by state tort law doctrines. *See supra* note 20. When Congress enacted the FTCA it probably did not foresee the continued liberalization of state tort law theories. *Cf* Laird v. Nelms, 406 U.S. 797, 801 (1971) ("Congress in considering the Federal Tort Claims Act cannot realistically be said to have dealt in terms of either the jurisprudential distinctions peculiar to the forms of action at common law or the metaphysical subtleties that crop up in even contemporary discussions of tort theory.").

[115] *See supra* note 101 and accompanying text.

[116] *Hylin*, 469 U.S. 807 (1985).

[117] *Hylin*, 755 F.2d at 554 (1985).

[118] *Id.* at 553.

[119] *Id.* at 554.

[120] *Id.* The court noted that the discretion exercised by MESA was significantly less than under the FAA. *Id.* However, the activities of the MESA inspectors still rose to the level of discretion necessary for the exception. *Id.* For example, the court stated: "Although the issuance of the citation is 'nearly automatic,' *Hylin*, 715 F.2d at 1214, the inspector is cloaked with the discretion to fix a reasonable time for abatement and, in some cases, to choose between two means by which the mine operator can abate the violation." *Hylin*, 755 F.2d at 554.

[121] *Varig*, 467 U.S. at 813.

was concerned that special protection should be afforded regulatory agencies in order to prevent judicial second guessing of administrative policy.[122] Although the standard, which the Court adopted, is unclear, the Court could not have intended to completely immunize acts of regulatory agencies from judicial review. The *Varig* opinion specifically cites the FTCA legislative history stating that "the common law torts of employees of regulatory agencies [in a nondiscretionary function], as well as of all other Federal agencies, would be included within the scope of the bill."[123]

The challenged regulatory action in *Varig* is distinguishable from the challenged regulatory action in *Hylin*. The role of the FAA is to police the conduct of private individuals by monitoring their compliance with FAA regulations.[124] Monitoring compliance is accomplished through a "spot-check" system where inspectors are free to decide whether and how thoroughly to review a given aircraft.[125] Under the FAA system, the individual inspector must determine the breadth of a given inspection based on policy judgments regarding the "degree of confidence . . . in a given manufacturer, the need to maximize compliance with FAA regulations, and the efficient allocation of agency resources."[126]

In *Varig*, the plaintiffs alleged that the FAA was negligent in failing to inspect certain aspects of the aircraft in the certification process.[127] A successful spot-check system requires that FAA inspectors be allowed to take calculated risks and omit inspection of certain specific items.[128] The FAA has determined that these risks are an inevitable consequence of the spot-check

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[122] *Id.* at 814.

[123] *Id.* at 810, citing *Hearing of H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 28, 33 (1942) (statement of Assistant Attorney General Francis M. Shea).

[124] *Varig*, 467 U.S. at 820.

[125] Brief for the United States at 45, United States v. De Viacao Aerea Rio Grandenses (Varig Airlines), 467 U.S. 797 (1984) (Nos. 82-1349 and 82-1350).

[126] *Varig*, 467 U.S. at 820.

[127] *Id.* at 815.

[128] *Id.* at 820. "The inspection process is the central means by which the FAA discovers violations and thereby enforces its laws, and it is thus crucial that the FAA be permitted to decide for itself which aircraft to inspect and how extensive that inspection should be." Brief at 45, *Varig* (Nos. 82-1349 and 82-1350).

system.[129] Hence, the plaintiff's challenge to FAA inspector's actions in executing the spot-check system necessarily challenges the FAA's decision to implement that system.[130]

Unlike the FAA's spot-checking system, MSHA inspectors have no choice in determining whether to inspect a mine.[131] MSHA is required by statute to conduct periodic inspections of mines subject to the Mine Safety Act.[132] The challenged act in *Hylin* was the negligent implementation of a federal safety standard.[133] The plaintiff was not challenging the promulgation of the agency's inspection system, but rather the careless implementation of a particular safety standard that increased the risk of injury.[134] The agency's discretionary decision to establish safety regulations to protect miners did not involve, either consciously or by unexpressed assumption, a decision to incur the risk that the safety standards implemented would increase the risk of harm to the miners.[135] Increasing the risk of injury to miners is

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[129] Brief at 44, *Varig* (Nos. 82-1349 and 82-1350), citing Harrison and Kolcynski, *Government Liability for Certification of Aircraft*? 44 AIR L. & COM. 23, 43 (1978). The United States' brief stated:

> Within the regulatory concept of the certification process there may be endless opportunity for the discovery of error. Yet inherent in the FAA's regulatory auditing process, which contemplates a review of tests reasonably necessary to demonstrate compliance with minimum standards, lies the reality that not all errors and defects can be discovered.

Brief at 44, *Varig* (Nos. 82-1349 and 82-1350).

[130] *Varig*, 467 U.S. at 819.

[131] 30 U.S.C. § 813 (1982). Section 813(a) provides:

> Authorized representatives of the Secretary or the Secretary of Health and Human Services *shall* make frequent inspections and investigations in coal or other mines each year . . . the Secretary *shall* make inspections of each underground coal or other mine in its entirety *at least four times a year*, and of each surface coal or other mine in its entirety *at least two times a year*. (emphasis added).

Id.

[132] *Id.*

[133] *Hylin*, 755 F.2d at 553.

[134] *Id.*

[135] Inherent in the FAA's spot-check system is the risk that certain defects will not be discovered. *See supra* note 129. The plaintiffs in *Varig* challenged the consequence of this risk which necessarily represents a challenge to the FAA's decision to implement the spot-check system. *See supra* note 130 and accompanying text. MESA's decision to implement its inspection process, however, did not represent a decision to incur the risk that the safety standards implemented would increase the risk of harm to the miners. Hence, in *Hylin* the plaintiff's challenge of the consequence of this risk does not represent a challenge of MSHA inspection process.

not necessary in the careful operation of a mine safety program; however, the *Hylin* opinion suggests that MSHA has the discretion to do so.

CONCLUSION

In *Hylin v. United States*,[136] the Seventh Circuit expanded the protection of the discretionary function exception to all inspection and enforcement duties of what is now the Mine Safety and Health Administration.[137] The *Hylin* court reads *Varig* as a directive to protect not only MSHA's decision of whether or not to inspect, but also any negligent act in performing the inspection.[138] *Hylin* completely immunizes the acts of MSHA despite legislative history, specifically cited in *Varig*, that the common law torts of regulatory agencies were intended to be within the scope of the FTCA.[139]

The *Hylin* opinion sets clear precedent that future acts of MSHA pursuant to the Mine Safety and Health Act are protected from private tort action.[140] In light of this broad implication, an action by the Mine Safety and Health Administration

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[136] 755 F.2d 551 (7th Cir. 1985).

[137] *Id.* at 554. *Hylin* actually expanded the discretionary function exception for actions of MESA and not MSHA. Mine inspections, however, are currently performed by MSHA pursuant to the Mine Safety Act, and federal courts have held that *Hylin* applies to inspections under the current act. *See infra* note 136.

[138] *But see* Valley Towing Service v. United States, 609 F. Supp. 298 (E.D. Mo. 1985). In *Valley*, the court held that the Coast Guard's method of policing compliance of its policy was under the discretionary function exception. *Id.* at 299. However, in dictum, the court stated a contrary view to the *Hylin* position: "it is clear that the discretionary function exception applies to the Government's decision whether or not to erect navigational aids or warnings . . . . Once the decision to construct such aids or warnings has been made, however, the Government can be liable for negligently maintaining its structures." *Id.* at 301.

[139] *Varig*, 467 U.S. at 810.

[140] The *Hylin* decision has been followed in actions premised on alleged negligence of MSHA inspections. *See, e.g.*, Russell v. United States, 763 F.2d 786, 787 (10th Cir. 1985) (finding that *Hylin* controls and that a negligent inspection which was the proximate cause of a fall and subsequent death of a miner was within the discretionary function exception); Ayala v. Joy Mfg. Co., 610 F. Supp. 86, 89 (D.C. Colo. 1985) (holding that *Hylin* controls and that actions of a MHSA inspector who negligently directed the installation of electrical components which caused explosion resulting in fifteen deaths was within the discretionary function exception).

that would give rise to a cause of action under the Federal Tort Claims Act is difficult to imagine.

Patrick G. Byrne