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United States v. Varig: Can King Only Do Little Wrongs?

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United States v. Varig: Can the King Only Do Little Wrongs?

INTRODUCTION

Prior to the Supreme Court's decision in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)* [hereinafter referred to as *Varig*],[1] the federal courts inconsistently applied the Federal Torts Claims Act[2] discretionary function exception[3] in actions against the United States based upon Federal Aviation Administration negligence.[4] The courts were unable to develop and apply a consistent standard as to what was or was not a discretionary function.[5] Therefore, when the Supreme Court granted certiorari[6] to hear the *Varig*[7] and *United Scottish*[8] cases, the legal community anticipated that the Supreme Court, through the facts of these two cases, would resolve the previous inconsistencies of the lower courts and establish clear guidelines for future application of the discretionary function exception.[9] However, the Supreme Court not only failed to seize a "unique opportunity to fine-tune the scope of the discretionary function exception to the Federal Tort Claims Act"[10] but, by treating the facts of the two consolidated cases as the

1. 104 S. Ct. 2755 (1984), *rev'g*, 692 F.2d 1205 (9th Cir. 1982) and 692 F.2d 1209 (9th Cir. 1982). United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 692 F.2d 1205 (9th Cir. 1982) [hereinafter cited as *Varig*], and United States v. United Scottish Ins. Co., 692 F.2d 1209 (9th Cir. 1982) [hereinafter cited as *United Scottish*], were consolidated by the Supreme Court. The Supreme Court's decision will be referred to and cited as *Varig*.

2. The Federal Torts Claim Act, Pub. L. No. 79-601, §§ 401-24, 60 Stat. 842 (codified as amended at 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401-02, 2411-12, 2671-80 (1982)) [hereinafter cited as FTCA].

3. 28 U.S.C. § 2680(a) (1982). *See infra* notes 9 and 15.

4. Hoffman v. United States, 398 F. Supp. 530 (E.D. Mich. 1975), *aff'd*, 600 F.2d 590 (6th Cir. 1979) (FAA had no discretion to ignore its own regulations; however, dismissed for failure to prove proximate cause); Rapp v. Eastern Air Lines, Inc., 264 F. Supp. 673 (E.D. Pa. 1967), *vacated by agreement*, 521 F.2d 1399 (3d Cir. 1975) (held that a cause of action exists against Federal Aviation Administration [hereinafter cited as FAA], for negligent inspection and certification); Takacs v. Jump Shack, Inc., 546 F. Supp. 76 (N.D. Ohio 1982) (held negligent inspection by FAA of parachute packing barred by discretionary function exception).

5. *See* cases cited *supra* note 4.

6. *Varig*, 103 S. Ct. 2084 (1983). *See supra* note 1.

7. 692 F.2d 1205 (9th Cir. 1982), *rev'd*, 104 S. Ct. 2755 (1984). *See supra* note 1.

8. 692 F.2d 1209 (9th Cir. 1982), *rev'd*, 104 S. Ct. 2755 (1984). *See supra* note 1.

9. For an excellent discussion *see* Comment, *Discretion and the FAA: An Overview of the Applicability of the Discretionary Function Exception of the Federal Tort Claims Act to FAA Activity*, 49 J. AIR. L. & COM. 143, 172 (1983).

10. Petition for Rehearing at 5, *United Scottish*, 105 S. Ct. 26 (1984), *denying reh'g to* 104 S. Ct. 2755 (1984), *rev'g* 692 F.2d 1209 (9th Cir. 1982) [hereinafter cited as

same (when in fact they were vastly different),[11] the unanimous opinion of the Court has also had the unfortunate result of further confusing the discretionary function's application to negligent inspection by federal agencies.[12]

This Note will discuss the Federal Tort Claims Act [hereinafter referred to as FTCA],[13] the discretionary function exception and the two leading Supreme Court cases prior to *Varig*. It will then provide an overview of pre-*Varig* decisions applicable to the negligent certification of aircraft. Next, the Note will briefly explain the Federal Aviation Administration [hereinafter referred to as FAA] certification process, before presenting the facts relating to the certification in the *Varig* and *United Scottish* cases. The Note will then analyze the Supreme Court's decision in *Varig*, address the problems created through the Court's misuse of the facts, and provide a criticism of the Court's decision. The Note concludes by suggesting an approach to determining the application of the discretionary function after *Varig*, reviewing recent lower court decisions applying the *Varig* holding, and suggesting methods of distinguishing the *Varig* facts from future FAA negligent certification cases.

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

The FTCA[14] was enacted as a limited waiver of the United States' sovereign immunity from suit for certain types of specified torts committed by federal agencies through its employees.[15] An

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Petition for Rehearing] (Petition for Rehearing on file in the offices of the California Western Law Review).

11. *See infra* notes 98-168 and accompanying text.

12. 3 L. ALERT 305, 311 (July 23, 1984).

13. 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401-02, 2411-12, 2671-80 (1982). *See also supra* note 2.

14. *Id.*

15. Dalehite v. United States, 346 U.S. 15, 17 (1953). By examining the torts which Congress excluded from coverage under the FTCA, one may reasonably infer that any other tort and its facts may be brought under the Act. 28 U.S.C. §§ 2671-79 (1982). 28 U.S.C. § 2680 (1982) generally excludes: a) claims of negligence against federal agencies and employees exercising discretion in the execution of their work (typically at the planning level); b) claims arising out of the negligent handling of letters or postal matters; c) claims against customs officers regarding duties or tax and the detention of property; d) claims in admiralty against the United States; e) claims of negligence against government employees regarding war and national defense under sections 1-31 of Title 50 of the U.S.C.; g) repealed; h) claims against United States' employees for intentional torts such as assault and battery, false imprisonment, malicious prosecution, misrepresentation and deceit; i) claims for damages caused by treasury fiscal operations or by monetary system regulations; j) claims against the government arising out of the combatant activities of the military during time of war; k) claims arising in a foreign country; l) claims arising from activities of the Tenn. Valley Authority; m) claims arising from the activities of the Panama Canal Company; and n) claims

individual asserting a claim against the United States for the negligent acts or omissions of its employees must proceed under the provisions outlined in the FTCA.[16] For example, the FTCA first requires the claimant to exhaust administrative remedies within the federal agency which is alleged to be negligent.[17] If the government fails to settle the plaintiff's claim and suit is then brought, the district courts may award damages against the United States only when a private individual could be held liable in like circumstances under the relevant state law.[18] However, when Congress enacted the FTCA, it excluded certain claims from the Act's coverage[19] out of fear that those claims would inhibit the government's functioning.[20]

The exception that is pertinent to this Note is the discretionary function exception.[21] This exception provides that the FTCA shall not apply to "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a *discretionary function or*

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arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

16. *See generally* 28 U.S.C. §§ 1346(b), 2671-80 (1982).

17. 28 U.S.C. § 2675 (1982). Section 2675(a) provides in pertinent part:

> An action shall not be instituted upon a claim against the United States for money 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, unless the claimant shall have first presented the claim to the appropriate Federal agency and his cliam shall have been finally denied by the agency in writing. . . .

28 U.S.C. § 2675(a) (1982). *See also* Genson v. Ripley, 681 F.2d 1240, 1241 (9th Cir. 1982); Three-M Enter., Inc. v. United States, 548 F.2d 293, 294 (10th Cir. 1977); Claremont Aircraft, Inc. v. United States, 420 F.2d 896, 897 (9th Cir. 1970).

18. Richards v. United States, 369 U.S. 1, 2, 5-12 (1962); Indian Towing Co. v. United States, 350 U.S. 61, 63-65 (1955). The FTCA gives district courts:

> [The] exclusive jurisdiction on claims against the United States, for money damages, accruing on and after January 1, 1945, 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 or omission occurred.

28 U.S.C. § 1346(b) (1982).

19. 28 U.S.C. § 2680 (1982). *See supra* note 15 for a general summary of those claims Congress excluded from coverage under the FTCA.

20. *Dalehite*, 346 U.S. at 28-30, 32 (1953). The Court stated that while Congress desired to waive government immunity for some of its employees tortious acts, "it was not contemplated that the Government should be subject to liability arising from acts of a governmental nature or function." *Id.* at 28.

21. 28 U.S.C. § 2680(a) (1982) excludes the following claims for FTCA coverage:

> Any claim based upon an act of 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.

duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."[22]

What constitutes a discretionary function is not defined within the FTCA.[23] The legislative history of the FTCA provides only one paragraph relating to the intent of Congress in passing the discretionary function exception.[24] The intent was to insulate legislative and regulatory decisions from review by the judiciary through damage suits in tort.[25] However, the legislative history also indicates that the common-law torts of all federal employees would be subject to a tort claim under the Act.[26]

Prior to *Varig*, the two leading Supreme Court cases interpreting the discretionary function exception were *Dalehite v. United States*[27] and *Indian Towing Co. v. United States*.[28] In *Dalehite*, the government developed and implemented a plan to produce fertilizer for war-ravaged Europe and the Orient.[29] The particular fertilizer had been stored in large quantities in Texas City, Texas, prior to being loaded onto a steamship for shipment overseas.[30] Prior to departure, the fertilizer caught fire and the ship exploded.[31] The United States was sued for damages resulting from the explosion of this fertilizer, which leveled most of the city and killed numerous people.[32]

The negligence alleged by the plaintiffs was that the government shipped or permitted to be shipped into a populated area, without adequate investigation or warnings, a highly explosive fertilizer.[33] The Supreme Court, after a thorough review of the FTCA's legislative history,[34] held that the United States was not liable for damages as a result of negligence in the fertilizer program.[35] The Court commented that "[w]here there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable."[36] Additionally, the Court stated that the decisions held culpable in *Dalehite*

22. *Id.* (emphasis added).
23. 28 U.S.C. §§ 1346(b), 2671-80 (1982).
24. H.R. REP. No. 1287, 79th Cong., 1st Sess. 5-6 (1945).
25. *Id.*; *see also Dalehite*, 346 U.S. at 33.
26. *Id.*; *see also Dalehite*, 346 U.S. at 24-35.
27. 346 U.S. 15, *reh'g denied*, 347 U.S. 924 (1953).
28. 350 U.S. 61 (1955).
29. 346 U.S. at 19-22.
30. *Id.* at 22.
31. *Id.* at 23.
32. *Id.*
33. *Id.*
34. *Id.* at 24-31.
35. *Id.* at 42.
36. *Id.* at 36.

were all responsibly made at the planning level and, therefore, not actionable, rather than at the operational level which, according to the Court, would have been actionable under the FTCA.[37]

The difficulty in establishing a test for what was a planning level decision and what was an operational level decision was apparent in the conflict between the *Dalehite* majority opinion and the dissenting opinion of Justice Jackson.[38] The majority held that no liability existed for the entire operation, right down to the negligent mislabeling of the bags of fertilizer.[39] In his dissent, Justice Jackson agreed with the planning level/operational level test, but found that only 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.[40]

Three years after *Dalehite*, the Supreme Court decided *Indian Towing v. United States*.[41] In that case, the plaintiff suffered economic loss when his tugboat and barge ran aground, resulting in the destruction of the cargo.[42] The Coast Guard's failure to properly maintain the lighthouse or to warn seamen of its inoperation was the acknowledged cause of the accident.[43]

The Supreme Court granted certiorari "[b]ecause the case presented an important aspect of the still undetermined extent of the Government's liability under the Federal Tort Claims Act."[44] The relevant provisions of the FTCA that the Court wished to review were: (1) section 1346(b), which provides that the liability of the United States is in accordance with the law of the place where the act or omission occurred;[45] (2) section 2674, which states that the United States shall be liable in the same manner and extent as a private individual under like circumstances;[46] and, (3) section 2680(a), the discretionary function exception.[47]

In *Indian Towing*, the government conceded that the operation of the lighthouse was at the "operational level" and, therefore, that the discretionary function exception did not apply.[48] However, the government argued that the operation of the lighthouse was a

37. *Id.* at 42.
38. *Id.* at 36-42, 47-60.
39. *Id.* at 40.
40. *Id.* at 58.
41. 350 U.S. 61.
42. *Id.* at 62.
43. *Id.* at 62-63, 70.
44. *Id.* at 63.
45. *Id. See generally* 28 U.S.C. § 1346(b), *supra* note 18.
46. 350 U.S. at 63. *See generally* 28 U.S.C. § 2674 (1982), which provides that "the United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances. . . ."
47. 350 U.S. at 63-64. *See generally* 28 U.S.C. § 2680(a), *supra* note 21.
48. 350 U.S. at 64.

uniquely governmental function and, as such, the government could not be held liable " 'in the same manner and to the same extent as a private individual under like circumstances,' " as provided by section 2674.[49]

The Supreme Court rejected this argument by stating that "the statutory language is 'under *like* circumstances,' and that it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner."[50] The Court commented further that "[t]he broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable."[51]

While a uniform test or a consistent application of the "planning level/operational level" distinction has never been established, the concession by the government that the operations of the lighthouse were "operational level" decisions, and the Court's agreement with this concession, have been an aid to the lower courts in applying the test to determine the scope of the discretionary function exception.[52]

II. PRE-*VARIG* CASES INVOLVING NEGLIGENT CERTIFICATION BY THE FEDERAL AVIATION ADMINISTRATION AND THE DISCRETIONARY FUNCTION EXCEPTION

Prior to the *Varig* decision, the United States Supreme Court had not addressed the discretionary function exception as applied to negligent certification of aircraft by the FAA.[53] A review of several

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49. *Id.* (quoting 28 U.S.C. § 2674). *See supra* note 46 and accompanying text.

50. *Id.* at 64-65 (emphasis added). The "Good Samaritan" requirements of the RESTATEMENT (SECOND) OF TORTS § 323 (1965) provide that:

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

51. *Indian Towing*, 350 U.S. at 68.

52. 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 . . . 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. at 69 (emphasis added).

53. 191 U.S. 1 (1903), *et seq.*

of the lower court cases that considered this issue illustrates the inconsistent interpretation of the planning level/operational level test when applied to cases involving negligent certification and the discretionary function exception.

In *Gibbs v. United States*,[54] plaintiffs alleged that the FAA negligently approved and certified as airworthy Twin Beach aircraft N2999, which crashed on take-off when, in fact, the aircraft as modified was not airworthy.[55] Plaintiffs contended that this negligence was a proximate cause of the accident and that the United States was liable under the FTCA.[56] In addressing this claim, the district court noted that, "[h]aving decided to enter the broad field of the regulation of the flight and repair and modifications of aircraft and licensing of pilots, the Government becomes responsible for the care with which those activities are conducted."[57] Further, the court noted, "[a]s to the . . . airworthiness of aircraft N2999 as modified, the Court cannot say that it [the FAA] discharged its duty of care. . . ."[58] The court was "impressed" that there was laxity in the manner in which the authorized inspector returned the aircraft to service without checking the modifications.[59] However, the court never applied the planning level/operational level test nor decided whether the government could be liable for negligent certification, because it found that the evidence failed to show that the government's negligence was the proximate cause of the accident.[60]

In *Rapp v. Eastern Air Lines, Inc.*,[61] an Eastern Lockheed Electra encountered a flock of starlings on takeoff from Boston. The birds were ingested into the engines, which then failed, thus causing the plane to crash.[62] Prior to the accident, in the certification process of the engines, the FAA required the manufacturer to conduct a "chicken test."[63] The tests were ordered for the purposes of determining the effects of bird ingestion on the engines.[64] The test showed that the engines' intakes were capable of ingesting birds and that such ingestion could cause a permanent loss of power in some

54. 251 F. Supp. 391 (E.D. Tenn. 1965).
55. *Id.* at 394.
56. *Id.* at 400.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 401. "The court is of the opinion and finds that the error of the pilot in overloading the craft and positioning its load so that its center of gravity was moved rearwardly beyond the safety point was the proximate cause of this tragic crash." *Id.* at 400-01 (referring to Bristow v. United States, 390 F.2d 465 (6th Cir. 1962)).
61. 264 F. Supp. 673 (E.D. Pa. 1967).
62. *Id.* at 675.
63. *Id.* at 676. The so-called chicken test is a test required by the FAA for engine certification wherein four-pound chicken carcasses are fired at high speed into an operating engine to simulate bird ingestion.
64. *Id.*

circumstances.[65] Notwithstanding this knowledge, the FAA certified the engines as airworthy without any warnings or limitations on the operation of the aircraft around airports where birds were known to be a hazard.[66]

In *Rapp*, the district court never discussed a planning level/operational level distinction, but concluded that the negligence of the government was the proximate cause of the accident and thus found the government liable for damages.[67] However, while on appeal, the government settled the case with a requirement that the opinion be vacated.[68] As a result, commentators have noted that "while *Rapp* is of limited value as authority for the proposition that the government has a duty to inspect in a non-negligent fashion, the government was sufficiently concerned about the issue to settle the case pending appeal and to insist upon an order vacating the judgment below."[69]

The government's liability for negligent inspection of an aircraft by an employee or authorized inspector of the FAA was also discussed in *In re Air Crash Disaster Near Silver Plume, Colorado*.[70] The suit arose from the crash of a Martin 404 aircraft that had recently been certified as airworthy by an authorized inspector. The inspector neglected to inspect the condition of the seat belts, which failed on impact with the ground.[71] The court, in a lengthy discussion of the FTCA, stated that where an employee of the FAA fails to perform an "operational duty" such as the required inspection of seat belts, the government can be held liable for the injuries that result from this negligence.[72] However, the court found that the negligence alleged in this case was not the proximate cause of the air crash.[73]

Contrary to the opinions which imply that the government may be held liable for negligent certification, is the decision in *Garbarino v. United States*.[74] In *Garbarino*, plaintiffs asserted that the FAA was negligent for not enacting stricter safety and inspection stan-

65. *Id.* at 678.
66. *Id.*
67. *Id.* at 680.
68. 521 F.2d 1399 (3d Cir. 1970). A vacated opinion is one in which the judgment and holding of the court has been cancelled or rescinded and, therefore, is without any value as a legal precedent for other courts to follow.
69. Krause & Cook, *The Liability of the United States for Negligent Inspection—1983*, 48 J. AIR. L. & COM. 725, 737 (1983).
70. 445 F. Supp. 384, 400-401 (D. Kan. 1977).
71. *Id.* at 405-09.
72. *Id.*
73. *Id.* at 410. The proximate cause of the accident appeared to be pilot error in allowing the aircraft to be flown at an unreasonably low altitude, although the court did not state what it felt was the proximate cause.
74. 666 F.2d 1061 (6th Cir. 1981).

dards.[75] Plaintiffs alleged that the FAA was negligent in failing to test and inspect the aircraft type for crashworthiness and design, in particular, the fuel tank assembly and fuel line system.[76] The Sixth Circuit affirmed the lower court's summary judgment in favor of the United States,[77] holding that the failure to enact stricter standards was planning level activity covered by the discretionary exception. It thus barred any claim against the government.[78]

In *Takacs v. Jump Shack, Inc.*,[79] the acting fiduciary of the estate of a parachutist, who was killed when his parachute failed to open, brought an action against the United States under the FTCA.[80] The suit alleged that the FAA was negligent in the inspection and certification of the parachute design and manufacture.[81] The court granted the FAA's motion for summary judgment on the basis that both causes of action were barred by the discretionary function exception.[82] The court first noted that the FAA's issuance of a certificate approving the design and manufacture of the parachute involved balancing a myriad of factors. It then concluded that "[t]he discretionary function exception affords a valid defense if there is room for policy judgment and discretion."[83]

Finally, in *George v. United States*,[84] plaintiffs alleged that the sole proximate cause of a crash was a defective fuel system, which was brought about by the corrosion of a brass and steel fuel pick-up component.[85] Plaintiffs contended that the certification of an aircraft with a brass and steel fuel pick-up was a violation of FAA standards.[86] The lower court found that "the plaintiffs' claim amounted to no more than a complaint that the government failed to promulgate regulations banning the use of coterminous, dissimilar metals in the fuel pick-up."[87] Consequently, the appellate court concluded that this was a planning level decision and, thus, held

75. *Id.* at 1063.
76. *Id.*
77. *Id.* at 1063, 1066.
78. *Id.* at 1065. "Deciding what those standards are to be and whether such standards are to include crashworthiness criteria, is the type of policy decision that falls squarely within the discretionary function exception. *Id.*
79. 546 F. Supp. 76 (N.D. Ohio 1982).
80. *Id.*
81. *Id.* at 77.
82. *Id.* at 79.
83. *Id.* at 78 (citing Nelms v. Laird, 442 F.2d 1163 (4th Cir.), *rev'd on other grounds*, 406 U.S. 797, *reh'g denied*, 409 U.S. 902 (1971)).
84. 703 F.2d 90 (4th Cir. 1983).
85. *Id.* at 90.
86. *Id.* at 91.
87. *Id.* Plaintiffs alleged the commingling of two dissimilar metals, in an environment subject to moisture retention, rendered the fuel pick-up particularly susceptible to rust and was thus a forseeable hazard. The court found this contention not borne out by the record, which, to the contrary, indicated that the brass and steel fuel pick-up had been used for thirty years without problems. *Id.* at 90-92.

that the district court properly determined that appellants' claim fell squarely within the bar of the discretionary function exception.[88]

These cases left the distinction between a planning level and an operational level decision very uncertain. Further, the cases failed to provide the courts with adequate guidance as to precisely which FAA certification activities were within the scope of the discretionary function exception and which activities were not within the scope.

III. THE *VARIG* AND *UNITED SCOTTISH* CASE

A. Certification of Aircraft by the Federal Aviation Administration

The Federal Aviation Act of 1958[89] established a duty on the part of the administrator of the FAA to prescribe minimum safety standards "governing the design, materials, workmanship, construction and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety."[90] Specific requirements for the procedure and duties in the certification process are set forth in the Federal Aviation Regulations.[91] Depending upon the manufacturer, type of certificate requested, and aircraft system or design under review, the regulations require either drawings and specifications, *spot checks*, or *actual physical inspection of the installed system* before any certificate will be issued.[92]

In certifying new aircraft for safe flight, the FAA uses a multistep process.[93] Before building a new airplane, a manufacturer must first submit design drawings and specifications to the FAA to obtain a type certificate.[94] Next, the manufacturer must build a prototype and demonstrate an ability to establish conformity of pro-

88. *Id.* at 92.
89. 49 U.S.C. §§ 1301-1552 (1982).
90. 49 U.S.C. § 1421(a)(1) (1982) states:
(a) Minimum standards; rules and regulations
The Secretary of Transportion is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:
(1) Such minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety.
91. 14 C.F.R. §§ 21.1-621 (1985).
92. *Id.*
93. Dombroff, *Certification and Inspection: An Overview of Government Liability*, 47 J. AIR. L. & COMM. 229, 231 (1982).
94. 49 U.S.C. § 1423(a) (1982) provides:
(a) Authorization to issue; application; investigation; tests; issuance of type certificate
(1) The Secretary of Transportation is empowered to issue type certificates for aircraft, aircraft engines, and propellers; to specify in regulations the

duction models with the prototype to obtain a production certificate.[95] Each of the aircraft produced thereafter must be inspected for conformity to the prototype and safety before an airworthiness certificate can be issued.[96] An aircraft cannot be operated legally in the United States without a current and valid type and airworthi-

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appliances for which the issuance of type certificates is reasonably required in the interest of safety; and to issue such certificates for appliances so specified.

(2) Any interested person may file with the Secretary of Transportation an application for a type certificate for an aircraft, aircraft engine, propeller, or appliance specified in regulations under paragraph (1) of this subsection. Upon receipt of an application, the Secretary of Transportation shall make an investigation thereof and may hold hearings thereon. The Secretary of Transportation shall make, or require the applicant to make, such tests during manufacture and upon completion as the Secretary of Transportation deems reasonably necessary in the interest of safety, including flight tests and tests of raw materials or any part or appurtenance of such aircraft, aircraft engine, propeller, or appliance. If the Secretary of Transportation finds that such aircraft, aircraft engine, propeller, or appliance is of proper design, material, specification, construction, and performance for safe operation, and meets the minimum standards, rules, and regulations prescribed by the Secretary of Transportation, he shall issue a type certificate therefor. The Secretary of Transportation may prescribe in any such certificate the duration thereof and such other terms, conditions, and limitations as are required in the interest of safety. The Secretary of Transportation may record upon any certificate issued for aircraft, aircraft engines, or propellers, a numerical determination of all of the essential factors relative to the performance of the aircraft, aircraft engine, or propeller for which the certificate is issued.

95. 49 U.S.C. § 1423(b) (1982) provides:

(b) Production certificates

Upon application, and if it satisfactorily appears to the Secretary of Transportation that duplicates of any aircraft, aircraft engine, propeller, or appliance for which a type certificate has been issued will conform to such certificate, the Secretary of Transportation shall issue a production certificate authorizing the production of duplicates of such aircraft, aircraft engines, propellers, or appliances. The Secretary of Transportation shall make such inspection and may require such tests of any aircraft, aircraft engine, propeller, or appliance manufactured under a production certificate as may be necessary to assure manufacture of each unit in conformity with the type certificate or any amendment or modification thereof. The Secretary of Transportation may prescribe in any such production certificate the duration thereof and such other terms, conditions, and limitation as are required in the interest of safety.

96. 49 U.S.C. § 1423(c) (1982) states as follows:

(c) Airworthiness certificates

The registered owner of any aircraft may file with the Secretary of Transportation an application for an airworthiness certificate for such aircraft. If the Secretary of Transportation finds that the aircraft conforms to the type certificate therefor, and, after inspection, that the aircraft is in condition for safe operation, he shall issue an airworthiness certificate. The Secretary of Transportation may prescribe in such certificate the duration of such certificate, the type of service for which the aircraft may be used, and such other terms, conditions, and limitations, as are required in the interest of safety. Each such certificate shall be registered by the Secretary of Transportion and shall set forth such information as the Secretary of Transportation may deem advisable. The certificate number, or such other individual designation as may be required by the Secretary of Transportation, shall be displayed upon each aircraft in accordance with regulations prescribed by the Secretary of Transportation.

ness certificate.[97]

The issue in the *Varig* case was the liability for the negligent inspection conducted under a "spot check" program prior to issuance of the airworthiness certificate.[98] Because of the nature and complexity of certifying a commercial aircraft, the FAA accomplishes its inspections by a "spot check" program whereby the inspectors randomly inspect only a percentage of the aircraft for conformity with the regulations.[99]

Should a design change be required in an existing aircraft, the party desiring the change is required to obtain a supplemental type certificate.[100] Obtaining a supplemental type certificate generally involves either submitting drawings and other details to the FAA or an actual physical inspection by an inspector.[101] The critical fact of the *United Scottish* case is that, since only two aircraft were involved, the regulations permitted less pre-installation documentation provided that an FAA inspector *examined* and *approved* the completed installation before a supplemental type certificate was issued.[102]

B. The Facts and Treatment of the Cases by the Lower Courts

This case was the consolidation of two Ninth Circuit cases, *Varig v. United States*[103] and *United Scottish v. United States*,[104] by the

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97. 49 U.S.C. § 1430(a)(1) (1982) provides:

(a) It shall be unlawful—

(1) For any person to operate in air commerce any civil aircraft for which there is not currently in effect an airworthiness certificate, or in violation of the terms of any such certificate. . . .

98. *Varig*, 692 F.2d 1205 (9th Cir. 1982), *rev'd*, 104 S. Ct. 2755 (1984).

99. A spot check program is the only practical way the FAA can enforce its air safety regulations. One major manufacturer of commercial aircraft estimated that in the course of obtaining a type certificate for a new wide-body aircraft it would submit to the FAA approximately 300,000 engineering drawings and changes; 2,000 engineering reports, and 200 other reports. In addition, it would subject the aircraft to about 80 major ground tests and 1,600 hours of flight tests. NATIONAL RESEARCH COUNCIL, COMMITTEE OF FAA AIRWORTHINESS CERTIFICATION PROCEDURES IMPROVING AIRCRAFT SAFETY 29 (1980).

100. 14 C.F.R. § 21.113 (1985) provides:

Any person who alters a product by introducing a major change in type design, not great enough to require a new application for a type certificate under § 21.19, shall apply to the Administrator for a supplemental type certificate, except that the holder of a type certificate for the product may apply for amendment of the original type certificate. The application must be made in a form and manner prescribed by the Administrator.

101. Brief for Respondents' at 5, *Varig*, 104 S. Ct. 2755 (1984) (copy on file in the offices of California Western Law Review).

102. FAA, ORDER TYPE CERTIFICATION MANUAL 31, 32 (Reprint 1967) (requiring a physical inspection of the "prototype modification" if compliance cannot be determined adequately from an evaluation of the technical data).

103. *Varig*, 692 F.2d 1205 (9th Cir. 1982), *rev'd*, 104 S. Ct. 2755 (1984). The primary focus of this Note is the facts of *United Scottish* and the Supreme Court's opinion

United States Supreme Court.[105] In both cases, the Ninth Circuit found the government liable for the negligent inspection of each aircraft and found liability was not barred by the discretionary function exception of the FTCA.[106]

In *Varig*, the plaintiffs contended that the FAA was negligent in certifying the Boeing 707 lavatory units as complying with FAA fire protection standards.[107] The standards specifically required "waste receptacles to be made of fire-resistant material and to incorporate covers or other provisions for containing possible fires."[108]

On July 11, 1973, a Boeing 707 operated by Varig Airlines caught fire in the aft lavatory waste receptacle.[109] Within four to six minutes, thick black smoke filled the cabin and cockpit.[110] Although the pilots were able to make a successful crash landing in a farm field, 124 of 135 people aboard died of asphyxiation from toxic gases.[111] Post-accident investigation revealed that the lavatory, manufactured by Boeing and inspected by the FAA, lacked a cover and had large holes, which made the compartment incapable of containing smoke or fire.[112]

The district court granted summary judgment for the United States on the ground that California law did not recognize an actionable tort duty for inspection and certification activities.[113] "The district court also found that, even if plaintiffs had stated a cause of action in tort, recovery against the United States was barred by the discretionary function exception [to the FTCA]."[114]

The Ninth Circuit reversed,[115] first holding that the government should be liable for negligent inspection under the California "Good Samaritan" rule.[116] Next, the court rejected the government's reliance on the discretionary function exception, reasoning that inspections of aircraft for compliance with FAA safety regulations are factual investigations not involving policy choices.[117] The court

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in relation to that case. However, the Supreme Court's opinion only makes sense in relation to the facts of the *Varig* case.

104. *United Scottish*, 692 F.2d 1209 (9th Cir. 1982), 104 S. Ct. 2755 (1984).
105. 103 S. Ct. 2084 (1983). *See also supra* note 1.
106. *Varig*, 692 F.2d 1205, 1208-09; *United Scottish*, 692 F.2d 1209, 1212.
107. *Varig*, 692 F.2d at 1206.
108. *Id.* at 1208.
109. *Id.* at 1206.
110. *Id.*
111. *Id.* at 1207.
112. *Id.* (citing S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines) v. Walter Kidde & Co., Inc., 690 F.2d 1235 (9th Cir. 1982)).
113. *Varig*, 104 S. Ct. 2755, 2758-59.
114. *Id.* at 2759.
115. *Varig*, 692 F.2d 1205.
116. *Id.* at 1207-08; *see also* RESTATEMENT (SECOND) OF TORTS §§ 323 AND 324A, *supra* note 50.
117. 692 F.2d at 1208-09.

compared the FAA inspector's investigation responsibilities to the lighthouse inspector in *Indian Towing*, and found them to be similar.[118]

The *United Scottish* case involved the crash of a DeHavilland Dove aircraft on October 8, 1968.[119] The aircraft was owned and operated by plaintiff, John Dowdle.[120] Shortly after taking off from Las Vegas, Nevada, the aircraft caught fire, crashed and burned, killing all four people on board.[121]

The aircraft was originally manufactured in the United Kingdom in 1951 and later purchased by Air Wisconsin in the United States.[122] In 1965, Air Wisconsin contracted with Aerodyne Engineering Corporation for the installation of a gasoline-burning cabin heater.[123] Pursuant to FAA regulations,[124] Aerodyne received authority for the installation and, upon inspection of the completed heater system by an FAA inspector, received a supplemental type certificate for the airplane as modified.[125]

An actual inspection of the installation by an FAA inspector was mandatory for certification in that the only previous specifications provided to the FAA were polaroid pictures taken of the "completed installation."[126] The trial court found that the heater, as installed, exhibited numerous design deficiencies, which should have alerted any reasonably competent FAA or General Aviation District Office[127] inspector to the fact that the overall quality of the design and fabrication of the heater system was not consistent with FAA regulations.[128] The trial court also found that the accident would not have occurred if a non-negligent, proper inspection had

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118. *Id.* at 1209; *see also supra* notes 41-51 and accompanying text.

119. *Varig*, 104 S. Ct. 2755, 2759.

120. *Id.* at 2759. The plaintiffs who brought this action were: United Scottish Insurance Co. (insurance carrier seeking indemnification); John W. Dowdle (owner and operator of the plane); Kathryn Felming, Maxine Clearly and Simone Weaver (survivors of three of the four crash victims).

121. *Id.*

122. *Id.*

123. *Id.*

124. 14 C.F.R. 21.113 (1985). *See supra* note 91 and accompanying text.

125. Findings of Fact at 3, nos. 5-7, *United Scottish*, No. 71-36-E (S.D. Cal. July 30, 1975) (Findings of Fact on file in the offices of the California Western Law Review). *See also* Joint Appendix at 206-07, *Varig*, 104 S. Ct. 2755 (1984) [hereinafter cited as Jt. App.] (Jt. App. on file in the offices of the California Western Law Review). *See generally infra* note 162 and accompanying text.

126. Jt. App., *supra* note 125, at 281-83. Deposition of Charles H. McMillan, Assistant Chief, Engineering-Manufacturing Branch, FAA, Ft. Worth, Texas. Mr. McMillan signed the supplemental type certificate for the Dove after modification.

127. General Aviation District Office; FAA employees located at airport offices throughout the country.

128. Findings of Fact at 6, no. 21, *United Scottish*, No. 71-36-E (S.D. Cal. July 30, 1975); *see also* Jt. App., *supra* note 125, at 209.

been made.[129] Therefore, the trial court found the negligence of the FAA inspector was a proximate cause of the inflight fire and resulting crash.[130]

The United States appealed and the Ninth Circuit remanded the case for a decision concerning whether the evidence was sufficient to support a finding of liability under the Good Samaritan Rule.[131] In the second trial, the district court found the government "liable to the plaintiffs for the physical harm they sustained as a result of the government's failure to exercise reasonable care in performance of inspection and certification of the aircraft."[132] "This liability [was] based on the finding that plaintiffs relied upon the government's undertaking and suffered harm thereby."[133]

The United States again appealed the decision to the Ninth Circuit, which affirmed the district court's finding of reliance under California's Good Samaritan rule.[134] Further, in an apparent application of the operational level test, the Ninth Circuit held that:

> F.A.A. officials enforce the [safety] requirements by inspecting aircraft, but [the inspector] cannot in any way change or waive safety requirements. Because no room for policy judgment or decision exists, a discretionary function is not being performed, and the trial court correctly refused to protect the government under the discretionary function clause.[135]

C. *Treatment of* Varig *and* United Scottish *by the Supreme Court*

On certiorari, the United States Supreme Court reversed the Ninth Circuit and held that liability for the negligence of the FAA in certifying aircraft for use in commercial aviation is barred by the discretionary function exception of the FTCA.[136] Chief Justice Burger, writing the opinion for a unanimous Court, first reviewed the brief legislative history and the confused judicial interpretations of the discretionary function exception.[137] Admitting that the Supreme Court's reading of the FTCA had not followed a straight

129. Findings of Fact at 7, no. 27, *United Scottish*, No. 71-36-E (S.D. Cal. July 30, 1975); *see also* Jt. App., *supra* note 125, at 210.
130. Findings of Fact at 7, no. 28, *United Scottish*, No. 71-36-E (S.D. Cal. July 30, 1975); *see also* Jt. App., *supra* note 125, at 210.
131. *United Scottish*, 614 F.2d 188, 198-99.
132. Memorandum Decision at 9, *United Scottish*, No. 71-36-E (S.D. Cal. Nov. 24, 1980) [hereinafter cited as Memorandum Decision] (Memorandum Decision on file in the offices of the California Western Law Review). *See also* 614 F.2d 188 (9th Cir. 1979).
133. Memorandum Decision, *supra* note 132, at 29.
134. *United Scottish*, 692 F.2d 1209, 1211 (1982).
135. *Id.* at 1212.
136. *Varig*, 104 S. Ct. 2755, 2769.
137. *Id.* at 2762-65.

line, the Court resurrected *Dalehite* and its almost blanket application of the discretionary function exception.[138] While the Court did not mention or repudiate the planning level/operational level test, the Court did distinguish previous cases that had found governmental liability under the FTCA.[139] In particular, the *Indian Towing* case, which had been used as a guide in interpreting the planning level/operational level test, was distinguished by the Court as never having dealt with the discretionary function exception in that the government conceded that it involved operational level activity.[140]

The Court determined that there are several factors useful in determining when the acts of a government employee are protected by the discretionary exception:

> First, it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case. . . . Thus, 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.
>
> Second, whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals.[141]

The Court's primary consideration was whether the discretionary function exception immunized from tort liability the FAA certification process "involved in this case."[142] The respondents' argument was summarized by the Court as "the negligent *failure* of the FAA to inspect certain aspects of aircraft type design in the process of certification gives rise to a cause of action against the United States under the Act."[143] The Court summarized the government's view of the FAA as that of a regulatory agency whose function is "merely to police the conduct of private individuals by monitoring their compliance with FAA regulations."[144] This regulatory activity, the government argued, is designed to encourage compliance with minimum safety requirements and, as such, is the sort of conduct protected by the discretionary function exception.[145]

After reviewing the technical and administrative requirements of type certification, the Court found that the "FAA's implementation of a [spot-check] mechanism for compliance review is plainly dis-

138. *Id.* at 2764-69.
139. *Id.* at 2764.
140. *Id.* "Significantly, the Government *conceded* that the discretionary function exception was not implicated in *Indian Towing*. . . ." *Id.*
141. *Id.* at 2765.
142. *Id.*
143. *Id.* at 2766 (emphasis added).
144. *Id.*
145. *Varig*, 104 S. Ct. at 2766.

cretionary activity of the 'nature and quality' protected by [the discretionary function exception]."[146]

The Court noted that the respondents' contention that the FAA was negligent in failing to inspect certain elements of the aircraft's design, challenged two aspects of the certification procedure.[147] The first aspect challenged was the decision by the FAA to implement a spot-check for compliance review, and the second was the application of the spot-check inspection to the particular aircraft in *Varig* and *United Scottish*.[148]

In the Court's view, both claims are barred by the discretionary function exception of the FTCA because "[w]hen an agency determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary regulatory authority of the most basic kind."[149] Further, the Court noted:

> In administering the "spot-check" program, these FAA engineers and inspectors necessarily took certain calculated risks, but those risks were encountered for the advancement of a governmental purpose and pursuant to the specific grant of authority in the regulations and operating manuals. Under such circumstances, the FAA's alleged negligence in failing to check certain specific items in the course of certificating a particular aircraft falls squarely within the discretionary function exception of § 2680(a).[150]

Additionally, the Court held that "the acts of FAA employees in executing the 'spot-check' program in accordance with agency directives are protected by the discretionary function exception as well."[151]

The Court viewed the implementation of a "spot checking" program to ensure manufacturers' compliance with safety standards as the best way to accomplish the goal of safe air transportation and to deal with the realities of limited FAA personnel and resources.[152] The Court emphasized that protection of regulatory activities was the underlying reason for the enactment of the discretionary function exception of the FTCA in 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."[153]

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146. *Id.* at 2768. *See supra* note 99.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 2768-69.
151. *Id.* at 2768.
152. *Id.*
153. *Id.* at 2765. *See also Dalehite*, 346 U.S. at 27.

In reviewing the judgments of the Ninth Circuit, the Supreme Court held that:

> In rendering the United States amenable to some suits in tort, Congress could not have intended to impose liability for the regulatory enforcement activities of the FAA challenged in this case. The FAA has a statutory duty to *promote* safety in air transportation, not to insure it. We hold that these actions against the FAA for its alleged negligence in certificating aircraft for use in commercial aviation are barred by the discretionary function exception of the Federal Tort Claims Act.[154]

IV. ANALYSIS OF THE COURT'S OPINION

Like Moses descending from the mountain top with the Ten Commandments, the government now descends upon the courts and plaintiffs' counsel saying "dismiss and sue no more," for this case ends forever a cause of action for negligent certification.[155] "Those who assert otherwise fail to understand the clear message of the Supreme Court in *Varig*."[156]

However, the message is not quite so clear. The Court's opinion either ignored or overlooked the facts of the *United Scottish* case. The Supreme Court noted:

> From the records in these cases there is no indication that either the Boeing 707 trash receptacle or the DeHavilland Dove cabin heater was actually inspected or reviewed by an FAA inspector or representative. . . . Respondents thus argue in effect that the negligent failure of the FAA to inspect . . . gives rise to a cause of action . . . under the Act.[157]

The Court cites as authority for this position the briefs of the United States and Varig Airlines. However, only in *Varig* was there an issue of "failure to inspect." The issue in *United Scottish* was negligent inspection, *not* failure to inspect. The government's brief failed to mention the specific finding of fact by the *United Scottish* trial court that an actual inspection was negligently done.[158]

Specifically, the trial court in *United Scottish* found, as a *matter of fact*, that an inspection of the modification was required by the FAA's regulations,[159] that the modification was inspected and that

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154. *Varig*, 105 S. Ct. 2769.

155. *See* Dombroff, *Varig, United Scottish and Dalehite Revisited*, AVIA. LIT. RPTR. 1,804, 1,808 (July 2, 1984). (Mr. Dombroff is the former Director, Torts Branch, Civil Division, U.S. Department of Justice. The actual quote is: "*Varig* lays to rest the regulatory inspection and certification activities of the United States as a basis for tort liability." *Id.*).

156. *Id.* at 1,808-09.

157. *Varig*, 104 S. Ct. at 2766 (citation omitted).

158. *Id.* at 2766. *See also* Petition for Rehearing, *supra* note 10, at 4.

159. Findings of Fact at 3, no. 7, *United Scottish*, No. 71-36-E (S.D. Cal. July 30, 1975); *see also* Jt. App., *supra* note 125, at 207.

the inspection was negligently performed.[160] The Ninth Circuit noted that "[t]he parties agree that FAA regulations also required that the FAA inspect the installation prior to giving its approval for issuance of the [supplemental type certificate]."[161]

The Supreme Court had all this information in the record before it,[162] and the finding of an actual inspection was pointed out to the Court in oral argument.[163] Yet, the opinion makes no mention of the issue of liability when an inspection is mandated, negligently performed, and results in a tragic accident.

In addition to the failure of the government to include the findings of fact in its brief,[164] part of the reason for the Court's misinterpretation may be found in the oral argument by Kenneth S. Geller, Esq., on behalf of the Solicitor General of the United States. Mr. Geller stated, "[t]here was no proof in this case, nor could there be in any of these cases that a particular FAA inspector went in, looked at a particular aircraft and determined that it was all right whereas the safety standards show it was not."[165]

Mr. Richard F. Gerry, Esq., attorney for respondent, United Scottish, accurately summarized the Court's mistake in his petition for rehearing:

> Thus, the Court is incorrect when it states in its discussion of the Supplemental Type Certificate requirements that:
>
> > "The methods used by FAA employees or their representatives to determine an applicant's compliance with minimum safety standards are generally the same as those implied for basic type certification." *United States v. Varig Airlines*, *supra* at 4835.
>
> As clearly shown by the record and found by the District Court, the methods used by the FAA in the single aircraft Supplemental Type Certificate are very different from those used in the certification of new types of aircraft.
>
> The reasoning of the Court in its June 19th opinion is based upon the alleged failure of FAA employees to inspect aircraft pursuant to a "spot-check" program which left those employees with discretion to determine whether or not to inspect. Such rea-

160. Findings of Fact at 7, no. 28, *United Scottish*, No. 71-36-E (S.D.Cal. July 30, 1975); *see also* Jt. App., *supra* note 125, at 210.

161. *United Scottish*, 614 F.2d 188, 190 (9th Cir. 1979).

162. The Joint Appendix referred to *supra* notes 125-26, 128-30, and 159-60, contained for the Court the district court findings of fact, the depositions of all pertinent witnesses and the lower court's decision. All clearly show that an inspection was required and negligently performed.

163. Transcript of Oral Argument before the United States Supreme Court at 29, *Varig*, *supra* note 1, 104 S. Ct. 2755 [hereinafter cited as Oral Argument] (Oral Argument on file in the offices of California Western Law Review).

164. *See supra* note 158.

165. Oral Argument, *supra* note 163, at 46.

soning cannot logically be applied to the facts of *United Scottish* where the employees were not imbued with such discretion but instead were required to inspect, did inspect and negligently inspected the installation of the heater in the DeHavilland Dove.[166]

The government contends that as a result of the *Varig* decision a cause of action no longer exists for negligent inspection.[167] However, a careful reading of the opinion and the facts of the *United Scottish* case shows that the only issue resolved by the Supreme Court was that the government and its employees are not liable for a failure to inspect.[168] The issue of liability, when the regulations require an actual physical inspection and that inspection is negligently performed, remains unresolved.

V. A SUGGESTED APPROACH TO DETERMINING THE APPLICATION OF THE DISCRETIONARY FUNCTION EXCEPTION AFTER *VARIG*

After *Varig*, the clear focus of a district court's analysis should be a factual determination of whether the challenged acts or omission bring into judicial review policymaking decisions of a regulatory agency—regardless of the rank or status of the individual actors. The Supreme Court accurately stated, "it is unnecessary—*and indeed impossible*—to define with precision every contour of the discretionary function exception."[169] Because a precise definition is "impossible," each case "requires a factual analysis of the circumstances and the government policy involved."[170]

The facts and circumstances of each case should be considered by the district court as they relate to each of the following questions:

1. To what extent does the act or omission directly affect the feasibility and practicability of the government's regulatory program?[171]
2. Does the act or omission require the exercise of political, social or economic judgement?[172]
3. Does the act or omission require evaluation of the need to maximize compliance with agency regulations?[173]
4. Does the act or omission require consideration of the efficient allocation of agency resources?[174]
5. Does the act or omission require a decision to take or not to

166. Petition for Rehearing, *supra* note 10, at 10.
167. Dombroff, *supra* note 155, at 1,808-09.
168. *Varig*, 104 S. Ct. at 2769.
169. *Id.* at 2765 (emphasis added).
170. *In re* All Asbestos Cases, 603 F. Supp. 599, 611 (D. Hawaii, 1984).
171. *Varig*, 104 S. Ct. 2768.
172. *Id.* at 2765.
173. *Id.* at 2768.
174. *Id.*

take certain calculated risks for the advancement of a government purpose?[175]

6. Did the decision involve a determination made by an executive or administrator in establishing plans, specifications or schedules of operations?[176]

7. Would judicial evaluation of the act or omission impair the effective administration of government?[177]

8. Does the act or omission require the actor to establish priorities for the accomplishment of policy objectives by balancing the objective sought to be obtained against practical consideration such as staffing and funding?[178]

9. Does the act or omission require a judgment regarding the degree of confidence that might reasonably be placed in the persons being regulated?[179]

10. Was the act or omission one of a subordinate in carrying out the operations of government in accordance with official specific directions?[180]

No one question should be controlling in determining whether a discretionary function exception applies. The above questions and the facts that answer each question should be weighed and balanced in relation to each other. The district courts should value each answer with regard to the particular case. The analysis and balancing of the answers to the above questions is not new to the district courts in that it is the same analysis and balancing used in determining negligence.[181]

Since this approach will require the scrutiny of facts peculiar to each case, the determination should only be done after full discovery has been allowed. The district courts should then rule as *finders of fact* that the acts or omissions are or are not within the discretionary function exception.

The determination by the district court of whether the challenged acts involved a regulatory agency's policymaking discretion should be reversed on appeal only if clearly erroneous. For, although the standard of review for questions involving the discretionary function exception has not been addressed in the appellate courts, the factual determinations necessary in a regulatory policymaking inquiry are analogous to the factual determination of diversity jurisdiction[182] and discrimination in violation of Title VII of the Civil

175. *Id.*
176. *Id.* at 2764. *See also Dalehite*, 346 U.S. at 35-36.
177. *Varig*, 104 S. Ct. at 2765.
178. *Id.* at 2768.
179. *Id.*
180. *Id.*
181. For example, *see* W. PROSSER & W. KEETON, THE LAW OF TORTS 235-38 (5TH ED. 1984).
182. *See* Scoggins v. Pollock, 727 F.2d 1025 (11th Cir. 1984) (district court's finding of domicile for purpose of diversity jurisdiction, will not be disturbed unless clearly

Rights Act;[183] both of which are reversible only if clearly erroneous. This standard of review is logical and necessary if the appellate courts are ever going to establish a body of precedent that the legal community can rely on for guidance. A review of several cases decided since *Varig* highlights the need for a consistent approach.[184]

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erroneous); Combee v. Shell Oil Co., 615 F.2d 698 (5th Cir. 1980) (district court's finding that plaintiff was a Florida domiciliary for diversity purposes was not clearly erroneous).

183. *See* Pullman-Standard v. Swint, 456 U.S. 273 (1982) (Inquiry as to whether the differential impact of a seniority system reflects an intent to discriminate is a pure question of fact, subject to the Federal Rule of Civil Procedure 52 clearly-erroneous standard. The rule broadly requires that findings of fact not be set aside unless clearly erroneous.). *See also* Rogers v. Lodge, 458 U.S. 613 (1982).

184. *See* Begay v. United States, 768 F.2d 1059 (9th Cir. 1985) (safe radioactive exposure levels for miners set by government later found to cause cancer were discretionary and, therefore, excepted from liability by § 2680(a). The court held that it was inappropriate to limit the application of the discretionary function exception to regulatory activities and that, even in respect to nonregulatory activities, the exception will be applied when a government employee or agent exercises judgment of what the best course of action was under the existing circumstances.); Gillis v. United States Dept. of Health & Human Serv., 759 F.2d 565 (6th Cir. 1985) (the extent to which the Department of Health and Human Services monitors as well as enforces compliance with regulations falls squarely within the agency's exercise of discretion); Hylin v. United States, 755 F.2d 551 (7th Cir. 1985) (Under *Varig*, where the Mine Enforcement and Safety Administration inspector has 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, the activities are protected by the discretionary function exception); Feyers v. United States, 749 F.2d 1222 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 2655 (May 28, 1985) (decision to delegate safety responsibility to employer safety programs and to not institute a safety training program were the type of discretionary functions excepted); Spencer v. New Orleans Levee Bd., 737 F.2d 435 (5th Cir. 1984) (federal officials enjoy absolute immunity from civil suit for the discretionary actions taken in the course of their employment); Jet Indus., Inc. v. United States, 603 F. Supp. 643 (W.D. Tex. 1984) (selection and supervision of participants in federal witness protection program constitute discretionary functions which are excepted from governmental tort liability); Federal Sav. and Loan Ins. Corp. v. Williams, 599 F. Supp. 1184 (D. Md. 1984) (federal agency's performance of its statutory mandatory duties to regulate and examine member associations when not in excess of its regulatory role fall within the discretionary function exception); Johnston v. United States, 597 F. Supp. 374 (D. Kan. 1984) (United States decisions to engage in use of radioactive aircraft instrument dials were discretionary and its *failure to label* the dials, which it subsequently supplied, even if actionable, was immune under the discretionary function exception); Aronson v. United States, 595 F. Supp. 178 (E.D. Pa. 1984), *aff'd*, 774 F.2d 1150 (3d Cir. Sept. 24, 1985) (Justice Department determination of who to name in a civil suit is discretionary and, therefore, shielded from tort liability if defendant named in error).

But see In re All Asbestos Cases, 603 F. Supp. 599 (D. Hawaii 1984) (determinating whether conduct of the government falls within the discretionary function exception requires a factual analysis of the circumstances and the government policy involved); Brown v. United States, 599 F. Supp. 877 (D. Mass. 1984) (discretionary function defense to tort claim does not permit government, under guise of policymaking, to negligently remove its proffered safety net without reasonable notice to those who risk their lives daily in reliance on it).

VI. SUBSEQUENT CASES

In *McMichael v. United States*,[185] plaintiffs sued the United States for the negligence of Defense Department inspectors in failing to enforce compliance with the safety requirements set forth in the Defense Department's manual.[186] The court of appeals rejected the government's discretionary function defense and held that the "Defense Department inspectors were not called upon to make discretionary regulatory judgments. Rather, they had a number of precise inspections to perform which involved no judgment concerning agency policy."[187]

Similarly, in *National Carriers, Inc. v. United States*,[188] the court of appeals upheld the district court's finding that a federal meat inspector had a duty to condemn or identify beef exposed to ditch water.[189] Citing *McMichael*, the court of appeals distinguished between "discretionary judgments concerning agency policy and nondiscretionary responsibilities to carry out federal regulations."[190] The court held that failure to condemn or identify the contaminated beef cannot be considered a protected discretionary act.[191]

In *Andrulonis v. United States*,[192] the government was sued for the negligent conduct of a government research doctor in the production and introduction of a rabies vaccine.[193] The court held that the case presented "issues of negligence in the exercise of professional and scientific judgment rather than policymaking and a concomitant balancing of competing considerations in determining the public interest."[194] Additionally, the court noted that "[t]he fact that an individual actor employed by the federal government *exercises some judgment in the carrying out of his responsibilities cannot be determinitive, or the discretionary function exception would swallow the general rule permitting tort suit against the government.*"[195]

Contrary to these opinions, in *Natural Gas Pipeline Co. v. United States*,[196] plaintiffs alleged that the FAA was negligent in issuing and monitoring certificates authorizing modifications to a certain

185. 751 F.2d 303 (8th Cir. 1985).
186. *Id.* at 304.
187. *Id.* at 307.
188. 755 F.2d at 675 (8th Cir. 1985).
189. *Id.* at 677.
190. *Id.* at 678.
191. *Id.*
192. 593 F. Supp. 1336 (N.D.N.Y. 1984).
193. *Id.* at 1338.
194. *Id.* at 1339.
195. *Id.* (emphasis added) (citing *Caban v. United States*, 671 F.2d 1230, 1232 (2d Cir. 1982); *Downs v. United States*, 522 F.2d 990, 995 (6th Cir. 1975); *Griffin v. United States*, 500 F.2d 1059, 1063-64 (3d Cir. 1974)).
196. 742 F.2d 502 (9th Cir. 1984).

type of jet aircraft, which later turned out to be defective.[197] In finding the decision of the Supreme Court in *Varig* wholly applicable, the court held that "[a]ppellants' challenge to the FAA's execution of its responsibility by failing to discover the defects sooner and failing to adequately monitor the [modifications] is barred by the discretionary function exception."[198]

The most significant result of the *Varig* decision and its effect on liability for regulatory agencies is found in *General Public Utilities Corp. v. United States*.[199] The plaintiffs' complaint asserted a cause of action under the FTCA alleging the Nuclear Regulatory Commission failed to warn them of equipment defects at the Three Mile Island nuclear facility.[200] In dismissing plaintiffs' complaint seeking more than four billion dollars in damages, the court of appeals reviewed the *Varig* decision and concluded, "[t]here is no substantial distinction between the choice made by the FAA as to its method of inspection and decisions made by the Nuclear Regulatory Commission. . . ."[201] Admittedly, the court noted, that while "in hindsight the Commission's judgment may have been ill-advised [this] in no way changes the character of the function under scrutiny."[202] "Regulatory activities are within the exception, not because alternatives exist in particular circumstances, but because of the fundamental character of the role assigned to the agency."[203]

Perhaps the most novel and expansive interpretation of the *Varig* decision is found in *Flammia v. United States*.[204] In *Flammia*, a police officer brought an action against the United States for injuries received when he was shot by a Cuban refugee who was admitted into this country by the Immigration and Naturalization Service [hereinafter referred to as INS].[205] The Cuban refugee had advised INS of his robbery conviction and imprisonment in Cuba.[206] The plaintiff alleged that the INS was negligent in releasing the refugee without proper supervision and without proper notification of local law enforcement authorities.[207] The Sixth Circuit, quoting from *Varig*, determined that the INS acted in its role as a " 'regulator of the conduct of private individuals' " and, as such, was excepted from tort liability by section 2680(a).[208]

197. *Id.* at 503-04.
198. *Id.* at 504-05.
199. 745 F.2d 239 (3d Cir. 1984), *cert. denied*, 105 U.S. 1227 (Feb. 19, 1985).
200. *Id.* at 240.
201. *Id.* at 246.
202. *Id.* at 245.
203. *Id.*
204. 739 F.2d 202 (5th Cir. 1984).
205. *Id.* at 203.
206. *Id.* at 204.
207. *Id.*
208. *Id.* at 205 (quoting *Varig*, 104 S. Ct. at 2765).

These cases highlight that a distinction can be made between a failure to inspect and a negligent inspection. When such a distinction is made, and the courts correctly perceive that distinction, then a correct following of *Varig* allows the courts to hold the government liable for a negligent inspection.

CONCLUSION

While the meaning of the *Varig* opinion is fairly clear regarding policy decisions, there is a difference of opinion in interpreting the extent of its meaning. Under a broad interpretation of the decision, which the government espouses, the United States is not liable for any negligence of its agencies in carrying out a regulatory function. However, if that is what the Supreme Court wished to say, a one sentence or paragraph referral to the fact that an actual inspection had been negligently performed in the *United Scottish* case would have easily done what the government is now going to have to labor to do. Plaintiffs' attorneys will have to be careful to distinguish their cases from the *Varig* case and *clearly* point out to the courts that an actual negligent inspection was never addressed in the opinion. Those cases that have held for plaintiffs since the *Varig* decision have all focused on a required inspection that was negligently performed.[209] Plaintiffs' counsel should use these cases to support this distinction of the *Varig* holding. Carefully establishing from the beginning of a case that the activity did not involve governmental policy, but rather the activity involved was mandated by regulations and negligently performed by the individual employee or agent of the regulatory agency, appears to be the best possible avenue to a successful suit under the FTCA where the discretionary function exception might be applicable.

Additionally, the courts should follow the approach suggested in this Note in order to establish a consistent body of precedent that attorneys can rely upon. Otherwise, new meaning will be given to Justice Jackson's comment in his dissent in *Dalehite*: "Surely a statute so long debated was meant to embrace more than traffic accidents. If not, the ancient and discredited doctrine that 'The King can do no wrong' has not been uprooted; it has merely been amended to read, 'The King can do only little wrongs.' "[210]

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209. *See supra* notes 184-95 and accompanying text.
210. *Dalehite*, 346 U.S. at 60.